OECD FORUM ON TAX ADMINISTRATION

Manual on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Arrangements

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Manual on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Arrangements

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Foreword

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

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

This *Manual on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Arrangements* ("MoMA" or "Manual") is part of the tax certainty work programme of the FTA, and has been produced jointly by members of the FTA MAP Forum and its focus group on "Exploring potential for wider use of multilateral MAP and multilateral APA". This Manual is intended as a guide to multilateral MAP and APA processes from both a legal and procedural perspective and provides tax administrations and taxpayers with information on the operation of these procedures and suggests different approaches based on the practices of jurisdictions, without imposing a set of binding rules.

The document was approved by the Inclusive Framework on BEPS, as well as all members of the FTA, on 12 January 2023, and prepared for publication by the OECD Secretariat.

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Reader's guide

This Manual on the Handling of Multilateral MAPs and APAs (MoMA) is intended as a guide to multilateral MAP and APA processes and how they could function. It provides tax administrations and taxpayers with basic information on the operation of such procedures and suggests different approaches based on the existing practices of jurisdictions, without imposing a set of binding rules upon jurisdictions. Further, it is not intended that jurisdictions be subject to any review or monitoring in relation to the implementation of any of the guidance in this Manual. In general, the approaches outlined in this Manual apply to both MAPs and APAs, except in sections where different approaches have been identified as ideal for each of these procedures.

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

- This Manual does not, and is not intended to, modify, restrict or expand any rights or obligations contained in the provisions of any tax treaty.
- Information contained in this Manual complements, and should not be considered a substitute for, the criteria, procedures, and guidance specified in the current versions of the OECD Model Tax Convention on Income and Capital (OECD Model Tax Convention) (OECD, 2019[1]) and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines) (OECD, 2017[2]).
- This Manual complements and does not affect the requirements, best practices or procedures established by the FTA MAP Forum in connection with the Action 14 minimum standard.
- To the extent that there are any statements or information in this Manual which appear to conflict, or to be incompatible with a convention, domestic guidance provided by a country, the OECD Model Tax Convention, its Commentary, the OECD Transfer Pricing Guidelines or the Action 14 final report (OECD, 2015[3]), then those documents will take precedence over this Manual.
- References to the OECD Model Tax Convention, its Commentary and the OECD Transfer Pricing Guidelines in this Manual may not be relevant for jurisdictions that do not follow such documents with respect to the interpretation and application of their tax treaties.

The approaches contained in this Manual are based on the approaches already undertaken by jurisdictions. Although taxpayers and tax administrations should consider these approaches while looking at multilateral MAP or APA processes, it is recognised that it may not always be possible to apply an approach as described in this Manual or that there may be situations where application may not be appropriate. It is also recognised that all references to timeframes for various steps in multilateral MAP or APA processes in this Manual are indicative and should only be treated as aspirational by jurisdictions.

In assessing whether implementation of any approach is appropriate, jurisdictions should take into account the circumstances of their own MAP and APA programmes and processes and the unique features of each case. It is paramount that the approaches be applied appropriately and with enough flexibility to improve current MAP and APA processes. However, to the extent appropriate, jurisdictions may adapt, refer to or

link to this Manual in their domestic guidance on multilateral MAP or APA processes to provide clarity on the procedures applicable in such cases.

Abbreviations and Acronyms

APA	Advance Pricing Arrangement
BAPAM	The Forum on Tax Administration Bilateral Advance Pricing Arrangement Manual
FTA	Forum on Tax Administration
MAP	Mutual Agreement Procedure
MoMA	Manual on the Handling of Multilateral MAPs and APAs
MNE	Multinational Enterprise
OECD	Organisation for Economic Co-operation and Development
OECD Model Tax Convention	The OECD Model Tax Convention on Income and Capital
OECD Transfer Pricing Guidelines	The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
PE	Permanent Establishment

Executive summary

During the inaugural Tax Certainty Day on 16 September 2019, tax policy makers, tax administrations, business representatives and other stakeholders agreed that multilateral Mutual Agreement Procedures ("MAPs") and Advance Pricing Arrangements ("APAs") offer greater tax certainty to both taxpayers and tax administrations where different parts of the same transaction or arrangement involving a multinational enterprise are covered by multiple bilateral tax treaties. However, most jurisdictions have limited experience in coordinating bilateral MAP and APA cases to offer multilateral certainty. Accordingly at the March 2019 plenary meeting of the Forum on Tax Administration, the following was noted in pursuance of the Tax Certainty Agenda:[1]

> *The FTA MAP Forum, in conjunction with the FTA Large Business International Programme, will study other avenues to advance on the tax certainty agenda, including by…..exploring the potential for the wider use of multilateral APAs and MAPs.....*

As a follow-up to the assignment of the task to the FTA MAP Forum, a focus group on "Exploring potential for wider use of multilateral MAP and multilateral APA" was established at the end of 2019. The focus group consisted of 19 jurisdictions: Australia, Austria, Canada, China (People's Republic of), Colombia, France, Germany, India, Ireland, Italy, Japan, Netherlands, Norway, Poland, Singapore, Spain, Thailand, the United Kingdom and the United States. In April 2020, a survey was circulated to focus group members that contained an outline of the legal basis for multilateral MAP and APA cases as well as the process for handling these cases. For each of the steps in the process, a description was included, followed by questions to members of the Focus group pertaining to the specific step. Based on the responses received, this Manual was prepared to provide guidance to jurisdictions on the handling and resolving of multilateral MAP or APA cases.

This Manual is divided into the following sections:

Introduction: This section comprises the outline of the project, the challenges that generally arise in multilateral cases and the overview of experiences of Focus group members based on their responses to the survey.

Basis for handling multilateral MAP and APA cases: This section contains guidance on the definition of a multilateral case, the legal basis for handling multilateral cases, the request filed in multilateral cases and the connection between access to multilateral procedures and the Action 14 minimum standard.

Procedural aspects to consider in multilateral cases: This section contains guidance on approaching the other jurisdictions concerned in multilateral cases, possible approaches to discussions, the coordination of procedural matters, the modalities of discussions, the interaction of available domestic remedies or procedures with multilateral cases, the implementation of agreements arising from these cases, arbitration where there is no MAP agreement and the rights and the obligations and role of the taxpayer.

Examples of multilateral cases: A number of representative, simplified examples of transactions that would generally benefit from multilateral solutions

Ideal timeline for a typical multilateral case: Indicative timelines for each step of a multilateral MAP or APA case in line with the guidance provided in the Manual.

The Manual allows tax administrations to explore whether implementation of these procedures is appropriate considering the circumstances of their own MAP and APA programmes and to consider whether the guidance therein may be incorporated in their domestic guidance on MAP or APA processes to provide additional clarity. The Manual also outlines the actions and cooperation expected from taxpayers to allow tax administrations to consider MAP and APA cases multilaterally.

References

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

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

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

Note

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

1 Introduction

1.1. Outline of the project

1. Tax treaties are entered into by jurisdictions on a bilateral basis. Disputes arising on the interpretation or application of these treaties are, therefore, also bilateral in nature. However, there are some situations where the application of multiple tax treaties acting together may cause legal consequences to a taxpayer or a group of related taxpayers in respect of the same transaction or series of transactions. This is particularly so in the case of multinational enterprises ("**MNEs**") that may simultaneously have a presence in multiple jurisdictions with different parts of the same transaction or arrangement being covered by multiple bilateral tax treaties. In such a situation, rather than have separate disputes ongoing under each concerned tax treaty leading to different consequences, taxpayers may prefer for such cases to be discussed and agreed upon multilaterally in the interest of tax certainty.

2. This is particularly relevant in the area of transfer pricing as questions on the arm's length pricing of transactions between associated enterprises or the attribution of profits to permanent establishments of MNEs cannot be considered only in a bilateral context. In fact, due to globalisation and developments in technology, production and distribution chains, as well as the provision of intra group services within MNEs, have become more and more integrated. Transfer pricing issues are no longer per se only bilateral in nature. An adjustment in one jurisdiction may have consequences for the allocation/attribution of profits in a number of other jurisdictions involved in a series of controlled transactions.

3. For both issues that arise when requesting an advance pricing arrangement ("**APA**") - the dispute prevention stage - or a mutual agreement procedure - the dispute resolution stage -, the legal basis for these procedures, resting in Article 25 of the tax treaty, is bilateral, even where the issue at stake may be of a multilateral nature. However, in practice, jurisdictions continue to use Article 25 as a basis to enter into multilateral agreements, during both the prevention and the resolution stage.[1] Although this is far from standard practice among jurisdictions, the peer review process on the implementation of the BEPS Action 14 Minimum Standard shows that jurisdictions with a substantial inventory of MAP cases generally allow for the resolution of multilateral disputes through the MAP process. Further, the APA statistics published by some jurisdictions such as the United States, Australia, Canada and Japan also show that there are a number of instances where multilateral APAs are being requested and/or entered into.

4. Paragraphs 38.1 to 38.5 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) (discussed in detail in the following sections) touch upon the possibility of multilateral procedures to prevent or resolve multilateral disputes in certain situations. Brief information in this respect is contained in section B.3 of Annex II to Chapter IV of the OECD Transfer Pricing Guidelines ("**TPG**") (OECD, 2017[2]). In addition, the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC) of July 23, 1990[2] ("**EU Arbitration Convention**") allows for the possibility of resolving multilateral transfer pricing disputes among European Union ("**EU**") Member States and the EU Joint Transfer Pricing Forum has agreed on a set of rules for such application in its revised Code of Conduct[3] ("**Code of Conduct**"). Finally, Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union[4] ("**EU Dispute Resolution Directive**") theoretically makes multilateral MAP possible, even though the procedural rules contained therein are not tailored to suit the same. While these sources may be of some assistance, there

is currently no comprehensive information published on how multilateral MAP and APA cases should be legally and procedurally handled as the guidance on MAP contained in the OECD Manual on Effective Mutual Agreement Procedures[5] ("**MEMAP**") and on APAs contained in the TPG do not address issues specific to multilateral cases in detail.

5. Accordingly, during the March 2019 plenary meeting of the Forum on Tax Administration ("**FTA**"), the following was noted in pursuance of the Tax Certainty Agenda[6]:

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

6. On this basis, a focus group exploring potential for wider use of multilateral MAP and multilateral APA ("**Focus group**") comprising 19 jurisdictions was created to commence work on this topic. Discussions in the Focus group suggested that members had some experiences in handling these type of cases, but that guidance on the procedural aspects would facilitate a more effective and efficient process. Accordingly, it was agreed that a paper would be issued outlining in detail the process steps for handling multilateral MAP / APA cases and the legal / procedural questions connected therewith. To have a clear view on jurisdictions' practices and to be able to come up with viable suggestions, it was agreed that this document would also contain questions to the members of the Focus group, enabling a stock-take on good practices, potential issues and suggestions for improvements to such processes.

7. Accordingly, a survey document was produced and circulated to the Focus group in April 2020 ("**Survey**"). The document contained an outline of the legal basis for multilateral MAP and APA cases as well as the process for handling these cases. For each of the steps in the process, a description was included, followed by questions to members of the Focus group pertaining to the specific step. Detailed responses were provided by 15 members of the Focus group.

8. Based on the responses received, this Manual was prepared to provide guidance to jurisdictions on the handling and resolving of multilateral MAP / APA cases.

1.2. Challenges arising in multilateral cases

9. There are several challenges that specifically arise in multilateral MAP / APA cases. First, there is no clear definition of a multilateral case and a lack of consensus on situations where multilateral solutions would be appropriate. Second, there is no clear agreement among jurisdictions as to the most appropriate legal basis for dealing with such cases, i.e. whether treaty relationships need to exist among all jurisdictions concerned and whether multiple requests are required. A number of ancillary, connected questions also arise, such as whether filing periods for MAP cases under tax treaties or domestic time limits would affect such cases. Third, several procedural concerns arise, such as the modalities of conducting such procedures, i.e. through multilateral discussions or multiple bilateral discussions and the sharing of information with multiple jurisdictions.

10. Annex II to Chapter IV of the TPG in Section B.3 (OECD, 2017[2]) refers to specific challenges that arise for multilateral APAs that would apply equally in the case of multilateral MAP cases, especially in transfer pricing cases. At the outset, it is acknowledged that it may be difficult for a single transfer pricing methodology to be applied to the wide variety of facts, transactions and jurisdictions concerned in a multilateral case, unless the methodology can be appropriately adapted. The TPG (OECD, 2017[2]) note that all the participating jurisdictions should ensure that the methodology, even after such adaptation, represents a proper application of the arm's length principle in the conditions found in their jurisdictions. Further, the TPG (OECD, 2017[2]) note that issues also arise in a multilateral case because several competent authorities are involved in a process that was designed for a bilateral procedure. One such

issue is the extent to which it may be necessary to exchange information between all the affected jurisdictions. This could be problematic in cases where there are no transaction flows or common transactions between two or more of the affected treaty partners, thereby creating doubts as to whether the information is relevant to the particular case being discussed, and difficulties in judging whether such information is relevant before it is reviewed. However, in cases where similar transactions are conducted by different parts of the MNE or for integrated businesses, there may be a need to have information about flows between other parties in order to be able to understand and evaluate the flows that are the subject of the particular bilateral APA. Even where relevant, the TPG (OECD, 2017[2]) further note that confidentiality issues may prevent the exchange of information and that for all such issues, case-specific solutions are usually required.

11. Given these challenges, further clarity and guidance on how to deal with these issues is needed, for both the prevention and resolution stage. In this respect, the items that the Focus group agreed to cover are:

- Legal possibilities and constraints to discuss MAP and APA cases in a multilateral manner
- The operation of the MAP and APA processes for multilateral cases, including:
  - Recipient of a request for a multilateral MAP / APA request
  - Identification of the multilateral case
  - Steps in the process, including:
    - Issuing of position papers
    - Organising face-to-face meetings/teleconferences.
  - Exchange of information throughout the process
  - Arbitration: practical application of the procedure in a multilateral case.
- Rights and roles of the taxpayer in the process
- Reaching an agreement:
  - Basis of the agreement: multiple bilateral agreements, a single multilateral agreement
  - Implementation of the agreement.
- Miscellaneous:
  - MAP cases: relationship with available domestic remedies
  - APA cases: relationship with domestic audits.

1.3. Overview of experiences

12. The responses received to the Survey clearly noted that multilateral MAPs and APAs offer greater tax certainty for taxpayers and CAs as compared to traditional bilateral agreements in several situations. However, given their multilateral nature and the relative inexperience of most jurisdictions in undertaking such processes, they offer significant challenges over-and-above bilateral MAP cases and APAs. Some of the challenges are the same as for bilateral MAP cases and APAs, albeit exacerbated by having more stakeholders involved. However, other challenges are unique.

13. First, several jurisdictions noted that multilateral MAPs/APAs were most appropriate in transfer pricing cases. Cases with group service providers for multiple jurisdictions, trading companies in multiple jurisdictions, permanent establishments in multiple jurisdictions etc. were cited as situations where multilateral solutions offered greater tax certainty as compared to bilateral solutions.

14. Second, most jurisdictions require treaties to be in place between all jurisdictions involved in a multilateral case. Some jurisdictions are more flexible and allow for a single MAP request from a taxpayer

under one treaty and then coordination using the equivalent of Article 25(3) of the OECD Model Tax Convention (OECD, 2019[1]) for other jurisdictions. In contrast, other jurisdictions require MAP requests under each treaty. However, since the equivalent of Article 25(3) may be used to coordinate multilateral MAPs for practicality reasons, implementation may be affected by domestic time limits.

15. Third, most jurisdictions noted that a similar level of information is required from taxpayers as in bilateral cases, but sharing information with multiple jurisdictions without formal MAP requests may raise confidentiality concerns. Further, there are two distinct approaches to multilateral cases: while some jurisdictions prefer to work with all the jurisdictions together multilaterally, some prefer to work bilaterally in a coordinated manner to achieve a harmonised result. Both approaches have merits and demerits, which were noted by jurisdictions.

16. The outcome of the Survey has reinforced the need for centralised practical guidance outlining the legal and non-legal issues faced by jurisdictions when dealing with multilateral APAs and MAP cases, as well as providing a framework to handle such multilateral cases in an effective and efficient manner. The Manual will aim to set out legal and procedural guidelines for multilateral MAP / APA cases, highlighting the different practices of jurisdictions having experience in this area and noting possible benefits and issues arising from each such approach.

References

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

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

Notes

1 As is noted in paragraph 21 of Annex II to Chapter IV of the Transfer Pricing Guidelines: “The desire for certainty has resulted in an emerging trend for taxpayers to seek multilateral MAP APAs covering their global operations…”. See also paragraph 4.141 of the Transfer Pricing Guidelines, where it is stated that: “…most jurisdictions prefer bilateral or multilateral APAs…[as] [t]he bilateral (or multilateral) approach is far more likely to ensure that the arrangements will reduce the risk of double taxation…and will provide greater certainty to the taxpayers concerned …”. Paragraph 27 of Annex II to Chapter IV also notes: “Indeed, where global trading is conducted on a fully integrated basis…, a multilateral, as opposed to a bilateral, APA has become the norm”.

2 Available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A41990A0436.

3 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A42009X1230%2801%29.

4 Available at https://eur-lex.europa.eu/eli/dir/2017/1852/oj.

5 Available at www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm.

6 See 2019 FTA Santiago communique. Available at: www.oecd.org/tax/forum-on-tax-administration-communique-2019.pdf.

2 Basis for handling multilateral MAP and APA cases

2.1. Definition of a multilateral case

17. There is no general definition for a multilateral case, either in the context of MAP or APAs. Bilateral treaties normally contain a MAP provision (equivalent to Article 25(1) and (2) of the OECD Model Tax Convention (OECD, 2019[1])) that provides that where a taxpayer considers that the actions of one or both of the jurisdictions result or will result for him in taxation not in accordance with the provisions of the treaty, he may, irrespective of the remedies provided by the domestic law of those jurisdictions, present his case to a designated competent authority of one or both of the jurisdictions. The competent authority receiving such request shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Convention.

18. However, where both competent authorities are of the view that a request filed under a tax treaty provision equivalent to Article 25(1) by a taxpayer cannot be resolved without the involvement of other third jurisdictions as well, paragraph 55.2 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) refers to the possibility of two competent authorities agreeing on a general basis, pursuant to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2019[1]), that:

> *…….they shall endeavour to resolve a case presented under paragraph 1 with the competent authority of any third State in circumstances where taxation on income or on capital in that third State is likely to affect or be affected by the resolution of the case.*

19. This paragraph also states that jurisdictions that wish to make an express provision for multilateral MAP may agree to use the following alternative formulation for Article 25(2), which reads as follows:

> ***Where the resolution of the case may affect or be affected by taxation on income or on capital in any third State****, the competent authorities shall endeavour to resolve the case by mutual agreement with the competent authority of any such third State provided there is a tax convention in force between each of the Contracting States and that third State and the competent authority of that third State agrees within the three-year period provided in paragraph 1 to consult with the competent authorities of the Contracting States to resolve the case by mutual agreement. In order to resolve the case, the competent authorities shall take into consideration the relevant provisions of this Convention together with the relevant provisions of the tax conventions between the Contracting States and any third State involved in the procedure.*

20. Based on the above, it can be derived that a multilateral MAP case generally arises in a bilateral context where the two competent authorities identify that the case cannot (fully) be resolved because cooperation by the competent authority(ies) of (a) third State(s) is required. In such cases, they could then use the general MAP provision (equivalent to Article 25(3) of the OECD Model Tax Convention (OECD, 2019[1])) or the abovementioned expanded wording in the provision equivalent to Article 25(2) in the tax treaty to endeavour to resolve the case with the competent authority(ies) of the third State(s).

21. In the context of APAs, it is generally accepted that bilateral APAs derive their legal basis from a tax treaty provision equivalent to Article 25(3), first sentence of the OECD Model Tax Convention (OECD, 2019[1]). Similarly, multilateral APAs should also derive their legal basis from these provisions contained in multiple treaties existing among the different jurisdictions involved.

22. The references in the Commentary on Article 25 (OECD, 2019[1]) to multilateral cases and ways to resolve them generally presume there is a treaty relationship between all jurisdictions concerned with all treaties containing the equivalent of Article 25 of the OECD Model Tax Convention (OECD, 2019[1]). This is stated in the Commentary on Article 25 in paragraphs 38.1 and 38.3 (for MAP cases) and paragraph 38.5 (for APA cases):

> *38.1 The combination of bilateral tax conventions concluded among several States may allow the competent authorities of these States to resolve multilateral cases by mutual agreement* ***under paragraphs 1 and 2 of Article 25 of these conventions*** *(…).*
>
> *38.3 This may, for instance, also be the case where a number of associated enterprises of different States are involved in a series of integrated controlled transactions and* ***there are bilateral tax conventions among the States of all the enterprises*** *(…).*
>
> *38.5 The desire for certainty may result in taxpayers seeking multilateral advance pricing arrangements ("APAs") to determine, in advance, the transfer pricing of controlled transactions between associated enterprises of several States.* ***Where there exist bilateral tax conventions among all these States*** *and it appears that the actions of at least one of these States are likely to result for the taxpayer in taxation not in accordance with the provisions of a convention,* ***Article 25 of these conventions allows*** *the competent authorities of these States to negotiate on a multilateral basis an appropriate set of criteria for the determination of the transfer pricing for the controlled transactions (…).*

23. This was affirmed by the fact that most jurisdictions that have experience with multilateral cases reported through the survey that they would require treaty relationships including the equivalent of Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) with all jurisdictions concerned to conclude a multilateral MAP or APA.[1] Jurisdictions noted that they would find it difficult to discuss multilateral cases without treaty relationships with all jurisdictions concerned owing to various factors such as lack of legal basis and taxpayer confidentiality rules under domestic law. Therefore, in most cases, it is expected that a multilateral case can only be handled and resolved if there is a treaty relationship existing between all jurisdictions concerned.[2]

24. Accordingly, drawing from the above, for the purpose of this Manual, a definition for a multilateral case that applies to both MAP and APA cases can be devised as follows:

> *A multilateral case is a case where two competent authorities –*
>
> *(a) cannot fully resolve taxation not in accordance with a treaty without resolving taxation not in accordance with other treaties involving third jurisdictions or address double or multiple taxation arising or that may arise owing to the taxation on income or on capital in one or more third jurisdictions; and*
>
> *(b) in such a case, endeavour to find agreement on the case by mutual agreement with the competent authority(ies) of the third jurisdiction(s),*
>
> *provided there are tax treaties in force between all of the jurisdictions involved containing provisions based on Article 25 of the OECD Model Tax Convention.*

2.2. Legal basis for handling multilateral cases[3]

25. The next key step in handling a multilateral case would be to determine the legal basis that jurisdictions would rely on to participate in that multilateral case.

26. There is for the most part a consensus among all jurisdictions that they would all rely on the equivalent of Article 25(3), first sentence of the OECD Model Tax Convention (OECD, 2019[1]) contained in their tax treaties as legal basis for both bilateral and multilateral APAs. Many jurisdictions are able to accept multilateral APA requests and discuss and enter into APAs with multiple jurisdictions on the basis of this provision. Jurisdictions that are able to enter into bilateral APAs on the basis of the equivalent of Article 25(3), first sentence of the OECD Model Tax Convention (OECD, 2019[1]) may enter into multiple such bilateral APAs and coordinate them to create a multilateral APA as a result However, jurisdictions having specific legal or constitutional requirements in this regard may be required to enact specific rules under domestic law, in addition to this treaty provision, to allow them to enter into multilateral APAs.

27. Multilateral MAPs, on the other hand, could be considered by jurisdictions on the basis either of the equivalent of Article 25(1) and (2) of the OECD Model Tax Convention ("**Article 25(1)**" and "**Article 25(2)**") (OECD, 2019[1]) or Article 25(3), first sentence of the OECD Model Tax Convention ("**Article 25(3)**") (OECD, 2019[1]), contained in their tax treaties.

28. Article 25(1) deals with the specific case MAP and applies where a taxpayer considers that an action of one or both of the contracting jurisdictions to a tax treaty results or will result for them in taxation not in accordance with the provisions of the treaty. Such a taxpayer is, irrespective of domestic remedies where pending or finalised, allowed to file a MAP request with the competent authority of one or both of the jurisdictions (depending of the wording of the treaty concerned) within three years from when the taxpayer was first notified of such action. Article 25(2) provides that the competent authority receiving the request shall, if the objection raised by the taxpayer is justified in its view and it cannot find a solution unilaterally, discuss the case with the competent authority of the other jurisdiction to resolve the issue complained of by the taxpayer through mutual agreement, and any such mutual agreement should be implemented by the competent authorities notwithstanding domestic time-limits.

29. Article 25(3), first sentence, on the other hand is the general MAP provision that does not envisage a MAP request filed by the taxpayer and allows competent authorities, at their discretion, to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty between them. Such cases do not require a specific taxation action taken by any of the jurisdictions concerned or a MAP request to be filed by a taxpayer. However, case-specific mutual agreements reached under Article 25(3) do not usually include a requirement for the treaty partners to implement the solution notwithstanding domestic time-limits since the treaty provision in this regard only applies to Article 25(1) MAP requests. This may cause difficulties for some jurisdictions in cases where domestic time limits have expired.

30. In the interest of flexibility and easier access to multilateral MAP, a number of jurisdictions derive legal basis for multilateral MAP discussions from the equivalent of Article 25(3), even where it is preceded by a specific request by a taxpayer ("**Article 25(3) Approach**"). In such a model, in most cases, the taxpayer is required to file a MAP request under Article 25(1) of one treaty ("**primary MAP request**"). This treaty usually involves the jurisdiction that has made or proposes to make a primary adjustment or action resulting in taxation not in accordance with the treaty. For this MAP request, the rules under Article 25(1) and (2) are applicable, including the time limit for filing MAP requests. However, where other jurisdictions are to be involved for a multilateral solution, the competent authorities may then use Article 25(3) under each concerned treaty to reach out to other competent authorities to initiate discussions on a multilateral MAP. Since the modalities of discussions are not specified in the treaty, the multilateral MAP could be done through multilateral discussions or coordinated bilateral discussions. In this situation, any agreement reached in MAP may be implemented notwithstanding domestic time limits in the concerned treaty since the primary MAP request was made pursuant to Article 25(1), but agreements made under Article 25(3) under the remaining treaties may face challenges of domestic-limits in some jurisdictions owing to Article 25(2), second sentence not being squarely applicable in such cases.[4] Such jurisdictions may facilitate the implementation of multilateral MAP agreements without being restricted by domestic time limits by amending their domestic law to allow the same.

31. However, other jurisdictions are of the view that where there is a taxpayer filed MAP request, the MAP case has to be considered under the equivalent of Article 25(1) and (2) ("**Article 25(1) Approach**"). For multilateral MAP cases considered under these provisions of multiple bilateral treaties in the Article 25(1) Approach, a number of things need to be kept in mind. Jurisdictions may require MAP requests to be filed by taxpayers under each applicable treaty. Each MAP request would require an action that has resulted or will result in taxation not in accordance with the treaty – which in transfer pricing cases, should include the apprehension of a non-arm's length result owing to adjustments in one of the jurisdictions concerned. Each MAP request should be filed within the time limit for filing MAP requests specified in each such treaty as well.[5] This may increase the level of legal requirements placed on the taxpayer to apply for a multilateral MAP. However, since the modalities of discussions are not specified in the treaty for such cases either, the multilateral MAP could be practically done through multilateral discussions or coordinated bilateral discussions and the resulting MAP agreement under each treaty can be implemented notwithstanding domestic time limits if allowed by the treaty.

32. Nevertheless, in practice, jurisdictions that are legally required to use the Article 25(1) Approach may still adapt simplification measures to reduce the procedural burden imposed on taxpayers in such cases. If the taxpayer files a single MAP request under Article 25(1) identifying all the jurisdictions that it believes should be involved in the multilateral MAP case, the jurisdiction receiving the request may consider that MAP requests have been received under the applicable treaties with all of the treaty partner jurisdictions specified in the request. For the purpose of such requests, the jurisdiction receiving the MAP request may, especially in transfer pricing cases where one primary adjustment could lead to pricing changes throughout the structure, also consider that there is an action creating at least the likelihood of taxation not in accordance with each treaty involving that jurisdiction in order to allow access to MAP for requests filed within the filing period under the treaty calculated as from the primary adjustment. For treaties not involving the jurisdiction that made the primary adjustment and for cases other than transfer pricing cases, subject to domestic law and/or treaty limitations, jurisdictions may consider notifying the taxpayer of a likely adjustment or assessment owing to a primary adjustment or action in another State, allowing them to file MAP requests challenging the action under Article 25(1) of those treaties. Such measures would allow flexible and easy access to MAP just as under the Article 25(3) Approach, while also addressing the uncertainty as to whether the implementation of MAP agreements would be restricted by time limits under the Article 25(3) Approach. However, even where a jurisdiction that is legally required to use the Article 25(1) Approach is not the jurisdiction receiving the MAP request, as long as the MAP request received by the other jurisdiction identifies the jurisdiction and the other jurisdictions as well, jurisdictions are encouraged to be flexible enough to consider that Article 25(1) and (2) under the concerned treaties have been invoked.

33. Irrespective of the approach chosen, jurisdictions are encouraged to remain as open and as flexible as possible to receive MAP requests and to handle and resolve them in multilateral cases. In this regard, jurisdictions should aim to provide clarity in their published MAP guidance as to the legal basis that they would use for multilateral MAP cases in situations where they are the jurisdiction receiving the primary MAP request or otherwise. Where jurisdictions involved in the same case follow different approaches owing to legal requirements, early coordination between the jurisdictions on the practical measures that can be taken to consider the case multilaterally would also be good practice.

34. Apart from the above, many jurisdictions are also able to handle multilateral MAP cases where there are no taxpayers eligible to benefits under one of the treaties concerned in the structure. This would be applicable where a resident of a third jurisdiction has multiple permanent establishments ("**PE**") in different jurisdictions and the allocation of profits to each PE and between PEs needs to be determined in a coordinated manner. This is specifically dealt with in paragraph 55 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]), which states that Article 25(3), second sentence of the OECD Model Tax Convention may allow the three jurisdictions to eliminate any double taxation remaining even though some of the transactions are not covered by a tax treaty as such:

> *55. The second sentence of paragraph 3 enables the competent authorities to deal also with such cases of double taxation as do not come within the scope of the provisions of the Convention. Of special interest in this connection is the case of a resident of a third State having permanent establishments in both Contracting States. The second sentence of paragraph 3 allows the competent authorities of the Contracting States to consult with each other in order to eliminate double taxation that may occur with respect to dealings between the permanent establishments….A multilateral agreement between the competent authorities of all involved States is the best way of ensuring that any double taxation can be eliminated.*

35. Where possible under domestic law, jurisdictions may adapt the above approach for multilateral MAP cases as well and use Article 25(3), second sentence, in conjunction with any of the approaches outlined above to find a solution in such a situation. In addition, jurisdictions that take the view that Article 25(3), second sentence, can be interpreted broadly to include the provision of advance certainty in such cases through multilateral APAs may allow the same as well.

36. However, irrespective of the approach taken and even though no fewer legal requirements connected therewith may apply in the Article 25(3) approach, taxpayers should submit all MAP requests submitted and connected information and documentation to the competent authorities of all jurisdictions concerned to avoid issues of confidentiality as discussed further in section 2.3.4.

2.3. The request in multilateral cases

37. Most tax treaties allow treaty benefits to all persons, including individuals, bodies corporate and other bodies of persons that are resident in one or both of the contracting jurisdictions to the treaty. Since multilateral MAPs and APAs should both derive legal basis from the equivalent of Article 25 of the OECD Model Tax Convention contained in a treaty as noted above, all persons that are accorded benefits under a tax treaty should be entitled to make such requests. In general, all multilateral MAP and APA requests should follow the guidance set by the jurisdictions receiving the request[6] and should ideally follow best practices as noted in MEMAP[7], Annex II to Chapter IV of the OECD TPG (OECD, 2017[2]) and the Bilateral Advance Pricing Arrangement Manual ("**BAPAM**") (OECD, 2022[4]).

38. In some cases, taxpayers are required to identify that a request pertains to a multilateral case when making a request. For example, the United States Revenue Procedure 2015-41 requires taxpayers to identify an APA request as a multilateral APA and Canada's MAP guidance requires taxpayers to identify a MAP request as relating to a multilateral MAP case. Further, paragraph 6.2(d) of the Code of Conduct to the EU Arbitration Convention[8] places a notification obligation on taxpayers to submit information concerning other parties, besides those involved in the bilateral case for which a request under the convention is submitted, involved in the case. However, paragraph 1.1(a) of the Code of Conduct provides that the two competent authorities involved in a bilateral case also have to agree that a case is a multilateral case, based on evidence following from a comparability analysis, a functional analysis and other related factual elements. Although such a detailed analysis and agreement between the competent authorities may not be necessary, some form of agreement among all competent authorities that the case is a multilateral case would represent good practice.

39. Therefore, while taxpayers must identify multilateral cases in their requests, the competent authority receiving the request must also agree with the taxpayer. Further, the same view should be shared by each competent authority receiving the information later in the multilateral stage, subject to the fact that in MAP cases, competent authorities must follow general rules concerning access to MAP as noted in section 2.4. In a situation where one or more of the competent authorities involved is not able to resolve the case as a multilateral case owing to substantive differences, it may not be possible to completely avoid double or multiple taxation. However, the remaining competent authorities should then proceed and resolve the double or multiple taxation to the extent possible and endeavour to resolve the remaining issues with the jurisdictions with differences bilaterally if this can be achieved.

40. The taxpayer may also be given the option to identify the case as a multilateral case following submission of the request. In addition, in a MAP case, the fact that taxpayers should ideally identify multilateral cases in their requests should not prevent competent authorities from identifying a case as a multilateral case where the taxpayer's request fails to do so. If the competent authorities involved in a bilateral MAP case agree that only multilateral discussions with a third jurisdiction(s) would allow a full resolution in the case at hand, the case may later be converted into a multilateral case depending on the approach taken by the jurisdictions concerned and taxpayer action, where necessary.

2.3.1. The multilateral APA request

41. Usually, a multilateral APA is formally initiated through a request filed by the taxpayer. Much like in the case of bilateral APAs, taxpayers filing a multilateral APA request may be involved in early-engagement or pre-filing discussions with the jurisdictions concerned by the potential request before it is filed. This would allow for increased collaboration between the taxpayer and the competent authorities, assisting the taxpayer to understand the expectations of the competent authorities in the process, including information and documentation requirements, and ensuring that *prima facie,* the concerns of all competent authorities are addressed in the taxpayer's formal request. While the taxpayer may start such an engagement through formal or informal preliminary discussions with the competent authority before which it intends to file the request initially, the taxpayer should engage with all other competent authorities involved, through joint meetings or otherwise, when it becomes evident that it is likely to submit a formal multilateral APA request. However, competent authorities should not use early engagement with the taxpayer to arrive at unilateral agreements on the transactions prior to initiating multilateral discussions.

42. Once these discussions are completed, taxpayers are expected to file multilateral APA requests simultaneously to all competent authorities concerned with the same information and documentation attached along with the application. Where a taxpayer has already submitted a unilateral or bilateral APA application and wishes to expand this request into a multilateral APA, competent authorities may allow the taxpayer to submit additional APA applications to each new affected competent authority as well or allow the taxpayer to withdraw the unilateral or bilateral APA application and submit a new multilateral APA application in place of this. All discussions undertaken at the early-engagement or pre-filing stage and the filing of the formal request for a multilateral APA should be done keeping in mind the best practices agreed by the FTA MAP Forum for bilateral APAs in the BAPAM (OECD, 2022[4]).

2.3.2. The request in the 25(3) Approach

43. Where multilateral MAP requests are accepted under the Article 25(3) approach, as noted above, it should be sufficient for the taxpayer concerned to file a single request.

44. The identification of a MAP request as a multilateral case by the taxpayer would be helpful in this situation, as the competent authorities under the treaty covered by the primary MAP request would then need to reach out to the competent authorities in all other jurisdictions concerned to start substantive discussions. The request along with supporting documentation should include all the information required to facilitate such discussions and agreement.

45. Even under the Article 25(3) Approach, all applicable requirements in the treaty under which the Article 25(1) request is filed should be kept in mind.

2.3.3. The request in the 25(1) Approach

46. Where the Article 25(1) approach is adopted for MAP requests, taxpayers would be required to file MAP requests under each treaty involved in a multilateral MAP request. As most multilateral cases would involve transfer pricing issues, taxpayers may claim that a primary adjustment that has been made or is proposed to be made in one jurisdiction has the potential to create taxation not in accordance with the

arm's length principle in each treaty concerned in the network, therefore falling within the scope of Article 25(1). For cases that are not transfer pricing cases, however, taxpayers may need to wait for one of the jurisdictions party to each treaty to take or propose some action that would lead to such taxation before filing MAP requests.

47. Since taxpayers are usually aware of the multilateral connotations of their transactions, they should identify the various jurisdictions concerned. Once the relevant treaties are identified, taxpayers may then file MAP requests as allowed under Article 25(1) of each treaty after taking into account the action subject to the request, the competent authority before which the request should be filed[9] and the time-limits for filing the request, in each case.

48. Although taxpayers should identify a case as a multilateral case in all situations, competent authorities may still, while analysing the MAP request or during preliminary discussions in the bilateral stage, identify a case as a multilateral case even where the taxpayer's MAP request is filed under one bilateral treaty. In the Article 25(1) Approach, the competent authorities could then notify the taxpayer hereof and encourage the taxpayer to file a MAP request under other connected treaties as well where required. This could then raise issues in connection with the filing period of other treaties. However, where additional competent authorities cannot be involved in the case or the taxpayer does not file additional MAP requests as required, in a reasonable time, competent authorities should proceed with discussions in the bilateral case and endeavour to resolve the case in line with their obligations under the equivalent of Article 25(2) in the concerned treaty.

49. For example, consider a situation where jurisdiction A has raised a primary adjustment for taxpayer A in its transaction with its associated enterprise B, a resident in jurisdiction B, and taxpayer A has filed a MAP request under the A-B treaty. Here, if the competent authorities agree that jurisdiction C should also be involved to avoid double or multiple levels of taxation for its resident associated enterprise, C, a MAP request under the A-C and B-C treaties may also be required to be filed within the filing period of these treaties, starting from the first notification of the primary adjustment. In this regard, paragraph 21 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) requires the "first notification" of the action leading to a MAP request to be interpreted in a way that is most favourable to the taxpayer. Competent authorities may, accordingly, consider moving the starting point of the filing period under the A-C and B-C treaties to the first notification of the impact on transactions with the associated enterprise C since, in these situations, the taxpayer and associated enterprises may as yet be unaware of the impact on other entities.

2.3.4. Form and contents of a multilateral case request

50. As regards the form and contents of a multilateral MAP or APA request, guidelines for such requests for bilateral cases under a jurisdiction's domestic law should apply. To develop their guidance, jurisdictions may refer to the "Guidance on Specific Information and Documentation Required to be Submitted with a Request for MAP Assistance" published along with the Action 14 peer review documents for MAP[10] and the "Guidelines for conducting Advance Pricing Arrangements under the Mutual Agreement Procedure (MAP APAs)" contained in Annex II to Chapter IV of the OECD TPG (OECD, 2017[2]). However, apart from these general requirements, taxpayers should ideally identify the following specifically in multilateral case requests to allow competent authorities to discuss and find agreement on the case:

- details of all associated enterprises and connected jurisdictions involved in the transactions
- details of all relevant transactions involved, including diagrammatical representation where possible
- details of all treaties that the MAP or APA request(s) would pertain to
- details of action(s) that create (the possibility of) taxation not in accordance with the treaties, in MAP cases

- an analysis of the issue(s) sought to be resolved in all jurisdictions and related documentation (particularly for APAs and transfer pricing MAP cases)
- details of other MAP or APA requests being submitted simultaneously on the same issue
- details of pending audits, domestic remedies initiated or decisions from such remedies in any of the jurisdictions in connection with the transactions.

51. Owing to the possible interactions with multiple jurisdictions, the request along with the attached documentation should be filed by the taxpayer(s) in each jurisdiction where filing is required with an attached English translation, except where all jurisdictions impacted by the request follow the same official language. Reliance may be placed on the OECD MEMAP[11] and BAPAM (OECD, 2022[4]) for templates for MAP and APA requests respectively, which may then be customised by taxpayers to include the information suggested under this section to adapt to the multilateral context.

52. Another complication that arises in this context is whether taxpayer information received in a MAP request may be freely shared by jurisdictions under the authority derived from the equivalents of Article 25 and Article 26 of the OECD Model Tax Convention (OECD, 2019[1]) contained in a tax treaty. Paragraph 4 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) notes that Article 26 applies to the exchange of information between jurisdictions for the purposes of the mutual agreement procedure. However, Article 26 only allows the sharing of foreseeably relevant information between jurisdictions and some jurisdictions may find it difficult to characterise information relating to transaction lines and entities that do not have any geographical connection to its jurisdiction as relevant to the pricing of the transactions that involve their jurisdiction. This would be particularly problematic where a jurisdiction is required to share information obtained from one jurisdiction with another jurisdiction. In addition, strict domestic law confidentiality rules may prevent several jurisdictions from exchanging taxpayer information with all jurisdictions concerned in a multilateral case. To address these concerns and for reasons of practicality, it is suggested that irrespective of the approach taken, taxpayers should be required to provide all the information contained in the MAP / APA requests filed and all relevant information and documentation attached along with these requests with all competent authorities identified in a case. If additional jurisdictions are identified and involved in the case at a later stage, the taxpayer should provide the same information to the jurisdictions as soon as possible as well. In case jurisdictions require additional comfort in this regard, their competent authorities may also ask taxpayers to generally consent to the exchange of information between all competent authorities involved for the purposes of a case, where this is helpful.

2.4. Access to multilateral procedures and the Action 14 minimum standard

53. Since APAs are voluntary processes that jurisdictions enter into for dispute prevention purposes, there are no internationally accepted standards regulating how jurisdictions grant access to APAs, even in bilateral cases. Therefore, jurisdictions should develop their own rules concerning which multilateral APA requests are accepted into the programme and discussed with other competent authorities. Guidance in this regard may be drawn from Annex II to Chapter IV of the OECD TPG (OECD, 2017[2]) and the BAPAM (OECD, 2022[4]).

54. However, since MAP is a right granted to taxpayers that are eligible to benefits under a tax treaty, the obligations placed on jurisdictions under treaty require them to grant access to MAP in all eligible cases. These obligations are emphasised in the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]), including the obligation for jurisdictions to provide access to MAP irrespective of whether domestic remedies are pending or finalised. In addition to this, the Action 14 minimum standard requires all Inclusive Framework member jurisdictions to give access to MAP in all eligible cases, particularly for:

(i) transfer pricing cases;

(ii) cases concerning the application of treaty and domestic anti-abuse provisions;

(iii) cases in which there has been an audit settlement; and

(iv) cases in which taxpayers have provided in the MAP request the required information and documentation as set out in a jurisdiction's MAP guidance.

55. Much like bilateral MAP cases, since multilateral MAP cases are in essence a combination of bilateral MAP cases, the rights provided to taxpayers under bilateral tax treaties should remain. A jurisdiction's option to adapt a different legal basis than Article 25(1) – i.e. Article 25(3) – to deal with a multilateral case should only be to reduce procedural complexities for taxpayers. It is understood that all international standards agreed to and followed for bilateral MAP cases, including and especially in connection with access to MAP, must also apply to each bilateral MAP case in a multilateral MAP case. These international standards apply to the extent that each jurisdiction must be willing to resolve the issue presented under each concerned treaty in a multilateral MAP case, although proceeding with a coordinated solution for various MAP cases would not be an obligation. Therefore, irrespective of the approach taken, practices with respect to each bilateral MAP case in a multilateral MAP case should also be subject to the Action 14 minimum standard and its rules concerning access to MAP.[12] Further, even where coordination for a multilateral solution is not possible, competent authorities should endeavour to resolve the taxation not in accordance with the bilateral treaty connected to the MAP request, in line with their treaty obligations. However, as allowed under the treaty for Article 25(1) cases in the bilateral context and as noted in paragraph 31.1 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]), if the competent authority receiving a MAP request believes, following a preliminary assessment of the objection raised in the request, that there is no reasonable grounds to believe that there is or will be, in either/any of the Contracting States, taxation not in accordance with the treaty, that competent authority may conclude that the objection is not justified. This process is subject to the bilateral notification or consultation process under element 3.1 of the Action 14 Minimum Standard if the concerned treaty does not allow submission of the MAP request to either competent authority. This is discussed further in section 3.1.

References

OECD (2022), *Bilateral Advance Pricing Arrangement Manual*, OECD Forum on Tax Administration, OECD Publishing, Paris, https://doi.org/10.1787/4aa570e1-en. [4]

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

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

Notes

[1] One jurisdiction noted that it could, in practice, reach a multilateral MAP solution even where one treaty is missing in the chain of jurisdictions involved through back-to-back MAP agreements under the other treaty. This may be achieved when information sharing as permitted under the existing treaties would allow all three jurisdictions to have the full picture. However, this jurisdiction noted that there would still be a number of issues in arriving at a position that is satisfactory in all respects in such situations.

[2] Although such cases are excluded from consideration in this Manual, some jurisdictions noted that they are able to use the equivalent of the second sentence of Article 25(3) in their treaties to discuss cases where no treaty benefits are available to a taxpayer under one or more treaties (owing to there not being a person resident in either jurisdiction for example).

[3] As elaborated below, from a legal standpoint, any reference to multilateral MAP/APA cases in this Manual only covers a series of bilateral MAPs/APAs under provisions equivalent to Article 25 contained in the OECD Model Tax Convention, that may be procedurally undertaken in a multilateral way for discussion purposes by competent authorities at their discretion.

[4] If a taxpayer's request specifically covers issues under multiple treaties and requests for multilateral discussions, some competent authorities may prefer to consider the request itself under Article 25(3) in order to allow multilateral discussions in the first instance from a legal perspective. Although this would be left to the competent authority's discretion as well, since a taxpayer filed MAP request is involved, the rules in connection with Article 25(1) and (2) for the bilateral treaty applied under should be respected.

[5] Although the Action 14 minimum standard requires jurisdictions to allow a filing period of at least three years from the first notification of the action resulting in taxation not in accordance with the treaty, the peer reviews under the Action 14 minimum standard show that many treaties contain different filing periods – some lesser than and some more than three years.

[6] The Action 14 Minimum standard requires jurisdictions to put in place rules, guidelines and procedures for MAP that should necessarily contain the contact information of its competent authority as well as the manner and form in which the taxpayer should submit its MAP request, including the documentation/information that it should include in such a request.

[7] Available at www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm.

[8] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A42009X1230%2801%29.

[9] Many new treaties and treaties that have been modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument") allow taxpayers to submit MAP requests before either competent authority as under the 2017 version of the OECD Model Tax Convention. However, many treaties still follow the 2014 version of the OECD Model Tax Convention and allow MAP requests to be filed only before the residence jurisdiction of the taxpayer (excluding nationality non-discrimination cases).

[10] Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.

[11] Available at www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm.

[12] Analogy may be made here to the approach used by the FTA MAP Forum to agree on the counting of MAP cases under the MAP Statistics Reporting Framework.

3 Procedural aspects to consider in multilateral cases

3.1. Approaching the other jurisdictions involved

56. Once a multilateral MAP or APA request is received by a competent authority, it should promptly notify the taxpayer that the request has been received. However, further procedures would vary.

3.1.1. Approaching the other jurisdiction in a MAP case.

57. The competent authority that receives a MAP request should also notify the other competent authorities specified in the request of such receipt as soon as possible. In line with the MAP Statistics Reporting Framework, which is applicable for MAP requests involving Inclusive Framework member jurisdictions, this should be done as soon as possible and ideally not later than four weeks after the receipt of the request. Where the taxpayer does not identify a case as a multilateral case, but where the competent authority receiving the request is of the view that other competent authorities must be involved in the case, that competent authority may involve the other competent authorities under Article 25(3) if the jurisdiction follows the Article 25(3) Approach. However, for jurisdictions that follow the Article 25(1) Approach, separate MAP requests under each treaty may be required; for these jurisdictions, the competent authority receiving the request could consult the taxpayer with respect to those additional MAP requests and require the taxpayer to also submit them to the other relevant competent authorities (along with the details contained in those requests and required accompanying information). Depending on the amenability of the competent authorities involved to do so, such involvement may be at a later stage of the MAP process as well.

58. In many cases, a competent authority will be able to inform the taxpayer that the request has been found admissible at the same time that it will confirm the receipt of the request.[1] Where this is not the case, the notification of the receipt should be quickly followed by a notification of the decision as to whether the request is admissible, which should ideally not be later than two months from the receipt of the request along with all required information ("**complete MAP request**").

59. Once the MAP request is found to be admissible, the competent authority receiving the request must determine whether the objection raised by the taxpayer in the request is justified. This decision must be taken soon after a request is considered admissible and should ideally be no later than three months from the receipt of a complete request. For MAP cases, where the taxpayer does not have the option to submit a MAP request to either competent authority involved, the Action 14 minimum standard requires competent authorities to undertake a bilateral notification or consultation process. This process may need to be adapted for multilateral cases. Under the Article 25(1) Approach, this process should be applied for all requests for which the objection is considered not justified. For the Article 25(3) Approach, this process should at a minimum be applied for the treaty in connection with which a MAP request is filed by the taxpayer, but ideally should be applied with all jurisdictions that are identified in the MAP request to ensure that all competent authorities are aware of the case and that their views have been taken into account.

60. In MAP cases, the competent authority receiving the request must also determine whether it can find a unilateral solution that addresses the issue raised by the taxpayer. This must be ideally determined within three months from the receipt of a complete request. If this is not possible, the multilateral stage in MAP cases is initiated as well.

3.1.2. Approaching the other jurisdiction in an APA case.

61. The competent authority that receives an APA request should reach out to the other competent authorities concerned by the request to notify them of the receipt of the request and to ascertain whether those competent authorities are willing/able to participate in a multilateral APA, subject to APA requests having been received by all the jurisdictions concerned. This should be done as soon as possible and ideally no later than four weeks after the receipt of the request. Where a taxpayer has already submitted a unilateral or bilateral APA application and wishes to expand this request into a multilateral APA, competent authorities may allow the taxpayer to enhance the case once a fresh request and documentation are submitted before each new competent authority as well.

62. The notification of the receipt should be quickly followed by a notification of the decision as to whether the request is admissible[2] and whether the competent authority is willing to move forward with the request, which should ideally not be later than three months from the receipt of the request along with all required information ("**complete APA request**").[3] Following acceptance, APA cases would move onto the multilateral stage once discussions between competent authorities are initiated.

3.2. Possible approaches to discussions in the multilateral stage

3.2.1. Approaches outlined under the OECD Model and EU Instruments

63. Once the multilateral stage is initiated for a multilateral MAP or APA case, there are different possible approaches to discussions in the case among the competent authorities. Paragraph 38.1 (for MAP) and 38.5 (for APAs) of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) allow for two options and provide that:

> *38.1 (…) A multilateral mutual agreement may be achieved either through the negotiation of a single agreement between all the competent authorities of the States concerned or through the negotiation of separate, but consistent, bilateral mutual agreements.*
>
> *38.5 (…) A multilateral APA may be achieved either through the negotiation of a single agreement between all the competent authorities of the States concerned or through the negotiation of separate, but consistent, bilateral mutual agreements.*

64. In this respect, paragraph 6.2(b) of the Code of Conduct to the EU Arbitration Convention[4] includes the following rules on the possible approaches for handling a multilateral MAP case:

> *One of the following approaches may be adopted by the competent authorities involved to resolve double taxation arising from EU triangular cases under the Arbitration Convention:*
>
> *a. the competent authorities can decide to take a multilateral approach (immediate and full participation of all the competent authorities concerned); or*
>
> *b. the competent authorities can decide to start a bilateral procedure, whereby the two parties to the bilateral procedure are the competent authorities that identified (based on a comparability analysis including a functional analysis and other related factual elements) the associated enterprise situated in another Member State that had a significant influence in contributing to a non-arm's length result in the chain of relevant transactions or commercial/financial relations, and should invite the other EU competent authority(ies) to participate as (an) observer(s) in the mutual agreement procedure discussions; or*

> *c. the competent authorities can decide to start more than one bilateral procedure in parallel and should invite the other EU competent authority(ies) to participate as (an) observer(s) in the respective mutual agreement procedure discussions.*
>
> *Member States are recommended to apply a multilateral procedure to resolve such double taxation cases. However this should always be agreed by all the competent authorities, based on the specific facts and circumstances of the case. If a multilateral approach is not possible and a two or more parallel bilateral procedures are started, all relevant competent authorities should be involved in the first stage of the Arbitration Convention procedure either as Contracting States in the initial Arbitration Convention application or as observers.*

65. The Code of Conduct[5] notes that the multilateral approach is recommended. Whether this approach is to be followed is to be decided by each competent authority individually and subsequently by all jointly. It may be the case that one or more of the jurisdictions involved do not favour this approach in general or for the specific case concerned. In such a situation, option (ii) mentioned in the Code of Conduct – two competent authorities undertake a bilateral procedure with the other competent authorities remaining as observers – seems to be less favourable, given that there would only be one procedure initiated between two competent authorities for only a part of and not for all parts in the chain of transactions. Therefore, this option is not considered further in this Manual.

66. The third option in the Code of Conduct[6] – multiple bilateral coordinated procedures – bears a lesser risk of non-resolution of double or multiple taxation. In this approach, although a third competent authority is not a direct party to any one of the bilateral discussions, the conclusions reached in such proceedings would still directly depend on the discussions in every other proceeding. It is therefore necessary that jurisdictions not actively participating in one or more of the procedures are kept informed or can take notice of developments in such other procedures. In this respect, the Code of Conduct introduces the possibility that any other competent authority that is not directly involved can still take part as an observer in the bilateral proceedings between the other competent authorities. The Code of Conduct does not specify what the exact role and rights of observer competent authorities would be.

3.2.2. Suggested approaches

67. Jurisdictions can follow one of the two approaches noted in the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) as regards the conduct of multilateral procedures, while taking into account the considerations described in the Code of Conduct[7] where appropriate as well. On the one hand, jurisdictions could follow multilateral discussions with all competent authorities involved at the table at the same time with the view to reaching a multilateral agreement that can be implemented in each jurisdiction ("**Multilateral Approach**"). On the other hand, jurisdictions could allow bilateral discussions among competent authorities under each concerned treaty with the aim to reaching multiple bilateral agreements that are coordinated in such a way that double or multiple taxation is avoided for the taxpayers concerned in the connected transactions ("**Bilateral Approach**"). In the Bilateral Approach, competent authorities in each bilateral discussion may allow other competent authorities that are part of the multilateral case and affected by the transactions being discussed to attend these meetings as observers, subject to the joint agreement of all competent authorities involved. An observer competent authority in a competent authority meeting should generally be given access to all documents shared among the competent authorities prior to the meeting (including position papers) and should be allowed to attend all meetings in connection with the case without active participation, except where the observer competent authority is asked to clarify the status of or positions taken in other connected competent authority meetings within the same multilateral case. As noted, the presence of such observers in meetings could only be allowed where the competent authorities involved agree that it would be useful to have other competent authorities act as observers in such meetings. For questions that involve several competent authorities, it is possible that one group of competent authorities may discuss an issue multilaterally, while others are involved through bilateral meetings. Although the multilateral leg of such discussions may

benefit from the procedures recommended in this Manual for the Multilateral Approach, the Bilateral Approach must be used then to ensure that there is no double or multiple taxation remaining in such cases.

68. In an ideal situation, the multilateral approach is usually most preferable, as the likelihood of the case being resolved in a timely manner is the highest under this approach, given that all competent authorities concerned fully participate in the proceedings. Some jurisdictions have noted in this regard that opting for a series of bilateral discussions as opposed to multilateral discussions have on multiple occasions led to different conclusions being drawn from each meeting which has necessitated a later multilateral meeting to agree on the facts, which was eventually an inefficient use of competent authority resources. However, proponents of the Bilateral Approach have suggested that the Multilateral Approach involves too many parties to arrive at material agreements in many cases and that the Bilateral Approach, which uses bilateral procedures with which competent authorities are already accustomed, avoids complex legal issues and leads to quicker and simpler resolutions. However, the Bilateral Approach could also lead to issues such as insufficient coordination or communication leading to divergent agreements that do not fully resolve double or multiple taxation, issues regarding sharing of information, duplication of time and effort and lack of engagement by all parties involved. Jurisdictions must factor in all of these elements in light of the case concerned before choosing one approach or the other for a particular request.

3.3. Coordination of procedural matters

69. All competent authorities involved should engage in an initial discussion to coordinate the handling and resolution of the case and where considered useful by the competent authorities, to appoint a coordinating competent authority to facilitate the process. This should include agreement on the approach chosen for multilateral discussions by all competent authorities – i.e. whether the competent authorities would choose the Multilateral Approach or the Bilateral Approach – and basic items of coordination such as language of communication and logistics for planned meetings and communications.

70. In APA cases, since more collaboration is required and expected, a project plan may be agreed between the competent authorities involved and the taxpayer which, in addition to the above elements, should also cover agreed high-level procedural aspects such as milestones in the process along with targeted timelines for each step in the multilateral stage (such as information gathering, sharing of position papers, scheduling of meetings and a general roadmap till agreement), with the caveat that all competent authorities involved may later agree to extend such timelines where necessary. Depending on the facts and circumstances and working relationship of the competent authorities involved, a less detailed and more fluid project plan may be considered and for simple cases, competent authorities may agree that no project plan is necessary. The project plan must ideally be completed along with the notification to the taxpayer within four months from the receipt of a complete APA request.

71. Competent authorities involved in a multilateral case may agree to appoint a coordinating competent authority for a particular case to assist with the coordination of the case.[8] While choosing the coordinating competent authority, several factors may be considered. For instance, competent authorities of the residence jurisdiction of the parent company of a group involved in a multilateral case, or the residence jurisdiction of the entity that undertakes the most complex functions, assets and risks associated with the transactions covered in the case may be appointed as coordinating competent authorities. For multilateral MAP cases, competent authorities may also agree that the jurisdiction that made the primary adjustment concerned in a transfer pricing case should act as the coordinating competent authority irrespective of the approach chosen. Where there is only one primary MAP or APA request involved, the competent authority of one of the jurisdictions that are subject to such request could be the coordinating competent authority. The main tasks of the coordinating competent authority could be to coordinate the procedure as agreed and specifically to:

- Act as a liaison for all competent authorities involved;

- Ensure that all information pertaining to the case under review is made available to each of the competent authorities involved;
- Draft and maintain the project plan in multilateral APA cases;
- In the Multilateral Approach:
  - Liaise with other competent authorities to determine which competent authority would issue the first position paper on a case
  - Coordinate the hosting of any face-to-face, telephonic or digital meetings among all competent authorities concerned; and
  - Conduct all other procedural and administrative aspects of the case, such as preparing a draft agreement, preparing closing letters, etc.
- In the Bilateral Approach:
  - Act as observer in each of the bilateral meetings that they are not already party to
  - Keep the competent authorities not directly involved in one of the proceedings updated on all developments, such as issuing of position papers, scheduling of meetings etc.; and
  - Ensure that agreements reached in each of the proceedings align with potential agreements in any of the other proceedings.

72. It is clarified that the coordination measures discussed above such as appointment and role of the coordinating competent authority and the creation of a project plan are only meant to facilitate the process and are not meant to be formalistic determinations that would be resource intensive. Competent authorities may be flexible in these approaches depending on the facts of a case. Some jurisdictions are of the view that set roles for competent authorities in cooperative processes such as multilateral MAPs and APAs may hamper the nature of such processes and prefer for roles and duties in such cases to be jointly agreed and distributed among all competent authorities. Such jurisdictions have not faced coordination issues in practice as well and prefer to not appoint coordinating competent authorities for their cases.

73. For multilateral APAs, prior to substantive technical discussions, the information-gathering phase must also be conducted. As is the case for bilateral APAs, it would always be preferable for all competent authorities involved in a case to jointly undertake the information gathering phase through combined information requests, functional interviews, site visits etc., where practically possible in order to avoid duplication of these processes. Where it is only practicable for jurisdictions to conduct due diligence separately or for separate information requests to be issued (such as where there are significant time zone differences or where there is no shared common language), competent authorities involved may limit coordination to the extent possible to facilitate the process. The coordinating competent authority, if appointed, should assume the responsibility of serving as the main point of contact for the taxpayer(s) for all such processes and if required, organise the maintenance of minutes of functional interviews conducted in this case by undertaking such duties itself or by requesting the taxpayer to do so. Additional information may be sought from the taxpayer(s) after initial discussions or analysis in multilateral MAP cases as well and, just as above, the coordinating competent authority, if appointed, should coordinate all such information requests and discussions with the taxpayer(s). This must be ideally completed within six months from the receipt of a complete request[9]. While competent authorities should only request necessary and relevant information from the taxpayer(s) at this stage, taxpayer(s) should provide all information requested to all competent authorities involved in the case, also to avoid concerns of confidentiality as noted above. Where any of the competent authorities has not received all information that has been shared with the other competent authorities, the coordinating competent authority, if appointed, should request that the taxpayer(s) provide the information to that competent authority as soon as possible to ensure that all information can be freely cited and shared between the competent authorities in the position papers and discussions.

3.4. Discussions in a multilateral case

3.4.1. Position papers and responses

74. The substantive discussions in a MAP or APA case are initiated through the sharing of position papers between competent authorities. Each competent authority should seek to provide a reasoned and principled position on how the case should be resolved and should therefore be able to present in a clear manner the treaty and domestic law basis for its tax administration's action or position taken with respect to the taxpayer(s). The usual procedural practice for doing so in a MAP or APA case is for one of the competent authorities to present to the other competent authority(ies) its position paper and to invite the other competent authority(ies) to respond to that position paper, where required. However, formal position papers may not be necessary in all cases and particularly so in simple cases.

75. In the Multilateral Approach, competent authorities should agree as to the competent authority that would provide the first position paper. In multilateral MAP cases, the first position paper should generally be issued by the jurisdiction that made the primary adjustment or the action that resulted in taxation not in accordance with the treaty in question. In multilateral APA cases, the coordinating competent authority, if appointed, could coordinate the issuance of the first position paper as noted. In order to ensure that the views of all competent authorities are documented prior to the meeting, it is recommended that all competent authorities should provide a written response to this position paper as well, even if the responses are simple and only outline points of agreement and disagreement, along with proposed different solutions where applicable. However, such responses may be restricted to an analysis of transactions that affect the tax base of the responding competent authority's jurisdiction, apart from general suggestions for points of coordination. Although a hierarchical order for such responses is not necessary, in multilateral MAP cases the competent authority of the jurisdiction of residence of the taxpayer involved in the transaction for which an adjustment is made may provide the first response to a position paper.

76. In the Bilateral Approach, position papers would be exchanged bilaterally among each bilateral group of parties as in any other bilateral MAP or APA case. However, as noted above, coordination is key where jurisdictions seek to adopt the Bilateral Approach and thus, the coordinating competent authority, if appointed, and any observers must also be provided copies of all position papers prior to discussions.

77. The first position paper should ideally be issued within twelve months from the receipt of a complete request, and all responses must ideally be issued within six months from the receipt of the first position paper. Position papers and all responses should be issued sufficiently in advance of any planned meetings for discussions and such exchanges should, depending on the complexity of the case, be concluded between two to four weeks prior to a meeting, to ensure that all competent authorities have adequate time to prepare for the meeting.

78. Section 3.4.1 of the OECD MEMAP[10] and Annex B to the BAPAM (OECD, 2022[4]) may be referred to for the general form and contents of position papers. However, competent authorities should, where possible, aim to provide a holistic analysis of the case, considering all transactions and jurisdictions concerned in their position papers and responses to avoid a duplication of analyses at a later stage (especially in the Bilateral Approach).

3.4.2. Conduct of discussions

79. As noted in Article 25(4) of the OECD Model Tax Convention and paragraph 58 of the Commentary on Article 25 (OECD, 2019[1]), the competent authorities may communicate directly with each other and through any means available to them. This would be the case for both MAP and APA cases. In practice, competent authorities should agree on how they will have discussions on the case, depending on the approach agreed to for these discussions. This will depend on the nature and complexity of the case and the existing relationship between the competent authorities. Different methods of communication may be

used for that purpose, including written/electronic correspondence, informal consultations through telephone conferences, virtual meetings through videoconferencing or formal face-to-face meetings.

80. Although written/electronic correspondences can serve as a means to have discussions around meetings, multilateral discussions can be conducted more easily through face-to-face meetings, and, where this is not possible, through video-conferencing meetings. This is particularly so in the Multilateral Approach, but also suits the Bilateral Approach as other competent authorities may need to participate as observers. All meetings should have set agendas that are finalised beforehand to ensure that all jurisdictions involved are given the opportunity to participate in the discussions. Competent authorities directly involved in the discussions should also organise the preparation of minutes for each meeting, where necessary, which should be shared with all the competent authorities involved in the multilateral case following the meeting.

81. Even though this is true for all MAP and APA discussions, arriving at agreement among multiple competent authorities has been seen to be particularly challenging by many competent authorities. All competent authorities involved should thus take extra efforts to ensure that their interventions during meetings are pragmatic and solution-oriented. Just as in bilateral cases, particularly in transfer pricing MAP and APA cases, it may be useful for all competent authorities to arrive at an agreement on the facts involved in the transactions concerned prior to agreements on the application of the treaty or the application of the method, comparability analysis and pricing in transfer pricing cases, where possible. The involvement of observers, including the coordinating competent authority if appointed, in the agreement on facts may also be useful where the Bilateral Approach is followed to ensure that all bilateral discussions are coordinated.

82. Competent authorities should generally aim to conclude discussions and arrive at an agreement in both multilateral MAP and APA cases within 36 months from the receipt of a complete request. Where this is not possible, discussions should be continued where there is the likelihood of a possible solution; in such cases, the competent authorities should notify the taxpayer(s) of an approximate timeframe within which they expect to be able to resolve the case. However, for multilateral MAP cases, competent authorities must keep in mind their obligation to seek to resolve all MAP cases within an average timeframe of 24 months and act in accordance with that targeted average. For cases that have exceeded, or are likely to exceed, a reasonable period, it is advisable for senior officials in the competent authority functions in the concerned jurisdictions to review the case to determine the reasons for the delay and to then agree on an approach to ensure the efficient completion of the case.

83. It is acknowledged that discussions in multilateral cases may lead to agreement among some but not all competent authorities involved. In such cases, competent authorities that find agreement should develop a multilaterally coordinated solution with each other. The competent authorities that could not find agreement on multilateral coordination should nevertheless endeavour to resolve the issue for each bilateral case where possible, at least partially eliminating the double or multiple taxation created to the extent conceivable.

3.4.3. Conclusion of the agreement

84. Although several outcomes are possible for MAP cases before and during the multilateral stage[11], once multilateral discussions are concluded there should either be agreement(s) fully eliminating double or multiple taxation faced/likely to be faced by the taxpayer(s), agreement(s) partially eliminating such taxation or no agreement arrived at between the competent authorities concerned. Agreements partially eliminating double or multiple taxation are likely where some competent authorities involved in the multilateral discussions arrive at an agreement, but others cannot do the same.

85. When the competent authorities arrive at tentative agreement(s) in the case, they should document the details of those tentative agreement(s) in writing as soon as possible, also to avoid possible disagreements as to what was agreed in the discussions. These written agreement(s) should describe the

extent to which each State would make adjustments, provide relief, when and for which period the adjustments or relief would apply along with any other relevant details such as currency conversion rates if applicable.

86. In the Multilateral Approach, since there may only be one agreement, all competent authorities involved must agree on which competent authority will prepare the first draft of the agreement. The coordinating competent authority, if appointed, will normally be best suited for this task. All other competent authorities should provide comments and seek to find agreement on the terms of the tentative agreement as soon as possible – keeping in mind that since there are multiple parties involved, issues of substance should take precedence over cosmetic or drafting issues while providing comments.

87. In the Bilateral Approach and where preferred by the competent authorities in the Multilateral Approach, multiple tentative bilateral agreements may be drawn up by the competent authorities as is generally the practice for bilateral MAP and APA cases. However, in order to ensure coordination between the various bilateral agreements, the coordinating competent authority, if appointed, should be provided with all the tentative bilateral agreements and propose revisions or adjustments to ensure coordination, or, where necessary, propose an additional, simple multilateral agreement among all the competent authorities to ensure that all the bilateral agreements are coordinated prior to the finalisation of the bilateral agreements.

88. The taxpayer(s) should be promptly notified of the tentative agreement(s) by the coordinating competent authority, if appointed, once finalised. In order to avoid a situation where the competent authorities would conclude mutual agreement(s) that would be binding on the jurisdictions but where the taxpayer(s) would resume or initiate judicial proceedings in order to obtain a different result in one of these States, it is recommended that the agreement(s) be subject to overt acceptance by the taxpayer(s). In MAP cases, the agreement(s) should normally be made subject to the termination and relinquishment of any available domestic law recourse, such as continuing previously suspended court proceedings on the same matters as those dealt with through the MAP, and/or the taxpayer(s) undertaking to refrain from seeking any further recourse on the same issue and years. The taxpayer(s) are generally required to accept the tentative agreement(s) in full and not allowed to accept them partially, unless this is explicitly agreed as an option by all competent authorities. Modifications proposed to the tentative agreement(s) by taxpayer(s) that would reopen discussions at this stage should generally not be permitted.

89. Where the taxpayer(s) reject the tentative agreement(s), the competent authorities can close discussions on the MAP or APA case and consider the proceeding closed and notify the taxpayer(s). Where the taxpayer(s) accept the tentative agreement(s), the competent authorities may formally conclude the mutual agreement through exchange of closing letters. In MAP cases, the competent authorities may proceed to implementation of the agreement(s). In APA cases, once there is mutual agreement, each competent authority may need to enter into a separate agreement with the taxpayer(s) to allow the jurisdiction concerned to implement the agreement. This should be done soon after the exchange of closing letters. In general, the steps outlined in this paragraph should be completed as soon as possible based on the circumstances of the case.

3.4.4. Reporting of statistics[12]

90. The MAP Statistics Reporting Framework requires all Inclusive Framework member jurisdictions to report all MAP cases in their inventory during each year through the filing of the MAP Statistics. As noted above, whether considered by the competent authorities under Article 25(1) or Article 25(3), all MAP cases involving requests filed by a taxpayer should be counted for the purposes of the MAP Statistics. However, irrespective of the approach taken in discussions, multilateral MAP cases must be recorded as multiple bilateral cases with each jurisdiction involved in the discussions. In this regard, the rules regarding “Start Date”, “Milestone 1” and “End Date” in the MAP Statistics Reporting Framework must be followed as well. It is clear that for MAP cases where the Article 25(1) Approach is followed, each MAP case should be

counted separately following these rules. For MAP cases where the Article 25(3) Approach is followed, the Article 25(1) case arising from the primary MAP request as well as each subsequent Article 25(3) MAP case should be counted as separate MAP cases based on the above rules.[13] Jurisdictions are encouraged to agree on key indicators for the matching of MAP Statistics in multilateral cases as early as possible in the process to avoid complications regarding matching closer to the deadline for reporting.

3.5. Interaction with available domestic remedies or procedures

91. Domestic remedies are in essence unilateral in nature. While they are not ideal to resolve disputes in bilateral cases in most situations, they provide for even more piecemeal solutions in multilateral cases. This should, by itself, encourage taxpayers to prefer multilateral options offered by jurisdictions, where possible.

92. The provisions equivalent to Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) contained in tax treaties create an obligation for jurisdictions to provide access to MAP in eligible cases irrespective of domestic remedies. This condition should be considered applicable even if the competent authorities consider Article 25(3) as the legal basis for the MAP request for practical purposes in multilateral cases. This means that eligible MAP requests in multilateral cases should be accepted even if domestic remedies at any level are pending or have been finalised in any of the jurisdictions concerned. To allow access to MAP as widely and freely as possible, competent authorities should ideally be able to deviate from decisions in domestic remedies in MAP. However, as noted in paragraph 35 of the Commentary on Article 25 of the OECD Model Tax Convention, some jurisdictions are bound by judicial or equivalent decisions owing to their domestic law, policy or practice and thus may be bound by such decisions in MAP. Even in these circumstances, competent authorities should allow access to MAP and discuss with the other competent authorities in a multilateral MAP case the possibility of reaching a multilateral agreement in line with the binding decision.

93. Jurisdictions also need to define rules that would apply where taxpayer(s) have chosen to pursue domestic proceedings actively along with the MAP request. As noted in paragraph 42 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]), competent authorities are allowed to take the position that where taxpayer(s) actively pursue judicial remedies in a State in relation to the same issue(s) as a MAP request, in-depth MAP discussions may be suspended until there is a court decision. Therefore, if the taxpayer(s) are actively pursuing a court case in respect of the issue at hand in any of the jurisdictions, detailed discussions in multilateral MAP may be suspended to avoid expending resources. In the case of such suspension, the targeted deadlines noted in this Manual may be considered extended to the extent of the pause as well. However, if the taxpayer(s) have simply filed a court case to stay within domestic deadlines or where the taxpayer(s) have ceased actively participating in or have requested suspension of court proceedings, competent authorities should fully engage in MAP discussions in line with the procedure detailed above. There are other practices among jurisdictions in this regard as well. While some jurisdictions actively discuss MAP cases in the bilateral stage only if domestic procedures are suspended, other jurisdictions allow the MAP and domestic procedures to run in parallel. In these situations, the multilateral MAP case may not be affected by domestic procedures as such.

94. The interaction of multilateral APAs with relevant domestic procedures, particularly audits, is less well defined than for MAPs since there is no treaty obligation concerning access to APAs arising from Article 25 itself and APAs are filed for advance certainty concerning future years in the traditional sense. Where audits have been started in respect of a transaction for previous years in one or more jurisdictions, jurisdictions may consider whether they would want to accept a case into the APA process since the competent authority dealing with APAs is usually an independent team from the audit team, although auditors may be involved in the review and fact-finding stage in several jurisdictions. However, where the multilateral APA case proceeds for long enough that an audit of relevant transactions for one of the covered

years is likely, jurisdictions are encouraged to put in place coordination measures between the competent authority function and the audit team to give precedence to tax certainty for multiple years through the APA where possible. Such coordination measures may follow what is put in place for bilateral APAs by jurisdictions in line with the best practices stated in the BAPAM. It is suggested that, in any case, the start of an audit should not automatically end APA discussions that are ongoing so that the tax certainty that is provided by an APA is not hindered.

3.6. Implementation of the agreements

95. Where a treaty contains the equivalent of Article 25(2), second sentence, there is an obligation for jurisdictions to implement the mutual agreement(s) reached in a MAP case, irrespective of domestic time limits. However, many jurisdictions feel that this obligation would only apply where the legal basis for a MAP request is Article 25(1). Even where the Article 25(3) Approach is followed as the legal basis, since this is more of a practicality measure, jurisdictions are encouraged to extend the application of Article 25(2), second sentence to such multilateral MAP requests. In any case, not all treaties contain the equivalent of Article 25(2), second sentence. However, as explained above, the obligation placed on jurisdictions to implement all MAP agreements arising from the Action 14 minimum standard remains.

96. The implementation of mutual agreement(s) concerning multilateral MAP and / or APA cases should be done promptly. The implementation of MAP agreements in a timely manner is also part of the Action 14 minimum standard. In MAP cases, this will typically require that a competent authority coordinates with other parts of the tax administration, such as the service responsible for issuing refunds. In APA cases, several jurisdictions allow taxpayers to make filings or revise their filings in accordance with the agreement(s), which would then lead to the acceptance of that position on scrutiny of such filings. Therefore, often, other parts of the tax administration take ownership of implementing MAP and APA agreements. Competent authorities should be prepared to be a point of contact for taxpayers if implementation is not done in a timely manner. In both situations, jurisdictions may require certain taxpayer actions, such as filing for refund in MAP cases, for the implementation of the agreement(s). Competent authorities should inform the taxpayer(s) of these requirements as soon as possible after the agreement(s) are finalised and afterwards, as any expectation for the competent authorities to ensure swift implementation would be subject to the completion of taxpayer action.

97. Some jurisdictions allow the roll-forward of multilateral MAP agreement(s) by means of multilateral APAs for future years to provide additional certainty, where the facts and circumstances involved remain identical and the taxpayer(s) request the same. Where this is possible, and where all substantive matters considered and agreed to in the MAP case remain identical, jurisdictions should seek to finalise multilateral APAs on identical terms as soon as possible.

98. Since the implementation of multilateral cases in multiple jurisdictions requires some level of coordination, it would be advisable for the coordinating competent authority, if appointed, to ensure that there is high-level communication between all competent authorities involved in the process to ensure that all agreements are implemented in a timely manner.

99. Competent authorities should generally aim to complete the implementation process in both multilateral MAP and APA cases as soon as possible following the exchange of closing letters or the taxpayer(s) signing domestic APAs implementing the agreement(s), whichever is later.

3.7. Arbitration where there is no MAP agreement

100. In some situations, competent authorities are not able to resolve a multilateral MAP case because their positions cannot be aligned. Under the Bilateral Approach, it may also be that competent authorities

were able to come to an agreement in one of the proceedings, but agreement could not be reached in the other proceeding(s). In such a situation, proceedings would end unless arbitration is available.

101. An increasing number of tax treaties now include an arbitration provision as part of the MAP provision, to supplement the MAP process in case of no agreement. Most of these provisions are based on Article 25(5) of the OECD Model Tax Convention (OECD, 2019[1]), whereas Part VI of the Multilateral Instrument ("**MLI**")[14] has added similar arbitration provisions in several other treaties. It could thus be that in a multilateral case, one of the applicable treaties contains an arbitration provision. While most jurisdictions have limited experience in arbitration procedures for unresolved issues in MAP cases, it may occur that a multilateral MAP case is not resolved before the expiry of the period following which the taxpayer(s) may trigger the MAP arbitration procedure.

102. Since most tax treaties that contain arbitration provisions allow arbitration to be invoked by the taxpayer only where a MAP case under Article 25(1) has not been resolved for a specified number of years, it is more likely that taxpayers would be allowed to start arbitration procedures only if the Article 25(1) Approach is followed or for the treaty under which the Article 25(1) MAP request is filed under the Article 25(3) Approach. However, even in the absence of a MAP arbitration provision in a particular treaty, paragraph 69 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]) recognises that competent authorities may implement through mutual agreement an arbitration process for general application or to deal with a specific case.

103. When applicable and where all parties involved in a multilateral MAP proceeding have arbitration provisions in their treaties with each other, the competent authorities may agree to resolve the lack of agreement under one treaty or under multiple treaties through arbitration following a request by the concerned taxpayer(s). Arbitration provisions in tax treaties usually require competent authorities to agree on procedures that they would follow in arbitration proceedings.[15] Thus, competent authorities could agree on the design of a multilateral or coordinated bilateral arbitration process where the same arbitrators would decide on different connected matters in the multilateral transaction(s) under different procedures under different treaties and attempt to coordinate their resolution, although this could be challenging to guarantee unless set out in the mandate for the procedure. The adoption of a MAP arbitration mechanism in contexts where only some of the treaties contain arbitration provisions would have to be evaluated in light of the relevant jurisdictions' positions in relation to the possibility noted in paragraph 69 of the Commentary on Article 25. In any case, bilateral MAP arbitrations under the treaties that already provide for it could offer partial solutions to avoid double or multiple taxation.

104. Recognising that finding a resolution in multilateral MAP cases may require more than two years, jurisdictions may either consider revisiting their treaty provisions in this context, or where a treaty specifically allows competent authorities to agree to extend the time period for specific cases (as Part VI of the MLI does), agree to extend the period following which arbitration can be triggered by the taxpayer under the treaty to 36 months from when all information necessary to proceed with the case has been received by the competent authorities concerned. Unless a particular type of case is excluded from the scope of arbitration, competent authorities are obliged under a treaty to start an arbitration procedure upon a taxpayer's request. However, where jurisdictions feel that they would like to develop more experience in the bilateral context before engaging in arbitration in the multilateral context, they could, for example, agree bilaterally to restrict arbitration under a tax treaty in relation to issues that arise in multilateral cases through protocols or exchange of notes.[16]

3.8. The rights, obligations and role of the taxpayer in multilateral cases

105. Since MAP and APAs are intergovernmental processes through which issues related to the interpretation and application of tax treaties are discussed and resolved between the competent authorities, the taxpayer(s) are involved only in certain parts of the process, typically those related to

submission of requests and responses to requests for information or engagement from the competent authorities and then accepting or rejecting the tentative agreement(s). However, taxpayers may participate more actively and assist the process where the competent authorities agree that this would facilitate agreement in a particular case. As noted above, in multilateral cases, the taxpayer(s) may need to be engaged more so than in bilateral cases to ensure that all information has been provided to all competent authorities involved to prevent confidentiality issues.

106. In any case, taxpayers, as stakeholders in the multilateral case, should be provided with regular updates by the coordinating competent authority, if appointed, regarding the progress made in each procedural step of the case. While taxpayers need not be informed of the substance of the discussions while the multilateral stage is ongoing, taxpayers should be informed that progress is being made and of the tentative timeframe within which a decision regarding an agreement is expected. Ideally, this should be by reference to the project plan in APA cases. Some competent authorities have noted that they feel comfortable in engaging with taxpayers with respect to their analysis before sharing their positions with the other jurisdiction(s) concerned. In any case, regular communication with the taxpayer(s) will encourage them to cooperate, such as by providing additional information where required, and will also contribute to the overall transparency of the MAP or APA process.

107. Taxpayers should also be made aware of their obligations in the process at every step. As noted throughout this Manual, taxpayers are expected to identify a multilateral case at the outset, contact the jurisdictions involved to understand and act on the filing procedures involved in these jurisdictions to start the process and to provide the information and cooperation required to facilitate multilateral resolution of the issues raised in their multilateral MAP or APA requests. Further, taxpayers are expected to coordinate with multiple local affiliate entities for information sharing where required. In general, much like the coordinating competent authority, if appointed, taxpayers (and especially MNEs) should maintain a central contact person in the jurisdiction of the coordinating competent authority who would interact with the coordinating competent authority and other competent authorities where required for the purposes of the case. The taxpayer should also assist competent authorities in the information gathering stage where possible by, for example, keeping and sharing minutes of functional interviews or site visits with them, where necessary and agreed by competent authorities. Taxpayers should ensure that all information requests are responded to in a comprehensive manner and that all relevant information should be shared with all competent authorities concerned, as noted in Section 2 above. Finally, in the interest of a solution, taxpayers are expected to undertake reasonable actions required by the concerned jurisdictions in their domestic law as described in section 3.6 to implement a multilateral MAP or APA.

108. In multilateral APA cases, taxpayers are expected to engage with the competent authorities involved in a principled, fair, objective and transparent manner, much like the competent authorities are expected to engage with each other. Since the purpose of a multilateral APA would be to provide advance certainty, taxpayer positions taken in multilateral APA requests should be fair and in accordance with the applicable bilateral tax treaties, the domestic laws of the relevant jurisdictions and relevant international transfer pricing guidance. In the spirit of co-operation and compromise, taxpayers should be open to the possibility of the proposed multilateral APA requiring changes from their original position in their request. In addition, taxpayers should maintain open and transparent participation and cooperation throughout the multilateral APA process, including by ensuring that information requests are responded to in a timely and comprehensive manner.

109. The OECD MEMAP[17] and BAPAM (OECD, 2022[4]) may be referred to for the rights, obligations and the role of the taxpayers in MAP and APA processes in general. More specifically, taxpayer conduct, participation and cooperation in a multilateral APA process should be in line with the best practices agreed by the FTA MAP Forum for bilateral APAs in the BAPAM.

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

Notes

[1] A MAP request is usually considered admissible where it has been filed within any parameters specified in the treaty (such as filing period, before the correct competent authority etc.), in line with a jurisdiction's MAP guidance and with all the information and documentation that the taxpayer is required to provide under such guidance.

[2] An APA request is usually considered admissible where it has been filed in line with a jurisdiction's APA guidance and with all the information and documentation that the taxpayer is required to provide under such guidance

[3] Some jurisdictions find it helpful to inform the taxpayer that the APA request has been found admissible at the same time that it will confirm the receipt of the request.

[4] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A42009X1230%2801%29.

[5] Idem.

[6] Idem.

[7] Idem.

[8] Analogy may be drawn here to the role of the lead tax administration in the OECD International Compliance Assurance Program ("ICAP"). Further information on ICAP can be found at: https://www.oecd.org/tax/administration/international-compliance-assurance-programme.htm.

[9] A "complete request" as referred to in this Manual includes reference to both complete MAP requests and complete APA requests.

[10] Available at https://www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm.

[11] Depending on the stage of the MAP case, various outcomes such as "denied MAP access", "objection not justified", "unilateral relief granted", "resolved by domestic remedy" or "withdrawn by taxpayer" are possible prior to or during the multilateral stage of MAP as noted in the MAP Statistics Reporting Framework.

[12] Various jurisdictions that report APA statistics domestically include statistics on multilateral APAs. However, as those statistics are not reported on a uniform basis, these statistics are not addressed in this manual in the context of multilateral APAs.

[13] Since taxpayer requests may not be strictly discernible for Article 25(3) cases, the date of notification of each new competent authority under Article 25(3) by the competent authorities involved in the primary MAP request could be considered for the purposes of determining the Start Date under the MAP Statistics Reporting Framework.

[14] The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, available at https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

[15] This is allowed for procedural matters such as the appointment of arbitrators or the type of arbitration process under Part VI of the Multilateral Instrument as well where the rules prescribed under Part VI may be superseded by a competent authority agreement.

[16] Such restrictions are already visible for different types of cases for treaties signed by the United States with Belgium, France, Germany, Spain and Switzerland for example.

[17] Available at https://www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm.

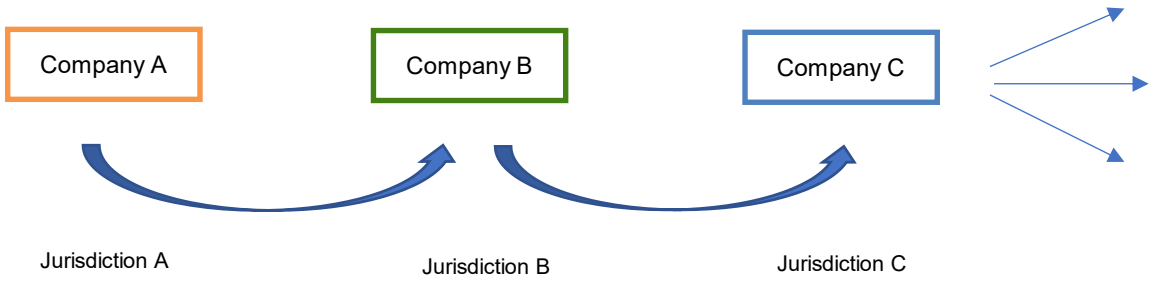
4 Examples of multilateral cases

110. Below are some representative, simplified examples of transactions that would generally benefit from multilateral solutions. In practice, multilateral cases tend to be more complex and specific cases could draw from the facts set out in more than one example below.

4.1. Transfer pricing cases

Figure 4.1. Example 1

A multinational enterprise group produces product X. Manufacturing of the semi-finalised products is performed by group Company A in Jurisdiction A. Group Company A then sells the semi-finalised products to group Company B in Jurisdiction B for assembly. Group Company B sells the finished products to group Company C in Jurisdiction C, which sells product X to third party customers.



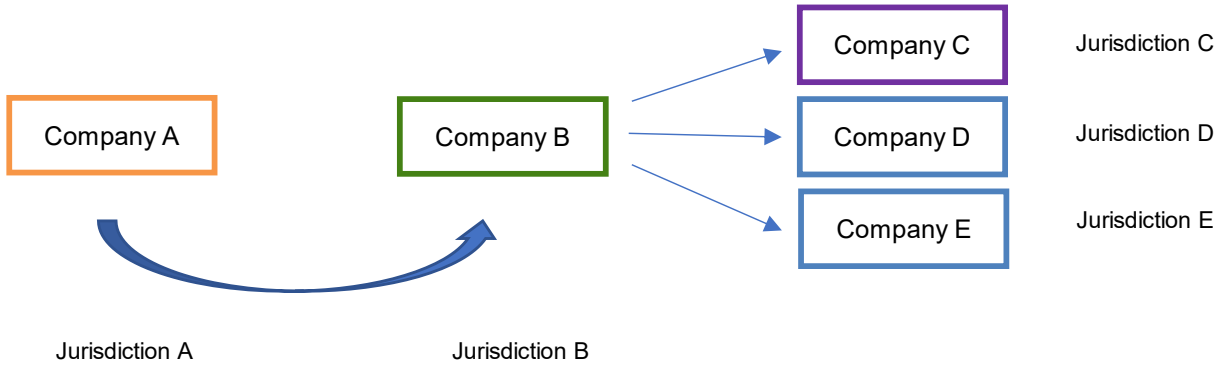
Source: OECD

111. In this example, the situation may occur that the tax administration of Jurisdiction C considers that Company C is not appropriately remunerated in light of the functions performed, assets used and risks assumed.[1] Since Company C sells the products to third-party customers, the price charged by Company C is not being challenged. If it is assumed that Company B is being remunerated at arm's length from looking at the Company B-Company C transaction in isolation, the issue arises owing to the pricing of the transaction between Company A and Company B.

112. As the arm's length remuneration of Company B is *de facto* not in question, the resolution of the case does not so much lie in the answer to the question what the correct arm's length price should be in the B-C transaction, but actually in the A-B transaction. For Jurisdiction B, however, the issue at stake is that it cannot agree on a different pricing for the B-C transaction as long as such pricing is not reflected in the A-B transaction at the same time. Otherwise it will put Company B in a less profitable or loss-making position which is not considered to be arm's length.[2] However, even if Jurisdiction B would be able to agree with Jurisdiction C that the adjustment is correct and is willing to make a corresponding adjustment, the excessive taxation would not be resolved for the whole chain of transactions. Irrespective of the fact that the taxation not in accordance with each concerned bilateral treaty may be resolved independently, this example may warrant a multilateral approach.

Figure 4.2. Example 2

A multinational enterprise has a "super-distributor" hub in a jurisdiction separate from that of its parent company for distribution for an entire geographic region.



Source: OECD

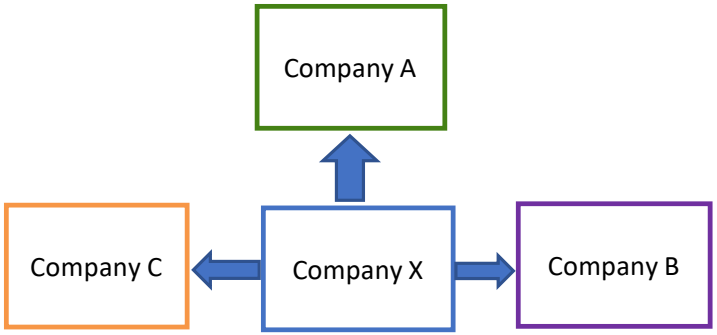
113. In this simplified example, an MNE group has Company A (located in Jurisdiction A) as its parent company. The MNE group develops, manufactures and sells products of a significant value to consumers across the globe. The MNE group operates through a local distributor model with a "hub" company operating in one jurisdiction across a geographic region. Company B (located in Jurisdiction B) acts as the hub company for the region and master distributor, selling to local distributors in local markets (Companies C, D, E in Jurisdictions C, D, E respectively).

114. If the group is loss making, Jurisdiction A may consider that the losses would be shared at arm's length between Company A and the other group companies in the value chain. However, Jurisdictions C, D and E may consider the local distributors (Companies C, D and E) are low-risk and would be entitled to a positive return at arm's length. Company B in Jurisdiction B may be subject to both standards and there is the risk that a non-arm's length result is reached where all of the losses not allocable to Company A are pushed into Company B absent a multilateral approach.

115. Irrespective of the fact that the taxation not in accordance with each concerned bilateral treaty may be resolved independently, in such an example, a multilateral approach may be preferred to ensure that the allocation across the group is overall in line with the arm's length standard.

Figure 4.3. Example 3

A group company within a multinational enterprise operating in the financial services industry provides intragroup services of the same nature to associated enterprises located in different jurisdictions.



Source: OECD
Note: The example also could concern the situation where instead of services, IP is licensed to group companies.

116. In this example, Company X provides services of the same nature (for instance, human resources services) to Company A, Company B and Company C and the residence jurisdiction of Company X makes independent, but similar, adjustments with respect to the pricing of the services received

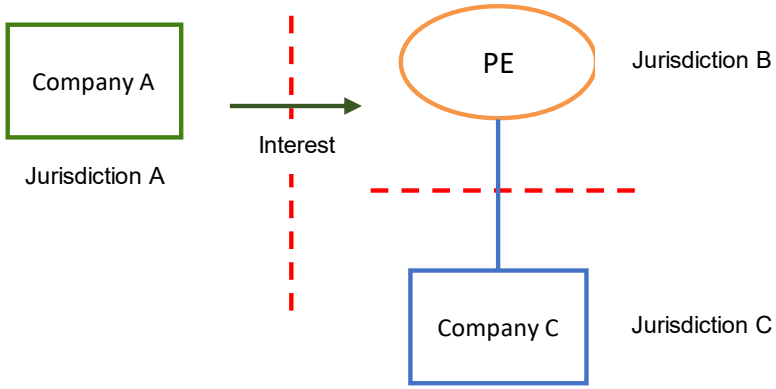
by Companies A, B, and C. If the case is only viewed in a bilateral context, taxation not in accordance with each bilateral treaty may be discussed and resolved individually. However, depending on the facts and circumstances of the case, uncoordinated resolutions of these cases individually could lead to double/multiple taxation under at least one of the treaties not being resolved. In fact patterns such as this, a multilateral solution, at least through coordinated MAP cases under each of the treaties concerned, could lead to a single, comprehensive resolution that fully resolves double/multiple taxation for the group.

117. However, this example depicts a simple structure for ease of reference. The number of group companies to which the services are provided may be larger or smaller and other factors such as the transfer pricing methodology adopted or different functional profiles may influence a jurisdiction's decision as to whether such a case can be pursued multilaterally in an efficient and timely manner or not.

4.2. Profit attribution to permanent establishments

Figure 4.4. Example 4

A financing transaction takes place between MNE group companies in circumstances where one of the group members uses the borrowed funds in a permanent establishment located in a third jurisdiction.

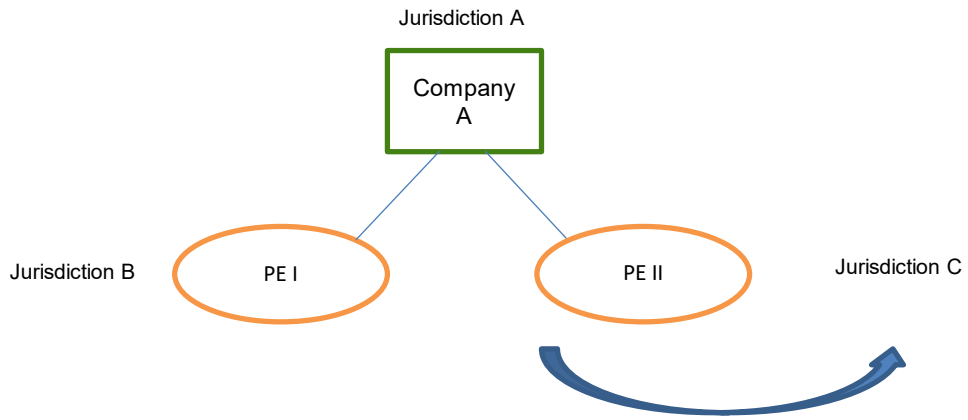


Source: OECD

118. In this simplified example, Company A receives a loan through the PE (situated in jurisdiction B) of Company C and pays interest directly to that PE. Per Article 11 of the A-C treaty, Jurisdiction A may apply a withholding tax of 10% to the interest payment, and Jurisdiction C is obliged to provide a credit with respect to the Jurisdiction A withholding tax. At the same time, Article 7 of the B-C treaty would permit Jurisdiction B to tax the income attributable to the Jurisdiction B PE of Company C, a resident of Jurisdiction C. The question therefore arises as to whether and to what extent the jurisdiction in which the PE is situated is required to provide a credit under the Article 24(3) equivalent of the B-C treaty, which in principle requires a permanent establishment to be granted credit for foreign tax borne when credit would be granted under domestic laws to resident enterprises carrying on the same activities. See generally paragraphs 67 to 72 of the Commentary on Article 24. Resolving this issue through a multilateral MAP conducted in accordance with the Article 25(3) equivalent of the A-B and A-C treaties together may result in a solution that aligns the arm's length amount of interest with the amount of income allocated to the PE and that avoids double taxation for the taxpayer group.[3]

Figure 4.5. Example 5

An enterprise has a permanent establishment in two jurisdictions that have dealings with each other.



Source: OECD

Note: An enterprise having a permanent establishment in two jurisdictions that have dealings with each other refers to intra-enterprise equivalents of separate enterprise transactions between a hypothetically separate PE and the other parts of the enterprise of which the PE is a part.

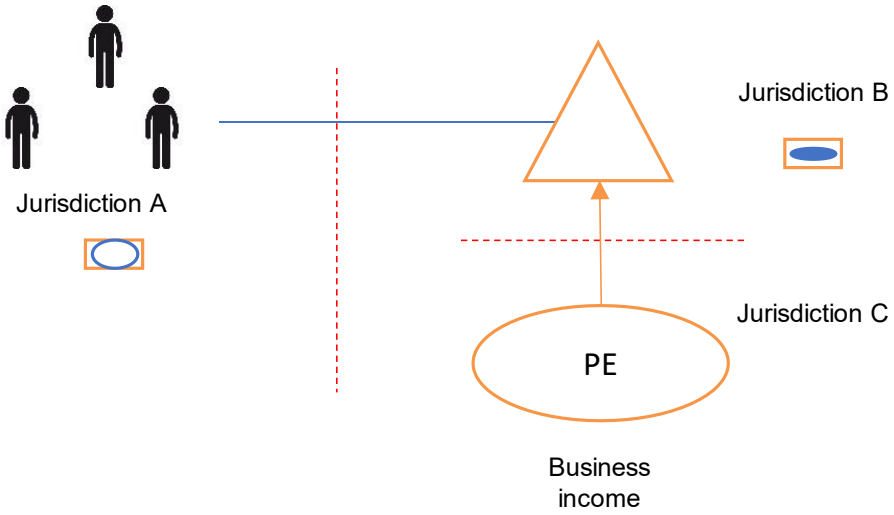
119. This example is derived from paragraph 38.2 of the Commentary on Article 25 of the OECD Model Tax Convention. In this situation, assume Jurisdiction B adjusts the profits attributed to the permanent establishment situated in Jurisdiction B with respect to that PE's dealing(s) with another PE of the same enterprise situated in Jurisdiction C. Such an adjustment may directly lead to excessive taxation where Company A is charged to tax on the same profits in both Jurisdictions B and C. While Jurisdiction A would be obliged to provide relief for the amount of adjusted profits of the permanent establishment in Jurisdiction B, it is unlikely that Jurisdiction A will be willing to provide relief with respect to the taxes of both Jurisdictions B and C with respect to the same income.

120. The dispute in this example is between Jurisdiction B and Jurisdiction C. There, however, is no direct legal basis for a MAP under Article 25 of the tax treaty between Jurisdictions B and C, as – pursuant to Article 3 of a tax treaty – permanent establishments are not considered persons for purposes of the treaty. Further, there is from a legal perspective no possibility for the competent authorities of Jurisdictions B and C to resolve a dispute via the specific-case MAP under Article 25(2). In fact, such a MAP would only be possible between Jurisdictions A and B or Jurisdictions A and C. However, from a fiscal perspective Company A is not party to the dealing(s) between Permanent Establishments I and II, which in any case are only hypothesised for the purposes of profit allocation pursuant to Article 7. Nevertheless, as the discussion pertains to the attribution of profits to these permanent establishments, the competent authority of Jurisdiction A may, on the basis of Article 25(2) of its treaty with either Jurisdiction B or C, open a mutual agreement procedure following a request from Company A.[4] Here too, the case may not be resolved due to all three competent authorities not being involved in the procedure, in particular because there is no mutual agreement procedure between the competent authorities of Jurisdictions B and C. As explained in paragraphs 38.4 and 55 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2019[1]), in such a situation, Article 25(3), second sentence may be used as a solution if allowed under the domestic law of the jurisdictions concerned as noted in section 2.2 above. This second sentence allows competent authorities to consult with each other in cases not provided for in the convention in order to eliminate double taxation in accordance with their respective domestic laws or with a tax treaty. By doing so, the competent authorities of Jurisdictions A, B and C could discuss the facts and circumstances of the case. If they in principle agree on the arm's length price for the dealing(s) between Permanent Establishments I and II, in this situation, Jurisdictions B and C could adapt the taxable income of the PEs accordingly, while Jurisdiction A would – on the basis of its treaties with Jurisdictions B and C – provide for relief in line with this.

4.3. Hybrid entities

Figure 4.6. Example 6

A partnership established in Jurisdiction B has three individual partners resident in Jurisdiction A. The partnership earns business income through a PE in Jurisdiction C.



Source: OECD

121. In this situation, a partnership established in Jurisdiction B has partners resident in Jurisdiction A. This partnership earns business income from Jurisdiction C through activities that would constitute a permanent establishment under Article 5 of the OECD Model Tax Convention (OECD, 2019[1]). While Jurisdiction A considers the partnership fiscally transparent, Jurisdiction B considers the partnership opaque. In such a situation, treaty benefits under both the B-C treaty and the A-C treaty may be extended with respect to the business income from Jurisdiction C, based on the equivalent of Article 1(2) of the OECD Model Tax Convention or the Commentary on Article 1 of the OECD Model Tax Convention. Where the A-C treaty and the B-C treaty have different definitions of PE and / or different standards for allocation of profits to the PE in Jurisdiction C (one provision following the OECD Model Tax Convention (2010) and the other following the OECD Model Tax Convention (2008)), there may be uncertainty as to how to attribute profits

to this PE. In such a situation, a multilateral approach involving all three jurisdictions applying the equivalent of Article 25(3) in the relevant tax treaties may result in a solution that achieves a coherent approach to profit attribution, avoids double or non-taxation and is acceptable to all jurisdictions concerned.

4.4. Dual-residence or multiple-residence issues

4.4.1. Example 7

An MNE parent company has its place of incorporation and strategic and operation places of management in multiple jurisdictions.

122. In a situation where Company A has its place of incorporation in Jurisdiction A, has its strategic centre for management in Jurisdiction B and has its operational centre in Jurisdiction C, each of these three jurisdictions may consider Company A a resident under its domestic law. The determination of the jurisdiction of residence for treaty purposes may thus require the application of the MAP under Article 4(3) of three different treaties (A-B, A-C and B-C treaties). However, in such a situation, incongruent determinations in individual MAPs may lead to double taxation, or non-taxation, for the taxpayer. To avoid this, a multilateral approach to resolve the residence of Company A in a single MAP may be preferred by both the taxpayer and competent authorities as a means to achieve a coherent resolution most efficiently.

Reference

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

Notes

[1] For this example, the number of group companies in the chain of production or responsible for sale of the finalised product can be larger. Another modified variation of this issue may arise where Company A licences out IP to Company B, which then uses it to manufacture goods sold to company C or other members of the MNE group. See paragraph 38.3 of the Commentary on Article 25 of the OECD Model Tax Convention.

[2] Assume Company B acquires the semi-finished goods from Company A for 95 and adds a margin of 5, so that the price charged to Company C is 100. If jurisdiction's C profit adjustment leads to a reduction of the price to 75, Company B would come into a loss-making position if it would agree to this adjustment and thus deprive itself of tax revenue. The sole option to avoid this would be that Jurisdiction B also imposes a downward adjustment for the transaction between Companies A and B, but this from itself would not resolve excessive taxation for the group as a whole, as still the taxable income for the group is higher than the actual profit realised.

[3] Note that positions in respect of Article 24(3) vary among jurisdictions.

[4] This is also explicitly contemplated in paragraph 38.2 of the Commentary on Article 25 of the OECD Model Tax Convention.

5 Ideal timeline for a typical multilateral case

Multilateral MAP cases	
Action	**Illustrative target timeframe**
Receipt of MAP request (where all necessary information has been provided)	X (starting point)
Notifying the other competent authorities concerned by request	X + 4 weeks
Decision as to admissibility of request	X + 2 months
Decision as to whether the objection is justified and whether a unilateral solution is possible	X + 3 months
First position paper	X + 12 months
Response position paper, if any	6 months from first position paper
Conclusion of position paper exchanges	2-4 weeks prior to a meeting
Mutual agreement between the competent authorities	X + 36 months
Taxpayer's approval of mutual agreement	As soon as possible
Exchange of closing letters	As soon as possible
Implementation of agreement	As soon as possible

Multilateral APA cases	
Action	**Illustrative target timeframe**
Receipt of APA request (where all necessary information has been provided)	X (starting point)
Notifying the other competent authorities concerned by request	X + 4 weeks
Decision as to admissibility of request	X + 3 months
Preparation of a project plan	X + 4 months
Information gathering phase	X + 6 months
First position paper	X + 12 months
Response position paper, if any	6 months from first position paper
Conclusion of position paper exchanges	2-4 weeks prior to a meeting
Mutual agreement between the competent authorities	X + 36 months
Taxpayer's approval of mutual agreement	As soon as possible
Exchange of closing letters	As soon as possible
Conclusion of domestic implementing agreements, where applicable	As soon as possible
Implementation of agreement	As soon as possible

Note

Please note that the timelines specified in this section reproduce the indicative timelines that are provided in the draft of this Manual. Accordingly, these timelines should not be seen in isolation of observations made in the context of these timelines in the Manual.

OECD FORUM ON TAX ADMINISTRATION

Manual on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Arrangements

ENHANCING TAX CERTAINTY

Multilateral Mutual Agreement Procedures (MAPs) and Advance Pricing Arrangements (APAs) offer greater tax certainty to both taxpayers and tax administrations where different parts of the same transaction or arrangement involving a multinational enterprise are covered by multiple bilateral tax treaties. However, most jurisdictions have limited experience in coordinating bilateral MAP and APA cases to offer multilateral certainty. In accordance with its commitment to advancing the tax certainty agenda, the FTA MAP Forum has developed the *Manual on the Handling of Multilateral MAPs and APAs* (MoMA) which is intended as a guide to multilateral MAP and APA processes from both a legal and procedural perspective. The MoMA provides tax administrations and taxpayers with basic information on the operation of such procedures and suggests different approaches based on the existing practices of jurisdictions, without imposing a set of binding rules. The MoMA allows tax administrations to explore whether implementation of these procedures is appropriate considering the circumstances of their own MAP and APA programmes and to consider whether the guidance therein may be incorporated in their domestic guidance on MAP or APA processes to provide additional clarity.

www.oecd.org/tax/forum-on-tax-administration/