

## The Experience with Advance Pricing Agreements

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*In times of increasing cross-border transactions, multinational enterprises are faced with the obstacle of rising legal uncertainty and therefore reduced planning reliability in tax matters. Advance pricing agreements (APAs) provide an appropriate means of tackling such problems relating to transfer pricing issues. In the last two decades APAs have risen from relative obscurity to become an important transfer pricing controversy management tool, offering benefits to taxpayers as well as tax administrations.<sup>1</sup> These issues are dealt with in Markham's<sup>2</sup> study, *Advance Pricing Agreements – Past, Present and Future*,<sup>3</sup> by focusing on the United States and Australia, the two countries that were at the forefront of adopting APAs and whose wealth of experience over two decades confirms their APA programmes as the global paradigms. Markham's study gives the opportunity to further develop the scientific thoughts and apply them to a European context, especially taking into account the practice of Austria.*

### I ADVANCE PRICING AGREEMENTS

An APA is an administrative approach aimed at preventing transfer pricing disputes. While traditional audit techniques deal with transactions which have already taken place, APAs determine criteria for applying the arm's length principle to transactions in advance of the transactions' taking place.<sup>4</sup> There are different types of APAs. Unilateral APAs are agreements between taxpayers and tax administrations,<sup>5</sup> while bilateral or multilateral APAs require an agreement between two or more tax administrations which determine how cross-border transactions will be taxed.<sup>6</sup> Furthermore, this understanding must be made legally effective in relation to the taxpayer.<sup>7</sup> In the course of bilateral or multilateral APAs, Article 25 of the Organisation on Economic Co-operation and Development (OECD) Model Tax

Convention on Income and on Capital (OECD MC) provides a basis for agreements between two or more states under a mutual agreement procedure.<sup>8</sup> An agreement based on Article 25 of the OECD MC binds only the involved tax administrations.<sup>9</sup> Therefore, an instrument which offers certainty to the taxpayer is needed. Following Article 25 of the OECD MC, the taxpayer has an obligation to request the mutual agreement procedure, although the taxpayer is not a party to the ensuing proceeding. However, the taxpayer's contribution is crucial in the course of an APA. The taxpayer especially has not only to provide comprehensive records, but also must actively contribute to create a risk and function analysis.<sup>10</sup>

According to Markham, the world's first bilateral APA was agreed in March 1991.<sup>11</sup> In Austria, the Tax Reform Act 2010 included the introduction of a formal advance tax ruling procedure in section 118 of the Austrian Federal

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<sup>1</sup> See M. Markham, *Advance Pricing Agreements – Past, Present and Future* (Wolters Kluwer 2012), 276.

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<sup>3</sup> Markham, *supra* n. 1.

<sup>4</sup> See OECD, *Guidelines for APA*, <http://www.oecd.org/tax/transferpricing/guidelinesforapa.htm> (accessed 15 Jan. 2013).

<sup>5</sup> See S. Domes, G. Gahleitner & G. Steiner, 'APA-Verfahren in Österreich: Rechtlicher Rahmen und erster Erfahrungsbericht', *Steuer und Wirtschaft International*, no. 2 (2009): 56.

<sup>6</sup> See T. Ehrke-Rabel & C. Ritz, 'Verbindliche "Rulings" im Steuerrecht', *Recht der Wirtschaft*, no. 10 (2010): 659.

<sup>7</sup> See Ehrke-Rabel & Ritz, 'Verbindliche "Rulings" im Steuerrecht', 664.

<sup>8</sup> See Ehrke-Rabel & Ritz, 'Verbindliche "Rulings" im Steuerrecht', 664.

<sup>9</sup> See Ehrke-Rabel & Ritz, 'Verbindliche "Rulings" im Steuerrecht', 664 et seq; for further information for the binding effect, see M. Lehner in K. Vogel, M. Lehner, *Doppelbesteuerungsabkommen Kommentar*, 5th edition (Munich: C.H. Beck, 2008): Art. 25 m.no. 154.

<sup>10</sup> See Domes, Gahleitner and Steiner, 'APA-Verfahren in Österreich: Rechtlicher Rahmen und erster Erfahrungsbericht', 56.

<sup>11</sup> See Markham, *supra* n. 1, at 275.

Tax Code (*Bundesabgabenordnung*, BAO). Thereby, the Austrian parliament codified a tax ruling procedure that gives taxpayers more certainty as regards the tax treatment of their transactions. The ruling procedure became effective as from 1 January 2011. Prior to that, most rulings were granted on an informal basis, providing protection on a good faith basis. However, the tax administration was not obliged to issue rulings on prospective circumstances. In contrast, section 118 of the BAO provides a binding advance tax ruling procedure. As section 118 of the BAO covers transfer pricing issues,<sup>12</sup> it can be seen as the Austrian solution for a unilateral APA.<sup>13</sup> During the first year following the introduction of advance rulings in Austria, the tax administration received thirty ruling requests.<sup>14</sup> Moreover, Austria's first bilateral APA was concluded at the end of 2011.<sup>15</sup>

## 2 ADVANTAGES OF USING AN ADVANCE PRICING AGREEMENTS

In her study, Markham points out that one of the main advantages of APAs is the certainty they provide for all parties involved. This is especially true for risk averse taxpayers.<sup>16</sup> APAs can be seen as 'the better of two evils' in relation to audits.<sup>17</sup> While APAs can be time consuming and costly to conclude, this must be compared to the time and cost involved in defending an audit and then seeking relief from double taxation through the mutual agreement procedure process.<sup>18</sup> In an APA, the tax administration intends to reach an agreement with the taxpayer, whereas in an audit the examiners often attempt to review all

material intercompany transactions in search of problems requiring correction. Therefore, an audit often takes much longer and imposes a significantly greater burden on the taxpayer in terms of information requested.<sup>19</sup> APAs not only simplify the taxpayer's situation, but also allow tax administrations to redeploy audit resources. From a revenue perspective, the advantages are timeliness, provision of information and a deemed 'compliance lock-in' for several years. In other words, an APA means there is no requirement for monitoring or risk review for the immediate future – which frees up resources for other compliance activity.<sup>20</sup>

Moreover, corporate governance issues have been a driving force behind APAs as the public perceptions regarding how 'moral' a company is has become increasingly significant in the global marketplace.<sup>21</sup> In Austria, the Fair Play initiative was launched by the Austrian Ministry of Finance in an attempt to increase tax compliance with a proactive inclusion of taxpayers.<sup>22</sup> Tax compliance involves the willingness to obey tax law and to correctly fulfil tax obligations voluntarily.<sup>23</sup> Furthermore, it is an enhancement of the good governance approach in the area of tax administration.<sup>24</sup> Taxpayers that perceive their interaction with the tax authority as 'fair' are typically more inclined to cooperate.<sup>25</sup> APAs are one means of positively influencing tax compliance.<sup>26</sup> The Austrian Fair Play approach therefore promotes the support of and cooperation with taxpayers by means of measures like advance rulings.<sup>27</sup>

Markham illustrates that while bilateral and multilateral APAs substantially reduce the risk of economic double taxation, unilateral APAs do not provide

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<sup>12</sup> Apart from transfer pricing issues, section 118 of the BAO also covers reorganizations and group taxation matters.

<sup>13</sup> See Ehrke-Rabel and Ritz, 'Verbindliche "Rulings" im Steuerrecht', 666.

<sup>14</sup> See Austrian Ministry of Finance, 'Geschäftsbericht 2011 der österreichischen Steuer und Zollverwaltung', 16.

<sup>15</sup> See presentation G. Steiner, Expertengespräch Verrechnungspreise zum Thema 'Ruling', Deloitte – Lunch & Talk, 23 Jan. 2012. For a discussion of the legal basis, the procedural rules and other practical aspects of APA at the initial stage of the negotiation of Austria's first bilateral APA, see Dommès, Gahleitner and Steiner, 'APA-Verfahren in Österreich: Rechtlicher Rahmen und erster Erfahrungsbericht', 56.

<sup>16</sup> See Markham, *supra* n. 1, at 282–285.

<sup>17</sup> See Markham, *supra* n. 1, at 283.

<sup>18</sup> See Kerwin Chung, a principal in Deloitte Tax's Washington National Tax Office, Melbourne, interviewed by Markham, *Advance Pricing Agreements*, 283.

<sup>19</sup> See Markham, *supra* n. 1, at 283.

<sup>20</sup> See Markham, *supra* n. 1, at 284 et seq.

<sup>21</sup> See Markham, *supra* n. 1, at 283.

<sup>22</sup> See [www.fwf.ac.at/de/downloads/pdf/am-puls-28-mueller.pdf](http://www.fwf.ac.at/de/downloads/pdf/am-puls-28-mueller.pdf) (accessed 29 Jan. 2013); From 20 to 21 Sep. 2012 the Austrian Ministry of Finance and the Institute for Austrian and International Tax Law, in cooperation with the Faculty of Psychology of the University of Vienna, organized the International Interdisciplinary Conference, *Tax Governance: The Future Role of Tax Administrations in a Networking Society*; see S. Beer K. Daxkoblner, M. Kasper, I. Kerschner, E. Müller, J. Owens, E. Pamperl, A. Ruiz Jiménez, C. Said Formosa, E. M. Schrittwieser, M. Stiastry & M. Wakounig, *Tax Governance: The Future Role of Tax Administrations in a Networking Society*, 41 Intertax 264–271 (2013).

<sup>23</sup> See E. Müller, *Good Governance und Steuermoral*, *Österreichische Steuerzeitung*, no. 8 (2011): 191, with reference to S. James & C. Alley, *Tax Compliance, Self-assessment and Administration in New Zealand – Is the Carrot or the Stick More Appropriate to Encourage Compliance?* 5 N.Z. J. Taxn. L. & Policy 3 (1999); OECD, *Monitoring Taxpayers' Compliance: A Practical Guide Based on Revenue Body Experience* (2008) ([www.oecd.org/dataoecd/51/13/40947920.pdf](http://www.oecd.org/dataoecd/51/13/40947920.pdf), accessed 15 Jan. 2012).

<sup>24</sup> See Müller, *Good Governance und Steuermoral*, 194.

<sup>25</sup> See Müller, *Good Governance und Steuermoral*, 192, with further reference to V. Braithwaite, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publ. Ltd. 2003); E. Kirchler, *The Economic Psychology of Tax Behaviour* (Cambridge 2007); Kirchler, Vertrauen in der Wirtschaft, *Bank-Archiv* no. 11 (2009), 780.

<sup>26</sup> Similar to section 118 BAO; e.g., E. Müller, Tax Governance Möglichkeiten zur Einflussnahme auf die Steuermoral, *Steuer und Wirtschaftskartei*, no. 34 (2011): 252 et seq.

<sup>27</sup> See [www.fwf.ac.at/de/downloads/pdf/am-puls-28-mueller.pdf](http://www.fwf.ac.at/de/downloads/pdf/am-puls-28-mueller.pdf) (accessed 29 Jan. 2013).

the same certainty in a bilateral context, as a tax administration – affected by the transactions covered by the APA but not having participated in the APA – may consider that the methodology adopted does not provide a result consistent with the arm's length principle.<sup>28</sup> In the absence of bilateral and multilateral APAs, taxpayers can often become the 'ham in the sandwich' between two competing tax administrations where one seeks to make a transfer pricing adjustment and the other is uncooperative in accommodating that adjustment.<sup>29</sup> However, unilateral APAs may be helpful in cases where the uncertainty is concentrated on one side of the transaction, or where the other country does not have a treaty in force or does not have an APA programme, or is not willing to enter into an APA for the particular case at hand.<sup>30</sup> Other key factors that indicate the importance of APAs include that the direct taxpayer is involved in setting the most appropriate pricing structure and that APAs provide the opportunity to revolve past issues through rollback.<sup>31</sup>

### 3 DISADVANTAGES OF USING AN ADVANCE PRICING AGREEMENT

Markham's research makes clear that APAs are not for everyone. If a taxpayer can determine that it has low tax risk, easy to value assets, sound comparables and reasonable tax authorities to deal with, an APA might be unsuitable.<sup>32</sup> Given the fact that APAs are resource-intensive and time-consuming, in certain situations undergoing an audit may be preferable to negotiating an APA.<sup>33</sup> Therefore, one of the greatest disadvantages is the amount of time required to work on an APA application. It can be disruptive to the corporation, the deadlines for information may seem short (especially in the case of a bilateral application with two tax administrations demanding information) and it can be an intrusive and burdensome experience.<sup>34</sup>

In addition, confidentiality issues must be taken into account, in particular if a tax administration has misused information that was obtained in an APA. Therefore, tax administrations should ensure the confidentiality of trade

secrets and other sensitive information and documentation submitted to them in the course of an APA proceeding.<sup>35</sup> Disclosing sensitive information to a tax administration might potentially open the door to further investigation. Furthermore, there is a significant risk concerning highly commercially sensitive information in light of information exchange agreements, as there is no ability to limit the use of information in another country.<sup>36</sup>

From an Austrian perspective, confidentiality issues are particularly interesting insofar as tax secrecy is a very significant principle aimed at protecting the private life of the taxpayer.<sup>37</sup> Under section 48a(1) of the BAO, there is a tax law obligation of secrecy 'in connection with the implementation of tax law procedures'. In this context the question arises as to whether information disclosed in an APA procedure is protected by tax secrecy. In the authors' view, 'in connection with the implementation of tax law procedures' can be interpreted in a way that covers information obtained by tax authorities in the course of an APA procedure. Therefore, APA procedures are to be protected by tax secrecy. However, the disclosure and use of information is allowed under the following circumstances: such use serves the enforcement of a tax law procedure, a monopoly procedure or a financial criminal procedure; such disclosure occurs due to a legal obligation or if it is in compelling public interest; or there is obviously no interest worthy of protection or the persons whose interests in tax secrecy are violated, consent to the disclosure.<sup>38</sup> To the extent that in a concrete situation one of the mentioned requirements is met, there may be a significant risk for the taxpayer in an APA procedure, as disclosing sensitive information to the tax administration might potentially open the door to further investigation. As previously obtained information may generally be shared with other authorities in the course of mutual assistance under Article 22 of the Federal Constitutional Law (*Bundes-Verfassungsgesetz*, B-VG), the confidentiality problem is exacerbated.

Not only from a domestic perspective, but also from a European and international perspective, the significance of confidentiality issues must be considered against the background of mutual assistance. The European Union

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<sup>28</sup> See Markham, *Advance Pricing Agreements*, 282.

<sup>29</sup> See Markham, *Advance Pricing Agreements*, 285.

<sup>30</sup> See Markham, *Advance Pricing Agreements*, 282.

<sup>31</sup> See Markham, *Advance Pricing Agreements*, 282 and 284.

<sup>32</sup> See Charles Triplett, a partner with Mayer Brown in Washington D.C., Melbourne, interviewed by Markham, *Advance Pricing Agreements*, 283.

<sup>33</sup> See Markham, *Advance Pricing Agreements*, 287.

<sup>34</sup> See Markham, *Advance Pricing Agreements*, 286.

<sup>35</sup> Caroline Silberstein, former head of the transfer pricing unit in the OECD Centre for Tax Policy and Administration, interviewed by Markham, *Advance Pricing Agreements*, 287.

<sup>36</sup> See Markham, *Advance Pricing Agreements*, 288 et seq.

<sup>37</sup> In this sense, H. Bavenek-Weber, 'Transparenz und Steuergeheimnis', *UFSjournal*, no. 4 (2010): 160.

<sup>38</sup> Section 48a(4) BAO.

(EU) Mutual Assistance Directive<sup>39</sup> does not contain a specific provision concerning secrecy issues. However, Article 16(1) of that Directive states that the protection of secrecy underlies the national law of the requesting State.<sup>40</sup> It can be concluded that under the EU Mutual Assistance Directive, the provisions with regard to secrecy are reduced substantially compared to the former Directive and that only 'relative' secrecy is granted.<sup>41</sup> As a consequence, protection of secrecy might be substantially limited within the EU – which again brings into focus the problems of further investigation in APA procedures. However, in various situations the concerned taxpayer may be protected by the limitations for mutual assistance stated in Article 17.<sup>42</sup>

From an international perspective, Article 26 of the OECD MC comes into play. As long as a ruling is 'foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities', information obtained in an APA procedure falls under the scope of the exchange of information.<sup>43</sup> According to Article 26(2):

Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

An interesting issue arising in this context concerns how Austria deals with countries which afford a lower level of information protection. The information is protected under the law of the requesting country also if such country affords a lower level of protection than Austria.<sup>44</sup> However, Article 26(2) of the OECD Model sets forth a precise list of the persons and authorities which may use the exchanged information. These limitations on use can be seen as a mitigation of the problems caused by the relative secrecy under Article 26(2) of the OECD MC.<sup>45</sup> Nevertheless, in light of the extensive Austrian treaty network,<sup>46</sup> the protection of secrecy might be dramatically weakened, which further extends the danger of further investigation on the basis of information obtained in an APA procedure. Similar to Article 17 of the Mutual Assistance Directive, Article 26(3)(c) of the OECD MC provides for limitations on the exchange of information.<sup>47</sup>

From a European perspective, a crucial issue was not dealt with in Markham's book, namely APAs in a state aid context. The question arises regarding the extent to which APAs can be seen as State aid.<sup>48</sup> According to Schön, a preferential ruling in respect of an individual enterprise could be characterized as State aid under Article 107(1) of the Treaty on the Functioning of the European Union (TFEU).<sup>49</sup> However, the determination as to whether an APA can be classified as State aid, depends on its specific legal design. For example, in the view of the European Commission, Belgium has – in breach of Article 108(3) of the TFEU – unlawfully implemented the tax ruling system for the business activities of foreign sales corporations as applied by the Belgian tax administration since January 1985. The Commission concluded 'that the tax reliefs accorded under the scheme constitute State aid that is not covered by any of the derogations from the

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<sup>39</sup> Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

<sup>40</sup> See also C. Staringer, 'Geheimnisschutz und steuerlicher Informationsaustausch', in M. Holoubek and M. Lang (eds.), *Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa* 246 (Linde 2012).

<sup>41</sup> See also C. Staringer, in Holoubek & Lang (eds.), *Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa* 246.

<sup>42</sup> For example, Art. 17(4): The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.

<sup>43</sup> See P. Saint-Amans (OECD), A. Kapur (India) & P. Oosterhuis (USA), in S. Bergmann, V. Daurer, M. Gruber, O.C. Günther, M. Hasanovic, M. Lehner, K. Spies & N. Tüchler, Tagungsbericht zum IFA-Kongress 2011 in Paris, *Österreichische Steuerzeitung*, no. 24 (2011): 610 et seq.

<sup>44</sup> See in this sense also Staringer, in Holoubek & Lang (eds.), *Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa*: 244 et seq.; M. Stiasny, Austria, in E. Kristofferson M. Lang, P. Pistone, J. Schuch, C. Staringer & A. Storck (eds.), *Tax Secrecy and Tax Transparency – The Relevance of Confidentiality in Tax Law* (Peter Lang), forthcoming.

<sup>45</sup> See also Staringer, in Holoubek & Lang, *Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa*, 247; M. Engelschalk in K. Vogel & M. Lehner, *Doppelbesteuerungsabkommen Kommentar*, Art. 26 m.no. 79.

<sup>46</sup> For further details, see O.C. Günther & I. Kerschner, 'Amtshilfe in den österreichischen Doppelbesteuerungsabkommen (Arts 26 und 27 OECD-MA)', in M. Lang, J. Schuch and C. Staringer (eds.), *Die österreichische DBA-Politik – Das 'österreichische Musterabkommen'*, 366 et seq.

<sup>47</sup> Article 26(3)(c) OECD MC: In no case shall the provisions of paras 1 and 2 be construed so as to impose on a Contracting State the obligation: to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

<sup>48</sup> See also W. Schön, *Tax Competition in Europe – The National Perspective*, European Taxn. 496 (2002).

<sup>49</sup> W. Schön, *Taxation and European State Aid Law*, 36 Com. Mkt. L. Rev. 911, 923 (1999).

prohibition of such aid and is therefore incompatible with the common market'.<sup>50</sup>

As regards the Austrian APA approach, it is necessary to analyse whether section 118 of the BAO can be considered as constituting State aid. In general, one of the State aid requirements, namely 'selectivity', is fulfilled if a tax provision leaves it to the discretion of the tax administration to grant a benefit as it sees fit.<sup>51</sup> As the responsible tax authority under section 118(1) of the BAO is obliged to issue a ruling, the selectivity requirement is – in the authors' opinion – not fulfilled.<sup>52</sup>

The decisive line must be drawn between 'specific' tax incentives which give rise to the procedure under Article 107 of the TFEU and general aspects of 'unfair tax competition' which are dealt with under the Code of Conduct.<sup>53,54</sup> According to Schön, there seems to be consensus as to the harmful effects of tax rulings which serve to differ from the general principles of tax law and to enable tailor-made tax regimes for individual investors.<sup>55</sup> For example, the Dutch practice of advance ruling has been reviewed and reformed under the auspices of the EU/OECD initiatives on harmful tax competition.<sup>56</sup> A possibility to confront the argument of section 118 of the BAO as a harmful tax practice would be the publishing of advance rulings in an anonymized form.<sup>57</sup> According to Schlager, an anonymized publication – similar to the Austrian Express Reply Service – would allow for uniformity in taxation, as well.<sup>58</sup>

## 4 THREATS TO THE FUTURE OF APA PROGRAMME

Transfer pricing is a specialized field that requires significant time for expertise to develop, so a critical mass of transfer pricing resources must be maintained by tax administrations. A sudden loss of transfer pricing expertise, or a failure to maintain adequate staffing levels can lead to a period of diminished capacity to manage the APA demand.<sup>59</sup> In addition, one of the greatest threats to the future of APA programmes is the danger that APAs will become more mainstream and more bureaucratic, and thus not able to adjust quickly to a changing world.<sup>60</sup>

The growing number of cases could lead to the problem that tax administrations are unable to reach an agreement in bilateral negotiations.<sup>61</sup> Bilateral APAs require a cooperative atmosphere between the two tax administrations, and APA programmes are undermined where this is absent. APAs depend on the good faith of the two governments. Hence, those tax administrations should not take positions solely based on maximization of tax revenue, rather than principled application of the law and OECD Guidelines to the facts.<sup>62</sup> In situations where tax administrations cannot reach an agreement, the use of arbitration could protect taxpayers from double taxation. Another possible threat to APA programmes is the breach of an APA by a tax administration, which would shatter confidence in the process.<sup>63</sup>

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<sup>50</sup> Commission Decision of 24 Jun. 2003 on the aid scheme implemented by Belgium – Tax ruling system for United States foreign sales corporations (notified under document number C (2003) 1868) (2004/77/EC), m.no. 80.

<sup>51</sup> Official Journal of the European Community, Commission notice on the application of the State aid rules to measures relating to direct business taxation (98/C 384/05) para. 21; ECJ Case C-256/97, 29 Jun. 1999 *D'ém'engements Manutention Transport SA*, 1999 I-03913, para. 27; W. Schön, *Taxation and European State Aid Law* 932.

<sup>52</sup> For a general discussion, see also T. Ehrke, *Verbindliche Auskünfte im österreichischen Abgabenrecht?* 163 (Linde 2003).

<sup>53</sup> The Code of Conduct for business taxation was set out in the conclusions of the Council of Economics and Finance Ministers (ECOFIN) of 1 Dec. 1997. The Code is not a legally binding instrument, but it clearly does have political force; [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/harmful\\_tax\\_practices/index\\_en.htm#code\\_conduct](http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm#code_conduct) (accessed 4 Feb. 2013).

<sup>54</sup> See W. Schön, *Taxation and European State Aid Law* 935.

<sup>55</sup> See W. Schön, *Tax Competition in Europe – The National Perspective* 496 et seq.

<sup>56</sup> See W. Schön, *Tax Competition in Europe – The National Perspective* 496 et seq., with reference to G. Meussen, *National Report The Netherlands*, in W. Schön (ed.) *Tax Competition in Europe* (IBFD Publications 2003): 337–377 (II.4.); the Dutch practice is defended by L. Stevens, *Ruling Policy Increases Administrative Transparency*, 10 EC Tax Rev. 70 (2001).

<sup>57</sup> See E. Müller, *Erböbung der Abgabemoral durch Einbeziehung der Bürger*, 9 Unabhängiger Finanzsenat (UFS) journal 299 (2010).

<sup>58</sup> See C. Schlager, *Die verfassungsrechtlichen Grenzen für die Ausgliederung der Abgabeneinbebung – Teil II* *Österreichische Steuerzeitung*, no. 3 (2007): 58.

<sup>59</sup> See Markham, *Advance Pricing Agreements*, 289 et seq.

<sup>60</sup> See Markham, *Advance Pricing Agreements*, 290.

<sup>61</sup> See Sean F. Foley, a principal with KMPG in Washington D.C., interviewed by Markham, *Advance Pricing Agreements*, 290.

<sup>62</sup> See Karl L. Kellar, interviewed by Markham, *Advance Pricing Agreements*, 292.

<sup>63</sup> See Sean F. Foley, a principal with KMPG in Washington D.C., interviewed by Markham, *Advance Pricing Agreements*, 290.

## 5 THE FUTURE OF ADVANCE PRICING AGREEMENTS

Today, over 100 countries have some kind of transfer pricing legislation. Due to the level of uncertainty inherent in transfer pricing disputes, taxpayers are encouraged to use dispute prevention mechanisms and improve the certainty of transactions. Over the past two decades, more than thirty APA programmes have been implemented in both OECD and non-OECD countries. In order to respond to the multilateral nature of cross-border transactions and transfer pricing disputes, the development of multilateral approaches provides an impetus for the increased use of APAs in the future.<sup>64</sup> The use of APAs in the future is promoted due to the development of tailored approaches to APAs for small and medium-sized enterprises or APAs combined with rulings on customs valuation.<sup>65</sup>

One of the main reasons transfer pricing experts predict a rise in the use of APAs is the certainty they offer on a prospective basis.<sup>66</sup> The growing scrutiny in other countries – particularly emerging markets in China and India – is creating more potential exposure and greater

uncertainty, particularly given the increased investments in those countries.<sup>67</sup>

As tax advisers now have more expertise and experience with the APA process, clients may be more comfortable with opting for an APA. In addition, a history of successful APAs may encourage others to go the APA route.<sup>68</sup> Moreover, as documentation fees continue to rise, a bilateral APA is becoming increasingly attractive.<sup>69</sup>

In the future, some of the key drivers behind the anticipated worldwide increased use of APAs include the ongoing move to globally integrated supply chains along with an ever growing proportion of world trade that is intra-group.<sup>70</sup>

In times of severe fiscal pressure for governments worldwide, the prevalence of international trade via Multinational Enterprises (MNEs) represents a risk of significant leakage for the government treasuries. Therefore, they require a robust transfer pricing regime to manage this risk. APAs can be more cost effective than an audit, allowing the taxpayer to develop a more cooperative relationship with the tax administration, which can be seen as a positive behavioural change by the tax administration and many MNEs.<sup>71</sup>

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<sup>64</sup> Caroline Silberstein, former head of the transfer pricing unit in the OECD Centre for Tax Policy and Administration, interviewed by Markham, *Advance Pricing Agreements*, 276 et seq.

<sup>65</sup> See Markham, *Advance Pricing Agreements*, 277.

<sup>66</sup> See Markham, *Advance Pricing Agreements*, 279.

<sup>67</sup> See Greg Ossi, Principal at PwC, Washington, D.C., interviewed by Markham, *Advance Pricing Agreements*, 279.

<sup>68</sup> See Lorraine Eden, Professor of Management and Mays Research Fellow at Texas A&M University, interviewed by Markham, *Advance Pricing Agreements*, 277 et seq.

<sup>69</sup> See Mark Nehoray, a senior partner in the Los Angeles office of Deloitte Tax, interviewed by Markham, *Advance Pricing Agreements*, 278.

<sup>70</sup> See Keir Cornish, Partner with E&Y, Melbourne, interviewed by Markham, *Advance Pricing Agreements*, 281.

<sup>71</sup> See Lyndon James, Partner with PwC, Sydney, interviewed by Markham, *Advance Pricing Agreements*, 276 et seq.