

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

BEST PRACTICES

Austria



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Abbreviations and Acronyms

APA	Advance Pricing Arrangement
EU	European Union
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 Action 14 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.

Austria 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 Austria'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 (www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf).

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. Austria reported that it has implemented an APA programme and that it is authorised to enter into bilateral APAs. The competent authority for handling APA requests is Directorate IV/8 of the Federal Ministry of Finance. Furthermore, the legal basis for entering into APAs is the MAP article under the applicable tax treaty. In that regard, Austria reported that APAs are dealt with under the same principles as MAP cases. More specifically, the timeline for requesting an APA is dependent on the specific timelines for filing a MAP request under the applicable tax treaty and the process for obtaining an APA is similar to the process for handling MAP cases. There, however, is no specific guidance relating to this programme or the conditions for requesting and entering into bilateral APAs. In this respect, Austria indicated that they envisage revising their transfer pricing guidelines of November 2010 (**‘Austrian Transfer Pricing Guidelines’**) to reflect recent developments and also to outline their APA programme.
3. Austria does not charge any fees to taxpayers for a bilateral APA request and does not make publically available statistics relating to bilateral APAs. Furthermore, there is no public information available on what information taxpayers should include in a request for a bilateral APA, what the steps for obtaining such APA are and the timing of these steps, the rights and role of taxpayers in the process, and other relevant information on the APA process.
4. Two peers provided input on this best practice. One peer indicated that all of their APA cases with Austria have been successfully resolved in a timely manner. Another peer noted that Austria has a well-functioning APA program.

[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.

5. 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.

6. Austria reported it publishes agreements reached on difficulties or doubts arising as to the interpretation or application of their tax treaties by its competent authority in the form of directives or regulations. This is also specified in section B.2.2 of its MAP guidance. These publications can be found at:

<https://findok.bmf.gv.at>

7. Peers provided no input in relation to this best practice.

[BP.3] Provide guidance on APAs

Jurisdictions' published MAP guidance should provide guidance on APAs.

8. 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.

9. Austria has published guidance in relation to MAP separately and as part of its domestic transfer pricing guidelines, which, however, does not include specific information on bilateral APAs, but Austria considers that the general information on MAP also is applicable to APAs.

10. Austria indicated that it envisages that, when updating its MAP guidance, it will include information on its APA programme. As regards the timing of the update of the MAP guidance, Austria indicated they will aim to finalise a first update towards the end of 2017, which also depends on developments at the level of the EU. A further update is envisaged to incorporate the changes following the signing of the Multilateral Instrument, which will be done once the impact of that instrument on Austria's tax treaties has become clear. Austria further reported that it will make available an English language version of the guidance in the future.

11. One peer provided input in relation to this best practice and commended the detailed guidance provided on the webpage of the Austrian Ministry of Finance in relation to bilateral APAs. This peer, however, also mentioned that it would appreciate to have a courtesy non-binding/non-official translation in the English language. In this peer's view such translation could be of great use to other competent authorities and to non-resident taxpayers.

[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.

12. Making audit/examination function 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.

13. Austria reported that training is provided to Austrian officials involved in the auditing and examination of taxpayers to ensure that any assessments made by them are in accordance with the provisions of its tax treaties. It further indicated that all officials of the Austrian tax administration have to complete a basic training ('Grundausbildung') for all tax officials that encompasses all areas of tax law, commercial law and accounting. They must also pass exams related to this material. Tax officials with a special function, such as auditors, have to complete a special training ('Funktionausbildung') that prepares them for performing their specific tasks. Austria also reported that the training for their auditors comprises both a practical and a theoretical training, which intensifies and complements the knowledge obtained within this basic training.

14. Peers did not provide input in relation to this best practice.

Part B

Availability and access to MAP

[BP.5] 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.

15. 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.

16. Austria does not charge fees to taxpayers when they submit a MAP request. As is set out in section B.2.1.1 and 6.3 of its MAP guidance, taxpayers are in Austria allowed to request MAP assistance and seek to resolve the same dispute via domestically available judicial and administrative remedies. MAP requests can thereby be made regardless of whether the issue under dispute has already been decided via these judicial and administrative remedies. However, Austria reported that its competent authority is bound by decisions of its domestic courts and cannot deviate from such decisions in MAP. To avoid that a court renders a decision before a MAP case is closed, it is possible to suspend domestic appeals procedures until the case under review is resolved in MAP pursuant to section 281 of the Federal Fiscal Code. In addition, if the taxpayer requests a continuation of the appeals procedure while the case is under consideration in MAP, the suspension procedure is no longer valid and it may constitute a ground for interrupting or ending the MAP, which, however, is dependent on the situation of each case.

17. Article 7(3) of the EU Arbitration Convention allows EU Member States not to apply the arbitration procedure as a supplement to the mutual agreement procedure, if pursuant to their domestic legislation they are not allowed to derogate from decisions of their judicial bodies.² The provision shall, however, not apply if the taxpayer resident in that particular member state has allowed the time provided to lodge an appeal to expire, or has withdrawn any such appeal before a decision has been delivered. Although Austria reported it is bound to decisions of its domestic courts, it did not make a declaration in that it applies Article 7(3) of the EU Arbitration Convention. Section D.3.2 of Austria's MAP

²

Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41990A0436:en:HTML>

guidance, however, states that Austria will not commence an arbitration procedure under the EU Arbitration Convention unless the taxpayer withdraws or renounces any domestic remedies.

18. One peer mentioned that Austria is not allowed to deviate from a court decision and that this sometimes prevents their competent authorities from finding a solution that avoids double taxation.

[BP.6] 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 the MAP for resolving these cases. Furthermore, specifying whether there is access to the MAP for these adjustments in a jurisdiction's MAP guidance provides additional clarity.

20. Austria reported it provides access to MAP for bona fide taxpayer-initiated foreign adjustments and that such cases have been accepted. However, its MAP guidance does not include information on whether in such cases there is access to MAP. Austria noted that it will update its MAP guidance in relation hereto and thereby specifying that taxpayers have access to MAP for bona fide taxpayer-initiated foreign adjustments.

21. One peer provided input and mentioned that it did not have experiences in its MAP relationship with Austria that would point to any shortcomings in Austria's implementation of this best practice.

[BP.7] 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. Austria's MAP guidance does not contain information on multilateral MAPs.

24. One peer provided input and mentioned it noticed that the information in relation to this best practice has not been addressed in Austria's MAP profile.

[BP.8] 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. Austria reported that it provides, upon request by taxpayers, for suspension of collection procedures during the period a MAP is pending. There are two possibilities for taxpayers to effectively benefit from such suspension. First, pursuant to section 212 of the Federal Fiscal Code, taxpayers have the possibility to apply for a deferral. Second, pursuant to section 212(a) of the Federal Fiscal Code, taxpayers may also submit an application for suspension of tax collection when the prerequisites under domestic law are met. This section requires a calculation by the taxpayer of the amount by which the tax due would be reduced if the position put forward in a MAP request would be the outcome of the mutual agreement procedure. In addition, the taxpayer should provide for an explanation of the difference between the tax due in the tax assessment notice and the calculated reduced tax due. In that regard, Austria noted that generally the information that is included in a MAP request is sufficient to make an assessment on the suspension of tax collection under section 212(a). It further noted that there are under that rule other prerequisites for granting the suspension of tax collection, such as that collection of taxes due should not be jeopardized by a suspension. Section B.2.1.4 of Austria's MAP guidance further describes the availability of deferrals and the suspension of tax collection.

27. Where a suspension of tax collection is under section 212(a) of the Federal Fiscal Code not being applied, and so long as the prerequisites established by law are met, taxpayers may also submit an application to the Federal Ministry of Finance to obtain unilateral tax relief by the issuance of an assessment notice based on section 48 of the Federal Fiscal Code. However, the issuance of such notice is at the discretion of the Federal Ministry of Finance and will not be granted if there is an abuse of the law. By issuing such notice any temporary double taxation will be set aside by applying the credit method for the period a case is under review in MAP. As a rule, a notice under section 48 of the Federal Fiscal Code is issued for a maximum duration of two years, whereby follow-on applications can be made. This is further described in section B.2.1.4 of Austria's MAP guidance. In section 4.2 of Austria's Transfer Pricing Guidelines it is further addressed that relief under section 48 of the Federal Fiscal Code, when submitting a MAP request, is only temporary. However, under section 48 it is also possible to issue final relief.

28. Specifically with respect to the EU Arbitration Convention, Austria specified in Annex 3 of the Final report on improving the functioning of the Arbitration Convention that taxpayers are allowed to request for a suspension of tax collection when filing a MAP if an

appeal has been lodged.³ Depending on the case, such suspension may be available if the amount of tax is directly, or indirectly, dependent on the outcome of an appeal filed by the taxpayer (reference is made to section 212(a) of the Federal Fiscal Code discussed above). Such suspension is generally not granted if it seems less likely that (i) the appeal will be successful, (ii) the appeal challenges a decree as to matters that do not deviate from a submission of the taxpayer, or (iii) the conduct of the taxpayer aims at endangering the collection of the tax.

29. Peers did not provide input in relation to this best practice

³ 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. (Accessed on 22 August 2017).

Part C

Resolution of MAP Cases

[BP.9] 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.

30. 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.

31. Austria reported it has implemented procedures to permit taxpayers to request multi-year resolution of recurring issues through the MAP. However, its MAP guidance does not include any information in relation hereto.

32. Peers did not provide input in relation to this best practice.

[BP.10] 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.

33. As mentioned under BP.5, taxpayers are pursuant to Article 25(1) of the OECD Model Tax Convention 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 for taxpayers and provides clarity to taxpayers as well as treaty partners.

34. In Austria's MAP guidance it is in section B.2.1.1 and 6.3 clarified that under Austrian domestic law taxpayers can request for MAP regardless of the fact that a legal remedy is pending or that appellate remedies within Austria are not yet exhausted.⁴ However, Austria is under its domestic law legally bound by decisions from its domestic

⁴ Section 4.2 of Austria's Transfer Pricing Guidelines also include information in relation hereto. It is in that section specified that a taxpayer can request for the suspension of domestic remedies until MAP proceedings have been finalised.

courts and its competent authority is not allowed to deviate from such agreement in MAP. This is clarified in Austria's MAP guidance, both with respect to the EU Arbitration Convention and tax treaties. Section D.3.2 of that guidance notes that as Austria is not allowed to deviate from court decisions, the arbitration procedure under the EU Arbitration Convention will not be applied unless taxpayer withdraw or waive appellate remedies.⁵ Section C.1.3 states that an arbitration procedure under a tax treaty may not be pursued if a domestic court has decided the case.

35. One peer provided input and indicated that Austria's published MAP profile provides the information that decisions which have been rendered by its domestic court are binding on the Austrian competent authority. However, this peer indicated that it was unclear to them at what stage a court decision becomes binding in Austria and how the suspension process of a pending court case works in cases where a MAP has already been initiated or where a request thereto will be submitted.

[BP.11] Publish 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 interest 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. Austria reported that it will deal with interest and penalties as part of MAP and that these are recalculated based on the outcome of a MAP case (either reduced or increased). This practice is, specifically with respect to the EU Arbitration Convention, also confirmed in Annex 3 of the Final report on improving the functioning of that convention.⁶

38. One peer noted that guidance on the consideration of interest and penalties in MAP has not been referred to in the answer to question 21 in Austria's published MAP profile.

[BP.12] 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.

39. 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.

40. Out of Austria's 90 tax treaties, 58 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention requiring the states to make a corresponding adjustment

⁵ Ibid.

⁶ 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

in case a transfer pricing adjustment is made by the other treaty partner. Furthermore, three treaties include a provision that is based on Article 9(2), but whereby corresponding adjustments can only be made via the mutual agreement procedure. For this reason these treaties are considered not having the full equivalent of Article 9(2) of the OECD Model Tax Convention.

41. Austria reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention in its tax treaties where possible. In that regard, Austria recently signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting to incorporate – on the basis of Article 17(2) of that instrument – Article 9(2) of the OECD Model Tax Convention in those tax treaties that do not contain the equivalent of that provision. Austria however, has, pursuant to Article 17(3)(a) of that instrument, reserved the right not to apply Article 17(2) to those treaties that already include a provision equivalent to Article 9(2) of the OECD Model Tax Convention. In addition, Austria reported it will seek to include Article 9(2) of the OECD Model Tax Convention in all of its future treaties.

42. Peers did not provide input in relation to this best practice.

Part D

Implementation of MAP agreements

43. 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 Settlement Mechanisms More Effective
Austrian competent authority	Directorate International Tax Law (IV/8) of the Federal Ministry of Finance
Austrian Transfer Pricing Guidelines	Verrechnungspreisrichtlinien issued by the Austrian Bundesministerium für Finanzen of November 2010
Federal Fiscal Code of Austria	Bundesabgabenordnung
MAP guidance	Austrian Mutual Agreement and Arbitration Procedures under Double Taxation Treaties and the EU Arbitration Convention
MAP Statistics Reporting Framework	Rules for reporting of MAP statistics as agreed by the FTA MAP Forum
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
Pre-2016 cases	MAP cases in a competent authority's inventory that are pending resolution on 31 December 2015
Post-2015 cases	MAP cases that are received by a competent authority from the taxpayer on or after 1 January 2016
Review period	Period for reporting MAP statistics that started on 1 January 2016 and that ended on 31 March 2017
Statistics Reporting Period	Period for reporting MAP statistics that started on 1 January 2016 and that ended on 31 December 2016
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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For more information:

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