

**Inclusive Framework on BEPS: Action 14
Making Dispute Resolution More Effective
MAP Peer Review Report Stage 2**

BEST PRACTICES
Switzerland



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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 of 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 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.

Switzerland 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 which peers have used to provide feedback on Switzerland's adoption of the best practices.

The peer review process on the implementation of the Action 14 Minimum Standard consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). Stage 2 is launched within one year upon the adoption of the peer review report by the BEPS Inclusive Framework through an update report by the Switzerland. This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices during stage 1 (period ranging from 1 January 2016 up to 31 December 2016) and stage 2 (ranging from 1 January 2017 up to 31 August 2018).

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 and lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. Switzerland reported it has no formal APA programme in place, but that it is allowed to enter into bilateral and multilateral APAs on the basis of the MAP provision in the applicable tax treaty. The authority competent to handle APA requests is the State Secretariat for International Finance (SIF) within the Federal Department of Finance, which is the same entity that acts as the competent authority for handling MAP cases.
3. Switzerland reported that there is not a specific timeline for the filing of an APA request, but that it applies APAs as from the first year covered by the request, irrespective of the date when the competent authorities enter into an APA. Such an APA generally runs for a period of five years, although shorter or longer periods are also possible, as in Switzerland there are no limits as to the years that can be covered by an APA other than that fiscal years should not be time-barred by domestic statute of limitations. Furthermore, Switzerland does not charge any fees to taxpayers for a bilateral APA request.
4. Further to the above, Switzerland also started publishing statistics on APAs, with the fiscal year 2016 being the first year for which statistics are published.² These statistics include (i) the number of APA requests received, closed and pending, (ii) completion times and (iii) the number of APAs per region.
5. A peer noted that in recent years they had successfully resolved several APA cases. Another noted that Switzerland's competent authority has been amenable to considering multilateral APAs in appropriate cases.

[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.

² Available at: <https://www.sif.admin.ch/sif/en/home/bilateral/verstaendigungsverf.html>.

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. Switzerland reported that it publishes agreements entered into by its competent authority to resolve difficulties or doubts arising as to the interpretation or application of their tax treaties by the competent authorities. These competent authority agreements are published in the original language which could be Italian, English, German³ or French.
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. Switzerland has not issued separate guidance that contains detailed information on APAs. There is a mention of APA programmes in Switzerland's MAP guidance. While this guidance does not further address how taxpayers can access and use bilateral APAs, it is stipulated that the definition of a MAP includes APAs and therefore information and documentation that taxpayers should include in their request for an APA is the same as for a MAP request.⁴
11. Peers did not provide input 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.

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

³ Available at: www.estv.admin.ch/estv/de/home/internationales-steuerrecht/fachinformationen/laender.html.

⁴ Available at: <https://www.sif.admin.ch/sif/en/home/bilateral/verstaendigungsverf.html>

Module developed by the Forum on Tax Administration (FTA) can be helpful in this respect.

13. Switzerland reported that tax officials involved in the auditing /examination of taxpayers are generally trained to be tax experts. Transfer pricing principles are part of the courses that are taught.

14. One peer provided input and noted that Switzerland's competent authority is a committed partner within the FTA MAP Forum and FTA Large Business Programme to raising awareness of the principles of the Global Awareness Training Module within its examination and competent authority functions.

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. No fees are charged to taxpayers when submitting a MAP request in Switzerland. Taxpayers in Switzerland are allowed to request MAP assistance and at the same time seek to resolve the same dispute via domestically available judicial and administrative remedies. Such requests can be made regardless of whether the issue under dispute has already been decided via these judicial and administrative remedies. In both instances access to MAP will be given. Connected herewith, Switzerland's Supreme Court has ruled that the MAP process is independent from domestic proceedings, such to the extent that the initiation of a MAP does not impede the taxpayer's rights under domestic law (judgment BGE/ATF 82 I-1 of 17 February 1956 and BGE/ATF 93 I-189 of 17 March 1967). Furthermore, Switzerland's Supreme Court also has ruled that where domestic remedies have been concluded, the competent authority is not bound by that decision in a MAP case (e.g. judgment BGE/ATF 66 I 270 of 18 December 1940).

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

[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.

18. 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.

19. Switzerland reported it gives access to MAP in double taxation cases resulting from bona fide taxpayer initiated foreign adjustments covered within the scope of MAP. Section 1 of its MAP guidance mentions such adjustments as being one of the reasons for which taxpayers can validly submit a MAP request.

20. One peer provided input and indicated that Switzerland is amenable to providing access to MAP in double taxation cases resulting from bona fide taxpayer initiated foreign adjustments covered within the scope of MAP.

[BP.7] Provide guidance on multilateral MAPs

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

21. 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.

22. Switzerland's MAP guidance in section 1 briefly addresses that MAP cases can be multilateral in nature if (i) the circumstances justify this and (ii) there is a tax treaty between the states concerned.

23. One peer noted that Switzerland's Competent Authority has been amenable to considering multilateral MAPs on a case-by-case basis.

[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.

24. 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.

25. Switzerland reported it applies its rules for suspension of tax collection that are laid down in its domestic law also during the period a MAP is pending. It should be noted, however, that most judicial domestic remedies are dealt with by Swiss cantonal law.

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

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.

27. 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.
28. Switzerland reported it permits taxpayers to request multi-year resolution of recurring issues through the MAP. Information hereon, however, is not included in its MAP guidance.
29. Peers did not provide input relating to this particular 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.

30. 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.
31. Section 1 of Switzerland's MAP guidance states that taxpayers are allowed to request MAP assistance independently from other legal remedies provided under either

domestic law of Switzerland or that of its treaty partner. Section 1 also states that Switzerland's competent authority is not legally bound by decisions from its domestic or foreign courts when handling MAP cases.

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

[BP.11] 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.

33. 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.

34. Switzerland reported it does take interest and/or penalties into consideration in a mutual agreement procedure. In transfer pricing cases interest or penalties resulting from adjustments made pursuant to a MAP agreement could be part of the MAP procedure. Information on this subject, however, is not included in Switzerland's MAP guidance.

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

[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.

36. 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 it is for providing clarity and certainty to taxpayers relevant.

37. Out of Switzerland's 95 tax treaties, 30 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention requiring their state to make a correlative adjustment in case a transfer pricing adjustment is made by the other treaty partner. Furthermore, 22 tax treaties do not include such a provision. With respect to the remaining 43 treaties, all contain a provision that is based on Article 9(2) of the OECD Model Tax Convention, but are considered not being equivalent thereof for the following reasons:

- In 37 treaties the sentence reading “*then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits*”, is replaced by wording that the competent authorities of the contracting states may consult together with a view to reaching an agreement on the adjustment of profits or losses in both Contracting States. In addition these 37 treaties do not include the sentence: “*in determining such adjustment due regard shall be had to the other provisions of this convention and the competent authorities of the contracting states shall, if necessary, consult each other.*”
- In one treaty it is not specified that the corresponding adjustment relates to the amount of the tax charged therein on those profits.
- In five treaties a corresponding adjustment is only to be made through the mutual agreement procedure.

38. Switzerland signed the Multilateral Instrument and has initiated the ratification process, for which completion is expected for the third quarter of 2019.

39. 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. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument. Article 17(2) of the Multilateral Instrument does not take effect for a tax treaty if one or both of the treaty partners have, pursuant to Article 17(3), reserved 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 under the condition 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. Where neither treaty partner has made such a reservation, Article 17(4) of the Multilateral Instrument stipulates that both have to notify the depositary whether the applicable treaty already contains a provision equivalent to Article 9(2) of the OECD Model Tax Convention. Where such a notification is made by both of them, the Multilateral Instrument will modify this treaty to replace that provision. If neither or only one treaty partner made this notification, Article 17(1) of the Multilateral Instrument will supersede this treaty only to the extent that the provision contained in that treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1) (containing the equivalent of Article 9(2) of the OECD Model Tax Convention).

40. Switzerland has not reserved, pursuant to Article 17(3), the right not to apply Article 17(2) of the Multilateral Instrument for those treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention. In regard of the 65 tax treaties identified in paragraphs 37 above that are considered not to contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention, Switzerland listed eight as a covered tax agreement under the Multilateral Instrument and for seven of these eight treaties did it make a notification on the basis of Article 17(4) that they do contain a provision described in Article 17(2).

41. With regard to those seven treaties, all treaty partners are a signatory to the Multilateral Instrument. Of these seven, two have, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as they considered that their treaty with Switzerland already contains the equivalent of Article 9(2), and three also made a notification on the basis of Article 17(4). The remaining two treaty partners did not make such a notification. Therefore, at this stage, three of the 65 tax treaties identified above will be replaced by the Multilateral Instrument upon its entry into force for these treaties to include the equivalent of Article 9(2) of the OECD Model Tax Convention and two will be superseded to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

42. With regard to the remaining treaty for which Switzerland did not make a notification on the basis of Article 17(4), the relevant treaty partner is a signatory to the Multilateral Instrument, listed its tax treaty with Switzerland as a covered tax agreement under that instrument, but did neither, on the basis of Article 17(3), reserved the right not to apply Article 17(2), nor did they make a notification on the basis of Article 17(4). Therefore, at this stage, this treaty will, upon its entry into force for this treaty, be superseded by the Multilateral Instrument to include the equivalent of Article 9(2) of the OECD Model Tax Convention, but only to the extent that the provisions contained in this

treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1).

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

Part D

Implementation of MAP Agreements

37. 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
OECD	Organisation for Economic Co-operation and Development
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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