

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

BEST PRACTICES

Luxembourg

2020



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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 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 effect the assessment of the assessed jurisdiction. Jurisdictions are free, however, to identify best practices they have adopted.

Luxembourg 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 Luxembourg'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 Luxembourg. 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 2017) and stage 2 (ranging from 1 April 2017 up to 30 September 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, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. Luxembourg concludes bilateral APAs although it does not have a formalized program for this practice. Luxembourg indicated that it concludes bilateral APAs on the basis of Article 25(3) of the OECD Model Tax Convention, according to which “*competent authorities [...] shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.*” Therefore, taxpayers are encouraged to request such bilateral proceedings. Where appropriate, Luxembourg clarified to the taxpayers concerned that the bilateral APAs provide them with greater legal certainty in the determination of transfer prices.
3. Luxembourg has not indicated any changes in this respect.

[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.

4. 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.
5. A peer reported that it had effectively used this procedure with Luxembourg 2015.
6. Luxembourg publishes agreements reached on difficulties or doubts arising as to the interpretation or application of their tax treaties by the competent authorities in its circulars. These publications can be consulted at:

<http://www.impotsdirects.public.lu/fr/legislation/circulaires.html#6>

[BP.3] Provide guidance on APAs

Jurisdictions' published MAP guidance should provide guidance on APAs.

7. 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.
8. As indicated previously, Luxembourg has not implemented a formal bilateral program. In particular, there is no specific time limit for requesting an APA and the roll-back of bilateral APA to previous fiscal years is theoretically possible. As an APA is a specific type of advance rulings, the conclusion of an APA is subject to the payment of a royalty generally amounting to 10,000 euro by the taxpayer. Finally, general information on such advance rulings can be found in the Annual Report of the Direct Tax Administration, which is available online (in French).²
9. Luxembourg has not indicated any changes in this respect.
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. Luxembourg specified in its MAP profile that the staff responsible of tax audits is given a training to ensure that tax adjustments comply with applicable tax treaties.
13. Luxembourg has not indicated any changes in this respect.
14. Peers did not provide input relating to this particular best practice.

²

<http://www.impotsdirects.public.lu/content/dam/acd/fr/profil/rapports/rapport2016.pdf>

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. In Luxembourg, taxpayers are entitled to apply for the opening of the mutual agreement procedure and to simultaneously lodge a judicial or administrative appeal, as provided for by domestic law. In particular, the request for the opening of a MAP does not entail any costs.

17. If the competent authorities reach an agreement within the framework of the MAP in order to modify a taxation not in accordance with the provisions of a tax treaty before a decision is taken in the administrative or judicial appeal, then the implementation of that agreement is subject to the condition that the taxpayer withdraws his appeal. If a final judicial decision is rendered before a MAP is concluded, Luxembourg's competent authority is able to continue the MAP but it must incorporate the judgement rendered and not make an additional (upward) adjustment of the taxpayer's position.

18. 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.

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. The availability of MAP for foreign adjustments made by bona-fide taxpayers is clarified in section 2.1. of Luxembourg's MAP guidance, and its MAP profile states that access to the MAP is granted to this type of case.

21. Peers did not provide information on this particular 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. Section 2.1. of Luxembourg's MAP guidance also contains information on multilateral MAPs at this stage.

24. Peers did not provide information on 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.

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. Luxembourg does not provide for suspension of collection of taxes upon initiation of a MAP case, which is clarified in section 5 of its MAP guidance. Luxembourg's MAP profile also refers to such information. On the other hand, if the taxpayer pursues a domestic law remedy, the tax collection may be suspended on application by the taxpayer. As stated in BP.5, the taxpayer can simultaneously pursue domestic remedies and request the initiation of a MAP.

27. 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.

28. 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.
29. Luxembourg has not implemented procedures permitting taxpayers to request multi-year resolution of recurring issues through the MAP for several financial years through the mutual agreement procedure.
30. 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.

31. 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.
32. This explanation is available in section 3 of Luxembourg's MAP guidance.
33. 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.

34. 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.
35. This explanation is available in section 4 of Luxembourg's MAP guidance.
36. 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.

37. 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.

Overview of tax treaties

38. Out of Luxembourg's 85 tax treaties, 68 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 made by the other treaty partner.³ Furthermore, in 12 tax treaties such a provision is not contained. With respect to the remaining five treaties, the following analysis is made:

- In two treaties a provision is contained that is based on Article 9(2) of the OECD Model Tax Convention, but the granting of corresponding adjustments is only optional, as the word "may" is used instead of "shall" and therefore is considered not being equivalent thereof
- In three treaties a provision is contained that is based on Article 9(2) of the OECD Model Tax Convention, but this provision requires that competent authorities have to consult each other before granting a corresponding adjustment and therefore is considered not being equivalent thereof.

Recent developments***Bilateral modifications***

39. Luxembourg signed new treaties with four treaty partners, one of which concerns the replacement of an existing tax treaty and three concerns a treaty partner with which there was no treaty yet in place. Of these four treaties, two have already entered into force, for one the ratification procedures has been completed by the treaty partner and for the

³ These 68 treaties include the treaty with former Czechoslovakia that Luxembourg continues to apply to the Slovak Republic.

remaining treaty such procedures have not been completed by either treaty partner. Furthermore, Luxembourg also signed an amending protocol to an existing treaty, which, however, does not have relevance with respect to Article 9(2). The effects of these newly signed treaties and amending protocol have been reflected in the analysis above where they have relevance.

40. With respect to the inclusion of Article 9(2) of the OECD Model Tax Convention, all four treaties contain the equivalent of Article 9(2), which was not the case for the one treaty that is currently in force and which will be replaced by the newly negotiated treaty upon entry into force of this treaty.

Multilateral Instrument

41. Luxembourg signed the Multilateral Instrument and has deposited its instrument of ratification on 9 April 2019. The Multilateral Instrument has for Luxembourg entered into force on 1 August 2019.

42. 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).

43. Luxembourg 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 17 tax treaties identified in paragraph 38 above that are considered not to contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention, Luxembourg listed all as a covered tax agreement under the Multilateral Instrument and for five of these 17 treaties it did make a notification on the basis of Article 17(4).

44. With regard to those five treaties, all treaty partners are a signatory to the Multilateral Instrument, one of which has, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as it considered that their treaty with Luxembourg already contains the equivalent of Article 9(2). The other four treaty partners also made a notification on the basis of Article 17(4). Of these four treaty partners, three already deposited their instrument of ratification of the Multilateral Instrument, following which the Multilateral Instrument has entered into force for the treaties between Luxembourg and

these treaty partners, and therefore has modified these treaties to include the equivalent of Article 9(2) of the OECD Model Tax Convention. For the remaining treaty, the instrument will, upon entry into force for this treaty, modify them to include this equivalent.

45. With regard to the remaining 12 treaties for which Luxembourg did not make a notification on the basis of Article 17(4), two treaty partners are not a signatory to the Multilateral Instrument. The other ten treaty partners listed their treaty with Luxembourg as a covered tax agreement under that instrument, whereby two, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as it considered that its treaty with Luxembourg already contains the equivalent of Article 9(2). None of the remaining eight treaty partners made a notification on the basis of Article 17(4).

46. Of the relevant eight treaty partners, six already deposited their instrument of ratification of the Multilateral Instrument, following which the Multilateral Instrument has entered into force for the treaties between Luxembourg and these treaty partners, and therefore has modified these treaties to include the equivalent of Article 9(2) of the OECD Model Tax Convention, but only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1). For the remaining two treaties, the instrument will, upon entry into force for these treaties, modify them to include this equivalent, but only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

47. 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 Settlement Mechanisms More Effective
FTA MAP Forum	Forum on Mutual Agreement Procedure in the Forum on Tax Administration
MAP guidance	Circulaire du Directeur des contributions L.G. - Conv. D.I. n° 60 du 28 août 2017 on the implementation of mutual agreement procedures provided in tax treaties signed by Luxembourg
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



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For more information:

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