OECD/G20 Base Erosion and Profit Shifting Project

Making Dispute Resolution More Effective – MAP Peer Review Report, Germany (Stage 1)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

OECD

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Foreword

The integration of national economies and markets has increased substantially in recent years, putting a strain on the international tax rules, which were designed more than a century ago. Weaknesses in the current rules create opportunities for base erosion and profit shifting (BEPS), requiring bold moves by policy makers to restore confidence in the system and ensure that profits are taxed where economic activities take place and value is created.

Following the release of the report *Addressing Base Erosion and Profit Shifting* in February 2013, OECD and G20 countries adopted a 15-point Action Plan to address BEPS in September 2013. The Action Plan identified 15 actions along three key pillars: introducing coherence in the domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty.

After two years of work, measures in response to the 15 actions were delivered to G20 Leaders in Antalya in November 2015. All the different outputs, including those delivered in an interim form in 2014, were consolidated into a comprehensive package. The BEPS package of measures represents the first substantial renovation of the international tax rules in almost a century. Once the new measures become applicable, it is expected that profits will be reported where the economic activities that generate them are carried out and where value is created. BEPS planning strategies that rely on outdated rules or on poorly co-ordinated domestic measures will be rendered ineffective.

Implementation is now the focus of this work. The BEPS package is designed to be implemented via changes in domestic law and practices, and via treaty provisions. With the negotiation for a multilateral instrument (MLI) having been finalised in 2016 to facilitate the implementation of the treaty related measures, 67 countries signed the MLI on 7 June 2017, paving the way for swift implementation of the treaty related measures. OECD and G20 countries also agreed to continue to work together to ensure a consistent and co-ordinated implementation of the BEPS recommendations and to make the project more inclusive. Globalisation requires that global solutions and a global dialogue be established which go beyond OECD and G20 countries.

A better understanding of how the BEPS recommendations are implemented in practice could reduce misunderstandings and disputes between governments. Greater focus on implementation and tax administration should therefore be mutually beneficial to governments and business. Proposed improvements to data and analysis will help support ongoing evaluation of the quantitative impact of BEPS, as well as evaluating the impact of the countermeasures developed under the BEPS Project.

As a result, the OECD established an Inclusive Framework on BEPS, bringing all interested and committed countries and jurisdictions on an equal footing in the Committee on Fiscal Affairs and all its subsidiary bodies. The Inclusive Framework, which already has more than 100 members, will monitor and peer review the implementation of the minimum standards as well as complete the work on standard setting to address BEPS issues. In addition to BEPS Members, other international organisations and regional tax bodies are involved in the work of the Inclusive Framework, which also consults business and the civil society on its different work streams.

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Abbreviations and acronyms

AO	Abgabenordnung (German Tax Code)
APA	Advance Pricing Arrangement
BEPS	Base Erosion and Profit Shifting
EU	European Union
FTA	Forum on Tax Administration
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development
USSR	Union of Soviet Socialist Republics

Executive summary

Germany has an extensive tax treaty network with over 90 tax treaties and has signed and ratified the EU Arbitration Convention. Germany has an established MAP programme and has long-standing and large experience with resolving MAP cases. It has a very large MAP inventory, with a substantial number of new cases submitted each year and almost 1 200 cases pending on 31 December 2016. Of these cases, 44% concern allocation/attribution cases. Overall Germany meets most of the elements of the Action 14 Minimum Standard. Where it has deficiencies, Germany is working to address them.

All of Germany's tax treaties include a provision relating to MAP. Those treaties generally follow paragraphs 1 through 3 of Article 25 of the OECD Model Tax Convention on Income and on Capital 2014 (OECD Model Tax Convention, OECD 2015). Its treaty network is largely consistent with the requirements of the Action 14 Minimum Standard, except mainly for the fact that:

- One-fourth of its tax treaties do not include a provision stating that mutual agreements shall be implemented notwithstanding any time limits in domestic law (which is required under Article 25(2), second sentence), or include the alternative provisions for Article 9(1) and Article 7(2) to set a time limit for making transfer pricing adjustments; and
- One-ninth of its tax treaties do not include the full equivalent of Article 25(1) of the *OECD Model Tax Convention* (OECD, 2015), whereby the majority of these treaties do not allow taxpayers to submit a MAP request within a period of at least three years as from the first notification of the taxation resulting in taxation not in accordance with the provisions of the tax treaty.

In order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standard, Germany needs to amend and update a certain number of its tax treaties. In this respect, Germany signed the Multilateral Instrument, potentially covering 34 tax treaties. Where treaties will not be modified, upon entry into force of this Multilateral Instrument, Germany reported that it intends to update all of its tax treaties to be compliant with the requirements under the Action 14 Minimum Standard via bilateral negotiations. Furthermore, Germany opted for part VI of the Multilateral Instrument concerning the introduction of a mandatory and binding arbitration provision in tax treaties.

Germany meets the Action 14 Minimum Standard concerning the prevention of disputes. It has in place a bilateral APA programme. This APA programme also enables taxpayers to request rollbacks of bilateral APAs and such rollbacks are granted in practice.

Germany also meets the requirements regarding the availability and access to MAP under the Action 14 Minimum Standard. It provides access to MAP in all eligible cases. It further has in place a notification/consultation process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not

justified. Germany also has clear and comprehensive guidance on the availability of MAP and how it applies this procedure in practice, both under tax treaties and the EU Arbitration Convention. This guidance, however does not include the contact details of Germany's competent authority, which should be reflected.

Concerning the average time needed to resolve MAP cases, the MAP statistics for Germany for the year 2016 are as follows:

2016	Opening inventory	Cases started	Cases closed	End inventory	Average time to resolve cases (in months)*
Attribution/ allocation cases	545	109	135	519	33.09
Other cases	632	244	215	661	22.11
Total	**1 177**	**353**	**350**	**1 180**	**26.34**

* The average time taken for resolving MAP cases for post-2015 cases follows the MAP Statistics Reporting Framework. For computing the average time taken for resolving pre-2016 MAP cases, Germany generally used as a start date the date its competent authority received a MAP request, or where the MAP request was submitted with the competent authority of the treaty partner, the date the German competent authority was informed about the request. It generally used as the end date the date an agreement was reached, or, for cases closed with other outcomes, the date of the other outcome (or, where not available, the date the German competent authority learned about the outcome).

The number of cases Germany resolved is roughly the same as the number of all new cases started in 2016. Its MAP inventory as per 31 December 2016 remained the same as compared to its inventory as per 1 January 2016. Germany's competent authority did not resolve MAP cases on average within a timeframe of 24 months (which is the pursued average for resolving MAP cases received on or after 1 January 2016), as the average time necessary was 26.34 months. This particularly concerns the resolution of attribution/ allocation cases, as the average time to resolve these cases is thereby considerably longer (33.09 months) than the average time to resolve other cases (22.1 months). This indicates that additional resources specifically dedicated to handling attribution/allocation MAP cases may be necessary to accelerate the resolution of these cases. Germany added during the last few years additional personnel to staff in charge of MAP and a further addition is scheduled for 2017. Whether additional resources may actually be necessary, is dependent on whether the additional staff hired contributes to a more effective and efficient resolution of MAP cases. In that regard, Germany should closely monitor whether the above-mentioned increase in resources to the MAP function will lead to the resolution of MAP cases in a more timely, effective and efficient manner.

Furthermore, Germany in essence meets the other requirements under the Action 14 Minimum Standard in relation to the resolution of MAP cases. However, personnel of tax administrations of the Länder directly involved in the adjustment at issue can participate in competent authority meetings during which MAP cases are resolved. This bears the risk that the competent authority function is not performed entirely independent from the approval or direction of the tax administration personnel directly involved in the adjustment at issue concerning the resolution of MAP cases during such meetings. Apart from that, the performance indicators used in Germany are appropriate to perform the MAP function.

Lastly, Germany also meets the Action 14 Minimum Standard as regards implementation of MAP agreements. Although Germany does not monitor the implementation of MAP agreements, no issues have surfaced regarding the implementation throughout the peer review process.

Introduction

Available mechanisms in Germany to resolve tax treaty-related disputes

Germany has entered into 93 tax treaties on income (and/or capital), of which 89 are in force.[1] These 93 treaties apply to 97 jurisdictions.[2] All of these 93 treaties provide for a mutual agreement procedure for resolving disputes on the interpretation and application of the provisions of the tax treaty. In addition, 14 of the 93 treaties provide for an arbitration procedure as a final stage to the mutual agreement procedure.[3] Germany is also a signatory to the EU Arbitration Convention, which provides for a mutual agreement procedure supplemented with an arbitration procedure for settling transfer pricing disputes and disputes on the attribution of profits to permanent establishments between EU Member States.[4] The mutual agreement procedure provisions in tax treaties and the EU Arbitration Convention are implemented directly in Germany's domestic law and as such take, pursuant to Section 2 of the German Fiscal Code (Abgabenordnung), precedence over German tax law.[5]

The competent authority functioning is under German tax treaties mandated to the Federal Ministry of Finance (Bundesministerium der Finanzen). Pursuant to circular of 20 June 2011 (Bundessteuerblatt ("**BStBl**") I 2011, 674, which replaced an earlier similar circular) this function was delegated to the Federal Central Tax Office (Bundeszentralamt für Steuern) in relation to: (i) mutual agreement procedures relating to individual cases, (ii) the EU Arbitration Convention and (iii) bilateral APAs.[6] The Federal Ministry of Finance, however, remains the competent authority to conduct mutual agreement procedures of a general nature which concern (or may concern) a category of taxpayers. Within the Federal Central Tax Office there are two divisions handling MAP cases. The portfolio of one of the divisions focuses on EU Member States and the other on the remaining treaty partners. At the end of 2016, staff in charge of MAP within the Federal Central Tax Office consisted of 43 positions, which concerns two heads of division, six deputy-heads, 32 case analysts and three staff assistants. Furthermore, eight additional persons have been assigned to the divisions concerned for a temporary period. In 2016, roughly 33% of combined staff working time was dedicated to handle requests for APAs and roughly 66% to handle MAP cases other than APAs.

Germany issued guidance on the governance and administration of the mutual agreement procedure in a Federal Ministry of Finance circular on mutual agreement and arbitration procedures (BStBl I 2006, 461) of 13 July 2006 ("**MAP guidance**"), which is available at:

www.bzst.de/DE/Steuern_International/Verstaendigungsverfahren/Merkblaetter/merkblaetter_node.html.[7]

Recent developments in Germany

Germany signed in 2016 new treaties with Armenia, Finland and Turkmenistan, which not yet have entered into force. Furthermore, Germany reported that it has recently signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**Multilateral Instrument**"), inter alia with a view to make the necessary amendments to the MAP article under its tax treaties to be compliant with the Action 14 Minimum Standard in respect of all the relevant tax treaties. With the signing of the Multilateral Instrument, Germany also submitted its list of notifications and reservations to that instrument.[8] In relation to this standard, Germany reported it did not make reservation on the application of Article 16 of the Multilateral Instrument (concerning the mutual agreement procedure), except for Article 16(5)(a) regarding the modification of existing treaties to allow of submitting a MAP request to the competent authorities of either contracting state.[9] This reservation is in line with the requirements of the Action 14 Minimum Standard.

Furthermore, in April 2017, a circular regarding the revision of paragraph 5 of the MAP guidance mentioned above was published.[10] This circular explains the current tax administration position in relation to waiver of the right to MAP or arbitration. Another recent circular addresses the relationship between MAPs/APAs and internationally co-ordinated audits.[11] Germany indicated that a full revision of its 2006 MAP guidance is expected to be issued in 2018.

In addition, Germany also reported that the resources for the competent authority function at the level of the Federal Central Tax Office have been substantially increased during recent years and a further increase has already been decided and will be implemented during 2017. At the end of 2017, staff in Germany's competent authority will amount to 55 persons.

Basis for the peer review process

The peer review process entails an evaluation of Germany's implementation of the Action 14 Minimum Standard through an analysis of its legal and administrative framework relating to the mutual agreement procedure, as governed by its tax treaties, domestic legislation and regulations, as well as its MAP programme guidance and the practical application of that framework. The review process performed is desk-based and conducted through specific questionnaires completed by Germany, its peers and taxpayers. The period for evaluating Germany's implementation of the Action 14 Minimum Standard ranges from 1 January 2016 to 31 March 2017 ("**Review Period**"). This report, however, may depict some recent developments that have occurred after the Review Period, which at this stage will not impact the assessment of Germany's implementation of this minimum standard. In the update of this report, being stage 2 of the peer review process, these recent developments will be taken into account in the assessment and, if necessary, the conclusions contained in this report will be amended accordingly.

For the purpose of this report and the statistics below, in assessing whether Germany is compliant with the elements of the Action 14 Minimum Standard that relate to a specific treaty provision, the newly negotiated treaties or the treaties as modified by a protocol, as described above, were taken into account, even if it concerns a replacement of an existing treaty. Furthermore, the treaty analysis also takes into account the treaty with the former Czechoslovakia, USSR and Yugoslavia for those jurisdictions for which this treaty is still being applied by Germany (see above). As it concerns three tax treaties that are

applicable to multiple jurisdictions, each of these treaties are only counted as one treaty for this purpose. Reference is made to Annex A for the overview of Germany's tax treaties regarding the mutual agreement procedure.

The questionnaires for the peer review process were sent to Germany and the peers on 7 March 2017. While the commitment to the Action 14 Minimum Standard only starts from 1 January 2016, Germany opted to provide information on the period starting as from 1 January 2015 (the "**look back period**").

In total 24 peers provided input: Australia, Belgium, Canada, Denmark, France, Greece, India, Ireland, Italy, Japan, Liechtenstein, the Netherlands, Portugal, Russia, Singapore, the Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. These peers represent approximately 75% of post-2015 MAP cases in Germany's inventory on 31 December 2016. Input was also received from taxpayers. Broadly all peers indicated having good working relationships with Germany with regard to MAP and their willingness to settle cases, but some peers also raised issues regarding the (close) relationship of Germany's competent authority with the tax administrations of the Länder and the long time it can take for receiving a position paper.

Germany provided extensive answers in its questionnaire and provided detailed additional information, which was submitted on time. Germany was very responsive in the course of the drafting of the peer review report by responding timely and comprehensively to requests for additional information, and provided further clarity where necessary. In addition, Germany provided the following information:

- MAP profile[12]; and
- MAP statistics[13] according to the MAP Statistics Reporting Framework (see below).

Finally, Germany is an active member of the FTA MAP Forum and has shown good co-operation during the peer review process. Germany provided detailed peer input and made constructive suggestions on how to improve the process with the concerned assessed jurisdictions.

Overview of MAP caseload in Germany

The analysis of Germany's MAP caseload relates to the period that started on 1 January 2016 and ended on 31 December 2016 (the "**Statistics Reporting Period**"). According to the statistics provided by Germany, on 31 December 2016 its MAP inventory was 1 180 cases, 519 of which concern attribution/allocation cases and 661 other cases. During the Statistics Reporting Period 353 cases were started and 350 cases were closed.

General outline of the peer review report

This report includes an evaluation of Germany's implementation of the Action 14 Minimum Standard. The report comprises the following four sections:

A. Preventing Disputes;

B. Availability and Access to MAP;

C. Resolution of MAP cases; and

D. Implementation of MAP agreements.

Each of these sections is divided into elements of the Action 14 Minimum Standard, as described in the terms of reference to monitor and review the implementation of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective ("**Terms of Reference**").[14] Apart from analysing Germany's legal framework and its administrative practice, the report also incorporates peer input and responses to such input by Germany. Furthermore, the report depicts the changes adopted and plans shared by Germany to implement elements of the Action 14 Minimum Standard where relevant. The conclusion of each element identifies areas for improvement (if any) and provides for recommendations how the specific area for improvement should be addressed.

The objective of Action 14 Minimum Standard is to make dispute resolution mechanisms more effective and concerns a continuous effort. Therefore, this peer review report includes recommendations that Germany continues to act in accordance with a given element of the Action 14 Minimum Standard, even if there is no area for improvement for this specific element.

Notes

1. The tax treaties Germany has entered into are available at: www.bundesfinanzministerium.de/Web/DE/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/staatenbezogene_info.html. The treaties that are signed but have not yet entered into force are with Armenia (2016), Finland (2016), South Africa (2008) and Turkmenistan (2016). Reference is made to Annex A for the overview of Germany's tax treaties.
2. Germany continues to apply the treaty with former Czechoslovakia to the Czech Republic and the Slovak Republic, the treaty with the former USSR to Moldova, and the treaty with former Yugoslavia to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia. Germany has signed new treaties with Armenia and Turkmenistan (not yet in force), but currently applies the treaty with the former USSR to these states. The treaty analysis, however, already takes into account the newly negotiated treaties.
3. This concerns treaties with Armenia, Australia, Austria, Canada, France, Japan, Jersey, Liechtenstein, Luxembourg, the Netherlands, Sweden, Switzerland, United Kingdom and the United States. See for a discussion element C.6 of this report. Reference is made to Annex A for the overview of Germany's tax treaties that include an arbitration clause.
4. Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC) of 23 July, 1990.
5. See in this respect also the circular of Germany's Federal Ministry of Finance on mutual agreement and arbitration procedures of 13 July 2006 (BStBL I 2006, 461), par. 1.1.4.
6. Available at: www.bzst.de/DE/Steuern_International/Advance_Pricing_Agreements/Vorschriften/BMF_Erlass_20110620.pdf (accessed on 22 August 2017).
7. An non-binding English translation is available at: https://www.oecd.org/ctp/dispute/47655635.pdf.
8. Available at: www.oecd.org/tax/treaties/beps-mli-position-germany.pdf.
9. Ibid. This reservation on Article 16 – Mutual Agreement Procedure reads: "Pursuant to Article 16(5)(a) of the Convention, the Federal Republic of Germany reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS

Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified".

10. Circular of Germany's Federal Ministry of Finance of 5 April 2017 (BStBL I 2017, 707).

11. Circular of Germany's Federal Ministry of Finance of 6 January 2017 (BStBL I 2017, 89).

12. Available at: www.oecd.org/tax/dispute/Germany-Dispute-Resolution-Profile.pdf.

13. The MAP statistics of Germany are included in Annex B and C of this report.

14. Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf).

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OECD (2016), *BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review Documents,* www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf (accessed on 22 August 2017).

Part A

Preventing disputes

[A.1] Include Article 25(3), first sentence, of the OECD Model Tax Convention in tax treaties

Jurisdictions should ensure that their tax treaties contain a provision which requires the competent authority of their jurisdiction to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of their tax treaties.

1. Cases may arise concerning the interpretation or the application of tax treaties that do not necessarily relate to individual cases, but are more of a general nature. Inclusion of the first sentence of Article 25(3) of the *OECD Model Tax Convention* (OECD, 2015) in tax treaties invites and authorises competent authorities to solve these cases, which may avoid submission of MAP requests and/or future disputes from arising, and which may reinforce the consistent bilateral application of tax treaties.

Current situation of Germany's tax treaties

2. Out of Germany's 93 tax treaties, 91 contain a provision equivalent to Article 25(3), first sentence, of the *OECD Model Tax Convention* (OECD, 2015) requiring their competent authority to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty.[1] In one of the other two treaties the provision is not included and in the other one the word "interpretation" is not included, by which this treaty is considered not including the full equivalent of Article 25(3), first sentence, of the *OECD Model Tax Convention* (OECD, 2015).

3. Germany reported that it is of the view that the application of a tax treaty also comprises the interpretation thereof and that the distinction made between both terms does not have legal or practical consequences. In that regard, it reported that even if a tax treaty does not include the full equivalent of Article 25(3), first sentence, of the *OECD Model Tax Convention* (OECD, 2015), Germany will be able to endeavour to solve any difficulties or doubts regarding the interpretation and/or application of such treaty.

Anticipated modifications

4. Several peers reported that the provisions of their tax treaty with Germany meet some or all of the requirements of the relevant elements of the Action 14 Minimum Standard. One peer mentioned that it is about to conclude a new treaty with Germany, which includes all the required elements under the Action 14 Minimum Standard. Some peers also reported that their treaty with Germany does not meet some or all of the requirements of the relevant

elements of the Action 14 Minimum Standard. In this respect, four peers indicated that they envisage implementing these elements by signing the Multilateral Instrument.

5. Germany reported it has recently signed the Multilateral Instrument with a view to inter alia update – on the basis of Article 16(4)(c)(1) of that instrument – tax treaties that do not contain a provision equivalent to Article 25(3), first sentence, of the *OECD Model Tax Convention* (OECD, 2015). It in that regard reported that the two treaties that do not include such equivalent are likely not to be modified via the Multilateral Instrument, as for one treaty bilateral negotiations are pending and for the other treaty because of its specific character. Both treaties also have not been listed by Germany as covered tax agreements. Where these two tax treaties will indeed not be modified by the Multilateral Instrument, Germany reported it will subsequently strive to update them via bilateral negotiations to be compliant with element A.1, for which in case of one treaty such negotiation is pending. In addition, Germany reported it will seek to include Article 25(3), first sentence, of the *OECD Model Tax Convention* (OECD, 2015) in all of its future treaties.

6. Most of the peers that provided input mentioned that their treaty with Germany meets the requirement under element A.1. One of the peers is a party to one of the two treaties mentioned above that do not include the equivalent of Article 25(3), first sentence, of the *OECD Model Tax Convention* (OECD, 2015). This peer indicated that it is about to conclude a new tax treaty with Germany that meets the requirement under element A.1. Another peer mentioned it recently negotiated a new treaty with Germany that also meets the requirement under element A.1.

Conclusion

	Areas for Improvement	Recommendations
[A.1]	Two out of 93 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention, OECD (2015).	Where treaties do not include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, OECD (2015) and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, Germany should request the inclusion of the required provision via bilateral negotiations, or finalise already pending negotiations. In addition, Germany should maintain its stated intention to include the required provision in all future treaties.

[A.2] Provide roll-back of bilateral APAs in appropriate cases

Jurisdictions 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.

7. An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustment thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.[2] The methodology to be applied prospectively under a bilateral or multilateral APA may be relevant in determining the treatment of comparable controlled transactions in previous filed years. The "roll-back" of an APA to these previous filed years may be helpful to prevent or resolve potential transfer pricing disputes.

Germany's APA programme

8. By decree of 29 November 2004 the Federal Ministry of Finance, in its role as competent authority, transferred the responsibility to conclude bilateral or multilateral APAs to the Federal Finance Office (Bundesamt für Finanzen). This responsibility was subsequently transferred to the Federal Central Tax Office as from its formation on 1 January 2006. Germany has run since that date an APA program. It is allowed to enter into bilateral and multilateral APAs, but only for those cases for which a tax treaty is applicable, as Germany considers the provision concerning the mutual agreement procedure in tax treaties as the legal basis for bilateral and multilateral APAs.[3]

9. Germany issued guidance on APAs in its circular of 5 October 2006 ("**APA guidance**").[4] This guidance sets out in detail what an APA is, which government institutions are responsible for handling APA requests, for what issues APAs can be obtained, when and by whom they can be requested, how the process for obtaining an APA functions in Germany, what information is to be included in a request for an APA, how an agreed APA is implemented in Germany, the legal effects and terms of APAs, the possibility to renew APAs and the possibility of a simplified procedure for small and medium sized enterprises to obtain APAs.

10. The Federal Central Tax Office co-ordinates the content of an APA with the competent tax administrations of the Länder.[5] These latter are responsible for granting the domestic advance approval of transfer prices that implements the bilateral or multilateral agreement and for issuing the relevant tax assessment notes. In As described in paragraph 4.3 of Germany's APA guidance, the Federal Central Tax Office will immediately inform the tax administration of the Länder when a taxpayer files an APA request. Thereafter, it will form an APA team with the tax administration(s) of the Land or Länder concerned, whereby the Federal Central Tax Office functions as a team co-ordinator and communicates and negotiates with the other competent authority concerned. When a bilateral or multilateral APA is reached between the competent authorities and once accepted by taxpayers, then the competent tax administrations of the Länder are obliged – as described in paragraph 5.1 of Germany's APA guidance – to issue binding advance approval to the same effect.

11. Paragraph 3.8 of Germany's APA guidance stipulates that an APA term generally commences at the beginning of the fiscal year in which the formal APA request is filed. In addition, this paragraph also sets out that an earlier commencement date may be allowed if on the date on which the APA request is filed no tax return has been submitted for an earlier fiscal year and the due date for such return has not yet expired.[6] In paragraph 2.3 and 3.1 of the APA guidance it is further addressed that the date on which the APA request is received by the Federal Central Tax Office determines the earliest date on which the term of the APA may commence. Typically, the term of application is three to five years.[7]

Roll-back of bilateral APAs

12. In paragraph 7.3 of its APA guidance it is stipulated that in Germany it is possible to apply an APA retroactively to assessment periods preceding the term of the APA. This under the requirement that it is requested by taxpayers, the other jurisdiction concerned agrees and certain other conditions are fulfilled. Generally, an effective granting of a roll-back of an existing bilateral APA requires proof from taxpayers that the circumstances in preceding fiscal years match the circumstances present in the fiscal years covered by the APA. Furthermore, taxpayers have to provide documentation for assessing these preceding fiscal years, which must match the documentation for the period covered by the APA.

13. From a formal perspective the preceding fiscal years, however, cannot be covered by the APA. Formally, roll-back of such APA to preceding fiscal years is in Germany only possible through the mutual agreement procedure. Paragraph 7.3 of Germany's APA guidance mentions in this respect that such process has to be initiated separately from the APA process, although both processes can be conducted simultaneously. From a legal perspective, however, the conclusion of both processes is done independently. In practice, however, bilateral APAs and roll-back of such APAs can be requested in the same document. Also the procedures are dealt with simultaneously by the same personnel and agreements are also (almost always) concluded at the same time and in the same document. Germany indicated that no extra conditions are imposed for effectively granting a roll-back of bilateral APAs, except for those as mentioned in the preceding paragraph. The formal requirements as set out in the APA guidance therefore do not create a practical impediment to effective grant roll-back of bilateral APAs.

Practical application of roll-back of bilateral APAs

14. Peers generally reported that they do negotiate and agree bilateral APAs with Germany. Not all peers, however, have experience with roll-back of such bilateral APAs for the years under review or in general. In total six peers reported they have experiences with Germany regarding roll-back of bilateral APAs. Their experiences show that Germany is open to provide for roll-back of existing bilateral APAs in appropriate cases. These peers further reported positive working experiences with Germany in the process of effectively providing for roll-back of APAs and indicated that they did not encounter any issues in relation hereto.

15. Germany reported that as of 1 January 2015 taxpayers requested for the roll-back of an APA in 19 cases (six in 2015 and 13 in 2016). The actual number of APAs for which a roll-back was granted is two in 2015 and 13 in 2016.

16. Peers reported that since 1 January 2015 taxpayers have in approximately 10-15 cases requested for roll-back of their bilateral APAs to which Germany is a signatory party. As regards those requests, peers reported that in a number of these cases a roll-back was already agreed on by the competent authorities and for the remaining cases the request is still under consideration.

Anticipated modifications

17. Germany did not indicate that it anticipates any modifications in relation to element A.2.

Conclusion

	Areas for Improvement	Recommendations
[A.2]	-	As Germany has done thus far, it should continue to provide for roll-back of bilateral APAs in appropriate cases.

Notes

1. These 91 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, the treaty with the former USSR that Germany continues to apply to Moldova, and the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
2. This description of an APA based on the definition of an APA in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.
3. See paragraph 1.2 of Germany's APA guidance (next footnote).
4. Available at: www.bzst.de/DE/Steuern_International/Advance_Pricing_Agreements/Merkblaetter/merkblaetter_node.html. An non-binding English translation is available at: https://www.oecd.org/ctp/dispute/47655669.pdf (accessed on 22 August 2017).
5. See paragraph 2.1 of Germany's APA guidance.
6. Other commencement dates may also be agreed on in order to take into account normal practice in other jurisdictions, if this other date does not impair the interest of the Germany tax authorities. See paragraph 3.8 of Germany's APA guidance.
7. Paragraph 3.8 of Germany's APA guidance also addresses that care should be taken to avoid the expiry of all or most of the term before the APA is concluded. If necessary, the taxpayer should alter its APA request accordingly.

Bibliography

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Part B

Availability and Access to MAP

[B.1] Include Article 25(1) of the OECD Model Tax Convention in tax treaties

Jurisdictions should ensure that their tax treaties contain a MAP provision which provides that when the taxpayer considers that the actions of one or both of the Contracting Parties result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty, the taxpayer, may irrespective of the remedies provided by the domestic law of those Contracting Parties, make a request for MAP assistance, and that the taxpayer can present the request within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.

18. For resolving cases of taxation not in accordance with the provisions of the tax treaty, it is necessary that tax treaties include a provision allowing taxpayers to request a mutual agreement procedure and that this procedure can be requested irrespective of the remedies provided by the domestic law of the treaty partners. In addition, to provide certainty to taxpayers and competent authorities on the availability of the mutual agreement procedure, a minimum period of three years for submission of a MAP request, beginning on the date of the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty, is the baseline.

Current situation of Germany's tax treaties

Inclusion of Article 25(1), first sentence of the OECD Model Tax Convention

19. Out of Germany's 93 tax treaties, one treaty contains a provision equivalent to Article 25(1), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a) as changed by the *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report* (Action 14 final report, OECD (2015b), allowing taxpayers to submit a MAP request to the competent authority of either state when they consider that the actions of one or both of the treaty partners result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty and that can be requested irrespective of the remedies provided by domestic law of either state. Further, 65 treaties include a provision equivalent to Article 25(1), first sentence, of the *OECD Model Tax Convention* (OECD, 2015) as it read prior to the adoption of that report.

20. The 27 remaining tax treaties that do not contain a provision equivalent to Article 25(1), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a), either as changed by the *Action 14 final report* (OECD, 2015b) or as it read prior to that report can be categorised as follows:

Provision	Number of treaties
A variation to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report, OECD (2015b) whereby the taxpayer can only submit a MAP request to the competent authorities of the contracting state of which they are resident.	24[1]
A variation to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report, OECD (2015b) whereby the taxpayer can only submit a MAP request to the competent authorities of the contracting state of which they are resident and whereby the taxpayer cannot submit such request irrespective of the remedies provided by the domestic laws of the contracting states.	1
A variation to Article 25(1), first sentence, of the OECD Model Tax Convention, OECD (2015a) as it read prior to the adoption of the Action 14 final report, OECD (2015b) whereby the taxpayer can only submit a MAP request to the competent authorities of the contracting state of which they are resident and whereby the occurrence of double taxation is required.	1
A variation to Article 25(1), first sentence, of the OECD Model Tax Convention, OECD (2015a) as it read prior to the adoption of the Action 14 final report, OECD (2015b) whereby taxpayers are not granted the specific right to request for MAP with the competent authority of the state of its residence or, if his case comes under the non-discrimination article, to the competent authority of the state of which he is a national.	1[2]

21. The 24 treaties mentioned in the first row of the table above are considered not to have the full equivalent of Article 25(1), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a) as it read prior to the adoption of the *Action 14 final report* (OECD, 2015b), since taxpayers are not allowed to submit a MAP request in the state of which they are a national where the case comes under the non-discrimination article. However, for the following reasons 23 treaties are considered to be in line with this part of element B.1:

- The relevant tax treaty does not include a non-discrimination provision and only applies to residents of one of the states (three treaties);
- The non-discrimination provision only concerns the taxation of permanent establishments, which are not considered residents for treaty purposes (one treaty); and
- The non-discrimination provision of the relevant tax treaty only covers nationals that are resident of one of the contracting states, following which it is logical to only allow for the submission of MAP requests to the state of which the taxpayer is a resident (20 treaties).

22. For the remaining treaty the non-discrimination provision is almost identical to Article 24(1) of the *OECD Model Tax Convention* (OECD, 2015) and applies to both nationals that are and are not resident of one of the contracting states. This treaty is therefore considered not to be in line with the requirements under element B.1.

23. Further to the above, the two treaties separately mentioned in the table are also not considered to have the full equivalent to Article 25(1), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a), as they are not granted the specific right to request for MAP, or limit access to MAP to cases of "double taxation" instead of "taxation not in accordance with the provisions of the convention".

Inclusion of Article 25(1), second sentence of the OECD Model Tax Convention

24. Out of Germany's 93 tax treaties, 65 contain a provision equivalent to Article 25(1), second sentence, of the *OECD Model Tax Convention* (OECD, 2015a) allowing taxpayers to submit a MAP request within a period of three years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty.[3]

25. The remaining 28 treaties that do not contain such provision can be categorised as follows:

Provision	Number of treaties
No filing period for a MAP request[4]	20
Filing period less than three years for a MAP request (two years)	7
Filing period longer than three years for a MAP request (four years)	1

26. Paragraph 2.2.3 of Germany's MAP guidance stipulates that if the applicable tax treaty does not include a time limit for submission of a MAP request, Germany only takes into account such request when it has been filed within a period of four years from the notification of the tax measure in question and where no particular circumstances have precluded earlier assertion. Such domestic applicable timeframe is in line with the requirements under element B.1.

27. One peer mentioned that it was aware of a case where a taxpayer had initiated a court case in Germany in order to have its case to be dealt with in MAP. In April 2016 Finanzgericht Köln ruled in three cases (cases 2 K 2402/13, 2 K 2809/13 and 2 K 1205/15) on access to MAP in relation to the filing period for MAP requests. In all three cases the Federal Central Tax Office had rejected the request on the basis that it had been filed more than four years from the first notification of the action resulting in taxation not in accordance with the applicable tax treaty. The taxpayer claimed in all three cases that as the relevant tax treaty did not include a time limit for filing of MAP requests there would be no time limit. Finanzgericht Köln found differentiated solutions for the three cases. In one case, where Article 25(2) of the *OECD Model Tax Convention* (OECD, 2015a) stipulates that the competent authority that receives a request "[…] shall endeavor (…) to resolve the case by mutual agreement […]", the applicable treaty, stemming from the 1950s, only stipulated that the competent authority that receives a request *can* mutually agree with the other competent authority to avoid double taxation. From this wording the court concluded that the competent authority that receives a request has discretion whether to open a MAP and that rejecting a request that was filed more than four years after the first notification of the action that resulted in double taxation was not an inappropriate use of such discretion. The applicable treaty was in the meanwhile revised. In the second case, Finanzgericht Köln focused on whether the MAP provision of an old tax treaty (which also did not include an explicit time limit for MAP requests) or the MAP provision of the 2011 revised treaty (which included the three year time limit as defined in Article 25(1), second sentence, of the *OECD Model Tax Convention* (OECD, 2015a)) was applicable for the case under review. Finanzgericht Köln concluded that the MAP clause of the 2011 treaty was applicable and also confirmed the Federal Central Tax Office's decision to reject the request. In the third case the applicable treaty does not provide for a filing period of a MAP request and also does not include the second sentence of Article 25(2) of the *OECD Model Tax Convention* (OECD, 2015a) on the implementation of MAP agreements. In that regard Finanzgericht Köln ruled that in the absence of such filing deadline, in the absence of other justifications for rejecting the MAP request and with the possibility to implement a MAP agreement within the domestic time limits of the treaty partner, there was no justification to deny access to MAP because the request hereto was not filed within four years from the first notification of the action resulting in taxation not in accordance with the convention. Germany responded that the consequence of this ruling in relation to the intended update of Germany's MAP guidance is currently under review and that the relevant tax treaty is under negotiation to be in line with element B.1.

28. Another peer noted they had a case for which Germany denied access to MAP (not on the grounds that the objection raised by the taxpayer was not justified), as the taxpayer submitted its MAP request not to the competent authority of the jurisdiction in which it is a resident, which is required under the applicable tax treaty.

Anticipated modifications

29. Germany reported it has recently signed the Multilateral Instrument. Germany thereby reserved the right, as is allowed pursuant to Article 16(5)(a) of the Multilateral Instrument, not to apply the first sentence of Article 16(1) of that instrument to its existing tax treaties, such to allow taxpayers to submit a MAP request to the competent authority of either contracting state.[5] In this reservation, Germany declared to ensure that all of its tax treaties, which are considered covered tax agreements for purposes of the Multilateral Instrument, contain a provision equivalent to Article 25(1), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a), as it read prior to the adoption of the final report on Action 14. It subsequently declared to implement a bilateral notification or consultation process for those cases in which its competent authority considers the objection raised by a taxpayer in its MAP request as not being justified. Germany has introduced such notification process, which will be further discussed under element B.2.

30. With respect to the period of filing of a MAP request, as reflected in Article 25(1), second sentence, of the *OECD Model Tax Convention* (OECD, 2015a), Germany additionally reported that it intends – pursuant to Article 16(4)(a)(ii) of the Multilateral Instrument – to modify its tax treaties if these do not allow taxpayers to present a MAP request within a period of at least three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty. In that regard, Germany reported it has not reserved the right, as is allowed pursuant to Article 16(5)(b) of the Multilateral Instrument, not to apply the second sentence of Article 16(1) of that instrument.

31. Germany is currently in the process of analysing which of its tax treaties will be modified via the Multilateral Instrument, the outcome of which is dependent on the choices made by its treaty partners. Where the aforementioned tax treaties that do not contain a provision equivalent to Article 25(1), first and/or second sentence, of the *OECD Model Tax Convention* (OECD, 2015a) and which will not be modified by the Multilateral Instrument, Germany reported it will subsequently strive to update them via bilateral negotiations to be compliant with element B.1. In addition, Germany reported it will seek to include Article 25(1) of the *OECD Model Tax Convention* (OECD, 2015a), either as it read prior to the adoption of the final report on Action 14 or as amended by that report, in all of its future treaties.

32. Several peers reported that the provisions of their tax treaty with Germany meet all of the requirements of element B.1, which also includes one treaty that was above-identified as not meeting these requirements. One peer thereby mentioned that its treaty with Germany is regarding the timeline for submission of MAP requests less demanding than Article 25(1), second sentence, of the *OECD Model Tax Convention* (OECD, 2015a), as it does not include a period for such submission. Another peer reported it recently negotiated a new treaty with Germany, which includes a provision as is required under element B.1. Furthermore, two peers, for whom their treaty with Germany is identified as not having the full equivalent of Article 25(1) of the *OECD Model Tax Convention* (OECD, 2015a) noted that they currently negotiating a new treaty with Germany that will be in line with the requirements under element B.1. Other peers reported that their treaty with Germany is not fully in line with these requirements, but that they envisage updating their treaties via the Multilateral

Instrument so as to be in line with element B.1. Of these peers, one mentioned that its treaty with Germany does not allow for the submission of a MAP request to the state of nationality in case of the application of the non-discrimination clause and that it does not include a filing deadline. Furthermore, one peer specifically mentioned that where such modification via this instrument is not possible, it will discuss updating the treaty with Germany bilaterally.

Conclusion

	Areas for Improvement	Recommendations
[B.1]	Ten out of 93 tax treaties do not contain a provision that is equivalent to Article 25(1) of the OECD Model Tax Convention, OECD (2015a). Of those ten tax treaties: Three do not contain a provision that is the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention, OECD (2015a), either as it read prior to the adoption of the final report on Action 14 or as amended by that final report; Six do not contain a provision based on Article 25(1), second sentence of the OECD Model Tax Convention, OECD (2015a), allowing taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty; and One does not contain a provision that is the equivalent of Article 25(1), first and second sentence, of the OECD Model Tax Convention, OECD (2015a), either as it read prior to the adoption of the final report on Action 14 or as amended by that final report.	Where treaties do not include the equivalent of Article 25(1) of the OECD Model Tax Convention, OECD (2015a) and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, Germany should request the inclusion of the required provision via bilateral negotiations. This concerns both: • a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention, OECD (2015a) either: a. As amended in the final report of Action 14; or b. As it read prior to the adoption of final report of Action 14, thereby including the full sentence of such provision; and • a provision that allows taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. Specifically with respect to the treaty with the former USSR that is being applied to Moldova, Germany should, once it enters into negotiations with the jurisdictions for which it applies those treaties, request the inclusion of the required provision. In addition, Germany should maintain its stated intention to include the required provision in all future treaties.

[B.2] Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process

Jurisdictions should ensure that either (i) their tax treaties contain a provision which provides that the taxpayer can make a request for MAP assistance to the competent authority of either Contracting Party, or (ii) where the treaty does not permit a MAP request to be made to either Contracting Party and the competent authority who received the MAP request from the taxpayer does not consider the taxpayer's objection to be justified, the competent authority should implement a bilateral consultation or notification process which allows the other competent authority to provide its views on the case (such consultation shall not be interpreted as consultation as to how to resolve the case).

33. In order to ensure that all competent authorities concerned are aware of MAP requests submitted, for a proper consideration of the request by them and to ensure that taxpayers have effective access to MAP in eligible cases, it is essential that all tax treaties include a provision that either allows taxpayers to submit a MAP request to the competent authority:

i. of either treaty partner; or in the absence of such provision;

ii. where it is a resident, or to the competent authority of the state of which they are a national if their cases come under the non-discrimination article. In such cases,

jurisdictions should have in place a bilateral consultation or notification process where a competent authority considers the objection raised by the taxpayer in a MAP request as being not justified.

Domestic bilateral consultation or notification process in place

34. Out of Germany's 93 treaties, one treaty contains a provision equivalent to Article 25(1), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a) as changed by the *Action 14 final report* (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of either treaty partner.

35. Germany reported that when its competent authority preliminary concludes that there is no taxation not in accordance with the provision(s) of the applicable tax treaty it will inform the taxpayer hereof and explain the rationale for this preliminary conclusion. This way of hearing taxpayers was already practice prior to 2016. The German competent authority will subsequently invite the taxpayer to reconsider the request or otherwise to provide any additional information that might have been overlooked. If the final conclusion is that the objection raised in the MAP request is indeed not justified, then the German competent authority will issue a notice of rejection to taxpayers, which includes information on the possibility of an administrative appeal to this decision.

36. Early 2016 Germany introduced a bilateral consultation and notification system for those tax treaties that do not contain a provision equivalent to Article 25(1), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a) as changed by the *Action 14 final report* (OECD, 2015b). Under this system the competent authority is expected to notify the competent authority of the other jurisdiction concerned of the preliminary conclusion that an objection raised in a MAP request is considered not justified, thereby stating the rationale for this conclusion. It then provides the other competent authority concerned the opportunity to provide its view on this conclusion before the final conclusion is made and the case is closed. Alternatively, the case and the preliminary conclusion may briefly be addressed during a competent authority meeting and accordingly be mentioned in the minutes of such meeting.

Practical application

37. Germany reported that as from 1 January 2015 its competent authority considered in eight cases that the objection raised by taxpayers in their MAP requests was not justified. This concerns six cases in 2015 and two cases in 2016. For the six cases in 2015, Germany provided the following reasons for the consideration objection not justified: (i) the taxation concerned was not covered by the relevant tax treaty (two cases); (ii) failure to meet the time limit in the tax treaty for refunding of withholding taxes (one case), and (iii) other situations of no taxation not in accordance with the tax treaty (three cases), for which further details were provided. For the two cases in 2016, Germany reported that it considered that there was no taxation not in accordance with the tax treaty, for which further details were provided. In one of these two cases it notified/consulted the other competent authority concerned, as for the other case the decision on the objection not justified was already made prior to the introduction of the notification system.

38. Peers have indicated not being aware of any cases for which the German competent authority denied access to MAP. They also reported not having been consulted/notified of a case where the German competent authority in 2016 considered the objection raised in a MAP request as not justified. This for the one case mentioned above can be clarified by the fact that it concerned a notification/consultation to the competent authority of a jurisdiction

that did not provide peer input. One peer reported one case for which both the German and its own competent authority agreed to close the case in 2017, because the taxpayer provided differing and conflicting information to the competent authorities.

Anticipated modifications

39. As previously discussed under element B.1, Germany has recently signed the Multilateral Instrument. Specifically regarding element B.2, Germany reserved the right, as is allowed pursuant to Article 16(5)(a) of the Multilateral Instrument, not to apply the first sentence of Article 16(1) of that instrument to existing treaties, such to allow taxpayers to submit a MAP request to the competent authority of either contracting state. [6] Where tax treaties will not be amended via the Multilateral Instrument, Germany will continue to apply its bilateral notification and consultation process when its competent authority considers the objection raised in a MAP request not to be justified. Germany further reported that it currently has no intention to replace existing tax treaties that include the equivalent of Article 25(1) of the *OECD Model Tax Convention* (OECD, 2015a) as it read prior to the adoption of the *Action 14 final report* (OECD, 2015b) with Article 25(1) of the *OECD Model Tax Convention* (OECD, 2015a) as it read after adoption of that report.

Conclusion

	Areas for Improvement	Recommendations
[B.2]	-	As Germany has done thus far, it should continue to apply its notification/consultation process for future cases in which its competent authority considers the objection raised in a MAP request as not being justified.

[B.3] Provide access to MAP in transfer pricing cases

Jurisdictions should provide access to MAP in transfer pricing cases.

40. Where two or more tax administrations take different positions on what constitutes arm's length conditions for specific transactions between associated enterprises, economic double taxation may occur. Not granting access to MAP with respect to a treaty partner's transfer pricing adjustment, with a view to eliminating the economic double taxation that may arise from such adjustment, will likely frustrate the main objective of tax treaties. Countries should thus provide access to MAP in transfer pricing cases.

Legal and administrative framework

41. Out of Germany's 93 tax treaties, 52 contain a provision that is the equivalent of Article 9(2) of the *OECD Model Tax Convention* (OECD, 2015a), requiring their state to make a correlative adjustment in case a transfer pricing adjustment is imposed by the other treaty partner.[7] Furthermore, one treaty includes a provision that is based on Article 9(2) of the *OECD Model Tax Convention* (OECD, 2015a), but whereby the granting of a corresponding adjustment is only allowed through the mutual agreement procedure.

42. Germany is a signatory to the EU Arbitration Convention, which provides for a mutual agreement procedure supplemented with an arbitration procedure for settling transfer pricing disputes and disputes on the attribution of profits to permanent establishments between EU Member States.

43. Access to MAP should be provided in transfer pricing cases regardless of whether the equivalent of Article 9(2) is included in Germany's tax treaties and irrespective of whether its domestic legislation enables it to do corresponding adjustments. In accordance with element B.3, as translated from the Action 14 Minimum Standard, Germany states it will always provide access to MAP for transfer pricing cases, provided that the general requirements under the MAP article of the applicable tax treaty are met. In this respect, paragraph 2.3.2 of its MAP guidance includes examples of situations where there can be taxation not in accordance with the provisions of a tax treaty, which also include transfer pricing adjustments.[8] Paragraph 2.3.2 specifically addresses that access to MAP is available for transfer pricing cases even in the absence of specific provisions in the applicable tax treaty.

Application of legal and administrative framework in practice

44. Germany reported that it has since 1 January 2015 not denied access to MAP on the basis that the case concerned a transfer pricing case.

45. Peers have indicated not being aware of a denial of access to MAP by Germany for transfer pricing cases since 1 January 2015. Also taxpayers reported not being aware of such denial. One peer mentioned that there is a hurdle in discussing transfer pricing cases in MAP due to the fact that the treaty with Germany does not include the equivalent of Article 9(2) of the *OECD Model Tax Convention* (OECD, 2015a). This, however, is not caused because Germany does not grant or is not willing to grant access to MAP for these cases, but this follows from the position of the peer. This peer also mentioned it is negotiating amendments to the treaty with Germany and that the issue could be satisfactorily resolved when the Multilateral Instrument is signed.

Anticipated modifications

46. Germany reported that it is in favour of including Article 9(2) of the *OECD Model Tax Convention* (OECD, 2015a) in its tax treaties where possible. In that regard, Germany recently signed the Multilateral Instrument to incorporate – on the basis of Article 17(2) of that instrument – Article 9(2) of the *OECD Model Tax Convention* (OECD, 2015a) in those tax treaties that do not contain the equivalent of that provision. Germany, however, has, pursuant to Article 17(3)(a) of the Multilateral Instrument, reserved the right not to apply Article 17(2) to those treaties that already include a provision equivalent to Article 9(2) of the *OECD Model Tax Convention* (OECD, 2015a).[9] In addition, Germany reported it will seek to include Article 9(2) of the *OECD Model Tax Convention* (OECD, 2015a) in all of its future treaties. In addition, Germany will seek to include Article 9(2) of the *OECD Model Tax Convention* (OECD, 2015a) in all of its future treaties.

Conclusion

	Areas for Improvement	Recommendations
[B.3]	-	As Germany has thus far granted access to the MAP in eligible transfer pricing cases, it should continue granting access for these cases.

[B.4] Provide access to MAP in relation to the application of anti-abuse provisions

Jurisdictions should provide access to MAP in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty.

47. There is no general rule denying access to MAP in cases of perceived abuse. In order to protect taxpayers from arbitrary application of anti-abuse provisions in tax treaties and in order to ensure that competent authorities have a common understanding on such application, it is important that taxpayers have access to MAP if they consider the interpretation and/or application of a treaty anti-abuse provision as being incorrect. Subsequently, to avoid cases in which the application of domestic anti-abuse legislation is in conflict with the provisions of a tax treaty, it is also important that taxpayers have access to MAP in such cases.

Legal and administrative framework

48. None of Germany's 93 tax treaties allows competent authorities to restrict access to MAP for cases when a treaty anti-abuse provision applies or when there is a disagreement between the taxpayer and the tax authorities as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty. In addition, also the domestic law and/or administrative processes of Germany do not include a provision allowing its competent authority to limit access to the MAP for cases in which there is a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty.

49. The document that constitutes the basis for Germany's negotiations of tax treaties (2013 version) includes a provision in Article 28 stipulating that:

1. This Agreement shall not be interpreted as to prevent
   - a Contracting State from applying its domestic legal provisions on the prevention of tax evasion or tax avoidance;
   - the Federal Republic of Germany from imposing its taxes on amounts to be included in the income of a resident of the Federal Republic of Germany under parts 4, 5, and 7 of the German External Tax Relations Act (Außensteuergesetz).
2. If the foregoing provisions result in double taxation, the competent authorities shall consult each other pursuant to paragraph 3 of Article 24 on how to avoid double taxation.

50. This provision, or a variation thereto, has been included in 37 of Germany's tax treaties. Irrespective of whether this provision is included in tax treaties, Germany reported that it considers issues relating to the application of a treaty anti-abuse provision and the question whether the application of a domestic anti-abuse provision is in conflict with the provision of a tax treaty within the scope of MAP, provided that the general requirements under the MAP article of the applicable tax treaty are met. This, however, is not addressed in Germany's MAP guidance.

Practical application

51. Germany reported that it has since 1 January 2015 not denied access to MAP in cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic law anti-abuse provision is conflict with the provisions of a tax treaty.

52. Peers have indicated not being aware of a denial of access to MAP by Germany in relation to the application of treaty and/or domestic anti-abuse provisions since 1 January 2015. Also taxpayers reported not being aware of such denial.

Anticipated modifications

53. Germany did not indicate that it anticipates any modifications in relation to element B.4.

Conclusion

	Areas for Improvement	Recommendations
[B.4]	-	As Germany has thus far granted access to the MAP in eligible cases concerning whether the conditions for the application of a treaty anti-abuse provision have been met or whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty, it should continue granting access for these cases.

[B.5] Provide access to MAP in cases of audit settlements

Jurisdictions should not deny access to MAP in cases where there is an audit settlement between tax authorities and taxpayers. If jurisdictions have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, jurisdictions may limit access to the MAP with respect to the matters resolved through that process.

54. An audit settlement procedure can be valuable to taxpayers by providing certainty on their tax position. Nevertheless, as double taxation may not be fully eliminated by agreeing on such settlements, taxpayers should have access to the MAP in such cases, unless they were already resolved via an administrative or statutory disputes settlement/resolution process that functions independent from the audit and examination function and which is only accessible through a request by taxpayers.

Legal and administrative framework

Audit settlements

55. Under German domestic law there is no formal audit settlement process available. In other words, there is no process in existence that allows auditors and taxpayers to enter into settlements in the course of an audit or thereafter. In Germany it is nevertheless possible that taxpayers and auditors of the concerned tax administration agree on the findings of the audit. Germany reported that such agreements, however, will generally not be binding on taxpayers and that they retain the right to file at a later stage an objection against the tax assessment notice that implements the outcome of the audit process.

56. With respect to access to MAP in cases where taxpayers and the auditors agreed on the finding of the audit, Germany reported that such access will generally not be denied based on the reason that the taxpayer concerned accepted the findings of the audit.

Waiver of rights to request MAP assistance

57. Under German domestic law taxpayers have the possibility to waive their rights to domestic appeals and waive their rights to request MAP. Germany reported that this possibility does not specifically relate to MAP, but is recognised in all areas of German procedural law. Paragraph 5 of Germany's MAP guidance, as it read prior to the update in April 2017, noted that the background for such waivers could be to accelerate and simplify the taxation process for taxpayers.[10] Germany further reported that the underlying intention of discussing waivers was to facilitate taxpayers that would in any case not submit a MAP request (i.e. because of a low amount of tax in question or that a corresponding adjustment could be obtained in the other jurisdiction concerned without having recourse to MAP) to have their case dealt with in a speedier manner.

58. When taxpayers declared such waiver, Germany reported that it will not grant access to MAP. However, as such waiver is only one-sided, it may for example occur that in transfer pricing cases the associated enterprise resident in the other treaty jurisdiction submits a MAP request. Paragraph 5 of Germany's MAP guidance, as it read prior to the update in April 2017, stipulated that in such situation and where both the German and the foreign associated enterprise waived their right on MAP, Germany will not consent to conduct a mutual agreement procedure.[11] In relation hereto, Germany noted that element B.5 only requires that audit settlements should not preclude access to MAP and that as explicit waivers by taxpayers are not audit settlements, the practice described in the MAP guidance as it read prior to the update in April 2017 was in line with element B.5. However, it also reported that the Federal Ministry of Finance is aware that some may consider that this practice is not in line with the spirit of the Action 14 Minimum Standard. In that regard Germany reported that during a meeting in March 2017 between the representatives from the Federal Ministry of Finance in charge of international tax matters and the representatives from ministries of Finance of the sixteen Länder it was decided to revise paragraph 5 of Germany's MAP guidance (which is discussed separately under element B.8 and in relation to audit settlements under element B.10).

59. This revised version was published on 5 April 2017 and does no longer include a reference on waiver of rights on requesting MAP assistance. Instead it is stated that access to MAP (and arbitration) is a right for taxpayers that is enshrined in German law, which may not obstructed by tax administrations.[12]

Agreement on facts

60. Germany further reported that it has an instrument in place, which was developed in case law and which is confirmed in Germany's administrative practice, that allows formal agreements on facts of a case between taxpayers and the local tax administration. The circumstances under which such agreements are possible, as also the consequences of entering into such agreements, are laid down in a circular of Germany's Federal Ministry of Finance of 30 July 2008 (BStBl I 2008, 831).[13] In paragraph 2.3 of this circular it is noted that an agreement on facts is permissible within the context of a legal ruling to the extent that it is necessary to decide on a preliminary question concerning facts. This instrument can be used both in audit situations as well as in other situations (such as in the course of

an administrative appeals procedure) for reaching an agreement on facts where establishing the detailed facts of the case would require disproportionate efforts.[14]

61. An agreement reached has, pursuant to paragraph 5.3 of the circular, to be signed by the tax official in charge of the taxpayer's tax assessment before it becomes effective. This tax official is not the same person as the auditor. In that regard Germany reported that in many cases, particularly those concerning large taxpayers, the tax official is not part of the same local tax administration office. Taxpayers and the local tax administration office are both bound by an agreement on facts, which is also set out in paragraph 1 and 6.1 of the circular of 30 July 2008 as mentioned above.[15]

62. With respect to access to MAP in cases where taxpayers and the local tax office entered into an agreement on facts, Germany reported that such access will generally not be denied based on the reason that there was such an agreement. However, as mentioned above, Germany updated its MAP guidance in April 2017. In this updated guidance it specified whether taxpayers have access to MAP in case of an agreement on facts between a taxpayer and the local tax administration. Paragraph 5 of this updated guidance stipulates that in situations where an agreement on facts was entered into, it is generally no longer possible to retroactively establish the facts during a MAP or arbitration procedure in such a way that it possesses evidentiary value. For that reason paragraph 5 of Germany's MAP guidance now stipulates that it is appropriate to require, when entering into an agreement on facts, that taxpayers waiver their right to make the substance of an agreement subject to an arbitration procedure (either under the EU Arbitration Convention or a tax treaty). Apart from that, Germany will grant access to MAP in such situation, but – due to the binding nature of an agreement on facts – will only seek to obtain correlative relief by the other jurisdiction concerned and not deviate from the content of the agreement reached or have such case referred to an arbitration procedure.

Administrative or statutory dispute settlement/resolution process

63. Germany has no administrative or statutory dispute settlement/resolution process in place that allows the German competent authority to deny access to MAP for issues resolved through that process.

Practical application

64. Germany reported that since 1 January 2015 it had not received any MAP requests whereby the taxpayer had waived its right to request MAP assistance. Germany indicated that waivers have occurred in the context of audits in Germany, but that the Federal Central Tax Office is not aware of the actual number of explicit waivers of the right to request MAP assistance that have occurred in the context of audits, as audits are generally a matter with state tax administrations. It further reported that it did not deny access to MAP for cases where the issue presented by the taxpayer has already been resolved through an audit settlement between the taxpayer and the local tax administration.

65. Peers generally indicated that they were not aware of a denial of access to MAP by Germany since 1 January 2015 in case where there was already an agreement on facts between the taxpayer and the local tax administration. Also taxpayers reported not being aware of such denial. Some peers, however, also noted that taxpayers are in Germany offered settlements in the course of an audit under the condition that they waive their rights on MAP. In this respect, one peer indicated that it has seen examples where the German tax administration proposed an audit settlement entailing taxpayers that they accept a given

(part of the) transfer pricing adjustment and waive their right to submit a MAP request for the case under review. Another peer reported being informed of a number of cases that longstanding practice at the level of local tax administrations in Germany to propose audit settlements under the condition that taxpayers waive their rights on MAP continued throughout 2016. In these cases the peer's competent authority was asked to grant unilateral relief whereby the taxpayer already entered into a settlement agreement with the German local tax administration. This peer also reported that it has discussed the practice of the local tax administrations with the German competent authority, which informed the peer that such settlement proposals are not valid and that this was also communicated to the relevant audit teams. This peer, however, acknowledged that, from its perspective, the German competent authority had no power to compel local auditors to desist from such practices. Furthermore, a third peer noted having encountered one situation where a taxpayer had claimed that Germany had discouraged access to MAP. This concerned a case where the local tax administration in Germany proposed an agreement with the unwritten condition that the taxpayer would not seek MAP assistance. Germany responded that if such a situation (i.e. auditors offering a reduced adjustment if a taxpayer waives its right to MAP) should occur, such auditor behaviour would in its view be inappropriate and is not suggested in or endorsed by any of Germany's official guidance. Germany added to this respect that taxpayers experiencing such behaviour have the opportunity to complain to the auditor's superiors, such as to the head of the relevant local tax administration, to the relevant regional tax office or to the highest tax authority of the relevant Land (generally the State Ministry of Finance). In case of federal auditors, to complain to the relevant superiors in the Federal Central Tax Office (up to the head of that office), or to the Federal Ministry of Finance. The same applies where auditors inappropriately suggest reduced adjustments in exchange for a waiver of the right to domestic appeals, be it in treaty matters or any other tax matter. Germany further clarified that in cases of wilful deceit or illegal threat (i.e. where a tax official tricked or threatened a taxpayer into a waiver) a waiver is ineffective. Furthermore, Germany stated that the Federal authorities know only of a very limited number of situations in which taxpayers (or other jurisdiction's competent authorities, based on information that they received from taxpayers) reported such auditor behaviour.

Anticipated modifications

66. Apart from the above-discussed update to the MAP guidance in relation to waiver of rights to request MAP assistance, Germany did not indicate that it anticipates any modifications in relation to element B.5.

Conclusion

	Areas for Improvement	Recommendations
[B.5]	-	As Germany has thus far granted access to the MAP in eligible cases, even if there was an agreement between the taxpayer and the tax authority, it should continue granting access for these cases.

[B.6] Provide access to MAP if required information is submitted

Jurisdictions should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information based on the rules, guidelines and procedures made available to taxpayers on access to and the use of MAP.

67. To resolve cases where there is taxation not in accordance with the provisions of the tax treaty it is important that competent authorities do not limit access to MAP when taxpayers have complied with the information and documentation requirements as provided in the jurisdiction's guidance relating hereto. Access to MAP will be facilitated when such required information and documentation is made publically available.

Legal framework on access to MAP and information to be submitted

68. The information and documentation that Germany requires taxpayers to include in a request for MAP assistance are discussed under element B.8.

69. Germany reported that when a taxpayer does not include in its MAP request the required information and documentation, its competent authority will inform the taxpayer hereof and indicate what information/documentation is missing. It will accordingly request the taxpayer to submit this missing information/documentation. There is no standard timeframe in Germany for submission of additional information requested. In practice, Germany reported that such timeframe generally ranges from four weeks to three months, depending on the type of information or documentation that is missing in an individual case and the expected time necessary for taxpayers to collect such information/documentation. In that regard, Germany also noted that taxpayers may apply for an extension of the indicated timeframe, which granting by the German competent authority is generally not a problem.

Practical application

70. According Germany it provides access to MAP in all cases where taxpayers have complied with the information or documentation required requirements as set out in its MAP guidance. In regard of the procedure used, as described above, Germany reported that a final denial on access to MAP on the basis that taxpayers have not complied with the information and documentation requirements for MAP requests is very exceptional. Since 1 January 2015 its competent authority has for this reason limited access to MAP only in one case. In this case the taxpayer claimed to have a place of management in the other jurisdiction concerned and paid tax accordingly, but could neither establish any relevant facts sustaining this claim nor could it show proof of tax assessment or tax payment. The German competent authority requested the taxpayer at multiple occasions to provide evidence sustaining its claim, which it did not do. Eventually, the German competent authority denied access to MAP for this specific case.

71. Peers have generally indicated not being aware of a limitation of access to MAP by Germany since 1 January 2015 in situations where taxpayers complied with information and documentation requirements set out in its MAP guidance.

Anticipated modifications

72. Germany did not indicate that it anticipates any modifications in relation to element B.6.

Conclusion

	Areas for Improvement	Recommendations
[B.6]	-	As Germany has thus far not limited access to the MAP in eligible cases when taxpayers have complied with the Germany's information and documentation requirements for MAP requests, it should continue this practice.

[B.7] Include Article 25(3), second sentence, of the OECD Model Tax Convention in tax treaties

Jurisdictions should ensure that their tax treaties contain a provision under which competent authorities may consult together for the elimination of double taxation in cases not provided for in their tax treaties.

73. For ensuring that tax treaties operate effectively and in order for competent authorities to be able to respond quickly to unanticipated situations, it is useful that tax treaties includes the second sentence of Article 25(3) of the *OECD Model Tax Convention* (OECD, 2015a), enabling them to consult together for the elimination of double taxation in cases not provided for by these treaties

Current situation of the Germany's tax treaties

74. Out of Germany's 93 tax treaties, 87 contain a provision equivalent to Article 25(3), second sentence, of the *OECD Model Tax Convention* (OECD, 2015a) allowing their competent authorities to consult together for the elimination of double taxation in cases not provided for in their tax treaties.[16]

Anticipated modifications

75. Germany reported it has recently signed the Multilateral Instrument with a view to inter alia update – on the basis of Article 16(4(c)(ii) of that instrument – those tax treaties that do not contain a provision equivalent to Article 25(3), second sentence, of the *OECD Model Tax Convention* (OECD, 2015a). Germany is currently in the process of analysing which of its tax treaties will be modified via the Multilateral Instrument, the outcome of which is dependent on the choices made by its treaty partners. Where tax treaties do not contain a provision equivalent to Article 25(3), second sentence, of the *OECD Model Tax Convention* (OECD, 2015a), will not be modified by the Multilateral Instrument, Germany reported it will subsequently strive to update them via bilateral negotiations to be compliant with element B.7. In addition, Germany reported it will seek to include Article 25(3), second sentence, of the *OECD Model Tax Convention* (OECD, 2015a) in all of its future treaties.

76. Most of the peers that provided input mentioned that their treaty with Germany meets the requirement under element B.7. Two peers noted they are negotiating a new treaty or an amendment to an existing treaty that will include the second sentence of Article 25(3) of the *OECD Model Tax Convention* (OECD, 2015a). These peers are party to two of the six treaties that currently do not include this sentence.

Conclusion

	Areas for Improvement	Recommendations
[B.7]	Six out of 93 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention, OECD (2015a).	Where treaties do not include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, OECD (2015a) and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, Germany should request the inclusion of the required provision via bilateral negotiations. In addition, Germany should maintain its stated intention to include the required provision in all future treaties.

[B.8] Publish clear and comprehensive MAP guidance

Jurisdictions should publish clear rules, guidelines and procedures on access to and use of the MAP and include the specific information and documentation that should be submitted in a taxpayer's request for MAP assistance.

77. Information on a jurisdiction's MAP regime facilitates the timely initiation and resolution of MAP cases. Clear rules, guidelines and procedures on access to and use of the MAP are essential for making taxpayers and other stakeholders aware of how a jurisdiction's MAP regime functions. In addition, to ensure that a MAP request is received and will be reviewed by the competent authority in a timely manner, it is important that a jurisdiction's MAP guidance clearly and comprehensively explains how a taxpayer can make a MAP request and what information and documentation should be included in such request.

Germany's MAP guidance

78. Germany's rules, guidelines and procedures relating to the MAP function are included in the circular of the Federal Ministry of Finance (BStBl I 2006, 461) of 13 July 2006 ("**MAP guidance**"), which is available at:

www.bzst.de/DE/Steuern_International/Verstaendigungsverfahren/Merkblaetter/merkblaetter_node.html.[17]

79. This document includes information on how taxpayers can access MAP and the availability and practical application of the MAP under the tax treaties Germany entered into. A specific section deals with the availability and practical application of the EU Arbitration Convention in Germany. More specific, Germany's MAP guidance contains information on:

a. *General:*

- General outline of the legal status and legal basis of mutual agreement and arbitration procedures;
- Availability of the mutual agreement procedure under tax treaties and the EU Arbitration Convention;
- A brief outline of the subject and purpose of MAP; and
- Competence to handle MAP cases;

b. *MAP under tax treaties:*

- Application for MAP by taxpayers, including the content of a MAP request, the timelines for filing of such request and the government authority to which the request should be submitted;
- Relationship with domestic available remedies and audit procedures;
- Examples of possible situations of taxation not in accordance with the provisions of tax treaties;
- How the MAP functions in terms of timing, the role of the competent authorities and the rights and role of taxpayers;
- Confidentiality and exchange of information during the MAP process;
- The process for implementing MAP agreements, including the methods of granting relief and the right for taxpayers to accept or reject these agreements;
- Waiver of the right on MAP by taxpayers (this part is no longer in force, as it was revised by circular of April 2017, as is described in paragraph 88 below);
- Consequences when a MAP does not lead to an agreement to avoid taxation not in accordance with the provisions of the tax treaty; and
- Bearing of costs during MAP by competent authorities and taxpayers.

c. *MAP and arbitration under the EU Arbitration Convention:*

- Application for the procedures under the EU Arbitration Convention, including the content of a request, the timelines for filing of such request and the government authority to which the request should be submitted;
- How the process functions in terms of timing, steps to be taken, the role of the competent authorities, and sending of position papers;
- The applicable legal principles for determining the correct arm's length price;
- The functioning of the arbitration procedure, including the starting-point of the two-year deadline for MAP, the composition of the advisory commission, appointment of its members, procedural rules, timing and content of the commission's opinion, and sharing of costs of the arbitration procedure; and
- Final decision by the competent authorities.

80. The FTA MAP Forum agreed on what information should be included in a jurisdiction's MAP guidance, which concerns: (i) contact information of the competent authority or the office in charge of MAP cases and (ii) the manner and form in which the taxpayer should submit its MAP request.[18] The above-described MAP guidance of Germany includes information on the availability and the use of the MAP and how its competent authority conducts the procedure in practice. Although Germany's MAP guidance provides information on the availability and the use of the MAP and how its competent authority conducts the procedure in practice, it only includes item (ii) and not the contact information of the competent authority or the office in charge of MAP cases.

81. Next to the MAP guidance, Germany also issued a circular on co-ordinated external audits with tax administrations of other states/jurisdictions.[19] This circular includes inter alia in paragraph 5 a description of the relationship between such co-ordinated audits and MAP.

82. Further to the above, the information included in Germany's MAP guidance is detailed and comprehensive, especially as regards the procedural aspects of MAP. However, some subjects are not specifically discussed in this MAP guidance. This concerns whether MAP is available in cases of: (i) the application of anti-abuse provisions, (ii) multilateral disputes and (iii) bona fide foreign-initiated self-adjustments; (iv) whether taxpayers can request for the multi-year resolution of recurring issues through MAP; (v) the possibility of suspension of tax collection during the course of the MAP; (vi) the consideration of interest and penalties in MAP; and (vii) the process how MAP agreements are implemented in terms of steps to be taken and timing of these steps, including actions to be taken by taxpayers (if any).

Information and documentation to be included in a MAP request

83. Germany's MAP guidance enumerates in paragraph 2.3.3 the information taxpayers should include in their MAP request. Furthermore, in paragraph 11.3.2 of its MAP guidance Germany included the specific information taxpayers should include in a request for the application of the EU Arbitration Convention. If a MAP request is made under the applicable tax treaty that concerns an attribution/allocation case, then taxpayers should also submit the information specified in paragraph 11.3.2 relating to the EU Arbitration Convention. The information to be included in a MAP request is as follows:

Tax treaties	EU Arbitration Convention
Name, address (registered office), tax number and locally-responsible tax office of the party covered by the tax treaty	Name, address (registered office) and locally-responsible tax office of the enterprise making the application in the Contracting State and other participants in the transactions in question
Detailed information on the facts and circumstances relevant to the case	Detailed information on the facts and circumstances relevant to the case (including details of relationships between the enterprise and other parties involved in the transactions in question)
Details of the tax period affected by the application	Information on the tax periods affected by the application
Copies of the tax advice, the investigation report or comparable documents which have led to the alleged double taxation as well as other relevant documents (e.g. contracts, applications for refunds/reductions of foreign tax deducted at source)	Copies of the tax advices, the investigation report or comparable documents which have led to the alleged double taxation
Details of any out-of-court appeals or litigation, and any court judgements affecting the case in Germany or abroad	Detailed information on any out-of-court or court appeals instituted by the enterprise or other parties involved in the transactions in question and any court judgements relevant to the case
A statement by the party covered by the tax treaty of the extent to which, in its own opinion, German or foreign taxation does not comply with the treaty	A presentation by the enterprise of the extent to which, in its opinion, the principles laid down in Article 4 of the Arbitration Convention have not been observed
The application by the party covered by the treaty	A commitment by the enterprise to respond as quickly and comprehensively as possible to any enquiries by a responsible authority and make the necessary documents available to the responsible authorities

84. Further to the above, Germany has entered into mutual agreements with the Netherlands, Switzerland, the United Kingdom and the United States on what information should be included in a MAP request in order to have the two-year (or three-year) deadline for the mutual agreement procedure commence in order for cases to become eligible for arbitration under the treaties with these jurisdictions.[20]

85. To facilitate the review of a MAP request by competent authorities and to have more consistency in the required content of MAP requests, the FTA MAP Forum agreed on guidance that jurisdictions could use in their domestic guidance on what information and documentation taxpayers need to include in a request for MAP assistance.[21] In light of this list, the requirements in Germany on what information and documentation should be included in a MAP request are checked below:

- ☑ Identity of the taxpayer(s) covered in the MAP request;
- ☑ The basis for the request (the nature of the action giving rise to, or expected to give rise to, taxation not in accordance with the convention);
- ☑ Facts of the case;
- ☑ Analysis of the issue(s) requested to be resolved via MAP;
- ☑ Whether the MAP request was also submitted to another authority under another instrument that provides for a mechanism to resolve treaty-related disputes;
- ☐ Whether the MAP request was also submitted to the competent authority of the other treaty partner;
- ☐ Whether the issue(s) involved were dealt with previously; and
- ☐ A statement confirming that all information and documentation provided in the MAP request is accurate and that the taxpayer will assist the competent authority in its resolution of the issue(s) presented in the MAP request by furnishing any other information or documentation required by the competent authority in a timely manner.

86. Peers did not provide input in relation to element B.8. One taxpayer provided input and mentioned that the available MAP guidance in Germany is sufficient, but that the timelines for requesting additional information are only of an indicative nature and may push the deadlines for resolving cases forward. This taxpayer therefore suggested that more (binding) guidance is necessary on the implementation of MAP agreements.

Anticipated modifications

87. Germany indicated that it is in the process of updating its MAP guidance, which will take into account all developments in Germany's tax treaties, developments at the level of the OECD and developments at the level of the EU in the field of dispute resolution. This update is expected to be published in the course of 2018.

88. Furthermore, as discussed under element B.5, in April 2017, a circular regarding the revision of paragraph 5 of the MAP guidance mentioned above was published.[22] This circular explains the current tax administration position in relation to waiver of the right to MAP or arbitration (in summary: the waiver of the right to arbitration is considered appropriate in certain narrow circumstances – so called domestic "mutual agreements on facts"). Another recent circular addresses the relationship between MAPs/APAs and internationally co-ordinated audits.[23]

Conclusion

	Areas for Improvement	Recommendations
[B.8]	Contact details of Germany's competent authority are not included in the MAP guidance.	Germany should update its MAP guidance to include the contact information of its competent authority as soon as possible. Furthermore, when following up its stated intention to update its MAP guidance, Germany could – although not part of the Action 14 Minimum Standard – consider including in its MAP guidance information on: • Whether MAP is available in cases of: (i) the application of anti-abuse provisions, (ii) multilateral disputes and (iii) bona fide foreign-initiated self-adjustments; • Whether taxpayers can request for the multi-year resolution of recurring issues through MAP; • The possibility of suspension of tax collection during the course of a MAP; • The consideration of interest and penalties in the MAP; and • The process how MAP agreements are implemented in terms of steps to be taken and timing of these steps, including actions to be taken by taxpayers (if any).

[B.9] Make MAP guidance available and easily accessible and publish MAP profile

Jurisdictions should take appropriate measures to make rules, guidelines and procedures on access to and use of the MAP available and easily accessible to the public and should publish their jurisdiction MAP profiles on a shared public platform pursuant to the agreed template.

89. The public availability and accessibility of a jurisdiction's MAP guidance increases public awareness on access to and the use of the MAP in that jurisdiction. Publishing MAP profiles on a shared public platform further promotes the transparency and dissemination of the MAP programme.[24]

Rules, guidelines and procedures on access to and use of the MAP

90. As discussed in the Introduction, Germany's MAP guidance is published and can be found at:[25]

www.bzst.de/DE/Steuern_International/Verstaendigungsverfahren/Merkblaetter/merkblaetter_node.html.

91. As regards its accessibility, Germany's MAP guidance is easily found on the website of Germany's Federal Ministry of Finance. The section dealing with international taxation contains a general overview that includes a link to the MAP guidance.[26]

MAP profile

92. Germany's MAP profile is published on the website of the OECD.[27] This MAP profile is complete and very often with detailed information. This profile includes external links which provide extra information and guidance.

Anticipated modifications

93. Germany did not indicate that it anticipates any modifications in relation to element B.9.

Conclusion

	Areas for Improvement	Recommendations
[B.9]	-	Germany should ensure that future updates of its MAP guidance are made publically available and easily accessible. Its MAP profile, published on the shared public platform, should be updated if needed.

[B.10] Clarify in MAP guidance that audit settlements do not preclude access to MAP

Jurisdictions should clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP. If jurisdictions have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, and jurisdictions limit access to the MAP with respect to the matters resolved through that process, jurisdictions should notify their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP programme guidance.

94. As explained under element B.5 an audit settlement can be valuable to taxpayers by providing certainty to them on their tax position. Nevertheless, as double taxation may not be fully eliminated by agreeing with such settlements, it is important that a jurisdiction's MAP guidance clarifies that in case of audit settlement taxpayers have access to the MAP. In addition, for providing clarity on the relationship between administrative or statutory dispute settlement or resolution processes and the MAP (if any), it is critical that both the public guidance on such processes and the public MAP programme guidance address the effects of those processes, if any. Finally, as the MAP represents a collaborative approach between treaty partners, it is helpful that treaty partners are notified of each other's MAP programme and limitations thereto, particularly in relation to the previously mentioned processes.

MAP and audit settlements in the MAP guidance

95. As previously discussed under B.5, Germany has no system in place that allows audit settlements between local tax administrations and taxpayers, but that in practice taxpayers and the auditors of the concerned tax administration agree on the findings of the audit. Furthermore, in Germany the possibility exist for the local tax administration in charge of the taxpayer's tax assessment and the taxpayer to enter into an agreement on facts. Germany recently updated it MAPs guidance In paragraph 5 it has set out its policy on agreements on facts in relation to MAP, whereby it is clearly stated that access to MAP is a right for taxpayers enshrined in law and that access to MAP will be granted in cases where the local tax administration in charge of the taxpayer's tax assessment and the taxpayer entered into an agreement on facts. It is further stipulated that discussions in MAP cannot alter what has been reflected in the agreement and that Germany will only seek correlative adjustment from the other competent authority concerned. Furthermore, it is also addressed that MAP arbitration is not open for cases where there is already an agreement on facts between the local tax administration and the taxpayer.

96. Peers raised no issues with respect to the availability of audit settlements and the inclusion of information hereon in Germany's MAP guidance. One peer, however, questioned whether Germany would adapt its rules on access to MAP and waiver of access as set out in its MAP guidance.

MAP and other administrative or statutory dispute settlement/resolution processes in available guidance

97. As previously mentioned under element B.5, Germany does not have an administrative or statutory dispute settlement/resolution process available. In that regard, peers indicated not being aware of the existence of an administrative or statutory dispute settlement/resolution process in Germany.

Notification of treaty partners of existing administrative or statutory dispute settlement/resolution processes

98. As Germany does not have an internal administrative or statutory dispute settlement/resolution process in place, there is no need for notifying treaty partners of such process.

Anticipated modifications

99. Apart from the above discussed update of Germany's MAP guidance, Germany did not indicate it anticipates any modifications in relation to element B.10.

Conclusion

	Areas for Improvement	Recommendations
[B.10]	-	-

Notes

1. These 24 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, and the treaty with Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
2. This treaty is the treaty with the former USSR that Germany continues to apply to Moldova.
3. These 65 treaties include the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
4. These 20 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, and the treaty with former USSR that Germany continuous to apply to Moldova.
5. This reservation on Article 16 – Mutual Agreement Procedure reads: "Pursuant to Article 16(5)(a) of the Convention, the Federal Republic of Germany reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of

the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified".An overview of Germany's positions on the Multilateral Instrument is available at: www.oecd.org/tax/treaties/beps-mli-position-germany.pdf.

6. This reservation on Article 16 – Mutual Agreement Procedure reads: "Pursuant to Article 16(5)(a) of the Convention, the Federal Republic of Germany reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified".An overview of Germany's positions on the Multilateral Instrument is available at: www.oecd.org/tax/treaties/beps-mli-position-germany.pdf (accessed on 22 August 2017).

7. These 52 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic.

8. Available at: www.bzst.de/DE/Steuern_International/Verstaendigungsverfahren/Merkblaetter/merkblaetter_node.html (accessed on 22 August 2017). An unofficial English translation can be found at: https://www.oecd.org/ctp/dispute/47655635.pdf.

9. An overview of Germany's positions on the Multilateral Instrument is available at: www.oecd.org/tax/treaties/beps-mli-position-germany.pdf.

10. Paragraph 5 of Germany's MAP guidance, as it read prior to the update in April 2017, specifically addressed that waiving rights on MAP could avoid delays and costs that would arise from determining the facts and circumstances, which would be necessary for the purpose of any mutual agreement procedure.

11. This paragraph further addresses that such non-consent only applies in case the foreign affiliated enterprises declared such waiver for a permanent establishment in Germany, or in cases of associated enterprises such declaration is made by both the foreign and German associated enterprise.

12. Available at: www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2017-04-05-neufassung-der-textziffer-5-des-merkblatts-zum-internationalen-verstaendigungs-und-schiedsverfahren-auf-dem-gebiet-der-steuern-vom-einkommen-und-vom-vermoegen-ergaenzung-des-BMF-Schreibens-vom-13-Juli-2006.html (accessed on 22 August 2017).

13. Germany additionally mentioned that such agreements are only possible on factual issues and not on questions of law. The purpose of these agreements is to allow both taxpayers and the tax administration to limit the time effort devoted to establish the detailed factual situation where such establishment would require disproportionate efforts.

14. In this respect, paragraph 3 of the circular notes: "reaching a mutual agreement on facts requires the existence of facts that can be determined only with great difficulty. This is the case, for example, when the determination of certain facts would require an unjustifiable amount of work or time."

15. As described in paragraph 8 of the circular, there are some restrictive circumstances in which an agreement on facts is not binding. This for example may be the case where a taxpayer entered into such agreement under disallowed pressure or that the case concerns a sham transaction.

16. These 87 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, the treaty with the former USSR that Germany continues to apply to Moldova, and the treaty with former Yugoslavia that Germany continuous to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.

17. An non-binding English translation is available at: https://www.oecd.org/ctp/dispute/47655635.pdf (accessed on 22 August 2017).

18. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf (accessed on 22 August 2017).

19. Circular note on co-ordinated external tax audits with tax administrations of other states and jurisdictions of 6 January 2017 (BStBl I 2017, 89).

20. The agreement with the Netherlands is available at: www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Niederlande/2012-12-10-Niederlande-Abkommen-DBA-Gesetz.pdf?__blob=publicationFile&v=3 (accessed on 22 August 2017).

    The agreement with Switzerland is available at www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Schweiz/2017-03-03-DBA-Schweiz-Schiedsverfahren.html (accessed on 22 August 2017).

    The agreement with the United Kingdom is available at www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Grossbritannien/2011-10-10-Grossbritannien-Abkommen-DBA-Verstaendigungsvereinbarung-Schiedsverfahren.html (accessed on 22 August 2017).

    The agreement with the United States is available at www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Verein_Staaten/2009-01-16-USA-Abkommen-DBA-Verstaendigungsvereinbarung.html (accessed on 22 August 2017).

21. Ibid.

22. Circular of Germany's Federal Ministry of Finance of 5 April 2017 (BStBL I 2017, 707).

23. Circular of Germany's Federal Ministry of Finance of 6 January 2017 (BStBL I 2017, 89).

24. The shared public platform can be found at: www.oecd.org/ctp/dispute/country-map-profiles.htm (accessed on 22 August 2017).

25. A non-binding English translation is available at: https://www.oecd.org/ctp/dispute/47655635.pdf (accessed on 22 August 2017).

26. Available at www.bundesfinanzministerium.de/Web/DE/Themen/Steuern/Internationales_Steuerrecht/Allgemeine_Informationen/allgemeine_informationen.html (accessed on 22 August 2017).

27. Available at: www.oecd.org/tax/dispute/Germany-Dispute-Resolution-Profile.pdf (accessed on 22 August 2017).

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Part C

Resolution of MAP Cases

[C.1] Include Article 25(2), first sentence, of the OECD Model Tax Convention in tax treaties

Jurisdictions should ensure that their tax treaties contain a provision which requires that the competent authority who receives a MAP request from the taxpayer, shall endeavour, if the objection from the taxpayer appears to be justified and the competent authority is not itself able to arrive at a satisfactory solution, to resolve the MAP case by mutual agreement with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with the tax treaty.

100. It is of critical importance that in addition to allowing taxpayers to request for a MAP, tax treaties also include the equivalent of the first sentence of Article 25(2) of the *OECD Model Tax Convention* (OECD, 2015a), which obliges competent authorities, in situations where the objection raised by taxpayers are considered justified and where cases cannot be unilaterally resolved, to enter into discussions with each other to resolve cases of taxation not in accordance with the provisions of a tax treaty.

Current situation of Germany's tax treaties

101. Out of Germany's 93 tax treaties, 91 contain a provision equivalent to Article 25(2), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a) requiring its competent authority to endeavour – when the objection raised is considered justified and no unilateral solution is possible – to resolve by mutual agreement with the competent authority of the other treaty partner the MAP case with a view to the avoidance of taxation which is not in accordance with the tax treaty.[1] The remaining two treaties do include a provision that is based on Article 25(2), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a), but do not incorporate all elements. In these treaties the sentence "[…] if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution" is missing and in one of these two treaties the objective of the mutual agreement procedure is to avoid *double taxation* and not *taxation not in accordance with the treaty*, which is considered not to be in in line with the requirements under Article 25(2), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a).[2]

Anticipated modifications

102. Germany reported it has recently signed the Multilateral Instrument with a view to inter alia update – on the basis of Article 16(4)(b)(i) of that instrument – tax treaties that do not contain a provision equivalent to Article 25(2), first sentence, of the *OECD Model*

Tax Convention (OECD, 2015a). The two treaties mentioned above that do not include this equivalent, however, have not been listed by Germany as covered tax agreements. In that regard Germany reported that where tax treaties do not contain a provision equivalent to Article 25(2), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a), it will subsequently strive to update them via bilateral negotiations to be compliant with element C.1. In addition, Germany reported it will seek to include Article 25(2), first sentence, of the *OECD Model Tax Convention* (OECD, 2015a) in all of its future treaties.

103. Most of the peers that provided input mentioned that their treaty with Germany meets the requirement under element C.1. One peer particularly noted that it recently started renegotiating the existing treaty with Germany, inter alia with a view to meets the requirement under element C.1.

Conclusion

	Areas for Improvement	Recommendations
[C.1]	Two out of 93 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a).	Where treaties do not include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a) and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, the Germany should request the inclusion of the required provision via bilateral negotiations. Specifically with respect to the treaty with the former USSR that is being applied to Moldova, Germany should, once it enters into negotiations with the jurisdictions for which it applies those treaties, request the inclusion of the required provision. In addition, Germany should maintain its stated intention to include the required provision in all future treaties.

[C.2] Seek to resolve MAP cases within a 24-month average timeframe

Jurisdictions should seek to resolve MAP cases within an average time frame of 24 months. This time frame applies to both jurisdictions (i.e. the jurisdiction which receives the MAP request from the taxpayer and its treaty partner).

104. As double taxation creates uncertainties and leads to costs for both taxpayers and jurisdictions, and as the resolution of MAP cases may also avoid (potential) similar issues for future years concerning the same taxpayers, it is important that MAP cases are resolved swiftly. A period of 24 months is considered as an appropriate time period to resolve MAP cases on average.

Reporting of MAP statistics

105. Statistics regarding all tax treaty related disputes concerning Germany are published on the website of the OECD as of 2007.[3] Germany publishes MAP statistics regarding transfer pricing disputes with EU Member States also on the website of the EU Joint Transfer Pricing Forum.[4]

106. The FTA MAP Forum has agreed on rules for reporting of MAP statistics ("**MAP Statistics Reporting Framework**") for MAP requests submitted on or after 1 January, 2016 ("**post-2015 cases**"). Also, for MAP requests submitted prior to that date ("**pre-2016 cases**"),

the FTA MAP Forum agreed to report MAP statistics on the basis of an agreed template. Germany provided their MAP statistics pursuant to the MAP Statistics Reporting Framework within the given deadline, including all cases involving Germany and of which its competent authority was aware. The statistics discussed below include both post-2015 and pre-2016 cases and the full statistics are attached to this report as Annex B and C respectively and should be considered jointly for an understanding of Germany's MAP caseload.[5] With respect to post-2015 cases, Germany reported having reached out to all its MAP partners with a view to have their MAP statistics matching. In that regard Germany reported it received a response from most of its MAP partners and was able to match statistics with most of them. There are with a few MAP partners small differences left where there has not yet been a common conclusion on the MAP statistics.

Monitoring of MAP statistics

107. Germany reported that it monitors its MAP caseload with its treaty partners and that it regularly exchange with them information on the status of open cases and the expected next steps for each case either at the occasion of competent authority meetings or by exchange of e-mail or telephone calls.

Timelines for the mutual agreement procedure under the EU Arbitration Convention

108. Germany's MAP guidance includes in paragraphs 11 and 12 timelines for steps to be taken during the mutual agreement procedure under the EU Arbitration Convention, which generally follow the timelines of the Code of Conduct for the effective implementation of the EU Arbitration Convention in relation to the two-year period for the mutual agreement procedure under that convention.[6] These timelines deviate for the situation where the measure that led or could lead to taxation not in accordance with the convention/double taxation was taken in Germany or in this other jurisdiction concerned and where the MAP request was either submitted in Germany or this other jurisdiction. These timelines are as follows:

- *Submission of the MAP request in Germany:*

  i. *Measure taken in Germany*: a position paper will normally be sent within four months after the date on which the decision on the increase in income is/was established, or, if later, four months after the date on which the German competent authority receives the MAP request and all required information and documentation from the taxpayer; and

  ii. *Measure taken in the other state concerned*: if there is an agreement between the German competent authority and the other competent authority concerned on the solution proposed by this latter authority, the German competent authority will inform the other competent authority concerned within six months. In the absence of such agreement, the German competent authority will send a responsive position paper within six months after receipt of the position and the relevant information of the case from the other competent authority concerned.

  Where the German competent authority has to send a position paper, paragraphs 12.2.1 and 12.2.2 of Germany's MAP guidance oblige the responsible tax administration of the Länder to send to the Federal Central Tax Office a corresponding statement with the necessary documents and a proposed solution for the case no later than one month before the Federal Central Tax Office is expected to act under sub a).

- *Submission of the MAP request in the other state concerned*:

  i. *Measure taken in Germany*: a position paper will normally be sent within four months after the date on which the decision on the increase in income is/was established, or, if later, four months after the date on the German competent authority received the institution of the mutual agreement procedure by the other competent authority concerned and the necessary information; and

  ii. *Measure taken in the other state concerned*: if there is an agreement between the German competent authority and the other competent authority concerned on the solution proposed by this latter authority, the German competent authority will inform the other competent authority concerned within six months after receipt of the position and the relevant information of the case from the other competent authority concerned, or, if later, within six months after the date on which the decision on the increase of the taxable income was established. In the absence of such agreement, the German competent authority will send a responsive position paper within six months of the later of the dates mentioned in the previous sentence.

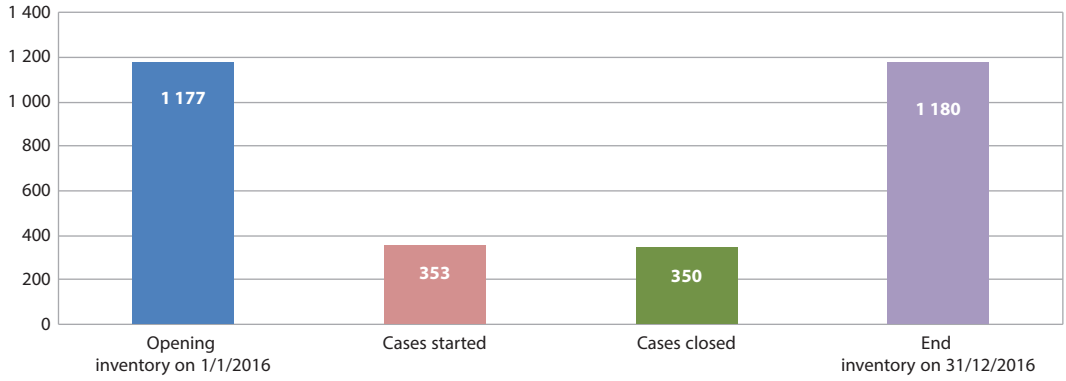
  Where the German competent authority has to send a position paper, paragraphs 12.3.1 and 12.3.2 of Germany's MAP guidance oblige the responsible tax administration of the Länder to send to the Federal Central Tax Office a corresponding statement with the necessary documents and a proposed solution for the case no later than one month before Federal Central Tax Office is expected to act under sub b).

Analysis of Germany's MAP caseload

Global overview

109. The following graph shows the evolution of Germany's MAP caseload over the Statistics Reporting Period.

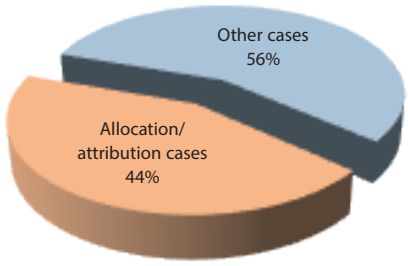
Figure C.1. **Germany's MAP inventory**



110. At the beginning of the Statistics Reporting Period Germany had 1 177 pending MAP cases, of which 545 were attribution/allocation cases and 632 other MAP cases.[7] At the end of the Statistics Reporting Period, Germany had 1 180 MAP cases in its inventory, of which 519 are attribution/allocation cases and 661 other MAP cases. The number of cases closed is almost equal to the new cases started and also Germany's MAP inventory

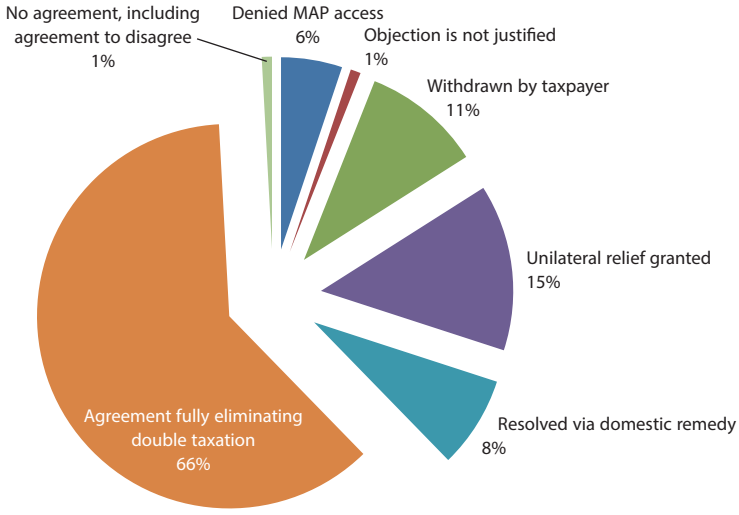
remained stable over the Statistics Reporting Period, also for each type of cases.The breakdown of the end inventory can be illustrated as follows:

Figure C.2. **End inventory on 31 December 2016 (1,180 cases)**



111. During the Statistics Reporting Period Germany in total resolved 350 MAP cases for which the following outcomes were reported:

Figure C.3. **Cases resolved during the Reporting Period (350 cases)**



112. This chart shows that during the Statistics Reporting Period, 215 out of 350 cases were resolved through an agreement that fully eliminated double taxation or fully resolved taxation not in accordance with the tax treaty.

Pre-2016 cases

113. At the beginning of the Statistics Reporting Period, Germany's MAP inventory of pre-2016 consisted of 1 177 cases, of which were 545 attribution/allocation cases and 632 other cases. At the end of the Statistics Reporting Period the total inventory had decreased to 890 cases, consisting of 416 attribution/allocation cases and 474 other cases. This decrease concerns 25% of the opening inventory. In total, 129 of the 287 closed cases concerned attribution/allocation cases and 158 concerned other MAP cases.

Post-2015 cases

114. In total 353 MAP cases were started on or after 1 January 2016, 109 of which are attribution/allocation cases and 244 other cases. At the end of the Statistics Reporting Period the total post-2015 inventory had decreased to 290 cases, consisting of 103 attribution/allocation cases and 187 other cases. Conclusively, Germany resolved 63 cases, which reflects 17.84% of the total post-2015 cases. This outcome can be specified as follows:

- Unilateral relief granted (34 cases);
- Resolved via domestic remedy (11 cases);
- Withdrawn by taxpayers (nine cases);
- Agreement that fully eliminated double taxation/fully resolving taxation not in accordance with the convention and in one case it was resolved via domestic remedies (five cases);
- Denied MAP access (three cases); and
- Objection not justified (one case).

Average timeframe needed to resolve MAP cases

Pre-2016 cases

115. For pre-2016 cases Germany reported that on average it needed 34.48 months to resolve 129 attribution/allocation cases and 29.59 months to resolve 158 other cases. This resulted in an average time needed of 31.79 months to close pre-2016 cases. For the purpose of computing the average time needed to resolve pre-2016 cases, Germany generally used:

- *Start date*: the date its competent authority received a MAP request, or where the MAP request was submitted with the competent authority of the treaty partner, the date the German competent authority was informed about the request; and
- *End date*: the date an agreement was reached or, for the cases closed with other outcomes, the date of the other outcome (or, where not available, the date the German competent authority learned about the other outcome).[8]

Post-2015 cases

116. As a preliminary remark, it should be noted that the period for assessing post-2015 MAP statistics only comprises 12 months.

117. During the Statistics Reporting Period Germany resolved 63 cases, six of which concerned attribution/allocation cases and 57 of which concerned other cases. These resolved cases represent 17.84% of new received post-2015 cases during the Statistics Reporting Period. The six attribution/allocation cases were on average closed within 3.26 months, four of which lead to an agreement that fully eliminated double taxation or fully resolving the taxation not in accordance with the provisions of the applicable tax treaty, one for which access was denied and in one case the taxpayer withdrew its request. The other MAP cases were on average closed within 1.36 months, with a variety of outcomes, mostly concerning unilateral relief granted or resolved via domestic remedy. The total average for resolving post-2015 cases is 1.54 months.

All cases resolved during Statistics Reporting Period

118. The average time needed to resolve MAP cases during the Statistics Reporting Period was 26.34 months, which can be broken down as follows:

	Number of cases	Start date to End date (in months)
Attribution/Allocation cases	135	33.09
Other cases	215	22.11
All cases	**350**	**26.34**

119. Germany provided an explanation on why it for some cases took on average longer than 24 months to resolve MAP cases. It mentioned that there are a number of factors that have contributed to relatively long procedures in some cases, which concerned *inter alia* resource issues in Germany and at the level of its treaty partners. Germany reported in that regard that resource issues are addressed, which will be discussed further in element C.3 below.

Peer input

120. All peers that provided input to Germany's implementation of the Action 14 Minimum Standard report a good working relationship with Germany's competent authority, which is further discussed under element C.3 below. This concerns both jurisdictions that have a large MAP inventory with Germany as also jurisdictions with a relatively modest MAP caseload. Peers reported that contacts with the competent authority of Germany are generally easy and that it is solution-oriented. Peers further indicated that cases are generally resolved within a reasonable period, although not all cases are resolved within the targeted 24-month period, particularly due to the involvement of the tax administrations of the Länder in the preparation and resolution of cases. Five peers also referred to, in their experience and at least in some cases, the long time it takes in Germany to send position papers. Germany responded that, as the target is a 24 month average, there should not be an expectation that all cases be resolved within 24 months.

Anticipated modifications

121. As will be further discussed under element C.6, Germany's tax treaty policy is to include a mandatory and binding arbitration provision in its bilateral tax treaties to provide that treaty-related disputes will be resolved within a specified timeframe and which should globally improve the time needed to settle MAP cases. Apart from that Germany did not indicate that it anticipates any modifications in relation to element C.2.

Conclusion

	Areas for Improvement	Recommendations
[C.2]	Germany submitted timely comprehensive MAP statistics and indicated they have been matched with their MAP partners. The year 2016 was the first year for which MAP statistics were reported under the new MAP Statistics Reporting Framework. These statistics were only recently submitted by most jurisdictions that committed themselves to the implementation of the Action 14 Minimum Standard and some still need to be submitted or confirmed. Given this state of play, it was not yet possible to assess whether Germany's MAP statistics match those of its treaty partners as reported by the latter.	

	Areas for Improvement	Recommendations
[C.2]	Within the context of the state of play outlined above and in relation to the MAP statistics provided by Germany, it resolved during the Statistics Reporting Period 17.84% (63 out of 353 cases) of its post-2015 cases in 1.54 months on average. In that regard, Germany is recommended to seek to resolve the remaining 82.16% of the post-2015 cases pending on 31 December 2016 (290 cases) within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.	

[C.3] Provide adequate resources to the MAP function

Jurisdictions should ensure that adequate resources are provided to the MAP function.

122. Adequate resources, including personnel, funding and training, are necessary to properly perform the competent authority function and to ensure that MAP cases are resolved in a timely, efficient and effective manner.

Description of Germany's competent authority

General outline

123. Germany is a federal state, following which there are federal and state tax administrations (of the German Länder, hereinafter referred to as "tax administrations of the Länder"). The tax administrations of the Länder, under which auspices the local tax administrations function, are in principle responsible for conducting audits and issuing tax assessment.[9] The head of the tax administrations of the Länder are in most cases the Ministries of Finance of the Länder. The Federal Central Tax Office is the federal tax authority under the supervision of the Federal Ministry of Finance.

124. The competent authority for handling MAP cases in Germany is, as a starting point, the Federal Ministry of Finance. Pursuant to a circular of 20 June 2011 (BStBl I 2011, 674) (which replaced an earlier similar circular) the competent authority function was delegated to the Federal Central Tax Office in relation to: (i) mutual agreement procedures relating to individual cases, (ii) the EU Arbitration Convention and (iii) bilateral and multilateral APAs.[10] The Federal Ministry of Finance remains the competent authority to conduct mutual agreement procedures of a general nature which concern (or may concern) a category of taxpayers. Taxpayers have to submit their MAP requests under tax treaties in Germany to the Federal Central Tax Office. Alternatively, they can also submit this request to the local tax administration that is in charge of the taxpayer's tax assessment, the local tax administration then has to forward the request to the Federal Central Tax Office (via the relevant regional tax administration, where applicable, and via the relevant superior state tax administration). If taxpayers submit a request for the application of the procedures under the EU Arbitration Convention, they, however, have to submit such request to the Federal Central Tax Office directly.

125. In relation to contacts with other competent authorities, Germany reported that the contact details of the Federal Central Tax Office are provided on its website, and in Germany's MAP profile on the OECD website, which includes the names of the heads of the two divisions that handle MAP and APA requests. Furthermore, treaty partners are notified of the case handler when a MAP case is opened in Germany and communicated to the treaty partner. Such notification includes the name and direct phone number of the case handler. Treaty partners are also informed if a case handler changes for an individual case. Delegations for bilateral competent authority meetings generally consist of new and experienced staff, whereby cases for discussion during such meetings are pre-discussed in team meetings.

Organisational structure within the Federal Central Tax Office

126. Within Germany's Federal Central Tax Office, two divisions (St III 1 and St III 2) are in charge of performing the competent authority function for MAPs and APAs, whereby the portfolio of one of the divisions has a focus on EU Member States and the other on the remaining treaty partners. Both divisions have no other tasks besides handling MAP cases and requests for bilateral/multilateral APAs, apart from tasks specifically related to MAPs and APAs, which for example concern participating in meetings of the FTA MAP Forum or the EU Joint Transfer Pricing Forum.

127. At the end of 2016 the staff in charge of MAP within the Federal Central Tax Office consisted of 43 positions. This concerns two heads of division, six deputy-heads, 32 case analysts and three staff assistants. In addition, eight additional persons have been assigned for a temporary period to the relevant divisions of the Federal Central Tax Office. Altogether, in 2016, this staff devotes approximately 33% of its time to handle APA cases and 67% of its time to handle MAP cases other than APA cases. Germany reported that the resources for the competent authority function at the level of the Federal Central Tax Office have been substantially increased during recent years, with the most important increase in 2016 when nine new staff members were added. It additionally reported that a further increase was already been decided on for 2017, by which the staff will further increase to 55 persons.

Monitoring mechanism

128. In Germany the framework for determining staff requirement is set at the federal level by the Federal Ministry of the Interior, which issued a handbook for organisation analyses and determination of staff requirement. Based on the guidance in this handbook, and in co-operation with the staff of the previous Federal Office of Central Services and Unresolved Property Issues (Bundesamt für zentrale Dienste und offene Vermögensfragen[11]) specialised in staff requirement determinations, the Federal Central Tax Office established the average time needed for resolving cases by case analysts and other personnel involved (with a distinction between APAs, attribution/allocation MAP cases and other MAP cases) and average time frames for activities that are indirectly related to MAP cases. The so established averages are multiplied with the expected number of new MAP cases (also with a distinction between APAs, attribution/allocation MAP cases and other MAP cases) so as to calculate the number of needed case analysts and other staff. This expected number of new MAP cases is recalculated on an annual basis in order to take into account the most recent number of new cases.

129. If based on the above-mentioned calculations it turns out that additional staff is required, a communication is made to the senior management of the Federal Central Tax Office. If they after review approve the additional staff requirements, they will communicate these requirements – along with the calculations that support them – to the German Federal Ministry of Finance. This ministry collects and weights all requirements for additional staff and on the basis thereof prepares a political decision on the staff budget. It is ultimately the German federal parliament (Bundestag) that decides on the annual federal budget, which then becomes binding on all federal authorities.

130. Germany indicated that the process for obtaining additional resources takes approximately 18 months, as for example the new cases received in 2016 constitute the basis for the calculations in 2017 relating to the budget for 2018. Germany further reported that since 2013 additional budget has been made available to the competent authority function in Germany and staff will have increased from 23 in 2012 to 55 at the end of 2017.

131. Germany reported that new staff within the Federal Central Tax Office receives training, which concerns both internal training and external training via the Federal Finance Academy. When new staff arrives, it will work closely with a more experienced staff member for a period of at least six months. During these six months the new staff member is not allowed to sign any positions on individual MAP cases. Germany further reported that within the two divisions all staff (new and experienced staff alike) hold regular meetings to exchange experiences, discuss MAP cases and attend presentations of recent developments, for example at the level of the OECD. In addition, continuing English language training is made available to all staff and new staff has to pass an English language test.

132. In terms of resources available to perform its MAP function, apart from staffing, Germany reported that it has sufficient resources for travelling, translation of documents and conducting face-to-face meetings with other competent authorities.

Working on prevention of disputes

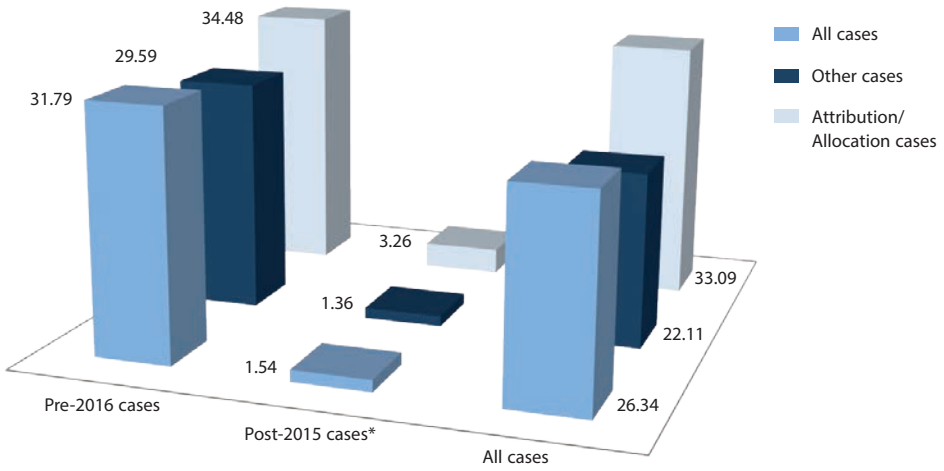
133. Next to providing certainty in advance to taxpayers through bilateral APAs (including allowing roll-backs), Germany also tries to prevent disputes by making use of co-ordinated external tax audits. In this respect, Germany published a circular on 6 January 2017, which sets out its policy on co-ordinated external tax audits with tax administrations of other jurisdictions.[12] In this respect, paragraph 1.1 of that circular particularly notes that achieving consensus on the facts of the case can also help to avoid international tax conflicts and connected therewith MAP cases, or to make these conflicts simpler and their resolution more efficient.

Practical application

MAP statistics

134. As discussed under element C.2, Germany has not resolved its MAP cases during the Statistics Reporting Period within the pursued 24-month average. However, a discrepancy exists between the average time taken to solve attribution/allocation cases and other cases. This can be illustrated by the following graph:

Figure C.4. **Average time (in months)**



* Note that post-2015 cases only concern cases opened and closed during 2016.

135. Based on these figures, it follows that on average it took Germany 26.34 months to resolve MAP cases. It took Germany 33.09 months to resolve attribution/allocation cases, which may indicate that additional resources specifically dedicated to these cases may be necessary to accelerate their resolution.

Relationship with local tax administrations/tax administrations of the Länder

136. When taxpayers submit their MAP request to the local tax administration, it is obliged to immediately forward this request to the Federal Central Tax Office, thereby using a standard form.[13] Paragraph 2.1.4 of Germany's MAP guidance stipulates that the local tax administration has to make a statement on the request when the case concerns taxation in Germany. Said statement considers: (a) the time limit for filing of MAP requests, (b) whether the request contains the required information and documentation and (c) whether the objection raised by the taxpayer is considered justified.[14] When a MAP request is submitted to the competent authority of the treaty partner, the Federal Central Tax Office will, at first, merely assess whether the formal conditions for MAP have been met and, pursuant to paragraph 2.5 of Germany's MAP guidance, will immediately forward the initiation letter by the other competent authority to the highest responsible office in the tax administration of the Länder concerned, and will also ask for a statement on the case.[15] The relationship with the local tax administrations/tax administrations of the Länder when taking a position on the case and when resolving MAP cases is further discussed under element C.4

Peer input

General

137. More than 20 peers provided input in relation to their contacts with the German competent authority and their experiences in resolving MAP cases. This concerns peers that have a large, significant and moderate MAP caseload with Germany. Some peers provided mixed input regarding their experiences with the German competent authority, but generally peers reported having a good MAP relationship with Germany and that it is very easy to get into contact with its competent authority.

Contacts with the German competent authority

138. Peers that have a high MAP caseload with Germany, especially those with a significant number of non-allocation/attribution cases, noted that they have (very) frequent and good contacts with the German competent authority, such by e-mail, conference calls and via competent authority meetings that are held at least once a year. Also other peers voiced positive contacts with the German competent authority, which are frequent and via different methods (e.g. letters, conference calls and e-mail). They reported their competent authorities schedule face-to-face meetings at regular occasions, and at least once or twice a year. One peer also reported that contact details of staff handling individual MAP cases are communicated by the German competent authority. Another peer also mentioned that it has been promptly notified by the German competent authority about the submission of a MAP request and about Germany's position on the case. It also mentioned that the communication with the German competent authority was without any problems or unnecessary delays.

139. Other peers with a more moderate caseload also reported a good and positive working relation with the German competent authority, whereby some noted that the German competent authority is responsive in its communications and that such communication has been straightforward and without any difficulties. These peers generally also mentioned that it is clear to them who to contact within the German competent authority for an individual MAP case. One peer, however, reported that in its experience communication with the German competent authority was slow and intermittent, whereby it encountered significant delays in receiving responses to communications for which they had to rely on information from taxpayers in order to become aware of developments on the case in Germany. Germany noted that from its perspective this concerns only one exceptional case where the person in charge was changed three times in a short time due to extraordinary circumstances.

Issuing of position papers

140. Several peers criticised the long time it takes in Germany, from their perspective and in some cases, to issue position papers. One peer noted that although Germany quickly informs its competent authority of a MAP request received it takes a long time before the German competent authority issues a position paper, even if it concerns a German-initiated adjustment. In particular this peer mentioned that in its experience it is an exception that position papers are sent within six months after taxpayers submitted their MAP request and sometimes it takes more than two years. This input was echoed by another peer that mentioned that it waited considerable time to receive an analysis by the German competent authority on the case under review. This peer mentioned an example of a case that was submitted in mid-2015, for which at the time of providing the input no position paper had yet been received. The case reported concerns the same case as referred to in the last sentence of the previous paragraph. Germany responded that it concerned an exceptional case and that it has provided a position paper in the meantime. The same peer also mentioned that it encountered a situation in which a taxpayer submitted a MAP request in Germany, but was instructed to first seek the position from the peer's competent authority before it was willing to proceed with the case. On the last case referred to by this peer, Germany responded that its competent authority only learned of that case through the peer input received. Upon receiving additional information on this case from the peer, the German competent authority became aware that the MAP request was filed at the local tax administration in Germany, which had not forwarded the request to the German competent authority (and which was contrary to the MAP guidance and established practice). Instead the local tax administration advised the taxpayer to request a refund in the other contracting state concerned. Germany noted that such advise can be useful, thereby remarked that another peer had suggested in its peer input that it would be desirable to initiate MAP cases only after completion of refund procedures under their domestic law.[16] In this respect, Germany stated that in practice it rarely happens that MAP requests received by the local tax administrations are not timely forwarded to the competent authority. However, based on the peer input given, Germany also stated that the local tax administrations of the Länder will be reminded that MAP requests at a local level have to, without delay, be forwarded to the German competent authority in all cases.

141. Another peer also mentioned that meeting the set timeframes for issuing position papers is often challenging, but that this applies to them as well as to the German competent authority. This peer noted that most cases progress is made in a reasonable time. Lastly, one peer noted that generally Germany sends position papers within six months after notification of a MAP request, but that in a small number of cases it has taken a longer time.

Resolving MAP cases

142. Peers generally provided positive input on Germany's approach to resolving MAP cases. One peer noted that it appreciated the pragmatic orientation by the German competent authority to resolve MAP cases within an average of 24 months. A second peer echoed this input and also mentioned that staff within the German competent authority is well-trained to handle MAP requests. Another peer noted that its experience is that Germany is co-operative to deal with. This peer reported that for non-allocation/attribution cases the relation with the German competent authority has been very professional and fluid, whereby cases were progressed quickly and there was a quick response to letters. It particularly mentioned that Germany has made an effort to keep them up to date on the developments of the case, whereby the exchange of information and positions was experienced as very positive. Two peers also noted that during a competent authority meeting the attitude by staff of the German competent authority was positive towards finding a solution that was acceptable for both parties. Lastly, one peer noted that Germany commits to a timely resolution of MAP cases and that adequate resources are provided to the MAP function.

143. One peer also raised some criticism on the resolving of MAP cases with Germany. This peer, which input was echoed by another peer for an individual case, noted that, from the peer's perspective, for some cases falling under the EU Arbitration Convention it takes a long period before the German competent authority decides if the taxpayer is allowed access to the procedures under this convention. This peer mentioned the example of an attribution/allocation case whereby Germany questions on whether taxpayers have access to these procedures if the transactions under review are influenced by transactions with associated enterprises in non-EU Member States, by which the time necessary to grant such access is delayed. In relation hereto, Germany responded that the issues raised in certain triangular cases are complex and that its limited resources had not allowed its competent authority to address all the complex issues as quickly as they wanted to.

144. Furthermore, the above-mentioned peer also mentioned that staff in the German competent authority also has less flexibility with respect to fiscal years that were not included in the MAP request, but which more than likely will lead to similar taxation as for the years included in the MAP request. On this remark, Germany responded that a MAP under a treaty provision resembling Article 25(1-2) of the *OECD Model Tax Convention* (OECD, 2015a) is only possible upon request by the taxpayer. Lastly, this peer also mentioned that it has experienced during face-to-face meetings that, due to competence of local tax administrations, the German competent authority had limited possibilities for flexibility in the position of Germany, but that it has noticed an improvement during the most recent face-to-face meeting. For more complex cases, this peer noted that it takes sometimes a long time to come to resolve a case, because of the fact that Germany's Federal Ministry of Finance has to be consulted. Germany responded to this input that the number of cases where the Federal Ministry of Finance has to be consulted is very limited. It, however, confirmed that in relation to that specific peer there had been cases where an issue of principle had been identified, such as whether domestic guidance was in conflict with a treaty or whether case law by German courts was in conflict with the commentary on the *OECD Model Tax Convention* (OECD, 2015a).

145. One peer specifically mentioned that it is aware of the complexities that the German federal tax system creates for the MAP process. The same peer also raised issues concerning for the clear determination of substantive completion and resolution dates of MAP cases. Germany responded that the remark concerning the substantive completion concerns the application of the general mutual agreement entered into (memorandum of

understanding) on the details for implementing the arbitration clause in the bilateral tax treaty. In that regard Germany reported that both competent authorities have discussed the issue and will endeavour to improve the communication on this matter between them. Regarding the comment on resolution dates of MAP cases, Germany responded that it discussed with the peer that staff in charge of MAP does not issue tax assessments notes implementing MAP agreements and that the length of time sometimes required before a MAP can be finally closed on both sides (closed here not for MAP statistical reporting purposes, but only in the sense of closing the files after the taxpayer has accepted or rejected a MAP solution) is not solely attributable to the German federal tax system.

146. This peer mentioned in the previous paragraph further noted that in its MAP cases with Germany non-attribution/allocation cases were resolved efficiently, which in their view seems attributable to the dedication of resources by the German competent authority to interpretation cases. With respect to attribution/allocation cases, this peer remarked that differences between both competent authorities concerned disagreements on technical, substantive issues on the application of the provisions of the tax treaty. In this peer's view this is also caused by the difficulty it has to understand how the timing and development of the position of negotiations of MAP cases in Germany is impacted by its federal tax structure.

147. Several other peers raised concerns about the relationship between the German competent authority and the German local tax administrations. One peer mentioned in this respect that Germany has entered into MAP cases based on the preliminary views of the auditors, without having prepared a position paper or analysis to support the auditors' positions. On this remark, Germany noted that having an early initial discussion, even without having fully developed an own position and without having provided a position paper, can often be useful and is often suggested by other peers. It does in Germany's view not mean that its competent authority will not develop is own position on the case under review. A second peer noted that in general it takes a long time to resolve MAP cases with Germany, due to insufficient resources in both jurisdictions, but also due to the involvement of the tax authorities of the Länder in Germany. In this peer's view the perception exist that the German competent authority is dependent on the decisions and approval of the regional tax authorities for each step of the process. This applies both to attribution/allocation cases and other MAP cases. Several peers made the same comment and mentioned that the German competent authority appears to have little room to manoeuvre on its proposed solution for the case, whereby also delays occur by the systematic consultation of the tax administration of the Länder. In this respect, one peer particularly noted that in its view it appears that the German competent authority has to consult this tax administration during MAP discussions. In relation hereto, Germany responded that the involvement of the tax administrations of the Länder in the MAP process is described in detail in paragraph 157.

Suggestions for improvement

148. Several peers made suggestions for improvement in relation to resolving MAP cases together with the German competent authority. First, a number of peers suggested scheduling more frequent face-to-face meetings, especially for attribution/allocation cases, as also more conference calls to discuss cases. On this remark, Germany noted that, in many bilateral relations, it has itself suggested more frequent meetings but met obstacles such as limited resources in the other jurisdiction or difficulties with finding matching dates in view of other competent authority meetings already arranged, meetings of the OECD that the persons involved had to attend, or other obligations of these persons at the level of both competent authorities concerned. In that regard, Germany also mentioned that conference calls are already frequently used, but are not always an adequate substitute for face-to-face meetings.

149. Other peers suggested using more frequently e-mail communication (also for sending of documents) instead of written correspondence to speed up proceedings. On that suggestion, Germany commented that with many competent authorities exchange via email or other electronic means of communication already takes place. Those peers that are interested in establishing such a way of communication should approach the German competent authority to discuss the best way in the specific bilateral relation, taking into account the specific technical possibilities, firewalls, etc. In this respect, Germany explained that its competent authority has to ensure that taxpayer-specific information that is exchanged electronically is only exchanged in a safe and encrypted way.

150. Furthermore, one peer suggested that more resources are to be attributed to the German competent authority, less involvement by the tax administrations of the Länder in informing the cases and more frequent communication between the competent authorities in between face-to-face meetings. Another peer suggested that it would be desirable to initiate MAP cases only after completion of refund procedures under domestic law, this to avoid unnecessary duplicate of MAP cases. Fourthly, one peer made several recommendations. This concerns: (i) acknowledgment of correspondence, including receipt of communications and acceptance into the German MAP program, (ii) providing updates to treaty partners if it is expected that agreed deadlines for a case will not be met, (iii) informing treaty partners of changes to contacts (including contact details), alternate contacts and avenues to resolve any issues or delays, and (iv) seeking to provide a position paper as expeditiously as possible. To the last made suggestions, Germany responded that these proposals were made by the peer whose input is also comprehensively discussed in paragraphs 139 and 140 of this report, and that the proposals made are based on bad experience in one exceptional case. Germany thereby pointed out that in general (i) reception of correspondence is acknowledged, (ii) treaty partners are informed if previously agreed deadlines cannot be met, (iii) treaty partners are informed where case handlers change and (iv) that position papers are always provided as quickly as possible.

151. Lastly, one peer made some suggestions to arrive at a more efficient communication between their competent authorities. This concern: (a) improving the overall consistency and frequency of exchanges of case-related documents, data, and position papers and (b) jointly improving consistency of communication at each level of the competent authorities. More specifically, this peer suggested that for non-attribution/allocation cases competent authorities could review existing practices to identify improvements for receiving and sharing information from taxpayers. For attribution/allocation cases the peer suggested to study the feasibility of exchanging provisional positions early in the MAP process to get an overview for which cases a more extensive discussion is required. On the last proposal made, Germany remarked that it has used this approach in some cases, however, with mixed experiences. Germany thereby pointed out that the proposal conflicts with input received from another peer, who criticised entering into discussions without having been provided with a proper position paper.

152. Other peers raised no concerns and mentioned that they did not identify any particular issues that would impede the resolution of MAP cases with Germany regarding the timeframe for resolving MAP cases or available resources for the MAP function.

153. In relation to already agreed improvements one peer mentioned that they agreed with Germany on speeding up timelines of the resolution of MAP cases and have committed to more frequent contacts with each other, including face-to-face meetings. Another peer also mentioned that progress is being made by both competent authorities to speed up proceedings in resolving MAP cases.

Anticipated modifications

154. Germany did not indicate that it anticipates any modifications in relation to element C.3 other than the finalisation of the staff increase mentioned in paragraphs 127 and 130.

Conclusion

	Areas for Improvement	Recommendations
[C.3]	As Germany resolved MAP cases in 26.34 months on average, there may be a risk that post-2015 cases are not resolved within the average of 24 months, which is the pursued average for resolving MAP cases received on or after 1 January 2016, and which might indicate that Germany's competent authority is not adequately resourced. Given the close working relationship with the tax administrations of the Länder, it might also indicate that the resources available at that level might not be adequate to ensure that Germany's competent authority is able to resolve post-2015 cases within the pursued average.	Germany should closely monitor whether the additional resources recently provided to the MAP function, as well as the additional resources already envisaged to be provided in the near future, will contribute to the resolution of MAP cases in a timely, efficient and effective manner.

[C.4] Ensure staff in charge of MAP has the authority to resolve cases in accordance with the applicable tax treaty

Jurisdictions should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the jurisdictions would like to see reflected in future amendments to the treaty.

155. Ensuring that staff in charge of MAP can and will resolve cases, absent any approval/direction by the tax administration personnel directly involved in the adjustment and absent any policy consideration, contributes to a principled and consistent approach to MAP cases.

Functioning of staff in charge of MAP

156. With respect to handling and resolving MAP cases, Germany mentioned that staff in charge of MAP is expected aiming at establishing taxation in accordance with the provisions of the relevant convention and in particular at avoiding double taxation. Staff thereby has to take German guidance into account (which is guidance developed by the Federal Ministry of Finance with the intention to be in line with OECD guidance), as also the Commentary to the *OECD Model Tax Convention* (OECD, 2015a) and the OECD Transfer Pricing Guidelines.

157. In terms of process of handling MAP cases, as was already described in element C.3 above, Germany reported the following process:

a. *Statement on the facts of the case under review*: when a new MAP case is submitted, staff in charge of MAP will request the relevant Ministry of Finance of the Länder or the relevant regional tax office of the Länder for a statement on the facts of the case under review and on what, in their view, domestic law and, in particular, the applicable tax treaty requires. This request is generally sent on to the local tax administration. This local tax administration will then send a statement to the regional tax administration or the Ministry of the relevant Land, which will in turn report back the local tax

administration's statement on the case under review (possible with additions or amendments) to the Federal Central Tax Office;

b. *Preparing a position on the case under review*: when preparing a position on the case, staff in charge of MAP at the level of the Federal Central Tax Office will take the statement by the local tax administration into account, along with the position of the taxpayer put forward in its MAP request. Where already available, the Federal Central Tax Office will also take into account the position of the other competent authority involved. Staff in charge of MAP has generally the authority to determine the position of the German competent authority in an individual case. Certain exceptions may, however, apply for new staff members and for those cases where the heads of division, or deputy heads of division, have reserved their right to sign a position. This latter can apply, in particular, where the case under review involves issues identified as questions of principle or particularly high amounts;

c. *Autonomy to prepare a position on the case under review*: although staff in charge in MAP is not bound by the statement of the local tax administration/tax administration of the Länder, it is expected to act in agreement with the responsible supreme or commissioned tax administration of the Länder.[17] In practice, this expectation implies that if there is a difference of view between the Federal Central Tax Office and the tax administration of the Länder, both have to reconcile to ensure that both parties are aware of all relevant facts of the case under review and all relevant guidance. Subsequently, they have to try to arrive at a common position. Should this not be possible, the case under review is to be dealt with at management level. Where at this level also no common position can be arrived at, the case is to be referred to the Federal Ministry of Finance. Germany reported that this system follows from the application of general principles of tax administration in Germany and is based on the German constitution. In a simplified manner, for the taxes where the Federation and Länder share the tax revenue, which includes personal and corporate income tax, the constitution assigns competence to the tax administrations of the Länder to administer federal tax laws, with certain supervisory rights by the Federation and certain specific tasks, including the relations to other countries, assigned to the Federation;

d. *Interaction with the Federal Ministry of Finance*: reporting to the Federal Ministry of Finance should be made if staff in charge of MAP (either the case analyst or the management) determines that the applicable tax treaty requires to take a position that would defer from published administrative guidance in Germany, or where the case under review concerns other matters of principle that should be brought to the attention of the staff at the level of the Federal Ministry of Finance in charge of treaty negotiations, general mutual agreements, OECD working parties and domestic administrative guidance. The Federal Central Tax Office in turn then can only act in agreement with the Federal Ministry of Finance. This latter is also the case if the Federal Central Tax Office intends deviating from a previous position of the local tax administration, wherethe amount concerned is very substantial. This process applies to the situation when the Federal Central Tax Office has to take a position in a to be issued position paper, when it (potentially) comes to a revised position, or, after discussions with the other competent authority concerned, when considering a compromise solution; and

e. *Negotiating a solution*: In principle, the German competent authority has autonomy to enter into MAP agreements. When, after thorough examination and discussion differences of view remain to exist on how to resolve the case with the other competent authority concerned, the Federal Central Tax Office will consider compromise

solutions to avoid double taxation. Whether in that regard consultation with the tax administration of the Länder is necessary depends on what has been arranged in an individual case. This for example may not be necessary if during a competent authority meeting an agreement can be reached that does not substantially deviate from the position that has previously been discussed with the tax administration of the Länder. Furthermore, Germany mentioned that in practice auditors are invited to attend competent authority meetings in a small number of cases. The reasons hereof are twofold. First, auditors have factual knowledge of the cases that are being discussed during such meetings, which knowledge may be helpful for resolving cases. Second, they can learn from the discussions, which can be beneficial to them for future audits.

158. The above description shows, as clarified by the federal structure in Germany, that there is a close relationship between the competent authority function in Germany, at the level of the Federal Central Tax Office, and the tax administrations of the Länder and/or the local tax administrations. This relationship causes that the German competent authority has to develop a position for an individual MAP case in collaboration with these tax administrations and de facto often (in those cases where the Länder tax administrations give little leeway) has to agree with them before communicating this position to the other competent authority concerned. When negotiating MAP agreements, the German competent authority has autonomy to enter into MAP agreements, but the margins to negotiate can (depending on the leeway pre-agreed in the individual case) in some cases be small in terms of deviating from a position which has been agreed with the tax administrations of the Länder and/or the local tax administrations.

Practical application

159. As discussed under element C.3, several peers raised concerns and criticised Germany on the close relationship with the local tax administrations/tax administrations of the Länder when handling MAP cases and negotiating agreements. Several peers provided particular input with respect to the question on whether staff in charge of MAP in Germany can resolve cases without being dependent on the approval or the direction of the tax administration that made the adjustment. One of these peers noted that Germany entered MAP disputes based on the preliminary views of the original auditors, without having prepared a position paper or analysis themselves. On this remark, as indicated previously, Germany responded that having an early initial discussion, even without having fully developed an own position and without having provided a position paper, can often be useful and is often suggested by other peers. It, however, does not imply that the German competent authority will not develop an own position in the case. Another peer reported that the German competent authority has to seek approval from the auditors that made the original adjustments. This peer, however, mentioned that it is not clear whether this concerns all MAP cases or only the largest and most significant cases. On this peer's comment, Germany responded that there appears to be a misunderstanding and that the German competent authority does not have to seek approval from the auditors that made the original adjustments. The German competent authority, however, does involve the tax administration of the Länder in the way described in paragraph 157. The intensity of that involvement can vary depending on the arrangement in the particular case. The last two peers noted that they did not identify any particular issues in relation to this question or that Germany has the authority to resolve MAP cases in accordance with the treaty.

Anticipated modifications

160. Germany did not indicate that it anticipates any modifications in relation to element C.4.

Conclusion

	Areas for Improvement	Recommendations
[C.4]	Personnel of tax administrations of the Länder directly involved in the adjustment at issue can participate in competent authority meetings during which MAP cases are resolved. This bears the risk that the competent authority function is not performed entirely independent from the approval or direction of the tax administration personnel directly involved in the adjustment at issue concerning the resolution of MAP cases during such meetings.	Germany should ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being dependent of approval or direction from the personnel of the tax administrations of the Länder directly involved in the adjustments at issue when they attend competent authority meetings.
	-	As it has done thus far, Germany should continue to ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being influenced by considerations of the policy that Germany would like to see reflected in future amendments to the treaty.

[C.5] Use appropriate performance indicators for the MAP function

Jurisdictions should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue.

161. For ensuring that each case is considered on its individual merits and will be resolved in a principled and consistent manner, it is essential that any performance indicators for the competent authority function and for the staff in charge of MAP processes are appropriate and not based on the amount of sustained audit adjustments or aim at maintaining a certain amount of tax revenue.

Performance indicators used by Germany

162. Germany reported that for controlling purposes it evaluates the performance of the MAP office (e.g. the two divisions in charge of MAP processes) as a whole based on three indicators, which are: (a) the number of MAP cases closed, (b) the number of MAP cases closed without reaching an agreement and (c) cycle times for MAP cases. Germany further mentioned that as of 2017 an enhanced controlling mechanism applies that measures: (i) timing of certain – internally defined – milestones for the MAP process and (ii) the share of cycle times that is allocable to the German competent authority vs. the share of cycle times that is allocable to the other competent authorities. Such measuring is subject to agreement by the staff council. At the level of individual staff members, targets may be set between the employee and the manager. However, there are no general targets that are used for all staff in charge of MAP processes in order to evaluate their work performance.

163. Germany furthermore reported it does not use any performance indicators for staff in charge of MAP processes that are based on the amounts of sustained audit adjustments or maintaining an amount of tax revenue. In that regard it noted that the Federal Careers Ordinance constitutes the basis for performing regular performance reviews of staff of

the Federal Central Tax Office. Such review takes place at least once every three years and aims at evaluating each civil servant's suitability, qualification and performance in his or her area of expertise. Germany will measure the performance of staff in charge of MAP in accordance with the Guidelines for performance reviews of civil servants employed by the Federal Office for Central Services and Unresolved Property Issues, the Federal Equalisation of Burdens Office, the Federal Central Tax Office and the Centre for Data Processing and Information Technology. In more detail, such measuring is based on 20 categories, which are clustered into following four groups: basic requirements, core competencies, requirements for dealing with others and special requirements.

164. In addition to the above, Germany reported that bonuses may be granted to staff for special performance. Such granting is independent from the performance review, but cannot contradict the current performance review.[18]

165. The Final Report on Action 14 includes examples of performance indicators that are considered appropriate. These indicators are shown below and presented in the form of a checklist for Germany. They are checked when they are taken into account by Germany's competent authority:

- ☑ Number of MAP cases resolved;
- ☑ Consistency (i.e. a treaty should be applied in a principled and consistent manner to MAP cases involving the same facts and similarly-situated taxpayers); and
- ☑ Time taken to resolve a MAP case (recognising that the time taken to resolve a MAP case may vary according to its complexity and that matters not under the control of a competent authority may have a significant impact on the time needed to resolve a case).

Practical application

166. Peers generally provided no specific input relating to this element of the minimum standard. Two peers particularly noted that they are not aware of the use of performance indicators by Germany that are based on the amount of sustained audit adjustments or maintaining a certain amount of tax revenue. As discussed under element C.3, all peers reported that Germany's competent authority is co-operative, constructive and solution-oriented and also has the intent to resolve cases in a timely, effective and principled manner.

Anticipated modifications

167. Germany did not indicate that it anticipates any modifications in relation to element C.5.

Conclusion

	Areas for Improvement	Recommendations
[C.5]	-	As it has done thus far, Germany should continue to use appropriate performance indicators.

[C.6] Provide transparency with respect to the position on MAP arbitration

Jurisdictions should provide transparency with respect to their positions on MAP arbitration.

168. The inclusion of an arbitration provision in tax treaties may help ensure that MAP cases are resolved within a certain timeframe, which provides certainty to both taxpayers and competent authorities. In order to have full clarity on whether arbitration as a final stage in the MAP process can and will be available in jurisdictions it is important that jurisdictions are transparent on their position on MAP arbitration.

Position on MAP arbitration

169. Germany has no domestic law limitations for including MAP arbitration in its tax treaties. The inclusion of MAP arbitration is part of its tax treaty policy.[19] In addition, Germany is a signatory to the EU Arbitration Convention and has been a participant in the sub-group on arbitration as part of the group which negotiated the Multilateral Instrument. Its MAP guidance includes in section C information on the availability of the EU Arbitration Convention and how Germany applies that convention in practice.

Practical application

170. Germany has incorporated an arbitration clause in 14 tax treaties as a final stage to the MAP. These clauses can be specified as follows:

- In seven treaties the arbitration clause is based on Article 25(5) of the *OECD Model Tax Convention* (OECD, 2015a), whereby in some treaties deviations from this provision were agreed (i.e. a three-year period for the MAP instead of a two-year period or that the arbitration procedure is initiated at the request of either competent authority instead of at the request of the taxpayer). In this respect, Germany included in a Protocol with Japan rules for conducting the arbitration procedure and entered into a competent authority agreement with the Netherlands and the United Kingdom to detail the rules to be applied during the arbitration procedure, which follow the Sample Mutual Agreement on Arbitration as included in the Annex to the Commentary on Article 25 of the *OECD Model Tax Convention* (OECD, 2015a);[20]
- In four further treaties the arbitration clause provides for a mandatory and binding arbitration procedure. Under one of these treaties, the arbitration procedure is conducted by the European Court of Justice. For the other three treaties, a main difference from Article 25(5) of the *OECD Model Tax Convention* (OECD, 2015a) is that they include substantially more rules on the arbitration procedure in the treaty itself, where the model refers to a mutual agreement on the application of the arbitration clause to be concluded between the competent authorities. Further, for two of the other three treaties, Germany entered into a mutual agreement on the application of the arbitration clause that further specifies how the arbitration procedure will be applied;[21] and
- In three treaties the arbitration clause provides for a voluntary and binding arbitration procedure.

Anticipated modifications

171. Germany reported that it has opted for part VI of the Multilateral Instrument, which includes a mandatory and binding arbitration provision.[22] It is currently in the process of analysing which of its tax treaties, and to what extent, will be modified to incorporate this arbitration provision.

Conclusion

	Areas for Improvement	Recommendations
[C.6]	-	-

Notes

1. These 91 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, and the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
2. One of these two treaties concerns the treaty with the former USSR that Germany continues to apply to Moldova.
3. Available at: www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm. These statistics are up to and include fiscal year 2015.
4. Available at http://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum_en. These statistics are up to and include fiscal year 2015 (accessed on 22 August 2017).
5. For post-2015 cases, if the number of MAP cases in Germany's inventory at the beginning of the Statistics Reporting Period plus the number of MAP cases started during the Statistics Reporting Period was more than five, Germany reported its MAP caseload on a jurisdiction-by-jurisdiction basis. This rule applies for each type of cases (attribution/allocation cases and other cases).
6. Available at: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ:C:2006:176:TOC (accessed on 22 August 2017).
7. Germany reported that for pre-2016 and post-2015 cases it follows the MAP Statistics Reporting Framework for determining whether a case is considered an attribution/allocation MAP case. Annex D of MAP Statistics Reporting Framework defines such case as: "a MAP case where the taxpayer's MAP request relates to (i) the attribution of profits to a permanent establishment (see e.g. Article 7 of the OECD Model Tax Convention); or (ii) the determination of profits between associated enterprises (see e.g. Article 9 of the OECD Model Tax Convention), which is also known as a transfer pricing MAP case".
8. Germany in addition mentioned that the dates on which the taxpayers who submitted the MAP requests were informed about the outcome were not available for a large number of pre-2016 cases, in particular where the request had been submitted with the competent authority of the treaty partner.
9. See Articles 85(3-4) and 108(3) of the Grundgesetz.
10. Available at: www.bzst.de/DE/Steuern_International/Advance_Pricing_Agreements/Vorschriften/BMF_Erlass_20110620.pdf (accessed on 22 August 2017). See also paragraph 1.4 of Germany's MAP guidance.
11. This office has recently been merged into another authority, the Bundesverwaltungsamt.
12. Circular note on co-ordinated external tax audits with tax administrations of other states and jurisdictions of 6 January 2017 (BStBl I 2017, 89).

13. Available at: www.bzst.de/DE/Steuern_International/Verstaendigungsverfahren/Merkblaetter/merkblaetter_node.html (accessed on 22 August 2017). The local tax administration has to forward the request through the official channel, which means via the relevant tax administration of the Länder, where applicable, and via the relevant superior tax administration of the Länder, generally the Ministry of Finance of the Länder.

14. Such immediate forwarding also has to be made when the local tax administration is not yet able to make a final statement, for example because the final result of a pending investigation must be awaited or where taxpayers initially pursue domestic available remedies.

15. Where a request is submitted to the other competent authority concerned under the EU Arbitration Convention, the German competent authority will, pursuant to paragraph 11.5 of its MAP guidance, also examine the formal requirements and forward the initiation letter by the other competent authority to the highest responsible office in the tax administration of the Länder. If necessary, the German competent authority will request the other competent authority concerned to send the information and documentation as listed in paragraph 11.3.2, which concerns the information and documentation Germany generally requires taxpayers to include in their request under the EU Arbitration Convention, as also a confirmation that the request was submitted within the three-year deadline and a notification of the start-date of the two-year deadline for the mutual agreement procedure.

16. Reference is made to paragraph 150 of this report for this specific suggestion.

17. This also follows from paragraph 1.4 of Germany's MAP guidance, which stipulates that: "the BZSt acts in agreement with the responsible supreme or commissioned state tax authority".

18. Germany refers to the Federal Ordinance on Performance-related civil service remuneration for the rules relating to performance bonuses.

19. Article 24 of the document Basis for negotiation for agreements for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital of 2013. A non-binding English translation is available at: https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Allgemeine_Informationen/2013-08-22-Verhandlungsgrundlage-DBA-englisch.html (accessed on 22 August 2017).

20. Reference is made to footnote 41 for the links to these agreements.

21. Reference is made to footnote 41 for the links to these agreements.

22. An overview of Germany's positions on the Multilateral Instrument is available at: www.oecd.org/tax/treaties/beps-mli-position-germany.pdf.

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Part D

Implementation of MAP Agreements

[D.1] Implement all MAP agreements

Jurisdictions should implement any agreement reached in MAP discussions, including by making appropriate adjustments to the tax assessed in transfer pricing cases.

172. In order to provide full certainty to taxpayers and the jurisdictions, it is essential that all MAP agreements are implemented by the competent authorities concerned.

Legal framework to implement MAP agreements

173. Taxpayers are in Germany allowed to submit a MAP request irrespective of whether they for the same case also have invoked domestic available remedies. In fact, in Germany taxpayers are allowed to submit a MAP request regardless of whether the case under review already has been resolved via such domestic remedies. This can be deducted from paragraph 2.1.5 of Germany's MAP guidance. Furthermore, from paragraph 13.1.4 of this guidance it can be deducted that the German competent authority is allowed to – in a mutual agreement procedure – deviate from decisions of its tax courts. In that regard there is in Germany no domestic law statute of limitations for implementing MAP agreements. In relation to the amendment of otherwise final and time-barred tax assessment, section 175a of the German Fiscal Code notes in this respect that:

> A tax assessment notice shall be issued, cancelled or amended where this is required in order to implement a mutual agreement understanding or an arbitral award pursuant to a treaty or convention within the meaning of section 2. The period for assessment shall not end before expiration of one year after the mutual agreement understanding or arbitral award has come into effect.[1]

174. When the German competent authority reaches an agreement with the other competent authority concerned, the agreement will be communicated without undue delay to the local tax administration as well as to the taxpayer. The taxpayer is subsequently invited to either accept or reject the agreement reached, for which there is no time limit. If the taxpayer accepts the agreement reached, he should submit a written declaration containing his consent to the implementation of the MAP agreement, to terminate any pending appeals and to declare a waiver of appeals against the tax assessment that reflects the MAP agreement.[2] This is also specified in paragraph 4.2 of Germany's MAP guidance, which stipulates:[3]

> When implementing the mutual agreement procedure, the locally responsible tax office must ensure, within the scope of reservation of consent that:
>
> - The applicant declares its agreement to implementation in writing;
> - Any pending appeals are terminated, and:

- Following notification of the advice implementing the mutual agreement, the applicant waives an appeal, provided that the results of the mutual agreement are correspondingly implemented thereby (partial waiver).

175. Upon receipt of the taxpayer's acceptance of the MAP agreement, the local tax authorities will implement the agreement through issuing tax assessments. Where the MAP agreement also needs to be accepted by the taxpayer in the other jurisdiction concerned, Germany reported it will implement the MAP agreement once the taxpayers' declaration of acceptance under German rules as well as under the rules of the other jurisdiction concerned are received by the German competent authority.

176. Germany reported that its competent authority does not monitor the actual implementation of MAP agreements, as this – as noted in paragraph 1.4 of Germany's MAP guidance – is a matter to be dealt with by the tax administrations of the Länder, but will do so when a taxpayer raises issues in a specific case. Germany noted that such cases are extremely rare.

Practical application

177. Germany reported that all MAP agreements that were reached on or after 1 January 2015, once accepted by taxpayers, have been implemented.

178. Peers generally reported that they were not aware of any MAP agreement reached on or after 1 January 2015 that were not implemented by Germany. Two peers particularly noted that it is their impression that Germany implemented MAP agreements correctly. Another peer voiced that Germany effectively and efficiently implements MAP agreements. One taxpayer provided input and mentioned that in its case an agreement was reached that was communicated by the German competent authority in due time.

Anticipated modifications

179. Germany did not indicate that it anticipates any modifications in relation to element D.1.

Conclusion

	Areas for Improvement	Recommendations
[D.1]	-	As it has done thus far, Germany should continue to implement all MAP agreements if the conditions for such implementation are fulfilled. In addition, to keep a record of whether all future MAP agreements are implemented, Germany could introduce a tracking system.

[D.2] Implement all MAP agreements on a timely basis

Agreements reached by competent authorities through the MAP process should be implemented on a timely basis.

180. Delay of implementation of MAP agreements may lead to adverse financial consequences for both taxpayers and competent authorities. To avoid this and to increase certainty for all parties involved, it is important that the implementation of any MAP agreement is not obstructed by procedural and/or statutory delays in the jurisdictions concerned.

Theoretical timeframe for implementing mutual agreements

181. As discussed under element D.1, taxpayers are not given a certain timeframe within which they should declare whether they agree with the content of the MAP agreement. In Germany there is thus no system in place that the taxpayer is deemed (not) to give his consent after a fixed period of time. In a general sense, section 175a of the German Fiscal Code requires that a MAP agreement has to be implemented within one year after the agreement has come into effect.

182. In addition, as also discussed under element D.1, taxpayers are informed by the German competent authority without undue delay of a MAP agreement reached. Once the taxpayer has declared its consent to the agreement, local tax administrations should initiate the implementation process also without delay. In that regard Germany reported that amended tax assessments will be issued in Germany shortly after receipt of the taxpayer's consent to the MAP agreement.

Practical application

183. Peers have not indicated experiencing any problems with Germany regarding the implementation of MAP agreements reached on or after 1 January 2015 in general or not on a timely basis. One peer specifically mentioned that it considered that MAP agreements with Germany have been implemented both timely and correctly. Another peer reported that for non-allocation/attribution cases implementation of MAP agreements takes a long time, as the implementation is to be performed by the local tax administration in Germany. This peer, however, did not provide specific examples of such delays.

Anticipated modifications

184. Germany did not indicate that it anticipates any modifications in relation to element D.2.

Conclusion

	Areas for Improvement	Recommendations
[D.2]	-.	As it has done thus far, Germany should continue to implement all MAP agreements on a timely basis if the conditions for such implementation are fulfilled.

[D.3] Include Article 25(2), second sentence, of the OECD Model Tax Convention in tax treaties or alternative provisions in Article 9(1) and Article 7(2)

Jurisdictions should either (i) provide in their tax treaties that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law, or (ii) be willing to accept alternative treaty provisions that limit the time during which a Contracting Party may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

185. In order to provide full certainty to taxpayers it is essential that implementation of MAP agreements is not obstructed by any time limits in the domestic law of the jurisdictions concerned. Such certainty can be provided by either including the equivalent of Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015) in tax treaties, or alternatively, setting a time limit in Article 9(1) and Article 7(2) for making adjustments to avoid that late adjustments obstruct granting of MAP relief.

Legal framework and current situation of Germany's tax treaties

186. As discussed under element D.1, Germany's domestic legislation includes a section that provides that otherwise final and time-barred tax assessments can be amended in order to implement MAP agreements.

187. Out of Germany's 93 tax treaties, 67 contain a provision that is equivalent to Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015) that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law.[4] For the remaining 26 treaties, the following analysis is made:

- In 24 tax treaties no equivalent provision to Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015) is included.[5] Further, none of these 24 tax treaties include the equivalent to Article 9(1) and Article 7(2), setting a time limit for making adjustments;
- One tax treaty does not include a provision that is based on Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015), but includes a provision stipulating that any MAP agreement shall be implemented within ten years. This treaty therefore is considered not having the full equivalent of Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015); and
- One tax treaty includes an equivalent provision to Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015), but this provision is supplemented with wording that may limit the implementation of MAP agreements due to constraints in the domestic legislation of the contracting states (e.g. "except such limitations as apply for the purposes of giving effect to such an agreement"). Although Germany's domestic legislation includes a section that provides that otherwise final and time-barred tax assessments can be amended in order to implement MAP agreements, such statute of limitation may be in existence in the domestic legislation of the treaty partner. This treaty therefore is considered not having the full equivalent of Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015).

Anticipated modifications

188. Germany reported it has recently signed the Multilateral Instrument with a view to inter alia modify – on the basis of Article 16(4)(b)(ii) of that instrument – those tax treaties that do not contain a provision equivalent to Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015) stipulating that any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the contracting states. In that regard, Germany reported it has not, as is allowed pursuant to Article 16(5)(c) of the Multilateral Instrument, reserved the right not to apply the second sentence of Article 16(2) of that instrument. Germany is currently in the process of analysing which of its tax treaties will be modified via the Multilateral Instrument, the outcome of which is dependent on the choices made by its treaty partners. Where the above-discussed tax treaties that do not contain a provision equivalent to Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015) will not be modified by the Multilateral Instrument, Germany reported it will subsequently strive to update them via bilateral negotiations to be compliant with element D.3. In addition, Germany reported it will seek to include Article 25(2), second sentence, of the *OECD Model Tax Convention* (OECD, 2015) in all of its future treaties.

189. Most peers that provided input reported that their treaty with Germany meets the requirement under element D.3. One peer noted that its treaty with Germany does not include this second sentence, which, however, is actually included in the treaty with this

peer. Three peers further mentioned that they are currently negotiating a new treaty or an amendment to the existing treaty with Germany with a view to *inter alia* be compliant with the requirement under element D.3. The treaties with these peers currently do not include the second sentence of Article 25(2) of the *OECD Model Tax Convention* (OECD, 2015). One other peer reported that its treaty with Germany does not include this sentence.

Conclusion

	Areas for Improvement	Recommendations
[D.3]	26 out of 93 tax treaties do contain neither a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention, OECD (2015), nor the alternatives provisions in Article 9(1) and Article 7(2).	Where treaties do not include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, OECD (2015), or include the alternatives provided in Article 9(1) and Article 7(2), and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, Germany should request the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions. Specifically with respect to the treaty with the former USSR and the treaty with former Czechoslovakia, Germany should, once it enters into negotiations with the jurisdictions for which it applies those treaties, request the inclusion of the required provision or its alternatives. In addition, Germany should maintain its stated intention to include the required provision, or be willing to accept the inclusion of both alternative provisions, in all future treaties.

Notes

1. A treaty or convention within the meaning of Section 2 of the German Fiscal Code concerns a tax treaty or convention, including bilateral tax treaties or the EU Arbitration Convention.
2. Section 354(1a) of the German Fiscal Code enables taxpayers to waive an appeal to a tax assessment for only those issues that are subject of a MAP agreement and subsequently to initiate or pursue domestic appeals for those issues that are not related to the issues covered in a MAP agreement.
3. See also paragraph 3.4 of Germany's MAP guidance.
4. These 67 treaties include the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
5. These 24 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, and the treaty with the former USSR that Germany continuous to apply to Moldova.

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Summary

	Areas for Improvement	Recommendations
Part A: Preventing disputes		
[A.1]	Two out of 93 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention, OECD (2015).	Where treaties do not include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, OECD (2015) and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, Germany should request the inclusion of the required provision via bilateral negotiations, or finalise already pending negotiations. In addition, Germany should maintain its stated intention to include the required provision in all future treaties.
[A.2]	-	As Germany has done thus far, it should continue to provide for roll-back of bilateral APAs in appropriate cases.
Part B: Availability and access to MAP		
[B.1]	Ten out of 93 tax treaties do not contain a provision that is equivalent to Article 25(1) of the OECD Model Tax Convention, OECD (2015a). Of those 10 tax treaties: Three do not contain a provision that is the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention, OECD (2015a), either as it read prior to the adoption of the final report on Action 14 or as amended by that final report; Six do not contain a provision based on Article 25(1), second sentence of the OECD Model Tax Convention, OECD (2015a), allowing taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty; and One does not contain a provision that is the equivalent of Article 25(1), first and second sentence, of the OECD Model Tax Convention, OECD (2015a), either as it read prior to the adoption of the final report on Action 14 or as amended by that final report.	Where treaties do not include the equivalent of Article 25(1) of the OECD Model Tax Convention, OECD (2015a) and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, Germany should request the inclusion of the required provision via bilateral negotiations. This concerns both: • a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention, OECD (2015a) either: a. As amended in the Action 14 final report, OECD (2015b); or b. As it read prior to the adoption of the Action 14 final report, OECD (2015b), thereby including the full sentence of such provision; and • a provision that allows taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. Specifically with respect to the treaty with the former USSR that is being applied to Moldova, Germany should, once it enters into negotiations with the jurisdictions for which it applies those treaties, request the inclusion of the required provision.In addition, Germany should maintain its stated intention to include the required provision in all future treaties.
[B.2]	-	As Germany has done thus far, it should continue to apply its notification/consultation process for future cases in which its competent authority considers the objection raised in a MAP request as not being justified.

	Areas for Improvement	Recommendations
[B.3]	-	As Germany has thus far granted access to the MAP in eligible transfer pricing cases, it should continue granting access for these cases.
[B.4]	-	As Germany has thus far granted access to the MAP in eligible cases concerning whether the conditions for the application of a treaty anti-abuse provision have been met or whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty, it should continue granting access for these cases.
[B.5]	-	As Germany has thus far granted access to the MAP in eligible cases, even if there was an agreement between the taxpayer and the tax authority, it should continue granting access for these cases.
[B.6]	-	As Germany has thus far not limited access to the MAP in eligible cases when taxpayers have complied with the Germany's information and documentation requirements for MAP requests, it should continue this practice.
[B.7]	Six out of 93 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a).	Where treaties do not include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a) and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, Germany should request the inclusion of the required provision via bilateral negotiations. In addition, Germany should maintain its stated intention to include the required provision in all future treaties.
[B.8]	Contact details of Germany's competent authority are not included in the MAP guidance.	Germany should update its MAP guidance to include the contact information of its competent authority as soon as possible. Furthermore, when following up its stated intention to update its MAP guidance, Germany could – although not part of the Action 14 Minimum Standard – consider including in its MAP guidance information on: • Whether MAP is available in cases of: (i) the application of anti-abuse provisions, (ii) multilateral disputes and (iii) bona fide foreign-initiated self-adjustments; • Whether taxpayers can request for the multi-year resolution of recurring issues through MAP; • The possibility of suspension of tax collection during the course of a MAP; • The consideration of interest and penalties in the MAP; and • The process how MAP agreements are implemented in terms of steps to be taken and timing of these steps, including actions to be taken by taxpayers (if any).
[B.9]	-	Germany should ensure that future updates of its MAP guidance are made publically available and easily accessible. Its MAP profile, published on the shared public platform, should be updated if needed.
[B.10]	-	-

	Areas for Improvement	Recommendations
Part C: Resolution of MAP cases		
[C.1]	Two out of 93 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention, OECD (2015a).	Where treaties do not include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention, OECD (2015a) and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, the Germany should request the inclusion of the required provision via bilateral negotiations. Specifically with respect to the treaty with the former USSR that is being applied to Moldova, Germany should, once it enters into negotiations with the jurisdictions for which it applies those treaties, request the inclusion of the required provision. In addition, Germany should maintain its stated intention to include the required provision in all future treaties.
[C.2]	Germany submitted timely comprehensive MAP statistics and indicated they have been matched with their MAP partners. The year 2016 was the first year for which MAP statistics were reported under the new MAP Statistics Reporting Framework. These statistics were only recently submitted by most jurisdictions that committed themselves to the implementation of the Action 14 Minimum Standard and some still need to be submitted or confirmed. Given this state of play, it was not yet possible to assess whether Germany's MAP statistics match those of its treaty partners as reported by the latter.	
	Within the context of the state of play outlined above and in relation to the MAP statistics provided by Germany, it resolved during the Statistics Reporting Period 17.84% (63 out of 353 cases) of its post-2015 cases in 1.54 months on average. In that regard, Germany is recommended to seek to resolve the remaining 82.16% of the post-2015 cases pending on 31 December 2016 (290 cases) within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.	
[C.3]	As Germany resolved MAP cases in 26.34 months on average, there may be a risk that post-2015 cases are not resolved within the average of 24 months, which is the pursued average for resolving MAP cases received on or after 1 January 2016, and which might indicate that Germany's competent authority is not adequately resourced. Given the close working relationship with the tax administrations of the Länder, it might also indicate that the resources available at that level might not be adequate to ensure that Germany's competent authority is able to resolve post-2015 cases within the pursued average.	Germany should closely monitor whether the additional resources recently provided to the MAP function, as well as the additional resources already envisaged to be provided in the near future, will contribute to the resolution of MAP cases in a timely, efficient and effective manner.
[C.4]	Personnel of tax administrations of the Länder directly involved in the adjustment at issue can participate in competent authority meetings during which MAP cases are resolved. This bears the risk that the competent authority function is not performed entirely independent from the approval or direction of the tax administration personnel directly involved in the adjustment at issue concerning the resolution of MAP cases during such meetings	Germany should ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being dependent of approval or direction from the personnel of the tax administrations of the Länder directly involved in the adjustments at issue when they attend competent authority meetings.
	-	As it has done thus far, Germany should continue to ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being influenced by considerations of the policy that Germany would like to see reflected in future amendments to the treaty.
[C.5]	-	As it has done thus far, Germany should continue to use appropriate performance indicators.
[C.6]	-	-

	Areas for Improvement	Recommendations
Part D: Implementation of MAP agreements		
[D.1]	-	As it has done thus far, Germany should continue to implement all MAP agreements if the conditions for such implementation are fulfilled. In addition, to keep a record of whether all future MAP agreements are implemented, Germany could introduce a tracking system.
[D.2]	-.	As it has done thus far, Germany should continue to implement all MAP agreements on a timely basis if the conditions for such implementation are fulfilled.
[D.3]	26 out of 93 tax treaties do contain neither a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention, OECD (2015), nor the alternatives provisions in Article 9(1) and Article 7(2).	Where treaties do not include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, OECD (2015), or include the alternatives provided in Article 9(1) and Article 7(2), and will not be amended by the Multilateral Instrument following its entry into force to include such equivalent, Germany should request the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions. Specifically with respect to the treaty with the former USSR and the treaty with former Czechoslovakia, Germany should, once it enters into negotiations with the jurisdictions for which it applies those treaties, request the inclusion of the required provision or its alternatives. In addition, Germany should maintain its stated intention to include the required provision, or be willing to accept the inclusion of both alternative provisions, in all future treaties.

Annex A

Tax treaty network of Germany

		Action 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	**Column 2**	**Column 3**	**Column 4**		**Column 5**	**Column 6**	**Column 7**	**Column 8**	**Column 9**	**Column 10**	**Column 11**	
Treaty partner	DTC in force?	Inclusion Art. 25(1) first sentence? If yes, submission to either competent authority (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? If no, please state reasons		Inclusion Art. 9(2)? If no, will your CA provide access to MAP in TP cases?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) second sentence? If no, alternative provision in Art. 7 & 9 OECD MTC?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion arbitration provision?	
	Y = yes N = signed pending ratification	E = yes, either CAs O = yes, only one CA N = No	Y = yes i = no, no such provision ii = no, different period iii = no, starting point for computing the 3 year period is different iv = no, others reasons	if ii, specify period	Y = yes i = no, but access will be given to TP cases ii = no and access will not be given to TP cases	Y = yes i = no and such cases will be accepted for MAP ii = no but such cases will not be accepted for MAP	Y = yes N = no	Y = yes i = no, but have Art 7 equivalent ii = no, but have Art 9 equivalent iii = no, but have both Art 7 & 9 equivalent N = no and no equivalent of Art 7 and 9	Y = yes N = no	Y = yes N = no	Y = yes N = no	if yes: i-Art. 25(5) ii-mandatory other iii – voluntary
Albania	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Algeria	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Argentina	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Armenia	N	O	Y	N/A	Y	i	Y	Y	Y	Y	Y	i
Australia	Y	E	Y	N/A	Y	i	Y	Y	Y	Y	Y	i
Austria	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	Y	ii

		Action 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	
Treaty partner	DTC in force?	Inclusion Art. 25(1) first sentence? If yes, submission to either competent authority (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? If no, please state reasons		Inclusion Art. 9(2)? If no, will your CA provide access to MAP in TP cases?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) second sentence? If no, alternative provision in Art. 7 & 9 OECD MTC?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion arbitration provision?	
Azerbaijan	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Bangladesh	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Belarus	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Belgium	Y	N	ii	2-years	i	i	N	N	N	N	N	N/A
Bolivia	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Bosnia and Herzegovina	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Bulgaria	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Canada	Y	O	ii	2-years	i	i	Y	N	Y	Y	Y	iii
China (People's Republic of)	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Chinese Taipei	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Costa Rica	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Croatia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Cyprus*	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Czech Republic	Y	O	i	N/A	Y	i	Y	N	Y	Y	N	N/A
Denmark	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Ecuador	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Egypt	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Estonia	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Finland	N	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A

		Action 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	
Treaty partner	DTC in force?	Inclusion Art. 25(1) first sentence? If yes, submission to either competent authority (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? If no, please state reasons		Inclusion Art. 9(2)? If no, will your CA provide access to MAP in TP cases?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) second sentence? If no, alternative provision in Art. 7 & 9 OECD MTC?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion arbitration provision?	
Former Yugoslav Republic of Macedonia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
France	Y	O	Y	N/A	i	i	Y	Y	Y	Y	Y	i
Georgia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Ghana	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Greece	Y	N	i	N/A	i	i	N	N	Y	N	N	N/A
Hungary	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Iceland	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
India	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Indonesia	Y	O	ii	2-years	i	i	Y	Y	Y	Y	N	N/A
Iran	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Ireland	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Israel	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Italy	Y	O	ii	2-years	i	i	Y	N	Y	N	N	N/A
Côte d'Ivore	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Jamaica	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Japan	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	Y	i
Jersey	Y	O	Y	N/A	i	i	Y	Y	N	N	Y	iii
Kazakhstan	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Kenya	Y	O	Y	N/A	i	i	Y	N	Y	Y	N	N/A
Korea	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Kosovo	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A

		Action 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	
Treaty partner	DTC in force?	Inclusion Art. 25(1) first sentence? If yes, submission to either competent authority (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? If no, please state reasons		Inclusion Art. 9(2)? If no, will your CA provide access to MAP in TP cases?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) second sentence? If no, alternative provision in Art. 7 & 9 OECD MTC?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion arbitration provision?	
Kuwait	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Kyrgyzstan	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Latvia	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Liberia	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Liechtenstein	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	Y	ii
Lithuania	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Luxembourg	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	Y	i
Malaysia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Malta	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Mauritius	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Mexico	Y	O	Y	N/A	Y	i	Y	N	Y	Y	N	N/A
Moldova	Y	O	i	N/A	i	i	N	N	Y	Y	N	N/A
Mongolia	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Montenegro	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Morocco	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Namibia	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Netherlands	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	Y	i
New Zealand	Y	O	i	N/A	i	i	Y	N	Y	N	N	N/A
Norway	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Pakistan	Y	O	ii	2-years	i	i	Y	Y	Y	Y	N	N/A
Philippines	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Poland	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Portugal	Y	O	ii	2-years	i	i	Y	N	Y	N	N	N/A

		Action 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6	
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Treaty partner	DTC in force?	Inclusion Art. 25(1) first sentence? If yes, submission to either competent authority (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? If no, please state reasons		Inclusion Art. 9(2)? If no, will your CA provide access to MAP in TP cases?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) second sentence? If no, alternative provision in Art. 7 & 9 OECD MTC?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion arbitration provision?	
Romania	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Russia	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Serbia	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Singapore	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Slovak Republic	Y	O	i	N/A	Y	i	Y	N	Y	Y	N	N/A
Slovenia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
South Africa	N	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Spain	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Sri Lanka	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Sweden	Y	O	i	N/A	Y	i	Y	Y	Y	Y	Y	iii
Switzerland	Y	O	i	N/A	i	i	Y	N	Y	Y	Y	ii
Syria	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Tajikistan	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Thailand	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Trinidad and Tobago	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Tunisia	Y	O	i	N/A	Y	i	Y	N	Y	Y	N	N/A
Turkey	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Turkmenistan	N	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Ukraine	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
United Arab Emirates	Y	N	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A

		Action 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	
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United Kingdom	Y	O	Y	N/A	Y	i	Y	N	Y	Y	Y	i
United States	Y	O	ii	4-years	Y	i	Y	Y	Y	Y	Y	ii
Uruguay	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Uzbekistan	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N	N/A
Venezuela	Y	O	ii	2-years	i	i	Y	Y	Y	Y	N	N/A
Viet-Nam	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A
Zambia	Y	O	i	N/A	i	i	Y	N	Y	Y	N	N/A
Zimbabwe	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N	N/A

* Footnote by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the "Cyprus" issue.

Footnote by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

Annex B

MAP statistics: Pre-2016 cases

Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2016	Number of pre-2016 cases closed during the reporting period by outcome										No. of pre-2016 cases remaining in MAP inventory on 31 December 2016	Average time taken (in months) for closing pre-2016 cases during the reporting period
		Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/ partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14
Attribution/ Allocation	545	3	0	7	3	4	111	0	0	1	0	416	34.48
Others	632	12	2	19	12	12	99	0	0	2	0	474	29.59
Total	1 177	15	2	26	15	16	210	0	0	3	0	890	31.79

Notes: 1. Germany's MAP statistics for the 2015 reporting period showed a 31 December 2015 ending inventory of 1.147 cases (539 transfer pricing or allocation of profits to permanent establishments and 608 other cases). As indicated in the footnote to the statistics for the 2015 reporting period, for those statistics Germany had applied the approach to treat a case as open as soon as the German competent authority received a request (or learned about a request received in the other jurisdiction). The difference between the 1.147 (539 and 608) ending inventory in the previous statistics and the number of pre-2016 cases in inventory on 1 January 2016 shown above is caused (a) by cases which were received by the other jurisdiction in 2015 or earlier (and which therefore are "pre-2016 cases" under the new common MAP Statistics Reporting Framework) but which the German competent authority only became aware of after 31 December 2015 (44 attribution/allocation cases and 24 other cases); (b) by the elimination of 37 APA rollback cases that were in the 31 December 2015 inventory but are no longer shown in the 1 January 2016 inventory as they are not regarded as MAP cases under the new MAP Statistics Reporting Framework; and (c) by the elimination of one case which was erroneously counted as a MAP case in the 31 December 2015 inventory but in fact was not a MAP request.

2. MAP cases where the request was filed under the EU Arbitration Convention are included in the attribution/allocation cases shown above.

3. Germany's MAP statistics for the 2015 reporting period showed cases as open (and thus in the ending inventory) until the German competent authority learned that the taxpayer concerned accepted an agreement reached between competent authorities. Germany changed the approach in the course of 2016 in order to align at least the end date for pre-2016 cases with the end date definition for post-2015 cases under the new common MAP Statistics Reporting Framework. Thus, the ending inventory shown in column 13 above only shows those cases where the end date as defined in paragraphs 12 and 13 of the new common MAP Statistics Reporting Framework had not been reached on 31 December 2016. As a consequence of moving to the new approach in the course of the year, the number of closed cases in 2016 is, as a one-time effect, higher than it would have been if the same principle had been used in the whole year.

4. The average time taken for closing pre-2016 cases in the reporting period 2016 has been calculated using (a) as start date: the date the German competent authority received a request or, where the request was filed in the other jurisdiction, the date the German competent authority was informed about the request, and (b) as end date: the date an agreement was reached or, for the cases closed with other outcomes, the date of the other outcome (or, where not available, the date the German competent authority learned about the other outcome). The dates on which the taxpayers who filed the requests were informed about the outcome were not available for a large number of cases, in particular where the request had been filed in the other jurisdiction.

Annex C

MAP statistics: Post-2015 cases

Treaty partner	No. of post-2015 cases in MAP inventory on 1 January 2016	No. of post-2015 cases started during the reporting period	Number of post-2015 cases closed during the reporting period by outcome										No. of post-2015 cases remaining in MAP inventory on 31 December 2016	Average time taken (in months) for closing pre-2016 cases during the reporting period
			Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation eliminated/fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/ partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/ Allocation	0	109	1	0	1	0	0	4	0	0	0	0	103	3.26
Others	0	244	2	1	8	34	11	1	0	0	0	0	187	1.36
Total	0	353	3	1	9	34	11	5	0	0	0	0	290	1.54

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Resolution Mechanisms More Effective
AO	Abgabenordnung (German Tax Code)
APA guidance	Information on bi- or multilateral mutual agreement procedures under double taxation agreements for reaching Advance Pricing Agreements ("APA") aimed at granting binding advance approval of transfer prices agreed between international associated enterprises (German original: *Merkblatt für bilaterale oder multilaterale Vorabverständigungsverfahren auf der Grundlage der Doppelbesteuerungsabkommen zur Erteilung verbindlicher Vorabzusagen über Verrechnungspreise zwischen international verbundenen Unternehmen (sogenannte "Advance Pricing Agreements"*), Federal Ministry of Finance circular of 5 October 2006 (BStBl I 2006, 594)
Federal Ministry of Finance	Bundesministerium der Finanzen
BStBl	Bundessteuerblatt (Federal Tax Gazette)
Federal Central Tax Office	Bundeszentralamt für Steuern
Look-back period	Period starting from 1 January 2015 and ending on 31 December 2015 for which Germany wished to provide information and requested peer input
MAP guidance	Memorandum on international mutual agreement and arbitration procedures in the field of taxes on income and capital (German original: *Merkblatt zum internationalen Verständigungs- und Schiedsverfahren auf dem Gebiet der Steuern vom Einkommen und vom Vermögen*), Federal Ministry of Finance circular of 13 July 2006 (BStBl I 2006, 461)
MAP Statistics Reporting Framework	Rules for reporting of MAP statistics as agreed by the FTA MAP Forum
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 15 July 2014
Pre-2016 cases	MAP cases in a competent authority's inventory that are pending resolution on 31 December 2015
Post-2015 cases	MAP cases that are received by a competent authority from the taxpayer on or after 1 January 2016

Review Period	Period for the peer review process that started on 1 January 2015 (including look-back period) and ended on 31 March 2017
Statistics Reporting Period	Period for reporting MAP statistics that started on 1 January 2016 and ended on 31 December 2016
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective

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OECD/G20 Base Erosion and Profit Shifting Project

Making Dispute Resolution More Effective – MAP Peer Review Report, Germany (Stage 1)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

Addressing base erosion and profit shifting is a key priority of governments around the globe. In 2013, OECD and G20 countries, working together on an equal footing, adopted a 15-point Action Plan to address BEPS. Beyond securing revenues by realigning taxation with economic activities and value creation, the OECD/G20 BEPS Project aims to create a single set of consensus-based international tax rules to address BEPS, and hence to protect tax bases while offering increased certainty and predictability to taxpayers. In 2016, the OECD and G20 established an Inclusive Framework on BEPS to allow interested countries and jurisdictions to work with OECD and G20 members to develop standards on BEPS related issues and reviewing and monitoring the implementation of the whole BEPS Package. Over 100 countries and jurisdictions have joined the Inclusive Framework.

Under Action 14, jurisdictions have committed to implement a minimum standard to strengthen the effectiveness and efficiency of the mutual agreement procedure (MAP). The MAP is included in Article 25 of the OECD Model Tax Convention and commits countries to endeavour to resolve disputes related to the interpretation and application of tax treaties. The Action 14 Minimum Standard has been translated into specific terms of reference and a methodology for the peer review and monitoring process.

The peer review process is conducted in two stages. Stage 1 assesses jurisdictions against the terms of reference of the minimum standard according to an agreed schedule of review. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report. This report reflects the outcome of the stage 1 peer review of the implementation of the Action 14 Minimum Standard by Germany.

Consult this publication on line at ***http://dx.doi.org/10.1787/9789264285804-en***.

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