OECD FORUM ON TAX ADMINISTRATION

Bilateral Advance Pricing Arrangement Manual

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OECD Forum on Tax Administration

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Foreword

The Forum on Tax Administration ("FTA"), created in 2002, is a unique body bringing together tax commissioners from over 50 advanced and emerging economies from across the globe. Together, FTA member administrations raise over EUR 12 trillion a year to fund public services and to deliver government objectives. The FTA has a common work programme delivered through collaborative networks, time-limited and action-oriented projects and pilots, as well as through the publication of a wide range of reports aimed at sharing knowledge and developing new approaches for better tax administration.

During the March 2019 FTA Plenary, the FTA Mutual Agreement Procedure ("MAP") Forum was tasked with working to further advance tax certainty through the exploration of various tools. The FTA MAP Forum is a collaborative network which seeks to improve dispute resolution between jurisdictions. It currently includes delegates from the over 140 members of the OECD/G20 Inclusive Framework on BEPS (Base Erosion and Profit Shifting). The Inclusive Framework on BEPS was created in 2013 by OECD and G20 countries in response to challenges arising from base erosion and profit shifting, and in an effort to introduce coherence and increase transparency, tax certainty, and compliance with minimum standards. This is achieved through the BEPS Action Plan and is one of the key components of the work programme of the FTA MAP Forum, along with tax certainty and dispute prevention and resolution.

This *Bilateral Advance Pricing Arrangement Manual* ("BAPAM" or "Manual") is part of the tax certainty work programme of the FTA, and has been produced jointly by members of the FTA MAP Forum and its focus group on "Identifying improvements to the Advance Pricing Agreement ("APA") process". This manual is intended as a guide to tax administrations and taxpayers for streamlining the bilateral APA process through increased transparency and collaboration between competent authorities and taxpayers and mitigating delays created by differences in individual jurisdiction's BAPA processes. In addition to detailing several Best Practices for engaging in bilateral APAs, it also includes practical resources for tax administrations and taxpayers, such as templates and examples.

The document was approved by the Inclusive Framework on BEPS, as well as all members of the FTA, on 6 July 2022, and prepared for publication by the OECD Secretariat.

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The *Bilateral Advance Pricing Arrangement Manual* has been produced by the Organisation for Economic Co-operation and Development ("OECD")'s Centre for Tax Policy and Administration ("CTPA") under the auspices of the Forum on Tax Administration ("FTA")'s Mutual Agreement Procedure Forum of the Committee on Fiscal Affairs. The report was prepared by Mr Jonathan Fraser, Mr Sriram Govind, and Ms Tamami Matsuka, all part of the MAP Unit, under the supervision of Ms Sandra Knaepen, Head of the MAP Unit, and Mr Achim Pross, Head of the International Co-operation and Tax Administration ("ICA") division of the CTPA.

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Reader's Guide

This Bilateral Advance Pricing Arrangement Manual is intended as a guide for streamlining the bilateral APA process. It provides tax administrations and taxpayers with basic information on the operation of bilateral APAs ("BAPAs") and identifies best practices for BAPAs without imposing a set of binding rules upon jurisdictions. Further, it is not intended that jurisdictions be subject to any review or monitoring in relation to the implementation of any of the best practices in this Manual.

The intention behind this Manual is only to allow all jurisdictions to work towards improving existing practices by adapting the agreed best practices based on their own timelines and order of priority, keeping in mind that jurisdictions have different levels of sophistication with respect to BAPAs at the outset.

The best practices identified in this Manual aim to streamline the BAPA process through:

- Mitigating delays created by differences in the BAPA processes in each jurisdiction, where possible.
- Avoiding information asymmetries between competent authorities by ensuring they have access to the same information, in the same form and at the same time.
- Increasing transparency between competent authorities and taxpayers throughout the BAPA process.
- Ensuring that there are realistic expectations for competent authorities and taxpayers at each stage of the BAPA process as to the resources required and the expected timeframes to come to an agreement.

The following points are important elements to consider in understanding the status of the Manual and its interaction with other OECD guidance:

- The Manual does not, and is not intended to, modify, restrict or expand any rights or obligations contained in the provision of any tax convention.
- Information contained in this Manual complements, and should not be considered a substitute for, the criteria, procedures, and guidance specified in the current versions of the OECD Model Tax Convention on Income and Capital (OECD, 2019[1]) ("OECD Model Tax Convention") and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD, 2017[2]) ("OECD Transfer Pricing Guidelines").
- This Manual, including the best practices contained herein, complements and should not affect the requirements, best practices or procedures established by the FTA MAP Forum in connection with the Action 14 Minimum Standard.
- To the extent any statements or information in this Manual appear to conflict, or to be incompatible with a tax treaty, the OECD Model Tax Convention (OECD, 2019[1]), its Commentary, the OECD Transfer Pricing Guidelines (OECD, 2017[2]) or the Action 14 Final Report (OECD, 2015[3]), the latter document or guidance is controlling.

"Best practice" is the term used in this Manual to describe what is generally thought to be the most appropriate manner to deal with a BAPA process or procedural issue. There is no priority or significance associated with their order or with the length of discussion of a particular practice. Nor should any best practice be considered to extend, restrict or modify the legal rights of either the taxpayers or jurisdictions. While the implementation of best practices under the Action 14 Minimum Standard by jurisdictions may be documented in a report, no such documentation is expected for the best practices contained in this Manual.

The best practices contained in this Manual are based on those best practices already undertaken by jurisdictions or put forward by taxpayers and jurisdictions as part of a consultation process rather than being developed from a unified single BAPA programme. Although taxpayers and tax administrations should ideally strive towards implementing these best practices, it is recognised that it may not always be possible to apply a best practice as described in the Manual or there may be situations where their application may not be appropriate.

This Manual also makes note of some of the current practices of jurisdictions. Unless specifically identified as part of a best practice, the processes described are for information purposes and should not be viewed as either being endorsed or not endorsed by this Manual. The best practices in this Manual seek to streamline current BAPA processes and provide an effective framework for jurisdictions developing a BAPA programme. Therefore, this Manual does not seek to provide or mandate a single and uniform BAPA process for all jurisdictions.

In assessing whether implementation of any best practice is appropriate, jurisdictions should consider the circumstances of their own BAPA programme and processes, and the unique features of each individual BAPA application. It is paramount that the best practices be applied appropriately and with enough flexibility to improve current BAPA processes.

References

OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, https://doi.org/10.1787/g2g972ee-en. [1]

OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, https://doi.org/10.1787/tpg-2017-en. [2]

OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241633-en. [3]

Abbreviations and Acronyms

APA	Advance Pricing Arrangement
BAPA	Bilateral Advance Pricing Arrangement
BAPAM	Bilateral Advance Pricing Arrangement Manual
BAPA Process	The end-to-end process associated with a BAPA agreement between competent authorities and the period for which the BAPA agreement covers.
FTA	Forum on Tax Administration
Manual	Bilateral Advance Pricing Arrangement Manual
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development
OECD Model Tax Convention	The OECD Model Tax Convention on Income and Capital
OECD Transfer Pricing Guidelines	The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
Taxpayers	Members of Business at the OECD that provided a response to the survey

Executive Summary

During the inaugural Tax Certainty Day on 16 September 2019, tax policy makers, tax administrations, business representatives and other stakeholders took stock of the tax certainty agenda and discussed further improvements in both tax dispute prevention and dispute resolution. As part of those discussions, all stakeholders agreed that Advance Pricing Arrangements were an effective tool for providing advance tax certainty but there were obstacles that meant APAs were currently underutilised. At the March 2019 plenary meeting of the Forum on Tax Administration, the following was noted in pursuance of the Tax Certainty Agenda:[1]

> *The FTA MAP Forum, in conjunction with the FTA Large Business International Programme, will study other avenues to advance on the tax certainty agenda, including by identifying improvements that could be made to the APA process and exploring the potential for the wider use of multilateral APAs and MAPs. In addition, we will explore the potential use and sharing of benchmarks for standard situations in the area of transfer pricing.*

As a follow-up to the assignment of the task to the FTA MAP Forum, a focus group on "Identifying improvements to the BAPA process" was established at the end of 2019. The focus group consisted of 22 jurisdictions: Australia, Canada, Colombia, Denmark, Finland, France, Germany, India, Ireland, Italy, Japan, Korea, Netherlands, Norway, China (People's Republic of) China, Poland, Singapore, Spain, Switzerland, Thailand, the United Kingdom and the United States. In April 2020, a survey was sent to the focus group members and a separate questionnaire was sent to members of Business at the OECD ("Taxpayers", formerly BIAC). The survey included a wide range of questions to both jurisdictions and taxpayers.

For jurisdictions, the survey covered how a jurisdiction's BAPA programme functions from early engagement (if undertaken) to domestic implementation and the relevant guidance available. This included questions on BAPA application filing requirements, procedures for information gathering and how BAPA analysis and position papers are developed. Further, jurisdictions were asked to provide responses on the practical aspects as to how a BAPA application was handled, including what criteria the competent authority used to determine acceptance of a BAPA application and how and when the competent authority engaged with the taxpayer and its treaty partners. Based on a jurisdiction's experience, competent authorities were asked to identify any obstacles and improvements to the BAPA process in terms of efficiency and effectiveness, both in relation to their own practices and that of treaty partners and taxpayers.

For taxpayers, the survey covered their experiences in relation to BAPAs with specific BAPA programmes and jurisdictions. Taxpayers were asked to provide an account of their experience and identify key strengths and weaknesses in the BAPA processes they had observed. Further, taxpayers were asked to provide insight into their considerations in determining whether to apply for a BAPA. Similarly, based on their experience, taxpayers were asked to identify any obstacles and improvements to the BAPA process in terms of efficiency and effectiveness, both in relation to their own practices and that of competent authorities.

This Manual summarises the views expressed in the survey responses and uses those views as the basis for the development of the best practices to streamline the BAPA processes undertaken by jurisdictions. This includes promoting greater consistency in the procedural aspects of BAPAs, as well as improving the timeliness and effectiveness of the process. The "BAPA process" is used to describe the end-to-end process associated with a BAPA agreement between competent authorities and the period for which the BAPA agreement covers.

This Manual should be viewed as a general guide for the BAPA process that highlights best practices that should be followed by competent authorities. As such, it encourages jurisdictions to improve the effectiveness of their BAPA programmes.

This Manual is intended to supplement the OECD Transfer Pricing Guidelines (OECD, 2017[2]), including Annex II to Chapter IV: Advance Pricing Arrangements. The best practices have been developed to provide greater detail to competent authorities and taxpayers in relation to the practices and behaviours outlined in the OECD Transfer Pricing Guidelines (OECD, 2017[2]).

This Manual is divided into the following sections:

- **Background**: This section provides the key aims of this Manual and a high-level summary of what a BAPA is, along with the key findings of the survey responses provided by competent authorities and taxpayers and outlines the need for streamlining of the BAPA process.
- **What makes an effective BAPA process?**: This section outlines the comments received from taxpayers and competent authorities and best practices that do not relate to specific parts of the BAPA process, but rather should be applied holistically to assist in streamlining the BAPA process.
- **The BAPA process in detail**: This section outlines the end-to-end BAPA process, the differences in approaches of jurisdictions, best practices in relation to specific parts of the BAPA process and input received from taxpayers and competent authorities to provide the relevant context to the best practice.
- **Other issues raised in relation to BAPAs**: This section outlines specific issues raised by competent authorities and taxpayers connected to the BAPA process and relevant best practices addressing those elements.

Further, the Annexes to this Manual provide a range of sample documents that may assist jurisdictions and taxpayers. These documents are intended to be generic in nature and for information purposes only. There is no expectation or requirement that jurisdictions use these documents or modify their BAPA documentation to align with the content of these documents. Further, any potential application of the documents provided in the Annexes should consider the circumstances and the specific requirements of the relevant BAPA application.

Note

[1] See 2019 FTA Santiago communique. Available at: https://www.oecd.org/tax/forum-on-tax-administration/events/forum-on-tax-administration-communique-2019.pdf.

References

OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, https://doi.org/10.1787/g2g972ee-en. [1]

OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, https://doi.org/10.1787/tpg-2017-en. [2]

OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241633-en. [3]

1 Background

1.1. What is a Bilateral Advance Pricing Arrangement?

1. Chapter IV of the OECD Transfer Pricing Guidelines (OECD, 2017[2]) defines an APA as:

> *An advance pricing arrangement ("**APA**") is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time. An APA is formally initiated by a taxpayer and requires negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations. APAs are intended to supplement the traditional administrative, judicial, and treaty mechanisms for resolving transfer pricing issues.*[1]

2. APAs are intended to give taxpayers and competent authorities "advance" tax certainty. That is, tax certainty in relation to the tax treatment of the relevant covered transaction(s) for fiscal years within a defined period. APAs supplement traditional administrative, judicial and treaty mechanisms for resolving transfer pricing disputes, by preventing those disputes from occurring. APAs are most useful when these traditional mechanisms fail or are difficult to apply[2] or in situations when there is an expectation of a transfer pricing dispute arising.

3. At the conclusion of the APA process, tax administrations provide confirmation to the taxpayer(s) that no transfer pricing adjustment will be made to the covered transaction(s) for a given period if the taxpayer follows the terms of the APA. There will also be provisions in the APA for possible revision or cancellation of the arrangement for future years when business operations change significantly, or when uncontrolled economic circumstances critically affect the reliability of the methodology in a manner that independent enterprises would consider significant for purposes of their transfer pricing.

4. While there is no general definition for the subsets of APAs, Section A.2 of Annex II to Chapter IV: Advance Pricing Arrangements in the OECD Transfer Pricing Guidelines (OECD, 2017[2]) outlines three possible forms of APAs in detail:

- Unilateral APAs, which are arrangements between a taxpayer and a single jurisdiction. Unilateral APAs are solely domestic law instruments of jurisdictions and only provide tax certainty in relation covered transaction(s) in a single jurisdiction.
- BAPAs, which are APAs between two jurisdictions and are generally implemented domestically through an agreement between the relevant taxpayer/s and each competent authority. However, some jurisdictions allow for the possibility of taxpayers to be party to the BAPA. Both methods give tax certainty in relation to covered transaction(s) in both jurisdictions.
- Multilateral APAs, which are APAs between more than two jurisdictions. Multilateral APAs offer significant tax certainty for taxpayers and competent authorities as compared to traditional bilateral agreements in situations involving more than two jurisdictions. However, given the coordination required and the relative inexperience of most jurisdictions in undertaking such engagements, Multilateral APAs raise significant challenges as well. Some of the challenges are the same as for

BAPAs, albeit exacerbated by having more stakeholders involved. However, other challenges are unique.[3]

5. It is generally accepted that BAPAs derive their legal basis from a tax treaty provision equivalent to Article 25(3), first sentence of the OECD Model Tax Convention (OECD, 2019[1]), which authorises the competent authorities to try to resolve by mutual agreement "*any difficulties or doubts arising as to the interpretation or application of the Convention*". BAPAs generally relate to difficulties or doubts in relation to the application of Article 9 (Associated Enterprises) or Article 7 (Business Profits) of the OECD Model Tax Convention (OECD, 2019[1]).

6. Paragraph 52 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) states under the provision of Article 25 competent authorities can:

> *52. Conclude bilateral advance pricing arrangements (APAs) as well as conclude multilateral APAs with competent authorities of third States with which each of the Contracting States has concluded a bilateral tax convention in cases where difficulties or doubts exist as to the interpretation or application of the conventions (especially in cases where no actions of the Contracting States are likely to result in taxation not in accordance with the provisions of a convention).*[4]

7. Even so, some jurisdictions do require domestic legislation to enable a competent authority to enter into BAPAs (including domestic agreements to implement a BAPA). Notwithstanding these potential limitations, paragraph 4.152 of the OECD Transfer Pricing Guidelines (OECD, 2017[2]) states that:

> *4.152. …[W]hen a tax convention contains a clause regarding the mutual agreement procedure similar to Article 25 of the OECD Model Tax Convention, the competent authorities generally should be allowed to conclude an APA, if transfer pricing issues were otherwise likely to result in double taxation, or would raise difficulties or doubts as to the interpretation or application of the Convention. Such an arrangement would be legally binding for both States and would create rights for the taxpayers involved. Inasmuch as double tax treaties take precedence over domestic law, the lack of a basis in domestic law to enter into APAs would not prevent application of APAs on the basis of a mutual agreement procedure.*[5]

8. The exact legal basis for handling a BAPA will be dependent on the domestic law requirements of each relevant jurisdiction. However, whether the legal basis for handling a BAPA directly derives its authority from the equivalent to Article 25(3) of the OECD Model Tax Convention (OECD, 2019[1]) or domestic law provisions does not have an adverse effect on the end-to-end BAPA process. Further, any exchange of information between competent authorities during the BAPA process is conducted in accordance with the exchange of information provision contained in the relevant tax treaty.

9. It should be noted that that the Action 14 Final Report (OECD, 2015[3]) included a best practice that stated that jurisdictions should implement BAPA programmes. The Action 14 Final Report (OECD, 2015[3]) further adds that jurisdictions should do this as soon as they have the capacity to do so[6] because APAs provide a greater level of tax certainty for both treaty partner jurisdictions, lessen the likelihood of double taxation and may prevent transfer pricing disputes.

10. It is of fundamental importance that it is recognised that BAPAs are strictly voluntary arrangements entered into between competent authorities for the purposes of giving a taxpayer advance tax certainty. Article 25(3), first sentence, only prescribes that competent authorities *"shall endeavour to resolve by mutual agreement"* and the commentary to Article 25(3) makes it clear that the provision "*invites and authorises the competent authorities to resolve, if possible, difficulties of interpretation or application by means of mutual agreement".*[7] Article 25(3) does not create any right or obligation that competent authorities are required to agree to the terms of a BAPA nor resolve any issue favourably for the taxpayer.

1.2. Objectives of BAPAs

11. BAPAs are designed to supplement traditional mechanisms to give taxpayers and tax administrations advance tax certainty to prevent tax disputes before they happen. While there has been a major focus on base erosion and profit shifting by multinationals in recent years, many transfer pricing disputes occur purely due to the subjective nature of the analysis required under the arm's length principle.

12. It is the experience of many jurisdictions that the resolution of transfer pricing disputes by traditional audit and examination techniques is often a difficult, time consuming and costly exercise for both tax administrations and taxpayers.[8] Such examinations require analyses to be undertaken after transfer prices have been set and there can be genuine difficulties in obtaining information to properly inform whether arm's length prices were used at the time they were set.[9] The OECD Transfer Pricing Guidelines (OECD, 2017[2]) notes the following:

> *9. …These difficulties led in part to the development of the APA process as an alternative way of solving transfer pricing issues in some cases in order to avoid some of the problems described above. The objectives of an APA process are to facilitate principled, practical and co-operative negotiations, to resolve transfer pricing issues expeditiously and prospectively, to use the resources of the taxpayer and the tax administration more efficiently, and to provide a measure of predictability for the taxpayer….* [10]
>
> *10. …Consideration of an APA may be most appropriate when the methodology for applying the arm's length principle gives rise to significant questions of reliability and accuracy, or when the specific circumstances of the transfer pricing issues being considered are unusually complex.*[11]

13. With the increased availability of access to MAP in tax treaties, transfer pricing disputes impose a significant burden on tax administrations and taxpayers well after the initial audit assessment, as taxpayers choose to avail themselves of MAP to eliminate double taxation. Therefore, being able to prevent these disputes is a key tenet of effective and efficient tax administration.

14. While giving taxpayers and tax administrations advance tax certainty is the goal of APAs, eliminating potential double taxation is also an important benefit. Unilateral APAs give rise to concerns in this area, as there is no certainty provided in relation to how the treaty partner will view the relevant transaction(s). Further, because BAPAs and multilateral APAs invariably involve other parties outside of the taxpayer and the primary tax administration, taxpayers often consider that the results of BAPAs and multilateral APAs are fairer and more in line with the arm's length principle.

15. Given the benefits of BAPAs and multilateral APAs with respect to eliminating double taxation, most jurisdictions prefer bilateral or multilateral APAs[12], and indeed some jurisdictions will not grant a unilateral APA to taxpayers in their jurisdiction. It is also the case that some jurisdictions are not permitted under domestic law to enter into binding agreements directly with the taxpayers, and so, APAs can be concluded with the competent authority of a treaty partner only under the mutual agreement procedure.[13]

1.3. Current issues with the BAPA process and key findings of the surveys

16. The BAPA process is used to describe the end-to-end process associated with a BAPA agreement between competent authorities and the period covered by the BAPA agreement.

17. With the clear benefits of BAPAs for tax administrations and taxpayers, having an efficient and effective process for undertaking BAPAs is vital to ensuring those benefits are maximised.

18. While the OECD Transfer Pricing Guidelines (OECD, 2017[2]), especially Annex II to Chapter IV of those Guidelines, outline in some detail the various steps involved in the BAPA process, very little guidance has been provided in relation to the effective management of the BAPA process. Given this, jurisdictions have been left to develop their BAPA programmes without a common framework. Not surprisingly, this has

led to divergent approaches being taken by competent authorities in administering their BAPA programmes. Further, there is often little information provided to taxpayers or treaty partners as to where divergences occur, making the BAPA process often difficult to navigate.

19. Having homogenous BAPA processes among jurisdictions is not a requirement for effective and efficient promotion of tax certainty. However, it should be a common goal to ensure that BAPA processes are broadly streamlined to ensure that each jurisdiction's approach is conducive to timely agreement, while ensuring the effective use of competent authorities' and taxpayers' resources.

20. As such, this Manual and its best practices have been developed to assist in achieving greater streamlining between individual jurisdiction's BAPA processes and well as taxpayer engagement. Specifically, the best practices have been developed based on the survey responses.

21. The high-level summary of the survey responses is as follows:

- Taxpayers and competent authorities overwhelmingly supported the current and future use of BAPAs as a tool to provide advance tax certainty. Their experience is that BAPAs are an effective preventative dispute resolution mechanism and reduce potential double taxation.
- Taxpayers prefer BAPAs to audit and Mutual Agreement Procedure engagements as they find that fairer tax outcomes are achieved through the process. As BAPAs are voluntary instruments, they are often more collaborative engagements.
- It is recognised that several issues limit the effectiveness of BAPAs as an advance certainty tool. While specific issues were raised regarding the entire BAPA process from end-to-end and some of those are addressed directly through the best practices in this Manual, four key issues were common to all responses that undermine the effectiveness of a BAPA programme:
    - **BAPAs take a long time to agree**. It is common in taxpayer experiences that the BAPA process is often longer than the period for which the BAPA was sought. Many taxpayers questioned whether without decreasing the time to agree a BAPA, BAPAs can truly be considered an instrument giving "advance" tax certainty.
    - **Differences in jurisdictions' BAPA processes at key times unnecessarily increases the length of the BAPA process**. A lack of a consistent framework often leads to duplication for taxpayers and information asymmetries occurring between competent authorities.
    - **BAPA processes require a large amount of resources from both competent authorities and taxpayers**. Taxpayers were often critical of competent authorities in relation to the level of scrutiny being undertaken and the information requested to form a BAPA position, especially where issues may not be directly related to the covered transaction(s). Competent authorities were often critical of taxpayers for delays in providing the necessary information and in relation to making decisions throughout the BAPA process.
    - **There is a lack of transparency at times between all stakeholders in key parts of the BAPA process**. This is relevant from the perspective of both taxpayers and competent authorities (in dealing with both taxpayers and treaty partners).

22. The responses to the survey reinforced the need for jurisdictions and taxpayers to have a common framework for undertaking BAPA processes. Without such a framework, the cumulative effect of these issues results in BAPAs being under-utilised as a tax certainty tool. The best practices contained in this Manual seek to **reduce BAPA times, make better use of current BAPA resources** and **improve transparency**, by aiming to:

- **Mitigate, where possible, delays created by differences in jurisdictions' BAPA processes at key stages**. The best practices focus on aligning BAPA processes at key phases, while balancing the need for flexibility due to domestic law requirements and the specific requirements of each

BAPA application. This includes expressly stating the responsibilities of competent authorities and taxpayers in relation to the BAPA process.

- **Avoid information asymmetries between competent authorities** by ensuring competent authorities have access to the same taxpayer information, in the same form and at the same time.
- **Ensure that there are realistic expectations for jurisdictions and taxpayers in the early phases of the BAPA process** as to the resources required and the expected timeframes to agree a BAPA. BAPAs require a large investment of resources for both taxpayers and competent authorities and it is important that all stakeholders are committed to resolving a BAPA within a reasonable timeframe.
- **Increase transparency and collaboration between competent authorities and taxpayers**. BAPAs are voluntary agreements and, in general, require significant collaboration between taxpayers and competent authorities. Greater planning and collaboration at certain stages in the BAPA process as well as increased transparency can be effective in resolving differences between positions and lead to a better overall BAPA experience for taxpayers and competent authorities alike.

Notes

[1] Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 4.134.

[2] Chapter IV of the *OECD Transfer Pricing Guidelines*, section F.1.

[3] Due to these challenges, multilateral APAs are not within the scope of the best practices outlined in this Manual. While many of the best practices outlined may potentially improve processes in relation to multilateral APAs, the design and relevant commentary in this Manual has not been developed with multilateral APAs in mind and does not take into account the unique issues associated with multilateral engagements. For further information on the processes for Multilateral APAs, see the Manual on the handling of Multilateral MAPs and APAs.

[4] Commentary on Article 25 of the OECD Model Tax Convention, paragraph 52.

[5] Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 4.152.

[6] *Making Dispute Resolution Mechanisms More Effective, Action 14* - 2015 Final Report, paragraph 48.

[7] Commentary on Article 25 of the OECD Model Tax Convention, paragraph 50.

[8] Annex II of Chapter IV of the OECD Transfer Pricing Guidelines, paragraph 9.

[9] Ibid.

[10] Ibid.

[11] Annex II of Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 10.

[12] Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 4.141.

[13] Annex II of Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 4.141.

References

OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, https://doi.org/10.1787/g2g972ee-en. [1]

OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, https://doi.org/10.1787/tpg-2017-en. [2]

OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241633-en. [3]

2 What makes an effective BAPA process?

23. Taxpayers and competent authorities overwhelmingly supported the current and future use of BAPAs as a tool to give advance tax certainty. The experience of both taxpayers and competent authorities is that BAPAs are effective dispute resolution mechanisms and reduce potential double taxation.

24. Sections F.3 and F.4 of the OECD Transfer Pricing Guidelines (OECD, 2017[2]) clearly articulate the advantages and disadvantages of APA programmes for both jurisdictions and taxpayers. Both taxpayer and competent authority responses to the survey aligned with these views.

25. In summary, the advantages of properly administered BAPA programmes are:

- BAPAs substantially reduce or eliminate the possibility of juridical or economic double or non-taxation since all the relevant jurisdictions participate.
- Provided the critical assumptions are met, BAPAs assist taxpayers and tax administrations by eliminating uncertainty through enhancing the predictability of tax treatment in international transactions. This may prevent costly and time-consuming examinations and litigation of major transfer pricing issues.
- BAPAs provide an opportunity for both tax administrations and taxpayers to discuss complex tax issues in a non-adversarial spirit and environment, which can stimulate a free flow of information among all parties involved for the purpose of coming to a legally correct and practicable result.
- A BAPA programme can improve knowledge and understanding of highly technical and factual circumstances in areas such as global trading and the tax issues involved.

26. However, some challenges may arise in the administration of a BAPA programme, such as:

- BAPA programmes may initially place a strain on transfer pricing audit resources, as tax administrations will generally have to divert resources designated for other purposes to the APA programme (e.g. examination, advising, litigation, etc.).
- The balance of compliance resources may be particularly difficult to achieve since a BAPA programme tends to require highly experienced and often specialised staff.

27. However, the effectiveness and efficiency of a BAPA programme has a strong effect on whether the advantages are fully realised. How the BAPA process is undertaken directly affects the relative weighting of the potential advantages and disadvantages for both taxpayers and competent authorities. Both taxpayers and competent authorities noted that, in general, the cumulative effect of these issues has led to an under-utilisation of BAPAs as an advance tax certainty tool.

28. While this Manual outlines best practices for the purposes of streamlining the BAPA process to overcome these issues, taxpayers and competent authorities noted the following areas for best practice development that are not directly related to specific procedural aspects of the BAPA process:

- fostering a collaborative and co-operative BAPA process
- providing clear guidance on the BAPA process

- embracing technology and increased communication and transparency to improve efficiency
- creating realistic expectations as to the probable length of the BAPA process
- ensuring BAPAs are prospective
- ensuring adequate resourcing in relation to BAPAs
- increased communication and transparency.

29. Although not directly related to streamlining the BAPA process in procedural terms, the aspects outlined above are considered fundamental to ensuring an efficient and effective BAPA programme.

2.1. Fostering a collaborative and co-operative BAPA process

30. The OECD Transfer Pricing Guidelines (OECD, 2017[2]) clearly articulates, "*to be successful, the [BAPA] process should be administered in a non-adversarial, efficient and practical fashion and requires the co-operation of all the participating parties*".[1]

31. All stakeholders noted that the overall spirit of a BAPA is more constructive than a MAP or an audit and that collaboration and co-operation is paramount to an effective and efficient BAPA programme. Fostering such an environment should be a priority for all BAPA stakeholders if BAPA processes are to be streamlined. Further, it was recognised that when a BAPA process is conducted in an open and forthcoming manner, competent authorities are often able to agree on BAPA applications more quickly. This applies to both taxpayer and treaty partner interactions.

32. Taxpayers appreciate the transparency that a BAPA brings and the opportunity to discuss and resolve complex tax issues with competent authorities. Further, they noted the knowledge and experience levels of the BAPA case officers and competent authorities cater better to analysing and resolving difficult technical items related to transfer pricing on a principled basis, particularly when dealing on an industry-by-industry basis or when economists are part of the team. This serves to effectively reduce overall tax risk and the risk of double taxation as well as prevent disputes. This was reciprocated by competent authorities, who recognised the indirect benefits of a BAPA process in developing greater taxpayer trust and co-operation as well as potentially lowering resource allocation to audits and MAP.

33. While BAPAs are agreements between competent authorities, the role of the taxpayer in ensuring an effective and efficient BAPA process should not be understated. The OECD Transfer Pricing Guidelines (OECD, 2017[2]) articulates the role of taxpayer as follows,

> *4.114. The co-operation of the associated enterprises is vital to a successful APA negotiation. For example, the associated enterprises ordinarily would be expected to provide the tax administrations with the methodology that they consider most reasonable under the particular facts and circumstances. The associated enterprises also should submit documentation supporting the reasonableness of their proposal, which would include, for example, data relating to the industry, markets, and countries to be covered by the agreement.*[2]

34. Competent authorities stated that the BAPA process was more efficient and effective when both taxpayers and treaty partners take principled and reasonable positions from the outset. It was often noted that a key difficulty in obtaining a BAPA agreement was when the initial positions adopted were not necessarily considered in line with the arm's length principle. This applied equally to taxpayer and treaty partner positions. It was observed that the differences in some positions were not necessarily driven by material differences in the delineation of the covered transaction(s), nor in the comparables selected. Rather, positions on certain issues were viewed as "starting" negotiation positions and this practice can lead to extended BAPA processes.

35. All these factors are important for an efficient and effective BAPA programme, especially given the process is voluntary. With this is mind, Best Practice 1 outlines that to ensure the advantages of a BAPA programme are realised, competent authorities and taxpayers should be committed to ensuring a good

faith application of a tax convention and endeavour to engage with BAPA applications in accordance with the applicable tax convention, relevant international guidelines and domestic laws.

Best Practice 1

Competent authorities and taxpayers should engage with one another in a principled, fair, objective and transparent manner, with each BAPA application decided on its own merits. To the extent applicable, the commentary to the relevant Model Tax Conventions and the international transfer pricing guidelines are an appropriate basis for the development of a principled approach.

As part of a principled approach to BAPAs, competent authority and taxpayer positions should be based on analysis conducted in accordance with the applicable bilateral tax treaty, the domestic laws of the relevant jurisdictions and the relevant international transfer pricing guidance.

Competent authority positions on particular issues should not be determined by the position that produces the most revenue. Similarly, taxpayer positions should not be influenced by achieving the highest tax saving. Competent authorities and taxpayers should look for appropriate opportunities for compromise within the arm's length principle in order to increase tax certainty for all parties.

To the extent possible, competent authorities that face significant recurring issues in their bilateral relationship may wish to reach agreement on the consistent treatment of such issues, notwithstanding consideration to the facts and circumstances of each case.

Competent authorities and taxpayers should strive to resolve any issue in a fair and objective manner, on its merits. It is important that the entire BAPA process be undertaken in a non-adversarial spirit and environment. It is expected that taxpayers and competent authorities engage in the following manner:

- parties co-operate fully with one another, including engaging in an open and transparent dialogue throughout the BAPA process
- the BAPA is assessed on its merits according to its facts and circumstances
- parties act transparently and disclose all the relevant facts throughout the process
- parties provide prompt and complete replies to reasonable queries.

The starting point is to ensure that all positions taken, and agreements entered are reasonable and in accordance with the terms of the treaty and applicable principles of international law on the interpretation of treaties as well as the international transfer pricing guidance. While it is inevitable that some element of negotiation will form part of any BAPA, competent authorities and taxpayers should engage in all parts of the BAPA process to find an answer acceptable to all parties within the framework of the arm's length principle rather than the answer that best suits their direct economic interests. This inherently recognises the indirect advantages of a BAPA process to competent authorities and taxpayers.

Competent authorities' positions on particular issues should not be determined by the position that produces the most revenue for its jurisdiction but rather that, which accords with the arm's length principle. Further, competent authorities should conduct themselves in accordance with the spirit of co-operation and collaboration to increase tax certainty for all parties.

Taxpayers' positions should not be influenced by achieving the highest tax saving. Further, positions in the BAPA application should be developed independent of the influence of competent authorities and in accordance with the domestic laws of both jurisdictions and the international commentary where

relevant. In the spirit of co-operation and compromise, taxpayers should be open to the possibility of the proposed BAPA requiring changes from their original position in their BAPA application. Taxpayers should assist with making such adjustments in order to achieve agreement. For example, this could include a change of transfer pricing method when both competent authorities agree to an alternative method. Further, taxpayers should not be putting forward positions for the purposes of avoidance of taxation, base erosion or profit shifting.

Where relevant, taxpayers should also assist competent authorities in the BAPA process and the implementation of these best practices (where adopted). Many of the best practices outlined in this Manual rely on co-operation between taxpayers and competent authorities. Taxpayers have a significant role in streamlining the BAPA process and should fully co-operate throughout the BAPA process, including ensuring timely turnaround of competent authority information requests.

Where possible and practical, taxpayers should seek BAPAs over unilateral APAs, especially at the application stage. Where the possibility of a BAPA becomes evident as part of a unilateral APA request, tax administrations should encourage taxpayers to pursue a BAPA in the first instance. However, this should not prohibit taxpayers from pursuing a unilateral APA where a BAPA is seen to not be feasible.

36. It is expected that taxpayers' positions in their BAPA applications should be in line with the arm's length principle. It should, therefore, be expected that once a BAPA application has been submitted, the taxpayer should file its income tax returns in the relevant jurisdictions based on the position taken in its BAPA application.

Best Practice 2

During the BAPA process, taxpayers should file their tax returns in the relevant jurisdictions in the proposed covered years based on the positions taken in their BAPA application.

It is expected that taxpayers file their tax returns in the period between when a BAPA application is submitted and the agreement between competent authorities based on positions taken in their BAPA application. However, this only applies if the circumstances in those proposed covered years are the same as outlined in the BAPA application.

Positions taken by taxpayers throughout the BAPA process should be both reasonable and defensible, with a realistic likelihood of being acceptable to all jurisdictions involved. Taxpayers should also not propose transfer pricing methodologies with the motivation of facilitating base erosion and profit shifting.

Taxpayers' filing positions in each jurisdiction should only change from that in its BAPA application if the taxpayer is willing to accept the same position under the BAPA. However, competent authorities should not treat the taxpayer's filing position as a minimum or maximum point for BAPA discussions, past which they would not move.

This best practice does not apply to transactions that have not yet occurred. As this best practice applies to taxpayers, it does not come with any expectation for any tax administration to make specific regulations or to police this type of behaviour.

2.2. Providing clear guidance on the BAPA process

37. Appropriate administrative processes and practices are important to ensure an environment in which competent authorities and taxpayers can fully and effectively reap the benefits of a BAPA

programme. For competent authorities, documented processes and practices are important to ensure a fair and consistent BAPA process is applied based on the facts and circumstances of each taxpayer's specific application. For taxpayers, access to publicly available guidance, rules and guidelines is important to ensure that they understand the obligations and expectations placed on them throughout the BAPA process.

38. Both taxpayers and competent authorities noted that major divergences in individual BAPA processes can lead to significant delays. However, in many instances, delays could have been avoided had the taxpayer or the competent authority been made aware of the difference. This issue was generally mitigated in situations where a jurisdiction had published detailed guidelines on their BAPA process. Further, jurisdictions with detailed guidance were viewed as having more efficient BAPA processes leading to taxpayers being more likely to engage in a BAPA.

39. However, many jurisdictions have little to no guidance on their BAPA process, or where guidance is provided, it is largely limited to the submission of a BAPA application and does not incorporate other aspects of the BAPA process. Given the lack of uniformity between jurisdictions' BAPA practices, it is important that tax administrations develop and publish rules, guidelines and procedures for their BAPA programmes for the benefit of taxpayers and treaty partners.

Best Practice 3

All jurisdictions with BAPA programmes should have clear published rules, guidelines and procedures, which outline how to access the BAPA process and the relevant steps in the BAPA process, and should take appropriate measures to make that information publicly available.

Jurisdictions should develop and publish rules, guidelines and procedures for their BAPA programmes, which should include guidance on how taxpayers may make requests for competent authority assistance. The guidance provided should be comprehensive and clear so that taxpayers and treaty partners (where applicable) are fully aware of requirements under the BAPA programme and the information required in the BAPA application. The guidance should provide an outline of the BAPA process and note any domestic limitations to the BAPA programme (e.g. availability of roll-back, processes for renewal etc.).

The guidance should remind taxpayers of potential differences in BAPA application requirements between jurisdictions and encourage taxpayers to coordinate BAPA applications between jurisdictions.

Such guidance should be drafted in clear and plain language and should be readily accessible to the public on the jurisdiction's OECD MAP profile and on the website of the relevant public body administering the BAPA programme. Further, any guidance should be made available in the language of the relevant jurisdiction as well as in English. This is so that foreign taxpayers and treaty partners may gain access to the relevant procedures.

40. While detailed guidance on the entire BAPA process is important, it is recognised that the BAPA process needs to remain flexible. Therefore, any guidance provided should be general in nature. It would be expected that any guidance made publicly available would at least include:

- any early engagement and / or notification required to be given by the taxpayer prior to the lodgement of a BAPA application

- the domestic law requirements for lodging a BAPA application as well as, in general, what information should be included in the BAPA application for a competent authority to commence its review[3]
- what factors are considered when reviewing a BAPA application for acceptance into a BAPA programme.
- an overview of the BAPA process, including what happens and the taxpayer's obligations at each stage, including ongoing monitoring and compliance
- circumstances in which a BAPA may be revised or cancelled
- the process for BAPA renewals.

2.3. Embracing technology to increase efficiency

41. Greater use of technology to increase the speed, efficiency and transparency of the BAPA process was a common request from both taxpayers and competent authorities.

42. Taxpayers noted that many competent authorities have embraced digital communication, whether that be through regular use of email, teleconferencing or videoconferencing allowing for more flexible scheduling, which decreased BAPA agreement times. Both competent authorities and taxpayers stated that the benefits associated with the potential use of videoconferencing for joint functional interviews and site visits. There are significant benefits for both competent authorities and taxpayers in undertaken joint processes, including reducing duplication and assisting competent authorities in having a common understanding of the underlying facts and circumstances in relation to the BAPA application. Further, greater use of videoconferencing allows for better and more frequent communication between competent authorities and reduces the need to have face-to-face meetings for BAPA discussions. Physical meetings with taxpayers (i.e. functional interviews) and treaty partners can be logistically difficult, especially where jurisdictions are not geographically close or due to scheduling constraints. The greater use of videoconferencing not only has the potential to increase frequency, speed and accuracy of communication but could also result in cost savings for jurisdictions and taxpayers. However, it was expressed that the greater use of digital communication should not come at the expense of physical meetings. Physical meetings, especially relating to competent authorities' discussions for agreement of a BAPA, assist to build a rapport between treaty partners, which is fundamental to an effective working relationship.

43. It was also commonly noted that the ability to submit and share information electronically significantly improved BAPA processes. Many tax administrations require (or allow) the digital submission of BAPA applications, requested information provided by taxpayers and information exchanged between competent authorities. However, this is not always the case.

44. In cases where technology was not necessarily being used to improve BAPA processes, this was either due to:

- domestic law limitations, including data protection and privacy laws which limited the ability of a tax administration or a competent authority to digitally receive or distribute the relevant information
- a lack of available digital infrastructure and resources within a tax administration.

45. Given the finite resources for tax administrations and taxpayers, and domestic law limitations, a pragmatic and flexible approach in utilising technology is important to ensure BAPA processes are improved. This also includes considering the potential limitations for treaty partners and taxpayers.

Best Practice 4

Jurisdictions should make greater use of technology throughout the BAPA process, including providing the means for treaty partners and taxpayers to provide information (including BAPA applications and subsequent requested information) electronically.

Jurisdictions should proactively make efforts to utilise any possible form of communication, which allows for increased frequency, speed and accuracy of information conveyed between competent authorities and taxpayers, subject to domestic regulations and resource constraints. This includes considering the position of the taxpayer and the treaty partner by adopting pragmatic and flexible approaches to the utilisation of technology to enhance the effectiveness of the BAPA process.

Where appropriate, this includes greater use of teleconferencing / videoconferencing for functional interviews and virtual site visits, if required.

The greater use of digital communication should not come at the expense of physical meetings. Digital communication should be widely embraced to supplement physical meetings and allow for easier and more frequent communication between competent authorities, BAPA case teams and taxpayers.

This best practice does not prescribe what technologies a jurisdiction should utilise. Jurisdictions should merely strive to make effective use of the technology available within its means. The available modes of communication and information sharing should be published in a jurisdiction's publicly available BAPA guidance.

2.4. Creating a realistic expectation as to the probable length of a BAPA process

46. While the time taken to resolve a BAPA case will inevitably vary according to the facts and complexity of each BAPA application, it was universally recognised that a fundamental impediment to the greater use of BAPAs and the general promotion of advance tax certainty was the time taken to agree a BAPA. Given the current state of play, taxpayers and competent authorities agreed that the current outcomes of BAPAs did not often lead to "advance" certainty. Some taxpayers noted that in the extreme cases, BAPA processes went on for up to ten years.

47. Reponses of taxpayers and competent authorities noted that the time taken to resolve BAPA cases was exacerbated by three factors.

48. The first factor is the level of due diligence undertaken by some competent authorities in assessing BAPA applications and forming positions. Taxpayers and some competent authorities were critical of the level of detail and analysis required by some tax administrations to conclude a BAPA. Taxpayers believed that there were significant disincentives to engage in BAPAs with competent authorities that treated BAPAs similar to pre-emptive audits. It was noted by taxpayers that BAPA applications and information gathering processes often involve the taxpayer voluntarily providing information on its broader business activities, which are normally outside the scope of transfer pricing audits. While taxpayers understood this as a requirement of good faith interactions as part of the BAPA process, some felt that the level of due diligence of their activities and the related intensive information gathering and analysis, was either the same or higher than an audit. In their view, this unnecessarily delayed BAPA agreement and in some cases prevented the taxpayer from undertaking a BAPA with the relevant jurisdiction. Relevantly, taxpayers noted that they have an incentive to provide accurate and complete details as part of their BAPA application as there is no protection under a BAPA if the critical assumptions (which detail the taxpayer's business activities and functional analysis) are breached.

49. However, competent authorities with more demanding BAPA processes noted that it is important to undertake such procedures to ensure tax certainty and meet their responsibilities as tax administrators. In their view, without rigorous due diligence processes, tax administrations could not be comfortable that the facts and circumstances on which a BAPA is based were in fact correct, nor be comfortable that the forecast tax outcomes were realistic. This would ultimately lead to less tax certainty, as there would be greater scrutiny required as part of the ongoing compliance of the BAPA and potentially expose some BAPAs to revocation or cancellation.

50. Conversely, some competent authorities take a less resource intensive approach to due diligence during the BAPA process. This approach requires a heavy reliance on the information contained in a BAPA application, verifying that the information provided is accurate and correct and relying on the critical assumptions, rather than scrutinising the taxpayer's activities afresh. Depending on the facts and circumstances, only specific issues may require detailed due diligence. This typically results in faster BAPA agreement times and less resources required of the relevant competent authority and the taxpayer.

51. Input received from competent authorities and taxpayers points to the fact that both approaches result in very few BAPAs being revoked or cancelled at a later stage. It is important for both taxpayers and competent authorities to recognise that the nature of a BAPA enquiry is different to that of an audit. BAPAs should be undertaken in a collaborative and co-operative manner. Regardless of which approach is taken, competent authorities should ensure that they undertake adequate due diligence of BAPA applications and the underlying analysis in fulfilling their duties as part of a tax administration. However, finding the appropriate balance is important to ensure that BAPAs are adequately promoted as a tax certainty tool and are undertaken in a timely and efficient manner, as well ensuring the efficient use of tax administration resources.

52. The second factor, which was noted by taxpayers, is that there is no common benchmark for the time taken to resolve a BAPA to ensure all parties were accountable for the timely and efficient agreement. Taxpayers were often reluctant to enter a BAPA process on the basis that the process has the potential to continue without resolution for a long time. This meant that they could not assess the potential costs involved as compared to the potential benefits of advance tax certainty. Further, once a taxpayer had engaged with the BAPA process, they are locked into the process due to the significant sunk costs. This was also exacerbated by the fact that competent authorities, BAPA case teams and staff within the taxpayer's organisation change within the extended review period, significantly increasing the review time.

53. Lastly, delays in reaching a BAPA agreement often made the BAPA process more complicated, given competent authorities would often require the assessment of any new data that became available during the review of the BAPA application. In addition, the length of the BAPA process was cited as making agreement between competent authorities more difficult, as the longer the BAPA process is, the more material any potential refund of previously paid tax or adjustment may need to be under the terms of the BAPA.

54. It was also noted by competent authorities that taxpayer behaviour could also contribute to long BAPA processes. This was especially caused by:

- taxpayer driven modifications of the proposed transfer pricing model after the BAPA application has been submitted
- the lack of timely provision of information and the form in which the information is received
- the lack of timely decision-making and the excessive time taken to get internal approvals from management
- a lack of adequate resources being made available at the appropriate times considering the other priorities of the business. This includes not only in relation to tax and finance related staff, but delays in availability of certain staff for functional interviews and access to sites.

55. While taxpayer responses did not necessarily disagree with these observations, it was frequently observed that in their view that in some situations these issues could be mitigated through closer competent authority and taxpayer interaction and the development of a mutual expectation as to the expected length of the BAPA process.

56. After reviewing the responses and the practices of several jurisdictions, it is considered best practice that jurisdictions and taxpayers have a common timeframe to work in pursuing BAPAs.

Best Practice 5

Jurisdictions and taxpayers should aim for a BAPA agreement to be signed within 30 months from the receipt of a complete BAPA application (containing sufficient information) by both competent authorities. Once jurisdictions have taken sufficient efforts to streamline and optimise their BAPA processes and resources in line with this Manual, this aim should be reduced to 24 months.

In some instances, competent authorities may not be able to meet these timeframes. In such situations, competent authorities may simply continue their discussions or may find it useful to agree to a reasonable timeframe with the taxpayer within which they expect to be able to resolve the case.

For cases that have exceeded, or are likely to exceed the suggested period, discussions should still continue and it is advisable for senior officials in the competent authority functions for both jurisdictions to review the case to determine the reasons for the delay and for both competent authorities to then agree upon an approach to ensure the efficient completion of the case.

Notwithstanding these targeted timeframes, it is recognised that many BAPAs at present, even under the best of circumstances, cannot be resolved within the specified period. This may be for several reasons for which no stakeholder is at fault. This may include the complexity of the case, a genuine lack of information or little domestic and international guidance or commentary on how a type of transaction should be dealt with under the prevailing tax rules. Non-adherence to the relevant period should not be construed as a failing by a jurisdiction, as the best practices are dependent on the complexity of the fact pattern and the behaviour of both the taxpayer and the relevant treaty partner in each case. Further, this best practice is predicated on taxpayers fully co-operating with competent authorities throughout the BAPA process.

Where a BAPA is likely to exceed the targeted timeframe, stakeholders should continue discussions. This best practice should not be considered to endorse the rejection of a BAPA application or the termination of a BAPA process on the basis that it is likely to exceed such timeframe. However, it may be helpful if the parties agree a reasonable expected timeframe to resolve the BAPA. This will normally be apparent at the start of the BAPA process when a project plan is agreed (see Best Practice 17). However, if a BAPA application is initially assessed as being reasonably achievable within the timeframe but it becomes apparent the case will take longer than estimated, it is expected that senior officials in the competent authority function will engage with one another to discuss steps to ensure an efficient resolution.

Some jurisdictions already resolve most of their BAPA applications cases within 24 months, while other jurisdictions meet it for a limited number of cases. But for many jurisdictions this target should be considered aspirational and meeting it may only be achievable over time and may require adoption of most or all of the best practices outlined in this report, including additional resources to the competent authority function. Therefore, the timeframe is staggered.

Initially, these jurisdictions should aim to have a BAPA signed within 30 months. However, once jurisdictions have had sufficient time to streamline their BAPA processes and have attained adequate resources, they should aim for a 24-month timeframe. The staggered timeframe recognises the vast differences between current BAPA practices and the resources available. Many changes required to improve a BAPA programme may take time to implement. Further, increasing resources within a competent authority function also requires that these resources are adequately trained and have sufficient experience to conclude BAPAs efficiently. However, the overall target timeframe of 24 months recognises the continued commitment of jurisdictions to decrease the time taken to complete BAPAs, notwithstanding the challenges in achieving this goal.

As these best practices are non-binding, when a jurisdiction moves from the 30-month to the 24-month target is at the discretion of that jurisdiction. Further, many jurisdictions may find it hard to meet the timeframes for its most complex cases at present. However, jurisdictions would be expected to try to adapt their less complex BAPA applications to the timeframes in the first instance and as policies in various jurisdictions are streamlined in line with these best practices, aim towards adapting the more complex BAPA applications to these timeframes at a later stage. Further, jurisdictions may initially strive to complete simpler BAPAs within 24 months while aiming to complete more complex engagements within 30 months.

As noted above, taxpayers may also cause significant delays in the BAPA process. In line with Best Practice 1, in achieving the prescribed targets, taxpayers should be considered to have an obligation to propose a balanced approach and to fully assist and co-operate with the competent authorities. Where taxpayers do not co-operate with the competent authorities in a particular case, competent authorities would have ample reason as to why they were not able to meet the time target for that case.

The relevant starting point for evaluating adherence to this best practice is the date on which both competent authorities receive complete BAPA applications. A “complete” BAPA application is a BAPA application that:

- meets the domestic BAPA application requirements of the jurisdiction, and
- contains sufficient information for a competent authority to commence its review of the BAPA application for the purposes of acceptance into the BAPA programme.

Where taxpayers submit incomplete BAPA applications, the relevant starting point should be once both competent authorities have the required information to commence their reviews for the purposes of acceptance into their respective BAPA programmes.

The information necessary for a complete BAPA application is at the discretion of each competent authority and may vary depending on the underlying facts and circumstances. However, a complete BAPA application only needs to include sufficient information to commence the process of determining acceptance of an application into a BAPA programme. That is, it does not need to contain all the necessary information that forms part of the information gathering stage for a competent authority to form its position. Jurisdictions should make it clear to taxpayers in any published guidance and during any pre-engagement undertakings as to what information is necessary to make an assessment as to whether a BAPA application should be accepted into that jurisdiction’s BAPA programme.

For completeness, where a jurisdiction has automatic acceptance of BAPA applications, the starting point will be when the treaty partner has received a “complete” BAPA application. Where both jurisdictions have automatic acceptance of BAPA applications, the starting point will be the day the complete BAPA applications are received. However, both situations are predicated on the BAPA application meeting any domestic law requirements for automatic acceptance into the BAPA programme.

The end point is the date on which the competent authorities sign the BAPA. The date of signing of any domestic implementing agreement or the time required for implementing a BAPA agreement would not affect the timeframe envisaged in this best practice.

This best practice only applies to new BAPA applications and not an application for the renewal of a BAPA. It is expected that renewals and roll-forward BAPAs should take less time than 24 months under streamlined procedures leveraging any previous analysis undertaken (see Best Practice 29).

2.5. Ensuring BAPAs are prospective

57. Given the purpose of a BAPA is to provide "advance" certainty and apply to prospective transactions, consideration needs to be given to the duration of any proposed BAPA. Paragraph 51 of the OECD Transfer Pricing Guidelines (OECD, 2017[2]) outlines the conflicting objectives of a BAPA as follows:

> *51. On the one hand, it is desirable to have a sufficiently long period so as to grant a reasonable degree of certainty of treatment. Otherwise, it may not be worth making the initial effort of resolving potential transfer pricing problems in advance, as opposed to tackling problems only when they arise through the normal audit or tax return examination procedures. On the other hand, a long period makes the predictions as to future conditions on which the mutual agreement negotiations are based less accurate, thereby casting doubt on the reliability of the MAP APA proposals. The optimal trade-off between these two sets of objectives will depend on a number of factors, such as the industry, the transactions involved and the economic climate.*[4]

58. It was commonly cited by taxpayers that in their experience the BAPA process often takes longer than the initially requested covered period, therefore having no prospective element. Both competent authorities and taxpayers noted that in many of these instances, there is a prospect of renewal or extending the covered period of a BAPA. However, it was not uncommon as part of a BAPA renewal process for elements of the original BAPA to require re-examination. Therefore, while in most cases a renewal of a BAPA required significant less resources than the original BAPA, it was neither guaranteed nor immediate in its operation. Therefore, longer BAPA periods are preferable to renewals.

59. Given the length of the BAPA process and the resources required from competent authorities and taxpayers, to give sufficient "advance" certainty, five-year BAPA terms should be the best practice duration for most BAPAs. Combined with Best Practice 5, five years ensures that for cases in line with that best practice, there are more prospective years than retrospective years once a BAPA is concluded.

Best Practice 6

The term of a BAPA should generally be a minimum of five years, including at least two prospective taxation years, where the facts and circumstances are expected to be the same.

Based on the aims of Best Practice 5, five-year BAPA durations ensure that for BAPA agreements there are sufficient prospective years to make the process "advance" and worth the resources expended by taxpayers and competent authorities. Where appropriate, competent authorities could use critical assumptions to balance the risk of future changes to the facts and underlying economic circumstances rather than unnecessarily restricting the duration of a BAPA.

Annex D contains a list of potential critical assumptions.

Further, longer BAPA terms should be encouraged where competent authorities and taxpayers can agree. Where possible, competent authorities should look to permit expedited renewal processes for BAPAs for which the term has already expired or is about to expire.

However, this best practice should only be applied in the appropriate circumstances. For instance, longer duration BAPAs may not be appropriate in certain industries and markets that are subject to volatile returns or industries where there are limited comparables. Further, it may become apparent during the information gathering and discussion stages of the BAPA process that the requested covered period is not appropriate. It is within the purview of the competent authorities and the taxpayer to agree to a different BAPA coverage period. In circumstances where the proposed period is shorter than requested for in the BAPA application, processes should be put in place for an expedited BAPA renewal process (if appropriate).

2.6. Ensuring adequate resourcing of competent authority functions

60. There is universal recognition that the BAPA process is resource intensive. Annex II to Chapter IV: Advance Pricing Arrangements in the OECD Transfer Pricing Guidelines (OECD, 2017[2]) outlines,

> 4.161. An APA programme may initially place a strain on transfer pricing audit resources, as tax administrations will generally have to divert resources earmarked for other purposes (e.g. examination, advising, litigation, etc.) to the APA programme. Demands may be made on the resources of a tax administration by taxpayers seeking the earliest possible conclusion to an APA request, keeping in mind their business objectives and time scales, and the APA programme as a whole will tend to be led by the demands of the business community. These demands may not coincide with the resource planning of the tax administrations, thereby making it difficult to process efficiently both the APAs and other equally important work.[5]

61. Both taxpayers and competent authorities noted that throughout the BAPA process, there were often delays because competent authorities did not have sufficient resources or sufficiently skilled staff to effectively deal with the unique challenges of BAPAs in a timely manner.

62. One of the main aims of this Manual is to streamline the current BAPA process to make more efficient use of the resources already dedicated to a jurisdiction's BAPA programme. However, to achieve some of the best practices in this Manual, it is recognised that some competent authorities may require additional resources to realise the benefits of their BAPA programme more effectively. This not only includes having an adequate number of staff members dedicated to a BAPA programme, but also ensuring that those staff members have the sufficient expertise in the varied skill sets required throughout the BAPA process.

Best Practice 7

Competent authorities should be adequately resourced to meet the demands of their BAPA programmes. BAPA case officers should be provided with adequate training for dealing with BAPA applications.

This best practice applies in addition to the obligation for jurisdictions to ensure that adequate resources are provided to the MAP function under element 2.5 of the BEPS Action 14 Minimum Standard.

Jurisdictions should ensure that adequate resources – including personnel, funding, training and other programme needs – are dedicated to a BAPA programme, to enable competent authorities to carry out the duties in a timely and effective manner. Given the finite resources of all tax administrations and noting that BAPAs are voluntary agreements, the number of staff dedicated to a BAPA programme should reflect that jurisdiction's BAPA inventory.

Ensuring staff dedicated to a BAPA programme are provided with adequate training is important to an efficiently functioning BAPA programme. Staff within a BAPA programme should have access to substantive training on tax treaties (including their interpretation and application), transfer pricing and on how to effectively deal with BAPA applications in a co-operative and efficient manner. Jurisdictions should also ensure that staff within a BAPA programme are given access to language resources, including translation services.

2.7. Increased communication and transparency

63. Outside a lack of harmonisation of BAPA processes, a lack of communication and transparency is a driver of inefficiencies in the current BAPA process. This not only in relation to interactions between taxpayers and competent authorities, but also with respect to the interaction between competent authorities.

64. For a BAPA process to be successful, the process should be administered in a non-adversarial, efficient and practical fashion and requires the co-operation of all the participating parties, transparency and adequate communication between all stakeholders. While many of the best practices in this Manual aim to increase transparency and communication at certain points in the BAPA process, it is very clear that the greater the transparency and the better the communication between all stakeholders throughout the entire BAPA process, the quicker BAPA resolutions tend to be. This would also lead to better experiences for taxpayers and competent authorities. However, it was cited by competent authorities and taxpayers that effective communication can often be lacking in the BAPA process.

2.7.1. Communication between taxpayers and competent authorities throughout the BAPA process

65. It was noted by taxpayers that throughout the BAPA process, there would be periods of close collaboration and regular contact with competent authorities followed by extended periods of no contact at all. Typically, in taxpayers' experiences, the early engagement stage involved regular contact with competent authorities and BAPA case officers. However, taxpayers noted that it was not uncommon that during the stages of the BAPA process that the taxpayer was not actively involved in, there were prolonged periods of no or little communication with either competent authority. For instance, taxpayers cited limited engagement during the BAPA application review, position paper and competent authorities' discussion

stages of the BAPA process. This has led to easily avoidable errors being made during the BAPA process as competent authorities may have misinterpreted information, and well as often resulting in duplication, which lead to a protracted BAPA process in the view of taxpayers.

66. Conversely, taxpayers noted that where BAPA case officers and competent authorities undertook regular communication with taxpayers and acted in a collaborative manner, the BAPA experience was significantly more positive and expedited. This included not only providing regular updates, but also a willingness to collaborate with the taxpayer to resolve issues that arose.

67. Timely and regular communication with taxpayers in the BAPA process would be a recognition of the fact that taxpayers are the key stakeholder of the process (rather than considering a BAPA process to be solely related to the agreement between competent authorities). Further, this also recognises that taxpayers have a fundamental role in assisting competent authorities to agree to BAPA outcomes in an efficient and timely manner.

Best Practice 8

BAPA case officers (and competent authorities) and taxpayers should be in regular contact with each other during the BAPA process. This is especially relevant, but not limited, to those parts of the procedure in which the taxpayer is not actively involved, including the progress of:

- **the review of the BAPA application during the process of consideration for acceptance into the BAPA programme, including any potential issues and concerns competent authorities may have**
- **position papers and discussions between competent authorities, including any potential issues arising as part of that process**
- **finalisation and implementation of the BAPA, including any impediments to timely implementation of the BAPA.**

Regular and transparent communication between the competent authorities (especially the BAPA case officers) and taxpayers is important, not only to increase the efficiency of the BAPA process through better case management, but also to manage the expectations of stakeholders. Regular communication includes ensuring that taxpayers are aware of the progress of their BAPA application, the next steps in the process and the timeline for next steps.

At the beginning of the BAPA process, taxpayers should be provided with the contact information of the competent authority and the relevant BAPA case officers who will be handling the case and should be promptly updated of any personnel changes later.

Similarly, taxpayers should provide the contact details of the relevant personnel (including advisors) dealing with the BAPA as part of their BAPA application and inform competent authorities (and especially BAPA case officers) in a timely manner of personnel changes or any other internal change that may affect the BAPA process. This also applies during the on-going monitoring phase after the BAPA is agreed.

Taxpayers should also make competent authorities aware of any other changes that may affect the analysis being undertaken by the competent authorities as soon as possible.

While it is expected that communication between taxpayers and competent authorities should be open and transparent, both taxpayers and competent authorities should also recognise that there are circumstances where full transparency may not be appropriate. For instance, it is not appropriate for a competent authority to disclose confidential discussions with its treaty partner as part of the BAPA

discussion process or to share position papers with the taxpayer. To do so would undermine the confidential nature of discussions, including the disclosure of without prejudice statements, and may lead to reduction in the openness of those discussions.

This best practice should not be viewed as creating any formal obligation on competent authorities or taxpayers; nor does this best practice mean that taxpayers and BAPA case officers should be constantly in contact, but merely that regular updates are provided throughout the BAPA process.

2.7.2. Communication between competent authorities throughout the BAPA process

68. Similarly, competent authorities recognised the advantages and importance of regular contact between treaty partners. However, in practice, this seems to vary greatly between jurisdictions.

69. Many competent authorities noted that they have regular contact with their treaty partners regarding individual cases. This was especially the case for treaty partners for which there is an established and continuing working relationship. However, others noted that there was limited contact with the treaty partner throughout the BAPA process, until the time came for competent authorities to enter discussions through face-to-face meetings. Where there was limited engagement between competent authorities before competent authority discussions took place, it was noted that the information gathering process was often extended and lacked focus on the information required for both competent authorities to come to a mutual understanding of the relevant issues. Further, competent authority discussions were often prolonged as in many situations an issue had not been discussed until the relevant meeting (or in the position paper which often provided immediately before the competent authority discussion meeting). This meant that such meetings were not fruitful and the BAPA process was unnecessarily extended as competent authorities did not have sufficient time to meaningfully consider the relevant issues or required further information from the taxpayer.

70. It is inevitable that competent authorities that share large BAPA application caseloads will have efficiencies due to familiarity of each other's process and a shared history. Notwithstanding this, the amount and regularity of communication between BAPA case officers and competent authorities with their treaty partners related to individual cases is reflective of how collaborative a BAPA process is. Often and frequent communication with treaty partners was noted to create a better understanding and quicker resolution of issues and contribute to an improved flow of the overall BAPA process. Where competent authorities and BAPA case officers communicated early in the BAPA process with their treaty partners and maintained open communication throughout the process, this led to quicker BAPA application resolutions.

Best Practice 9

Once a BAPA application has been accepted into a BAPA programme, BAPA case officers and / or competent authorities in each jurisdiction should be in regular contact with one another in relation to the specific case. This specifically includes communication in between specified meetings between the competent authorities and agreed meetings with the taxpayer.

To foster a more collaborative relationship between competent authorities in relation to individual BAPA applications, BAPA case officers should be permitted, and actively encouraged, to discuss BAPA applications with their treaty partner counterparts and not be restricted to communication only at formal or large-scale meetings.

The BAPA process is intended to be collaborative. The sharing of information, including preliminary thoughts and positions, and regular progress updates between treaty partners in relation to individual

BAPA applications is expected. While it may not be appropriate for formal positions to be discussed in ad-hoc discussions, BAPA case officers should be empowered to work collaboratively and coordinate BAPA engagements with their treaty partner counterparts to discuss the relevant issues and possible paths to resolution (including what information may further be required to form a position) freely, prior to the formation of official positions. Specifically, this includes promptly informing the treaty partner:

- when certain transactions are not appropriate to be covered under the BAPA, and discussions should be held between the competent authorities regarding the coverage of such transactions
- if transactions in the nature of business-restructuring may lead to anti-avoidance concerns.

How jurisdictions choose to implement this best practice will vary and may be determined on a case-by-case basis. For example, for jurisdictions with a long-standing relationship and many BAPA applications with a treaty partner, the means of communication (including regular large caseload meetings etc.) will be different from those jurisdictions with only a few common BAPA applications.

It should also be recognised that regular communication between treaty partners may be difficult in some circumstances. This may be in cases where there are significant time-zone differences or where there is no shared common language. Competent authorities should put in place adequate procedures to limit these difficulties early in the BAPA process.

Further, this best practice is not intended to prevent competent authorities or BAPA case officers from discussing a potential BAPA application prior to acceptance into a BAPA programme.

2.7.3. Personnel changes during the BAPA process

71. Lastly, a commonly cited issue for both competent authorities and taxpayers was the turnover of BAPA case officers. While it is inevitable, due to the length of the BAPA process, that changes in BAPA case teams and competent authorities will occur, treaty partners and taxpayers were often not aware of such changes. Further, new BAPA case officers were not always adequately briefed on issues that had arisen during the BAPA process. This often leads to duplication or issues that had previously been resolved being reinvestigated or previously agreed positions being reopened without any new information or a change in facts. In extreme cases, it was noted that a change in BAPA case team or competent authority could cause a BAPA process to start anew.

72. Therefore, competent authorities should take all the necessary steps to ensure that changes in a BAPA case team do not disrupt the BAPA process.

Best Practice 10

Competent authorities should ensure that turnover of BAPA case officers is effectively managed, including ensuring that there is an appropriate transition.

This best practice is not intended to require formal processes to be implemented by competent authorities.

However, to assist with managing the longer timeframes involved with BAPA applications, it is expected that competent authorities ensure adequate briefing between new and old BAPA case team members, as well as notifying the treaty partner and taxpayer of the relevant changes. Further, it is expected that where there is a change in the composition of a BAPA case team, that team will build

on the work that has already been undertaken and maintain the previously agreed positions unless new information becomes available.

To assist with this best practice, the general practice of any competent authority function should include well-managed internal filing requirements to ensure previous communications are available later.

Notes

[1] Annex II of Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 10.

[2] Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 4.114.

[3] See definition of "complete BAPA application" below at Best Practice 5.

[4] Annex II of Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 51.

[5] Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 4.161.

Reference

OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, https://doi.org/10.1787/g2g972ee-en. [1]

OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, https://doi.org/10.1787/tpg-2017-en. [2]

OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241633-en. [3]

3 The BAPA process in detail

3.1. The BAPA process

73. Each jurisdiction's BAPA process is unique and has been developed in the context of its own domestic regime and risk management structure, rather than developed from a common framework. Differences in jurisdictions' BAPA processes increase the length of the BAPA process and a lack of consistent framework can lead to duplication for taxpayers and causes information asymmetries between treaty partners.

74. While BAPA processes vary significantly, the BAPA process can be broadly described as comprising the following stages:

1. Early Engagement and Pre-Filing.
2. Formal Application and BAPA Acceptance.
3. Post BAPA Acceptance and Information Gathering.
4. Position Paper and Competent Authority Discussion.
5. Finalisation and Implementation.
6. Ongoing Monitoring.

75. The purposes of this Manual and the following paragraphs are to identify key steps in the BAPA process, highlight certain issues that can arise at each step and recommend best practices to overcome those issues. The following paragraphs are not intended to be a complete summary of all the relevant activities undertaken by taxpayers and competent authorities during a BAPA process. Each stage has been described at a high level and should not in any way be considered to encompass all undertakings by a competent authority or taxpayer at each stage. To the extent that specific practices of jurisdictions are mentioned below, those practices are only intended to provide context to the development of the relevant best practice.

3.2. Early Engagement and Pre-filing

76. A feature of many jurisdictions' BAPA processes is the ability to undertake a preliminary meeting (or meetings) before a formal BAPA application is submitted. This is referred to as the "Early Engagement and Pre-Filing Stage". This stage provides a taxpayer the opportunity to discuss the suitability of a BAPA, the type and extent of information which may be required, and the scope of any analyses required for the completion of a successful BAPA with the tax administration. The process also provides the taxpayer with an opportunity to discuss any concerns regarding disclosure and confidentiality of data, the term of the BAPA and for competent authorities to give an early indication of the likelihood of acceptance into the BAPA process.[1]

77. Generally, preliminary discussions expedite the processing of the subsequent formal BAPA application. Further, it also creates the opportunity for competent authorities to have preliminary discussions with the taxpayer(s). The preliminary meeting may be useful to clarify the expectations and

objectives of the taxpayer(s) and the tax administration, while providing an opportunity to explain the process and the policy of the tax administration in relation to BAPAs as well as to provide details of any procedures in domestic law to implement the BAPA when concluded. At the same time, the tax administration can provide guidance as to the content of the proposal, and the timeframe for evaluating and concluding the BAPA.

78. There is no obligation for a competent authority to accept a taxpayer into the BAPA programme, even in circumstances where early engagement has been undertaken. However, early engagement enables all parties to establish whether a BAPA is appropriate before the taxpayer undertakes further work on the BAPA application. It allows for a discussion of the taxpayer's circumstances and the particular issues that the taxpayer would like to be considered under the BAPA and for the competent authority to identify and discuss any areas where additional information, documentation and analysis are required.

3.2.1. Taxpayer engagement with competent authorities prior to filing a BAPA application

79. The practices of jurisdictions vary greatly in relation to early engagement and pre-filing meetings.

80. In some jurisdictions, early engagement or pre-filing meetings are mandatory for each BAPA application. This can often be a substantial process and includes taxpayers being required to provide significant information and to have already undertaken some of the relevant analysis that forms part of its BAPA application. For others, early engagement or pre-filing meetings are undertaken as an informal process, with limited documentation required. In some jurisdictions, the early engagement process functions as a pre-approval process whereby at the cessation of the early engagement process taxpayers will be accepted into the BAPA programme and then will be required to submit a formal BAPA application with the required detailed analysis.

81. In some jurisdictions, although pre-filing meetings are not mandatory, they are generally encouraged and considered helpful. In such jurisdictions, competent authorities may require a meeting even though this was not requested by the taxpayer. On the other hand, even though a pre-filing meeting is generally encouraged, competent authorities may decline a taxpayer's request for a pre-filing meeting depending on the facts and circumstances. Further, some jurisdictions allow pre-filing meetings to be held on an anonymous basis if sufficient information is provided by the taxpayer or their representative as part of the pre-filing questionnaire. In some jurisdictions, no pre-filing or early engagement stage is available.

82. Early engagement and pre-filing meetings are generally restricted to just a single tax administration and the taxpayer. As a matter of general practice, many jurisdictions do not undertake discussions with its relevant treaty partner at the early engagement and pre-filing stage. However, most jurisdictions are open to having joint pre-filing meetings and / or less formal discussions with treaty partners where warranted.

83. Taxpayers stated that early engagement is typically a positive aspect of the BAPA programme. It provides an opportunity for taxpayer input and allows taxpayers to understand where tax administrations will focus their attention and to address any key issues in their BAPA application. Taxpayers noted most tax administrations are often willing to express their (non-binding) opinions openly regarding procedural, factual or economic analysis issues. This results in a more efficient process. Where a competent authority guided the taxpayer to shape their BAPA application, this led to a refinement of the covered transaction(s) in a way that was acceptable to all parties.

84. However, it was noted by taxpayers that not all early engagement experiences were positive. This was typically due to situations where:

- tax administrations or officials were not willing to provide constructive feedback
- tax administrations asked irrelevant questions, or their procedures were unnecessarily onerous
- the time taken by tax administrations to schedule pre-filing meetings was long

- the content and format of the early engagement process were not well defined
- competent authorities were not transparent on the circumstances under which they would accept a BAPA application and used non-standard internal guidelines (e.g. tax revenue impact) to assess the pre-filing request.

85. Competent authorities that undertook early engagement and pre-filing activities noted the benefits, especially in expediting the time taken to assess a BAPA application for acceptance into a BAPA programme.

86. However, it was noted that an early engagement process that is too onerous or one where the requirements are subjective in nature could significantly delay the overall BAPA process. Further, the information provided by the taxpayer as part of the early engagement process was not always shared with the treaty partner, resulting in an asymmetry of information. Further, it was recognised that not all BAPA applications require pre-filling meetings. Mandatory pre-filing meetings can put an unnecessary burden on a tax administration, especially when taxpayers may use the process to "test the waters" and in many instances a formal BAPA application is not forthcoming.

87. On balance, some form of early engagement between taxpayers and both competent authorities prior to a taxpayer requesting acceptance into a BAPA programme should be considered best practice. However, there needs to be sufficient flexibility to ensure that where a competent authority deems early engagement unnecessary given the relevant circumstances, resources are not unnecessarily dedicated to undertaking such engagements. Therefore, it is important that any best practice allows a competent authority to inform the taxpayer of issues that should be covered in its BAPA application, where it is deemed appropriate, rather than mandate early engagement in all circumstances. This opportunity should be given to the competent authorities at the earliest point where it becomes evident that a taxpayer is likely to submit a BAPA application. Competent authorities should not be receiving requests for acceptance into a BAPA process without the prior opportunity (whether taken or not) to engage with the taxpayer.

Best Practice 11

Taxpayers should notify both competent authorities of their potential BAPA application before requesting acceptance into a BAPA programme. While taxpayers may engage in formal or informal preliminary discussions with a single competent authority, the taxpayer should notify the other competent authority when it becomes evident that it is likely to submit a BAPA application.

Taxpayers should notify competent authorities of their intention to lodge a BAPA application. If the competent authority believes it is in the interest of all stakeholders, it may engage the taxpayer and seek to resolve, for the purposes of the taxpayer's BAPA application:

- the identification of the relevant taxpayer(s)
- the term of the proposed BAPA, including any proposed roll-back years
- the covered transaction(s) and entities conducting such transaction(s)
- the extensiveness of the information required to be provided as part of submitting a complete BAPA application based on which a competent authority can start the application analysis process
- if applicable, the language in which the application should be filed (considering Best Practice 14).

Given other best practices require that competent authorities receive the same information as part of the BAPA application (and after), this best practice should ensure that taxpayers are aware of the

information expected from them from both competent authorities as part of their application. It will also allow the taxpayer to form a view, as part of the BAPA application, on areas of concern a competent authority (or both competent authorities) may have, to ensure there is sufficiently detailed consideration of those issues in the BAPA application. Further, in certain situations, competent authorities may identify that it would be advantageous to undertake a co-ordinated early engagement approach with the treaty partner.

However, this best practice does not mandate the form or the scale of any early engagement between a taxpayer and a competent authority. Once notified of a potential BAPA application, a competent authority might agree to the taxpayer submitting its BAPA application with no or little engagement. This may also be determined on a case-by-case basis. However, taxpayers will be required to contact a competent authority to give them an opportunity to have meaningful engagement prior to a request for acceptance into a BAPA process being made.

Similarly, this best practice also does not limit jurisdictions from undertaking extensive pre-filing processes. Jurisdictions with early engagement and / or pre-filing processes will generally be in line with this best practice.

In practice, taxpayers will normally commence preliminary discussions with a single competent authority. This best practice should not be construed to prohibit or restrict such discussions or require the taxpayer to commence discussions simultaneously. However, it requires a taxpayer to notify the treaty partner when it becomes evident that the taxpayer is likely to submit a BAPA application. This should be done when it can be objectively viewed that the submission of the BAPA application is probable (but not necessarily certain). It was noted in responses that some taxpayers contact competent authorities where significant pre-filing work had already been undertaken with the treaty partner and the exercise was largely considered by the taxpayer to be a courtesy. Given collaboration between competent authorities and the taxpayer(s) is paramount to an effective and efficient BAPA process, the earlier both competent authorities are involved in the BAPA process, the better and more expedient the likely outcome.

3.2.2. Conduct of competent authorities during early engagement

88. A common issue for competent authorities without substantive early engagement practices was the asymmetry of information between the competent authorities where a BAPA application is effectively being worked on by one competent authority prior to formal acceptance. It was also noted that some jurisdictions have informed the taxpayer during early engagement that they would not accept a BAPA application into a BAPA programme unless the taxpayer agrees to certain positions being taken. Further, some competent authorities may ask taxpayers to consider alternative transfer pricing methodologies or take a more balanced approach.

89. It is important that any early engagement undertaken by a competent authority does not prejudice the BAPA process, including the discussions and potential agreement with its treaty partner. Any early engagement should be related to ensuring that the taxpayer, in its BAPA application, covers all the relevant issues and provides the necessary information to allow the competent authority to decide as to whether the BAPA application should be accepted into the BAPA programme. The early engagement stage should not be used by a competent authority to reach prior agreement on positions or outcomes with the taxpayer. To do so would undermine the intended co-operative and collaborative nature of the BAPA process.

Best Practice 12

During any engagement between a competent authority and the taxpayer, prior to a taxpayer being accepted into a BAPA process or lodging a BAPA application – whichever is later, competent authorities should not:

- **unduly influence the taxpayer's position on any issue that forms part of its BAPA application**
- **undertake analysis for the purposes of determining the competent authority's position on any issue associated with the BAPA. Any preliminary analysis undertaken by a competent authority as part of early engagement or pre-filing should only be to inform the taxpayer as to the issues that should be covered in its request for acceptance into a BAPA process (including collateral issues).**

While competent authorities may note specific issues that the taxpayer should consider in its BAPA application, competent authorities should not engage with the taxpayer to unilaterally agree any position for the purposes of the taxpayer's BAPA application (including the acceptable transfer pricing method, comparables or pricing).

The aim of any early engagement process is to ensure that the taxpayer has a complete BAPA application to minimise the review time required by both competent authorities. Early engagement aims to ensure that taxpayers propose outcomes in line with the arm's length standard that are likely to be acceptable to both jurisdictions and not seek to propose an outcome that is in line with only one jurisdiction's views.

The very nature of the engagement between a competent authority and the taxpayer prior to a taxpayer being accepted into a BAPA process results in competent authorities potentially influencing the taxpayer's position on any issue that forms part of its BAPA application. However, it should not result, either directly or indirectly, in a unilaterally agreed position(s) between the taxpayer and the competent authority for the purpose of a BAPA. A competent authority's influence should be limited to informing the taxpayer of what specific issues it would seek to have addressed in the taxpayer's BAPA application and what information the competent authority would require as part of that application to inform its decision to accept the application into a BAPA programme. Further, early notification of potential issues allows the taxpayer to assess the likelihood of being able to reach an acceptable position if the BAPA application was to be accepted into the programme. However, competent authorities and taxpayers should not seek to substantively discuss or agree on positions to resolve such issues prior to the lodgement of the BAPA application.

Engagement by a competent authority and the taxpayer prior to a taxpayer being accepted into a BAPA process should also not involve any detailed analysis of the taxpayer's position outside of whether the application should be accepted into a BAPA programme. However, this does not preclude a competent authority from requesting specific information from a taxpayer to be included in a BAPA application and / or during the early engagement stages of the BAPA process.

While noting that BAPAs are voluntary, unilaterally pre-agreeing positions undermines the potential for later agreement between competent authorities and unnecessarily extends the BAPA process. Further, it can negatively affect the relationship between treaty partners, which has the potential to have a broader detriment than just the individual BAPA application as this could also affect the conduct of other competent authority undertakings. While it is expressly recognised that each case should be undertaken mutually exclusive from others and assessed on its own merits, having a good working relationship with treaty partners clearly adds significant benefits to the overall BAPA programme of any jurisdiction.

3.3. The BAPA Application and Acceptance Stage

90. The BAPA application and acceptance stage refers to the development and submission of a taxpayer's BAPA application and the relevant activities undertaken by competent authorities in determining whether that application should be accepted into a BAPA programme.

91. If the taxpayer wishes to pursue a BAPA, it will need to make a detailed proposal in its BAPA application to the relevant tax administration, after considering all domestic law or procedural requirements.

92. The purpose of the BAPA application is to give the relevant competent authorities all the information needed to evaluate the BAPA application for acceptance into the BAPA programme. The information provided by the taxpayer should, in theory, be sufficiently detailed to allow the competent authorities to start discussions once the BAPA application has been accepted. However, in practice, this information may be subject to due diligence by each competent authority and supplemented with further information provided later in the BAPA process.

93. As provided in the OECD Transfer Pricing Guidelines (OECD, 2017[2]), a BAPA application would typically include the following:

> *a) The transactions, products, businesses or arrangements that will be covered by the proposal; (including, if applicable, a brief explanation of why not all of the transactions, products, businesses or arrangements of the taxpayer(s) involved in the request have been included);*
>
> *b) The enterprises and permanent establishments involved in these transactions or arrangements;*
>
> *c) The other country or countries which have been requested to participate;*
>
> *d) Information regarding the world-wide organisational structure, history, financial statement data, products, functions and assets (tangible and intangible) of any associated enterprises involved;*
>
> *e) A description of the proposed transfer pricing methodology and details of information and analyses supporting that methodology, e.g. identification of comparable prices or margins and expected range of results etc.;*
>
> *f) The assumptions underpinning the proposal and a discussion of the effect of changes in those assumptions or other events, such as unexpected results, which might affect the continuing validity of the proposal;*
>
> *g) The accounting periods or tax years to be covered;*
>
> *h) General description of market conditions (e.g. industry trends and the competitive environment);*
>
> *i) A discussion of any pertinent ancillary tax issues raised by the proposed methodology;*
>
> *j) A discussion of, and demonstration of compliance with, any pertinent domestic law, tax treaty provisions and OECD guidelines that relate to the proposal; and*
>
> *k) Any other information which may have a bearing on the current or proposed transfer pricing methodology and the underlying data for any party to the request.*[2]

94. The above list is not intended to be exhaustive. Ideally, where information is necessary for a competent authority to assess a BAPA application for acceptance into a BAPA programme, this would be made known as part of any early engagement activity. However, it is expected that the taxpayer will include functional analysis as part of its BAPA application. In addition, the scope of a BAPA should be clearly articulated in the taxpayer's BAPA application, noting that flexibility is often required as it may be difficult to evaluate some issues in isolation (these issues are referred to as "Collateral Issues"). Consideration of the collateral issues and the broader discussion of system profits within a BAPA application is important for assisting competent authorities in the determination of whether the positions articulated by the taxpayer are reasonable.

95. What is required as part of a BAPA application varies depending on the jurisdiction. For those jurisdictions that engage in early engagement or pre-filing meetings, the BAPA application process is usually an extension of the early engagement stage, but with more detailed functional and economic analysis. While some jurisdictions are flexible in the BAPA application and acceptance stage, many are constrained by domestic legislation concerning the form of the BAPA application and the relevant process that must be followed.

96. Taxpayers noted that the preparation of a BAPA application can be a burdensome and lengthy process, suggesting that less formal requirements in each jurisdiction and a common approach for the BAPA application process (including consistent requirements as to the contents of a BAPA application) would be helpful. In some instances, taxpayers felt that that BAPA application filing requirements were overly detailed and voluminous, especially considering much of the information and analysis was either reinvestigated or required to be provided in another form as part of the information gathering stage. Accordingly, taxpayers considered that providing a prescribed list of information that should be filed along with the BAPA application would save time and resources for the taxpayer during both the pre-filing and BAPA application stage.

97. Conversely, competent authorities noted that in many circumstances, despite having published guidance, BAPA applications can still exclude basic elements (for instance, benchmarking analyses) and that these incomplete BAPA applications caused significant delays in the BAPA process.

98. While a harmonised approach to BAPA applications may be difficult given some jurisdictions have domestic law constraints regarding BAPA applications, information about the BAPA application process and the contents of a BAPA application should be provided in the published BAPA guidance of a jurisdiction (see Best Practice 3).

3.3.1. Simultaneous lodgement of BAPA applications

99. It was noted by competent authorities that different BAPA application requirements often result in information asymmetries occurring between competent authorities and can delay the BAPA process. While some jurisdictions require the submission of a BAPA application with the treaty partner simultaneously, many jurisdictions have no such requirement. Taxpayers and competent authorities indicated that it is preferable to submit the requests to the competent authorities of both jurisdictions concerned simultaneously, rather than sequentially, to avoid further delaying the BAPA process.

100. Where BAPA applications are not submitted to both competent authorities simultaneously, this can cause potential delays in the BAPA process for several reasons. First, the BAPA process for each jurisdiction is now misaligned in relation to the timing of each step. While one jurisdiction may have commenced review of the BAPA application, or even accepted the BAPA application into the BAPA programme, its treaty partner may not have even commenced review. Where this happens, there can be significant delays and it can lead to potential duplication in the information gathering stage.

101. Further, delays in the BAPA application review process and subsequent stages can be avoided where the same information is provided to both competent authorities. This is a key theme in streamlining the BAPA process in general. It was noted by competent authorities and taxpayers that differences in the requirements of a BAPA application can often lead to only one competent authority being privy to certain information, which can lead to an avoidable misalignment in the views of competent authorities when assessing the BAPA application or in later stages of the BAPA process.

Best Practice 13

Taxpayers should submit BAPA applications simultaneously to both competent authorities and both BAPA applications should contain the same information.

While it is preferable that jurisdictions have harmonised and streamlined BAPA application filing processes, due to the differences in current practice and the domestic law constraints of some jurisdictions, it is considered best practice that the same information is provided to both competent authorities.

The form in which the relevant information is provided as part of a BAPA application may be different for each jurisdiction. However, as long as the same information (meaning all information that is provided by the taxpayer to one competent authority) is provided to the treaty partner, it should then be considered in line with this best practice.

In some circumstances where one competent authority does not ask or require certain information from a taxpayer as part of a BAPA application, the taxpayer should still provide any information that has been provided to the treaty partner. It is important that both competent authorities are privy to the same information at the same time to avoid potential misalignments.

3.3.2. Language requirements for BAPA applications

102. Another commonly shared issue for taxpayers and competent authorities was the difficultly where the relevant competent authorities did not share a common language, and / or where the domestic law requirements of a jurisdiction required submission of a BAPA application in a prescribed language.

103. This increases the cost and the time to prepare a BAPA application. Many jurisdictions are constrained by domestic law requirements, or resource constraints. However, where possible, competent authorities and taxpayers should be cognisant of the difficulties created by differences in native language and work collaboratively to find appropriate solutions.

Best Practice 14

Where competent authorities do not share a common language, BAPA applications (and attached materials) should be filed by the taxpayer with an attached English translation (or a different language, if agreed by both competent authorities). However, this is not necessary where the competent authorities, prior to the submission of a BAPA application, agree that a translated version is not required.

Further, competent authorities should agree with the taxpayer as to the language of conduct of the entire BAPA process, including that applicable to the information provided by the taxpayer.

Under Best Practice 11, when a taxpayer notifies a competent authority of its intention of submit a BAPA application, it should specify the language of the BAPA submission. Given the issues related to the differences in the native languages between competent authorities and the domestic law requirements of certain jurisdictions, generally, the taxpayer should provide an English translation of its BAPA application unless the competent authorities agree otherwise. This is to ensure that all competent authorities have access to the same information. Further, it is preferable that competent authorities agree to a common language for the entire BAPA process to reduce the burden on taxpayer resources.

This best practice does not preclude competent authorities from agreeing that a different language will be the language used for the BAPA application. Ideally, this should be undertaken as part of any early engagement or as part of the notification under Best Practice 11.

Competent authorities and taxpayers should remain flexible in their application of this best practice and work collaboratively in solving the issues related to differences in native languages. For instance, for conducting joint functional interviews, there may be circumstances where interviewees are not fluent in the chosen language, and it makes practical sense to conduct the interview in the local language (rather than conduct the interview in the previously agreed language). Competent authorities should be accommodating in such situations and base their decisions on what is the most practical and effective way to collaboratively solve issues in relation to differences in language. However, taxpayers should be mindful that many competent authorities might lack the relevant resources to be flexible in the language in which a BAPA process is undertaken.

3.3.3. Competent authority interaction during the review of a BAPA application for acceptance

104. Once a "complete" BAPA application has been received, a jurisdiction will then assess whether the BAPA application will be accepted into a BAPA programme. As noted above, in some jurisdictions, access to the BAPA programme may have already been granted at the conclusion of the early engagement stage.

105. Whether a BAPA application is accepted into a BAPA programme is the sole discretion of each jurisdiction. However, both jurisdictions are required to accept a BAPA application into a BAPA programme for a BAPA to be agreed. In determining whether a BAPA application should be accepted into a BAPA programme, competent authorities noted they *may* choose to consider whether:

- the transfer pricing method proposed best achieves consistency with the international transfer pricing guidance
- the proposed arrangements are likely to be put in place or are already in place
- the proposed conditions related to the BAPA are unlikely to change significantly in the period of the BAPA
- the transfer pricing issues are complex, and the transactions are material enough, to warrant a BAPA
- the taxpayer is in compliance with its tax laws
- the probability of economic double taxation in relation to the transactions proposed to be covered by the BAPA
- the expected resourcing requirements of accepting the BAPA application, including the expected time to complete the BAPA
- the potential application of general and specific anti-avoidance rules, including anti-treaty shopping rules.

106. The list above is not intended to be exhaustive, and the relative weight of any considered element is usually fact dependent.

107. The process of reviewing a BAPA application for acceptance also varies between jurisdictions. However, generally, there are three categories of BAPA application acceptance processes:

- **Automatic acceptance**: Some jurisdictions will automatically accept a complete BAPA application without an authorisation or preliminary review and move to the next stage of the BAPA process,

noting the application might later be considered inappropriate for a BAPA through an official review after the acceptance.

- **Review and decision within a specific timeframe**: Some jurisdictions will review and decide on the acceptance of a BAPA application within a prescribed timeframe. This timeframe will be set either by domestic law or by internal policy of the tax administration.
- **Review and decision without a specific timeframe**: Most jurisdictions will review the BAPA application and make a decision but have no prescribed timeframe to decide.

108. Under all three methods, acceptance in a BAPA programme does not guarantee that a BAPA will be concluded, and competent authorities reserve the right to end the BAPA process at any time.

109. The differences in the BAPA acceptance process often leads to a significant misalignment of the timing of the later BAPA processes. Generally, the assessment of a BAPA application is undertaken by a competent authority with little to no discussion with the treaty partner. Early collaboration between treaty partners is important to not only streamline the BAPA process through ensuring steps are aligned but also ensure the efficient and adequate use of each competent authorities' resources.

Best Practice 15

A competent authority should, upon receiving a BAPA application, notify the treaty partner of the receipt of such BAPA application and engage with its treaty partner to:

- **outline the potential parameters of the BAPA application**
- **if relevant, discuss any immediate issues and additional information that either competent authority requires as part of the BAPA application assessment process**
- **if relevant, outline any domestic limitations that may affect the BAPA process.**

The expected engagement between treaty partners under this best practice should differ from jurisdiction-to-jurisdiction and on a case-by-case basis. What is important is that BAPA case officers are engaging earlier in the BAPA process to ensure collaboration between tax administrations. However, this best practice is not intended to be a process that requires formal meetings or discussions to take place. Depending on the situation, this best practice may be met by:

- Email correspondence between treaty partners – this could be as simple as introducing the relevant BAPA case officers and noting a BAPA application has been received and the application is being reviewed. This correspondence could also include any preliminary issues (including further information required) in relation to the taxpayer or the contents of the application, domestic limitations in relation to the BAPA application, and the expected date a decision of the BAPA application will be made.
- Ad-hoc informal teleconference between treaty partners – if, after a preliminary review (initial first review), there are potentially substantive issues raised by a jurisdiction in relation to the BAPA application, treaty partners could undertake a teleconference to discuss. However, this first review should not encompass a substantive review of the BAPA application and does not require treaty partners to take any position. The first review should just highlight areas of potential concern that may be relevant for the treaty partner's BAPA acceptance process.

For jurisdictions that automatically accept BAPA applications into a BAPA programme, this best practice would still be relevant as:

- If the treaty partner does not automatically accept BAPA applications, this best practice will ensure the treaty partner is aware of any potential issues (including domestic limitations) from

the treaty partner's perspective and any expectations as to resourcing and time to resolve for the purposes of assessing the application into its own BAPA programme.

- If the treaty partner similarly automatically accepts BAPA applications, this best practice will allow the jurisdictions to start collaboration on the BAPA process to come to a timely resolution.

It is not intended under this best practice that any substantive discussion on issues be undertaken as part of this initial communication. The purpose of the notification and any discussion is not to find common ground between jurisdictions but to merely introduce the officials and to flag any potential issues for the purposes of the acceptance process of either competent authority. Further, it would be expected that a competent authority notify its treaty partner of any other relevant considerations for acceptance of the BAPA application, such as the proposed covered transaction(s) being under audit, potential anti-avoidance concerns or concerns as regards the taxpayer's previous compliance with BAPAs.

Where practical, treaty partners should freely discuss the potential prospect of acceptance of the BAPA application as part of this discussion. However, this is not intended to be another level of formal assessment in the BAPA application process. It is intended to ensure that treaty partners communicate their preliminary thoughts on the BAPA application to assist each jurisdiction with its review for acceptance purposes.

The determination of accepting a BAPA application into a jurisdiction's programme should require understanding the issues (including resource constraints) of the treaty partner to determine how that affects the potential acceptance of an application. Any level of assessment at this point should be considered non-binding and for information purposes only. For instance, one competent authority may think that the BAPA is straight-forward and be willing to accept it into its BAPA programme on the basis that it will be undertaken quickly and not require intensive use of resources. However, in limited situations, the treaty partner may have significant issues with the transaction or the taxpayer, and therefore may not be willing to accept the application into their BAPA programme, or if it does, the BAPA application will require significant time and resources to resolve the issues at hand.

3.3.4. Notifying the taxpayer of acceptance or rejection of a BAPA application

110. Competent authorities noted that they endeavour to decide in relation to the acceptance or rejection of a BAPA application into a BAPA programme as soon as possible. However, where jurisdictions have no prescribed timeframe to decide on a BAPA application, this can cause considerable issues for treaty partners and taxpayers.

111. Taxpayers noted that some jurisdictions could take several years to determine whether a BAPA is accepted into a BAPA programme. Even in circumstances where a BAPA application is accepted, where a significant amount of time has passed since the BAPA application was lodged, the BAPA process is made significantly more difficult. The passage of time may have resulted in key personnel changes or the information in the BAPA application may need to be revised and updated at a significant cost to the taxpayer while delaying the BAPA process further.

112. This also causes similar issues for treaty partners. Further, it is not uncommon for situations to occur where one competent authority had undertaken significant amount of work, even in the next stage of the BAPA process, to later find out that the treaty partner had either not undertaken any review of the BAPA application or had rejected the BAPA application.

Best Practice 16

Jurisdictions should aim to make a decision in relation to a BAPA application for acceptance into the BAPA programme within 30 days of receipt of a complete BAPA application and immediately inform the taxpayer and the respective treaty partner of any decision.

Where a decision cannot be made within 30 days of receipt of a complete BAPA application, the competent authority should inform the taxpayer and the treaty partner of the expected decision date.

For the purposes of the 30-day period, the start date is from when a "complete" BAPA application has been received by both competent authorities, in line with Best Practice 5.

It is acknowledged some assessments may take longer than 30 days, either due to the complexity of the covered transaction(s) or due to the resource constraints of a jurisdiction. Where this is the case, the competent authority should inform the taxpayer and the treaty partner of the expected decision date.

Where a jurisdiction's standard practice for review of a BAPA application is longer than 30 days (i.e. 45 days or 60 days), it is recommended that this timeframe should be included in any published guidelines or practices. As a matter of practicality, publication of the standard date would mean a jurisdiction is in line with this best practice. However, it is recommended that the treaty partner be informed of this date as part of the engagement undertaken under Best Practice 15.

If a jurisdiction has automatic acceptance of BAPA applications into a BAPA programme this best practice does not apply. However, jurisdictions should still notify their treaty partner of the acceptance of the BAPA application.

3.4. Post BAPA Acceptance and Information Gathering

113. Once a BAPA application has been accepted into a BAPA programme, tax administrations may undertake whatever steps they deem appropriate in the circumstances to form their positions for discussion (and potential agreement) with the treaty partner. The aim of this stage of the BAPA process is for the competent authorities to have all relevant information, data and analyses they need to form positions and for the discussions with the treaty partner to commence.

114. This includes, but is not limited to:

- requesting further information deemed relevant to review and evaluate the taxpayer's proposal.
- if necessary, the carrying out of functional interviews and site visits
- the engaging of necessary experts
- undertaking benchmarking studies and information and data gathering on comparable taxpayers.[3]

115. Of the competent authorities who participated in the survey, none were subject to any domestic limitations in relation to how the information gathering stage was conducted. While competent authorities noted that they aim to coordinate the information gathering stage, this is typically undertaken in an ad-hoc manner with little to no input from the taxpayers. Pertinently, competent authorities noted that a robustly drafted BAPA application speeds up the information gathering process.

3.4.1. Development of a BAPA project plan

116. Taxpayers and competent authorities noted that their BAPA experiences were significantly improved when a working agreement was in place between competent authorities, or a project plan was agreed at the start of the information gathering process. However, in practice, the use of such plans is largely determined on a case-by-case basis.

117. Competent authorities noted that often a lack of taxpayer resources, especially in relation to the timely provision of requested information and the availability of the relevant staff for functional interviews, delayed the BAPA process. Similarly, taxpayers noted that it was difficult to plan and arrange for resources to be available at the required times with sufficient advance notice. Both taxpayers and competent authorities noted that BAPA processes that include pauses for long periods in between cause unnecessary delays.

118. The lack of a defined timeline for the various parts of the BAPA process means there is little accountability for jurisdictions and taxpayers to meet deadlines in the BAPA process. The effort and input of competent authorities and taxpayers vary significantly throughout the BAPA process and without defined timelines it is difficult for them to determine the allocation of the relevant resources required. Accounting for these considerations early in the BAPA process should allow both taxpayers and competent authorities to efficiently allocate their resources through greater coordination and project management.

119. A high level of commitment from all parties is required for an efficient and effective BAPA process. To assist with effective project management, it is considered important that, after a BAPA application has been accepted, competent authorities and taxpayers agree to a high-level project plan based on key milestones and commit the relevant resources at the appropriate time to ensure the timely resolution of the BAPA process.

Best Practice 17

Upon acceptance of an application into the BAPA programme, both competent authorities and the taxpayer(s) should agree a project plan outlining the timelines for each stage of the process from commencement to finalisation.

Based on the agreed project plan, taxpayers and competent authorities should commit to providing the required resources to ensure that the agreed timeline is met.

Before agreeing to the timeline, taxpayers should also assess their capacity to produce the required information as requested by competent authorities and meet the required timelines as part of the BAPA process.

The relevant timelines in a BAPA application project plan should by determined on a case-by-case basis, based on collaborative discussions between the competent authorities and the taxpayer. The plan should include clearly stipulated and mutually agreed timelines for the information gathering stage, deadlines for information requests, position papers, and meetings.

The intent of this best practice is not to create a resource intensive or formal process. Timelines should be high-level, revolving around key milestones in the BAPA process. The detail required in any project plan should be tailored to the complexity and circumstances of each BAPA application and should be sufficiently flexible to consider the fluid nature of the BAPA process. For instance, a plan may simply involve agreement between the taxpayer and the competent authorities as to tentative dates for the different steps that are initially envisaged for the process. As part of this discussion, competent authorities may also agree how they may coordinate the process in accordance with Best Practice 18.

In developing a project plan, taxpayers and competent authorities should undertake an assessment of their internal resources and when it will be required to allocate resources to progressing the BAPA (for instance during the information gathering stage). At the time the project plan is agreed, the taxpayer should commit to providing the necessary resources to meet the agreed timelines. In committing to providing the required resources, the taxpayer ensures that competent authorities can meet the agreed upon milestones. Similarly, competent authorities should ensure that in developing the project plan, the entirety of its BAPA application load and the relevant BAPA cases officers are considered to ensure effective project management of the BAPA programme as well as that of individual applications.

In situations where it becomes clear that agreed dates in the project plan are no longer achievable, the project plan should be revised.

A sample timeline is provided in Annex B and outlines some of the relevant milestones.

3.4.2. Co-ordination of the information gathering process

120. As previously noted, the level of coordination between competent authorities throughout the BAPA process varies significantly. As provided in the OECD Transfer Pricing Guidelines (OECD, 2017[2]):

> *56. Generally, the competent authorities would conduct simultaneous, independent reviews and evaluations of the taxpayer's proposal, assisted in this task, where necessary, by transfer pricing, industry, or other specialists from elsewhere in their tax administration. However, it may be more efficient in appropriate cases to have some degree of joint fact finding. This could take a variety of forms ranging from an occasional joint fact finding meeting or site visit, to the preparation of a joint report by delegated caseworkers….*
>
> *60. Many countries prefer to be fully involved in the process as soon as it commences and wish to work closely with the other competent authorities. Other countries prefer to confine their involvement to reviewing and commenting upon the MAP APA proposals as they near completion. However, the involvement of all participating tax administrations in the process at an early stage is recommended, subject to resource constraints, as this should maximise the efficiency of the process and help forestall unnecessary delays in concluding the mutual agreement.*[4]

121. Competent authorities noted that the use of joint questionnaires, joint on-site visits and joint interviews are options for information requests that they use on a case-by-case basis.

122. Some competent authorities and taxpayers noted that communication between jurisdictions, prior to and during the undertaking of the information gathering stage, on the areas of potential dispute can prevent unnecessary questions to taxpayers. Coordination can speed up the BAPA process as both jurisdictions can focus on requesting information only in relation to the controversial issues. In addition, greater coordination in the early stages of a BAPA application avoids duplication of effort on the part of both the taxpayers and competent authorities. Taxpayers noted that a lack of coordination causes delays where the taxpayer receives multiple information requests from the competent authorities, in some cases requesting the same information but in a different form.

123. Taxpayers and competent authorities noted disparities in information requested and agreement of facts is one of the biggest challenges in the information gathering stage. Further, taxpayers and some competent authorities noted the BAPA process works best when tax administrations agree on the information to be requested. Taxpayers noted that where information requests are concise, focused on the shared issues of controversy and involve the tax administrations' understanding of the case, turnaround times and the overall length of the BAPA process were significantly reduced. Competent authorities did note that there was a significant improvement in the BAPA process where the key issues that information requests would be focused on were agreed between competent authorities in advance. This was seen to be beneficial by allowing for the removal of any unnecessary information for review and analysis. Further,

it also allowed competent authorities to collaboratively solve issues through greater engagement with one another prior to formal discussions taking place.

124. When there is a lack of coordination, it often resulted in information asymmetries due to competent authorities receiving different information or the same information is different forms. Further, it can also be the case that competent authorities may interpret information received from taxpayers, either through information requests or in functional interviews, differently. This is especially relevant when functional interviews and / or site visits are not undertaken jointly.

125. However, some competent authorities prefer to have little coordination in the information gathering process. These competent authorities noted that coordination efforts can often prolong the information gathering process and can often be logistically difficult to undertake given geographical and language differences. Further, in some instances, coordination in the information gathering process can also prolong the process where agreement is required on the precise wording of the questions. Therefore the coordination of information gathering should be flexible enough to not require such agreement.

126. As such it is important that any information gathering undertaken by competent authorities be co-ordinated and be sufficiently flexible to streamline the BAPA process by reducing duplication for taxpayers and reducing the potential misalignment of positions between competent authorities.

127. It should be made clear that functional interviews and site visits are not necessary in all circumstances and should only be conducted where necessary. Typically, coordinated joint functional interviews would include competent authorities providing a single pre-agreed list of questions to the taxpayer with ad-hoc follow-up questions in the interview. However, this does not preclude discussions from being free-flowing or restrict the questions interviewers may want to ask. The coordination of the information gathering process should not limit the ability of competent authorities to request information they deem necessary to form a position, but the aim should be to limit potential duplication in questioning by competent authorities.

Best Practice 18

Competent authorities should coordinate the information gathering process to limit duplication. Where practical, functional interviews and site-visits (if necessary) should be conducted jointly, either in person or via teleconference. When functional interviews are conducted, if a set of minutes is recorded, those minutes should be provided to the treaty partner and the taxpayer. Even where separate interviews are conducted, the minutes should be shared with the treaty partner.

A coordinated information gathering process reduces duplication and ensures that competent authorities are privy to the same information.

Coordinating an information gathering process does not necessarily mean competent authorities undertake joint functional interviews and / or site visits. Undertaking these activities jointly may be impractical in some circumstances and unnecessarily delay such interviews and site visits taking place.

Coordinating the information gathering process could merely include competent authorities agreeing on the contentious issues that require further information and limiting information requests to the resolution of those issues. For instance, joint site visits may impose an excessive burden to both competent authorities where geographical or linguistic constraints exist.

Similarly, coordination could include competent authorities sharing information requests (and questionnaires) with treaty partners prior to the request being forwarded to the taxpayer. In such circumstances, as taxpayers are required to provide the same information to both competent

authorities, the treaty partner could look to only include additional information it requires in its own request. Further, any information provided by the taxpayer should also be provided to the treaty partner. In some instances, it may be advantageous to send a single, joint information request.

The provision of minutes of a functional interview to the treaty partner may be important because it could highlight any misalignment in the understanding of the facts by competent authorities early in the BAPA process. The minutes of functional interviews are intended to record the factual representations made in the functional interviews and should not include any analysis of any kind.

For some jurisdictions, it is preferred that taxpayers take minutes of the functional interviews, while other jurisdictions prefer that the competent authority prepare the minutes. While no approach is preferred, competent authorities and taxpayers should agree as to which approach they would like to adopt, and ensure that all parties receive the minutes, including treaty partners (who may not be present at the functional interview).

In situations where a taxpayer or competent authority believes there to be a material error in the recorded facts from the functional interviews, competent authorities may seek further information and clarification. However, the providing of minutes is not intended to be a formal procedure, nor does this best practice require there to be agreement on the minutes provided. However, in situations where a competent authority raises questions in relation to material information contained in the minutes, it is highly recommended that both competent authorities engage with one another with the view to come to a common understanding.

3.4.3. The provision of taxpayer information to competent authorities

128. The OECD Transfer Pricing Guidelines (OECD, 2017[2]) makes it clear that in order to expedite the BAPA process, taxpayers should take responsibility for ensuring that the competent authorities are in possession of the same facts, have all the information they need and have a thorough understanding of the issues, before formal discussions commence.

> *59. This can be achieved by the taxpayer routinely making information requested by one tax administration available, at broadly the same time, to the other tax administration, preparing and transmitting notes of fact finding meetings by one tax administration to the other tax administration and where logistically and economically practical, facilitating joint fact finding meetings.*[5]

129. Competent authorities stated that they generally encourage taxpayers to submit all information in identical form simultaneously to both jurisdictions that are involved in the BAPA. The timely provision of information by taxpayers to both competent authorities is important to ensuring that there are no unnecessary delays in the BAPA process.

Best Practice 19

Taxpayers should provide any requested information to both competent authorities simultaneously and as soon as possible. This includes circumstances where competent authorities request information separately. Both competent authorities should receive the same information regardless of whether an individual competent authority has requested the information.

Taxpayers should always deliver the same information simultaneously to both competent authorities. In doing so, taxpayers should also provide such information in accordance with the pre-agreed language requirements.

It is not intended that this best practice be enforced under specific domestic law requirements. Where all the information requested is available, it is in the interest of all parties that the taxpayer share it immediately with both competent authorities to avoid potential information asymmetries.

Where possible and appropriate, competent authorities and taxpayers may agree to a staggered receipt of requested information rather than halt the BAPA process until all requested information is received. However, the possibility of a staggered provision of information is only for circumstances where, in good faith, the information cannot be immediately obtained or produced by the taxpayer and waiting for such information would delay the review of any other requested information. The provision of staggered information may not be helpful in some circumstances, as competent authorities may require all the requested information (or several pieces of requested information) before they are able to continue the BAPA process due to the information being interrelated.

3.4.4. Information requests by competent authorities

130. In coordinating their information requests, competent authorities should be cognisant of the volume of information being requested from the taxpayer. Taxpayers noted that they were required to consistently respond to detailed information requests and that numerous interviews, site visits and multiple rounds of information requests can cause the information gathering process to become drawn-out. Further, competent authorities noted that where too much information is requested, it can put an unnecessary burden on competent authorities and BAPA case officers.

131. As a result, taxpayers noted that BAPA case officers did not always consider the information provided and ended up requesting the same data later. In many instances, taxpayers felt that there was no discernible link between the information being requested and the covered transaction(s). Further, taxpayers often noted that competent authorities requested information or analyses in a different form than was readily available. Ensuring such requests were met required significant time and effort by the taxpayer, delaying the BAPA process with no discernible advantage over sharing the readily available information.

132. Conversely, competent authorities noted that in order to form their positions and ultimately agree a BAPA, they need to consider the broader economic circumstances and conditions. This may include an understanding of the broader global business model or information in relation to any collateral issues identified. Most competent authorities noted they seek to limit the amount of information requested from a taxpayer. However, they noted it was common for taxpayers to question why certain information was being requested and often such questioning by taxpayer led to unnecessary delays in the BAPA process.

133. It is important that competent authorities consider what information is necessary to form their positions. To assist in reducing information request turnaround times, where possible, requested information should be targeted at resolving the issues in dispute and competent authorities should be open to working with taxpayers to minimise the amount of newly generated information required.

Best Practice 20

Competent authorities should only request information from the taxpayer that is necessary and relevant to informing a competent authority's position on a BAPA related issue.

Competent authorities should not be restricted in the information they can request from a taxpayer, provided it is relevant to the covered transaction(s) or identified collateral issues.

It is recognised that to inform its positions in relation to covered transaction(s) or identified collateral issues, competent authorities will require an understanding of the broader business activities of the participating taxpayers and the global group's activities. However, information should only be

requested if that information is relevant to inform the competent authority's positions in relation to the BAPA.

Competent authorities should be open to discussing information requests with taxpayers to help refine the requests to avoid unnecessary delays and wasted resources. This will increase transparency and may be helpful in speeding up the information process as taxpayers may have additional information that may assist, or the information request may be refined if better information is available. However, taxpayers do not have a right to refuse any information request by a competent authority where it is relevant to the covered transaction(s) or the collateral issues identified by the competent authorities, nor are competent authorities required to provide any formal or substantive statement of reasons for requesting such information.

Taxpayers should act in a manner that is proactive and should assist competent authorities in the information gathering process and in the resolution of any potential collateral issues. This means taxpayers should present any requested information objectively. Further, taxpayers should not make frivolous requests as to why information is relevant as this causes unnecessary delays. Taxpayers should only discuss the relevance of information requests with competent authorities where the information is not available and / or the information requested has no clearly discernible connection to the covered transaction(s) or the identified collateral issues.

3.4.5. Engagement of competent authorities on areas of potential disagreement during the information gathering stage

134. At the end of the information gathering stage, a competent authority should have all the required information to form its position and to commence discussions with its treaty partner. Therefore, it is important that any disagreement in relation to the delineation of the covered transaction(s) and the underlying facts should be considered as part of the information gathering stage before competent authorities commence discussions.

135. However, competent authorities noted that it is not uncommon that disagreements on factual matters do not become apparent until the circulation of position papers, or even until when competent authorities enter discussions. This inevitably leads to further information being required from the taxpayer, a revision of the relevant analysis (including revisiting comparability analysis) and further delays in the discussions between competent authorities. While this may not be avoidable in all circumstances, it should be the aim of competent authorities to ensure that they have a common understanding of the facts and all the necessary information to form their positions, prior to commencing discussions. This should limit the amount of analysis required to be undertaken after position papers have been circulated, reduce the amount of additional information required of the taxpayer during the competent authority discussion stage and ensure that those discussions can be undertaken without significant delays.

Best Practice 21

If, during the information gathering stage, a competent authority materially disagrees with the delineation[6] of the covered transaction(s) outlined in the taxpayer's BAPA application, that competent authority should share its view with the treaty partner as soon as possible.

The relevant facts of a BAPA application provide the basis for position papers, but often these facts are disputed. Thus, the discussion of any material differences in the delineation of the covered transaction(s) earlier in the BAPA process is advantageous. This should assist to ensure that there is a common understanding of the facts and the development of position papers prior to the

commencement of competent authority discussion. Where there is a common understanding of the underlying facts between competent authorities, they should engage with the taxpayer again for further information, prior to forming a formal position and undertaking detailed benchmarking analysis.

To ensure that there is adequate communication between competent authorities prior to undertaking formal discussions, where it becomes apparent that a competent authority disagrees with the taxpayer's position in its BAPA application, it should inform its treaty partner. Ideally, such conversations would occur prior to undertaking any benchmarking analysis. In any event, the competent authority should notify its treaty partner as soon as possible.

It may be the case that both competent authorities' positions as to the appropriate delineation of the covered transaction(s) are the same, but differ from the taxpayer's position. However, where competent authorities' understanding of the allocation of the relevant functions, assets and risks in relation to the covered transaction(s) materially differ, competent authorities should engage with the taxpayer again to seek further information and clarification, with the view of forming a common understanding.

It is important to also recognise that this best practice does not preclude competent authorities from disagreeing on the facts underlying a BAPA application. Many elements of functional analysis are subjective and therefore material differences in opinion may occur. However, this best practice aims to ensure that any material differences in competent authorities' opinions as to the facts are known and discussed, ideally prior to the comparability / benchmarking analysis.

This best practice aims to ensure that once a BAPA application moves to the discussion stage, no further information or clarification from the taxpayer should be required for the competent authorities to determine their positions. However, this does not preclude further requests or clarifications, where necessary.

3.5. Position Paper and Competent Authority Discussions

136. Once a competent authority has analysed the information received from the taxpayer, it will form its position and commence discussions with its treaty partner.

137. To achieve timely resolution and to facilitate meaningful discussions, competent authorities should consider the preparation and transmission of a position paper as a matter of priority. Position papers outline a jurisdiction's position related to the covered transaction(s) and inform the treaty partner. Position papers, where required, are important to allow competent authorities to understand the treaty partner's position prior to discussions commencing.

138. Competent authorities noted that it is a matter of general practice to prepare position papers prior to the commencement of discussions with a treaty partner. However, for practical purposes it was noted that in some cases and especially where the competent authority agreed with the taxpayer's application, position papers are not needed. Whether position papers and competent authority discussions are necessary for a BAPA application should be discussed in line with Best Practice 9.

139. Most jurisdictions do not have a prescribed format for BAPA position papers. However, position papers should include sufficient detail to enable the treaty partner to understand the relevant issues. Typically, position papers will include the following information:

- legal name and address and taxpayer identification number of the taxpayer, its related persons in the other jurisdiction, if applicable, and the basis for determining the association
- the contact details of the competent authority official in charge of the case

- background to the covered transaction(s), including a summary of the taxpayer's business, functional analysis, and summary of financials
- outline of the taxpayer's position, including its selection of transfer pricing method and selection of comparables
- outline of the competent authority's position, including its selection of transfer pricing method. For complex transactions, this may also include the relevant comparables
- the proposed relevant critical assumptions
- the proposed term of the BAPA.

140. It is also worth noting that some jurisdictions have two types of position papers. The first, being a long-form position paper which provides significant detail in relation to all aspects of the analysis undertaken. This type of position paper typically is used for complex BAPA applications and includes an in-depth analysis in relation to the financial analysis, comparables search (including the profiles, financial statements and financial ratio of the relevant comparables) and working capital adjustments. The second, being a shorter position paper that is used for less-complex BAPA applications and merely contains the information outlined in paragraph 148 above. It was noted by some competent authorities that the use of shorter position papers was preferred for less complex BAPA applications in certain circumstances as much of the additional information (details of all of the relevant comparables) was unnecessary. It was noted that the use of either the long or shorter form position paper should be agreed by competent authorities. Such agreement would be in line with Best Practice 9. A sample of a short-form position paper is found in Annex C.

141. In addition, some jurisdictions also noted that it was their practice to circulate a position matrix, which reconciles the positions of the taxpayer and both competent authorities, prior to each competent authority discussion. These jurisdictions noted that the use of the matrix was useful for ensuring the majority of competent authority discussion was focussed on the areas of dispute. A sample position matrix can be found in Annex E.

3.5.1. The timely provision of position papers

142. Typically both competent authorities will provide their treaty partner with a position paper prior to the commencement of discussions. While it is not uniform across jurisdictions, jurisdictions will typically agree as to how the transmission of position papers will occur.

143. Competent authorities noted that face-to-face discussions (or videoconferences) are not always necessary to agree a BAPA. In instances where the competent authorities agree with the position taken in the taxpayer's BAPA application and there are no other controversial issues, BAPAs can be agreed without competent authority meetings.

144. However, when competent authorities are required to meet, it is important that position papers be circulated well in advance of any proposed competent authority discussions with enough time and sufficient information to allow the treaty partner to evaluate the positions before discussion take place. Competent authorities noted that it was common for position papers to be provided too close to the scheduled meeting date. In these circumstances, meetings between competent authorities become a wasted exercise, prolonging the BAPA process, as the treaty partner's positions could not be considered and evaluated prior to the discussions.

145. In many instances, competent authorities noted that the lack of timely provision of position papers was due to a reluctance of some treaty partners to commence the development of position papers or discussions until the next round of financial information becomes available. This resulted in unnecessary delays to the BAPA process.

Best Practice 22

Position papers and competent authority discussions should proceed on the latest financial information available, including unaudited financials to the extent the taxpayer represents that those financials give an accurate view of the transaction(s) covered by the BAPA.

At the time a meeting date is set, competent authorities should agree when position papers (including partial position papers if necessary) should be issued so that all competent authorities have enough time to evaluate a position paper before discussions take place.

The development of position papers and the commencement of competent authority discussions should not be delayed due to waiting for any pending financial results of the relevant taxpayers. Taxpayers should always provide competent authorities with the latest financial information available and competent authorities should proceed based this information. This could include unaudited financials, where the taxpayer asserts that it is reasonable to rely on such financials. However, taxpayers would be required to immediately provide the audited financial information as soon as it becomes available, and interim data should only be used when they are considered reliable. Instances where interim data may not be reliable would include where there is significant volatility in the taxpayer's financials or there are known issues with the financials that are or will be subject to accounting audit scrutiny. Where competent authorities have relied on interim financial results, when audited financials become available, competent authorities should revisit their analysis to ensure the data is consistent with what was expected when the previous analysis was undertaken. In some circumstances, any uncertainty relating to the use of interim data could be mitigated by the use of critical assumptions in the BAPA. For example, if the audited financials would differ significantly from the unaudited financials relied upon, the pricing of a covered transaction(s) could be adjusted.

To ensure the timely provision of position papers, during the administrative scheduling process for an upcoming competent authority discussion, competent authority representatives should coordinate with one another on the date on which the position papers should be exchanged. Position papers may not necessarily be required. However, competent authorities should agree if position papers are not going to be provided.

Where required, competent authorities should aim to provide final position papers to treaty partners. If for some reason a competent authority is unable to provide a complete position paper within the agreed timeframe, competent authorities should make every effort to provide partial positions within the timeframe. These positions can be augmented with the complete information when available and a complete position paper made available to the treaty partner as soon as possible.

The required time to consider positions papers may differ on a case-by-case basis. But as a matter of general practice, it is recommended that position papers be exchanged two to four weeks in advance of the meeting to give competent authorities and BAPA case officers sufficient time to consider positions.

While responses to a treaty partner's position paper are not mandatory, to the extent a competent authority wishes to, the response should be provided with sufficient time for the treaty partner to review. This includes any materials a competent authority wishes to refer to in the meeting. Where competent authorities agree that it would be advantageous to receive responses to position papers prior to a meeting, the responses would be expected to be received one week prior to the meeting. Ideally, the relevant dates will be agreed as part of the project plan or during the administrative scheduling process.

In considering a treaty partner's position paper, competent authorities should feel free to seek clarifications on relevant issues and positions prior to discussions, if that information will assist in evaluating the treaty partner's position.

3.5.2. The taxpayer's role during competent authority discussions

146. The taxpayer does not have a direct role in the preparation of position papers or in the discussions between competent authorities. Some competent authorities noted the role of the taxpayer during this stage is to provide information to assist the competent authorities, as appropriate. Often treaty partners mutually agree to share positions with the respective taxpayers to help foster openness and encourage comment to help bring the parties closer to an agreement. However, some competent authorities felt there are times when including the taxpayer at this time frustrates the BAPA process and curbs the likelihood of a timely resolution.

147. Many taxpayers expressed a view that position papers, whether in full or limited form, should be shared with them. It was noted that giving the taxpayer the opportunity to understand the position of each competent authority and the factual rationale of which that position was based would ensure significant misunderstandings and errors are not being made. Further, some taxpayers expressed that they should be part of competent authority discussions. It was noted that where the discussion between competent authorities has stalled due to differing points of view, it often is helpful for the taxpayer to be involved in the discussion with both the competent authorities in one forum. The presence of the taxpayer can provide a different perspective or the taxpayer can provide further information so that the gap in positions can be bridged. This would also reduce potentially reduce the need for further information requests.

148. The position paper and competent authority discussion stage is noted to often be protracted and can be frustrating taxpayers. Taxpayers noted that there can be long periods where there is no communication with either competent authority during this period. Some competent authorities indicated that it was their practice to ensure the taxpayer is always informed of the competent authority's position before discussions commence and taxpayers were constantly provided with high-level updates on the progress of the development of the position paper and discussions and any issues to be resolved. This can often help to clarify facts and issues.

149. Competent authorities are reminded that regular communication, such as described above, during the position paper and competent authority discussion stage are in line with Best Practice 8. However, it is not considered best practice for taxpayers to be part of the competent authority discussion process.

Best Practice 23

Competent authorities and BAPA case officers should not give taxpayers access to position papers and taxpayers should not be part of the substantive discussions on the BAPA between competent authorities.

The sharing of position papers with taxpayers would undermine the discussion process between competent authorities. However, this does not preclude competent authorities from discussing issues raised in position papers with taxpayers and giving taxpayers the opportunity to provide further information to assist competent authorities in coming to an agreement.

While taxpayers should not be part of substantive BAPA discussions between competent authorities, this should not preclude taxpayers from presenting to competent authorities jointly, prior to the commencement of discussions (especially in the case of face-to-face discussions). However, such

presentations should only be considered where it is beneficial to the BAPA process, with the agreement of both competent authorities and not cause a delay in discussions.

The taxpayer's presentation should be limited to what competent authorities ask them to do and limited to the facts, which is typically an overview of its business. Further, the taxpayer should not present new factual information or make supplementary representations as this will require time to review such matters and will necessitate a postponement of a final decision.

Further, it may also be useful if the taxpayer made itself available during the competent authority discussions (via teleconference) to answer any factual questions competent authorities may have to avoid discussions being stalled until the information is made available.

3.5.3. Specific conduct of competent authorities during discussions

150. Noting Best Practice 1, competent authorities should conduct themselves in a manner that is conducive to reaching timely agreement. It is important to recognise that during competent authority discussions, if issues cannot be resolved at the specific meeting, there is often a significant amount of time until discussions can further progress. To streamline the current BAPA process, it is expected that competent authorities will work together in a non-adversarial manner to find arm's length solutions. In conducting discussions, competent authorities should engage with one another to find common solutions rather than merely identify problems or difficulties with the analysis or the positions taken by a treaty partner or the taxpayer.

Best Practice 24

During competent authority discussions, a competent authority raising an issue should, as part of noting the issue, where possible, provide its treaty partner with a recommendation as to how to resolve the issue.

This best practice aims for greater collaboration between competent authorities. Where possible, a competent authority raising an issue should recommend solutions to the issues raised, so that competent authority discussions continue to progress in a timely fashion. However, it is acknowledged that offering a solution may not be possible in all cases and if so, competent authorities are encouraged to start discussions on the issue raised with the aim to collaboratively finding an agreed solution as soon as possible.

3.5.4. Development of draft BAPA terms

151. Prior to the development of the draft terms of the BAPA, the competent authorities will generally inform the taxpayer as part of regular updates as to the in-principle agreement that has been reached. Competent authorities noted that, in limited circumstances, the in-principle terms were not acceptable to the taxpayer and the taxpayer withdrew its BAPA application. In such circumstances, taxpayers are well within their rights to withdraw from the BAPA process.

152. Further, there is no obligation for the competent authorities to restart BAPA discussions if the in-principle terms were not acceptable to the taxpayer. In fact, discussions should only be restarted if the taxpayer's concerns are immaterial to the in-principle terms agreed by the competent authorities. However, this should be avoided where possible, by ensuring regular contact with the taxpayer throughout the BAPA process.

153. However, once in-principle terms have been agreed, competent authorities should coordinate to ensure expedited drafting of the BAPA agreement and avoid duplication in this process.

Best Practice 25

Competent authorities should agree as to which competent authority will draft the text of the BAPA.

Once the in-principle terms of a BAPA have been agreed, competent authorities should immediately determine which competent authority will commence drafting the BAPA. Typically, this would be undertaken by the competent authority in the jurisdiction in which the significant functions in relation to the covered transaction(s) (for example, the jurisdiction of the "entrepreneur" or the "parent entity"), or the competent authority that has sufficient resources to draft the BAPA in a timely manner. The draft BAPA should then be provided to the treaty partner for review.

It is advisable that the exchange of drafts occur via email to decrease processing times at this stage. If the treaty partner has comments or issues with the draft text, it should provide revisions to the draft BAPA text or drafting recommendations.

A sample BAPA agreement can be found in Annex F.

154. Once in-principle agreement has been reached, it may not be necessary for further competent authority meetings to finalise the BAPA.

155. If the competent authorities are unable to reach agreement with each other, the taxpayer is usually notified within a set period (e.g. 30 days) of the competent authority meeting, setting out the reasons why agreement could not be reached. The exact form and mechanism of notification is typically determined by domestic law or internal policy. However, regardless it is recommended that the taxpayer be notified in a timely manner in line with Best Practice 8.

3.6. Finalisation and implementation

156. Finalisation and implementation refers to the period in the BAPA process after which the competent authorities have agreed to the terms of the BAPA. This stage typically involves:

- finalisation of the BAPA, and
- domestic implementation of the BAPA.

157. In some jurisdictions, the BAPA is drafted before the taxpayer(s) is contacted for acceptance of the BAPA terms. However, it is noted that such practice can lead to circumstances where significant drafting of the BAPA is undertaken but the terms of the BAPA are not agreeable to the taxpayer.

158. Where the taxpayer does not agree with the final BAPA terms, or where the taxpayer wishes to propose an amendment to the text of the BAPA, some jurisdictions are willing to consult with the taxpayer and their treaty partner to see whether any modification can be made so that a final set of terms and conditions can be achieved that are agreeable to all parties. However, some jurisdictions are not open to any modifications after they and their treaty partner have reached an agreement.

159. Competent authorities and taxpayers noted that finalising a BAPA can be a time-consuming process. There can be significant delays owing to the review of the draft BAPA and it is common for additional issues to be raised.

160. Once the BAPA terms have been agreed, the BAPA is signed and formal letters that specify that the agreement is a mutual agreement under Article 25 of the relevant treaty are exchanged. Some jurisdictions require that the BAPA include a clause that it is conditional on the taxpayer(s) signing on to the domestic implementation requirements in both jurisdictions. As previously mentioned, the mechanisms for domestic implementation of a BAPA typically fall within two categories.

161. The first being where a jurisdiction relies solely on the BAPA, and domestic implementation is not required. Effectively, once the BAPA is signed by the competent authorities, it is forwarded to the taxpayer for approval. Where the taxpayer approves, the BAPA is binding, and the tax administration compliance team liaises with the taxpayer to make the necessary adjustments to previous year tax returns (if required). Where this mechanism of implementation in undertaken, both taxpayers and competent authorities noted that the process is timely.

162. The second method of implementation of BAPAs by many jurisdictions is through a domestic implementation agreement between the taxpayer and the relevant tax administration. Typically, the domestic agreement(s) will be drafted simultaneously along with the BAPA. However, this is not always the case. Further, in many jurisdictions a domestic agreement will include the signed BAPA as an appendix. Once the domestic agreement is agreed, the terms of the BAPA are binding on the taxpayer and the tax administration compliance team liaises with the taxpayer to make the necessary adjustments to previous year tax returns (if required).

163. Where the second method applies, it is important that domestic implementation be expedited to ensure advance tax certainty is given. It was noted that significant delays can occur when multiple stakeholders within a jurisdiction are part of the process. This is typically the case where the BAPA process is undertaken by a competent authority at a federal or national level, but agreement needs to be reached with sub-national government officials prior to domestic implementation occurring. Similarly, competent authorities noted that significant delays can occur due to the taxpayer requiring internal approvals prior to agreeing to the terms of the BAPA and signing the domestic implementation agreement or making the required adjustments to previous year tax returns. Further, competent authorities noted that taxpayers frequently wait to see the draft BAPA to compare it to the domestic implementation agreement before signing, which can lead to significant delays.

Best Practice 26

Competent authorities and taxpayers should complete finalisation and implementation of a BAPA as soon as possible.

Competent authorities and taxpayers should make the finalisation and implementation of BAPAs a priority.

It is recognised that some competent authorities may no longer have control over domestic implementation (i.e. implementation may be undertaken by a regional office). However, internal processes (including in regional tax offices) should be put in place in such cases to ensure that BAPAs are implemented in a timely fashion.

Further, implementation may be dependent on the actions undertaken by the taxpayer (i.e. revising tax returns filed for covered years that have passed during the BAPA process). Competent authorities should inform taxpayers what they need to do immediately after the BAPA is signed and taxpayers should ensure their internal agreement processes are streamlined to prevent any unnecessary delays.

3.6.1. Domestic implementation of BAPAs

164. It is recognised that tax administrations may need to include additional information in the domestic agreement, particularly in relation to adjustments required or to meet domestic law requirements. However, the taxpayer should be aware of these requirements as part of the liaison with the tax administration during the competent authority discussion stage.

165. However it was noted that some taxpayers and competent authorities have tried to use the domestic implementation process to reopen issues already agreed in the BAPA or to extend the scope of the covered transaction(s) for domestic law purposes only. Competent authorities specifically noted that in some circumstances taxpayers had attempted to make significant changes to the wording of the domestic agreement, which affected the already established BAPA.

Best Practice 27

The terms of any domestic agreement implementing a BAPA entered into by a competent authority and the taxpayer should be similar to those in the BAPA, subject to domestic law requirements.

There should be no material delay between the signing of the BAPA and implementation through a domestic agreement.

This best practice does not require domestic agreements to be in the same form as a BAPA. However, competent authorities and taxpayers should not seek to deviate in substance from the terms and conditions outlined in the BAPA in the domestic agreement. Further, competent authorities should not put additional conditions on the taxpayer that are different from or in excess of the conditions agreed in the BAPA.

However, this best practice is subject to the domestic law requirements of each jurisdiction. For example, certain domestic filing requirements, ongoing compliance conditions or secondary adjustments may require certain terms and conditions to be part of the domestic agreement signed with the taxpayer, over and above the conditions agreed in the BAPA. However, these should only be permitted when such requirements are required by law and should not be seen as an opportunity to change the conditions agreed as part of the BAPA.

3.7. Ongoing monitoring

166. Taxpayers are required to abide by the terms of the BAPA throughout the covered period, including ongoing compliance with the critical assumptions. If the taxpayer fails to abide by the terms and conditions, then the BAPA should no longer be applied. The ongoing compliance requirements on the taxpayer are often contained in the BAPA or in the domestic agreement implementing the BAPA.

167. Taxpayers and the tax administrations should agree the types of documents and records (including any necessary translations) that the taxpayer must maintain and retain for the purposes of verifying the taxpayer's compliance with the BAPA. These requirements are typically covered in the BAPA agreement.

168. The ongoing compliance requirements of a BAPA differ from case to case. The preferred approach of most competent authorities is that taxpayers file an annual BAPA compliance report in addition to the domestic tax return. This report demonstrates the taxpayer's compliance with the terms and conditions of the BAPA, including the information necessary to decide if the critical assumptions, or other safeguards, have been met.

169. The guidance in Chapters IV and V of the OECD Transfer Pricing Guidelines (OECD, 2017[2]) should be followed in order to avoid the documentation requirements becoming overly burdensome. Provisions regarding the retention period and the response time for producing the documents and records may also be included.

Notes

[1] Annex II to Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 29.

[2] Annex II to Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 39.

[3] Annex II of Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 56.

[4] Annex II to Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraphs 58 and 60.

[5] Annex II to Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 59.

[6] "Delineation of the covered transactions" is made by reference to Sections D1.1-5 of Chapter 1 of the OECD Transfer Pricing Guidelines.

Reference

OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, https://doi.org/10.1787/g2g972ee-en. [1]

OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, https://doi.org/10.1787/tpg-2017-en. [2]

OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241633-en. [3]

3.8. Other issues raised in relation to BAPAs

170. In addition to the comments received on the issues outlined in the previous sections, both taxpayers and competent authorities provided comments in relation to how other aspects of a tax administration's process or policy interacted with the BAPA process. Of these, the most significant are:

- interaction of audit with the BAPA process
- retroactive application of BAPAs
- BAPA renewals
- fees as part of the BAPA process.

171. These aspects can affect the effectiveness and efficiency of the BAPA process and therefore have been considered in detail below.

3.9. Interaction of audit with the BAPA process

172. Given the nature of the types of transaction(s) that taxpayers seek to have covered by BAPAs, it is inevitable that there will be some interaction between audits and BAPAs.

173. The OECD Transfer Pricing Guidelines (OECD, 2017[2]) provides the following on the interaction between audits and BAPAs:

> *17. The fact that a taxpayer may be under audit or examination should not prevent the taxpayer from requesting a MAP APA in respect of prospective transactions. The audit or examination and the mutual agreement procedure are separate processes and generally can be resolved separately. Audit or examination activities would not normally be suspended by a tax administration whilst the MAP APA is being considered, unless it is agreed by all parties that the audit or examination should be held in abeyance because the obtaining of the MAP APA would assist with the completion of the audit or examination.*[1]

174. However, this is more complicated in practice. While a taxpayer under audit is not expressly prevented from applying for a BAPA, whether the taxpayer and / or the relevant transaction(s) are under audit is a relevant consideration in determining whether a BAPA application should be accepted into a BAPA programme.

175. Many taxpayers noted that it would be advantageous if there was a cessation of audit activity during the BAPA process. It was noted by competent authorities that this would be difficult to achieve in practice given the separate and different roles assigned to the audit and competent authority functions.

176. In some jurisdictions, audits and BAPAs can run in parallel. In these circumstances, the view is taken that audits are confined only to past years and hence are separate from the prospective nature of BAPAs. In these jurisdictions, the preferred approach is for the taxpayer to deal with any potential double taxation due to audit adjustments through the MAP process and use the BAPA process to deal with future income tax years.

177. However, some jurisdictions noted that when an audit was in its early stages and the taxpayer requested a BAPA for the relevant transaction(s), then both processes should be coordinated to prevent duplication and to utilise resources effectively. This was also seen to be effective in reducing potential unfairness to taxpayers and mitigated potential delays in both the audit and the BAPA process. It was noted that for combined processes to be successful, coordination between the relevant stakeholders is paramount. Competent authorities should be transparent with treaty partners and audit teams to make sure processes are run simultaneously. This can be difficult to manage considering potential domestic law limitations or internal policies (such as ethical walls between the audit and competent authority functions).

178. Other jurisdictions are of the view that the processes could run in parallel but not be mixed as the legal framework and procedures undertaken are different. Of relevance was the fact that audit decisions may be subject to formal judicial review. Further, some jurisdictions are unable to be able to combine both processes owing to domestic law constraints. However, taxpayers did note that if the processes are run in parallel, it is advantageous when the audit function and competent authority leveraged the same information.

179. Conversely, some jurisdictions are of the view that if a taxpayer is under audit, it is not appropriate for the taxpayer to be accepted into a BAPA programme. This is especially the case where the proposed covered transaction(s) are under review. In this circumstance, competent authorities noted that running both processes in parallel would result in significant duplication. Further, it was noted that taxpayers could potentially use the BAPA process to influence the audit outcome, which would undermine the audit function's independence.

180. However, many jurisdictions who felt that it was not appropriate for a taxpayer under audit to be accepted into a BAPA programme, took a different view once the audit had completed. Many jurisdictions are not willing to accept BAPA applications until all domestic appeals in relation to an audit have been exhausted. This is especially the case where the competent authority cannot deviate from the tribunal or court decision. Some jurisdictions noted that they expected the taxpayer to take the same position in their BAPA application as the audit position and were willing to leverage the information provided during the audit to expedite the BAPA process. Other jurisdictions noted that audits and BAPAs were separate processes and therefore the taxpayer was not bound by the audit outcome in its BAPA application. However, some of these jurisdictions have ethical walls between BAPAs and audits, and therefore leveraging information produced as part of the audit was not an option.

181. Where an audit proceeded a MAP case, some competent authorities were willing to coordinate MAP cases with BAPA applications, noting that such actions reduce duplication and can lead to efficient outcomes. However, some noted that the MAP and BAPA processes are different and achieving the same outcome under both processes is not guaranteed even if the circumstances are the same.

182. It was noted by all jurisdictions that there was nothing preventing taxpayers currently in a BAPA process being subject to audit in relation to covered transaction(s) prior to the BAPA being signed. When this was the case, jurisdictions took different approaches. Some jurisdictions took the view that audit proceedings result in an immediate cessation of the BAPA process. However, other jurisdictions will continue the BAPA process. For these jurisdictions, either:

- The BAPA and audit processes will continue to run independently. In some jurisdictions, there is close coordination between the BAPA and audit functions to reduce duplication. In other jurisdictions, there is no coordination as the BAPA and audit functions are totally separate, and / or may be subject to ethical walls.
- The audit process is effectively subsumed into the BAPA process. Competent authorities noted that such an approach was a practical use of tax administration resources as the use of a BAPA would prevent the possibility of having to deal with any double taxation through MAP arising from an audit assessment.

183. Finally, the role of auditors in the BAPA process deserves consideration. While competent authorities recognise the importance of ensuring that the competent authority function is independent of the audit function, it was noted that the potential conflicts of the interaction between auditors and BAPAs are less than those in relation to MAP cases. While conflicts prevent auditors from assisting with MAP cases, auditors assisting with BAPA applications can be a valuable resource given their in-depth knowledge of the taxpayer and its business. This can potentially offer significant efficiencies in speeding up the BAPA process and reducing the amount of information necessary for a competent authority to form its position. It is also recognised that the use of auditors can also assist in reducing delays in domestic implementation, especially where previous year tax adjustments are required. In some jurisdictions,

auditors may also have responsibility for the ongoing monitoring of the BAPA and being involved in the BAPA process may provide valuable knowledge for that ongoing responsibility.

184. However, it was noted by some taxpayers that the use of auditors as part of the review of the BAPA application was inappropriate and counterproductive. Taxpayers felt that the conflict of interest for auditors was unavoidable. Further, taxpayers noted that the information they are often required to provide as part of a BAPA application is significantly more than they would be required for general tax compliance. As auditors would have direct access to this information, this is a significant disincentive to engage in the BAPA process.

185. Even if personnel from the audit function are involved in the work surrounding a BAPA, the competent authority should play a more significant role in the discussion stage to ensure that the approach taken in the BAPA is different from that taken in audit, as noted under Best Practice 1. To ensure that there is transparency, if personnel from the audit team are to be present at competent authority meetings for BAPA discussions in the interest of fact-finding, competent authorities felt that the treaty partner should be notified in advance of the meeting. However, audit personnel nor members of the audit function of a tax administration should be involved in the decision-making process in relation to a BAPA. That responsibility rests solely with the competent authority.[2]

Best Practice 28

Jurisdictions should ensure they have in place adequate policies/practices to ensure that its audit and BAPA functions communicate and coordinate effectively. In this regard, jurisdictions should also include an explanation of the relationship between the audit and BAPA process in their published BAPA guidance.

Subject to domestic limitations, a competent authority involved in the BAPA process should also ensure that they inform the treaty partner of potential audit interactions, such as ongoing or planned audits in relation to a transaction(s) covered by the BAPA or the planned presence of auditors in BAPA discussions (including auditors on the BAPA team).

While the practices and views of competent authorities may differ significantly in relation to the interactions between the audit and the competent authority functions, jurisdictions should consider all relevant issues and put in place and document policies or practices to ensure that the competent authority and audit functions communicate and coordinate effectively. However, for jurisdictions where BAPA teams are functionally separated from audit teams to preserve independence, coordination would only be expected to the extent possible and necessary to facilitate the BAPA process.

The complex interaction between the audit and BAPA processes is generally governed by a jurisdiction's domestic law and / or administrative procedures and may thus give rise to uncertainty, particularly considering the different approaches adopted. Such uncertainty may concern, for example, the availability of BAPAs where audits are planned or ongoing. Jurisdictions should thus include in their published BAPA guidance an explanation of this relationship.

To ensure transparency, competent authorities where permitted, as a matter of general practice, should inform treaty partners of situations where an audit is either planned or ongoing in relation to a transaction that is subject to the BAPA process. Similarly, competent authorities should inform treaty partners where they would want to include auditors in the competent authority meetings to discuss a BAPA.

3.10. Roll-back of BAPAs

186. Element 2.7 of the BEPS Action 14 Minimum Standard states that jurisdictions with BAPA programmes should provide for the roll-back of BAPAs (to previously filed tax years not included within the original scope of the APA) in appropriate cases, subject to the applicable time limits (such as domestic law statutes of limitation for assessments) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.

187. In practice, the ability to obtain roll-back of BAPAs for previous income tax years varies considerably. Some jurisdictions allow for potential roll-back of BAPAs to varying extents, including up to ten years. However, in many instances competent authorities were limited in the extent to which they could provide roll-back under domestic law. This includes roll-back only being eligible for non-statute barred years. In most cases, taxpayers are required in their BAPA application to disclose any potential roll-back years and to specifically request for the roll-back of the BAPA for those years.

188. Competent authorities that offered roll-backs noted how many years a roll-back was offered to a taxpayer would vary. This may also be impacted by the roll-back periods offered by the treaty partners. Further, it was noted that longer periods of roll-back sometimes require significant additional analysis outside of what had already been undertaken during the BAPA process. As competent authorities need to be comfortable the facts and circumstances in the roll-back period are the same as those in the BAPA covered period, the longer the potential roll-back period the larger the burden for competent authorities and taxpayers. Therefore, in practice, most jurisdictions limit roll-back to between two to three years.

189. Competent authorities noted that generally roll-backs are only appropriate where there are no material changes to the covered transaction(s) or the conditions that operated between the parties in the roll-back period as compared to the BAPA period. Competent authorities noted that roll-backs are typically easier in circumstances where the BAPA outcome is the same as the taxpayer's previous tax filing positions and therefore no domestic adjustments to previous tax returns are required. Some jurisdictions noted that other relevant considerations in determining whether a roll-back is appropriate include:

- whether there are any ongoing audits or examinations in respect of the period(s) or transaction(s) which are to be covered by the roll-back
- whether there are any appeal or judicial proceedings under way in either jurisdiction in relation to the prior periods concerned.

190. Competent authorities also generally undertake verification that the facts and circumstances relating to a roll-back request are the same as covered by the BAPA itself. The level of scrutiny in this verification is usually simpler than that in an audit and most competent authorities can undertake such verifications without initiating formal procedures.

191. Taxpayer's experiences were positive in relation to the use of roll-backs and it was expressed that greater use of roll-backs would give more tax certainty. However, taxpayers noted that due to the current length of the BAPA process, roll-backs were not feasible or necessary in many jurisdictions as pre-BAPA years can be statute barred. Based on the comments received and the varying application of roll-back between jurisdictions, it would be expected that jurisdictions include their relevant policies and process in relation to the roll-back of BAPAs in their published guidance, in line with Best Practice 3.

3.11. BAPA renewals

192. Renewals of BAPAs are common in all jurisdictions that offer BAPAs. The OECD Transfer Pricing Guidelines (OECD, 2017[2]) outlines that,

> *86. A request to renew a MAP APA should be made at the time prescribed by the participating tax administrations, bearing in mind the need for sufficient lead time for the taxpayer(s) and tax administrations to review and evaluate the renewal request and to reach agreement. It may be helpful to commence the renewal process well before the existing MAP APA has expired.*
>
> *87. The format, processing, and evaluation of the renewal application would usually be similar to those for an initial MAP APA application. However, the necessary level of detail may be reduced with the agreement of the participating tax administrations, particularly if there have not been material changes in the facts and circumstances of the case. Renewal of a MAP APA is not automatic and depends on the consent of all parties concerned and on the taxpayer demonstrating, among other things, compliance with the terms and conditions of the existing MAP APA. The methodology and terms and conditions of the renewed MAP APA may, of course, differ from those of the previous MAP APA.*[3]

193. Competent authorities and taxpayers noted that in most circumstances, BAPA renewal processes were significantly quicker and less onerous than the original BAPA process. This was largely attributed to a good working relationship between the parties and to having a thorough understanding of the taxpayer's business developed through the BAPA process. Further, competent authorities noted that there were reductions in taxpayer driven delays due to familiarity of requirements and expectations from the BAPA process.

194. However, competent authorities stressed the importance of early engagement if the taxpayer was to potentially pursue a renewal application. While the renewal process is likely to be quicker and less burdensome than the original BAPA process, it still requires significant effort from all parties. In fact, many jurisdictions do have time-orientated filing requirements for renewal applications (for instance, applications must be filed no later than 90 days before the end of the current BAPA).

195. Most jurisdictions have in place streamlined processes to expedite BAPA renewals and will heavily leverage the information provided as part of the original BAPA process. However, renewals are not automatic and rely on the taxpayer submitting a formal application. Further, adherence to the ongoing compliance requirements of the original BAPA was relevant in determining whether a renewal application was accepted.

196. Where a taxpayer is not proposing changes to the BAPA as part of a renewal process, there was a reliance on the taxpayer adequately proving in its renewal application that the facts and circumstances were the same as those within the BAPA period. This includes providing the required economic and comparability analysis. While renewal processes may be streamlined, competent authorities still needed time to undertake sufficient due diligence of the information provided and, in many circumstances, may require further information.

197. Further, where the facts and circumstances are not the same as those during the BAPA covered period, this does not preclude the taxpayer from seeking a BAPA renewal. Competent authorities sought to leverage as much as possible from the original BAPA process, but often new facts and circumstances did require thorough analysis and potentially can materially change the positions previously taken by competent authorities.

198. Previous BAPAs do not set a precedent for renewal BAPAs. Competent authorities are not bound by the previously agreed BAPA terms and conditions. In some cases, even where the facts and circumstances of the taxpayer were the same, BAPAs could not be renewed, or the analysis needed to be significantly refreshed due to changes in the relevant economic conditions. Further, competent authorities noted that even where the taxpayer's facts and circumstances and the underlying economic conditions were the same, changes to domestic law or advancement in the relevant international guidance may make it difficult for a renewal application to be expedited.

199. Regarding this, competent authorities noted that for covered transactions where the tax treatment is difficult to determine, competent authorities often come to practical solutions to achieve agreement. However, in the intervening years, the relevant domestic laws may have changed, or international guidance

may provide for a different outcome than what was previously agreed by the competent authorities. In these circumstances, a renewal based on the previous agreement may not be appropriate. In such cases, competent authorities should consider the changes and commence discussions with the treaty partner to find a new basis of agreement, increasing the length of the renewal BAPA process considerably.

200. While fact dependent, where it was established that a renewal of the BAPA is appropriate, competent authorities noted that agreement may be achieved without substantive discussions with the treaty partner. For simple cases, this is often undertaken through written procedure without the need for competent authority discussions.

201. Both competent authorities and taxpayers noted that given the significant effort of all parties to establish the original BAPA and the benefits of advance tax certainty, where possible and appropriate, BAPAs should be renewed.

Best Practice 29

Where requested by the taxpayer and appropriate, the renewal of a BAPA should be considered in the final year of a BAPA as a matter of general practice where the relevant facts and circumstances are expected to be the same as those during the BAPA period.

Given the significant investment of time and resources by taxpayers and competent authorities in establishing a BAPA, where appropriate, taxpayers and competent authorities should be encouraged to undertake renewals of BAPAs. However, this does not mandate that competent authorities should grant renewals for all applications. The renewal of BAPAs is voluntary and competent authorities are free to exercise their discretion when it comes to accepting renewal applications.

As BAPAs are taxpayer initiated, if appropriate, taxpayers should look to initiate renewal applications within the final year of the current BAPA. This is to provide sufficient time for the renewal application to be considered by competent authorities. In assessing the appropriateness of renewing a BAPA, competent authorities should consider whether the information provided and the terms agreed as part of the original BAPA can be used in reviewing the renewal application.

Competent authorities should endeavour to make renewal processes sufficiently streamlined and expedited where possible and appropriate. This could include different application processes, limited information gathering and analyses and streamlined competent authority discussions (which could be limited to assessing the relevant comparability analysis and determining whether there has been any material changes). Generally, a renewal process where the facts and circumstances are unchanged should be limited to verifying there have been no material changes to:

- the facts and circumstances in connection with the transaction(s) since the BAPA application was agreed, including the broader business model
- the relevant economic conditions since the BAPA application was agreed (i.e. movements in business environment)
- the application of the relevant domestic laws of the jurisdictions covering the transaction(s), including any relevant international guidance.

However, competent authorities are not precluded from undertaking a detailed review of a BAPA renewal application; nor are they bound to positions taken as part of the original BAPA. In instances where there has been a material change in any of the elements mentioned above, it is expected that significant review may be required. In addition, a renewal process would also involve testing updated benchmarking sets (where applicable).

To assist with expediting any BAPA renewal process, taxpayers should liaise with competent authorities prior to the submission of a renewal application and ensure that the application is complete and includes any updated analysis that the competent authorities deem necessary to assist with their review.

3.12. Fees as part of the BAPA process

202. Some jurisdictions charge fees for access to a BAPA programme. While many jurisdictions choose not to charge taxpayers, of those jurisdictions that do charge fees for BAPAs, the fee regimes typically fall within the following categories:

- **Direct cost recovery model** – these jurisdictions generally charge BAPA fees based on an hourly rate and expected additional expenses (for instance, travel costs). Taxpayers are given a provisional quotation at the start of the BAPA process, which they are required to pay prior to the application being accepted into a BAPA programme. At the end of the BAPA process, taxpayers are refunded any non-spent amounts.
- **Fixed fee model** – these jurisdictions charge a fixed application fee (either a flat fee or a percentage of the value of the covered transaction(s) capped) that is required to be paid as part of the BAPA application process. Where flat fees apply, these typically are tiered, based on the value of the covered transaction(s) or the size of the business, allowing reduced rates for smaller entities. Jurisdictions operating this fee model are likely to either have automatic acceptance of BAPA applications or to provide refunds of the application fee if the BAPA application is not accepted into the BAPA programme.

203. Fees are generally only applicable after the lodgement of a BAPA application and do not apply to early engagement or pre-filing processes. It is important to recognise how fees impact the decision of a taxpayer to submit a BAPA application. The OECD Transfer Pricing Guidelines (OECD, 2017[2]) make it clear that there should be equitable access to APAs for all taxpayers.

> *4.174. [T]he nature of APA proceedings may de facto limit their accessibility to large taxpayers. The restriction of APAs to large taxpayers may raise questions of equality and uniformity, since taxpayers in identical situations should not be treated differently. A flexible allocation of examination resources may alleviate these concerns. Tax administrations also may need to consider the possibility of adopting a streamlined access for small taxpayers. Tax administrations should take care to adapt their levels of inquiry, in evaluating APAs, to the size of the international transactions involved.*[4]

204. It was noted by taxpayers that significant fees may be a disincentive for taxpayers to seek advance tax certainty, especially for smaller taxpayers. The BAPA process already requires substantial time and resources to be expended by the taxpayer, in addition to consultant costs that are often required to navigate and assist with the BAPA process.

205. Conversely, competent authorities noted that charging for BAPA services can also be used to ensure that only motivated taxpayers enter the BAPA process to not waste the resources of competent authorities. Further, creating monetary barriers to entry may ensure that competent authorities are engaging only on substantial transactions, without having to expend resources on small-value transactions or transactions where there is a limited risk of double taxation occurring.

206. Regardless of the fees charged for BAPAs, it is important that any potential costs be communicated transparently to the taxpayer prior to the start of the BAPA process. In determining fees for

BAPAs, competent authorities need to carefully consider the balance of using their resources efficiently while ensuring there is equitable access for all taxpayers.

Notes

[1] Annex II to Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 17.

[2] Recommendation 2.7 in the *Making Dispute Resolution Mechanisms More Effective, Action 14* - 2015 Final Report states that, "Countries with bilateral advance pricing arrangement (APA) programmes should provide for the roll-back of APAs in appropriate cases, subject to the applicable time limits (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit."

[3] Annex II to Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraphs 86 and 87.

[4] Annex II to Chapter IV of the *OECD Transfer Pricing Guidelines*, paragraph 4.174.

References

OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, https://doi.org/10.1787/g2g972ee-en. [1]

OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, https://doi.org/10.1787/tpg-2017-en. [2]

OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241633-en. [3]

Annex A – List of Best Practices

Best Practice 1

Competent authorities and taxpayers should engage with one another in a principled, fair, objective and transparent manner, with each BAPA application decided on its own merits. To the extent applicable, the commentary to the relevant Model Tax Conventions and the international transfer pricing guidelines are an appropriate basis for the development of a principled approach.

As part of a principled approach to BAPAs, competent authority and taxpayer positions should be based on analysis conducted in accordance with the applicable bilateral tax treaty, the domestic laws of the relevant jurisdictions and the relevant international transfer pricing guidance.

Competent authority positions on particular issues should not be determined by the position that produces the most revenue. Similarly, taxpayer positions should not be influenced by achieving the highest tax saving. Competent authorities and taxpayers should look for appropriate opportunities for compromise within the arm's length principle in order to increase tax certainty for all parties.

To the extent possible, competent authorities that face significant recurring issues in their bilateral relationship may wish to reach agreement on the consistent treatment of such issues, notwithstanding consideration to the facts and circumstances of each case.

Best Practice 2

During the BAPA process, taxpayers should file their tax returns in the relevant jurisdictions in the proposed covered years based on the positions taken in their BAPA application.

Best Practice 3

All jurisdictions with BAPA programmes should have clear published rules, guidelines and procedures, which outline how to access the BAPA process and the relevant steps in the BAPA process, and should take appropriate measures to make that information publicly available.

Best Practice 4

Jurisdictions should make greater use of technology throughout the BAPA process, including providing the means for treaty partners and taxpayers to provide information (including BAPA applications and subsequent requested information) electronically.

Best Practice 5

Jurisdictions and taxpayers should aim for a BAPA agreement to be signed within 30 months from the receipt of a complete BAPA application (containing sufficient information) by both competent

authorities. Once jurisdictions have taken sufficient efforts to streamline and optimise their BAPA processes and resources in line with this Manual, this aim should be reduced to 24 months.

In some instances, competent authorities may not be able to meet these timeframes. In such situations, competent authorities may simply continue their discussions or may find it useful to agree to a reasonable timeframe with the taxpayer within which they expect to be able to resolve the case.

For cases that have exceeded, or are likely to exceed the suggested period, discussions should still continue and it is advisable for senior officials in the competent authority functions for both jurisdictions to review the case to determine the reasons for the delay and for both competent authorities to then agree upon an approach to ensure the efficient completion of the case.

Best Practice 6

The term of a BAPA should generally be a minimum of five years, including at least two prospective taxation years, where the facts and circumstances are expected to be the same.

Best Practice 7

Competent authorities should be adequately resourced to meet the demands of their BAPA programmes. BAPA case officers should be provided with adequate training for dealing with BAPA applications.

Best Practice 8

BAPA case officers (and competent authorities) and taxpayers should be in regular contact with each other during the BAPA process. This is especially relevant, but not limited, to those parts of the procedure in which the taxpayer is not actively involved, including the progress of:

- **the review of the BAPA application during the process of consideration for acceptance into the BAPA programme, including any potential issues and concerns competent authorities may have,**
- **position papers and discussions between competent authorities, including any potential issues arising as part of that process, and**
- **finalisation and implementation of the BAPA, including any impediments to timely implementation of the BAPA.**

Best Practice 9

Once a BAPA application has been accepted into a BAPA programme, BAPA case officers and / or competent authorities in each jurisdiction should be in regular contact with one another in relation to the specific case. This specifically includes communication in between specified meetings between the competent authorities and agreed meetings with the taxpayer.

Best Practice 10

Competent authorities should ensure that turnover of BAPA case officers is effectively managed, including ensuring that there is an appropriate transition.

Best Practice 11

Taxpayers should notify both competent authorities of their potential BAPA application before requesting acceptance into a BAPA programme. While taxpayers may engage in formal or informal preliminary discussions with a single competent authority, the taxpayer should notify the other competent authority when it becomes evident that it is likely to submit a BAPA application.

Best Practice 12

During any engagement between a competent authority and the taxpayer, prior to a taxpayer being accepted into a BAPA process or lodging a BAPA application – whichever is later, competent authorities should not:

- **unduly influence the taxpayer's position on any issue that forms part of its BAPA application, and**
- **undertake analysis for the purposes of determining the competent authority's position on any issue associated with the BAPA. Any preliminary analysis undertaken by a competent authority as part of early engagement or pre-filing should only be to inform the taxpayer as to the issues that should be covered in its request for acceptance into a BAPA process (including collateral issues).**

While competent authorities may note specific issues that the taxpayer should consider in its BAPA application, competent authorities should not engage with the taxpayer to unilaterally agree any position for the purposes of the taxpayer's BAPA application (including the acceptable transfer pricing method, comparables or pricing).

Best Practice 13

Taxpayers should submit BAPA applications simultaneously to both competent authorities and both BAPA applications should contain the same information.

Best Practice 14

Where competent authorities do not share a common language, BAPA applications (and attached materials) should be filed by the taxpayer with an attached English translation (or a different language, if agreed by both competent authorities). However, this is not necessary where the competent authorities, prior to the submission of a BAPA application, agree that a translated version is not required.

Further, competent authorities should agree with the taxpayer as to the language of conduct of the entire BAPA process, including that applicable to the information provided by the taxpayer.

Best Practice 15

A competent authority should, upon receiving a BAPA application, notify the treaty partner of the receipt of such BAPA application and engage with its treaty partner to:

- **outline the potential parameters of the BAPA application.**
- **if relevant, discuss any immediate issues and additional information that either competent authority requires as part of the BAPA application assessment process.**

- **if relevant, outline any domestic limitations that may affect the BAPA process.**

Best Practice 16

Jurisdictions should aim to make a decision in relation to a BAPA application for acceptance into the BAPA programme within 30 days of receipt of a complete BAPA application and immediately inform the taxpayer and the respective treaty partner of any decision.

Where a decision cannot be made within 30 days of receipt of a complete BAPA application, the competent authority should inform the taxpayer and the treaty partner of the expected decision date.

Best Practice 17

Upon acceptance of an application into the BAPA programme, both competent authorities and the taxpayer(s) should agree a project plan outlining the timelines for each stage of the process from commencement to finalisation.

Based on the agreed project plan, taxpayers and competent authorities should commit to providing the required resources to ensure that the agreed timeline is met.

Before agreeing to the timeline, taxpayers should also assess their capacity to produce the required information as requested by competent authorities and meet the required timelines as part of the BAPA process.

Best Practice 18

Competent authorities should coordinate the information gathering process to limit duplication. Where practical, functional interviews and site-visits (if necessary) should be conducted jointly, either in person or via teleconference. When functional interviews are conducted, if a set of minutes is recorded those minutes should be provided to the treaty partner and the taxpayer. Even where separate interviews are conducted, the minutes should be shared with the treaty partner.

Best Practice 19

Taxpayers should provide any requested information to both competent authorities simultaneously and as soon as possible. This includes circumstances where competent authorities request information separately. Both competent authorities should receive the same information regardless of whether an individual competent authority has requested the information.

Best Practice 20

Competent authorities should only request information from the taxpayer that is necessary and relevant to informing a competent authority's position on a BAPA related issue.

Best Practice 21

If, during the information gathering stage, a competent authority materially disagrees with the delineation[1] of the covered transaction(s) outlined in the taxpayer's BAPA application, that competent authority should share its view with the treaty partner as soon as possible.

Best Practice 22

Position papers and competent authority discussions should proceed on the latest financial information available, including unaudited financials to the extent the taxpayer represents that those financials give an accurate view of the transaction(s) covered by the BAPA.

At the time a meeting date is set, competent authorities should agree when position papers (including partial position papers if necessary) should be issued so that all competent authorities have enough time to evaluate a position paper before discussions take place.

Best Practice 23

Competent authorities and BAPA case officers should not give taxpayers access to position papers and taxpayers should not be part of the substantive discussions on the BAPA between competent authorities.

Best Practice 24

During competent authority discussions, a competent authority raising an issue should, as part of noting the issue, where possible, provide its treaty partner with a recommendation as to how to resolve the issue.

Best Practice 25

Competent authorities should agree as to which competent authority will draft the text of the BAPA.

Best Practice 26

Competent authorities and taxpayers should complete finalisation and implementation of a BAPA as soon as possible.

Best Practice 27

The terms of any domestic agreement implementing a BAPA entered into by a competent authority and the taxpayer should be similar to those in the BAPA, subject to domestic law requirements.

Best Practice 28

Jurisdictions should ensure they have in place adequate policies/practices to ensure that its audit and BAPA functions communicate and coordinate effectively. In this regard, jurisdictions should

also include an explanation of the relationship between the audit and BAPA process in their published BAPA guidance.

Subject to domestic limitations, a competent authority involved in the BAPA process should also ensure that they inform the treaty partner of potential audit interactions, such as ongoing or planned audits in relation to a transaction(s) covered by the BAPA or the planned presence of auditors in BAPA discussions (including auditors on the BAPA team).

Best Practice 29

Where requested by the taxpayer and appropriate, the renewal of a BAPA should be considered in the final year of a BAPA as a matter of general practice where the relevant facts and circumstances are expected to be the same as those during the BAPA period.

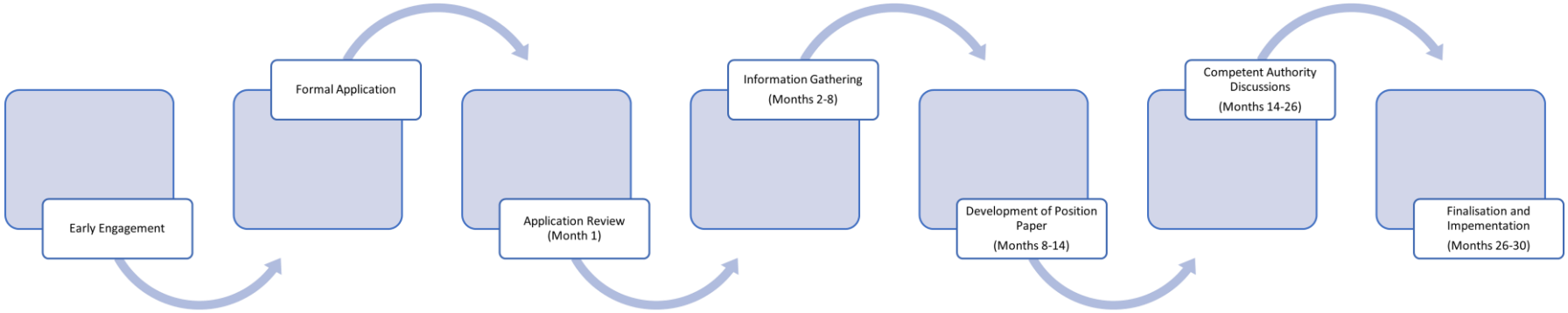
Note

[1] "Delineation of the covered transactions" is made by reference to Sections D1.1-5 of Chapter 1 of the OECD Transfer Pricing Guidelines.

Annex B – Sample BAPA Timeline

The timeline depicted below is intended to provide a guide for each stage of a BAPA process. Pursuant to Best Practice 5, jurisdictions and taxpayers are encouraged to complete a new BAPA case within 30 months from the receipt of a complete BAPA application by both competent authorities. This should be reduced to 24 months once jurisdictions have taken sufficient efforts to streamline and optimise their BAPA processes and resources in line with this Manual. Further, the timelines for each BAPA application will vary based on the specific circumstances of that application. This indicative timeline assumes the co-operation of the taxpayer in responding to inquiries in a timely manner.

Figure B.1. Sample BAPA timeline



Source: OECD.

Early engagement and Pre-Filing

- Where jurisdictions require early engagement, taxpayers will need to undertake such processes. In other cases, taxpayers may choose to undertake such processes (if available). Regardless, when it becomes evident that the taxpayer is likely to submit a BAPA application, the taxpayer should notify both competent authorities ("**CAs**") of its intention to lodge a BAPA application.
- The expected timeframe in relation to early engagement will be dependent on the practices of individual jurisdictions and the individual BAPA application.

Formal application

- Taxpayer(s) to submit a complete BAPA application containing all the relevant information, including in relation to potential collateral issues identified by CAs during early engagement (if undertaken), for CAs to decide as to whether the application will be accepted or rejected from the BAPA programme.
- In line with Best Practice 13, the taxpayer(s) simultaneously submits a formal BAPA application to both CAs, which contains the same information.

Application Review and Acceptance (Month 1)

- Upon receipt of complete BAPA applications by both CAs, they commence an initial review of the BAPA application to determine if it will be accepted into the BAPA programme. Receipt of a "complete" BAPA application by both CAs is the starting point for Best Practice 5. Upon receipt of the BAPA application, CAs should contact their treaty partner, in line with Best Practice 15.
- Within 30 days (or otherwise, provided the taxpayer and the treaty partner are notified), each CA should notify the taxpayer and the treaty partner of its decision on acceptance or rejection of the BAPA application (Best Practice 16).

Information Gathering (Months 2-8)

- The taxpayer(s) and the CAs develop a high-level project plan based around key milestones prior to commencing the information gathering process. This could include the expected dates for when:
    - information requests will be sent, and taxpayers are expected to respond

  - functional interviews (if necessary) will take place
  - position papers will be developed
  - the CAs will meet to formally discuss the BAPA application.
- Both CAs conduct a detailed review of the BAPA application and determine what further information is required (if any). Prior to issuing information requests, CAs should coordinate the information gathering process (Best Practice 18). In coordinating their information gathering, CAs should also notify their treaty partner of potential disagreements with the taxpayer's positions in its BAPA.
- Any information provided by taxpayer(s) should be provided to both CAs.

Development of Position Papers (Months 8-14)

- CAs evaluate the information provided by the taxpayer(s) with the contents of the BAPA application and determine their relevant positions. During this phase, it may be likely that further, targeted information requests are required of the taxpayer. It is recommended that CAs (or BAPA case officers), when appropriate, discuss any relevant issues informally with their treaty partner.
- Towards the end of this period, CAs will agree to when they will meet to discuss the BAPA application, at which time CAs should also agree when position papers will be issued in advance of the meeting. As a matter of general practice, for meetings between CAs where multiple cases are discussed it would generally be considered that position papers be exchanged two to four weeks in advance to give CAs sufficient time to consider (Best Practice 23).

Competent Authority Discussions (Months 14-26)

- CA meetings take place to discuss the BAPA application (or multiple BAPA applications).
- At the end of this process, CAs will have either:
  - reached a tentative agreement on the terms of the BAPA, or
  - agreed that a BAPA cannot be agreed.
- Once a tentative agreement has been reached, the taxpayer should be made aware of the proposed terms of the BAPA and the CAs agree to who will be drafting the BAPA terms.
- It is expected that most BAPA applications can be agreed within 1 - 2 CA meetings. However, complex BAPA applications may require more meetings.

Finalisation and Implementation (Months 26-30)

- The terms of the BAPA are drafted and agreed by the CAs. For the purpose of Best Practice 5, the end point is when both CAs signed the BAPA agreement.
- If required, the drafting of a domestic APA will also be undertaken between the CA and the taxpayer.
- The taxpayer makes the required adjustments (if necessary) to the previous year tax returns in line with the terms of the BAPA.

Annex C – Sample Short-form Position Paper

Position Paper

Request for Bilateral Advance Pricing Arrangement

[Country A] Entity:

[Insert relevant identifying details of - Entity A ("Taxpayer")]

[Foreign] Entity:

[Insert relevant identifying details of - Entity B]

Treaty Articles:

[Insert relevant treaty articles:

Article 9 – Associated Enterprises

Article 25 – Mutual Agreement Procedure]

Covered Tax Periods:

The proposed covered period of this BAPA is [proposed start of BAPA covered years] through [proposed end of BAPA covered years].

Background

[**Note**: Competent authorities should look to reference the taxpayer's BAPA application (including the date of submission) and other documentation where possible and focus on areas of concern or disagreement. Competent authorities should still confirm where they do agree with the taxpayer's analysis, but this does not necessarily require the competent authority to repeat the analysis and can instead refer to the taxpayer's documentation.]

Background, Functional and Risk Analysis:

[Insert the relevant background facts and the functional and risk analysis]

Summary of Taxpayer's Business

[Insert summary of taxpayer's business and a summary of the outcomes of analysis in relation to the 5 comparability factors (delineation).]

Economic and Financial Analysis

Taxpayer's Position:

Selection of Transfer Pricing Method

[Insert taxpayer's proposed TPM]

[Country A] Position:

1. Summary

[Insert summary of position]

2. Transfer Pricing Method Analysis

[Insert summary of the analysis undertaken and support for the position, including the relevant reference to information provided by the taxpayer and functional analysis undertaken. This should also include any financial analysis undertaken.]

Recommended Application of TPM

[Insert recommended application of TPM]

Critical Assumptions:

[[Insert critical assumptions as relevant]

Term:

[Country A] proposes that the TPM be applied on a term basis at the conclusion of the APA term, with adjustments to the [specify adjustments if relevant – for example, nearest edge of the arm's length range].

Annex D – Potential Critical Assumptions List

Standard critical assumptions – these are critical assumptions that generally, will be reflected in every BAPA. The exact wording may be different depending on the drafting preferences of the relevant jurisdictions.

- The business activities, functions performed, assets employed and risks assumed, financial and tax accounting methods and classifications [and methods of estimation] of Taxpayer in relation to the Covered Transaction(s) will remain materially the same as described or used in Taxpayer's APA Request. A mere change in business results will not be a material change.
- The organisational structure of the [Jurisdiction] Taxpayer and the [Foreign] Taxpayer remain substantially the same as described in their BAPA requests.
- The accounting policies, procedures, and practices of the [Jurisdiction] Taxpayer and the [Foreign] Taxpayer remain substantially the same as those described in their BAPA requests.
- The working capital levels (such as accounts receivable, accounts payable and inventory) of the [Jurisdiction] Taxpayer/[Foreign] Taxpayer [or both as applicable] do not vary significantly from those levels existing when the transfer pricing method for the Covered Transaction(s) was established.
- The [Jurisdiction] Taxpayer/[Foreign] Taxpayer [or both as applicable] has no exposure to extraordinary items or the sharing of losses arising in other entities, other than that exposure arising from its own decision-making and activities.
- Neither the [Jurisdiction] Taxpayer nor the [Foreign] Taxpayer enter into a transaction involving intangible property that either directly or indirectly affects the Covered Transaction(s).

Bespoke critical assumptions – the use of critical assumptions in the following areas identified below will depend on the facts and circumstances of each BAPA case. The areas below are not intended to be an exhaustive list, but merely identify key areas where critical assumptions may be required. Further, depending on the facts and circumstances, some of these critical assumptions may be better suited for the 'transfer pricing method' section of the BAPA as the items can be addressed without a breach of the entire APA.

- **Operational and economic critical assumptions** – these critical assumptions are predominately related to how the taxpayer(s) undertakes their operations to limit material changes, where those changes may affect the underlying profitability of the taxpayer(s). These may include:
    - how the taxpayer defines, computes, allocates, and apportions costs and expenses, and limits on the amount and manner by which expenses and costs can vary
    - limits on sales mixes, maximum sales amounts, projections of sales, and permissible sales trends and variations
    - how new or disposed of related entities are treated, to what extent inventories can fluctuate, or to what extent covered purchases can be imported finished products
    - that specific items remain substantially the same, including: customers, products, risks, functions, business methods, assets, pricing policies, business structure, presence and effect of a cost sharing agreement, functional currency, operating assets, presence or absence of intangible assets, intangible asset ownership, licensee agreements, specific

personnel, location of specific personnel, presence or absence of commissions, and royalty amounts and percentages
    - consistent exchange rates, interest rates, credit ratings and capital structure
    - no significant changes in market conditions, technology, product liability, product design, process design, and market share.
- **Legal critical assumptions** – these critical assumptions are predominantly related to ensure consistent legal and regulatory conditions and may include:
    - ensuring consistent external conditions in relating to supervisory rights, customs duties, import and export restrictions, government regulatory requirements and maintenance of agreements in place (for example, distribution agreements)
    - the maintenance of current related and non-related party agreements, such as guarantees, warranties, product liability and debt obligations
    - consistent shareholding ratios.
- **Financial and tax related critical assumptions** - these critical assumptions are predominantly related to ensure consistent financial and tax conditions and may include:
    - no substantial changes to the tax circumstances prevailing in either country, including significant tax reform
    - limiting changes to: the taxpayer(s)'s estimated tax liability; period of limitation on assessment; tax effect of specified expenses; sourcing of income; permanent establishment; foreign tax credit limitation; increasing coverage to other controlled foreign corporations; the ability to change a specified tax election or undertake tax consolidation (or fiscal unity), and; the ability to file for a refund
    - limitations on system loss, intangible profit projections, buy-in payments, lack of currency risk, and valid business reasons for debt
    - assumptions regarding the use of generally accepted accounting principles, favorable certified opinions, mark to market accounting, consistency of accounting computations for all related parties, methods of accounting for foreign currency gains and losses, and unchanged methods for both financial and tax accounting
    - corrections to transfer prices by a third-party country not involved in the APA which influence the APA.

Annex E – Sample Position Matrix

[Insert BAPA Identifier]				
		Taxpayer(s) Position	**Jurisdiction A Position**	**Foreign Jurisdiction Position**
1.	Covered Entities	'Entity A' ([Jurisdiction A]): • [Insert name] 'Entity B' ([Foreign Jurisdiction]): • [Insert name]	Accept/Not accept	
2.	Covered Transaction(s)	• [Insert covered transaction(s)]	• Accept/ [List accepted transaction(s) if all are not accepted]	
3.	APA Term	[Insert proposed term]	Accept/[Insert proposed alternative]	
4.	Transfer Pricing Method ("TPM")	[Insert proposed TPM. For example, • Transactional Net Margin Method (TNMM) • [Entity A] as the tested party • Operating margin (OM) PLI]	• Accept/[Insert proposed alternative] • Accept/[Insert proposed alternative] • Accept/[Insert proposed alternative]	
5.	Analysis Window	[Insert analysis window for comparables. For example, FY18- FY21]	Accept/[Insert alternative analysis window]	
6.	Tested Financials	[Insert Tested Financials. For example, Entity A's segmented financials]	Accept/[Insert proposed alternative]	
7.	Adjustments to Data of Comparables	[Insert adjustments. For example: • Apply asset adjustments for accounts receivable and accounts payable,	Accept/[Insert proposed alternative]	

[Insert BAPA Identifier]				
		Taxpayer(s) Position	**Jurisdiction A Position**	**Foreign Jurisdiction Position**
		inventories]		
8.	Comparables:	[Insert listed comparables]	[Insert accepted comparables]	
9.	Arm's Length Range (ALR)	[Insert proposed ALR. For example, 2.18% ≤ OM ≤ 6.26%]	[Insert acceptable ALR. For example, 4.7% ≤ OM ≤ 7.4%]	
10.	Critical Assumptions	[Insert proposed critical assumptions]	Accept/[Insert critical assumptions]	
11.	Testing and Compensating Adjustments	[Insert proposed testing and compensating adjustments. For example, Test over the entire APA term with adjustments, if necessary, to the nearest edge of range]	[Insert acceptable testing and compensating adjustments. For example, Annual testing with adjustments, if necessary, to the nearest edge of range]	
12.	Other Issues		[Insert any other issues Jurisdiction A would like to discuss]	

Annex F – Sample BAPA Agreement

[Note: This sample is not tailored to attribution BAPAs under Article 7 of the OECD Model Tax Convention or equivalent]

Bilateral Advance Pricing Arrangement (BAPA) Agreement

[ENTITY A] – [ENTITY B]

This confirms the results of our mutual consideration of the BAPA requests filed with [Jurisdiction] on [date] by [Entity A] (the "[Jurisdiction] Taxpayer") and with the [Foreign Jurisdiction] on [date] by [Entity B] (the "[Foreign] Taxpayer"). The [Jurisdiction] Taxpayer is the [Jurisdiction] [parent/subsidiary/affiliate] of the [Foreign] Taxpayer.

This BAPA is governed by Articles 9 and 25 of the Convention between [Jurisdiction] and [Foreign] for the Avoidance of Double Taxation With Respect to Taxes on Income and on Capital and the Prevention of Fiscal Fraud and Evasion, the OECD Transfer Pricing Guidelines and the domestic rules of both countries.

The terms and conditions of this BAPA set no precedent for the terms and conditions of any renewal of this BAPA.

The following constitutes our understanding of the BAPA reached on [date] and subsequent discussions:

1. **PARTIES TO THE BAPA**

The Parties of the BAPA are identified as follows:

I. [Jurisdiction] Competent Authority:

[Insert relevant details]

II. [Foreign] Competent Authority:

[Insert relevant details]

2. **COVERED TAXPAYERS**

The entities affected by this BAPA are:

- [Jurisdiction] Taxpayer

  [Name, Address and Jurisdiction Tax/Identification Number of Jurisdiction Taxpayer]

- [Foreign] Taxpayer

  [Name, Address and Foreign Tax/Identification Number of Foreign Taxpayer]

3. **COVERED TRANSACTION(S)**

This BAPA is in respect of the following transaction(s) (the "Covered Transaction(s)") between the [Jurisdiction] Taxpayer and the [Foreign] Taxpayer:

[**Note**: Describe the Covered Transaction(s)]

4. **TERM**

This BAPA is effective for all taxation years of the [Jurisdiction] Taxpayer and [Foreign] Taxpayer from the taxation year beginning on [date] to the taxation year ending on [date].

[**Note**: If there is a rollback, add: In addition, this BAPA will be applied to all taxation years of the rollback period from the taxation year beginning on [date] to the taxation year ending on [date].]

5. **TRANSFER PRICING METHODOLOGY**

The transfer prices for the Covered Transaction(s) shall be determined in accordance with the following transfer pricing methodology ("TPM"):

[**Note**: Describe the TPM]

6. **CRITICAL ASSUMPTIONS**

This BAPA is entered into based on the following critical assumptions:

[**Note**: Add critical assumptions. Further, if the competent authorities agree to a different functional profile than outlined in the Taxpayer's APA request, reference to the agreed functional profile may be included in the BAPA agreement.]

7. **ADVANCE PRICING ARRANGEMENT/AGREEMENT CHANGES**

[**Note**: If there are related domestic advance pricing arrangements/agreements with the taxpayer, add this section: The competent authorities for [Jurisdiction] Country and the [Foreign] Country agree to consult before either a related domestic advance pricing arrangement/agreement (APA) is cancelled, revoked or subject to a revision that would have an impact on this BAPA.]

8. **CURRENCY OF PAYMENT**

Transfer prices for the Covered Transaction(s) shall be calculated, expressed and paid in [Jurisdiction/Foreign currency]. Any resulting foreign exchange gain or loss will be borne by the [Jurisdiction/Foreign] Taxpayer.

9. **DOCUMENTATION TO BE SUBMITTED**

For each fiscal year covered by the BAPA, Taxpayers shall provide, along with the Corporate Income Tax returns, an Annual Report demonstrating the Taxpayers' compliance with the terms and conditions of this BAPA.

The Annual Report shall in particular comprise the following:

[Insert necessary elements]

The Annual Report shall be submitted to the competent authorities of both [Jurisdiction] and [Foreign] Tax Authorities.

[**Note**: If roll-back applies - For fiscal year [insert], the Annual Report shall be provided to each competent authority within [x] months from the date the BAPA has been notified to its corresponding taxpayer.]

10. **RETROACTIVE APPLICATION OF THE BAPA**

If it is necessary to comply with the application of the BAPA, the [Jurisdiction Taxpayer, Foreign Taxpayer] will submit to the [Jurisdiction/s] Tax Administration the appropriate amended tax return applying the transfer pricing methodology set up in section 4, within the [x] month period after the communication of the signed BAPA by the Tax Administration.

11. **DISPUTE RESOLUTION**

In the event of difficulties, disputes or differences of opinion in the implementation of this BAPA, including action on the part of either Tax Administration to revoke, revise or cancel this BAPA, the competent authorities shall endeavour to resolve such matters by mutual agreement in a prompt manner.

12. IMPLEMENTATION

The [Foreign] and [Jurisdiction] competent authorities will implement this BAPA pursuant to the [Jurisdiction] [Foreign] Income Tax Convention, including the relevant Articles in relation to its use and disclosure, and in accordance with each country's domestic procedures for APAs.

This constitutes a mutual agreement as contemplated under Article (equivalent of Article 25 of the OECD Model Tax Convention) of the Convention.

XXX	XXX
[Jurisdiction Competent Authority]	[Foreign Competent Authority]
[Department]	[Department]
[Date]	[Date]

OECD FORUM ON TAX ADMINISTRATION

Bilateral Advance Pricing Arrangement Manual

Dispute prevention is a fundamental tenet of tax certainty. Bilateral Advance Pricing Arrangements ("BAPAs"), in a growing number of cases, have successfully contributed to providing advance tax certainty to both taxpayers and tax administrations, ensuring predictability in the tax treatment of international transactions. However, stakeholders have identified obstacles that prevent an optimal use of BAPAs. In continuing with its commitment to advancing the tax certainty agenda, the FTA MAP Forum, in conjunction with the FTA Large Business International Programme, has developed the ***Bilateral Advance Pricing Arrangement Manual*** ("BAPAM') which is intended as a guide for streamlining the BAPA process. The BAPAM provides tax administrations and taxpayers with information on the operation of BAPAs and identifies 29 best practices for BAPAs without imposing a set of binding rules. As part of the BAPAM's development, tax administrations have committed to assessing whether implementation of these best practices is appropriate, considering the circumstances of their own BAPA programme and the unique features of each BAPA application, so that the best practices are applied appropriately and with enough flexibility to improve current BAPA processes. The BAPAM also highlights what tax administrations expect from taxpayers in the BAPA process to facilitate a cooperative and collaborative process.

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