

**Inclusive Framework on BEPS: Action 14
Making Dispute Resolution More Effective
MAP Peer Review Report**

BEST PRACTICES
Denmark



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Abbreviations and Acronyms

APA	Advance Pricing Arrangement
FTA	Forum on Tax Administration
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development

Introduction

The final report on BEPS Action 14: “Making Dispute Resolution Mechanisms More Effective” identified a number of best practices related to the three general objectives of the Action 14 Minimum Standard.

Paragraph 9 of the Terms of Reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective¹ stipulates that:

The best practices are not part of the minimum standard and whether or not a jurisdiction has implemented the best practices will not be peer reviewed or monitored, nor will it affect the assessment of the assessed jurisdiction. Jurisdictions are free, however, to identify best practices they have adopted.

Denmark has provided information and requested feedback by peers on how it has adopted best practices. In that regard, the FTA MAP Forum agreed on an optional best practices feedback form that peers have used to provide feedback on Denmark’s adoption of the best practices.

This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices.

¹ Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective ([CTPA/CFA/NOE2\(2016\)45/REV1](#)).

Part A

Preventing Disputes

[BP.1] Implement bilateral APA programmes

Jurisdictions should implement bilateral APA programmes.

1. APAs concluded bilaterally between competent authorities provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. Denmark reported that it is authorised to enter into bilateral and multilateral APAs based on the MAP provision of the underlying tax treaty and the arm's length principle. The competence for handling APA requests is conferred to Danish Customs and Tax Administration's (SKAT), specifically the Large Companies department. The arm's length principle has been defined in Section 2 of the Danish Tax Assessment Act, which in turn is based on the OECD Transfer Pricing Guidelines. Guidance on APAs is provided in Section C.D.11.15.3 of the Danish Customs and Tax Administration's (SKAT) public legal guidance² ("**MAP Guidance**"), which is further discussed under element B.P3.
3. Denmark reported it has no specific timelines for filing an APA request nor are there fees involved with APA requests. However, tax years, for which the statute of limitation has already lapsed, can only be included in an APA via roll-back under the condition that the other competent authority agrees to grant such a roll-back. Generally, an APA is entered into for a period of five years, whereby it is possible to renew such APA.
4. According to Denmark, it has since 1 January 2015 received 18 bilateral APA requests. 4 of these requests have been granted, one request has been denied as there was/is no tax treaty with the relevant jurisdiction and 13 requests are still pending.
5. Two peers provided input to the bilateral APA programme of Denmark. The first peer noted that it has a cooperative and productive APA relationship with the Danish competent authority and that it values this relationship. The second peer noted that the Danish competent authority, based on its own experience, is supportive of taxpayers' requests for bilateral APAs.

² Available at: <http://skat.dk/skat.aspx?old=2060565&chk=214580> (in Danish) – The chapters relevant for MAP and APA are currently being translated into English.

[BP.2] Publish mutual agreements of a general nature

Jurisdictions should have appropriate procedures in place to publish agreements reached by competent authorities on difficulties or doubts arising as to the interpretation or application of their tax treaties in appropriate cases.

6. Agreements reached by competent authorities to resolve difficulties or doubts arising as to the interpretation or application of their tax treaties in relation to issues of a general nature which concern, or may concern, a category of taxpayers reflect the competent authorities' mutual understanding of the meaning of the convention and its terms. As such agreements provide information that might be useful to prevent difficulties or doubts in the interpretation or application of tax treaty provisions, publication of these agreements is valuable.
7. Denmark reported it publishes mutual agreements reached on difficulties or doubts arising as to the interpretation or application of their tax treaties. These publications can be found in the MAP Guidance, specifically in the section on general agreements on tax treaties.
8. Peers did not provide input relating to this particular best practice.

[BP.3] Provide guidance on APAs

Jurisdictions' published MAP guidance should provide guidance on APAs.

9. Guidance on a jurisdiction's APA programme facilitates the use of that programme and creates awareness for taxpayers on how the APA process functions. As APAs may also prevent future disputes from arising, including information on APAs in a jurisdiction's MAP guidance is relevant.
10. As previously mentioned under element BP.1, Denmark is authorised to enter into bilateral APAs. Guidance on Denmark's APA programme is provided in section C.D.11.15.3 of its MAP Guidance. This guidance includes a definition of a bilateral/multilateral APA, the legal basis of an APA, the reasoning why to enter into a bilateral APA, an explanation of the APA process, guidance on which transactions can be covered by an APA and the process for submitting an APA request. The guidance further explains the term of an APA, the binding effect of the agreement and provides finally information on the process of notification of changes, amendment and revocation of the APA.
11. The MAP Guidance further outlines that a request for a bilateral APA must be submitted in writing (e-mail requests are accepted by the Danish competent authority) and can be submitted in Danish, Norwegian, Swedish or English. The request must include as a minimum the following:
 - A description of the company, the group it belongs to and the market on which it operates;

- A description of the controlled transaction(s), a detailed comparability study, including an analysis of the functions performed, assets used and risks assumed of each related party to the transaction(s);
- An explanation for the choice of the transfer pricing method including its implementation and the critical assumptions.

12. One peer provided input stating that, because of its limited relationship with the Danish competent authority, it has not gained the opportunity to experience Denmark's implementation of best practices, but that the MAP profile of Denmark includes the relevant information relating to this particular best practice.

[BP.4] Develop “global awareness” of the audit/examination functions

Jurisdictions should develop the “global awareness” of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration’s “Global Awareness Training Module” to appropriate personnel.

13. Making audit/examination functions of tax administrations that are involved in international matters aware of: (i) the potential for creating double taxation, (ii) the impact of a proposed adjustment on the tax base of one or more jurisdictions and (iii) the process and principles by which competing juridical claims are reconciled by competent authorities, may be useful to prevent disputes from arising. Using the Global Awareness Training Module developed by the Forum on Tax Administration (FTA) can be helpful in this respect.

14. Denmark reported that training is provided on a regular basis (bi-annual) to Denmark's officials involved in transfer pricing auditing and examination. This training is provided to ensure that any assessments made by these officials are in accordance with the provisions of Denmark's tax treaties. The topics of these trainings are (i) updates by delegates in OECD's working party 6 on the OECD Transfer Pricing Guidelines and the BEPS project, and (ii) presentation of difficult issues in pending audit cases. Furthermore, during these training sessions, case studies are discussed in group sessions in which both audit staff and personnel working in Denmark's competent authority participate. Lastly, personnel working in Denmark's competent authority also contribute in plenary sessions to provide the competent authority's view on the discussed topics.

15. Peers did not provide input relating to this particular best practice.

Part B

Availability and access to MAP

[BP.1] Implement appropriate administrative measures to facilitate recourse to MAP

Jurisdictions should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes, recognising the general principle that the choice of remedies should remain with the taxpayer.

16. Under Article 25(1) of the OECD Model Tax Convention, the mutual agreement procedure is a dispute settlement procedure in annex to domestic available remedies and not a substitute for such remedies. Reference is made to inter alia paragraph 7 of the Commentary to Article 25 of the OECD Model Tax Convention, which specifies that the right to submit a MAP request is available to taxpayers *without depriving them of the ordinary legal remedies available*. Facilitating recourse to the MAP through appropriate administrative measures, under the general principle that the choice of remedies remains with taxpayers, enables them to effectively resort to such dispute settlement procedure.

17. Denmark reported it does not charge any fees to taxpayers when submitting a MAP request, which is also specified in section C.F.8.2.2.25.3 of the Danish MAP Guidance. It also reported that taxpayers are allowed to request MAP assistance and at the same time seek to resolve the same dispute via domestically available judicial and administrative remedies. The decision on a transfer pricing adjustment, sent to the taxpayer by the Danish Customs and Tax Administration, includes an explanation that domestic remedies and MAP are parallel options. In addition, Denmark reported that in practice taxpayers submit a protective MAP claim, or a protective complaint under the legal system, whereby it asks either the competent authority or the court to stall proceedings before the other process has been finalised. Furthermore, Denmark also reported that a MAP request can be submitted regardless of whether the issue under dispute has already been decided via these judicial and administrative remedies, provided that the court decision has not led to a full or partial relief of double taxation.

18. One peer provided input stating that, because of its limited relationship with the Danish competent authority, it has not gained the opportunity to experience Denmark's implementation of best practices, but that the MAP profile of Denmark includes the relevant information relating to this particular best practice.

[BP.2] Provide access to MAP for bona fide taxpayer-initiated foreign adjustments

Jurisdictions' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments.

19. A taxpayer-initiated foreign adjustment is considered bona fide where it reflects the good faith effort of the taxpayer to report correctly, timely and properly the adjusted taxable income from a controlled transaction or the profits attributable to a permanent establishment with a view to reflect an arm's length result, and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the laws of the treaty partners. As such taxpayer-initiated foreign adjustments may lead to cases of double taxation, it is relevant that there is access to MAP for resolving these cases. Furthermore, specifying whether there is access to the MAP for these adjustments in a jurisdiction's MAP guidance also provides additional clarity.

20. Denmark reported it allows cases of double taxation resulting from bona fide taxpayer-initiated foreign adjustments in MAP. However, Denmark's MAP Guidance does not include any further information.

21. One peer provided input stating that, because of its limited relationship with the Danish competent authority, it has not gained the opportunity to experience Denmark's implementation of best practices, and the MAP profile of Denmark does not include the relevant information relating to this particular best practice. However, this information is included in Denmark's MAP profile.

[BP.3] Provide guidance on multilateral MAPs

Jurisdictions' published MAP guidance should provide guidance on multilateral MAPs.

22. In recent years, globalisation has created unique challenges for existing tax treaty dispute resolution mechanisms. Whilst the mutual agreement procedure provided for in Article 25 of the OECD Model Tax Convention has traditionally focused on the resolution of bilateral disputes, phenomena such as the adoption of regional and global value chains as well as the accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes. In that regard, it is for clarity purposes relevant that jurisdiction's MAP guidance includes information on availability of and access to multilateral MAPs.

23. Denmark's MAP guidance does not contain any guidance on multilateral MAPs. Denmark reported that it does not oppose multilateral MAPs, but that the Danish competent authority does not have any experience in this regard.

24. One peer provided input stating that, because of its limited relationship with the Danish competent authority, it has not gained the opportunity to experience Denmark's implementation of best practices, and the MAP profile of Denmark does not include the relevant information on the guidance relating to this particular best practice.

[BP.4] Provide for suspension of collection procedures for pending MAP cases

Jurisdictions should take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending. Such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.

25. If, following an adjustment taxpayers immediately have to pay the tax due, whereas the same amount was already paid to the tax administration of the other jurisdiction involved, double taxation will in fact occur. As taxpayers may then face significant cash-flow issues, at least for the period the MAP case is pending, it is relevant that jurisdictions provide for suspension of collection procedure for this period under at least the same conditions as available for domestic remedies.

26. Denmark reported that it does provide for suspension of collection procedures during the period a MAP is pending, such upon request by the taxpayer. Information on the suspension of collection can be found in Section C.F.8.2.2.25.3 of the MAP Guidance. This guidance makes reference to Section 51 of the Danish Tax Administrations Act that states that a taxable person may request a deferral of the payment of tax and interest where the request concerns an objection to the payment of Danish taxes. The Danish Customs and Tax Administration (SKAT) regards the request for deferral as a request to review the assessment, and the deferral can be granted from the point of time the Danish Customs and Tax Administration (SKAT) approves the request.

27. Specifically with respect to the EU Arbitration Convention, Annex 3 of the Final report on improving the functioning of the Arbitration Convention specifies for Denmark that taxpayers are allowed to request for a suspension of tax collection when filing a MAP request under this convention and under the conditions mentioned above.³

28. One peer provided input stating that, because of its limited relationship with the Danish competent authority, it has not gained the opportunity to experience Denmark's implementation of best practices, but that the MAP profile of Denmark includes the relevant information relating to this particular best practice.

³ See EU Joint Transfer Pricing Forum, Final Report on improving the functioning of the Arbitration Convention (JTPE/002/2015/EN), March 2015. Available at:

http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf.

Part C

Resolution of MAP Cases

[BP.1] Permit taxpayers to request multi-year resolution of recurring issues through the MAP

Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayer which are within the time period provided for in the tax treaty for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

29. In certain cases, a MAP request with respect to a specific adjustment to income may present recurring issues that may be relevant in previous or subsequent tax years. Allowing taxpayers to submit requests for the multi-year resolution through MAP with respect to such recurring issues, where the relevant facts and circumstances are the same, may help avoid duplicative MAP requests and facilitate a more efficient use of competent authority resources.

30. According to its MAP profile Denmark reported it allows taxpayers to request multi-year resolution of recurring issues through the MAP. However, the MAP Guidance does not address this topic specifically.

31. One peer provided input stating that, because of its limited relationship with the Danish competent authority, it has not gained the opportunity to experience Denmark's implementation of best practices, and that the MAP profile of Denmark does not include the relevant information relating to this particular best practice. However, this information is included in Denmark's MAP profile.

[BP.2] Publish explanation of the relationship between the MAP and domestic remedies

Jurisdictions should publish an explanation of the relationship between the MAP and domestic law administrative and judicial remedies.

32. As mentioned under BP.5, pursuant to Article 25(1) of the OECD Model Tax Convention taxpayers are allowed to submit a MAP request irrespective of available domestic remedies. This, however, does not further specify how to proceed if both available remedies are initiated and the case is dealt with in the bilateral phase of the MAP. Publicly available guidance on the relationship between the MAP and domestic remedies provides clarity to taxpayers as well as treaty partners.

33. Denmark has included in its MAP Guidance an explanation addressing the relationship between the MAP and domestic law administrative and judicial remedies. In Sections C.D.11.15.2.2, C.D.11.15.2.3 and C.F.8.2.2.25.1 it is stipulated that the fact that the taxpayer has submitted a MAP request cannot deprive him from simultaneously initiate domestic available remedies. Specifically concerning the EU Arbitration Convention, section C.D.11.15.2.3 stipulates that if a case is being dealt with in a domestic proceeding, the case cannot be referred to an advisory commission. In addition, section C.F.8.2.2.25.2 notes that taxpayers should avail themselves of the possibility to submit a MAP request and simultaneously initiating domestic remedies, as the submission of a MAP request does not defer the time limits for initiating these remedies, which is pursuant to Article 48(3) of the Danish Tax Administration Act three months. The section further notes that domestic remedies may be suspended until the MAP process has been finalized. Section C.F.8.2.2.25.3, however, stipulates that competent authorities may stall a MAP until domestic court proceedings have been finalised, if initiated simultaneously.

34. Furthermore, Denmark reported that its competent authority is under its domestic law bound by decisions from its domestic courts, which is explained in section C.F.8.2.25.3 of the MAP Guidance. Only in rare circumstances the Danish competent authority might come to a different conclusion than a court, but it is possible, if justified by specific circumstances.

35. One peer provided input stating that, because of its limited relationship with the Danish competent authority, it has not gained the opportunity to experience Denmark's implementation of best practices, and that the MAP profile of Denmark includes the relevant information relating to this particular best practice.

[BP.3] Provide guidance on consideration of interest and penalties in MAP

Jurisdictions' published MAP guidance should provide guidance on the consideration of interest and penalties in the mutual agreement procedure.

36. As interests and penalties may concern substantial amounts, providing clarity in a jurisdiction's MAP guidance on whether interest and penalties are in the scope of the MAP is relevant to ensure that a taxpayer is well-informed on this issue.

37. Denmark reported it does not automatically impose penalties when an adjustment to the taxable income is made. Penalties are only imposed in situations where there is a violation of the Danish tax law (e.g. when a taxpayer does not produce a transfer pricing documentation within 60 days from the request by the Danish Customs and Tax Administration (SKAT)). In relation hereto, Denmark reported that its competent authority is not involved in the imposition of penalties, but instead this is at the level of the audit department. When auditors, during an audit, consider that there is a violation of the tax law, they will forward the issues for investigation to the department for "Legal Administration" within the Danish Customs and Tax Administration (SKAT). It is this department that may decide to impose a penalty. For this reason, Denmark does not take penalties in consideration during a mutual agreement procedure.

38. With respect to interest charges, Denmark reported that interest is automatically calculated by the Danish Customs and Tax Administration's accounting unit when either collecting (inbound interests) or reimbursing (outbound interests) taxes from/to the

taxpayer. It also reported that, upon request by the taxpayer, it provides for the suspension of interest charges during the period a MAP is pending.

39. Information on the suspension of interest charges (but not on penalties) can be found in Section C.F.8.2.2.25.3 of the MAP Guidance. This guidance refers to section 51 of the Danish Tax Administrations Act, in which it is stipulated that a taxable person may request a deferral of the payment of tax and interest charges where the request concerns an objection to the payment of Danish taxes. The Danish Customs and Tax Administration (SKAT) regards the request for deferral as a request to review the assessment. Such deferral is granted as from approval of the request by the Danish Customs and Tax Administration (SKAT).

40. Specifically with respect to the EU Arbitration Convention, Denmark specified in Annex 3 of the Final report on improving the functioning of the Arbitration Convention that its approach is similar as described above.⁴

41. One peer provided input stating that, because of its limited relationship with the Danish competent authority, it has not gained the opportunity to experience Denmark's implementation of best practices, and that the MAP profile of Denmark does not include the relevant information relating to this particular best practice. However, this information is included in Denmark's MAP profile.

[BP.4] Include Article 9(2) of the OECD Model Tax Convention in tax treaties

Jurisdictions should include paragraph 2 of Article 9 of the OECD Model Tax Convention in their tax treaties.

42. Article 9(2) of the OECD Model Tax Convention allows competent authorities to make a corresponding adjustment to unilaterally eliminate double taxation arising from primary adjustments. Including this provision in tax treaties provides taxpayers the possibility to obtain the elimination of such double taxation via a unilateral corresponding adjustment.

43. Out of Denmark's 78 tax treaties, 50⁵ contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention requiring their competent authorities to make a corresponding adjustment in case a transfer pricing adjustment is made by the treaty partner. Furthermore, 21 treaties do not contain such a provision that is based on or is equivalent to Article 9(2) of the OECD Model Tax Convention.⁶ For the remaining 7 treaties the following specifications can be made:

- one tax treaty contains a provision that is based on Article 9(2) of the OECD Model Tax Convention, but which does not allow competent authorities to consult each other where necessary;

⁴ See EU Joint Transfer Pricing Forum, Final Report on improving the functioning of the Arbitration Convention (JTPF/002/2015/EN), March 2015. Available at:

http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf.

⁵ These 50 treaties include the Nordic Convention that for Denmark applies to the Faroe Islands, Finland, Iceland, Norway and Sweden.

⁶ These 21 treaties include the treaty with the former USSR that Denmark continues to apply to Belarus.

- three tax treaties contains a provision that is based on Article 9(2) of the OECD Model Tax Convention, but whereby a corresponding adjustment is only possible through consultations between the competent authorities;
- one tax treaty contains a provision that is based on Article 9(2) of the OECD Model Tax Convention, but whereby a corresponding adjustment is optional (“*may*”); and
- two tax treaties contain a provision that has similarities with Article 9(2) of the OECD Model Tax Convention, but is not the equivalent thereof as they include different language.

44. Denmark reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention in its tax treaties where possible and that it will seek to include Article 9(2) of the OECD Model Tax Convention in all of its future tax treaties. In that regard, Denmark recently signed the Multilateral Instrument. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the OECD Model Tax Convention – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 9(2) of the OECD Model Tax Convention. This, however, only if both contracting parties to the applicable treaty have listed this tax treaty as a covered tax agreement under the Multilateral Instrument and insofar both notified the depository of the fact that this tax treaty does not include the equivalent of Article 9(2) of the OECD Model Tax Convention. Furthermore, Article 17(2) of the Multilateral Instrument does not take effect, if one or both of the signatory states to the tax treaty reserved, pursuant to Article 17(3), the right not to apply Article 17(2) for those tax treaties that already contain the equivalent of Article 9(2) of the OECD Model Tax Convention, or not to apply Article 17(2) in the absence of such equivalent, on the basis that: (i) it shall make appropriate corresponding adjustments or (ii) its competent authority shall endeavour to resolve the case under mutual agreement procedure of the applicable tax treaty.

45. Denmark has, pursuant to Article 17(3), reserved the right not to apply Article 17(2) of the Multilateral Instrument on the basis that they already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention. In regard of the 28 treaties identified above that are considered not to contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention, Denmark listed 18 of them as a covered tax agreement under the Multilateral Instrument and included 3 of them in the list of treaties for which Denmark has, pursuant to Article 17(3), reserved the right not to apply Article 17(2) of the Multilateral Instrument on the basis that they already contain the equivalent of Article 9(2). Of the relevant 15 treaty partners, 8 are not a signatory to the Multilateral Instrument, whereas 1 has not listed its treaty with Denmark under that instrument. Of the remaining 6 treaty partners, 1 has, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as it considered that its treaty with Denmark already contains the equivalent of Article 9(2). At this stage therefore, the Multilateral Instrument will, upon entry into force, modify 5 of Denmark’s tax treaties to include the equivalent of Article 9(2) of the OECD Model Tax Convention.

46. Peers did not provide input relating to this particular best practice.

Part D

Implementation of MAP agreements

There are no best practices for Part D.

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Resolution Mechanisms More Effective
Look-back period	Period starting from 1 January 2015 and ending on 31 December 2015 for which Denmark wished to provide information and requested peer input
MAP Guidance	The Danish Customs and Tax Administration's (SKAT) public legal guidance
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 15 July 2014
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective)



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