

International Compliance Assurance Programme

Walk through and Updates

June 2024



Background

In the era of globalization and increased cross border transactions, transfer pricing disputes are often viewed as a top concern of Multi National Enterprises (MNE). As transfer pricing disputes can be time consuming and expensive, MNEs seek to adopt various tools in order to achieve tax certainty. With an intention to support MNEs with their tax risk assessment, the Organisation for Economic Co-operation and Development (OECD) had introduced a voluntary programme named International Compliance Assurance Programme (ICAP)

ICAP programme was launched by OECD 3 years ago and over 23 tax administrations have participated in the said programme. ICAP may gain momentum due to the FAQ published by OECD in June 2024. The FAQ has several pointers, a key update being a possibility of involving a Surrogate Tax Administration in case where the HQ jurisdiction is not part of the ICAP program.

The ensuing paragraphs will provide a detailed understanding of ICAP including the procedural aspects, the importance of FAQ released in June 2024 and a high level comparison of ICAP with Advance Pricing Arrangement (APA).



ICAP – All we need to know

1. Introduction

ICAP is a voluntary risk assessment and assurance process designed to be an efficient and effective tool to facilitate MNE Groups achieve increased tax certainty with respect to their activities/transactions concerning transfer pricing and other international tax matters. The first rollout of ICAP was announced in 2020 following the release of two pilots by OECD in 2018 and 2019. In the year 2021, OECD has released a handbook for tax administrations and MNE Groups providing complete information about the programme

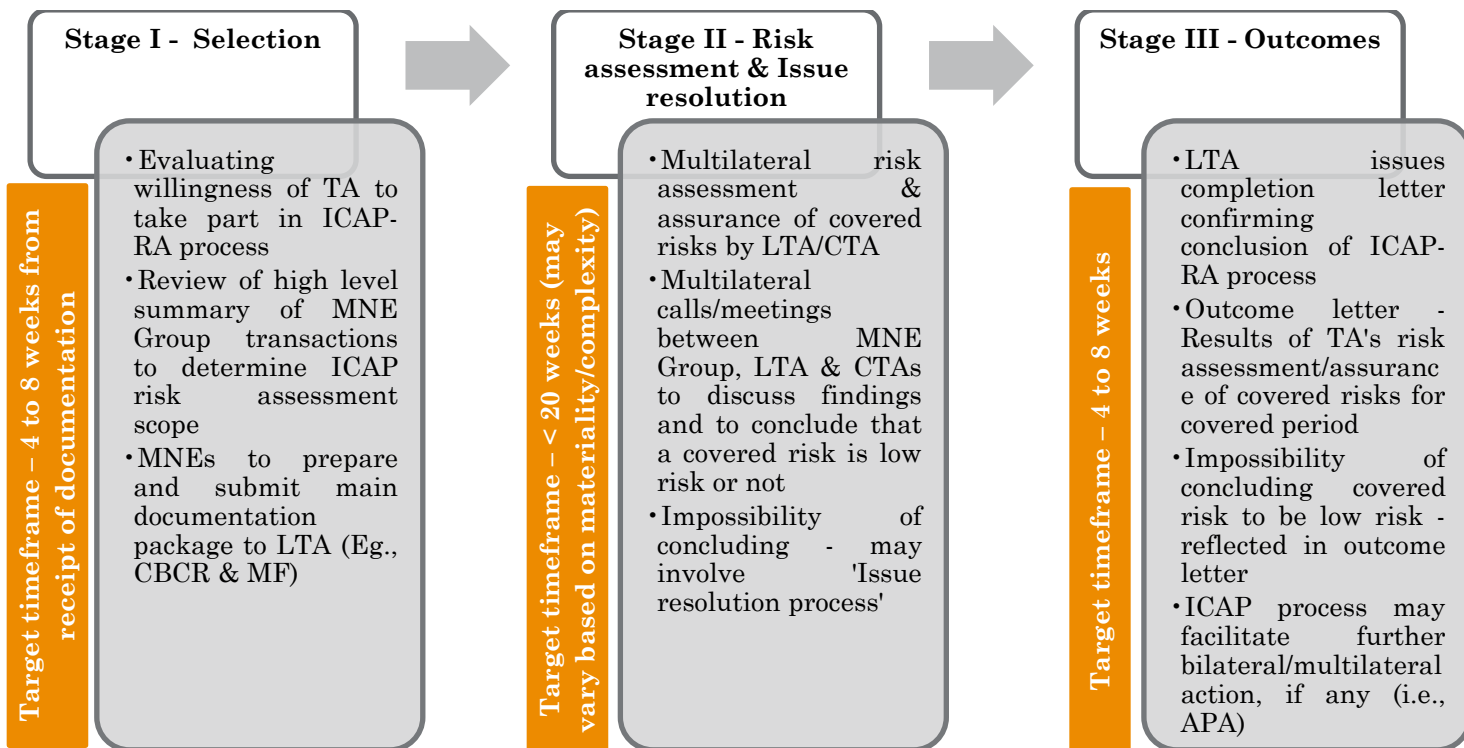
(OECD Handbook)¹. Currently 23 countries are participants of this programme including US, UK, France, Australia, Japan, Netherlands, Denmark, Singapore.

ICAP involves a review of selected transfer pricing issues and other international tax matters i.e., hybrid mismatches, withholding taxes, permanent establishment issues. Even though ICAP does not provide legal certainty like APA, it provides a degree of comfort and assurance to the tax administrations participating in MNE Group's risk assessment process.

The MNE Group and tax administrations [Lead Tax Administration (LTA) and Covered Tax Administrations (CTA)] participate in the ICAP risk assessment (RA) process, in order to provide pathway to improved tax certainty for the MNE Groups. It uses Country by Country (CbC) reports and other relevant information to facilitate the risk assessment process offering bouquet of benefits such as short timeframes, enabling MNE Groups to engage simultaneously with several tax administrations through LTA or multilateral engagements and does not require Double Tax conventions and is operated through exchange of information between tax administrations and therefore provides unique opportunity to address issues involving non-treaty partners

2. ICAP process

The ICAP-RA process comprises of three stages wherein initial phase deals with MNEs discussion about tax administrations' willingness to participate in ICAP, determining the scope of risk assessment by review of transactions by LTA, risk assessment and related issue resolution, the probable outcome they may expect and their suitability to participate in the programme.



¹ www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.htm

3. Scope

The process of determining the scope of ICAP-RA process involves the identification of:

▶ ***Lead Tax Administration***

The LTA will be in the jurisdiction of the Ultimate Parent Entity (UPE) of an MNE Group and is also a CTA in the ICAP-RA process. In case the tax administration in which is UPE is resident is not willing to participate in the ICAP-RA process, the MNE Group may approach another tax administration as a Surrogate LTA. The recent FAQ released by OECD specifically clarifies about the concept of Surrogate LTA which is dealt with in detail in the ensuing section.

▶ ***Covered Tax Administration***

Once the suitability of an MNE Group to participate in the ICAP-RA process is evaluated, the respective tax administrations will decide its willingness to be a CTA in such process. CTA should be in jurisdictions where international agreements are in place allowing exchange of information with LTA.

▶ ***Covered risks and Covered transactions***

ICAP will be best suited to cover international and cross border risks such as Transfer pricing risk, Permanent establishment risk and Other international tax risks (i.e., hybrid mismatch, WHT, treaty benefits, etc.). It can cover all transactions/risks or partial coverage subject to acceptance of CTA and MNE Group

▶ ***Covered period(s)***

- Eligible period for review in ICAP process is an MNE Group's tax filing periods for which they have been required to file CbC report (including filing under surrogacy rules)
- Period(s) to be covered will be agreed between the MNE Group, LTA and other CTAs;
- In general, either single or two consecutive covered period may be focused by ICAP process

▶ ***Roll forward period***

- Tax administrations may aim to provide tax assurance for a two tax filing period immediately following the covered period (Roll forward period), provided no material changes are present;
- Roll forward period may be specified in the outcome letter;
- The ability to provide comfort in respect of Roll forward period depends on each TA (tax administration) domestic legal framework



Key takeaways from recent FAQ

OECD has recently released an updated document comprising of Frequently Asked Questions (FAQ)² in respect of ICAP process and its corresponding clarifications. Some of the new pointers in FAQ which are significant are provided below:

² <https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-frequently-asked-questions.pdf>

Surrogate LTA

a. When UPE's TA is not participating in ICAP

On a plain reading of the Handbook released by OECD on ICAP process, one may observe that an MNE Group can take part in the ICAP process only if the tax administration where the UPE of the MNE Group is a resident is participating in ICAP. This raises a concern on the eligibility of MNE Group to apply for ICAP if its UPE jurisdiction is not participating in ICAP. This FAQ clarifies the following:

- ▶ Where an MNE Group is a resident in jurisdiction which is not participating in the ICAP process, a suitable TA may act as a Surrogate LTA for the said MNE Group's risk assessment, wherein the Surrogate LTA takes up the role of a LTA
- ▶ MNE Group to identify the jurisdiction where it has significant operations and establish the same as a Surrogate LTA
- ▶ MNE Group to inform the TA of UPE about its desire to participate in the ICAP process and evaluate the suitability of the potential Surrogate LTA
- ▶ The potential Surrogate LTA is provided with 3 options i.e., either to agree to act as a Surrogate LTA, or decline or suggest an alternative Surrogate LTA

b. When UPE's TA is participating in ICAP

If the TA in the jurisdiction where UPE of MNE Group is a resident declines to act as a LTA, then the MNE Group may approach any other jurisdiction participating in ICAP to be its Surrogate LTA. The reason for declining by the TA should only be on account of lack of capacity or that the MNE Group has very limited operations in that jurisdiction. Such option of resorting to a Surrogate LTA needs to be consulted with the TA of the UPE. If the UPE jurisdiction is not in appreciative of involving Surrogate LTA, then ICAP-RA process may not be conducted for the said period

Requesting additional ICAP-RA process

No restriction on MNE Group in submitting additional ICAP-RA requests for later periods, even if it has already participated in an ICAP-RA process. Further there is no time limit that must be elapsed before applying for a new request.

Eligibility in case of no mandate to file CbCR

MNE Groups exempt from filing CbCR in their jurisdiction can apply for ICAP-RA process even though furnishing CbC report along with documentation package is necessary at the selection stage. However MNE Groups may be expected to prepare and submit a similar report as part of the main documentation package.

Assistance by external advisors

MNE Group may seek assistance from its external/legal advisors in the ICAP-RA process. Since the intention of ICAP is to promote transparency between TA and MNE Group, advisors should only support the MNE Group and not be used as a replacement for the personnel from MNE Group.



ICAP and APA

OECD in its Handbook on ICAP has specifically recognizes APA as one of the best tools available for achieving tax certainty between jurisdictions and it has discussed the similarities and differences between

these two i.e., ICAP and APA. For some MNEs, APA may provide a better approach on the other hand for certain MNEs, ICAP may work better and in few cases a combination of both may be beneficial.

The two programmes are different in many respects which is discussed below:

Particulars	APA	ICAP
Level of certainty	Legal certainty to the MNE Group in the form of a binding written agreement between MNE and Government	TA gains comfort over the covered risks in the form of an 'Outcome letter'
Covered period	Prospective agreements which may cover forward looking period of upto 5 years and rollback period for certain years	Roll-forward period covering one or two consecutive tax filing periods
Covered transactions	MNE Groups may cover all or few transactions entered into with its affiliates	Allows extensive coverage of transactions. Best suited not only in respect of TP issues but also extends to other international tax matters (hybrid mismatch, PE issues, etc.)
Resources involved	Involves huge cost and demands significant amount of time to complete the process. The cost involves Government fee, consultant fee, and involvement of Company resources	The cost and involvement of resources is way too limited in comparison to APA wherein there is no user fee charged
Documentation requirement	APA calls for mammoth amounts of information and submissions in respect of the covered transactions and the requirement will get multifold in case of bilateral or multilateral APAs	Documentation package comprises of basic documentation any MNE Group would already possess (i.e., CbCR, MF, TP studies, etc.) and basic information such as list of proposed CTA, covered periods, list of transactions falling within proposed covered risks, etc.
Time Frame	Time taken to conclude an APA is a critical issue faced by MNEs. APA process may take several months to conclude which will be even more in case of bilateral/multilateral APAs.	ICAP has targeted time frame to complete the RA process in a span of 24 to 28 weeks from the time of submission of documentation package by MNE Groups. However, it may vary depending on complexity of transactions involved

Even though the process of ICAP and APA have various similarities, ICAP cannot act as a replacement to APA whereas the same can complement in certain cases of risk mitigation. Also ICAP may be instrumental in identifying the suitable transactions to be covered under an APA.



Conclusion

The intention behind formulating ICAP-RA process is to offer a voluntary, transparent and cost effective outcomes to the MNE Group at a very quicker timeframe. Even though it is quite sometime since the ICAP process is rolled out, not much of information is available about the programme except a recent statistics published by OECD in January 2024³ and a publicly available information about a marquee MNE Group who has been appreciative of the ICAP process and the corresponding impact it had on its company's reputation⁴. Further the statistics report indicate that the ICAP is faster than APA / MAP processes and also offers a possibility of informal dispute resolution. Therefore one must carefully consider the probability of obtaining desired outcomes by resorting to ICAP process.

The recent clarification provided by OECD through the FAQ in respect of adopting a Surrogate LTA is a welcome move which will facilitate many MNEs to come forward to participate in the risk assessment process. It is remarkable to note that even though ICAP cannot offer legal certainty as obtained through APAs, it can best be used as a tool to achieve effective domestic audit process which may be completed more quickly and with less additional documentation needed. While the benefits outweigh the shortcomings of the process, it is expected that ICAP may be embraced by many TA thereby paving way for quicker resolution of APA cases.

About us



VSTN Consultancy Private Ltd is a boutique Transfer pricing firm with extensive expertise in the field of international taxation and transfer pricing.

Our offering spans the end-to-end Transfer Pricing value chain, including design of intercompany policy and drafting of Interco agreement, ensuring effective implementation of the Transfer Pricing policy, year-end documentation and certification, Global Documentation, BEPS related compliances (including advisory, Masterfile, Country by Country report), safe harbour filing, audit defense before all forums and dispute prevention mechanisms such as Advance Pricing agreement.

We are structured as an inverse pyramid where leadership get involved in all client matters, enabling clients to receive the highest quality of service.

Being a specialized firm, we offer advice that is independent of an audit practice, and deliver it with an uncompromising integrity.

Our expert team bring in cumulative experience of over six decades in the transfer pricing space with Big4s spanning clients, industries and have cutting edge knowledge and capabilities in handling complex TP engagements.



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³ <https://www.oecd.org/tax/administration/icap-statistics-january-2024.pdf>

⁴ <https://us.pg.com/policies-and-practices/tax-principles/index.html>