

# Rollback of APAs in Greece

The author reviews recently adopted legislation implementing the rollback of APAs in Greece.

## 1. Introduction

Article 22 of the Tax Procedures Code<sup>1</sup> (TPC) provides for the possibility of the Greek tax authority (the Independent Authority for Public Revenue, IAPR) adopting an advance pricing agreement (APA) by issuing a decision following an application by the taxpayer to approve in advance of controlled transactions an appropriate set of criteria for the determination of the transfer pricing of those transactions over a fixed period of time. The APA regime applies as from 1 January 2014 onwards. The basis of the Greek APA regime is found in article 22 of the TPC and in a decision of the Governor of the IAPR, POL. 1284/2013.<sup>2</sup> Article 22 of the TPC was amended by article 17(1)(a) of law 4714/2020<sup>3</sup> and the possibility of the rollback of APAs was introduced.

As the name indicates, an APA in principle concerns future transactions. Indeed, the rule contained in article 22(1) of the TPC stipulates that an enterprise may file an application with a view to obtaining an approval for the methodology they intend to apply in the pricing of certain future controlled transactions or categories of transactions with other associated enterprises. In particular, an APA request should be submitted at the latest before the end of the tax year, in order for that year to be included in the scope of the APA; the APA can cover up to four years. By article 22(3)(b) of the TPC, it is now provided that an enterprise that has filed an application for an APA may also include a rollback request in the application.

## 2. The OECD BEPS Action 14 Peer Review

According to the OECD's 2016 Peer Review Documents on BEPS Action 14 on More Effective Dispute Resolution Mechanisms,<sup>4</sup> the Action 14 minimum standard requires that jurisdictions with bilateral APA programmes provide for the rollback of APAs in appropriate cases, subject to the applicable time limits (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances in an audit.

This need has been identified as a real one, since situations may arise in which the issues resolved through an APA are relevant with respect to previously filed tax years not included in the original scope of the APA.<sup>5</sup> The "rollback" of the APA is understood to mean that the outcome of the APA is applied to tax years ending prior to the first year of the mutual agreement procedure (MAP) APA; if the rollback is accepted, the APA can apply retroactively.<sup>6</sup>

This element of the Action 14 minimum standard is related to the prevention of disputes and is aimed at providing greater certainty on the tax treatment of taxpayers' cross-border trade and investment and clarity on the application and interpretation of the tax treaty.<sup>7</sup>

Under element A.2 of the Stage 1 BEPS Action 14 MAP Peer Review Report for Greece,<sup>8</sup> it was reported that it was not possible to obtain a rollback of bilateral APAs.<sup>9</sup> At that time it was also reported that no modifications in relation to this element were anticipated.<sup>10</sup> The peer review concluded that this was an area of improvement and contained a recommendation that Greece should introduce

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1. GR: Law 4174/2013, OJ Folio A' 170 of 23 July 2013, in force since 1 January 2014.  
 2. For an analysis of the Greek APA regime, see K. Perrou, *New Law Amends Transfer Pricing Documentation Rules and APA Procedure*, 23 Intl. Transfer Pricing J. 6 (2016), Journal Articles & Opinion Pieces IBFD (accessed 6 Dec. 2020); K. Perrou, *Publication of Clarifications on Transfer Pricing Documentation*, 23 Intl. Transfer Pricing J. 2 (2016), Journal Articles & Opinion Pieces IBFD (accessed 6 Dec. 2020); K. Perrou, *APA Guidance Released by Tax Authorities*, 22 Intl. Transfer Pricing J. 2 (2015), Journal Articles & Opinion Pieces IBFD (accessed 6 Dec. 2020); K. Perrou, *Decision of the Secretary General for Public Revenue on Transfer Pricing Documentation Rules*, 21 Intl. Transfer Pricing J. 6 (2014), Journal Articles & Opinion Pieces IBFD (accessed 6 Dec. 2020).  
 3. GR: Law 4714/2020, art. 17(1)(a), OJ Folio A' 148 of 31 July 2020.

4. OECD, *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2016), available at <http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf> (accessed 8 Mar. 2021) [hereinafter BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents].  
 5. Id., at para. 12, footnote 13.  
 6. The concept of "roll-back" is explained in Annex II to Chapter IV (Guidelines for Conducting Advance Pricing Arrangements under the Mutual Agreement Procedure ("MAP APAs")), sec. D.4.2 (Possible retroactive application ("Roll back")), para. 69 *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2017), Primary Sources IBFD [hereinafter *OECD Guidelines*].  
 7. BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents, *supra* n. 4, at para. 12.  
 8. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Greece (Stage 1): Inclusive Framework on BEPS: Action 14*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2019), available at <https://www.oecd-ilibrary.org/docserver/9789264310001-en.pdf?expires=1614804157&id=id&accname=guest&checksum=A9116707649B93A5D2EA445EE1D9CB76> (accessed 8 Mar. 2021) [hereinafter MAP Peer Review Report for Greece].  
 9. Id., at para. 11.  
 10. Id., at para. 15.

the possibility of – and in practice provide for – the rollback of bilateral APAs in appropriate cases.<sup>11</sup>

### 3. The Introduction of MAP APA Rollbacks in the Greek TPC

Following the recommendation on how to comply with the Action 14 minimum standard, the Greek parliament adopted legislation introducing the rollback of APAs.<sup>12</sup> Under the possibility introduced in the TPC, a taxpayer that has filed an application for a bilateral or multilateral APA may ask for the retroactive effect of such an APA, under certain conditions. If the rollback is accepted, then this will be part of the Decision of the Governor of the IAPR, which is issued according to article 22(8) of the TPC in order to give effect to the APA.

#### 3.1. The conditions for the rollback

The conditions for the rollback are set in article 22(3) of the TPC.

First of all, it is necessary that the facts and circumstances of the prior years, for which the rollback is requested, are identical to the facts and circumstances examined under the APA application. Secondly, the rollback request may be extended only to past years which, at the time the APA application is filed, are not time barred because of the statute of limitations.<sup>13</sup> Thirdly, the years for which the rollback is requested must not be the subject of an audit order that the taxpayer has already been notified of at the time that the APA request is filed.

This third condition is set in order to clearly delineate and separate the audit function from the dispute prevention function to which the APA belongs. The rationale behind this last limitation to the potential extent of the rollback request is that, once a certain year has become the subject of a tax audit, the involvement of any other agency in an open tax audit could be perceived as interference with the audit. Also, from another point of view, the APA request and the possibility for a rollback cannot be a tool in the hands of taxpayers that allows them to essentially block or avoid a tax audit that has been initiated. This is the reason why the notification of a tax audit order is the crucial point in time: as soon as the taxpayer is notified that a certain year is the subject of a tax audit,

this year cannot be included in a rollback request submitted by the taxpayer.<sup>14</sup>

If, however, an APA request is filed coupled with a rollback request covering years for which no audit order is notified to the taxpayer, the competent authority is not prohibited from including the rollback clause in the APA. In particular, if an audit order is notified after the rollback request has been duly submitted by the taxpayer, then the progress of the audit is not hindered by the rollback request; both the APA (containing the rollback request) and the tax audit progress in parallel. If, as a result of the tax audit, a corrective tax assessment is notified to the taxpayer before the conclusion of the APA, the APA cannot extend the rollback to the years for which a corrective tax assessment has been notified. If, however, the APA is concluded before a corrective tax assessment is issued and notified to the taxpayer, then such an APA can contain a rollback clause, even for the years covered by the tax audit order.<sup>15</sup>

The Greek legislation only regulates what the Greek competent authority can or cannot do. Therefore, in the case of a bilateral or multilateral APA for which the rollback option is available, the agreement of all competent authorities involved in the APA would be needed in order to adopt a rollback clause.<sup>16</sup> Accordingly, the rollback clause, if agreed upon, should be part of the agreement of the competent authorities and cannot have a different scope for different jurisdictions involved in the APA.<sup>17</sup>

#### 3.2. The retroactive application of the option to request the rollback of an APA

Since the possibility to request the rollback of a bilateral or multilateral APA was created for the first time in 2020, it is expressly provided that pending requests for a bilateral or multilateral APA can be complemented with a rollback request, following the entry into force of the new provisions. This means that APA requests that had been submitted before 31 July 2020 and had not been concluded by that time can also benefit from the new provisions.<sup>18</sup>

#### 3.3. Tax audit of years covered by the rollback

One important issue that is also regulated by the amendment to article 22 of the TPC is the relationship between the rollback clause, where adopted, and the extent of a

11. Id.

12. The reason for the amendments to the TPC is explained in the explanatory statement that accompanies the draft bill of Law 4714/2020 to the parliament; in the explanatory statement it is expressly stated that the proposed amendments follow the recommendations under element A.2 contained in the MAP Peer Review Report for Greece, *supra* n. 8, concerning the implementation of the results of BEPS Action 14.

13. See OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, para. 33 (OECD 2015), Primary Sources IBFD, where it is stated that the rollback of an APA will remain subject to the applicable time limits: those provided by article 25 where a MAP request has been or will be made with respect to the earlier tax years, or those provided by the relevant domestic law (such as statutes of limitation for assessment) where no MAP request has been or will be made with respect to the earlier tax years.

14. The rationale underlying the conditions of limiting the rollback and not allowing it for years under tax audit seems to be contrary to the position adopted in the *OECD Guidelines*. In Annex II to Chapter IV, para. 69 *OECD Guidelines* it is stated that if the transfer prices are already under enquiry by one tax administration in accounting periods prior to the MAP APA period, that tax administration and the taxpayer may wish to take the opportunity to use the agreed methodology to resolve the enquiry, or, pursuant to domestic law requirements, the tax administration may choose to make such an adjustment even without the taxpayer's request or agreement.

15. These cases are clarified in the explanatory statement that accompanied art. 17 Law 4714/2020.

16. See, on this point, para. 4.147 *OECD Guidelines*, where it is stated that the application of an APA to resolve similar transfer pricing issues in open prior years would require the agreement of the tax administration, the taxpayer, and, where appropriate, the treaty partner.

17. This guidance is also provided in the explanatory statement that accompanied Law 4714/2020 to the parliament.

18. Art. 17(1)(b) Law 4714/2020.

subsequent tax audit of years covered by such a rollback. According to article 22(4) of the TPC, as amended by article 17(2) of Law 4714/2020, it is provided that the tax audit for those years is limited to verifying that the facts and circumstances are indeed identical to the facts and circumstances that were examined under the APA that included the rollback request. If the tax audit confirms that the facts and circumstances of the years covered by the rollback are identical to those covered by the APA, then the APA will also apply for those years. If, however, the audit concludes that this is not the case, then the APA does not have retroactive effect.

This provision is necessary in order to safeguard the effectiveness of the rollback clause and to ensure legal certainty for the taxpayers that have obtained an APA complemented by a rollback clause.

### 3.4. Other issues

By article 17(4), a new paragraph 9 is introduced to article 22 of the TPC, regulating the timely compliance with the outcome of an APA. According to article 22(9) of the TPC, if the conclusion of an APA results in an obligation for the taxpayer to submit amending tax returns for the years that are covered by the APA, the time limit for filing such amending tax returns is 30 days from the notification of the APA decision to the concerned taxpayer. This provision is particularly important for cases in which the APA leads to a higher tax liability in Greece, for which it is possible that penalties and interest may be calculated in addition.

Indeed, since bilateral APAs may take a long time, and as the final agreement may result in a higher tax obligation for the taxpayer in Greece than initially estimated by the taxpayer, the taxpayer should file amending tax returns in conformity with the results of the APA. Such amending tax returns normally trigger the imposition of penalties and interest. It is expressly provided in the law that in such cases no interest or penalties are imposed on the amount of additional tax due as a result of the implemen-

tation of the APA for the period between the filing of the APA request and the conclusion and subsequent notification of the APA to the taxpayer.

As explained in the explanatory statement that accompanied article 17(2) of Law 4714/2020 to the parliament, the aim of these provisions is to avoid the adverse consequences of the, sometimes lengthy, procedures that lead to the conclusion of a bilateral APA. Moreover, this particular provision is also retroactive, in order to cover all APAs since the introduction of the regime in 2014.

## 4. Concluding Remarks

It is true that in the 2019 Stage 1 MAP Peer Review Report for Greece, it is reported that Greece had received four requests for bilateral APAs and that since 1 January 2016 Greece had received no requests for rollbacks of bilateral APAs.<sup>19</sup> Similarly, all peers that provided input reported not having received any requests from a taxpayer asking for a rollback of a bilateral APA with Greece.<sup>20</sup> However, taking into account the general trend showing that the number of APA requests is increasing, it appears that it is only positive that the rollback facility is now available under Greek legislation. Indeed, as the emphasis in relation to cross-border tax disputes is shifting more and more towards prevention, strengthening the APA regime and extending the agreement reached in the context of a bilateral APA to previous years that have not been time barred and for which the facts and circumstances are identical can only improve the effectiveness of both the bilateral dispute prevention mechanism and the dispute resolution mechanism.<sup>21</sup>

19. MAP Peer Review Report for Greece, *supra* n. 8, at para. 13.

20. *Id.*, at para. 14.

21. *See also* MAP Peer Review Report for Greece, *supra* n. 8, at para. 8, where it is stated that the methodology to be applied prospectively under a bilateral APA may be relevant in determining the treatment of comparable controlled transactions in previous years. The rollback of an APA to these previous years may be helpful in preventing or resolving potential transfer pricing disputes.