

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

BEST PRACTICES

Guernsey

2022



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Making Dispute Resolution More Effective
MAP Peer Review Report

Guernsey
Best practices (2022)

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Please cite this publication as:

OECD (2022), *BEPS Action 14 MAP Peer Review Report Stage 2: Best Practices – Guernsey (2022)*, *OECD/G20 Inclusive Framework on BEPS*, OECD, Paris.

<http://www.oecd.org/tax/beps/beps-action-14-peer-review-best-practices-guernsey-2022.pdf>

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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 implementation 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.

Guernsey 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 Guernsey’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 Guernsey. 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 March 2019) and stage 2 (ranging from 1 April 2019 up to 31 December 2020).

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. Guernsey reported that it has not implemented bilateral APA programmes, and roll-back of APAs is not available in Guernsey.
3. In this regard, Guernsey commented that since it does not have any specific transfer pricing legislation, it does not consider that there is any need or practical requirement to introduce APA regimes at this stage. Guernsey continued that in the event a potential need arises in the future, this position would be reviewed accordingly.
4. Peers did not provide input relating to this particular best practice.

[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. Guernsey reported that as detailed in Section 10 of its MAP guidance, to assist other taxpayers in the future, the Director of the Revenue Service will publish an anonymised summary of successfully completed MAP cases as a Statement of Practice, unless it could lead to the identification of the taxpayer(s) involved.²

² Guernsey's MAP guidance is available at: <https://www.gov.gg/CHttpHandler.ashx?id=118907&p=0>.

7. 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.

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. Guernsey reported that it has not implemented bilateral APA programmes, and therefore, no guidance on APAs are available in Guernsey.
10. 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.

11. 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.
12. Guernsey reported that in-house training on international tax issues including MAP is provided as required to Revenue Service employees nominated/involved in the examination of those issues, and that such officers also attend training provided by the OECD for onward dissemination as appropriate.
13. Peers did not provide input relating to this particular 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.

14. 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.

15. Section 7.7.4 of Guernsey’s MAP guidance clarifies that it is possible for a taxpayer to request MAP assistance from Guernsey’s competent authority in situations where a decision has been rendered by Guernsey’s tax tribunal or courts.³ The guidance further states that Guernsey’s competent authority cannot deviate from such a decision in a MAP. The relationship between MAP and domestic remedies will be further discussed under BP.10.

16. 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.

17. 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

³ Guernsey’s MAP guidance is available at: <https://www.gov.gg/CHttpHandler.ashx?id=118907&p=0>.

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.

18. Section 7.7.2 of Guernsey's MAP guidance refers to taxpayer-initiated foreign adjustments, and indicates that Guernsey's competent authority is willing to accept MAP requests for consideration with regard to transfer pricing cases (including such cases concerning such adjustments) and make corresponding adjustments, as applicable.⁴ It also clarifies that access to MAP is possible in Guernsey, regardless of whether or not the applicable tax treaty includes the equivalent of Article 9(2) of the Model Tax Convention.

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

[BP.7] Provide guidance on multilateral MAPs

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

20. 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.

21. Section 7.7.7 of Guernsey's MAP guidance contains the guidance that although Guernsey's tax treaties do not explicitly refer to multilateral MAPs, in the event that a MAP issue involves more than two tax jurisdictions, Guernsey's competent authority will consider entering into a series of bilateral MAPs as an alternative means to resolving such a multilateral situation, if Guernsey has tax treaties with the relevant jurisdictions.⁵

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

[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.

23. 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

⁴ Guernsey's MAP guidance is available at: <https://www.gov.gg/CHttpHandler.ashx?id=118907&p=0>.

⁵ Ibid.

provide for suspension of collection procedure for this period under at least the same conditions as available for domestic remedies.

24. Section 7.7.1 of Guernsey's MAP guidance prescribes that where a taxpayer considers that tax charged is likely to be excessive and/or not due, a taxpayer may submit a request to the Director of the Revenue Service to suspend the payment of the whole or part of the disputed sums involved, pending resolution of the MAP (provided that the taxpayer has appealed against the relevant assessment(s) and has paid, or agrees to pay, any undisputed amount of tax due).⁶

25. Guernsey's MAP guidance further states that whether or not tax is suspended is at the discretion of the Director but, in practice, Guernsey reported that it is exceptional for the Director to reject an application for suspension which is reasonable based on the facts, and that in the event that any part of the suspended tax is subsequently agreed to be properly due and payable, the outstanding sum may attract late payment surcharges in accordance with the Income Tax Law.

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

⁶ Guernsey's MAP guidance is available at: <https://www.gov.gg/CHttpHandler.ashx?id=118907&p=0>.

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. Section 5 of Guernsey’s MAP guidance clarifies that it is possible for a taxpayer to make a MAP request covering multiple years (with the same recurring issues), where the relevant facts and circumstances are the same. Guernsey further reported that a MAP request of this nature does, however, remain subject to the time limits for a MAP request prescribed under Article 25(1) of the OECD Model Tax Convention.⁷

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.

⁷ Ibid.

31. Section 7.7.4 of Guernsey’s MAP guidance clarifies that it is possible for a taxpayer to request MAP assistance from Guernsey’s competent authority in situations where a decision has been rendered by Guernsey’s tax tribunal or courts.⁸

32. Guernsey’s MAP guidance also states that it is also possible for a taxpayer to submit a request for MAP assistance while judicial or administrative proceedings are ongoing, and that in the event of such cases, Guernsey’s competent authority will generally request that the taxpayer agrees to the suspension of its judicial or administrative remedies pending the outcome of the MAP. Guernsey’s MAP guidance further states that if the taxpayer does not agree to suspend the administrative or judicial remedies, the competent authority may delay the MAP process pending the outcome of the administrative or judicial proceedings.

33. Lastly, Guernsey’s MAP guidance clarifies that once a MAP is completed, and if the competent authorities cannot reach agreement, or if the taxpayer rejects the agreement reached between the competent authorities, the taxpayer can then pursue any available domestic administrative or judicial remedies.

34. 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.

35. 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.

36. Section 7.7.8 of Guernsey’s MAP guidance clarifies that no relief will be available under MAP for interest and penalties imposed by the other country.

37. Section 7.7.1 of Guernsey’s MAP guidance states that in the event that any part of the suspended tax is subsequently agreed to be properly due and payable, the outstanding sum may attract late payment surcharges in accordance with the Income Tax Law.⁹

38. Guernsey’s MAP guidance also states that in the exceptional situation that penalties may become payable in respect of an adjustment to be made in a MAP case, the penalties can be mitigated, based on the circumstances in which they arise.

39. 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.

40. 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

⁸ Guernsey’s MAP guidance is available at: <https://www.gov.gg/CHttpHandler.ashx?id=118907&p=0>.

⁹ Ibid.

possibility to obtain the elimination of such double taxation via a unilateral corresponding adjustment.

Overview of tax treaties

41. Out of Guernsey's 27 tax treaties, 19 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention requiring their state to make a corresponding adjustment in case a transfer pricing adjustment is imposed by the treaty partner. Furthermore, two treaties do not contain a provision on associated enterprises at all. Out of the remaining six treaties, two treaties contain a provision based on Article 9(2), but it requires a recourse to MAP for the granting of corresponding adjustments. One treaty contains a provision that is based on Article 9(2) of the OECD Model Tax Convention, but does not contain the last part of the sentence stating that the competent authorities "shall if necessary consult each other". The remaining three treaties contain a provision on associated enterprises, but do not contain a provision that is based on Article 9(2) of the OECD Model Tax Convention at all.

Recent developments

Bilateral modifications

42. Guernsey signed a new treaty with one treaty partner, which concerns a newly negotiated treaty with a treaty partner with which there was no treaty yet in place. The newly signed treaty contains a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention, and has already entered into force. The effects of this newly signed treaty have been reflected in the analysis above where they have relevance.

Multilateral Instrument

43. Guernsey 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 this provision in all of its future tax treaties. In that regard, Guernsey signed the Multilateral Instrument, and deposited its instrument of ratification on 12 February 2019. The Multilateral Instrument for Guernsey entered into force on 1 June 2019.

44. 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).

45. In regard of the six treaties identified in paragraph 41 above that are considered not to contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention, Guernsey listed two of these six treaties as a covered tax agreement under the Multilateral Instrument, but Guernsey has, pursuant to Article 17(3), reserved the right not to apply Article 17(2) of the Multilateral Instrument to these two treaties. Therefore, at this stage, no treaties will be modified by the Multilateral Instrument.
46. Peers did not provide input relating to this particular best practice.

Part D
Implementation of MAP agreements

47. There are no best practices for Part D.

Glossary

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|-----------------------------------|--|
| Action 14 Minimum Standard | The minimum standard as agreed upon in the final report on Action 14: Making Dispute Settlement Mechanisms More Effective |
| 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 21 November 2017 |
| 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 (CTPA/CFA/NOE2(2016)45/REV1) |



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For more information:

 ctp.beps@oecd.org

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