

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

BEST PRACTICES

Poland



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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
TOA	Tax Ordinance Act of 29 August 1997

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.

Poland 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 Poland's adoption of the best practices.

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

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

Part A

Preventing Disputes

[BP.1] Implement bilateral APA programmes

Jurisdictions should implement bilateral APA programmes.

1. APAs concluded bilaterally between competent authorities provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. Poland reported it has an APA program since 2006. Publicly available information and guidance can be found in Poland's Tax Ordinance Act ('TOA'), specifically articles 20a to 20r which is further discussed under element B.P3. Poland also publishes statistics relating to bilateral APAs.² Poland reported that APAs are possible only for transactions that have not been completed before the date of the application for an APA or that are not under tax audit or appeal procedures in an administrative court. Poland further reported that taxpayers that seek renewals of an APA should file such a request at least 6 months in advance.³
3. As described in Poland's MAP profile, before filing an APA request in Poland there may be a preliminary meeting organised in order to give the taxpayer all necessary information about the APA procedure. Poland further reported that the timeline for making the arrangement and scope of necessary information, as well as the expected conditions and validity thereof may be discussed during such a meeting. This pre-filing can be organised at the request of the taxpayer. Poland indicated that during a pre-filing meeting, it is not necessary to provide any details identifying the taxpayer. According to Poland's MAP profile, APAs may apply at the earliest from the date of filing an APAP request.
4. Peers did not provide any input related to this best practice.

² Available at: <http://www.finanse.mf.gov.pl/cit/ceny-transferowe1/uprzednie-porozumienia-cenowe-apa/procedura-zawierania-apa>

³ A fee is charged equal to 1% of the value of the transaction constituting the object of such arrangement. This fee is typically between PLN 5,000 and PLN 50,000 for unilateral APAs for domestic transactions. The fee for foreign transactions is typically between PLN 20,000 and PLN 100,000 for a bilateral (or multilateral) APA. The fee for a renewal of an APA is half of the normal fee for a first time APA.

[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. Poland publishes agreements reached on difficulties or doubts arising as to the interpretation or application of their tax treaties by the competent authorities. These publications can be found on the Ministry of Finance's website at: <http://www.finanse.mf.gov.pl/abc-podatkow/umowy-miedzynarodowe/wykaz-umow-o-unikaniu-podwojnego-opodatkowania>.
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. As previously mentioned under element BP.1, Poland reported it has an APA program in place since 2006. This APA guidance is available in Polish at: <http://www.finanse.mf.gov.pl/cit/ceny-transferowe1/upzednie-porozumienia-cenowe-apa>
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. Poland reported that there is an annual training program for fiscal administration officials. There are approximately 5-15 training sessions that are provided relating to the interpretation and application of tax treaties, covering various subjects such as residence, permanent establishment, passive income and employment income.

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

Part B

Availability and access to MAP

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

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

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. No fees are charged to taxpayers for a MAP request in Poland. Taxpayers in Poland 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 a request can be made regardless of whether the issue under dispute has already been decided via judicial and administrative remedies. Poland reported, however, that final court rulings are binding during the MAP.

16. As mentioned in BP.10 Poland published information on the relationship between the MAP and domestic law administrative and judicial remedies. Poland's published information specifically addresses whether its competent authority considers that it is legally bound to follow a domestic court decision in the MAP or will not deviate from a domestic court decision as a matter of its administrative policy or practice. This guidance is available in Polish at:

<http://www.finanse.mf.gov.pl/abc-podatkow/umowy-miedzynarodowe/procedura-wzajemnego-porozumiewania-sie>

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

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

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

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. Poland does not provide guidance regarding bona fide taxpayer initiated foreign adjustments, but reported that it would grant access to MAP in practice regarding such adjustments. This, however, is specified in Poland's MAP profile.

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

[BP.3] 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. Poland's MAP guidance does not contain guidance on multilateral MAPs. Poland did not publish any guidance on multilateral MAPs. Poland reported that its APA guidelines, however, refer to its multilateral APA program.⁴

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

⁴ Available at: <http://www.finanse.mf.gov.pl/web/wp/cit/ceny-transferowe1/>.

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

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

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. Poland reported that it provides for suspension of collection procedures during the period a MAP is pending. Poland's MAP profile states that tax collection procedures are suspended as regards collections made on the basis of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures unless there is a danger of fraud or insolvency.

26. Poland further reported that Polish tax law, under Article 201 of the TOA, provides the possibility for the head of the local tax office to make a decision in individual tax cases on the suspension of collection procedures concerning domestic tax obligations in cases where a MAP has been initiated. It is further stipulated under Article 201, section 1b of the TOA that local tax authorities may suspend the tax proceedings in cases where the mutual agreement procedure has been initiated. Furthermore, in case of administrative enforcement proceedings, the law of 17 June 1966 on Administrative Enforcement Proceedings provides the possibility for suspension of domestic enforcement procedures in cases where the MAP has been initiated. Poland further reported that the suspension of collection procedures is made at the request of a taxpayer.

27. Poland reported that Article 56, section 1 of the Law on Administrative Enforcement Proceedings enumerates in which cases enforcement proceedings may be suspended in whole or in part, which are (i) suspension of tax obligation (ii) postponement of the deadline of tax obligation's or spread out in instalments (iii) death of a taxpayer, if the tax obligation is not directly related to the taxpayer (iv) loss of legal capacity by the taxpayer (v) at the request of the creditor or (vi) any other case provided by law. Poland also reported that in case of a foreign execution title, the suspension of collection procedure is available where the foreign title is issued by another EU member state.

28. Lastly, Poland reported that under Article 32c of the Law on Administrative Enforcement proceedings, if a MAP agreement is reached and its outcome affects the tax obligation covered by a foreign execution title provided by other EU member states, then the enforcement proceedings shall be suspended until the MAP is closed, unless there is an urgent need for immediate enforcement due to tax fraud or a taxpayer's insolvency.

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

Part C

Resolution of MAP Cases

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

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

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. Poland reported that it has implemented procedures to permit taxpayers to request multi-year resolution of recurring issues through the MAP. Poland did not indicate in its MAP guidance that multi-year resolution of recurring issues through MAP would be granted. This, however, is specified in Poland's MAP profile.

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

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

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

33. 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.

34. As indicated in BP.5, final court rulings in Poland are binding for Poland's competent authority during the course of a MAP. This information is available in Poland's MAP guidance, which includes information on the relationship between the MAP and domestic law administrative and judicial remedies. This information is also specified in Poland's MAP profile.

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

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

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

36. As 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. Poland reported that it does not take interest or penalties in consideration in a mutual agreement procedure. Poland specifies in its MAP profile that interest or penalties resulting from adjustments are not waived nor dealt with as part of the MAP procedure. Apart from the information available in its MAP profile, Poland reported that there is no further information that is published regarding this subject.

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

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

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

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. The analysis of the 85 tax treaties Poland has entered into with respect to the inclusion of Article 9(2) of the OECD Model Tax Convention is provided below.

41. Out of Poland's 85 tax treaties, 67⁵ contain a provision that is the 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 imposed by the other treaty partner. The other 18 treaties do not include a provision on granting corresponding adjustments.

42. Access to MAP should be provided in transfer pricing cases regardless of whether the equivalent of Article 9(2) is included in Poland's tax treaties and irrespective of

⁵ These 67 treaties include the treaty with the former Yugoslavia that Poland continues to apply to Montenegro and Serbia.

whether its domestic legislation enables the granting of corresponding adjustments. In accordance with element B.3, as translated from the Action 14 Minimum Standard, Poland indicated that it will provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments except for MAP requests submitted under 13 treaties that do not include the equivalent of Article 9(2), for which Poland reported that it would not grant access to MAP in transfer pricing cases.

43. The relationship between access to MAP and transfer pricing can be found in Poland's MAP guidance.⁶

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

45. Poland has for 54 of its 85 tax treaties reserved the right not to apply Article 17(2) of the Multilateral Instrument on the basis that these treaties already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention. These 54 treaties are included in the 67 treaties identified in paragraph 39 above that contain a provision equivalent to Article 9(2).

46. For the 18 treaties that do not include such equivalent, 4 treaty partners are not a signatory to the Multilateral Instrument, whereas Poland did not list 3 as a covered tax agreement under that instrument. All remaining 11 treaty partners have listed their treaty with Poland in the list of treaties and did not make for this treaty the reservation pursuant to Article 17(3) of the Multilateral Instrument. At this stage therefore the Multilateral Instrument will modify 11 of the 18 of Poland's tax treaties to include the equivalent of Article 9(2) of the OECD Model Tax Convention.

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

⁶ Guidance on MAP in transfer pricing is available in Polish at: <http://www.finanse.mf.gov.pl/cit/ceny-transferowe1/procedura-wzajemnego-porozumiewania-sie-map>.

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
Look-back period	Period starting from 1 January 2015 and ending on 31 December 2015 for which Poland wished to provide information and requested peer input
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 15 July 2014
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective



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For more information:

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