Executive summary

On 23 January 2018, the Organisation for Economic Co-operation and Development (OECD) announced the launch of the International Compliance Assurance Programme (ICAP) pilot. The pilot is being led by the OECD Forum on Tax Administration (FTA), and focuses on the multilateral risk assessment and resulting tax assurance of large Multinational Enterprise (MNE) groups. The pilot was launched at an event attended by participating groups and tax authorities in Washington, DC.

ICAP is a voluntary program that will use Country-by-Country (CbC) reports and other taxpayer-provided information to allow MNE groups and tax administrations to engage in an open and transparent discussion on tax risks, and, if agreement can be reached that the issues are low risk, to provide outcome letters that state this. The MNE group will also receive assurance that they will not receive further compliance interventions from the covered tax administrations (covering the period of review, together with the next two succeeding tax years), provided there are no material changes during this period.

Any issues that cannot be agreed via ICAP and therefore require further attention will be handled outside of ICAP, via processes such as Advance Pricing Agreements (APAs) or, when deemed necessary, a tax audit.
The ICAP pilot focuses on low risk taxpayers, while the OECD hopes that future ICAP programs will allow taxpayers with higher risk profiles to also enter the program. At the conclusion of the event, the OECD also released an ICAP Handbook2 (the Handbook) which provides more detail on the program.

There are eight FTA jurisdictions participating in the pilot: Australia, Canada, Italy, Japan, the Netherlands, Spain, the United Kingdom and the United States. The number of MNE groups participating in this exercise is unknown, and each was invited to participate by the tax authority of the jurisdiction in which it is headquartered. Future ICAP participants will have specific eligibility requirements and an application process for MNE groups to follow.

A multilateral assessment of specific international tax risks posed by each MNE group in the pilot will commence during the first half of 2018, with all risk assessments expected to be completed within 18 months, due to the fact that participating jurisdictions may have differing financial years. Some assessments may be completed in less than six months. Although ICAP does not provide an MNE group with legal certainty, it can give assurance where tax administrations participating in the program consider risks to be low.

Pilot Handbook

The ICAP Handbook contains information on the ICAP program and pilot procedures. The information contained in the handbook will be revised based upon experiences gained in the pilot, and will be used as the basis for an ICAP Operating Manual, which will describe in detail the processes to be applied in any future ICAP program.

The Handbook is divided into four sections, and in its introduction, the pilot process is summarized. The ICAP process starts with the identification of a number of MNE groups which must be headquartered in one of the eight participating jurisdictions. Next, MNE groups are invited to participate in the pilot, and must provide a package of documentation, the content of which is set out in annex 1 of the Handbook. The covered tax administrations (i.e., tax administrations participating in an ICAP risk assessment, which may not include all eight jurisdictions) then conduct an assessment of the transfer pricing and permanent establishment risks posed by the MNE group, based on the information contained in the documentation package and other information (e.g., master file) held by the covered tax administrations. Covered tax administration will assess for risk using their existing domestic processes.

At the conclusion of the risk assessment process (which is described in more detail below), and subject to domestic requirements and processes, each covered tax administration will issue an outcome letter to the MNE group, which will set out each of the covered risks where the tax administration has been able to gain assurance, and any identified tax risks that remain.

The second section of the handbook describes the scope of the pilot. The international tax risks covered by the Pilot program are transfer pricing risk and permanent establishment risk. However, following the pilot, future ICAP risk assessments may also cover other relevant or material international tax risks, as agreed between an MNE group and covered tax administrations (for example, hybrid entities and hybrid financial instruments and withholding taxes and the application of the relevant international tax treaty).

The tax filing periods eligible for review under the pilot program are an MNE group’s reporting fiscal years beginning on or after 1 January 2016, which correspond to the MNE group’s reporting fiscal years for CbC reporting. For MNE groups with a calendar year end, the covered periods for the pilot will therefore be fiscal years commencing 1 January 2016 and 1 January 2017. The determination of the covered tax administrations for a particular ICAP risk assessment is a matter for discussion and agreement between an MNE group and the respective covered tax administration, taking into account factors such as the level of the MNE group’s activity in each jurisdiction, its perceived level of risk, and the resources that would be required to support the ICAP risk assessments.

The Handbook describes the risk assessment process (which is further analyzed below) as well as highlighting the role of the ICAP steering group, that includes a senior representative from each participating tax administration, and which will provide stewardship decisions and strategic oversight, as well as compliance with each participating tax administration’s own internal governance procedures.

Finally, the Handbook contains two annexes; the first provides information on the pilot documentation package, and the second contains the target timeframes for an ICAP risk assessment.
The ICAP risk assessment process

The ICAP process has two core phases via which a covered group's tax risks are assessed and, if deemed acceptable, assured. The two phases may be successive, depending on the level of risks identified.

Level 1 risk assessment

The Level 1 risk assessment involves the covered tax administrations undertaking the ICAP risk assessment and assurance using the ICAP model approach. By way of high level summary, the covered tax administrations will collate intelligence, review the ICAP documentation submitted by the taxpayer and undertake a coordinated risk assessment to determine the risk rating for each covered risk. As part of the ICAP pilot, this stage will also include a pre-assessment workshop between the covered tax administrations and, around one week later, a further workshop between the covered tax administrations and the respective MNE group to discuss the group's key international tax risks.

The ICAP documentation package that should be provided by an MNE group participating in the pilot includes among others the MNE group's CbC report, the MNE group's transfer pricing master file, where this is required to be prepared in the jurisdiction of the lead tax administration (the tax administration in the headquarter jurisdiction of the MNE group), the MNE group's audited consolidated financial statements for the relevant fiscal periods, audited entity financial statements for all MNE group entities in the jurisdictions of covered tax administrations for the relevant reporting fiscal years, permanent establishment documentation and a value chain analysis.

The anticipated timeframe for the completion of a Level 1 risk assessment is 8 weeks, though in the pilot it is extended to 10 weeks to allow time for the workshop. The Handbook notes that the MNE group has a key role to play during this period, working closely with the covered tax administrations to answer any questions they have.

There may also be cases where the covered tax administrations determine that, if specific changes are made to aspects of the MNE group's tax filings, the covered tax administration would be able to assure the covered risks as low or no risk without further risk assessment being conducted. In such a case, the Level 1 risk assessment may enter a “risk assurance” phase, which is a cooperative process through which covered tax administrations and the MNE group work together to agree on what tax adjustments are required (or why an adjustment may not be required). The target timeframe for this risk assurance phase should be no more than three weeks, but may be extended at the agreement of the MNE group and covered tax administrations. If agreement can be reached within the agreed timeframe, the process moves directly to providing tax assurance and the ICAP risk assessment concludes. In the event agreement is not reached, then the process will progress to a Level 2 risk assessment.

If the covered tax administrations agree that the taxpayer may remain at Level 1, the risk assessment then concludes with the MNE group being issued an outcome letter from each individual tax administration that confirms the outcome of the review by each. It is anticipated that this stage of the process is expected to take three weeks. For cases where a more detailed risk assessment is required, these cases will not be finalized but instead will move to a Level 2 risk assessment.

Level 2 risk assessment

The Level 2 risk assessment provides for additional steps and a longer time frame to enable the covered tax administrations to assess the covered risks. This stage is only undertaken where required, with issues requiring further consideration or clarification before the tax position can be considered assured. The anticipated timeframe for this second level risk assessment varies, but the OECD expects that it will take approximately five months. The anticipated timeframe for the risk assurance steps to agree tax adjustments, if required, or to resolve any divergent views among the covered tax administrations, will take approximately three further weeks.

Following the Level 2 risk assessment, a meeting (or telephone conference call) will be held between the MNE group and the covered tax administrations, during which the risk assessment, recommendations and conclusions of each covered tax administration will be discussed. Discussions will include attempting to agree which modifications may need to be made to the group's tax filing positions in order to secure a low risk status. If the discussions are favorable, and the group is willing to make such modifications, the Level 2 risk assessment concludes and the resulting agreement is documented by the lead country. The covered tax administrations will then issue outcome letters to the group, finalizing the case.
Next steps
Following the pilot launch, participating MNEs will be invited to provide their ICAP documentation package, as defined in Annex 1 of the Handbook. Six weeks after the documentation package is provided, there will be a meeting between the MNE group and all covered tax jurisdictions. An ICAP risk assessment may be completed in as little as 17 weeks (where assurance of all covered risks is achieved during a Level 1 risk assessment and no additional time or documentation is needed), and it is expected that all pilot cases should be completed within 18 months. It should be noted that a participating MNE group may exit ICAP without penalty at any point during the process.

Implications
Although there are already other mechanisms for tax certainty, ICAP is distinctive in nature as interaction between the taxpayer and the authorities of the countries is institutionalized in a way that the taxpayer engages with all authorities at once. The launch of ICAP therefore marks an important milestone in the international tax arena, reflecting a shift towards a more multilateral approach to the administration of tax, supporting and expanding the important role of other processes (such as bi- and multilateral APAs) which are available to all taxpayers.

While ICAP is an entirely voluntary program, MNE groups may be approached by their national tax administration in 2018 in order to gauge overall levels of interest regarding potential future participation. MNE groups should therefore ensure that they are aware of ICAP’s workings, as well as the potential challenges and benefits of participation.

Endnotes
1. Eight FTA members kick off multilateral tax risk assurance programme to provide early certainty for tax administrations and MNEs.
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