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FOREIGN INCOME

Income Tax Treaties: Competent Authority Functions and Procedures of Selected Countries (D–G)

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PORTFOLIO DESCRIPTION

Tax Management Portfolio, *Income Tax Treaties: Competent Authority Functions and Procedures of Selected Countries (D–G)*, No. 6887, discusses the competent authority functions and procedures of Denmark, France, and Germany. Each chapter focuses exclusively on the mutual agreement procedure that is available to tax-payers subject to double taxation and discusses topics such as the basic procedure for requesting competent authority relief, statute of limitations issues, the role of appeals (if any), the small case procedure (if any), interest on deficiencies and refunds, and the possibility of arbitration. If a country also has procedures for Advance Pricing Agreements, those procedures are also discussed herein.

Each chapter then discusses the procedures relating to consultation between competent authorities regarding the interpretation or application of an income tax treaty, exchange of information, and assistance in collection. With respect to exchange of information, each chapter also considers procedures under any tax information exchange agreements to which the country is a party.

For competent authority functions and procedures of the United States, see 6880 T.M., *U.S. Income Tax Treaties — U.S. Competent Authority Functions and Procedures*.

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CHAPTER 45: DENMARK

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Eric Lesprit is a registered attorney, partner of Deloitte Société d'Avocats in France, an international law firm and part of the global Deloitte member firm network. His experience covers a wide range of industries as he was the French Competent Authority in charge of Advance Pricing Agreements and Mutual Agreement Procedures. Eric has more than 20 years of experience in transfer pricing and international tax. Beginning in 1998, he was with the French Tax Administration, working on company and individual international tax issues. He took part in the creation of the Advance Pricing Agreement program in France in 1999, concluded the first French APA, and then became the head of the program. He was also involved in the French legislative drafting process as a specialist on fighting tax fraud, tax control policy, the management of tax information exchanges, and the French audit directions network. At the international level, for several years he set forth the French position at the European Community and the OECD, especially with respect to the fight against tax havens and the negotiation of tax information exchange agreements with non-cooperative territories. From 2003 to 2006, Eric was in Washington, D.C., as a technical advisor to the IMF, focusing on public revenues (taxes and customs duties). In 2015, he joined the Transfer Pricing department of Deloitte Société d'Avocats as a Partner. He advises on international taxation in general and transfer pricing in particular.

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Based in Hamburg, Dr. Daniel Liebchen is a partner with the transfer pricing team at Flick Gocke Schaumburg; a partnership of lawyers, tax advisors, and auditors, and the German member of Taxand. He has more than fifteen years of experience in transfer pricing, business restructurings, and valuation issues, with particular experience in representing multinational enterprises in transfer pricing tax audits and competent authority negotiations. He is also extensively involved in providing planning solutions to companies with cross-border transactions and has advised leading multinationals in various industries, including chemical, automotive, food and beverage, and energy. Dr. Liebchen is a guest lecturer at the *Bundesfinanzakademie* (Germany's Federal Finance Academy). He regularly gives speeches on transfer pricing and is a commentator of leading German transfer pricing and DTC commentaries (e.g., Flick/Wassermeyer/Baumhoff/Schönfeld (Eds.), Außensteuerrecht, §1 Foreign Tax Act; Flick/Wassermeyer/Kempermann (Eds.), DTC Germany-Switzerland, art. 9; Schönfeld/Ditz (Eds.), DTC, art. 25 OECD MC, 1st and 2nd ed.) and handbooks (Wassermeyer/Baumhoff (Eds.), Verrechnungspreise international verbundener Unternehmen; Mössner et al., and Steuerrecht international tätiger Unternehmen, 4th, 5th and 6th ed.). In addition,

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Dr. Liebchen has authored numerous articles on transfer pricing and business restructurings. Daniel is a certified tax advisor. He received his Ph.D. from the Helmut-Schmidt-University and his diploma in business administration (Diplom-Kaufmann) at the University of Federal Armed Forces in Hamburg.

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PAGE

DETAILED ANALYSIS

Chapter 45: DENMARK

ISBN 978-1-61746-885-8

ISBN 978-1-61746-885-8

ISBN 978-1-61746-885-8

ISBN 978-1-61746-885-8

DETAILED ANALYSIS

Chapter 45 — DENMARK

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I. Introduction

Denmark, as a small country, has historically depended to a considerable degree on its international trade. This flow of goods, services, and investments requires the appropriate recognition of the need for agreements to share taxing rights between Denmark and other countries. Tax treaties have long been a vital component in Denmark for removing tax-related barriers, creating certainty, facilitating international trade, and stimulating its economy.

Denmark currently has more than 70 treaties in force, including limited taxation agreements covering tax on income from international transport. The Danish tax treaties with France and Spain were terminated by Denmark in 2008. Denmark and France concluded a new bilateral tax treaty in 2022, which is applicable from January 1, 2024, whereas Denmark and Spain have not negotiated a new bilateral tax treaty.

Denmark has an unpublished model treaty that broadly accords with the Organisation for Economic Co-operation and Development (OECD) Model Treaty (the "OECD Model"). As with the OECD Model, Denmark's tax treaties recognize the need to provide administrative provisions that will enable the parties to the treaty to determine how the treaty will operate in particular circumstances. In line with the OECD Model, those treaties place responsibility for these administrative provisions in the hands of the competent authorities. The principal role of the competent authority is set out in the Mutual Agreement Procedure (MAP) article of the Danish tax treaties. All of Denmark's full treaties contain an article on MAP.

In 2017, Denmark signed the OECD's Multilateral Instrument (MLI), which was ratified by the Danish parliament in 2019. The MLI is generally applicable for Denmark's covered tax agreements from January 1, 2020.

Administration of a treaty's provisions, where bilateral discussions between the two countries' competent authorities are appropriate, is facilitated by the Exchange of Information article, also contained in Denmark's full tax treaties.

The application of the MAP and Exchange of Information provisions along with the work of the competent authorities generally has been growing during the last decade or so, as tax treaty networks expand and international trade increases. The responsibilities of the competent authorities are broad. However, much of the of the competent authority activity has been in the area of transfer pricing. Requests for relief under the MAP article have increased dramatically as international enforcement of transfer pricing rules has grown.

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II. Competent Authority

A. General

The role of the competent authority is essentially to facilitate the operation of tax treaties, including:

- administering the provisions of the MAP article;
- entering into exchanges under the Exchange of Information article;
- resolving issues relating to dual residence; and
- interpreting undefined terms in the treaty.

In Denmark, the designated competent authority is the Ministry of Taxation.

The address and contact information of the Danish Competent Authority regarding cases covered by Articles 7 and 9 of tax treaties are as follows:

Skattestyrelsen Store Selskaber
Kompetent Myndighed
Hannemanns Allé 25
2300 Copenhagen S
E-mail: store-selskaber-sikker-post@sktst.dk

The address and contact information of the Danish Competent Authority regarding cases covered by other articles tax treaties are as follows:

Skattestyrelsen Jura
Kompetent Myndighed
Hannemanns Allé 25
2300 Copenhagen S
E-mail: HovedpostkasseJura@sktst.dk

B. Identification

The competent authority is defined in Denmark's treaties as the Minister of Taxation or his authorized representative.

In relation to specific taxpayer cases covered by Articles 7 or 9 of the OECD Model, the Minister of Taxation has authorized the Tax Administration, Large Companies Service as the competent authority. In relation to specific taxpayer cases covering other articles of the OECD Model, the Minister of Taxation has authorized the Tax Administration, Legal Services as the competent authority. In relation to issues of a general nature covered by Article 25(3) of the OECD Model, the competent authority is the Department of the Ministry of Taxation.

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III. Mutual Agreement Procedure — Taxpayer Cases

A. *Treaty Provisions on Mutual Agreement*

The MAP article is one of the most (if not the most) important treaty subjects for which the competent authorities are responsible. Generally, the MAP article in tax treaties allows representatives of each contracting state(s) through their respective competent authority to engage with one another with the intent of resolving international tax disputes. The competent authorities are not required to resolve the international tax dispute but merely to "endeavor to reach an agreement." The procedure comprises a number of different elements.

1. *OECD Model*

Article 25 of the OECD Model contains the MAP article, which provides three general areas where two contracting states may endeavor to resolve an international tax dispute.[1] To summarize, paragraphs 1 and 2 of Article 25 apply to instances where a taxpayer believes that the actions of one or more contracting states have resulted or will result in "taxation not in accordance with the provisions of the Convention."[2] The most common disputes implicating MAP are those involving transfer pricing where associated enterprises of large multinationals incur large tax assessment as a result of double taxation or tax authority adjustments related to inter-group transactions (ergo, disputes arising from permanent establishment queries, the amount of profits attributable to a permanent establishment, or application of withholding tax rules to income). Paragraph 3 of Article 25 allows for the competent authorities to reach a conclusion in cases where double taxation results where "difficulties or doubts [arise] as to the interpretation" of the relevant treaty at hand.[3] Lastly, paragraphs 4 and 5 of Article 25 provide the rules pertaining to dialogue among the competent authorities to resolve the tax dispute, including the application of arbitration.[4]

2. *Denmark Income Tax Treaties*

Denmark has not made any reservations or comments in respect of the MAP article in the OECD Model, and most of its modern treaties closely follow the OECD Model. One departure from the Model in its 2017 edition is that Article 25(5), which deals with arbitration, is only applied in some of Denmark's tax treaties, including those with Japan, Israel, and Switzerland. However, the OECD's Multilateral Instrument (MLI) and EU's Arbitration Directive and Arbitration Convention expand the possibilities for arbitration with other jurisdictions.

B. *Background*

1. *Historical Background*

The Danish Tax Authorities have published guidelines regarding the Competent Authority MAP process in the tax assessment guidelines for corporations.[5]

The MAP article has assumed much greater prominence over the course of the last decade with the growth in transfer pricing legislation and increases in transfer pricing disputes. It has also assumed importance in Denmark as the source of authority for negotiating and concluding bilateral Advance Pricing Agreements ("APAs").

2. *Powers of Competent Authorities in a MAP*

The duty of the competent authorities in a MAP is to consider cases presented to them to determine whether tax is being levied not in accordance with the treaty. If the competent authorities find this to be the case, they may resolve the case unilaterally or endeavor to resolve the case bilaterally with the goal of eliminating double taxation.

The Danish Tax Authorities are not entitled to conclude an agreement that would impose more burdensome taxation compared to domestic Danish tax law. This follows from the prior legislative history to the law that revoked the previous act on double taxation agreements.[6] Moreover, the tax authorities are generally not able to conclude an agreement that would impose less burdensome taxation compared to domestic Danish tax law and the provisions of the tax treaty. Accordingly, the authority of the competent authority is limited by the domestic Danish tax law and international tax treaty provisions.

Denmark's approach to the equivalent of paragraph 4 of Article 25 of the OECD Model means that its competent authority is able to communicate directly with its treaty counterparts in administering the MAP.

3. *Types of Cases*

The terms of the MAP article are of sufficient breadth to allow for a variety of cases to fall within its scope.

a. *Allocation Cases*

Allocation cases concern the attribution of profits to a permanent establishment (Article 7 of the OECD Model) or the determination of profits between associated enterprises (Article 9 of the OECD Model).

In 1998, the arm's length principle was codified in section 2 of the Tax Assessment Act. Pursuant to the legislative history of section 2, the provision is based on the 1995 OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (hereinafter, the "OECD Transfer Pricing Guidelines"). As a result, there should be consistency between Denmark's approach to transfer pricing under its domestic legislation and the application of the Associated Enterprises articles of its treaties where these follow the equivalent provisions of

[1] Article 25 of the OECD Model Treaty.
[2] *See* Article 25(1) and (2) of the OECD Model Treaty.
[3] *See* Article 25(3) of the OECD Model Treaty.
[4] *See* Article 25(4) and (5) of the OECD Model Treaty.
[5] *See* the Legal Guidelines: Mutual Agreement Procedure (C.F.8.2.2.25), available at https://info.skat.dk/data.aspx?oid=2060703.
[6] Act no. 945 of Nov. 23, 1994.

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the OECD Model. In 2012, the Authorized OECD Approach[7] underlying the interpretation of Article 7 of the 2010 OECD Model was enacted into domestic Danish tax law for the purpose of determining the profits of a permanent establishment.[8]

b. Other Cases

The provisions equivalent to Article 25(1) and 25(3) of the OECD Model address situations in which actions of contracting states result in taxation not in accordance with the treaty and situations in which there are difficulties or doubts as to the interpretation or application of the treaty. This empowers Denmark's Competent Authority to consider cases and issues presented to it relating to the general operation of a treaty.

4. Program Evaluation

The Danish Tax Authorities do not produce any official statistics relating to the resolution of cases under the MAP, but the OECD has released MAP statistics for 2022. They are of the view, however, that the procedure is effective in totally eliminating double taxation in the vast majority of cases, especially in the areas of transfer pricing and attribution of profits. The number of transfer pricing mutual agreement cases continues to increase. At the end of 2022, Denmark had an inventory of 112 ongoing MAP related transfer pricing disputes, having closed 143 transfer pricing cases in 2022.[9]

5. Self-Help Alternative

Denmark has a self-assessment system in place for income tax purposes. However, if a company decides to pay the arm's length price as determined by the foreign tax administration without first seeking the view of the Danish Tax Authorities or requesting the consideration of the competent authority, it risks being challenged by the Danish Tax Authorities.

C. Competent Authority Process

1. Sources

Published sources of information regarding the competent authority process in Denmark are comprised principally of the following:

- the Commentary on Article 25 of the OECD Model Treaty;
- the 2022 OECD Transfer Pricing Guidelines, in particular, chapter IV; and
- the Legal Guidelines, section C.F.8.2.2.25.

2. Taxes and Issues Covered

The taxes covered by Denmark's tax treaties are generally limited to income and net wealth taxes, including capital gains taxes. No indirect taxes or customs duties are covered by Denmark's tax treaties.

3. Who Can Apply

In general, the approach adopted in Denmark's treaties is to allow a resident of a contracting state to present its case to the competent authority of the contracting state of which it is a resident. However, regarding Danish tax treaties covered by the MLI, it is also possible for a taxpayer to present its case to the competent authority of the other jurisdiction.

4. Timing of Requests

a. In General

The majority of Denmark's treaties contain time limits for submitting a MAP request. They generally require the presentation of a case to the competent authority within three years from the first notification to the taxpayer of the actions giving rise to taxation not in accordance with the treaty. Exceptions to this include the treaties with Brazil, Greenland, Switzerland, Trinidad and Tobago, the United States, and Zambia, which have no time limit for the presentation of cases. The Danish Tax Authorities adopted the general position that the three-year rule of the OECD Model is applicable if there is no time limit in a tax treaty.[10] More recently a district court has determined that the time limits in domestic Danish tax law are applicable in lieu of a tax treaty time limit.[11] This position is disputed since the treaty should override domestic law.

For the purpose of applying the time limit, the first notification of action giving rise to taxation not in accordance with the treaty is usually the relevant notice of assessment. In Denmark, the first notification is deemed to be the final assessment issued by the tax authorities.[12] This view accords with paragraph 18 of the commentary to Article 25 of the OECD Model, which states that "the first notification" should be interpreted in the most favorable way to the taxpayer.

A taxpayer may proceed with an appeal under domestic appeal procedures before the conclusion of a competent authority agreement. Normally, however, the tax authorities are required to implement a decision of the National Tax Tribunal or a decision of a Danish court. In practice, therefore, if a domestic appeal reaches the point of such a decision, subsequent endeavors of the Danish Competent Authority may be limited to demonstrating to the competent authority of the treaty partner country that the court decision is in accordance with the treaty, as a matter of principle and amount, and that relief should be provided by that country. However, if new information is presented that demonstrates that the factual basis for the court case was incorrect, the Danish Competent Authority may conclude an agreement that differs from the outcome of the court case.

b. Statute of Limitations and Other Procedural Limitations

(1) In General

The statute of limitations in domestic Danish tax law is three years and four months after the end of the income year. In transfer pricing cases and other cases dealing with controlled

[7] The OECD's authorized approach allows an alternative to computing business profits attributable to a permanent establishment leaning on the transfer pricing rules.

[8] *See* sections 2(2) and 8(6) of the Corporate Tax Act; sections 2(3) and 25 of the Withholding Tax Act.

[9] *See* OECD, Mutual Agreement Statistics, available at https://www.oecd.org/tax/dispute/map-statistics-denmark.pdf.

[10] The Legal Guidelines 2024-1 C.F.8.2.2.25.2.

[11] SKM2021.119.BR.

[12] The Legal Guidelines 2024-1 C.F.8.2.2.25.2.

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transactions, the statute of limitations is extended for another two years (i.e., five years and four months). However, the tax return may be reopened with no time limits by either the taxpayers or the tax authorities if a foreign tax authority has rendered a decision that is of relevance for the Danish tax assessment. In this situation, the request must be filed no later than six months after the taxpayer was made aware of the basis for the request.

(2) Treaty Provisions

Specific provisions in treaties dealing with time limits for implementation of a competent authority agreement under a MAP article take precedence over the normal domestic law time limits that would otherwise apply to the provision of relief from double taxation. Most of Denmark's treaties include a provision in the MAP article which states that "the solution so reached shall be implemented notwithstanding any time limits in the national laws of the Contracting States." This means that the taxpayer can ensure, by presenting a case to the competent authority under the MAP article, that the mere expiration of domestic time limits does not preclude the granting of relief.

5. Unilateral Relief

The competent authority initially examines whether there is a basis for eliminating double taxation unilaterally. The examination is carried out by staff members of the competent authority who were not involved in an audit of the taxpayer. If the competent authority decides the issue can be resolved unilaterally, it provides the taxpayer with a proposed decision and, if the taxpayer agrees with the proposed decision, it is made final. Otherwise, the case is handled under MAP.

6. The Domestic Procedure

If a taxpayer does not agree with an adjustment by the Danish tax authorities, the taxpayer may file an appeal to the National Tax Tribunal. There is no bar in Denmark to a taxpayer filing an appeal against such an assessment and presenting its case under the MAP of the relevant treaty. The taxpayer may ask the National Tax Tribunal to put aside an appeal while the competent authorities endeavor to resolve the matter. If an appeal is decided before a mutual agreement is concluded by the competent authorities, the Danish Competent Authority is usually bound by the Tribunal's decision, unless such decision was held on an incorrect factual basis.

7. Pre- and Post-Filing Conferences

There are no formal procedures in Denmark regulating conferences between the tax administration and the taxpayer, either before or after a case is presented under the MAP. It is usual, however, for the tax authorities to be prepared to discuss matters informally with taxpayers before a formal application is lodged. Further meetings often occur before the tax administration sends its position paper to the other competent authority.

8. Information Required

There are no formal requirements regarding the procedure for the presentation of a case under the MAP. However, according to the Danish tax treaties, a taxpayer should present its case to the competent authority of the country in which it is a resident. However, regarding Danish tax treaties covered by the MLI, it is also possible for a taxpayer to present its case in the country of source. There is no set format in which a taxpayer must present its case to the Danish Competent Authority. However, in order for the Competent Authority to handle a request, the taxpayer must present sufficient factual information to substantiate that actions of one or both of the contracting states resulted or will result in taxation not in accordance with the provisions of the tax treaty. The Danish Legal Guidelines reference the OECD's "*Manual on Effective Mutual Agreement Procedures (MEMAP)*" which proscribe that a MAP request must include at a minimum:

- the taxpayer's name, address and CPR number (civil registration number) or CVR number/SE number (business registration number/VAT number);
- the identity of the tax authority of the other state which has made, or is expected to make, a tax assessment in contravention of the tax treaty (if applicable);
- the relevant income years;
- a description of the facts and circumstances of the case, including the amount of income in question;
- the articles of the tax treaty which the taxpayer believes are not applied properly;
- the taxpayer's perception of how the tax treaty should be interpreted;
- details of any prior request to other competent authorities on the same issue;
- details of any notice of objection against the tax assessments in question;
- if relevant, a statement of consent that the Danish Tax Agency may address an authorized agent;
- details of any submission of the request to other authorities; and
- a commitment from the taxpayer to respond as completely and quickly as possible to all reasonable and appropriate requests made by a competent authority and have documentation at the disposal of the competent authorities.

In addition to this information, transfer pricing MAP requests must include an identification of other taxpayers involved and a description of the controlled transactions and intra-group pricing.

9. Protective Measures

A taxpayer may file a request for a MAP proceeding to the competent authority or file an appeal to the National Tax Tribunal in order to not breach any time limits.

10. Small Case Procedure

There is no provision in Denmark's legislation, or distinction in its practice, to give rise to a separate procedure for small cases. There are no particular legislative provisions or internal practices in Denmark governing cases falling below particular amounts. Furthermore, Denmark does not have a *de minimis* limit below which taxpayers are not required to apply the arm's length principle in their transfer pricing.

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11. Denial of Request

If a case presented under the MAP article of a treaty meets the basic requirements of the treaty (e.g., as to the tax being a covered tax, the applicant being a Danish resident, and any applicable time limits being satisfied), the Danish Competent Authority is not entitled to deny access to the process. The terms of the MAP article, where equivalent to Article 25 of the OECD Model, require that if a taxpayer's claim appears justified and he cannot himself resolve the matter unilaterally, the competent authority "shall endeavor … to resolve the case by mutual agreement." Thus, only in cases in which the Danish Competent Authority considers the claim unjustified, is it able to reject a case.

12. Processing of MAP Cases

a. Stages of the Procedure

The first stage in the MAP is between the taxpayer and the Danish Competent Authority. In the first stage, the Competent Authority considers whether the case may be resolved unilaterally. The second stage occurs if the Competent Authority finds that double taxation in whole or in part is caused by action in the other treaty country. In this case, the Competent Authority is required to initiate the MAP with the competent authority of the other contracting state. The second stage is, strictly speaking, a procedure between the competent authorities. However, according to Danish law, the taxpayer has the right of access to all documents that are exchanged between the competent authorities of the contracting states. The taxpayer is not entitled to participate in meetings between the competent authorities.

b. Withdrawal of MAP Request

A taxpayer is entitled to withdraw a MAP request at any time during the proceedings.

c. Effect on Domestic Proceedings

The MAP has no bearing on an appeal to the National Tax Tribunal.

d. Appeal

A taxpayer may, in principle, apply for judicial review of an agreement entered into by the competent authority. However, it is the practice of the Danish Tax Authorities to request the taxpayer to confirm that it agrees with a draft mutual agreement before it is signed and that an appeal against the agreement will not be filed.

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IV. Arbitration

A. *Tax Treaties*

Most of Denmark's tax treaties do not contain an arbitration clause. However, the income tax treaties with Japan (2017), Israel (2009), and Switzerland (2009) do contain an arbitration clause. These clauses in the treaties with Israel and Switzerland are applicable effective from January 1, 2020, whereas the arbitration clause in the treaty with Japan is applicable from November 5, 2021.[13] In addition, as discussed below, Denmark's treaties covered by the MLI, may also provide for arbitration. A taxpayer can opt for arbitration under the tax treaties with Japan and Israel if the competent authorities have not resolved the matter within two years. The deadline for invoking the arbitration clause under the Swiss tax treaty is three years. The scope of these arbitration clauses covers a variety of disputes over the interpretation and application of the tax treaties, such as transfer pricing, permanent establishments, and beneficial ownership. However, in Denmark there is no access to arbitration if the matter concerned has been subject to a court ruling. The treaties do not specify a specific arbitration procedure to be followed. The competent authorities must thus conclude a bilateral agreement dealing with the procedure and the type of arbitration.[14] The tax treaties do not call for the arbitration result to be published.

Article 43(3) of the Denmark-Germany Income Tax Treaty provides that the competent authorities may request an expert opinion regarding a specific taxpayer case; however, an expert opinion is not binding on the competent authorities.

B. *OECD's Multilateral Instrument (MLI)*

Denmark signed and ratified OECD's Multilateral Instrument (MLI), which is generally applicable for Denmark effective as of January 1, 2020. Denmark opted for MLI Part VI on mandatory binding arbitration. Because of the MLI, it is possible to obtain arbitration with additional jurisdictions, in addition to the treaties previously mentioned. The scope of arbitration includes all types of disputes relating to the interpretation and application of a tax treaty. In addition, Denmark opted for the reservations that the chairman of the arbitration panel must be a judge and that Denmark is entitled to publish a summary of the arbitration result. Arbitration is not possible if the taxpayer has been subject to sanctions for tax fraud, willful default, or gross negligence.[15]

Arbitration under the MLI requires that the competent authorities have not resolved the case within two years. A request for competent authority must be submitted no later than three years after the final decision in the case giving rise to the dispute. The competent authorities must conclude a bilateral agreement specifying the information that must be presented for the two-year deadline to commence. The two-year deadline is suspended if a competent authority has suspended the MAP because the case is pending before a national administrative body or a court. In this case, the deadline.

The competent authorities may agree bilaterally on the arbitration procedures. If a bilateral agreement is not concluded, one of two standard procedures of the MLI must be followed. The primary procedure is referred to as the "baseball arbitration," where the arbitration panel must choose between one of the solutions (final offer) submitted by the competent authorities. Denmark and the other countries have not entered a reservation regarding baseball arbitration, which is likely to be the relevant arbitration type. The second procedure of the MLI is an independent opinion from the arbitration panel which is not limited to the solutions submitted by the competent authorities.

The decision of the arbitration panel, which consists of three members, is binding on the contracting states and must be implemented through the mutual agreement procedure. National deadlines must be disregarded. A taxpayer must accept the decision within 60 days and bring any pending domestic proceedings to an end.

C. *EU Arbitration Convention*

Denmark ratified the EU Arbitration Convention;[16] accordingly, the tax authorities are required to resolve transfer pricing matters between affiliated companies resident within the EU and permanent establishments and head offices within the EU. If the tax authorities have not resolved a case within two years, an advisory commission has six months to work out a solution to the case. Thereafter, the competent authorities have another six months to reach a mutual agreement that eliminates double taxation. A Code of Conduct for the effective implementation of the EU Arbitration Convention should ensure uniform application by all EU Member States of the Arbitration Convention.[17]

D. *EU Arbitration Directive*

Denmark implemented the EU Arbitration Directive (Council directive (EU) 2017/1852 of October 10, 2017), which is applicable for complaints submitted to the competent authorities beginning from July 1, 2019, regarding income years effective from January 1, 2018. The Directive is based on the Arbitration Convention model, with detailed procedural rules. The scope of the directive covers various types of tax disputes that arise under a tax treaty or the EU Arbitration Convention. To benefit from these rules, the taxpayer must be tax resident in an EU member state, and the tax concerned must be an income or net wealth tax covered by the tax treaty or convention.

A taxpayer complaint must be submitted no later than three years after the decision that gave rise to the dispute. The competent authorities, in turn, must resolve the dispute within two years. Each of the competent authorities is entitled to postpone the deadline by one year.

The taxpayer can request the competent authorities to establish an arbitration panel if the dispute is not resolved within

[13] The treaties contained special effective dates for arbitration clauses that became effective later, when a legal basis for arbitration had been created in Denmark.

[14] In this respect, it is likely that the approaches under OECD's Multilateral Instrument will be adopted.

[15] OECD, Denmark — MLI Arbitration Profile, available at https://www.oecd.org/tax/treaties/beps-mli-arbitration-profile-denmark.pdf.

[16] 90/436/EEC of July 23, 1990.

[17] COM (2004) 297 final of Apr. 23, 2004.

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the deadline. The panel must have at least five members and must prepare an opinion within six months from the time it is established. This deadline may be postponed by three months.

The competent authorities must resolve the dispute no later than six months after having received the opinion from the arbitration panel. The competent authorities are not required to resolve the case in the same manner as the arbitration panel. The final decision is binding upon the contracting states, and the decision or a summary must be published in the public domain.

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V. Advance Pricing Agreements

A. Introduction

Denmark has no domestic legislation specifically regarding Advance Pricing Agreements (APAs). However, pursuant to section 21 of the Tax Administration Act, a taxpayer may request an ordinary binding ruling of a unilateral nature, which for most issues is binding upon the tax authorities for five tax years. A ruling regarding the value of an asset, however, is only binding on the tax authorities for six months from the date of issuance of the ruling. Hence, a ruling concerning a transaction involving a transfer of the asset must be implemented within six months in order to be binding.

The Danish Tax Authorities are entitled to enter into bilateral and multilateral APAs on the basis of Article 25 of the Danish tax treaties ("MAP APA"). According to the European Commission, at the end of 2022, Denmark had 44 APAs in force. The tax authorities have not adopted formal APA rules but follow a flexible approach.[18] However, the Commission of the European Communities has published a procedure for concluding EU APAs ("EU APA Procedure").[19] The Danish Tax Authorities often follow the EU APA Procedure, even with APAs that are not concluded among EU participants.

According to the EU APA Procedure, an APA application should typically have four distinct stages:

(a) Pre-filing stage/Informal application;

(b) Formal application;

(c) Evaluation and negotiation of the APA; and

(d) Formal agreement.

B. Scope of APAs

The scope of an EU APA is dealt with in paragraphs 48–50 of the EU APA Procedure, as summarized below:

> 48. It is up to the taxpayer to initially decide which transactions and which group entities to include in the APA. However, the tax administration decides whether to accept the taxpayer's application;
>
> 49. It is important that tax administrations are as flexible as possible in allowing the taxpayer to include documentation in the APA submission. It is recommended that the taxpayer provides a thorough rationale for the substance of the transactions, including the reasoning for including or excluding certain companies; and
>
> 50. A tax administration should exchange information (EOI) spontaneously (subject to any domestic law limitations) with another tax administration that the first tax administration feels should be included in the APA. The taxpayer would need to be consulted about which tax administrations are involved in the APA since the taxpayer's agreement to the terms and conditions of the APA must be obtained.

C. Duration

The EU APA Procedure does not contain a specific set of rules regarding the duration of an APA. Instead, taxpayer proposes the period for which an APA is desired.

Comment: Typically, APAs concluded by the Danish Tax Authorities have a duration of five years.

D. Retroactive Effect

Pursuant to Danish tax law, APAs can be applied retroactively (rollback). The retroactive effect of an EU APA is dealt with in paragraphs 58–61 of the EU APA Procedure, as summarized below:

> 58. Rollback — when provided for in domestic legislation — APAs can be considered where they will resolve disputes or remove the possibility of disputes in earlier periods;
>
> 59. Rollbacks should only be a secondary result of the APA and should only be carried out where it is appropriate to the facts of the case. Similar facts and circumstances to those in the APA must have existed for previous periods in order for rollback to be appropriate;
>
> 60. Rollbacks of the APAs must strictly be applied with the taxpayer's consent; and
>
> 61. A tax administration has recourse to the usual domestic measures if, as part of the APA process, it discovers information that would affect the taxation of earlier periods. But tax administrations should advise the taxpayer of any such intended action to give the taxpayer the opportunity to explain any apparent inconsistency before making a tax re-assessment concerning previous periods.

E. Pre-Filing Stage

Taxpayers seeking an APA may request a pre-filing meeting with the competent authority on either an anonymous or non-anonymous basis. That request should include a draft outline of the taxpayer's case. The pre-filing stage is dealt with in paragraphs 21–25 of the EU APA Procedure, which provides the following:

> 21. The pre-filing meeting must allow all parties to assess whether the application is acceptable and whether an APA would be appropriate. The tax administration must be provided with sufficient information to permit this assessment. This information should at a minimum describe the activity and transactions to be covered, the taxpayers concerned, the preferred methodology, desired length of the APA, any rollback, and the countries at issue.
>
> Taxpayers should approach the tax administrations as early as possible once they are clear about their intended actions when considering an APA.
>
> 22. Tax administrations might consider anonymous approaches from taxpayers, but nothing binding can be agreed to anonymously. The taxpayer's intentions

[18] The Legal Guidelines 2023-1 C.D.11.5.3.
[19] COM (2007) 71 final dated Feb. 26, 2007.

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should be relatively fixed for the anonymous meeting and should not be a protracted process;

23. The tax administration should give a clear indication as soon as possible whether a taxpayer's subsequent formal application is likely to be accepted and also indicate, where possible, which aspects might be more controversial;

24. The taxpayer should approach all of the EU Member States directly involved in the APA. Where more than one tax administration is consulted, the same information should be provided to each administration (this should apply throughout the APA process); and

25. As part of the pre-filing stage, the competent authorities should consult with one another where necessary. Any consultation should take place as quickly as possible.

In the pre-filing stage, the taxpayer and tax administration should discuss which documentation must be included with the formal application. Any complexity threshold must also be discussed at this stage. The tax administration should also use the pre-filing stage to influence the content of the application.

F. Formal Application

The formal application for an APA is covered by paragraphs 26–28 of the EU APA Procedure,[20] which provides the following:

26. Formal application for an APA should be made as early as possible in relation to the years to be covered by the APA and soon after any informal approach. The taxpayer should make the formal application to the tax administration where it pays tax and to all other countries concerned. Where Member States have different administrative or legal procedures concerning APAs, it is the taxpayer's responsibility to ensure that all applications are compliant. The tax administration should inform the taxpayer as soon as possible whether the application for an APA has been formally accepted for processing and to request as soon as possible any further documentation necessary to evaluate the APA and to formulate a position;

27. In the initial formal application, the taxpayer should submit all relevant information necessary for the tax administration to evaluate the application and to come to a view about the methodology that will be used later to calculate the arm's length price. Appendices A and B to the EU APA Procedure contain details of the type of information that might often be necessary in all instances but is not necessarily exhaustive. The precise information necessary for the formal application should be tailored to the specific case; and

28. A tax administration has the right to ask for supplementary information to evaluate the APA application.

[20] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52007DC0071.

G. Evaluation and Negotiation of the APA

The evaluation and negotiation of an APA is dealt with in paragraphs 29–44 of the EU APA Procedure, as summarized below.

29. The aims of the evaluation and negotiation are distinct even if it might sometimes be appropriate to carry out these tasks simultaneously. A balanced approach should be adopted to ensure that the evaluation takes place as quickly as possible and the negotiation begins as soon as possible.

In the evaluation, the tax administration should formulate its preferred terms and conditions for the APA. The negotiation with the other tax administrations concerned should resolve any differences that arise between tax administrations so that one set of terms and conditions can be provided to all the taxpayers involved.

30. As soon as possible after a formal application is received, the competent authorities of the tax administrations concerned should contact one another and establish a timetable for the APA. The taxpayer should be involved in the creation of the timetable. A model timetable is contained in Appendix C. In multilateral APAs, the competent authorities could agree that one takes the lead in organizing the procedure;

31. The taxpayer should provide the tax administration with information to evaluate the application. The evaluation should be completed as soon as possible to allow negotiations to start;

32. Tax administrations should make every effort to minimize the burden of the evaluation by requiring only pertinent information; taxpayers must in turn provide any information requested as quickly as possible. All parties should agree on what information is relevant;

33. All information provided to one tax administration should also be provided to the other tax administrations involved. Details of what information has been requested should also be exchanged. A convention should be established for each APA to ensure the exchange of pertinent information;

34. Where a tax administration forms an evaluation different from the taxpayer's application, then its evaluation should be discussed with the taxpayer;

35. The tax administration should try to obtain the taxpayer's agreement with the position of the tax administration. It is advantageous for the tax administration and the taxpayer to work together to reach a mutually acceptable conclusion;

36. Tax administrations and taxpayers should work together to minimize any delay, in particular by making timely requests for necessary information and supplying information in a timely manner. Tax administrations should always consider making joint/common requests for information when doing so would further minimize delays;

ISBN 978-1-61746-885-8

37. As soon as its evaluation is complete, a tax administration should endeavor to begin negotiations and, if necessary, the other tax administration involved should complete its own evaluation so as to participate in negotiations;

38. The evaluation stage should involve competent authority interaction where it would aid in reaching an APA. Provisional agreement should be reached where possible. However, it is preferable that a tax administration form a preliminary evaluation before actual competent authority negotiations begin;

39. If it would aid the APA procedure, preliminary negotiations should begin before the evaluation is finalized, but this should not permit tax administrations to inappropriately postpone finalizing the evaluation;

40. For most APAs, each competent authority should produce a position paper containing the tax administration's evaluation. The formal exchange of positions should take place with an exchange of position papers. This should be done as soon as possible after the application is received;

41. Where appropriate, the competent authorities do not need to exchange position papers if this makes the APA process more efficient and faster. But in most cases, having all competent authorities prepare position papers before full negotiations begin will help to identify disputes and may lead to quicker resolutions. Where one has prepared a position paper, any other competent authority involved in the negotiation should identify any areas of disagreement;

42. The contents of a position paper should set out the view of the tax administration involved in the APA. Appendix D lists some of the details that are likely to be necessary in a position paper;

43. Negotiations should commence after the position papers are exchanged. A timetable should be agreed for the negotiations. Taxpayers should be kept informed of all significant developments;

If the competent authorities agree, taxpayers should be allowed to attend their meetings to address factual matters by making a presentation; and

44. If beneficial, the competent authorities should arrange regular meetings to keep the entire APA program up to date, but this should not impede arranging and conducting meetings on individual cases.

Pursuant to Danish law, the taxpayer has the right to access documents that are exchanged between the competent authorities, including position papers.

H. Formal Agreement of APA

The conclusion of the APA is covered by paragraphs 45–47 of the EU APA Procedure, which provides:

45. The formal APA should be given effect by formal agreements between the tax administrations involved (in a multilateral APA there could be one agreement between all tax administrations or a series of bilateral agreements between each tax administration). All agreements should detail the terms and conditions of the APA;

46. These agreements should give certainty to those involved in the APA and, provided the relevant terms of the APA are met, the transfer pricing for the transactions will be as determined in the APA, and the transactions will not be subject to a different interpretation by the tax administration. Tax administrations should ensure that they are able to provide this certainty; and

47. Appendix E of the EU APA Procedure contains information which is likely to be necessary for all APA formal agreements.

I. Documentation Requirements

The documentation requirements are described in paragraphs 18–19 of the EU APA Procedure:

18. Where a Multinational Enterprise uses the EU Transfer Pricing Documentation (EUTPD), this will serve as a useful basis for any APA application. Useful additions can be any transfer pricing policy documentation on which the application is based and any reports received on which the application relies. Documentation requirements should not be unduly onerous for taxpayers, but the tax administration must be given the opportunity to fully evaluate the transactions included in the APA.

Appendices A and B of the EU APA Procedure provide a list of documentation that is likely to be of use for any APA application. What is actually required in the formal application should be agreed at the pre-filing stage.

19. The specific information necessary to monitor the application of the APA should always be agreed upon as part of the APA negotiation. The taxpayer must maintain documentation throughout the APA so that the tax administration can monitor how the APA is applied.

The documentation should include critical assumptions for an APA, which follow from paragraphs 51–57 of the EU APA Procedure. A summary of these rules are as follows:

51. The taxpayer should describe in the application the assumptions on which the ability of the methodology to accurately reflect the arm's length pricing of future transactions;

52. Critical assumptions should be drafted carefully to ensure the capability of the APA to reflect arm's length pricing;

53. Taxpayers and tax administrations should attempt to identify critical assumptions that are based where possible on observable, reliable, and independent data;

54. Critical assumptions should be tailored to the individual circumstances of the taxpayer, the particular commercial environment, the methodology and the type of transactions covered;

ISBN 978-1-61746-885-8

55. However, critical assumptions should not be drawn so narrowly that certainty provided by the APA is jeopardized but should encompass as wide a variation of the underlying facts as those involved in the APA feel comfortable with;

56. The APA agreement should include parameters for an acceptable level of divergence for some assumptions in advance and only if these parameters are exceeded should a renegotiation of the APA become necessary; and

57. Taxpayers should inform their tax administrations if critical assumptions are not met.

All those involved in the APA should consult with each other to examine the reasons why a critical assumption has not been met and to see if the APA methodology is still appropriate. An attempt should be made to renegotiate the APA if at all possible.

J. Small Business APAs

There are no special APA procedures applicable to small businesses in Denmark.

K. Time Frame

The time frame for an APA is discussed in Appendix C of the EU APA Procedure:

Pre-filing stage — informal application — month 0

An informal approach is made by a taxpayer to two tax administrations, requesting an APA.

The tax administrations listen to the statements made and indicate whether the particular case merits an APA. The tax administrations consult with one another to ensure both parties will agree.

Each has brief discussions with the taxpayer over what information should be provided in the first instance and explores what methodology will be appropriate.

Months 1–3

The formal application is received by each tax administration. The competent authorities establish in month one a timetable to evaluate and negotiate the APA. Both tax administrations conduct an initial review independently and issue information requests if necessary.

Months 4–12

The tax administrations continue to evaluate independently with the full cooperation of the taxpayer. The first full face-to-face meeting could take place with a presentation to all involved parties by the taxpayer. The competent authorities consult as appropriate. The taxpayer is involved in this evaluation and is consulted. By the end of this period, each tax administration has formulated its position. The competent authorities are able to exchange position papers. They agree to meet to discuss these in Month 14.

Month 13

Each competent authority evaluates the other position paper and obtains further information where necessary. (Alternatively, in month 12 one competent authority issues a position paper, and in month 13 the other issues a position paper, rebutting the position and suggesting alternatives.)

Months 14–16

Discussions occur between competent authorities. Further clarifications are obtained from the taxpayer who is kept informed of the negotiations.

Month 17

The competent authorities reach agreement. The taxpayer is consulted and indicates its agreement.

Month 18

The APA is formally agreed between the competent authorities. Formal documents are exchanged. The taxpayers receive assurances that the APA is acceptable.

More complex cases may take longer but, with the cooperation and planning of all parties, the time taken to conclude an APA should be kept to a minimum. According to the Danish Tax Authorities, the full process for a new APA often takes four to five years, but the renegotiation of an existing APA may be accomplished much quicker.

L. Withdrawing from the APA Process

A taxpayer or the tax authorities may discontinue or withdraw from the APA process at any time. Even after a tax administration has accepted an APA application and commenced the APA process, it is not compelled to execute or conclude the APA. In such cases, the taxpayer is given the opportunity to meet with the tax authorities and discuss the reasons for the decision. If the competent authorities cannot agree, the Danish Tax Authorities may nevertheless agree to finalize an APA on a unilateral basis. Failure to conclude an APA creates serious problems for the taxpayer and the tax authorities in future years. The Danish Tax Authorities endeavor to find a solution and rarely withdraw from the process.

ISBN 978-1-61746-885-8

VI. Consultation Between Competent Authorities Regarding Treaty Interpretation or Application

All of Denmark's treaties contain provisions allowing for competent authorities to resolve by mutual agreement any difficulties or doubts arising from the interpretation or application of any of the treaty provisions. The provisions in all the modern treaties are very similar to paragraph 3 of Article 25 of the OECD Model. The treaties also allow the competent authorities of the contracting states to communicate with each other directly to reach an agreement. In a number of treaties, provisions are combined to allow communication between tax authorities to resolve any difficulty or doubt as to the interpretation or application of the treaty. A taxpayer can contact the competent authority if it believes that there is reason to initiate a procedure under Article 25(3). No specific rules exist in this area.

ISBN 978-1-61746-885-8

VII. Exchange of Information

A. *In General*

1. *Exchange of Information Outside of International Agreements*

The Danish Tax Authorities are not authorized to exchange information about taxpayers with the tax authorities of foreign states without an explicit legal basis in domestic law or international law.

2. *Exchange of Information Under International Agreements*

The legal basis for the exchange of information may be:

- Income tax treaties;
- Bilateral conventions on mutual assistance in tax matters;
- Nordic Convention on Mutual Assistance in Tax Matters;
- EC Directive on Mutual Assistance (2011/16/EU); or
- OECD's 2010 Convention on Mutual Administrative Assistance in Tax Matters.

All of Denmark's full tax treaties contain an article requiring the competent authorities to exchange information about taxpayers to ensure that the correct amount of tax due in accordance with the treaty is paid and also to assist in combating tax evasion. The treaty provisions are normally drafted in accordance with Article 26 of the OECD Model; however, the content may vary significantly. Denmark has no observations or reservations with respect to Article 26 of the OECD Model. Most Danish treaties follow the OECD Model.

Denmark has many bilateral tax information exchange agreements (TIEAs) with tax havens, based on the 2002 OECD Model Agreement on Exchange of Information on Tax Matters. Denmark has also concluded a number of bilateral agreements regarding the operation of exchange of information provisions in tax treaties.

On November 15, 2012, Denmark and the United States concluded a bilateral agreement to improve international tax compliance and agreed to implement the Foreign Account Tax Compliance Act (FATCA), as well as a memorandum of understanding regarding the agreement. The agreement imposes an obligation on Denmark and the United States to collect and exchange information regarding certain accounts on an automatic basis, addresses certain domestic Danish legal impediments vis-à-vis FATCA, and reduces the reporting burden for Danish financial institutions. The agreement is based on the reciprocal version of the model intergovernmental agreement published by the U.S. Department of the Treasury on July 26, 2012 (Model 1A). This agreement was implemented into domestic Danish law in 2013.[21]

The first Nordic Multilateral Treaty on Mutual Assistance in Tax Matters was signed in 1972. The treaty included provisions on the exchange of information, collection of taxes, the supply of tax return forms and service of documents. A new convention was signed on December 7, 1989 and has been in force since May 9, 1991.

The original EU Directive on Mutual Assistance was adopted on December 19, 1977 (77/799/EEC) and was replaced by a new directive in 2011 (2011/16/EU). In 2014, the scope of the directive was amended to include the automatic exchange of information regarding interest, dividends, and certain other forms of income (2014/107/EU). In 2015, the directive was amended to include the automatic exchange of binding rulings and APAs regarding cross-border transactions (2015/2376/EU). In 2016, the directive was amended to include the automatic exchange of country-by-country reports (2016/881/EU) and to ensure that tax authorities have information on beneficial ownership (2016/2258/EU). In 2018, the directive was amended to include automatic exchange of reportable cross-border arrangements (directive 2018/822/EU). In 2021, the directive was amended to include the automatic exchange of information regarding digital platforms (directive 2021/514/EU). In 2023, the directive was amended to the automatic exchange of information regarding crypto-asset transactions (directive 2023/2226/EU).

The Member States of the Council of Europe and the Member States of the OECD prepared a Convention on Mutual Administrative Assistance in Tax Matters, which was open for signature from January 25, 1988. This convention was modified by a protocol in 2010, which was ratified by Denmark.

B. *Exchange of Information Under Income Tax Treaties*

1. *In General*

Administration of the Exchange of Information article under Danish tax treaties is the responsibility of the Tax Administration, Person Udland 5 — Kompetent myndighed, Lyseng Alle 1, 8270 Højbjerg.

2. *Types of Exchanges*

a. *In General*

While the Danish treaties do not stipulate the types of exchanges of information that are possible, Denmark conventionally agrees with other contracting states to exchanges of the following kinds:

- *Automatic exchanges.* Relating to the systematic supply of information about a category of payment or income;
- *Spontaneous exchanges.* Where either Denmark or the other contracting state has information in its possession that it believes may be of relevance to the other treaty partner;
- *Specific exchanges.* Where Denmark or the other contracting state has made a request to the other treaty party for information on a specific taxpayer;
- *Simultaneous tax examinations.* Where Denmark and the other contracting state have a common or related interest regarding the tax affairs of a taxpayer; and
- *Tax examinations abroad.* Where a contracting state has an interest in being present in the other contracting state

[21] *See* Law no. 1634 of December 26, 2013. *See also* regulation no. 769 of June 25, 2014, regarding the identification and reporting of financial accounts with connections to the United States.

ISBN 978-1-61746-885-8

through a representative of the competent authority during a tax examination.

b. Exchange Regarding a Change in Tax Law

Denmark generally follows Article 2(4) of the OECD Model, requiring in its own tax treaties notification of any significant or "substantial" changes to domestic laws. However, some of the Danish tax treaties omit notification requirements.

c. Automatic Exchange of Information

Typically, the nature of automatic exchanges is that they relate to the passing on of information provided to the tax authorities under its domestic return requirements. A primary example of this is information relating to interest income provided in returns by financial institutions. The tax administration has improved its systematic handling procedures to take advantage of the administrative efficiencies provided by the OECD format and electronic media.

d. Spontaneous Exchange of Information

Spontaneous exchanges of information may involve situations in which there is some suspicion that an item shown in a Danish tax return may not be dealt with symmetrically in a corresponding overseas return or may not have been reported abroad at all; more generally, there may be some suspicion that taxes are being evaded on transaction(s) with an international dimension. The actual exchanges must be made only by the competent authority. The tax authorities have committed to engaging in the spontaneous exchange of binding rulings and unilateral APAs with OECD member countries, G20 countries, and other countries implementing the recommendations of the BEPS Action 5 standard on the exchange of information on tax rulings.[22]

e. Specific Requests for Information

The competent authority is responsible for handling specific requests for information (i.e., requests from or by a treaty partner in respect of specific taxpayers or transactions). As one of their functions, the competent authorities must ensure that the information in question can appropriately pass between the two contracting states under the terms of the treaty, given limitations placed on such exchanges on the grounds of trade secrecy, public policy, or inconsistency with domestic laws or practices.

There is no set form in which requests for information must be made to Denmark, but the tax administration encourages the supply of all material that will best enable it to locate the information in question.

f. Industry-Wide and Issue-Specific Exchanges of Information

The Danish Tax Authorities do not generally participate in exchange of information inquiries with respect to particular industries or issues.

3. Simultaneous Examination Programs

a. General Purpose

According to the OECD, a simultaneous tax examination is defined as:

> an arrangement between two or more Parties to examine simultaneously, each in its own territory, the tax affairs of a person or persons in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain.[23]

The purpose of such a process is to better understand the operations of the taxpayer and thus to ensure that all of its profits are being appropriately recognized and taxed in the correct country. Historically, the approach arose out of concern about the use of tax havens to conceal profits that one country alone might not be able to identify but which, by joining with one or more treaty partners, it would be better able to uncover. Not surprisingly, this has meant that most such examinations have been concerned with transfer pricing in complex situations and particularly where flows have involved tax havens.

In the 1995 Transfer Pricing Guidelines, the OECD recommended greater use of simultaneous tax examinations in the examination of transfer pricing cases (ergo, to facilitate the exchange of information and the operation of the MAP) and the use of the provisions of the OECD Model for simultaneous tax examinations.[24]

b. Specific Objectives

Simultaneous tax examinations may be seen as having a number of objectives, all served by improving the flows and adequacy of information available to a tax authority at the time of examining the taxpayer's return for a given period. They may allow more efficient access to information relating to transactions with third parties, particularly in non-treaty countries. In supplementing the information on group flows of goods, services, and assets, they may provide better data from which to make functional analyses and pricing comparisons. While they may be targeted at possible tax abuses, they should also ensure elimination of double taxation and help resolve transfer pricing issues.

Tax administrations may gain from the knowledge of a multinational enterprise that simultaneous examinations facilitate, particularly in cases involving cost sharing arrangements or global trading.

c. Procedures

Denmark has no published procedures governing its participation in simultaneous tax examinations. The program in Denmark has primarily been used in cooperation with the tax authorities of the other Nordic countries.

Once a simultaneous examination commences, each country proceeds independently but exchanges with its co-participant(s) information that it receives as part of its own examination.

[22] SKM2016.308.SKAT.

[23] OECD, Convention on Mutual Assistance in Tax Matters, Section 8.

[24] OECD 2022 Transfer Pricing Guidelines, ¶¶ 4.92 and 4.93.

ISBN 978-1-61746-885-8

d. Disclosure of Information

Simultaneous tax examinations take place pursuant to the Exchange of Information article of tax treaties and must be governed by the confidentiality terms of such articles. If more than two countries are involved in a simultaneous examination, the Danish Competent Authority must ensure that the bilateral nature of tax treaties is respected.

4. Responding to Specific Requests Under Denmark's Tax Treaties

a. Specificity of Request

The Danish Competent Authority expects any request for information to be sufficiently specific and detailed to be satisfied that the information is properly available to the treaty partner under the exchange of information provisions. The Competent Authority refers to the terms of the particular treaty and does not proceed unless he or she is satisfied that the request relates to an identified matter that is the subject of the treaty provisions.

b. Use of Revenue Powers to Obtain Information

Section 6 of the Tax Control Act grants powers to the tax authorities to obtain information from taxpayers and others, but does not authorize the tax authorities to obtain information for the purpose of transmitting it to foreign tax authorities. According to Section 8Y of the Tax Control Act, an international agreement must provide for the exchange of information to foreign tax authorities.

c. Mutuality Clause

Denmark generally follows both the formulation of the "mutuality" provisions in the OECD Model Exchange of Information article and its associated commentary. This means that Denmark provides in its tax treaties that information is not required to be exchanged if it is not obtainable under the laws of, or in the normal course of administration of, Denmark or the other contracting state.

This has the effect of removing from Denmark any obligation to carry out administrative measures or otherwise supply information to a requesting state if that requesting state is not itself able to carry out corresponding administrative measures or to obtain the information under its laws or in the normal course of its administration. It prevents Denmark's information system from being used by another state with a more limited system.

The approach generally adopted in the Exchange of Information article of Denmark's tax treaties is not to impose an obligation to supply information that would disclose any trade, business, industrial, commercial, or professional secret, or trade process (similar to the formulation in the OECD Model). A person asked to supply information can object to its being passed on to a treaty partner on trade or secrecy grounds. However, the information must be supplied to the tax authorities in the first place. Once the information has been supplied, it is then up to the Danish Competent Authority, taking into account the taxpayer's objections, to decide whether to exchange the information. The Danish Competent Authority is not required to warn a taxpayer that particular information is being exchanged.

5. Restrictions on Disclosure and Use of Exchanged Information

Denmark's domestic and treaty provisions place tight restrictions on the disclosure of exchanged information. Denmark's treaties limit the disclosure of information received under a treaty as follows:

> Any information received by the Competent Authority of a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which this agreement applies and shall be used only for such purposes.

This language customarily extends to preventing disclosure of information to other government departments, including those concerned with indirect taxes, as such taxes are not taxes covered by Denmark's tax treaties.

Information received by the Danish Competent Authority from one treaty partner cannot be passed on to the competent authority of a third country under a tax treaty Denmark has with that third country. The duty to prevent disclosure of that information is regarded as overriding any duty to exchange information with the third country.

C. Exchange of Information Under FATCA IGA Concluded with the United States

The Foreign Account Tax Compliance Act (FATCA) was enacted by the United States Congress in March 2010 as part of its efforts to improve compliance with U.S. tax laws. FATCA imposes certain due diligence and reporting obligations on foreign financial institutions.

On November 15, 2012, the United States and Denmark signed an intergovernmental agreement (IGA) that implements the Foreign Account Tax Compliance Act, which entered into force on September 30, 2015. On November 24, 2015, the Danish Competent Authorities signed a Competent Authority Arrangement with the United States pursuant to the intergovernmental agreement to facilitate reporting under FATCA. On October 25, 2016, the Danish Customs and Tax Administration announced that starting August 30, 2016, Denmark-based financial institutions should use Version 2.0 of the U.S. Foreign Account Tax Compliance Act (FATCA) XML schema for all FATCA returns.

The U.S.-Denmark IGA follows Model 1 and provides for reciprocity. Under the terms of the agreement, Danish Financial Institutions report information to *Skatteministeriet,* and the information is made available to the Internal Revenue Service (IRS) as a government-to-government exchange. The effective date of the U.S.-Denmark IGA is June 30, 2014.

D. Exchange of Information Under the CRS

The OECD Common Reporting Standard (CRS) is a global standard for collecting, reporting, and exchanging financial

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account information on foreign tax residents.[25] Paralleling FATCA's requirement of reports on financial accounts held by U.S. persons, the CRS requires banks and other financial institutions to collect and report to tax authorities financial account information with respect to non-residents. The obtained information about those non-residents' accounts is in turn exchanged with other participating foreign tax authorities. As a result, each participating tax authority receives information about its own residents' foreign financial accounts from other countries' tax authorities. The CRS ensures that residents report income from financial accounts in other countries in compliance with domestic tax law and acts as a deterrent to tax evasion.

On May 27, 2010, Denmark signed the Convention on Mutual Assistance in Tax Matters as amended in 2010 ("CMMA"), which entered into force on June 1, 2011. On October 29, 2014, Denmark signed a Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information (MCAA-CRS), which was based on the standard for automatic exchange of financial account information developed by the OECD. Both of these agreements facilitate the implementation of the CRS on a multilateral basis.

On January 16, 2017, the Danish Customs and Tax Administration issued the first version of the Common Reporting Standards (CRS) and the EU Directive 2014/107/EU on Administrative Cooperation (DAC2) guidelines, providing for the technical issues in reporting financial account information by financial institutions. On October 25, 2016, the Danish Customs and Tax Administration announced that starting August 30, 2016, Denmark-based financial institutions should use Version 2.0 of the OECD common reporting standard (CRS) XML format for CRS reporting. In Denmark, the implementation of the CRS is effective as of January 1, 2016. Denmark has also implemented EU Council Directive 2018/822 (DAC6), with reporting requirements effective from July 1, 2020.[26] DAC6 provides for the mandatory disclosure of potentially aggressive cross-border tax planning arrangement by intermediaries, if at least one of the Directive's hallmarks is met.

[25] *See* OECD, https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/.

[26] *See* section 46a of the Tax Reporting Act.

ISBN 978-1-61746-885-8

VIII. Assistance in Tax Collection

Assistance in the collection of taxes is covered by the Nordic Convention on Mutual Assistance in Tax Matters and the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters. Moreover, Denmark's tax treaties with a number of countries contain provisions on mutual assistance in the collection of taxes similar to Article 27 of the OECD Model. Finally, the EU directive on mutual assistance for the recovery of taxes (2010/24/EU) covers income taxes.

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DETAILED ANALYSIS

Chapter 50 — FRANCE

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I. Introduction

The global rise in transfer pricing disputes did not bypass France. Multinational entities (MNEs) operating in France face an increase in both foreign transfer pricing adjustments impacting France and French transfer pricing adjustments. France maintains a delicate balance between recent global concerns on tax optimization and tax evasion and the necessity to resolve double taxation occurrences. In this respect, France has not only increased its transfer pricing legal arsenal and its scrutiny over MNEs but also created a dedicated single window (SJCF-4B) to increase the efficiency of proceedings under Mutual Agreement Procedure (MAP) articles and proceedings for Advance Pricing Agreements (APAs).

Almost all income tax treaties concluded by France include a MAP article as a form of dispute resolution mechanism. This mechanism normally does not impose a binding obligation on France and the other country involved to eliminate the double taxation, but some arbitration procedures are now included in a certain number of income tax treaties concluded by France (most notably the treaty with the United States).

In addition, the European Union (EU) establishes, through the EU Arbitration Directive, a procedure that obliges the concerned EU Member States to avoid double taxation within a maximum of three years.

Thus, French companies subject to transfer pricing adjustments may have two different procedures for eliminating the double taxation arising from a tax audit, depending on the country of the related entity concerned. In this respect, these two procedures are not mutually exclusive: when both the Arbitration Directive and a MAP are available, one should use both procedures. In addition, the two procedures broadly follow the same conditions of application, and the arbitration process is beginning to develop beyond the European Union. Consequently, this Chapter will review the MAP procedure and the arbitration process together.

As a preliminary remark, the Competent Authority and APA offices used to be separate in France. A single window, called the Mission d'expertise juridique et économique internationale (MEJEI), which was dedicated to double taxation elimination, was created in 2013. The Prévention et résolution des différends internationaux (International Dispute Prevention and Resolution Unit) (SJCF-4B Department), which is a part of the Legal Department of the Public Finances Directorate General, replaced the MEJEI by a decree dated November 10, 2020. The SJCF-4B Department now oversees both Competent Authority proceedings. These proceedings are often referred to simply as MAPs and proceedings involving APAs.

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II. The Competent Authority of France

The Competent Authority in France is the Minister in Charge of Economy and Finance. However, the day-to-day responsibility in relation to competent authority procedures is delegated to the Director of Public Finances (*Direction générales des finances publiques*, or DGFiP) and more precisely to the SJCF-4B.

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III. The Mutual Agreement Procedure for Taxpayer Cases

A. Background

In general, the MAP article provides a process whereby a taxpayer may request assistance from the Competent Authority of its contracting state of residence (or the state in which the taxpayer is a national) to prevent taxation inconsistent with the tax treaty. Additionally, to prevent tax treaty disputes, the Competent Authority itself is empowered to initiate a MAP without the taxpayer's request. This procedure has been modified by the Multilateral Instrument (MLI).[1]

There are three types of cases which can lead to double taxation issues or situations in which taxes levied do not correspond to the provisions of a treaty. These cases, which are discussed in paragraphs 8 to 11 of the Commentary on Article 25 of the OECD Model Tax Convention on Income and on Capital (OECD Model), are as follows:

- Cases related to an incorrect interpretation of the treaty (e.g., a resident of a Contracting State is liable for withholding tax on interest or royalties without receiving a tax credit);
- Cases related to taxation not in accordance with the provisions of the treaty; and
- Cases of double economic taxation involving specific transfer pricing issues.

Since 2020, the number of double taxation cases in France has slightly increased, from 983 files at the end of 2020 to 1,074 at end of 2022 (according to last available OECD statistics). This can be connected to the fact that completion procedures have grown increasingly slower due to an inadequate number of staff members and the major political concerns about tax evasion. The average resolution time now sits at about 24 months (average for resolving transfer pricing MAP cases received on or after January 1, 2016). Focusing on transfer pricing cases, after an increase in the resolution time in 2021 (from 17 months in 2020 to 25 months 2021), the average length of time to settle a case has been down again in 2022 (23 months only). The French Tax Authority (FTA) acknowledges this disappointing outcome and is in the process of addressing this situation by increasing the work force dedicated to MAPs and APAs. The FTA has already recruited several officers and SJCF-4B is supposed to have 25 people at end of 2024

B. The Role of the French Competent Authority

As a general policy, the French Competent Authority makes every effort to avoid double taxation and to reach an agreement with other competent authorities as long the issue is technically substantiated.

The SJCF-4B has a team of 11 international tax experts who prepare different cases and handle negotiations with the relevant foreign competent authorities. Additionally, the French Competent Authority may delegate negotiation to local services in cases connected to individuals and low-amount tax adjustments (mainly individuals working in a neighboring country and resident in another).

Over the next few years, the SJCF-4B does not officially anticipate either a decrease or a significant increase in requests for elimination of double taxation. However, that position can easily change, as the Organization for Economic Development and Cooperation (OECD) Base Erosion and Profit Shifting (BEPS) project has created a specific context, creating uncertainties particularly in the transfer pricing field and upon application, a likelihood of more tax disputes (e.g., in future French tax audits, the reaction of the tax administrations of other countries, and the divergent approach of tax administrations to new BEPS principles could trigger unintended consequences that would be dissatisfactory to the taxpayer).

C. The Procedure

The process for a MAP (under an income tax treaty) and for a proceeding under the EU Arbitration Procedure are respectively specified and detailed by the administrative instruction BOI-INT-DG-20-30-10 (Bilateral MAP) and BOI-INT-DG-20-30-20 (MAP pursuant to the European Arbitration Convention — no comment is currently provided regarding implementation of the European Arbitration Directive), dated February 18, 2014, and last completed on February 02, 2017. Nonetheless, both administrative procedures are similar (even though the EU Arbitration Directive has introduced detailed specificities).

1. Scope of a MAP

Most of France's income tax treaties do not contain specific provisions regarding the scope of a MAP. However, the MLI has provided certain amendments as further discussed below.

Ideally, a MAP article should allow for cases involving the broadest possible scope. Although some treaties provide examples of situations that can be addressed through the MAP (e.g., France's income tax treaties with Belgium, Germany, and Sweden), many cases that are brought actually fall outside those examples. The following issues are typically dealt with through MAP under an income tax treaty:

- Determination of a taxpayer's residence;
- Characterization of income;
- Interpretation of treaty language;
- Permanent establishment issues; and
- Transfer pricing issues.

Even if they are not the most numerous, MAPs related to transfer pricing involve the largest amounts at stake. Unlike the broader scope of MAPs under income tax treaties and the EU Arbitration Directive, only transfer pricing issues are dealt with under the EU Arbitration Convention.

The implementation of the OECD Multilateral Instrument (MLI) brought significant modifications to the way MAP provisions are drafted in tax treaties. As currently drafted, the MLI includes 95 jurisdictions, effective March 15, 2021.[2] As stat-

[1] *See* III.C.1., below.

[2] *See* OECD, Tax treaties: OECD publishes 30 country profiles applying Arbitration under the multilateral BEPS Convention, available at https://www.oecd.org/tax/treaties/oecd-publishes-30-country-profiles-apply-

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ed by the OECD, the "MLI modifies the application of thousands of bilateral tax treaties concluded to eliminate double taxation."[3] It also implements agreed minimum standards.

Article 16 of the MLI regarding MAPs provides the following new minimum standards:

- Where a person considers that the actions of one or both of the contracting states result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either contracting state. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.[4]

- The competent authority shall endeavor, 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 contracting state, with a view to the avoidance of taxation which is not in accordance with the tax treaty.[5] Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the contracting states.[6]

- The competent authorities of the contracting states shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty. They may also consult together for the elimination of double taxation in cases not provided for in the tax treaty.[7]

2. Initiating a MAP or a Proceeding Under the EU Arbitration Convention/Directive

a. Time Frame for initiating the Procedure

Determining the appropriate time to initiate the MAP is a strategic decision that must be evaluated based on the specific facts and circumstances of the tax audit. From a legal standpoint, the MAP should be initiated within a specified period after the receipt of a tax administrative measure, which includes:

- A notice of reassessment in the case of a contradictory procedure (contested proceedings);

- The notification of tax bases in the case of an *ex officio* procedure; and

- The application of a withholding tax.

In almost all income tax treaties concluded by France, the period to file the request is set at three years after receipt of the tax administrative measure, although some treaties provide for shorter periods. The EU Arbitration Convention and Directive also require the request to be filed within three years after the first notification of the action that results or is likely to result in double taxation.

Comment: From a practical standpoint and based on the authors' experience, it appears more favorable, when possible under the appropriate tax treaty rules, for a taxpayer to submit its request when it has completed the entire internal appeal procedure within the tax authority. This effectively allows for clarifying the transfer pricing adjustments in order to subsequently expedite the resolution of the double taxation case. However, some multinational groups adopt alternative strategies and submit their request upon receipt of the notice of reassessment while continuing to challenge it. It should be emphasized that though this request is legally valid, the French Competent Authority cannot start processing a case that is currently on appeal within the tax authority.

It is also important to note that since January 1, 2014, the collection of taxes is no longer suspended by the launch of a procedure for elimination of double taxation.[8]

When submitting a request, if the double taxation relates to transfer pricing within the EU, one can also start an EU arbitration procedure. Under this procedure, arbitration should be triggered if the competent authorities have failed to eliminate double taxation within two years after the request was submitted. The two procedures can thus be managed jointly.

b. Situations Precluding the Opening of a Procedure

The French Competent Authority is not required to respond to a request if proof of double taxation has not been provided. In addition, the French Competent Authority is not required to respond to a request if the tax administrative measures generating double taxation were coupled with severe penalties that have become definitive. These severe penalties are specified by France under the EU Arbitration Convention, and it is generally accepted that they also apply to MAPs. These sanctions cover criminal penalties and tax penalties (such as for bad faith, fraudulent practices, opposition to tax audits, etc).

3. Submission of the Request and Consequences for the Taxpayer

In France, the procedure is formally initiated upon a taxpayer's request filed with the SJCF-4B. In addition, the taxpayer must concurrently send a copy of the request to the tax authorities in charge of the tax audit (if the audit was undertaken in France) and to their usual tax office where tax returns are filed (if the audit was undertaken outside of France).

ing-arbitration-under-the-multilateral-beps-convention.htm#:~:text=The%20MLI%20so%20far%20covers%2095%20jurisdictions%20and,treaties%2C%20transforming%20the%20way%20tax%20treaties%20are%20modified.

[3] *Id.*

[4] *See* MLI, article 16, available at https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

[5] *Id.* The FTA notified 10 tax treaties that did not include equivalent provisions. Their amendment is subject to the local application of MLI (tax treaties with Belgium, Benin, Burkina-Faso, Ivory Coast, Luxembourg, Morocco, Mauritania, Monaco, Senegal, and Zambia).

[6] *See* https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf. The FTA notified 30 tax treaties that did not include equivalent provisions. Their amendment is subject to the local application of the MLI (tax treaties with Argentina, Austria, Bangladesh, Belgium, Benin, Bosnia-Herzegovina Brazil, Bulgaria, Burkina Faso, Canada, Cyprus, Holland, Ivory Coast, Egypt, Finland, Hungry, Indonesia, Ireland, Italy, Jordan, Malaysia, Malta, Morocco, Mauritius, Mauritania, Mexico, Nigeria, Norway, New-Zealand, Philippines, Poland, Portugal, Romania, Senegal, Serbia, Singapore, Slovakia, South Korea, Sri Lanka, Switzerland, Thailand, Tunisia, Vietnam, Zambia, and Zimbabwe).

[7] *Id.* The FTA notified seven tax treaties that did not include equivalent provisions. Their amendment is subject to the local application of MLI (tax treaties with Belgium, Canada, Chili, Italia, Mexico, Nigeria, and Zambia).

[8] *See* III.C.3.c., below.

ISBN 978-1-61746-885-8

a. Content of the Application

The taxpayer's submission for MAP request must include the following information:

- Identification (such as company name, address, etc.) of the taxpayer and the other party to the relevant transaction(s);
- Detailed information related to the relevant facts and circumstances of the case, including details of the relations between the taxpayer and the other party to the relevant transaction(s);
- Identification of the taxes and the fiscal year(s) concerned;
- Copies of the tax reassessment notices leading to the alleged double taxation;
- Detailed information of any litigation and of any court decisions regarding the case;
- An undertaking that the company will respond as completely and quickly as possible to all reasonable and appropriate requests made by the Competent Authority; and
- A reference to the legal basis of its requests, either on the basis of the EU Arbitration Convention or on the basis of an income tax treaty. In this respect, as noted above, the taxpayer may initiate the procedure based on both.

Under French regulations, the SJCF-4B is required to send a letter acknowledging receipt of the request within 30 days. In addition, the French Competent Authority contacts the competent authority in the other contracting state with 30 days after receipt of the completed submission.[9]

Comment: However, in the author's experience, the MEJEI typically takes more than a month to send a letter of acknowledgement and to contact the respective competent authority.

Additionally, the French Competent Authority has never opened a case without information to the taxpayer nor refused to enter into a case (which itself is rare) without providing an explanation. Therefore, any delays in the beginning of the procedure do not have any practical consequences for the taxpayer.

b. Starting Point of the MAP Procedure

The procedure is considered open on the date on which the French Competent Authority acknowledges receipt of the taxpayer's request.

Subsequently, if the procedure is not opened with the foreign competent authority for any reason, the SJCF-4B must notify the taxpayer.

c. Suspension of Recovery of Taxes, Late Payment Interest, and Penalties

In France, upon the issuance of a notice of reassessment, the French tax authorities generally have three years to issue a notice of collection. Previously, Article L189 A of the French Tax Procedures Code suspended the recovery of the amount of tax that was under consideration in the procedure, except when the revenues were subject to no or low tax in the other country (an anti-avoidance rule implemented starting January 1, 2011).

Article L189 A was removed from French law and no longer applies for MAPs initiated after January 1, 2014. The mechanism was deemed by the French tax authorities to allow dormant companies to postpone the recovery of taxes, regardless of the bases of their requests, and placed an undue burden on the French Competent Authority to manage the exceeding number of requests, leaving little time to focus on pending double taxation cases.

Since then, the taxpayer can ask for the suspension of payment only if a legal procedure is started, under the common provision for legal procedure (Article L277 of the French Tax Procedures Code); however, the taxpayer must provide payment warranties. To benefit from this partial suspension of payment(s), two procedures must be simultaneously initiated: (i) the legal procedure and (ii) the MAP procedure.

4. The Procedure for Resolving Double Taxation

The procedure for resolving double taxation follows the same rules irrespective of whether it is opened under the framework of an income tax treaty or the EU Arbitration Convention. The procedure generally consists of the following two phases: (i) an internal phase followed by an (ii) international phase. These rules are further discussed below.

a. Step One — Internal Phase of the Procedure

The French Competent Authority first analyzes the admissibility of the taxpayer's request regarding its legal competence, the existence of double taxation, and the provision of all the necessary information by the taxpayer. If the French Competent Authority believes that the taxpayer has not submitted the minimum information necessary for the initiation of a MAP, the taxpayer is invited (usually within two months upon receipt of the request) to provide the Competent Authority with the needed specific additional information.

In the context of a French tax audit, in order to have a complete understanding of the situation, the French Competent Authority (SJCF-4B) generally consults with the French tax authorities who led the tax audit operations to receive their opinion on the specific case.

In addition, depending on the specific facts and circumstances of the case, a meeting may be held between the SJCF-4B and the taxpayer to collect additional comments and explanations.

Based on the request of the taxpayer and the explanations from the service that led the tax audit, the Competent Authority prepares its position paper that is submitted to the foreign competent authority during the international phase, except for the few cases where the double taxation issue can be resolved via internal procedures.

b. Step Two — International Phase of the Procedure

When the double taxation is the result of French tax adjustments, the French Competent Authority sends a position paper to the foreign competent authority involved in the case. This position paper generally includes:

[9] Paragraphs 66 to 68 of French reg (BOFiP 14 F-1-06 n° 34, 23 February 2006).

ISBN 978-1-61746-885-8

• An opinion related to the merits of the case and, in particular, the reasons why double taxation has occurred or is likely to occur;

• An analysis of how the case might be resolved, with a view to the elimination of double taxation, together with a full explanation of the proposal;[10] and

• All of the relevant documentation supporting the requested adjustment.

The procedure then becomes bilateral, and the French Competent Authority implements all appropriate means for reaching a mutual agreement, such as meetings and written and verbal exchanges between the two contracting states. In addition, informal communications between the competent authorities are encouraged as often as necessary to assist in reaching an agreement to alleviate double taxation. The French Competent Authority is aware of the importance of this part of the process, which is why it has restructured its internal organizational structure during the merger process[11] and chosen to designate one contact person for each country in order to ease these informal contacts.

Because the procedure is a semi-diplomatic procedure in the international phase, it is France's position that the taxpayer has no right to obtain a disclosure of written exchanges between the competent authorities or to attend the negotiations between the contracting states. Nevertheless, France recognizes the important role the taxpayer plays in resolving the double taxation issue. Generally, the SJCF-4B tries to use its best effort to keep taxpayers informed of the procedure's progress and of its technical position (this is customary in transfer pricing cases). The French Competent Authority may invite the taxpayer to provide explanations, information, and documents that may be useful to resolve the case. Depending on the matter at stake, the Competent Authority may also ask the taxpayer to provide explanations or information when presenting the case to either competent authority or during a joint meeting.

c. Conclusion of the Procedure

The French tax authorities report that the procedure is typically concluded within 24 months from the date the case is first submitted.[12]

Comment: In practice, however the procedure is long and might sometimes take up to 10 years before a conclusion is reached, although these cases are rare.

At the conclusion of these protocols, the French Competent Authority must notify the taxpayer of the proposed solution agreed upon between the two contracting states. Under previous French rules, the taxpayer had 30 days to appeal the competent authorities' decision.[13] Since 2014, the Competent Authority now defines the timing in which the taxpayer must announce its appeal.[14] Experience shows that the French Competent Authority normally follows the same 30 day timing.

If the taxpayer accepts the proposed solution, it must formally express (in writing) its consent, withdraw any judicial or administrative proceedings with respect to the case, and also formally renounce any judicial proceedings connected to the competent authority procedure and the suggested solution. Finally, the taxpayer must implement the solution through an appropriate adjustment (refund of the appropriate amount, in line with the MAP) within 90 days of the acceptance.[15]

If the taxpayer refuses the proposal or does not respond, the procedure is closed, and the agreement reached between the two competent authorities is null and void. In this case, the taxpayer is allowed to challenge the taxation through judicial or administrative proceedings under domestic law (depending on the statute of limitation rules).[16]

If the competent authorities do not reach any agreement, the taxpayer is informed that the procedure is closed. However, at that point, under the EU Arbitration Convention and certain income tax treaties, an arbitration procedure starts.

Comment: The taxpayer is advised to pursue the case in court simultaneously with the MAP procedure to preserve relief under domestic rules if the MAP dispute resolution channel proves unsuccessful. If the case is pursued in court before the end of the MAP proceedings and the court issues a decision before a mutual agreement is reached, the taxpayer must renounce the court decision if the mutual agreement leads to a better solution.[17] From a practical standpoint, the French Competent Authority dislikes parallel procedures. Nevertheless, the trend has been that the SJCF-4B is speeding up the MAP process, even when a legal procedure has commenced.

D. The Arbitration Procedure

The complexity of disputes caused by transfer pricing reassessments has led some countries to request arbitration to avoid the shortcomings of MAPs. The EU Arbitration (from the Convention or the Directive) is a tool specifically designed to minimize the impact of double taxation as a result of transfer pricing adjustments. The main purposes of the EU Arbitration process are to complement the MAP and assure the taxpayer of resolution of complex transfer pricing problems.

As mentioned above, several income tax treaties concluded by France now contain an arbitration clause. Specifically, due to the implementation of the MLI, France has now chosen a wide use of the arbitration procedure. Although arbitration procedures outside of the EU are still untested, it is reasonable to presume they will be implemented akin to the EU Arbitration procedures (albeit the procedures are not identical). The primary difference lies in the fact that under the EU Arbitration procedures, the taxpayer is assured that the final solution will eliminate double taxation, and the arbitration procedure will be automatically triggered for a specific period of time. Under income tax treaties, the contracting states generally commence

[10] The French Competent Authority's position regarding transfer pricing cases is based on the OECD Guidelines and the arm's length principle.

[11] *See* I., above.

[12] Average for resolving MAP cases received on or after January 1, 2016, according to the "MAP Peer Review Report, France", published by the OECD in April 2020.

[13] BOI-INT-DG-20-30-10.

[14] *See* BOI-INT-DG-20-30-10, dated February 18, 2014.

[15] BOI-INT-DG-20-30-10.

[16] BOI-INT-DG-20-30-10.

[17] Court proceedings run parallel to the MAP process and cannot be suspended.

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the arbitration procedure for an undefined period of time, which may not necessarily result in the alleviation of double taxation. Experience shows that the EU arbitration process has rarely been launched between EU Member States, even after the two-year period has passed. Recently, there has been an increase in the use of the arbitration process by member states.

1. Arbitration under the EU Convention

The competent authorities must set up an advisory commission if they are not able to reach an agreement within two years of the date of the request. Technically, the Arbitration Convention applies only to transfer pricing adjustments within the EU where both beneficial owners are EU tax residents. It is uncertain therefore whether "triangular" cases, where an EU resident is acting as a hub between a non-EU resident and an EU resident, can benefit from the Arbitration Convention. Ever since the implementation of new regulations on arbitration in the EU, this subsection on the Arbitration Convention is to be considered as a reminder.

a. Setting Up an Advisory Commission

The contracting state that issued the first tax reassessment notice takes the initiative for the establishment of the advisory commission and its secretariat, with the agreement of the other state concerned, and arranges for its meetings.[18] The costs related to the advisory commission are shared equally between the contracting states.

The commission consists of two independent individuals (one selected by each contracting state), a chairman (chosen by the two previous individuals from a list of specialists designated by Member States), a secretary, and two representatives from each contracting state's competent authority. All members of the advisory commission are committed to ensuring the confidentiality of the information provided by the taxpayer. Only the three independent individuals (the two chosen by the contracting states and the chairman the other two have designated) take part in the final decision.

b. Execution of Proceedings

Before the advisory commission's first meeting, the two competent authorities provide the advisory commission with all relevant information and, in particular, documents, reports, correspondence, and conclusions used during the MAP.[19] A case is considered to have been referred to the advisory commission on the date on which the chairman confirms that all the members have received all relevant information and documentation.

Taxpayers as well as tax authorities are required to fully cooperate in the arbitration phase; thus, the commission may ask taxpayers and tax authorities to appear before it. In addition, taxpayers may, at their request, be heard or represented before the advisory commission.

c. Opinion of the Advisory Commission

Based on the EU Arbitration Convention, the advisory commission must issue an opinion based on the arm's length principle within six months.[20] The opinion must include, in particular, a description of the facts and circumstances of the dispute, a clear statement of what is claimed, a short summary of the proceedings, the arguments and methods on which the decision in the opinion is based, and the opinion. This opinion is not public and is kept by the two competent authorities in their files; it does not create a precedent.

Following the opinion of the advisory commission, the competent authorities must find a compromise within six months. The compromise may deviate from the opinion, but it must not trigger double taxation. At the end of the six-month period, if competent authorities fail to reach such an agreement, the opinion prevails.

2. Arbitration under the EU Directive 2017/1852

a. Background

Experience showed that the July 23, 1990 Convention was suffering from the limitation of its scope and that the switch from MAP to arbitration, when no solution was found under the MAP within a two-year period, was not enforced by Member States. The October 10, 2017 Directive on Mechanisms[21] for Resolving Tax Disputes in the European Union aims to standardize the framework for resolving dispute resolution. This Directive was transposed in the French tax law by the introduction of a new section in the French Tax procedure book.[22]

It extends the scope of the dispute settlement mechanisms to all cross-border situations involving double taxation of business income and, where applicable, of capital. The Directive provisions apply to any request submitted from July 1, 2019, on relating to disputes on income or capital earned in a tax year from January 1, 2018. Thus, the scope of the Directive 2017/1852 does not overlap with that of the 90/436/CEE Convention detailed above. However, as no detailed comment has been provided by the French Tax Administration on detailed practical examples of implementation, a careful examination of the facts and circumstances should be performed on a case-by-case basis to ensure a proper implementation.

b. Initiation and Arbitration Procedures

The request to initiate the dispute settlement procedures must be submitted to the French Tax Authorities and those of the other Member States concerned within three years of receipt of the first administrative measure that may lead to immediate or future taxation determined in principle and in amount.

When the request for initiation is accepted by the French Tax Administration and by those of the other Member States concerned, the French Tax Administration must address the dispute negotiations within two years of the last notification of a decision to accept the request for initiation by one of the administrations of the Member State(s) concerned.

The two-year time limit may be extended by a maximum of one year on the basis of a reasoned decision of the tax administration, communicated to the taxpayer and to all the other administrations of the Member States concerned.

[18] Convention 90/436/CEE, Article 9.
[19] Convention 90/436/CEE, Article 10.
[20] Convention 90/436/CEE, Article 4.
[21] Council Directive 2017/1852/EU, October 10, 2017.
[22] Law n° 2019-616 — June 21, 2019.

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If the French Tax Administration and the other Member States concerned do not reach an agreement within the time limit, the French Tax Authority ("FTA") must notify the taxpayer, indicating the reasons that it has not been possible to reach an agreement, as well as the channels and time limits for referral to the competent commission.

c. Referral to a Commission

Two types of commissions can be set up to solve the dispute.

(1) Referral to the Advisory Commission

At the taxpayer's request to the French Tax Authorities and to those of the other Member States concerned, an Advisory Commission can be set:

- When the request to initiate the dispute resolution has been rejected by the French tax administration or by one or more of the administrations of the other Member States concerned but not by all of these administrations;
- When the French tax administration and those of the other Member States concerned have accepted the taxpayer's request for the opening of proceedings but have not reached an agreement on the resolution of the dispute within the time limit provided.

The advisory commission must be set up within 120 days from the date of receipt of the taxpayer's request. Since the French tax audit services are issuing heavy penalties more frequently, one must keep in mind that no commission will be set up in case of the application of several penalties by the FTA, including the 40% penalty for bad faith and the 80% penalty in case of discovery of occult activity or in case of deliberate breach of tax.

When the consultative commission has been constituted, the decision to accept or reject the request to open the dispute settlement procedure is taken within six months from the date of its constitution.

When the advisory commission accepts the request to open the mutual agreement procedure provided for, the mutual agreement procedure is initiated at the request of the tax authorities.

If the French tax authorities and those of the other Member States concerned have not requested the initiation of the mutual agreement procedure within 60 days from the notification of the decision of the advisory commission, the commission must provide an opinion on how to settle the dispute. The advisory commission must deliver its opinion within six months of the date on which it was set up.

If the advisory commission determines that the complexity of the request requires additional time, it may decide to extend the period referred to in the first subparagraph by a maximum of three months. It must thus inform the FTA and the taxpayer accordingly.

The FTA and those of the other Member States concerned must agree on how to settle the dispute within six months of notification of the opinion of the advisory commission. Those administrations may depart from the opinion of the Advisory Commission only if they reach an agreement on how to settle the dispute within the period mentioned in the first subparagraph.

(2) Referral to an Alternative Dispute Resolution Commission

Instead of an Advisory Commission, the competent authorities of the concerned Member States may agree to set up an Alternative Dispute Resolution Commission. The Alternative Dispute Resolution Commission may differ regarding its composition and form from the Advisory Commission, except for the rules regarding the independence of its members.

Such a Commission may use any dispute resolution process or technique to solve the question in dispute in a binding manner. When the Advisory Commission suggests a solution the Member States can use or adapt, the Alternative Dispute Resolution Commission provides a solution the Member States should set in place, as provided by the Commission.

E. Double Taxation Resolution Through the MLI Provisions

If the application of the MAP tax treaty provision explained above does not lead to an agreement, the taxpayer may submit a request through the arbitration procedure. The framework provided in the MLI enhances the application of arbitration procedures outside the European Union.

However, the arbitration provisions are not part of the minimum standards set by the MLI. Thus, they are solely intended to apply to covered tax treaties with countries that have explicitly opted for the application of these provisions.

France has opted into the application of these provisions to its signed treaties, provided that the other contracting jurisdiction has opted for the same implementation. Thus, it is mandatory for the FTA to submit a case to the binding arbitration process if requested by a taxpayer when an issue is still unsolved at the end of a three-year period.

France has opted for specific provisions. Indeed, any unresolved issue arising from a MAP must not be submitted to arbitration if a decision on this issue has already been rendered by a court or administrative tribunal of either country.

Additionally, if at any time after a request for arbitration has been made and before the arbitration commission has delivered its decision, a decision concerning the issue is provided by a judge of one of the contracting states' jurisdictions, the arbitration process must terminate.

France has chosen to apply a non-disclosure rule, providing that tax authorities involved in the procedure must ensure that each person that presented the case and their advisors agree in writing not to disclose to any other person any information received during the course of the arbitration proceedings from either competent authority or the arbitration panel. The arbitration must terminate if, at any time, a person that presented the case or one of that person's advisors breaches that agreement.

Lastly, France has chosen to apply Article 24, providing that an arbitration decision must not be binding and must not be implemented if the competent tax authorities agree on a different resolution of all unresolved issues within three calendar months after the arbitration decision has been delivered.

F. Practical Experience and Advice

The procedure for the elimination of double taxation is free, as no fee is required for submitting the request or for exe-

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cuting the procedure. A procedure should always be considered by a taxpayer if a transfer pricing reassessment leads to double taxation, even though the procedure may be long. Pending MAPs under the EU Arbitration Convention in 2022 is slightly higher in France (315 cases at the end of 2022) to those ones in 2019 (262 cases) due to an increase of cases in 2022.

France, Spain, and Germany are countries involved in the higher number of MAPs, if we except Italy, which is now providing significant effort to work on elimination of double taxation. Specifically, there were 470 cases in Germany, 320 cases in Spain, and 315 cases in France at the end of 2022 based on most recent available EU Commission statistics. This should not be a surprise, considering that these countries constitute the main economies of the EU, along with Italy, and are also very active participants in the EU Arbitration Convention. According to the FTA, France typically successfully concludes double taxation cases with the following trading partners: Germany, Italy, Belgium, the United Kingdom, the United States, and Japan. In general, taxpayers are more often initiating a MAP as a tool for managing international tax disputes. MAPs also help manage the accounting reserve policy, as they reflect the expectation of limiting the exposure to a local statutory level with limited impact at the consolidated level. For an increasing number of Chief Tax Officers, MAPs take up a considerable amount of their work.

Still, a MAP result is unpredictable. One of the causes for a MAP failure is insufficient and inadequate cooperation from the FTA or a foreign taxpayer. Some foreign competent authorities effectively stop the procedure if the local taxpayer does not cooperate sufficiently with them. In accordance with OECD recommendations, the French Competent Authority pursues a case only if the taxpayer complies in a timely manner to a request for information. The fact that taxpayers are not directly parties to the MAP discussions does not mean that they do not need to be involved in the process and cooperate with the Competent Authority. Usually, the French Competent Authority informs the taxpayer regarding France's positions and the negotiations with foreign competent authorities.

Even if a transfer pricing adjustment triggers double taxation, in some countries part of the transfer pricing adjustment may be treated as a domestic issue not covered by the relevant income tax treaty. Although such situations are contrary to OECD principles, they cannot be solved because the French Competent Authority cannot pursue a case alone; it needs the contracting state's competent authority.

Based on the author's experience, to improve the effectiveness and progress of a MAP, the taxpayer should consider the following measures:

- Have accurate and contemporaneous transfer pricing documentation available on the first day of the tax audit. In addition to the specific penalties applicable in the case of a lack of documentation or incomplete documentation, there have been recent cases in which the French tax authorities imposed bad-faith penalties (40%) because a French-compliant transfer pricing report was not readily available. These bad-faith penalties jeopardize the taxpayer's acceptability in the Competent Authority process;
- Beware of aggressive tax planning that could expose the taxpayer to bad-faith penalties that would prevent the taxpayer from MAP benefits;
- Provide similar and consistent information and documents to both competent authorities concerned, as the information is compared during the procedure. In this respect, providing different information leads to significant difficulties in the resolution of a double taxation case and a significant increase in the time needed to close the case;
- Be proactive during the procedure, responding promptly to all requests from the competent authorities, and trying to provide appropriate information regarding the case; and
- Suggest ways of resolving the double taxation issue in the request for a MAP in order to give both competent authorities a starting point.

France remains a country that effectively aims to suppress all double taxation for compliant taxpayers. As France enjoys a vast network of income tax treaties, this represents a significant asset for MNEs operating in France. This does not mean that French MAP results should be taken for granted.

Thus, ensuring that transfer pricing documentation meets the French standard is a necessity too often overlooked by non-French MNEs. Since France made transfer pricing documentation mandatory for MNEs in 2009,[23] and extended the scope of this documentation to a broadened number of companies starting January 2024, with the finance law for 2024 (threshold has been decreased to 150 M€ as a turnover of a company on its own or group of companies where one of them meets this threshold), taxpayers must file a transfer pricing form (Form 2257-SD)[24] every year, and penalties for noncompliant documentation were increased in 2014.[25] The Finance Bill for 2016 includes the Country-by-Country reporting ("CbC reporting") as recommended by the OECD Base Erosion Profit Shifting ("BEPS") report. In addition, managing the tax audit properly will prove critical to avoid incurring severe penalties.

Finally, even though the taxpayer is not a party to the MAP discussions, one should stay significantly and constantly involved in order to provide adequate support, ensure smooth information-flow management between the two competent authorities, and eventually play a go-between role with both tax authorities to speed the process and increase the chances of success. The MAP process is neither easy nor fast, but it is still a strong weapon in resolving double taxation cases.

[23] Law n°2009-1674 — December 30, 2009 — art. 22.
[24] Law n°2013-1117 — December 6, 2013 — art. 45.
[25] Law n°2014-1654 — December 29, 2014 — art. 78.

ISBN 978-1-61746-885-8

IV. Advance Pricing Agreements

France introduced its APA program in October 1999.[26] The French APA procedure initially allowed only bilateral APAs, as defined in Article 25 of the OECD Model. Unilateral APAs were permitted following the issuance of regulations in January 2005 but only under specific conditions.[27] Bilateral APAs are preferred by the French tax authorities, as unilateral APAs do not protect the taxpayer from a reconsideration of the transfer pricing method by the other contracting state, leading to legal uncertainty. In addition, France does not enter retroactive APAs, including the current accounting year (although this position may be reconsidered in light of the BEPS recommendations in this area).[28]

France is one of the most experienced countries in handling multilateral APAs, as it started to work in this area in early 2000. An APA that includes several countries is a rather long process but provides significant benefits to international groups involved in difficult and specific transactions.

A. Objectives of an APA

An APA provides legal certainty and stabilizes the tax environment of MNEs. French and foreign firms can enter into an agreement with the tax administration regarding the method to be used for pricing their future intercompany transactions. This procedure ensures that the method used is compliant with the tax laws as well as the 2017 edition of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* ("OECD Guidelines"). It also ensures that the French Tax Administration does not regard a taxpayer's pricing of industrial, commercial, or financial intra-group transactions as being planned profit transfers under the terms of Article 57 of the French Tax Code.

B. Role of the Bureau SJCF-4B (Prévention et Résolution des Différends Internationaux)

The main purpose of an APA is to eliminate the risk of double taxation through an agreement with another contracting state. Thus, the competence for negotiating such an agreement lies with the French Competent Authority.

The SJCF-4B is responsible for examining applications, drafting and signing APAs in France. The team in charge of investigating the case studies the documents provided in the request, investigates facts and circumstances as they are described, challenges the method applied in the particular economic environment, and tests the robustness of forecasts. The team includes high-level and experienced international professionals, mostly former tax auditors. However, experience shows that the approach of an APA investigation has nothing to do with an audit. The rule is that during a future tax audit, if facts and circumstances described during the APA procedure were not true, the APA is cancelled with retroactive effect. Compared to what applies in many other countries, an APA request does not trigger an audit.

C. Transactions Covered by an APA

Applications for APAs may relate to every kind of transaction between related enterprises, as stated in Article 57 of the French Tax Code (transactions in tangible and intangible goods and the provision of services), or to transactions between the head office and one or more permanent establishments within a single multinational enterprise.

Depending on the taxpayer's application, the APA may deal with an activity segment, a function, a single product, or even a single type of transaction. The scope of the agreement may be broad or narrow, depending on the elements put forward by the enterprise and the impact on the tax base of the other State.

D. APA Procedure

According to the French APA procedure, the competent authorities of the two countries involved must agree on the terms of the APA. An APA leads to the determination of the transfer pricing method that would best apply to future transactions between related companies and the figures to be used for a period determined by the parties (generally between three and five years).[29] Different types of ratios can be included, depending on the chosen method. A transfer price is often built with a single target and two boundaries to provide flexibility, as no correction will be necessary if the real figure is in between the two boundaries.

The procedure begins with a preliminary meeting between the company applying for the APA and the SJCF-4B. It is an opportunity for both parties to agree on the functions performed by the entities involved, transactions to be covered, possible method to be used, way to value the possible prices of the transactions, and to see if an agreement is possible. Experience shows that this meeting is very important for anticipating the work to be performed under the APA procedure and possible changes needed to accommodate the French Tax Administration's needs, but also for reaching compromises on both sides. The SJCF-4B often agrees to provide feedback, whether it is during that meeting or a short time after, to explain what problems can be anticipated and possibly why an agreement would not be possible based on the information provided during the meeting. This should be seen as a unique opportunity to spell out the goals of the group, understand the needs of the SJCF-4B, and include the French Tax Administration's observations/needs in the submitted request. At this time, the following issues are discussed:

- The opportunity for an agreement;
- The type and scope of data necessary to analyze the company's transfer pricing methodology;
- Provisional planning of the different steps; and
- All other issues relevant to the request.

[26] BOI-SJ-RES-20-10, dated February 18, 2014, last amendment July 18, 2018.

[27] BOI-SJ-RES-20-20, dated February 18, 2014, last amendment February 1, 2017.

[28] BOI-SJ-RES-20-10 n°220, dated February 18, 2014, last amendment July 18, 2018.

[29] BOI-SJ-RES-20-10 n°190, dated February 18, 2014, last amendment July 18, 2018.

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The taxpayer then submits an official request to the French Tax Authorities (commonly referred to as "FTA"). The request must be submitted at least six months before the beginning of the first year to be covered by the APA. However, the FTA has recently expressed its will to be more flexible and possibly agree on covering a wider range of years, when it is technically meaningful and can help the requesting group (as long as the roll-back is possible according to treaty partner rules). However, the FTA has not published any additional explanations and conditions to agree on such an adjustment of the French APA procedure. Generally speaking, the FTA acknowledges the importance of the APA procedure and wants to improve its efficiency, especially for international groups, the evidence being the change in the historic approach of the FTA.

The taxpayer proposes a transfer pricing method and includes documentation justifying the method and its consistency with the arm's length principle. The documentation must be consistent with OECD requirements and must set out a panel of comparable firms for the purpose of defining an arm's length range. If requesting a bilateral APA, the taxpayer must request an APA from the other contracting state and provide the SJCF-4B with a copy of the documents submitted to the foreign competent authority. The French APA procedure does not trigger an audit, and initiating an APA does not automatically trigger a risk for being audited. Information submitted to the SJCF-4B is not verified on site by auditors.

Once the SJCF-4B determines its position with respect to the taxpayer's transfer pricing methodology, a joint examination of the transfer pricing method and tested transactions is undertaken by the French and the foreign competent authorities. The outcome of the APA negotiations results in one of the following two possible outcomes:

- No agreement is reached, and the procedure is closed, which would occur, for example, if the tax authorities of the foreign country do not accept the terms of the agreement, causing the SJCF-4B not to be bound by the agreement. Until now, only very few agreements have not been concluded. If an agreement is not concluded, because the SJCF-4B is independent from the tax audit department and there is an ethical wall between these two parts of the FTA, no information or document is transmitted by the SJCF-4B to auditors, and the absence of an agreement does not have an immediate impact on the taxpayer's situation. No breach of this rule has been reported to date.

- The two competent tax authorities succeed in reaching an agreement, and a letter of acceptance reiterating the terms of the agreement is sent to the taxpayer, who must sign the letter, thereby becoming obligated to respect its conditions.

For APAs signed in 2014, the average period for a unilateral or bilateral APA's conclusion was 37 months, in contrast with APAs signed in 2010, when the average period was 26 months. According to the FTA, the longer period for APAs signed in 2014 was specifically connected to the conclusion of complicated cases and discussions with difficult partners.[30]

E. Content of an APA

An APA generally covers the following items:

- Entities and transactions covered by the agreement;
- Description of the transfer pricing method to be used;
- Description of the critical assumptions and procedures for revising or cancelling the agreement (compensatory or automatic adjustments);
- Date the agreement enters into force;
- Term of the agreement and the fiscal years covered;
- Data to be included in the annual report to be provided to the SJCF-4B; and
- Conditions under which the APA may be renewed.

As mentioned above, the minimum period covered by an APA is three years, with a maximum of five years. According to the FTA, the vast majority of APAs cover a period of five years.

In addition to agreeing to respect the terms of the APA, the taxpayer must also agree to provide an annual report to the SJCF-4B that will allow it to verify that the terms of the APA are being followed. Failure to produce the annual report cancels the APA from the accounting year in which the annual report was not produced.[31]

The taxpayer may request a renewal of the APA no later than six months before the expiration date of the APA. If the conditions of the transactions covered by the APA remain similar to the conditions during the first negotiation, the APA can be extended. Otherwise, a new APA request must be filed according to the existing APA procedure. Experience shows that the renewal procedure is shorter than for an initial request, as long as the facts and circumstances remain the same as under the initial period covered by the former APA.

F. Advantages and Disadvantages of an APA

Some practitioners believe that APAs are more effective than transfer pricing documentation, as they are usually less costly in the long term and cover multiple years. When a bilateral or multilateral APA is delivered, it also provides for complete legal security, as it ensures that no tax adjustment will be performed by the tax administrations that took part in the agreement (as long as the APA rules are strictly enforced by the group).

In France, an APA also guarantees a light transfer pricing tax audit, including: (i) the tax auditor limiting its investigations of the facts and circumstances (including organizational structure of the entities) as described by the group during the APA procedure (if no discrepancy is discovered, the transfer pricing method is not challenged); and (ii) the correct implementation of the transfer pricing method validated by the APA.

APAs can also be viewed as offensive weapons — giving parties the advantage of proactively anticipating potential concerns and solving them in advance. Nevertheless, an APA request should be made only after a complete comparative cost/benefit analysis has been performed, taking into consideration

[30] Annual FTA report on tax security and letter of comfort.

[31] BOI-SJ-RES-20-10 n°230, February 18, 2014.

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all factors, such as the tax policies of the countries involved, the specificity of the tested activities, and the taxpayer's need for certainty. Business-restructuring operations are sensitive matters for the FTA. Such operations are very carefully scrutinized and, depending on the conditions and specifics of the case, they may lead the FTA to clearly explain that it will not work on the case as it is too sensitive. However, groups are informed at an early stage of the procedure, if not at the pre-filing meeting. Once again, groups must not hesitate to present their case to the SJCF-4B, as such a refusal will not lead to an audit.[32]

Although an APA may be beneficial, it does not exempt a company from the responsibility of establishing and updating its transfer pricing documentation, even if the company can include elements from the documentation and information provided during the APA procedure.

G. Moving Towards a New Trustful Relationship

France recently enacted the Trust Act,[33] revamping the rules pertaining to trust structures in France. In general, several general initiatives were carried out by the French government to radically transform the relationship between companies and the French administration. These initiatives were developed through a wide range of instruments, including OECD efforts.

For example, regarding the support of the tax administration in the event of a double taxation concern, in the context of BEPS, which is anticipated to increase the number of those situations, the French Tax Administration set up a specific letter of comfort offer in international matters (to address permanent establishment questions) and a regularization service dedicated to handling double taxation queries. This initiative creates more opportunities for taxpayers to make contacts with the tax administration and avoid waiting for tax audits (which was the traditional way for the tax administration to liaise with business stakeholders).

The FTA is also willing to organize two meetings per year with business representatives to discuss issues relating to the implementation of tax treaties. Convention renegotiations will then provide opportunities to rework articles when needed.

A desk dedicated to assisting companies in their relations with foreign tax authorities is also available. Companies can report problems in international tax situations and, upon investigation and analysis, the FTA:

- offers advice and guidance as to the appropriate instrument(s) (i.e., MAP, APAs, and letters to treaty partners dedicated to specific points on treaty clauses interpretation);
- contacts technical experts in the specific field of the tax issue to convey technical positions;
- ensures high-level contacts with treaty partner(s) authorities to convey the tax position and help taxpayers to address the technical issues.

[32] *See* IV.B., above.
[33] Law n°2018-727, August 10, 2018.

ISBN 978-1-61746-885-8

V. Exchange of Information

A. *Exchange of Information Under Income Tax Treaties*

Most of France's income tax treaties contain provisions that allow exchange of information between the competent authorities of the treaty countries.[34] These provisions generally follow Article 26 of the OECD Model. Under these provisions, the French Tax Authorities may request information regarding a specific case from the other tax administration, including information on what a taxpayer declared on tax returns it filed in the other country.

B. *Exchange of Information Under Tax Information Exchange Agreements*

Since April 2009, France has signed 28 tax information exchange agreements (TIEAs),[35] including agreements with Guernsey, Jersey, Isle of Man, Andorra, Gibraltar, Liechtenstein, Cayman Islands, and Bermuda. These TIEAs aim to promote transparency and exchange of information relating to global tax matters, as well as to fight international tax fraud and evasion. Unlike income tax treaties, these TIEAs are not for the avoidance of double taxation but for the prevention of fiscal evasion; their scope is limited to exchange of tax information. The object of a TIEA is for the competent authorities of the two countries to provide assistance through the exchange of information that is foreseeably relevant to the administration and enforcement of their domestic tax laws. This includes information relevant to the determination, assessment, enforcement, or collection of tax, or to the investigation or prosecution of criminal tax matters. In the case of France, the taxes covered are income tax, corporation tax, taxes on salaries, wealth tax, inheritance and gift taxes, registration duties on transactions, and VAT.

C. *Exchange of Information Under France-U.S. Intergovernmental Agreements*

1. *Introduction*

The Foreign Account Tax Compliance Act (FATCA) was enacted by the U.S. Congress in March 2010 as part of its efforts to improve compliance with U.S. tax laws. FATCA imposes certain due diligence and reporting obligations on foreign financial institutions and foreign entities with respect to U.S. taxpayers via intergovernmental agreements.

On November 14, 2013, the United States and France signed a Model 1 intergovernmental agreement (IGA) implementing the FATCA, which entered into force on October 14, 2014. On April 21, 2016, a memorandum of understanding was concluded between the two countries.[36] Consequently, French financial institutions and entities are required to gather and report the U.S. taxpayers' activities in France within the meaning of the IGA to the French Tax Administration (DGFiP), who in turn release the information to the U.S. Competent Authority via a government-to-government exchange. Failure to follow the terms of the IGA will subject French financial institutions to 30% withholding on U.S. source income.

2. *Implementation of the France-U.S. IGA*

Very generally, IGAs facilitate the implementation of FATCA outside the United States.[37] There are two models, Model 1 and Model 2.[38]

In the Model 1 IGA, financial institutions apply the local rules and report only to their local tax administration. France follows the Model 1 IGA.

3. *Explanation and Commentary on FATCA IGA*

The shift to an international standard on the automatic sharing of information was accelerated by the U.S. Foreign Account Tax Compliance Act (FATCA). In 2010, the U.S. Congress created FATCA to target non-compliance by U.S. individuals using foreign accounts. FATCA requires foreign financial institutions to report to the U.S. Internal Revenue Service regarding financial accounts held by U.S. individuals or by foreign entities in which U.S. individuals hold substantial ownership interests. The United States has tried to negotiate agreements with as many countries as possible that permit foreign banks to meet this obligation without violating their national laws on data protection. After long and difficult negotiations, an agreement between France and the United States on FATCA was signed on November 14, 2013. The Law authorizing the Intergovernmental Agreement was promulgated on September 29, 2014.

Under this agreement, French financial institutions must report any account held by a U.S. citizen or resident to the French Tax Authorities, while U.S. financial institutions must report any account held by a French citizen or resident to the IRS. In other words, FATCA requires reciprocity.

In this respect, Article 1649 AC of the French Tax Code creates an obligation for French financial institutions to disclose the accounts held by foreign citizens or residents of a contracting state with whom France has signed an automatic exchange of information agreement. This allows for the reinforcement of the Global Standard on Automatic Exchange of Information developed by the OECD.[39] On August 5, 2015, the French Tax Authority published guidelines[40] for the financial institutions (including banks, insurance companies, and other investment vehicles) to comply with the reporting obligations.

To that extent, French reporting financial institutions are required to identify and report U.S. accounts and meet specific obligations.[41]

D. *Exchange of Information Under CRS*

1. *Introduction*

The Common Reporting Standard (CRS) is a global standard for the collection, reporting, and exchange of financial ac-

[34] For example, the 1989 income tax treaty with Italy (Art. 27) or the 1994 income tax treaty with the United States (Art. 27).

[35] BOI-ANNX-000307, June 21, 2019.

[36] https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act.

[37] BOI-INT-AEA-10-40, February 26, 2020.

[38] A Model 2 IGA requires financial institutions to report to the local tax administration and the IRS.

[39] *See* V.F., below.

[40] BOI-INT-AEA-10-10, August 5, 2015.

[41] BOI-INT-AEA-10-40, February 26, 2020. See also Decree n° 2015-907 — July 23, 2015 — Annex I.

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count information on foreign tax residents, developed by the OECD. Paralleling FATCA's requirement of reports on financial accounts held by individual U.S. taxpayers, the CRS requires banks and other financial institutions to collect and report to tax authorities similar financial account information on non-residents, which is in turned exchanged with other participating foreign tax authorities. As a result, each participating tax authority receives information about its own residents' foreign financial accounts from other countries' tax authorities. The CRS ensures that residents report income from financial accounts in other countries in compliance with domestic tax law and acts as a deterrent to tax evasion.

On May 27, 2010, France signed the Convention on Mutual Assistance in Tax Matters as amended in 2010 ("CMMA"), which entered into force on April 01, 2012. On October 29, 2014, France signed a Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information (MCAA-CRS), which was based on the standard for automatic exchange of financial account information developed by the OECD. Both of these agreements facilitate the implementation of the CRS on a multilateral basis.

2. Implementation of CRS in France

France opted for reciprocity in the exchange of information under the CRS. The signatory states to the Agreement may expressly waive reciprocity; however, France did not, meaning that no information is shared with countries that do not provide information to France. Participation in the exchange requires compliance with strict rules of confidentiality. France adheres to those rules and shares information as required with compliant treaty partners.

Since January 1, 2016, the implementation of the CRS has led financial institutions of the signatory countries to the agreement and the member states of the European Union to carry out the required due diligence to identify the accounts to be declared (i.e. those whose holder is a resident of a "partner" country). To that extent, the amending Finance Act for 2017 developed the regime to comply with France's international and European commitments to ensure the relevance of the information transmitted in such context of automatic exchange of the information relating to financial accounts for tax purposes.

The law specifies who the competent authorities are, for the control of financial institutions subject to this obligation, based on the already existing missions in the fight against money laundering. The *Autorité des marchés financiers* (AMF), which is responsible for supervising portfolio management companies in this area, monitors compliance with the obligation to identify accounts by these entities, whereas the *Autorité de contrôle prudential et de resolution* (ACPR) supervises all other financial institutions subject to this obligation.

Under the CRS, financial institutions must keep information and documents justifying the due diligence carried out for identification purposes until the end of the fifth year following the year in respect of which the declaration is filed.

The CRS also specifies the coordination of the obligations incumbent on financial institutions on the one hand, and on account holders on the other, to ensure the reliable and complete nature of the exchanges.

3. Information Disclosed

Under the CRS, each "accountable financial institution" must report for each account, regardless of the nature of the holder of the account the following information:[42]

- the account number (or contract or insurance policy number or other equivalent functional); and
- the balance or value carried on the account at the end of the calendar year in question or, if the account has been closed during the year or period in question, the date of the closure of the account.

Depending on the specific nature of the account holder, additional information must be provided, including:

- The individual account holder's residency of a state in which information is submitted to transmission;
- If the account is held in an entity, the residency of the entity for which information is submitted for transmission; and
- If the account is held in an entity that is controlled by one or more persons, the residence of the state in which information is submitted.

E. Exchange of Information Under the European Union Rules

There are specific European Union provisions regarding mutual assistance. For direct tax purposes, a 1977 directive[43] provided for information exchange between tax authorities. In France's implementation of the Directive, the Directive dealt with the following taxes:

- Corporate income tax;
- Business tax;
- Personal income tax; and
- Property tax.

On February 15, 2011, the Economic and Financial Affairs Council (ECOFIN) formally adopted the Council Directive 2011/16/EU on administrative cooperation in the field of taxation, repealing Directive 77/799/EEC. On December 6, 2012, the European Commission adopted a regulation laying down detailed rules for implementing Council Directive 2011/16/EU. It includes various provisions concerning the standard forms and means of communication that Member States must use in exchanging information. The national laws, regulations, and administrative provisions implementing the 2011 Directive generally entered into force on January 1, 2013, with the exception of certain provisions that entered into force on January 1, 2015.

The previous directive on mutual assistance (Directive 77/799/EEC) was effectively designed for a different context and did not meet internal market requirements at the time. The EU

[42] *See* OECD, Standard for Automatic Exchange of Financial Account Information in Tax Matters: Implementation Handbook, available at https://www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-account-information-in-tax-matters.htm.

[43] Directive 77/799/CEE of Dec. 19, 1977.

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needed an instrument that established a basis for administrative cooperation between the Member States while maintaining full national sovereignty over the types and levels of taxes. The main provisions of the 2011 Directive are the following:

- The directive ensures that the EU standards for transparency and exchange of information on request are aligned with international standards. In particular, it provides that Member States cannot refuse to supply information solely because this information is held by a bank or other type of financial institution.
- The directive provides for exchanges of information that is of "foreseeable relevance" to the administration and the enforcement of Member States' tax laws.
- The scope of the directive is extended to all taxes of any kind with the exception of VAT, customs duties, excise duties, and compulsory social contributions already covered by other Union legislation on administrative cooperation.
- The exchanges can relate to natural and legal persons, associations of persons, and any other legal arrangement.
- The directive introduces automatic exchange of information from January 1, 2015, on five categories of income and capital based on available information (income from employment, director's fees, life insurance products not covered by other directives, pensions, and ownership of and income from immovable property).
- The directive also ensures that the existing mechanisms for exchanges of information are improved. Deadlines are introduced to accelerate procedures both for the exchange of information on request (reply is due within six months following receipt of request), and for spontaneous exchange of information (transmission of information is no later than one month after it becomes available);
- The directive introduces a mechanism to encourage feedback by the Member States that have received the information. Such feedback should be given, at the latest, three months after the outcome of the use of the information is known.
- The directive provides for other means of administrative cooperation, including being present in the offices where the administrative authorities of the requested Member State carry out their duties, being present in administrative enquiries of the requested Member State, simultaneous controls, requests for notification, and sharing of best practices.
- The directive provides for the introduction of standard forms for exchange of information on request and spontaneous exchanges, computerized formats for the automatic exchange of information, and channels for exchanging information.

On April 19, 2013, the G20 Finance Ministers endorsed automatic exchange as the expected new standard, which was approved by the OECD Council on July 15, 2014.

To facilitate the implementation of the automatic exchanges endorsed by the G20 and the OECD and to avoid the conclusion of parallel and uncoordinated agreements between Member States of the EU, Directive 2011/16/EU was modified by Directive 2014/107/EU in December 2014. The Directive also provides for reporting and due diligence rules for the financial institutions, from which information is automatically exchanged in the EU. The financial information required to be reported concerns all relevant income (interest, dividends, etc.), but also account balances and sale proceeds from financial assets. The provisions of this directive regarding the automatic exchange of information became effective in January 2017.

According to Directive 2015/2376/EU of December 8, 2015, Member States automatically and confidentially exchange a basic set of information on cross-border rulings and APAs concluded, modified, or renewed after January 1, 2017. Rulings and APAs concluded between January 1, 2012, and December 31, 2013, were also exchanged, but only to the extent they had an impact after January 1, 2014. With respect to rulings and APAs concluded between January 1, 2014, and December 31, 2016, information has been exchanged, whether the rulings and APAs were still valid or not.

In connection with the OECD BEPS Project, Directive 2016/822/EU of May 25, 2016, introduced an automatic "country-by-country" reporting mechanism applicable since June 5, 2017.

Additionally, Directive 2018/822/EU of May 25, 2018, amended the 2011/16/EU Directive. It now requires intermediaries to declare their proposed "aggressive tax planning" schemes to their resident tax authority as of July 1, 2020, and provides for the automatic exchange of those declarations between member states. The targeted schemes are cross-border organizations meeting specific hallmarks defined by the Directive, as they are likely to present a risk of aggressive tax planning.

The Directive covers natural persons (i.e., individuals), legal persons (i.e., companies), and any other legal arrangement, such as trusts and foundations that are resident or established in one or more EU Member States.

On July 19, 2020, the French Parliament passed an article in the Third Amending Finance Bill for 2020, which transposed into French law a six-month deferral to the European Union Directive on the mandatory disclosure and exchange of cross-border tax regimes. This provision follows the EU Council amendments to EU Directive 2011/16, adopted on June 24, 2020, allowing Member States to defer, for up to six months, the deadlines for filing and exchanging cross-border information arrangements under the Directive 2018/822 (commonly referred to as "DAC-6").

The reason for this deferral was the context of the crisis linked to the COVID-19 pandemic and following requests from Member States, financial institutions, and taxpayers. The reporting deadlines are as follows:

- Cross-border arrangements for which the first step of implementation took place between June 25, 2018, and June 30, 2020, had to be reported by February 28, 2021, at the latest.
- For cross-border arrangements that are made available for implementation or are ready for implementation, or where the first step in their implementation was made between July 1, 2020, and December 31, 2020, the period

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of 30 days to report the arrangements began by January 1, 2021.

• For intermediaries who have provided — directly or by means of other persons — aid, assistance, or advice between July 1, 2020, and December 31, 2020, the period of 30 days to report the arrangements began by January 1, 2021.

• The first exchanges of information between tax administrations have been reported since April 30, 2021.

Lately, Directive 2021/514 of March 22, 2021 (commonly referred to as "DAC-7"), extended the automatic exchange of information to the obligation of declaring certain types of transactions carried out through digital matchmaking platforms. DAC-7 also improved cooperation between tax authorities, particularly through the implementation of joint controls between the administrations of EU Member States.

Lastly, Directive 2023/2226/EU of October 17, 2023 (commonly referred to as "DAC-8"), enlarged, as well, the scope of automatic exchange of information to income from crypto-asset transactions. [44]

Concerning the Country-by-Country Reporting, which will be further developed in the next subsection, the European Union largely implemented the OECD's BEPS Action 13 in their own corpus of regulations. Council Directive (EU) 2016/881 of May 25th, 2016, amended Directive 2011/16/EU constraining Member States to put in place a country-by-country reporting mechanism by the 4th of June 2017 at the latest. The EU Directive 2021/2101 of November 24th, 2021, introduced an obligation to publicly report income tax information on a public CbC report. This obligation applies in particular to stand-alone companies whose net turnover exceeds €750 million at the end of two consecutive financial years and the ultimate parent entities of consolidated groups established in France when the consolidated turnover exceeds these same limits. [45] The obligations emanating from the 2021/2101 Directive are to be enforced as from June 22nd, 2024. Its stated objective is to combat "aggressive tax planning" and promote transparency in companies' fiscal practice. Furthermore, due to a strong reluctance of France to approve the directive (given that it may result in the disclosure of business and commercial secret strategy, Member States agreed to join France in its claim to protect groups international strategy by deferring public information sharing). To that end, the Directive also includes the following two mechanisms:

• the information must be published within the twelve months following the balance sheet date ending the financial year for which the declaration is made;

• a review clause is added based on a report to be submitted by the European Commission by June 22, 2027.

[44] DAC-8 also enlarge the scope of automatic exchange of information to tax rulings concerning high-net-worth individuals (for a minimal amount of transaction of €1.5 million).

[45] C. com. art. L 232-6, I and III created by ord. 2023-483 of 21-6-2023 and D 232-8-1 created by decree 2023-493 of 22-6-2023.

F. Exchange of Information Under OECD Standards and Rules

In 2014, the Global Forum on Transparency and Exchange of Information for Tax Purposes endorsed the automatic exchange of information standard implemented in the EU and created a process to enable its members to commit to a timetable for the implementation of the standard within their jurisdictions. This commitment relates to a fully reciprocal automatic exchange of information with appropriate partners.

France signed the multilateral Competent Authority agreement to exchange information automatically, based on Article 6 of the Multilateral Convention on October 29, 2014.

Similar to what was implemented in the EU, under the OECD rules, jurisdictions obtain information from their financial institutions and automatically and confidentially exchange it with other jurisdictions on an annual basis. This financial information includes all types of investment income (interest, dividends, account balance or value, income from certain insurance products, sales proceeds from financial assets, and other income generated with respect to assets held in the account or payments made with respect to the account).

The financial institutions that must report the information include not only banks, but also brokers, depository institutions, investment entities, and certain insurance companies. Accounts to be reported include not only those held by individuals but also entities (trusts, foundations, etc.).

In October 2015, the OECD released the final BEPS reports, including a transfer pricing obligation endorsing the country-by-country (CbC) reporting (Action 13 of the BEPS project). For all fiscal years beginning on or after January 1, 2016, multinational enterprises with revenues of €750 million or higher are required to comply with CbC reporting. It is required for groups to provide a variety of information to the French Tax Authorities, including the location of the group's companies and activities, the global distribution of its profits, and the global distribution of taxes paid by the group's entities. The information is automatically and confidentially transmitted to the tax authorities of any other country in which the group has operations, provided the country has also endorsed CbC reporting. This obligation is mandatory for all in-scope companies, and the form must be filed within 12 months following the end of each fiscal year.

As considered in the BEPS Action 13 report, the OECD launched a public consultation on February 6, 2020, for a review of the Country-by-Country Reporting framework (CbCR). The proposed measures aim at extending the scope of the scheme. In October 2022, the OECD launched a new publication: "Guidance on the implementation of the CbCR: BEPS Action 13". This guidance updates information that should be included in Table 1 and Table 2 of the CbCR. For example, it provides guidance on when positive and negative amounts should be used in completing Table 1, or how Constituent Entities that are permanent establishments should be described in Table 2. These extensions of the scope of the schemes of Table 1 and Table 2 were the main concerns regarding the CbCR, raised during the public consultation of February 2020.

ISBN 978-1-61746-885-8

VI. Assistance in Tax Collection

Globalization not only makes it difficult to determine the appropriate tax liabilities of companies, it also makes it more logistically difficult for tax authorities to collect taxes owed. In this regard, most of France's income tax treaties contain provisions permitting the tax authorities from both jurisdictions to assist each other in tax collection.

The U.S.-France Income Tax Treaty, signed on August 31, 1994, and amended most recently on January 13, 2009, contains a provision with respect to assistance in tax collection. Article 28 states that France and the United States must undertake to provide each other assistance and support in the collection of taxes. The article also specifies that revenue claims are enforced by the country to which application is made and collected by that country, according to the country's laws regarding the enforcement and collection of its own taxes. In addition, each country is permitted to take conservancy measures on behalf of the other country, as authorized by the first country's laws for the enforcement of its own taxes.

There are also specific European tools regarding mutual assistance in tax collection. Although these instruments (e.g., Council Directive 76/308/EEC) were originally developed to cover agricultural levies and customs duties, traditional sources of European Community revenue, they were later extended to VAT (Council Directive 79/1071/EEC), excise duties (Council Directive 92/108/EEC), and taxes on income and capital and taxes on insurance premiums (Council Directive 2001/44/EC). A codified version of this legislation was adopted on May 26, 2008 (Council Directive 2008/55/EC). It also deals with matters, such as the details of electronic communication, deadlines for responses, administrative procedures, and reimbursement arrangements for costs linked to the recovery of debts.

On March 16, 2010, the European Council adopted a new directive on mutual assistance in the recovery of taxes, namely Council Directive 2010/24/EU. It applies to all taxes and duties levied by Member States in their territorial or administrative subdivisions. This directive was transposed into French domestic law by amending Financial Law 2011. The creation of a broad European instrument permitting enforcement and conservancy measures in another Member State significantly improves the capabilities of Member States with respect to the cross-border collection of taxes. Detailed rules in connection with this 2010 Council Directive have been provided by the Commission on October 27, 2017 (Commission Implementing Regulation 2017/1966). It mainly focuses on communication deadlines to share information between Member States, format of information requests and IT specificities to exchange information, to make this intra-Euorpean information sharing more efficient.

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DETAILED ANALYSIS

Chapter 55 — GERMANY

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I. Introduction

Germany has concluded both income tax and specialized treaties with more than 90 countries.[1] The specialized models include treaties on Inheritance and Gift Taxation, Motor Vehicle Tax, special taxation arrangements for Shipping and Air Transport Enterprises, and several general treaties on the Exchange of Information and Judicial Assistance.[2]

Germany generally follows the Organisation for Economic Co-operation and Development's Model Tax Convention on Income and Capital ("OECD Model Tax Treaty") as well as the recommendations of the OECD reflected in the commentary to Art. 25 OECD Model Tax Treaty in its income tax treaty negotiations. Furthermore, the OECD issues special manuals as non-binding guidance and best practices for enhancing dispute resolution and prevention for bilateral and multilateral cases (see III.A.5 and IV.A.6., below, for details).

In particular, all German income tax treaties include regulations for a mutual agreement procedure ("MAP") similar to Art. 25 of the OECD Model Tax Treaty. Generally, the German tax authorities are quite open to using the MAP, and this is reflected in the number of MAPs initiated by Germany. Before 2017, this number had remained stable, with 350 initiated MAPs in 2015 and 353 in 2016, but increased significantly in 2017 with 582. The number continued to steadily increase with 615 MAPs initiated in 2018, 659 MAPs in 2019, 747 MAPs in 2020 and 727 MAPs in 2022.[3] Only in 2021, for the first time since the implementation of the BEPS project, with 703 initiated MAPs,[4] a slight decrease is seen.

When it comes to dispute resolution mechanisms, Germany has signed the multilateral European Union (EU) Convention for the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises ("EU Arbitration Convention")[5] and adopted the Council Directive (EU) 2017/1852 of October 10, 2017 on tax dispute resolution mechanisms in the European Union[6] into national law in 2019 (*EU-Doppelbesteuerungsabkommen-Streitbeilegungsgesetz* [EU-DBA-SBG]).[7] Germany has also signed and ratified the OECD Multilateral Instrument (an agreement signed by a variety of countries to combat base erosion, hereinafter "MLI"), in connection with which it elected to incorporate mandatory and binding arbitration provisions into its tax treaties, as provided in Section VI of the MLI.[8] In late 2020, the first national decree implementing the MLI as such into German law was enacted, and in June 2024, the second national decree concluding the legislative implementation of the MLI in Germany, was enacted.[9] For the treaties affected by the application act, the MLI is likely to enter into force in Germany as of January 1, 2025.

The discussion in this chapter centers on German income tax treaties which have been in force since December 2023.

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[1] For a list of countries, see the Ministry of Finance, Circular of February 18, 2021, IV B 2-S 1301/07/10017-12, Federal Tax Gazette (BStBl.) I 2021, p. 265 (Ministry of Finance Circular of February 18, 2021, no. IV B 2-S 1301/07/10017-12).

[2] The Ministry of Finance, Circular of February 18, 2021, IV B 2-S 1301/07/10017-12, Federal Tax Gazette (BStBl.) I 2021, p. 265 (Ministry of Finance Circular of February 18, 2021, no. IV B 2-S 1301/07/10017-12).

[3] OECD statistics for Germany 2016 to 2022, available at https://www.oecd.org/content/dam/oecd/en/topics/policy-issue-focus/map-statistics/map-statistics-germany.pdf.

[4] *Id.*

[5] *See* 90/436/EEC, Official Journal of the European Communities, L 225/10.

[6] *See* COM(2016) 686 final.

[7] *See* III.A.2, below, for more details.

[8] *See* III.A.3, below, for more details.

[9] *See also* Art. 35(7) MLI.

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II. The German Competent Authority

The German tax authorities are not organized as a unitary tax administration.[10] In principle, the tax authorities are a double-tracked, three-level organization consisting of federal and state level tax authorities that are subdivided into supreme, mid, and local level authorities.[11] At the federal level, Germany's Federal Ministry of Finance (*Bundesministerium der Finanzen* — hereafter "Ministry of Finance") is the supreme authority, the regional tax offices (*Oberfinanzdirektionen*) are the mid-level authorities,[12] and the local level authorities are the regional customs offices and the customs investigation offices. Similarly, at the state level, the supreme authorities are the State Ministries of Finance, the *Oberfinanzdirektionen* are the mid-level authorities, and the local authorities also consist of numerous tax offices.

In Germany, the Federal Central Tax Office (*Bundeszentralamt für Steuern*, hereafter "BZSt") serves as the competent authority for MAPs and advance pricing agreements ("APAs"). However, in exceptional cases the Federal Ministry of Finance acts as the competent authority. Moreover, the competent supreme state authority plays an important role in APA proceedings.

[10] §1 German Tax Administration Act (*Finanzverwaltungsgesetz*).
[11] *Id.*
[12] §7 et seq. Tax Administration Act.

ISBN 978-1-61746-885-8

III. Mutual Agreement Procedures and Arbitration Procedures

A. *Treaty Provisions and Practical Guidance on Mutual Agreement and Arbitration*

1. German Treaty Negotiations Model

Germany's income tax treaties generally apply to German Income Tax (*Einkommensteuer*), German Corporate Income Tax (*Körperschaftsteuer*), German Trade Income Tax (*Gewerbesteuer*), and German Wealth Tax (*Vermögensteuer*).[13]

The German model tax convention ("*German Model Tax Treaty*") serves as a guideline for negotiators in MAP and arbitration proceedings, but it is not legally binding.[14] The German Model Tax Treaty generally follows the June 2010 revised version of the OECD Model Tax Treaty but also reflects recent German policy for negotiating tax treaties.[15] While the German Model Tax Treaty does not include the specific provisions of the OECD Model Tax Treaty for developing countries, these provisions will be considered in negotiations with such countries.[16]

In large part, the German Model Tax Treaty and OECD Model Tax Treaty mirror one another, subject to some exceptions. For example, regarding the initiation and performance of a MAP, Art. 24(1) to (4) of the German Model Tax Treaty generally align with Art. 25(1) to (4) of the OECD Model Tax Treaty 2010. But in contrast, Art. 24(5) of the German Model Tax Treaty includes the following additional requirements that must be met if a taxpayer opts for arbitration remedies that are not provided for in Art. 25(5) of the OECD Model Tax Treaty:

- Art. 24(5)(c) of the German Model Tax Treaty requires that the case not be one that the competent authorities agree would not be suitable for arbitration prior to the date on which arbitration proceedings would otherwise have begun. This limitation is included in Art. 25(5)(b)(aa)(B) of the Germany-United States income tax treaty; and

- Art. 24(5)(d) of the German Model Tax Treaty requires that the case not be one in which the arbitration process under the EU Arbitration Convention prevails over the arbitration procedure under the tax treaty. This coordination measure should prevent different arbitration procedures from proceeding at the same time in an uncoordinated fashion, as addressed in the commentary to Art. 25(5) of the OECD Model Tax Treaty.[17]

Amendments to Art. 25 of the OECD Model Tax Treaty made by the updates in 2014 and 2017 have not yet been included in Art. 24 of the German Model Tax Treaty. As regards dispute resolution, these OECD changes include particularly the possibility, pursuant to Art. 25(1) of the OECD Model Tax Treaty, to initiate MAPs also in the source state and also the application of a clearer rule in Art. 25(5) of the OECD Model Tax Treaty for the start of the time period for initiating arbitration proceedings only if the information required by the competent authority has been made available to the competent authorities.[18]

The following points illustrate other differences between the German Model Tax Treaty and the OECD Model Tax Treaty:

- As a result of the deletion of Art. 14 of the OECD Model Treaty, the numbering of the articles in the German Model Tax Treaty now corresponds to that of the OECD Model Tax Treaty through Art. 13, while Art. 14 to 26 of the German Model Tax Treaty correspond to Art. 15 to 27 of the OECD Model Tax Treaty;

- Articles 27 (Procedural Rules for Taxation at Source; Investment Funds), 28 (Application of the Convention in Special Cases), and 30 (Protocol) of the German Model Tax Treaty make no reference to the OECD Model Tax Treaty;

- Articles 29, 31, and 32 of the German Model Tax Treaty correspond to Arts. 28, 30, and 31 of the OECD Model Tax Treaty; and

- The German Model Tax Treaty[19] does not contain a provision corresponding to Art. 29 of the OECD Model Tax Treaty (Territorial Extension); however, to remedy this, a protocol to the German Model Tax Treaty includes explanatory notes along with the material provisions that more fully detail territorial extension.

Mandatory arbitration procedures are included in Germany's income tax treaties with Austria,[20] the United States,[21] the United Kingdom,[22] Switzerland,[23] Liechtenstein,[24] the

[13] Wealth tax is not imposed in Germany.

[14] The Ministry of Finance first presented its version on April 18, 2013, with an update on August 22, 2013; *see* Model for the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital (*Verhandlungsgrundlage für Doppelbesteuerungsabkommen im Bereich der Steuern vom Einkommen und Vermögen*), Ministry of Finance Circular of August 22, 2013, IV B 2 — S 1301/13/10009, also available at https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuer-recht/Allgemeine_Informationen/2013-08-22-Verhandlungsgrundlage-DBA-deutsch.pdf?__blob=publicationFile&v=3. The model is printed in Schönfeld/Ditz, DBA, 2nd ed. 2019, Annex 4 with commentaries; Wassermeyer (Ed.), *Doppelbesteuerung, volume 1.*

[15] Lüdicke, *Internationales Steuerrecht* Beihefter 10/2013, p. 27.

[16] Lüdicke, *Internationales Steuerrecht* Beihefter 10/2013, p. 27.

[17] Lüdicke, *Internationales Steuerrecht* Beihefter 10/2013, p. 41; Art. 25 OECD Model Tax Treaty, no. 67.

[18] Alignment with Art. 25(5) of the OECD Model Tax Treaty is expected to occur with the next update of the German Model Tax Treaty. As Germany has reserved against Art. 25(1) of the OECD Model Tax Treaty, in a future update of the German Model Tax Treaty, presentations of cases to competent authorities should consequently still only be addressed to the state of residence. But the update should contain an obligation for the additional performance of a bilateral notification or consultation procedure if the state of residence considers the taxpayer's objection to be unjustified. For the contents of the amendments and the corresponding German tax policy *see* German Parliament, Official Record (Bundestag Drucksache) no. 19/20979, p. 84 (Vorbehalt).

[19] For a detailed discussion, *see* Schönfeld/Ditz, Annex 4; Lüdicke, *Internationales Steuerrecht* Beihefter 10/2013, p. 26 et seq.

[20] Art. 25(5) of the Germany-Austria Income Tax Treaty (08/24/2000).

[21] Art. 25(5) and (6) of the Germany-U.S. Income Tax Treaty (06/01/2016).

[22] Art. 26(5) of the Germany-United Kingdom Income Tax Treaty (04/12/2011).

[23] Art. 26(5) of the Germany-Switzerland Income Tax Treaty (10/27/2010).

[24] Art. 25(5) of the Germany-Liechtenstein Income Tax Treaty (02/12/2013).

ISBN 978-1-61746-885-8

Netherlands,[25] Luxembourg,[26] France,[27] Australia,[28] Japan,[29] Armenia,[30] and Singapore;[31] as well as based on the MLI Germany opted for mandatory arbitration as well. Due to corresponding notifications and reservations for arbitration based on Art. 18 et seq., of the MLI, as of January 1, 2025, Germany is disposing mandatory arbitration clauses with Greece, Hungary, Malta, and Spain (Italy will follow at a later stage as it has not yet finished its national implementation of the MLI).[32]

It is generally assumed that unless otherwise specified in the tax treaty, arbitration procedures based on either the EU-DBA-SBG, the EU Arbitration Convention, or the respective tax treaty apply.[33] The applicable arbitration procedure depends on the legal basis of the preceding MAP. The legal basis of a MAP, in turn, is generally directed upon the request of the taxpayer for the initiation of a MAP. Consequently, the competent authority requires taxpayers to clearly indicate in MAP applications the legal basis on which the request for the initiation of an MAP is to be based (EU-DBA-SBG, EU Arbitration Convention, or an applicable income tax treaty provision).[34] This is also reflected in §4(4) of the EU-DBA-SBG and in Art. 15 EU Arbitration Convention. As far as the arbitral proceeding based on Art. 18 et seq. MLI is applicable towards German treaties with European treaty partners, it has not yet been clarified by law or the tax administration if the EU Arbitration Convention and the EU-DBA-SBG should generally prevail Art. 18 et seq. MLI or if this must be decided on a case-by-case decision. This question comes up as Germany notified respective reservations based on Art. 28 MLI.[35]

2. *Multilateral Instrument (MLI)*

On June 7, 2017, together with 68 representatives of other countries, Germany signed MLI.[36] As of June 27, 2024, 103 countries have also signed the MLI.[37]

Modifications to the covered treaties will not become effective until the two contracting states involved have completed their domestic ratification procedures. As of January 1, 2024, the MLI was in force in 88 countries.[38]

Germany ratified the MLI and notified the OECD of said ratification as a depositary at the end of 2020. However, the MLI has not yet modified any of the Covered Tax Agreements with German treaty partners for the following reason. Germany made the election under MLI Art. 35(7)(a), to delay the effective date of the MLI on its treaties until domestic constitutional processes could be completed. Although there is a national decree implementing the MLI in German law (the *MLI-Umsetzungsgesetz*),[39] enacted on November 24, 2020, that decree can only become applicable after the enactment of special treaty-related application decrees for each treaty. This is justified by Germany's Bundestag (the German Federal Parliament) on the grounds of legal certainty and clarity.[40] Meanwhile, treaty-related application decree ("the *MLI-Anwendungsgesetz,* hereinafter: *MLI-AnwG*") was enacted on June 19, 2024.[41] Overall, it has to be noted that only 11 treaties — of originally 35 oGerman income tax treaties — are Covered Tax Agreements (CTAs).[42] However, the MLI-AnwG concludes the legislative implementation process of the MLI in Germany relating to 9 treaties according to Section 1 (2) MLI-AnwG, namely: Croatia (§3 MLI-AnwG), the Czech Republic (§4 MLI-AnwG), France (§5 MLI-AnwG), Greece (§6 MLI-AnwG), Hungary (§7 MLI-AnwG), Japan (§8 MLI-AnwG), Malta (§9 MLI-AnwG), Slovakia (§10 MLI-AnwG), and Spain (§11 MLI-AnwG). For these countries the MLI is likely to enter into force as of January 1, 2025.

In turn, the treaties with Italy and Turkey could not yet be included because the MLI has not yet entered into force in these countries. This requires that Germany enacts a further application law after the MLI enters into force in both countries. In the end, this leads to different effective dates for the MLI in Germany depending on the treaty partner.[43]

The treaties with Austria and Luxembourg are not covered by the MLI-AnwG as the revision protocols for both treaties have already implemented the BEPS measures exhaustively.[44] Finally, Romania no longer notified the treaty with Germany as a CTA during its national implementation process.[45]

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[25] Art. 25(5) of the Germany-Netherlands Income Tax Treaty (11/12/2015).

[26] Art. 24(5) of the Germany-Luxembourg Income Tax Treaty (08/26/2015).

[27] Art. 25(5) of the Germany-France Income Tax Treaty (02/26/2016).

[28] Art. 25(5) of the Germany-Australia Income Tax Treaty (11/21/2016).

[29] Art. 24(5) of the Germany-Japan Income Tax Treaty (01/18/2017).

[30] Art. 25(5) of the Germany-Armenia Income Tax Treaty (07/25/2017).

[31] Art. 26(5) of the Germany-Singapore Income Tax Treaty (12/09/2019).

[32] *See* III.A.3, below, for more details.

[33] Liebchen, in: Mössner/Lampert et al., Steuerrecht international tätiger Unternehmen, 6th ed. 2023, no. 13.153 et seq.

[34] Federal Ministry of Finance (*Bundesfinanzministerium*), Circular of February 21, 2024, IV B 3 - S 1304/21/10005:003, Federal Tax Gazette (BStBl.) I 2024, p. 254 (Ministry of Finance, Circular of February 21, 2024), nos. 10, 38, 102, 114 und 154.

[35] *See* III.A.3, below, for more details.

[36] A list of signatories and parties to the Agreement is available at http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

[37] https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

[38] https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

[39] *See* Decree to the MLI of November 24, 2020 to Implement Tax Treaty Related Measures to Prevent BEPS (*Gesetz zu dem Mehrseitigen Übereinkommen vom 24. November 2016 zur Umsetzung steuerabkommensbezogener Maßnahmen zur Verhinderung der Gewinnverkürzung und Gewinnverlagerung*), Federal Law Gazette (BGBl.) II 2020, 946.

[40] *Id.*

[41] *See* Decree to the application of the MLI of June 19, 2024 to Implement Tax Treaty Related Measures to Prevent BEPS (*Gesetz zur Anwendung des Mehrseitigen Übereinkommens vom 24. November 2016 und zu weiteren Maßnahmen),* Federal Law Gazette (BGBl.) I 2024, No. 205.

[42] *See* German Parliament, Official Record (Bundestag Drucksache) no. 19/20979, p.79 et seq. Based on the MLI-Umsetzungsgesetz this were the following 14 countries: Austria, Croatia, Czech Republic, France, Greece, Hungary, Italy, Japan (further amendments in relation to the amendment of the income tax treaty already in force), Luxembourg, Malta, Romania, Slovakia, Spain, and Turkey. The MLI-AnwG confirms that only the treaties with Croatia, Czech Republic, France, Greece, Hungary, Japan (further amendments in relation to the amendment of the income tax treaty already in force), Malta, Slovakia and Spain are regarded as CTAs.

[43] *See* Decree to the MLI of November 24, 2020 to Implement Tax Treaty Related Measures to Prevent BEPS (*Gesetz zu dem Mehrseitigen Übereinkommen vom 24. November 2016 zur Umsetzung steuerabkommensbezogener Maßnahmen zur Verhinderung der Gewinnverkürzung und Gewinnverlagerung),* Federal Law Gazette (BGBl.) II 2020, 946.

[44] *See* German Federal Council of February 9, 2024, Official Record (Bundesrat Drucksache) no. 75/24, p. 2; Protocol to the treaty with Austria as of August 21, 2023 and Protocol to the treaty with Luxembourg as of July 6, 2023.

[45] *See* OECD, MLI Matching Database, available at: http://www.oecd.org/tax/treaties/mli-matching-database.htm.

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Additionally, Germany agreed to implement the measures incorporated in the MLI on a bilateral basis with 45 treaty-partner states.[46]

Based on Art. 35(4) of the MLI, Art. 16 of the MLI is applicable to MLI-related treaties as soon as the MLI is applicable for the respective CTAs (i.e., for Germany, this is expected for requests filed on January 1, 2025 or later).[47] For the German treaties with Greece, Hungary, Malta and Spain, provided the applications are received by the BZSt or the foreign competent authority from January 1, 2025, and it is after the date the MLI is applicable, such arbitration proceedings have to be based on Art. 18 et seq. of the MLI (according to Art. 36(1) of the MLI). Arbitration is also available for a MAP which was applied for and conducted before this effective date. For the applicability of Art. 18 et seq. of the MLI the only decisive factor is therefore the time of the application for arbitration (and not of the MAP). However, according to Germany's reservation to Art. 36(2) of the MLI, the competent authorities can also determine on an ad hoc basis that Part VI is extended to arbitration requests which are filed before January 1, 2025. The table in Worksheet 43 provides details of the MLI regarding dispute resolution mechanisms with respect to the following: (i) the relevant provision in the MLI; (ii) Germany's response to each provision (i.e., whether it agrees to or rejects the provision); and (iii) the effect on the Covered Tax Agreements.[48]

[46] *See* German Parliament, Official Record (Bundestag Drucksache) no. 19/26319, p.3 et seq. These countries are Argentina, Belgium, Bulgaria, Canada, China, Costa Rica, Cyprus, Denmark, Ecuador, Egypt, Estonia, Finland, Iceland, India, Indonesia, Iran, Ireland, Israel, the Republic of Korea, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Mauritius, Mexico, Morocco, the Netherlands, New Zealand, Norway, Poland, Portugal, the Russian Federation, Serbia, Singapore, Slovenia, Sri Lanka, South Africa, Sweden, Switzerland, Tadzhikistan, Thailand, Trinidad and Tobago, Ukraine, and the United Kingdom. Amendments to income tax treaties or amendment protocols are already signed with Denmark, Estonia, Finland, Ireland, Liechtenstein, Singapore, and the United Kingdom.

[47] See Art. 35(7)(a)(i) and (4) MLI.

[48] *See* German Parliament, Official Record (Bundestag Drucksache) no. 19/20979, p. 79 et seq. for the choices or reservations declared by Germany.

3. *EU Arbitration Convention*

The EU Arbitration Convention has been in effect since January 1, 1995. It represents the main instrument for avoiding double taxation resulting from transfer pricing disputes in the European Union.[49] To reduce uncertainties relating to the interpretation of the EU Arbitration Convention, the former EU Joint Transfer Pricing Forum ("EU JTPF")[50] developed a Code of Conduct that became effective on December 22, 2009.[51] The Code of Conduct is not legally binding but represents a political commitment on the part of each participating member country. The Ministry of Finance specified the terms and conditions for the mutual agreement procedure and the arbitration procedure under the EU Arbitration Convention in a circular dated July 13, 2006, replaced first by the circular dated October 9, 2018, and the latest by the circular of August 27, 2021 (updated February 19, 2024), in which it mostly follows the suggestions of the EU JTPF.[52]

The EU Arbitration Convention lists four steps in a MAP, which are illustrated in the table below and subsequently discussed at length.

[49] EU Convention for the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, (90/436/EEC), Official Journal L 225 of August 20, 1990. The Convention was modified with the EU Directive 2011/16/EU of February 15, 2011.

[50] Meanwhile the mandate of the EU-JTPF expired. For more information *see* European Commission, Joint Transfer Pricing Forum, available at: https://taxation-customs.ec.europa.eu/taxation/business-taxation/transfer-pricing-eu/joint-transfer-pricing-forum_en?prefLang=de.

[51] EU JTPF, Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, December 30, 2009, Doc No.: 2009/C 322/01, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42009X1230(01)&from=DE. The EU JTPF suggested a modified Code of Conduct on March 12, 2015 that has not been ratified by the EU member states yet (available at https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/final_report_ac_jtpf_002_2015_en_final_clean.pdf). *See* Puls/Bickenbach, *Internationale Steuer-Rundschau* 2015, p. 356.

[52] Ministry of Finance, Circular of February 21, 2024.

1. Preliminary Proceedings (Art. 5)	**2. MAP (Art. 6)**	**3. Arbitration Proceedings (Art. 7 et seq.)**	**4. Arbitration Agreements (Art. 12)**
• Taxpayer receives notice of planned adjustment. • Foreign tax authority either agrees or refuses to make a corresponding adjustment.	If there is no agreement at step 1, taxpayer can request a MAP within three years of notification asserting non-compliance with Art. 4 of the EU Arbitration Convention.	• Arbitration proceeding enters into force if a MAP does not yield agreement within a two-year negotiation period. • An advisory commission provides recommendations for the elimination of double taxation.	• Within six months, the advisory commission proposes a solution. • Competent authorities may agree to a solution or seek alternative resolution within six months. • Commission opinion becomes binding if competent authorities do not reach resolution in six-month time frame.
See III.B.2.a., below.	*See* III.B.2.a., below.	*See* III.C.2.a., below.	*See* III.C.2.b., below.

ISBN 978-1-61746-885-8

4. EU Directive on Tax Dispute Resolution Implemented as EU-DBA-SBG

The EU Council adopted the Directive on Tax Dispute Resolution mechanisms in the European Union (the "Directive") on October 10, 2017.[53] EU Member States had the obligation to implement the Directive into national law by June 30, 2019. The Directive applies to all tax disputes for tax periods beginning on or after January 1, 2018, in relation to complaints — submitted on or after July 1, 2019.[54] In Germany, the decree implementing the Directive (*EU-Doppelbesteuerungsabkommen-Streitbeilegungsgesetz* — "EU-DBA-SBG") was published on December 12, 2019, and entered into force on the day after, with retroactive effect to July 1, 2019.[55] Meanwhile, all EU Member States have implemented the EU Directive on Tax Dispute Resolution.[56]

Worksheet 44 provides a synopsis of how the regulations of the EU Directive on Tax Dispute Resolution have been implemented in the EU-DBA-SBG. The untranslated table, illustrated in Worksheet 44, was part of the draft bill of the implementation act.[57]

While the EU Arbitration Convention applies only to double taxation resulting from transfer pricing disputes and disputes over the attribution of profits to PEs, the scope of the Directive is extended to all disputes arising from double taxation.[58] In correspondence with the EU Arbitration Convention, the Directive generally takes a three-step approach as well: (*i*) Request and Complaint Procedure, (*ii*) MAP; and (*iii*) Arbitration Procedure. The Directive includes safeguards with respect to taxpayer rights (e.g., access to the Directive), clearly defined time frames, and a guarantee that an agreement will be reached. The Directive further provides taxpayers with legal remedies ensuring that the provisions of the Directive are applied, and that the ultimate agreement is implemented by the competent authorities.

5. Practical OECD Guidance for the Conduct of MAP Proceedings

In 2007 the OECD published a Manual on Effective Mutual Agreement Procedures ("MEMAP").[59] The MEMAP describes recommended approaches for conducting MAP activities of the competent authorities of the OECD member countries and by doing so, highlights the best practices. Thus, the MEMAP serves as a general guide for the MAP process and encourages countries to improve the effectiveness of MAP. The MEMAP, as well as other manuals of the OECD, is not to be considered as a binding legal basis, but as non-binding guidance for streamlining the respective dispute resolution proceeding. If there are conflicting rules with provisions of income tax treaties, the OECD Model Tax Treaty or OECD Commentary's recommendations, or the OECD Transfer Pricing Guidelines, those generally supersede the conflicting recommendations of the MEMAP.

The MEMAP first describes the background and the functioning of MAP and its relationship to domestic law as such. In its Annexes 1 to 3, an ideal timeline for a typical MAP process, 25 best practices, and a MEMAP glossary are included and are to be evaluated as recommended by the OECD for years. This is not directly demonstrated in the treaty provisions of Art. 25 OECD Model Tax Treaty. Regardless of lacking an explicit legal basis enabling the initiation and conduct of multilateral cases, the admissibility of these proceedings corresponds to the international practice for income tax treaties, the EU Arbitration Convention, and the EU Dispute Resolution Directive.[60] Up until now, among OECD members, it was not clarified if the legal basis for multilateral proceedings is to be seen in Art. 25(1) or Art. 25(3) of the OECD Model Tax Treaty. The MEMAP also left open the question as to whether two or more bilateral MAP or APA proceedings or truly multilateral proceedings should be qualified as a multilateral MAP or an APA.

To address and solve remaining open questions, the OECD published the "Manual on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Arrangements" ("MoMA")[61] in early 2023 to provide more guidance for the initiation and conduct of multilateral MAP and APA processes. The MoMA is part of the tax certainty work program of the OECD Forum on Tax Administration ("FTA") and aims at enhancing tax certainty from a legal and a procedural perspective for tax administrations and taxpayers. The MoMA has been prepared jointly by members of the FTA MAP Forum and its focus group on "Exploring potential for wider use of multilateral MAP and multilateral APA" which consists of members of 19 jurisdictions. The recommendations were derived from a survey circulated by the OECD to the members of the focus group beforehand and reflect the multilateral MAP and APA approaches already undertaken by these jurisdictions. This manual, as well as other manuals of the OECD ("MEMAP" and the "BAPAM — Bilateral Advance Pricing Arrangement Manual"), is not to be considered as a binding legal basis, but as non-binding guidance for streamlining the respective dispute resolution or prevention proceedings. If there are conflicting rules with provisions of income tax treaties, the OECD Model Tax Treaty or OECD Commentary's recommen-

[53] Directive on Tax Dispute Resolution mechanisms in the European Union, EU DOC: ST 9420 2017 INIT.

[54] Art. 22, 23 of the EU Tax Dispute Resolution Directive.

[55] *See* decree (*Gesetz zur Umsetzung der Richtlinie (EU) 2017/1852 des Rates v. 10.10.2017 über Verfahren zur Beilegung von Besteuerungsstreitigkeiten in der Europäaumlischen Union (EU-Doppelbesteuerungsabkommen-Streitbeilegungsgesetz-EU-DBA-SBG*), Federal Law Gazette (BGBl.) I 2019, p. 2103.

[56] The EU Arbitration Convention is also no longer applicable as of January 1, 2021, in relation to the United Kingdom. *See* Ministry of Finance, Circular of February 21, 2024, nos. 11, 118.

[57] *See* draft bill of the German Federal Government (*Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2017/1852 des Rates vom 10. Oktober 2017 über Verfahren zur Beilegung von Besteuerungsstreitigkeiten in der Europäischen Union; EU-Doppelbesteuerungsabkommen-Streitbeilegungsgesetz* — EU-DBA-SBG), p. 43 et seq.

[58] *See* §1 EU-DBA-SBG.

[59] OECD (2007), Manual on Effective Mutual Agreement Procedures ("MEMAP"), available at https://www.oecd.org/ctp/38061910.pdf (hereinafter "MEMAP").

[60] For income tax treaties see OECD, Commentary to Art. 25 of the OECD Model Treaty, no. 38.1 to 38.5, 55.2 and Section B.3, Annex II to Chapter IV OECD Transfer Pricing Guidelines 2022; for the EU Arbitration Convention see no. 1.1 Revised Code of Conduct of the EU JTPF https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A42009X1230%2801%29.

[61] OECD (2023), Manual on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Arrangements, OECD Forum on Tax Administration OECD, available at https://doi.org/10.1787/f0cad7f3-en (hereinafter "MoMA").

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dations, or the OECD Transfer Pricing Guidelines, those generally supersede conflicting recommendations of the MoMA. Best practices are not included in the MoMA.

The guidance predominantly focuses on clarification in relation to the applicable legal basis, the procedural steps, and establishes a model timeline for the conduct of multilateral MAP and APA proceedings.[62] The following table provides a summary:

[62] MoMA, p. 10 et seq.

Stage	Issue	Recommendation	Comments
Definition of a multilateral case	No general definition of the characteristics of a multilateral case in existing income tax treaties and Art. 25 OECD Model Tax Treaty. Art. 25 (1) and (3) of the OECD Model Tax Convention define a tax dispute only from the perspective of two states. Therefore, a treaty relationship must generally be given between all jurisdictions.	The MoMA sums up that a multilateral case 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.[63] But, in keeping with a bilateral MAP, the competent authorities are not obliged to find a mutual agreement. The OECD recommends in the context of Art. 25(3) sentence 2 of the OECD Model Tax Convention that competent authorities shall determine a multilateral settlement even though some of the transactions might not be covered by a tax treaty as such.[64] Regardless of the lack of a separate legal basis for multilateral proceedings, the OECD addresses the necessity for further simplification, i.e., the OECD urges the countries to deal pragmatically with the problem. In other words, countries are encouraged to remain as open and as flexible as possible to receive MAP requests and to handle and resolve them in multilateral cases.[65]	In literature, it is criticized that the assumption of a multilateral case appears to remain in the discretion of the competent authorities.[66] It remains an open question whether a taxation not in accordance with an income tax treaty must be assumed for all income tax treaties involved or if the identification of a taxation in violation of one income tax treaty is sufficient.[67] This question may vary between the different legal bases; based on the Multilateral Approach considered by Art. 25(3) of the OECD Model Tax Treaty, the MoMA tends to only require a singular taxation in violation of one income tax treaty. By contrast, the bilateral approach considered by Art. 25(1) and (2) of the OECD Model Tax Treaty seems to require a violation of all involved income tax treaties. But as the contracting states are requested to deal in the most flexible manner with multilateral questions it is very likely that the taxpayer must not present violations of more than one income tax treaty in the application. Future practice will show if the MoMA contributes to more multilateral cases and flexibility among the involved competent authorities.

[63] The MoMA defines a multilateral case in no. 24 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, endeavor 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."*

[64] OECD, Commentary to Art. 25 OECD Model Treaty, no. 55; no. 34 MoMA.

[65] *See* no. 32 et seq. MoMA.

[66] Bühl, *NWB Internationales Steuer- und Wirtschaftsrecht (IWB)* 2023, 264.

[67] *See* OECD, Commentary to Art. 25 of the OECD Model Treaty, nos. 38.1, 38.3 and 38.5. See no. 22 MoMA.

ISBN 978-1-61746-885-8

Legal basis for handling multilateral cases	Identification of the legal basis for multilateral MAP is still missing in existing income tax treaties and Art. 25 OECD Model Tax Treaty. Neither Art 25(1) and (2) nor Art. 25(3) OECD Model Tax Treaty is clearly considered as preferred legal basis.[68]	Building upon this, the MoMA still abstains from straightening out the legal basis for the initiation and conduct of multilateral MAP proceedings.[69] Consequently, it still belongs to the common practice that jurisdictions continue to use Art. 25 OECD Model Tax Treaty as a legal basis to enter multilateral agreements, during both the prevention and the resolution stage.[70] Depending on the view shared by the involved countries, the legal basis can be seen in Art. 25(1) and (2) or in Art. 25(3) OECD Tax Treaty Model.[71] The OECD recommends a Multilateral Approach rather than the conduct of several bilateral negotiations.[72]	The handling of constitutional issues that arise as a result of the application of Art. 25(2) of the OECD Tax Treaty Model for multilateral cases is not addressed by the MoMA. Affected countries are also not mentioned.
Operation of the MAP processes for multilateral cases	Identification of similarities or differences in the initiation and conduct of multilateral MAPs.	The MoMA underlines that the initiation and conduct of multilateral dispute resolution or prevention cases generally corresponds to the related standards used in bilateral proceedings and best practices.[73] Germany shares this view but assumes that multilateral cases are still only to be conducted on an exceptional basis.[74] Taxpayers must identify multilateral cases in their requests and the competent authority receiving the request must agree with the taxpayer.[75] One application is likely to be sufficient if multilateral MAP requests are accepted under the Article 25(3) approach.[76] Under the Article 25(1) and (2) approach, the MoMA also enables applicants to first only file a request for a bilateral MAP and to extend this request to a multilateral request in the further course of the proceeding.[77] In this respect,	As the MoMA omits to take a position on the conduct of only one multilateral proceeding or several bilateral proceedings, it is still recommendable to file a separate MAP application for all involved income tax treaties and not only one application in one state (in Germany, mandatorily the country of residence) with validity towards all involved countries. Apart from that, the recommendations of the MoMA for the initiation and conduction of multilateral MAP proceedings correspond to those for bilateral MAP procedures, i.e., the obligation to try to explore a unilateral relief to resolve the dispute unilaterally, as well as the duty to only endeavour to find a MAP settlement and the non-party status of the taxpayer within the proceeding.[83]

[68] OECD, Commentary to Art. 25 of the OECD Model Treaty, no. 55.2.
[69] *See* nos. 18, 25 et seq. MoMA.
[70] No. 3 MoMA.
[71] *See* no. 49 MoMA.
[72] No. 68 MoMA.

ISBN 978-1-61746-885-8

		the MoMA also authorizes the competent authorities to extend the scope of a bilateral MAP to a multilateral MAP if this appears helpful for settlement purposes;[78] if Art. 25(1) and (2) OECD Model Tax Treaty are considered as legal basis instead, the extension of the MAP to a multilateral MAP must be requested by the taxpayer. The period of three years from the first notification of the measure resulting in taxation not in accordance with the treaty is — as already known from bilateral cases — to be assessed from the perspective of the taxpayer. Every application should be shared with all involved competent authorities and enclose any information required from an international or domestic perspective; if necessary, English translations should be attached.[79] Applicants should indicate this with the application and name a representative acting as the central contact person. 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.[80] According to Art. 25(4) of the OECD Model Tax Treaty, 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.[81]	

[73] No. 55 MoMA.
[74] No. 8 MoMA.
[75] No. 39 MoMA.
[76] No. 43 et seq. MoMA.
[77] No. 40 MoMA.
[83] No. 107 MoMA.
[78] No. 48 MoMa. *See also* Bühl, *NWB Internationales Steuer- und Wirtschaftsrecht (IWB)* 2023, p. 266.
[79] No. 50 et seq. MoMA.
[80] No. 71 MoMA.

ISBN 978-1-61746-885-8

		Taxpayers should be updated about the progress of the proceedings by default.[82]	
Status of taxpayers	Applicant, but no status as party.	The MoMA recommends that taxpayers may participate more actively and assist with the process where the competent authorities agree that this would facilitate agreement in a particular case.[84]	
Reaching an agreement	How many mutual agreement(s) are required in a multilateral MAP and is the implementation process different?	Only where a treaty contains the equivalent of Article 25(2), second sentence, is there an obligation for jurisdictions to implement the mutual agreement(s) reached in a MAP case, irrespective of domestic time limits. Therefore, this is clearly valid only for the Bilateral Approach. The MoMA encourages jurisdictions using the Multilateral Approach to extend the application of Article 25(2) sentence 2 to such multilateral MAP requests as well.[85]	In application of the Multilateral Approach, competent authorities are likely to only find one agreement; in application of the Bilateral Approach competent authorities are likely to align on bilateral agreements first and in the further course also on one simple multilateral agreement among all the competent authorities to ensure that all the bilateral agreements are coordinated prior to the finalization of the bilateral agreements[86].
Arbitration	Access to Arbitration questionable if at least one bilateral negotiation ends without a settlement (Bilateral Approach) or no settlement (Multilateral Approach).[87] Questionable if access to Arbitration requires arbitration clauses in one or more involved income tax treaties.	No access if one treaty lacks access to arbitration. According to the MoMA, the scope of arbitration is given if a mandatory arbitration clause is integrated in all involved MAP clauses; in the case of doubt or absence of arbitration clauses, it is recommended to implement an arbitration process through mutual agreement.[88]	If necessary, further alignment of procedural questions between the arbitration clauses of the different income tax treaties necessary, i.e., the settlement period of the MAP stage.[89]
Relationship with available domestic remedies	Suspension of proceedings required?	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 the Manual may be considered	

[81] No. 79 MoMA.
[82] No. 106 MoMA.
[84] Nos. 105 et seq. MoMA.
[85] No. 95 MoMA.
[86] No. 87 MoMA.
[87] No. 100 MoMA.
[88] OECD, Commentary to Art. 25 of the OECD Model Treaty, no. 69. *See* also no. 102 MoMA.
[89] No. 104 MoMA.

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		extended to the extent of the pause as well.[90] 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.	
Timeline	Which timeframes have to be considered in multilateral cases?	The MoMA identifies uniform time frames for the procedural steps of the multilateral MAP. The recommended timeline can be summarized as follows: • Once a multilateral MAP request is received by a competent authority, it should promptly notify the taxpayer that the request has been received. Notification of other involved competent authorities of a request for the initiation of a multilateral MAP shall be done within four weeks. • Approval of a "complete MAP request" within two months of receipt.[91] • Once the MAP request is accepted, the competent authority receiving the request must determine whether the objection raised by the taxpayer in the request is justified. This decision should ideally be issued no later than three months from the receipt of a complete request.[92] • The MoMA recommends exchanging position papers within six months upon receipt of the request; two weeks before a meeting at the latest. In Multilateral Approach cases, the first position paper should generally be issued by the jurisdiction that made the primary adjustment or the action	

[90] No. 93 MoMA.

ISBN 978-1-61746-885-8

		that resulted in taxation not in accordance with the treaty in question;[93] in Bilateral Approach cases, position papers shall be exchanged bilaterally among each bilateral group of parties as in any other bilateral MAP or APA case.[94] • Settlement within 36 months at the maximum, ideally within 24 months, upon receipt of the request.[95] Early submission of the draft mutual agreement to the taxpayer in a rather abstract description;[96] prompt notification of taxpayers. Taxpayer(s) are generally required to accept the tentative agreement(s) in full and are not allowed to accept them partially unless this is explicitly agreed as an option by all competent authorities;[97] rejection is possible as well.[98]	

[91] No. 58 MoMA.
[92] No. 59 et seq. MoMA.
[93] No. 75 MoMA.
[94] No. 76 MoMA.
[95] No. 82 MoMA.
[96] No. 78 MoMA.
[97] No. 88 MoMA.
[98] No. 89 MoMA.

ISBN 978-1-61746-885-8

B. The MAP Process

The role of multinational firms in world trade has increased dramatically; by 2020 in Germany 61% of companies with at least 50 or more employees were integrated into global value chains.[99] Today, about 70% of worldwide trading volume derives from intra-group trade and this is expected to grow further with the increased globalization of the economy.[100] This has led many countries, including Germany, to introduce their own transfer pricing rules.[101] While these rules generally follow the arm's length principle in Article 9 of the OECD Model Tax Treaty, they are often inconsistent and subject to change. The growth in volume of related-party trade and the lack of consistency in transfer pricing rules has led to an increased focus on transfer pricing in tax audits, an increased risk of transfer pricing disputes, and a higher incidence of double taxation among multinational enterprises ("MNEs"). MAPs, arbitration procedures, and APAs represent three international approaches to solving these transfer pricing disputes.

The selection of the appropriate procedure must be made on a case-by-case basis. A MAP provides dispute resolution for the specific case under review only. There is no guarantee that using a MAP will eliminate double taxation or that the case will be resolved within a reasonable period of time, but if a MAP is combined with a mandatory arbitration procedure,[102] the elimination of double taxation is guaranteed. APAs are also viewed as an efficient *ex ante* tool for resolving transfer pricing disputes. However, in recent years, APA proceedings involving the German authorities have lasted between three and four and a half years.

The following section provides an overview of the structure and process of a MAP in Germany. Arbitration procedures are discussed in III.C., below. The APA process is discussed in IV., below.

Article 25 of the OECD Model Tax Treaty, the legal basis for the MAP process, provides for a four-step process, which is illustrated in the table below and subsequently discussed at length.

[99] Cf. German Federal Statistical Office (Statistisches Bundesamt), available at https://www.destatis.de/DE/Presse/Pressemitteilungen/2022/11/PD22_498_52931.html.

[100] Baumhoff/Ditz, in: Wassermeyer/Baumhoff/Ditz, Verrechnungspreise International Verbundener Unternehmen, 2nd ed. 2022, no. 1.1.; Baumhoff/Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 4.1.

[101] *See* §90(3) FCG and §162(3) FCG. The Federal Ministry of Justice provides an English translation of the Fiscal Code of Germany as of December 3, 2015, available at http://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p1234.

[102] The arbitration procedure can either be required by an income tax treaty, the EU Arbitration Convention, or the EU-DBA-SBG.

1. MAP Application	2. Approval of a MAP Application	3. MAP Negotiations	4. Implementation of a MAP
• Taxpayer is subject to an assessment contrary to a tax treaty; • A MAP application is filed with the local tax office or BZSt within three years from notification of action.	Competent Authority approves the MAP if the following conditions are fulfilled: • applicant is covered by a tax treaty; • application is filed on time; and • case involves taxation inconsistent with treaty.	• MAP negotiations involve two governments and taxpayer plays only a passive role.	• Mutual agreement is fixed in writing by final exchange of position papers. • Taxpayer is informed of results and may agree with the terms of the solution. • If taxpayer agrees and waives appeal, agreed terms will result in a revised tax assessment.
See III.B.1.a., below.	*See* III.B.1.b., below.	*See* III.B.1.c., below.	*See* III.B.1.d., below.

1. Income Tax Treaties

a. MAP Application

Under Article 25 of the OECD Model Tax Treaty, a taxpayer subject to an assessment contrary to the terms of an income tax treaty can apply for a MAP. In Germany, the application can be filed if the taxation contrary to the tax treaty is "imminent," which is the case after a tax audit has been completed and the taxpayer receives a tax audit report. There are no legislative or administrative *de minimis* dispute value in order to file a request for a MAP in Germany.

In 2017, the OECD approved the updated Model Tax Convention[103] that allows taxpayers to present their case to the competent authority of either contracting state.[104] Germany generally follows the OECD approach and the latest amendments in its treaty policy.

As German income tax treaties are based on the OECD Model Tax Treaty, most of these treaties have adopted a time frame of three years for a taxpayer to present its case to the relevant competent authority, which starts from the date of notification of the action resulting in taxation that is not in accordance with the treaty. Germany extends the time frame to four years under the Germany-United States income tax treaty and limits the time frame to two years under the income tax

[103] Approved by the OECD Council on November 21, 2017, and published on December 18, 2017.

[104] 2017 Update to the OECD Model Tax Treaty, available at http://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf.

ISBN 978-1-61746-885-8

treaties with Belgium, Canada, Indonesia, Italy, Pakistan, Portugal, and Venezuela.[105] As soon as the MLI is applicable for German treaties, Art. 16 (1)(2) of the MLI applies to the treaties with the Czech Republic, Greece, and Slovakia and implements the three-year time frame called for in the MLI as well.[106] All old treaties did not contain any time limit. This also applies later for Italy as soon as the Italian implementation process is finalized and an additional application decree enters into force.[107] *See* III.A.2, above.

The mutual agreement procedure requires a request from the taxable person as applicant; a representation by an authorized representative is admissible.[108] The application may also be filed by a liable debtor insofar as a notice of liability has been issued to him or her.[109] This request must be submitted or recorded in writing and must clearly state the legal basis for the dispute resolution proceedings the request is based on.[110]

MAP applications must be submitted to the competent authority of the state of residence. As previously stated, the BZSt is the competent authority in Germany.[111] This provision reflects the fact that Germany has made the Art. 16 (5)(a) of the MLI reservation to Art. 16(1)(1) of the MLI MLI. This is in relation to presentations to all competent authorities of the contracting states. Consequently, presentations of cases still can only be submitted to the taxpayer's state of residence.[112] However, the BZSt, if indicated, is obliged to conduct bilateral consultations if it considers the objection of the taxpayer to be unjustified. Previously in Germany, applications were primarily to be filed with the taxpayer's local tax office (*Finanzamt*), which would in turn forward the application to the BZSt, together with its opinion. Alternatively, applications could be filed directly with the BZSt, which had to subsequently contact the local tax office and ask for its opinion on the case.[113] In practice, most applications were directly addressed to the BZSt, which negotiated with the other competent authority and decided the case. Meanwhile, the Ministry of Finance's latest circular seems to provide for applications regularly to the BZSt as the competent authority and rather in exceptional cases to the local tax office.[114] The latter can be the case if the taxpayer is not only requesting the initiation of a MAP but also the amendment of a domestic tax assessment. Such request for amendment must be addressed directly to the local tax office as the BZSt is not entitled to do so.

If a matter relates to several people with residence in Germany and the matter can only be assessed uniformly for tax purposes (as is the case, for example, for tax groups and partnerships), a request should be made jointly by all persons concerned — ideally by a joint representative.[115] If several taxpayers are involved (e.g., a parent company and a subsidiary), the application should be submitted in all the countries of residence of all the taxpayers concerned, and the applicant should ensure that the competent authorities involved receive the same information (even if the competent authorities of the countries concerned impose different requirement for requests).[116] In the case of several applicants, reference must be made to the multiple applicants in the application.[117]

It should be emphasized that applications generally have to be submitted in German as the official language; this is only not the case if the BZSt has approved the request to be made in a foreign language.[118] Any applications that are submitted in a language other than German without the BZSt's prior consent cannot be treated as on time, according to the Ministry of Finance's opinion.[119] In such cases, only the subsequent declaration of approval is therefore considered to meet the deadline.

In principle, applicants have a right to choose the preferable legal basis for a MAP.[120] Therefore, they are asked to specify their choice, which in this case would be the respective bilateral income tax treaty provision.[121] If the applicant requests the initiation of the MAP simultaneously on two or more legal bases, the BZSt is obliged to request the applicant to make a specific choice; i.e., in the event of a lack of feedback, the BZSt will interpret the application in the favor of the applicant and make the respective decision.[122] If the applicant addresses requests to the BZSt one after the other, the submission of the application according to the originally selected legal basis generally precludes applications based on other legal bases; i.e., with regard to MAP provisions of income tax treaties, this applies only in relation to the EU Arbitration Convention, as a request based on the EU-DBA-SBG precludes requests based on other legal bases (in cases of simultaneous requests as well as subsequent requests).[123]

Requests for the initiation of mutual agreement procedures must substantiate the existence or threat of taxation in violation of a convention.[124]

[105] Worksheet 32 ("Time Limits Under German Treaties for Requesting Competent Authority Relief (from Notification of Action")).

[106] *See* section 4 no. 3, section 6 no. 3 and section 10 no. 8 MLI-AnwG.

[107] Decree to the MLI of November 24, 2020, to Implement Tax Treaty Related Measures to Prevent BEPS (*Gesetz zu dem Mehrseitigen Übereinkommen vom 24. November 2016 zur Umsetzung steuerabkommensbezogener Maßnahmen zur Verhinderung der Gewinnverkürzung und Gewinnverlagerung)*, Federal Law Gazette (BGBl.) II 2020, 946.

[108] Ministry of Finance, Circular of February 21, 2024, no. 38.

[109] *Id.,* nos. 40 et seq.

[110] *Id.,* no. 38.

[111] This responsibility is generally delegated from the Ministry of Finance, which still reserves the right to assist the BZSt or to conduct a mutual agreement procedure itself in individual cases. *Id.,* no. 34, 49.

[112] *Id.,* no. 45. If the residence is disputed, the application can be filed in any of the possible residence states. In cases of discrimination, the application can usually also be filed with the competent authority of the state of which the applicant is a national.

[113] See regarding the old practice Ministry of Finance, Circular of October 9, IV B 2 S 1304/17/10001, Federal Tax Gazette (BStBl.) I 2018, p. 1122 (Ministry of Finance, Circular of October 9, 2018), no. 2.1.4 (replaced by Ministry of Finance, Circular of February 21, 2024).

[114] Ministry of Finance, Circular of February 21, 2024, nos. 34, 37 et seq., 45 and 90.

[115] *Id.,* no. 42.

[116] *Id.,* no. 46.

[117] For this purpose, the BZSt should receive a copy of the application to the competent authority of the other state. *Id.,* no. 47.

[118] *Id.,* nos. 60 et seq. Preferably together with a translation of the application into a common working language.

[119] *Id.,* no. 62.

[120] *Id.,* no. 9.

[121] *Id.,* nos. 38, 102, 114 and 154.

[122] *Id.,* no. 10.

[123] *Id.,* nos. 9, 11.

[124] *Id.,* nos. 52, 103.

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MAP applications based on income tax treaties should furthermore include inter alia the following information:[125]

- name, address (registered office), tax number, and local tax office of the applicant (and, as far as relevant, also the foreign competent tax authority);
- explanation of the eligibility to apply for a MAP;
- detailed information on the facts and circumstances of the case;
- details of the tax period affected by the application;
- copies of the tax assessment, the tax audit report, or comparable documents that led to the alleged double taxation (e.g., contracts, applications for refunds/reductions of foreign tax deducted at source) and other significant documents (even if the local tax office has already disposed of the aforementioned documents);
- information on reimbursement requests made abroad and, if available, the response of the foreign state;
- details of any out-of-court appeals or litigation, and any judgments affecting the case in Germany or abroad, and information as to whether and, if applicable, the amount for which the suspension of execution has been applied for;
- a statement by the party covered by the tax treaty of the extent to which, in its own opinion, German or foreign taxation does not comply with the tax treaty.

With the latest update to a circular from the Ministry of Finance for the conduct of mutual agreement and arbitration procedures, the on-time receipt of all information and documents to be submitted is explicitly stated as a condition for the compliance with the (in principle) three-year application deadline for MAP requests.[126] Insofar the circular grants the respective discretionary powers to the BZSt the request may be rejected or admitted upon discretion of the BZSt. However, if the BZSt addresses requests for additional information to the applicants within a period of three months,[127] it is still not entirely clear whether the original receipt of the request from the applicant by the BZSt, the receipt of such an information request from the BZSt by the applicant, or the receipt of the requested information by the BZSt determines whether the deadline is met.[128]

As far as the relationship between international dispute resolution proceedings and national appeal proceedings is concerned, the German Federal Ministry clarifies in its circular that both proceedings can generally be conducted simultaneously.[129] It does not preclude the taxpayer's right to apply for a MAP if a legal remedy is pending under German or foreign tax law or if domestic remedies have not been exhausted yet.[130] But, to keep the tax assessment open, and to allow the taxpayer to preserve any domestic remedies, a taxpayer planning to pursue a MAP should still file an administrative appeal within 30 days from the receipt of the tax assessment notification with its local tax office.

The BZSt forwards requests for a MAP to the foreign competent authority only for information or informs only of the receipt of the request.[131] The BZSt confirms the receipt of the request to the taxpayer and forwards the application without delay to the responsible federal/state tax authority with a request for a statement.[132]

b. Approval of MAP Applications

Germany will approve the MAP application and initiate the MAP under the following conditions: (i) the application is filed by a taxpayer that is covered by an income tax treaty, (ii) the application is filed on time to the BZSt as competent authority, and (iii) the case relates to taxation that is inconsistent with a treaty and (iv) cannot be resolved through domestic measures.[133]

Prior to the approval or the rejection of the application, according to Art. 25(2)(1) of the MLI, the competent authority having received the application is required to investigate whether the beforementioned requirements in (i) to (iii) are met, as well as the taxpayer's issue can be resolved unilaterally by the German tax authorities (so-called "Abhilfe"). Unilateral relief is appropriate if the action of the other contracting state may be justified, and the case can be resolved by means of such relief. Neither a pending appeal nor failure to exhaust legal redress under German law present an obstacle to proceeding with a MAP. German treaties generally comply with these requirements. With the applicability of the MLI as of January 1, 2025, Art. 16(2) sentence 1 of the MLI amends the old German treaty with Greece respectively.[134] In case of an envisaged rejection, Germany is obliged to conduct a consultation proceeding prior to the issuance of a written denial statement based on Art. 16(5)(a) of the MLI. Therefore, clauses corresponding to Art. 25(2)(1) OECD Model Tax Treaty need to be adapted accordingly. As this duty is not mentioned in the MLI-AnwG, the synopsis still to be prepared by the German Ministry of Finance should hopefully contain the necessary addition to Art. 25(2)(1) OECD Model Tax Treaty. This implementation requirement applies to all German treaties covered by the MLI-AnwG. Any other treaties must be amended on a bilateral basis. In the case of Austria and Luxembourg, this duty is not yet implemented in the latest protocols.

[125] The required level of information to be submitted is initially outlined in general terms by the Ministry of Finance in no. 57 and is subsequently specified for the provisions for the individual dispute resolution procedures (nos. 105, 120, 161; for income tax treaties no. 105 completely refers to no. 57). *S.* Ministry of Finance Circular of February 21, 2024. Additional information about disclosures may also be accessed in the BZSt's information sheets online at https://www.bzst.de/SharedDocs/Downloads/DE/Merkblaetter/uebersicht_erforderliche_unterlagen_unternehmer.pdf?__blob=publicationFile&v=2.

[126] *Id.*, nos. 53, 57 et seq.

[127] *Id.*, no. 106.

[128] *Id.*, nos. 106, 120 et seq. 163.

[129] *Id.*, nos. 12 et seq. With this view, the Ministry of Finance seems to deviate from international practice that always requires the suspension of one proceeding. *See* Art. 25 OECD Model Tax Treaty, no. 76 p. 3 a). However, the extent to which the implementation of mutual agreements or arbitration solutions can lead to an overruling of the legal force of national judgments is not clarified in the circular. Instead, only general reference is made to the "MAP Profiles" of the OECD countries (https://www.oecd.org/tax/dispute/country-map-profiles.htm).

[130] Ministry of Finance Circular of February 21, 2024, no. 12.

[131] *Id.*, no. 50.

[132] *Id.*, nos. 50 et seq.

[133] *Id.*, no. 65.

[134] *See* §6 no. 3 MLI-AnwG.

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If the application to initiate a MAP is rejected, the BZSt immediately informs the applicant, the foreign competent authority, and the competent state tax authority of this decision. For the applicant, this decision constitutes an administrative act which can be challenged domestically (usually first by an appeal to the BZSt within the administrative appeals procedure and if necessary, by legal remedy to the local tax court of Cologne).[135] Germany may reject a request for a MAP if the taxpayer does not provide sufficient information or if the German tax authorities suspect tax evasion. In cases where the tax treaty concerned does not specify a time frame for filing a MAP application, German authorities will not approve an application filed more than four years after the notification of the relevant tax action was issued.[136]

In the past, the German tax authorities typically required taxpayers (and related parties in foreign jurisdictions) to forgo the right to initiate a MAP in certain circumstances (e.g., during tax audit settlements or if unilateral APAs were in place).[137] However, the EU JTPF criticized this practice as it excluded non-German tax authorities from the final resolution of a case in which they had an interest.[138] Following the EU JTPF's recommendation, the German Ministry of Finance modified its circular regarding this topic respectively as follows: Since the revision of the respective circular on April 5, 2017, the German Ministry of Finance acknowledges the general right of taxpayers to MAP and arbitration proceedings.[139] If the German tax authorities and the taxpayer have reached a unilateral agreement (e.g., a "*tatsächliche Verständigung*") on the facts underlying the tax assessment, the BZSt is bound by the facts underlying the unilateral agreement in subsequent mutual agreement or arbitration proceedings.[140] Unlike before, the German Ministry of Finance no longer comments on the admissibility of waiving the application for mutual agreement and/or arbitration proceedings in the circular. In the former version of the Circular of 2018, such a waiver was limited only to arbitration proceedings; originally, the waiver concerned MAPs.[141]

Comment: Nevertheless, it should still be considered appropriate to require a taxpayer to forgo its right to a MAP or arbitration proceedings if the taxpayer applies for a unilateral agreement or resolution.[142] The other view is not convincing: If the taxpayer, in the context of its disposition as a party to the dispute, can dispose of its rights and possibilities of legal protection under the domestic procedural law,[143] it should not be able to effectively dispose of respective rights under international agreements (in the sense that they are practically "imposed" on it).

In the first stage of the process, the BZSt is obliged to check whether it has sufficient information to deal with the case and confirm that the case falls within the relevant MAP provisions of the applicable tax treaty. The BZSt will also check the criteria for an admissible request if the application was addressed to the other competent authority.[144]

- Within this first stage of the process, the BZSt will also forward the application to the other competent authority, or at least inform it about receiving the application, and will confirm receipt of the application to the applicant.[145] The application will be forwarded to the respective state tax authority (*Landesfinanzbehörde*) without delay. This goes hand in hand with the BZSt's request to comment on the case (admissibility of the application as well as of the existence of a taxation not in accordance with the income tax treaty) and provide any additional information that the responsible state tax office may deem appropriate.[146]

- If additional documents or information from the applicant are necessary, the BZSt is obliged to request them within three months after the receipt of the application.[147] The period for consultations with the other competent authorities (i.e., the two-year period for the bilateral consultations before arbitration proceedings may be requested) is suspended until receipt of the additional information by the BZSt. The BZSt is entitled to request further information outside the time frame of three months, but this would not affect the two-year period at which arbitration might be requested.[148]

- At this juncture, the BZSt may also decide to reject the application if the taxpayer has not provided enough information or there is suspicion of tax evasion. With the application of the MLI relating to the nine treaties effected by the MLI-AnwG, Germany is obliged to conduct bilateral consultations about the envisaged rejection with the other contracting state (as a result of the reservation for accepting only applications for an MAP to the competent authority at domicile).

From 717 closed cases overall in 2022,[149] the BZSt denied MAP access in 26 cases and held that objections were not justified in 41 cases. In further 68 cases, the German tax authorities granted unilateral relief. In contrast, 442 cases were fully

[135] Ministry of Finance Circular of February 21, 2024, no. 67.

[136] *Id.,* no. 104.

[137] Federal Ministry of Finance, Circular of July 13, IV B 6-S 1300-340/06, Federal Tax Gazette (BStBl.) I 2006, p. 461 (Ministry of Finance, Circular of July 13, 2006), no. 5 (replaced by Ministry of Finance, Circular of October 9, 2018) (also replaced by Ministry of Finance, Circular of February 21, 2024); Flüchter, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 111 et seq. For a detailed discussion, *see* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.183 et seq.

[138] OECD Manual on Effective Mutual Agreement Procedures, no. 4.3; EU JTPF Final Report on Improving the Functioning of the Arbitration, March 12, 2015, no. 2.4 para. 14.

[139] Ministry of Finance, Circular of February 21, 2024, no. 5.

[140] *Id.,* no. 33. This was already reflected in the prior version of the Circular (s. Ministry of Finance Circular of October 9, 2018, no. 5) (replaced by Ministry of Finance, Circular of February 21, 2024). For a detailed discussion, *see* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.183–13.185.

[141] Ministry of Finance, Circular of October 9, 2018, no. 5 and Ministry of Finance, Circular of July 13, 2006, no. 5 (all replaced by Ministry of Finance, Circular of February 21, 2024).

[142] For further reflections on the new situation *s.* Liebchen/Strotkemper, *Internationales Steuerrecht* 2022, p. 93 (97).

[143] §354 Fiscal Code of Germany (*Abgabenordnung*, hereafter: "FCG" or "AO"), or §50 of the German Tax Court Code (*Finanzgerichtsordnung* [FGO], hereafter "GTCC").

[144] Ministry of Finance, Circular of February 21, 2024, no. 69.

[145] *Id.,* no. 50.

[146] *Id.,* nos. 50 et seq.

[147] *Id.,* no. 106.

[148] But such requests do not affect any time limits. *Id.,* no. 107.

[149] OECD statistics for Germany 2022, available at https://www.oecd.org/content/dam/oecd/en/topics/policy-issue-focus/map-statistics/map-statistics-germany.pdf.

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resolved, and four cases partially resolved by mutual agreement eliminating the taxation not in accordance with the tax treaty.

If the application is based on income tax treaties, there are generally no explicit legal remedies available to a taxpayer if a MAP request is denied by the German tax authorities.[150] The taxpayer may, however, file a lawsuit in a local tax court (although the local tax court of Cologne is the only court with jurisdiction for claims against the BZSt), which will then evaluate whether the tax authorities' administrative discretion was properly exercised. The success of the taxpayer's lawsuit will depend on the provisions in the applicable tax treaty. If admissible, thereupon the taxpayer may also appeal the judgment of the local tax court of Cologne before the Federal Fiscal Court in Munich. Five separate decisions made by the local tax court of Cologne between 2016 and 2022 and one decision by the Federal Fiscal Court in 2019, discussed below, illustrate the ways in which applicable treaty provisions may affect the result of a claim:[151]

- In the first case, the local tax court of Cologne upheld the BZSt's refusal to approve a MAP application filed more than four years after the first notification of an assessment contrary to the applicable tax treaty. The court relied on the text of Art. 25(2) of the Germany-France income tax treaty (prior to its amendment by the 2015 Protocol), which granted the competent authority's discretion to resolve issues of double taxation through an MAP process, without expressly requiring that the double taxation had to be contrary to the provisions of the treaty. The court reasoned that the refusal was justified so long as such refusal was not solely based on failure to file within the proper time frame.[152]

- In another case involving refusal to approve a 2010 MAP application derived from a 2003 notice of assessment, the court also upheld the refusal. The case concerned Art. 24(1) of the Germany-Spain income tax treaty, which provides for a three-year time frame for presenting a MAP application.[153]

- Another case concerned the version of the Germany-Switzerland income tax treaty which was in effect in 2005,[154] which neither specified a filing deadline for a MAP application nor granted the competent authorities discretion to refuse such an application. Here, the court ruled that the denial of the application was not justified because neither the three-year period specified in the OECD Model Tax Treaty, nor the four-year period specified in the Ministry of Finance Circular of July 13, 2006,[155] nor the general four-year assessment period laid down in §169(1) sentence 2 FCG, afforded any legal basis for refusing to approve the application.[156] Contrary to the prevailing view at the time, the local tax court of Cologne did not consider the treaty language to the effect that the competent authorities should "endeavor to resolve" an issue of taxation not in accordance with the treaty by mutual agreement gave discretion to the competent authorities as to whether or not to accept a MAP application.[157] As the relevant wording in the former version of the Germany-Switzerland income tax treaty exactly follows the wording of the OECD Model Tax Treaty, this decision may be relevant to all other income tax treaties that use similar language.

- In a further case, the local tax court of Cologne[158] also upheld the BZSt's denial of a MAP application based on the EU Arbitration Convention. In the court's opinion, the claim was not disposing of legal protection due to an already existing bilateral agreement based on Art. 25 of the Germany-France income tax treaty. This bilateral agreement had not yet been implemented in Germany pursuant to §175a FCG, because the taxpayer had not agreed to the MAP and had not waived appeals. The dismissal of the action was thus based on the reasoning that, a successful agreement had been reached under the bilateral treaty, there was no failed mutual agreement procedure and no need to initiate further proceedings to achieve a mutual agreement were necessary. Because of this reasoning, the local tax court of Cologne could have left open the question as to whether it is permissible to conduct several MAPs simultaneously based on different legal bases.

- Most recently, the tax court of Cologne upheld a rejection of the BZSt to initiate a MAP at the request of the taxpayer — who was domiciled in Belgium in the fiscal years concerning the dispute — which had not been filed with the Belgian Competent Authority in its capacity as recipient competent authority.[159]

- A decision by the Federal Tax Court in 2019[160] contributed to legal certainty in two respects:

  - First, the decision outlined several conditions with respect to the admissibility of lawsuits against the rejection of a MAP application made by the BZSt. (*i*) Not only taxpayers domiciled in Germany whose applica-

[150] The same applies to requests based on the EU Arbitration Convention. In contrast, the EU-DBA-SBG entitles to file a legal remedy. *See* III.B.3., below, for more details.

[151] For a detailed discussion of the court decisions Bickenbach, *Internationale Steuer-Rundschau* 2016, p. 305; Flüchter, *Internationale Steuer-Rundschau* 2016, p. 311.

[152] Local tax court of Cologne, April 14, 2016, 2 K 2402/13. The text of Art. 25(2) as amended by the 2015 Protocol now expressly provides that the MAP can only deal with taxation "that is not in accordance with the treaty" and that an MAP case must be presented within three years from the first notification of the action resulting in such taxation (Art. 25(1)).

[153] Local tax court of Cologne, April 14, 2016, 2 K 2809/13. Although Art. 24(1) of the 2011 Germany-Spain income tax treaty provides for the three-year time frame (the previous Germany-Spain treaty contained no such limitation), the treaty did not enter into effect until January 1, 2013 (i.e., after the 2010 refusal to approval the MAP application). However, Art. 30(4) of that treaty provides that Art. 24 is to have retroactive effect with respect to any MAP claim existing before that date (i.e., it applied to the case at issue here).

[154] The treaty has since been updated and includes the three-year time frame for applications.

[155] Ministry of Finance Circular of July 13, 2006, no. 2.2.3, replaced by Ministry of Finance, Circular of February 21, 2024, no. 104 et seq (also replaced by Ministry of Finance, Circular of February 21, 2024).

[156] Local tax court of Cologne, April 14, 2016, 2 K 1205/15.

[157] Bickenbach, *Internationale Steuer-Rundschau* 2016, p. 305 (310).

[158] Local tax court of Cologne, July 4, 2017, 2 K 2679/17.

[159] Cf. Local tax court of Cologne, February 16, 2022, 2 K 2875/19, EFG 2022, p. 914. Cf. also Haverkamp/Meinert, *Deutsches Steuerrecht kurzgefasst (DStR K)* 2022, p. 239.

[160] Federal Fiscal Court (*Bundesfinanzhof*), September 25, 2019, I R 82/17, Federal Tax Gazette II (BStBl. II), p. 229.

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tions have been addressed to the BZSt, but also taxpayers domiciled abroad whose applications have been addressed to the other competent authority are granted authority to appeal. (*ii*) The legal remedy is not aimed at stopping an administrative action with an annulment claim (*Anfechtungsklage*), but at securing a pure action by the BZSt (initiation of a MAP or, in this case, consent thereto). (*iii*) Due to the mandatory character of a MAP and arbitration clauses, taxpayers dispose of a subjective-public right to the initiation of a MAP stage by the competent authorities.[161]

o Second, the Federal Tax Court approved the decision of the local tax court of Cologne that it was not discretionary to reject the initiation of a MAP, as it had been finally determined in a judicial or administrative proceeding that an applicant was engaged in criminal tax conduct with reference to the disputed double taxation.[162]

c. MAP Negotiations

If the cases cannot be resolved unilaterally, the BZSt will officially initiate the MAP and — if not yet done — forward the application for the initiation of a MAP to the competent authority of the other contracting state that a MAP application has been submitted. Usually, this is done within one month of the submission of the application. The MAP proceeding usually begins by the BZSt sending a position paper to the foreign competent authority. The approval of the initiation of a MAP application does not constitute an administrative act toward the taxpayer and is consequently not legally contestable. The position paper commenting on the case will be prepared by the BZSt — usually within six months of receipt of an MAP request. As a next step, the other competent authority prepares a counter-position paper.

Upon the exchange of the position papers, the competent authorities of the contracting states will enter negotiations to resolve the issue. These negotiations may be conducted purely by written procedure, but the BZSt also conducts periodic face-to-face meetings with a variety of competent authorities in order to negotiate all current or new cases. The BZSt informs the involved state tax authority about the content and progress of the procedure.[163] Based on Art. 25(2) sentence 1 of the OECD Model Tax Convention and corresponding treaties, the competent authorities are required to endeavor to resolve the case by mutual agreement with the other competent authority. Again, German treaties generally meet this requirement. Only the old treaty with Greece will be amended according to Art. 16(2) of the MLI with the upcoming application of the MLI.[164]

The taxpayer plays only a passive role in bilateral MAP negotiations involving the competent authorities.[165] If additional information is required, the taxpayer must provide the requested information in a timely manner. The taxpayer may withdraw a MAP application and terminate the proceedings at any stage in the MAP process, in which case, after the application is withdrawn, the taxpayer may choose to litigate the case under German domestic tax rules. The taxpayer must not comment on the question as to whether to withdraw unilateral legal remedies until he or she has been notified of a proposal for mutual agreement.[166]

In the case of a settlement, the competent authorities generally conclude the agreement in writing.[167] The competent authorities are not obliged to agree on a settlement. If the income tax treaty does not contain an arbitration clause, the international dispute settlement proceeding is to be terminated.

d. Implementation of a MAP

If the competent authorities of the two contracting states have reached a mutual agreement, Art. 25(2) sentence 2 of the OECD Model Tax Convention as well as most German treaties oblige the competent authorities to implement the mutual agreement irrespective of domestic assessment, validity or implementation periods in national law. Art. 16(2) sentence 2 of the MLI corresponds to these standards. With the upcoming application of the MLI, Art. 16(2) sentence 2 of the MLI amends the old treaties with the Czech Republic, Greece and Slovakia (and Italy at a later stage) correspondingly.[168]

It should be acknowledged that the mutual agreement eliminates taxation not in accordance with the tax treaty, in most international double taxation scenarios. But, the mutual agreement regularly cannot also prevent secondary adjustments that are prescribed by domestic law which may provoke another double taxation.[169]

Practically, the achieved mutual agreement is memorialized in writing by a final exchange of position papers.[170] The taxpayer will be informed of MAP results, which are subject to approval of the taxpayer for the implementation in national law according to §175a FCG.[171] Consent must be declared to the BZSt in writing. If the taxpayer agrees and waives its right to appeals and objections in relation to the notice implementing the mutual agreement of the competent authorities, as well as withdraws any appeals filed and still pending (domestic and foreign) insofar as they relate to the subject matter of the dispute resolution proceedings and are not otherwise settled, the agreed solution will be implemented by the local tax office by way of a revised tax assessment.[172] The BZSt must set a reasonable deadline (of at least 60 days) for the applicant or the person(s) concerned to submit the consent to the BZSt and related

[161] For details, *see* Hendricks/Strotkemper, *Unternehmensbesteuerung* 2020, p. 310 et seq.

[162] The decision in this case did not relate to a rejection of an application for the initiation of a MAP based on an income tax treaty, but under the EU Arbitration Convention, Art. 8(1) of which permits rejection of a MAP request if the double taxation results from fiscal fraud or tax evasion subject to penalties. The subject matter of the case may therefore result in different legal considerations for cases under income tax treaties.

[163] Ministry of Finance, Circular of February 21, 2024, no. 74.

[164] *See* §6 no. 3 of the MLI-AnwG.

[165] Ministry of Finance, Circular of February 21, 2024, nos. 80 et seq.

[166] *Id.,* no. 82.

[167] *Id.,* no. 83.

[168] *See* §4 no. 3 for the Czech Republic, §6 no. 3 for Greece, §10 no. 8 for Slovakia.

[169] *See* Local tax court of Munich, May 22, 2023, 7 K 2545/19; *see* also Kempf/Hoffmann, *Internationales Steuerrecht* 2024, 656.

[170] Ministry of Finance, Circular of February 21, 2024, no. 83.

[171] This is a pure information act and not to be considered as a contestable administrative act. *Id.,* no. 90.

[172] *Id.,* nos. 84 et seq., 87.

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declarations to the respective recipients (local tax office and/or tax court).[173] If the applicant or the person(s) concerned does not submit their declarations within the set time limit, this may, depending on the circumstances of the individual case, result in the final non-implementation of the notification in Germany and abroad.[174]

The bilateral agreement cannot be implemented in German law by the local competent tax office before the required declarations of the taxpayer are submitted to the BZSt or other recipients.[175] The BZSt must inform the competent state tax authority as soon as the prerequisites for implementation are met and notifies it of the effective date of the mutual agreement. Section 175a FCG ensures the implementation of the result of a MAP or an arbitration procedure even if the statute of limitations has expired under domestic rules. If a taxpayer has filed a legal remedy while a MAP request is pending, the appeal is likely to be suspended by the local tax office — where appropriate, at the suggestion of the taxpayer — until the final MAP decision is announced. An unfavorable decision in the domestic proceedings does not affect a MAP request or vice versa. The following scenarios might occur:

- If an appeal has not been filed domestically, MAP decisions can still be implemented because the time frame for amending binding tax assessments does not expire until one year after the mutual agreement has become effective pursuant to §175a FCG. If the one-year period suspending the expiration of the period to amend the tax assessment in correspondence to the settlement is about to expire without such amendment, it is recommended that a request is filed to the local tax office demanding the tax authority to execute the amendment. By doing so, that taxpayer is granted an additional suspension of the expiration period until the tax authority makes a decision on the new request.[176]

- If a taxpayer has objected to a tax assessment under German domestic law and simultaneously applied for a MAP, the objection is likely to be suspended until the competent authority's final decision is announced. In these circumstances, the tax authorities usually also grant a request for suspension of the corresponding tax payment. If the taxpayer confirms the mutual agreement, the objection filed with the local tax office must be withdrawn consequently.

- If the taxpayer does not accept the MAP decision, the taxpayer can continue pursuing any pending domestic remedies. If an objection is unsuccessful at the domestic level of the administrative appeals procedure, the taxpayer may also file a claim with the Fiscal Court. If a taxpayer has filed an appeal while a MAP request is pending, the appeal will be suspended until the final MAP decision is announced. An unfavorable decision in the domestic proceedings does not affect the MAP request or vice versa.

[173] *Id.,* no. 86.
[174] *Id.,* no. 89.
[175] *Id.,* no. 91.
[176] *See* §171(3) of the FCG.

2. EU Arbitration Convention

a. Preliminary Proceedings

If the tax authority of one state intends to adjust a taxpayer's income in accordance with Art. 4 of the EU Arbitration Convention, as part of the preliminary proceedings of Art. 5 of the EU Arbitration Convention, they must inform the taxpayer as soon as possible about the planned adjustments so that all parties involved in the other contracting state may be informed as well. The related parties must be given adequate time to discuss the issue with their tax authorities to determine whether the parties can agree on a corresponding adjustment that will avoid double taxation in the other contracting state. The Ministry of Finance's new circular does not further comprise information on the preliminary proceedings according to Art. 5 EU Arbitration Convention, but the previous best practice may be checked beforehand and replaced version of the circular dated October 9, 2018.[177]

If the parties involved agree to the adjustments, there will be no need for a mutual agreement or arbitration proceedings, and the preliminary proceedings can be terminated successfully according to Art. 5 of the EU Arbitration Convention. The Ministry of Finance requires all involved competent authorities to agree to an adjustment, including the BZSt.[178] This deviation from the wording of Art. 5(3) of the EU Arbitration Convention suggests that the actual adjustment can represent a compromise between the related parties according to the German interpretation.[179]

b. MAP Application

If the parties involved do not reach an agreement about the planned adjustment according to Art. 5 of the EU Arbitration Convention, the taxpayer must file an application for the initiation of a MAP according to Art. 6 of the EU Arbitration Convention and must assert that the principles set forth in Art. 4 of the EU Arbitration Convention have not been observed (Art. 6(1) sentence 1 of the EU Arbitration Convention).[180] Access to a MAP in this case is limited to entities who are subject to adjustments of tax authorities relating to the allocation of intercompany prices in cross-border cases, or, under Art. 1(1) and Art. 4 no. 2 of the EU Arbitration Convention, with respect to cases concerning profit allocations between an enterprise and its permanent establishment in another contracting Member State. The EU Arbitration Convention considers a permanent establishment as an enterprise of that other contracting state for purposes of the EU Arbitration Convention, according to Art. 1(2) EU Arbitration Convention.[181] Consequently, the proceedings provided by Art. 6(1) of the EU Arbitration Convention are not open to any tax disputes relating to conflicts other than allocation conflicts (e.g., no access for the resolution

[177] Ministry of Finance, Circular of October 9, 2018, no. 10.1 (replaced by Ministry of Finance, Circular of February 21, 2024).
[178] *Id.,* no. 10.2.
[179] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.126; Krabbe, in: Wassermeyer, Art. 5 EU-SchÜ, no. 8.
[180] S. also *Id.,* no. 117.
[181] S. Ministry of Finance, Circular of February 21, 2024, no. 115.

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of other tax disputes of entities and no access at all for tax conflicts concerning individuals).

The application must be addressed to the competent authorities of all states of residence of the taxpayers concerned and explicitly refer to the EU Arbitration Convention as the legal basis for the demanded performance of a MAP.[182] In Germany, the BZSt is the competent authority for proceedings based on the EU Arbitration Convention as well, as well as under bilateral tax treaties. An application for a MAP under the EU Arbitration Convention can also be filed in a permanent establishment's state, provided that it concerns the permanent establishment of a company with its registered office in a Member State of the EU, since permanent establishments are considered to be legal entities for the purposes of the application of the EU Arbitration Convention (Art. 1(2) EU Arbitration Convention).[183]

The application must be filed within three years after notification of the first tax assessment or its equivalent that led to (economic) double taxation according to Art. 6(1) sentence 2 EU Arbitration Convention.[184] The application must be submitted in triplicate in order to avoid delays to the BZSt.[185] The information already outlined above for MAP applications based on income tax treaties must be disclosed in the application under the scope of the EU Arbitration Convention.[186] Additionally, the following information is required:[187]

- name, address (registered office), taxpayer ID, and local tax office (if relevant also foreign competent tax authority) of the other party or parties to the relevant transactions;
- detailed description of the relationship between the applicant company and the other parties to the relevant transactions;
- a statement by the requesting company as to how, in its opinion, the arm's length principle has not been observed;
- only in permanent establishment cases: breakdown of permanent establishment profits, including auxiliary and subsidiary calculations and designation of the country of domicile of the ultimate parent company (the internationally accepted concept of the "ultimate parent entity" can be used as a basis).

Moreover, the (revised) Code of Conduct by the former EU JTPF requires a confirmation by the company that it will respond as fully and as quickly as possible to any queries from a competent authority and provide the competent authorities with the necessary documentation.[188]

c. Approval of a MAP Application

Pursuant to Art. 6(2) of the EU Arbitration Convention, Germany will initiate a MAP with the competent authority of the other contracting state according to the application if:

(i) the application is filed by an entity affected by a profit adjustment based on Art. 1 and 4 of the EU Arbitration Convention,

(ii) the application is filed on time with the BZSt as competent authority,

(iii) the application sufficiently substantiates that the principles set forth in Art. 4 of the EU Arbitration Convention have not been observed, and

(iv) the competent German tax authorities are unable to reach a satisfactory solution.[189] The initiation will be performed no later than four months after the later of: *(i)* the date of the tax assessment notice by which the final decision on the income increase has been assessed or determined; or *(ii)* the date on which the company's application and any additional information eventually requested from the taxpayer have been received by the BZSt.[190] In the former alternative, a final decision on an income increase is not given before a decision of a court of last instance has become binding.[191] The applicant will be informed about the initiation of a MAP and the start date of the two-year period according to Art. 7(1) of the EU Arbitration Convention.[192]

Again, the BZSt may reject a request for a MAP due to a lack of information or when information is not transmitted within the maximum filing period of three years. Furthermore, Art. 8(1) EU Arbitration Convention provides flexibility in denying access to the Arbitration Convention if taxpayers are subject to serious penalties with final effect (e.g., for fiscal fraud or tax evasion).[193] In addition, Art. 8(2) of the EU Arbitration Convention legitimizes the suspended initiation of a MAP due to respective pending domestic procedures.

d. MAP Negotiations

The BZSt follows the revised Code of Conduct for the effective implementation of the EU Arbitration Convention with regard to the procedure for the adjustment of profits of associated enterprises, including the position papers to be prepared. Cases are resolved in a common working language or are carried out in a manner that has the same effect, as quickly as possible given the complexity of each case.[194] The deadlines specified therein are to be complied with. Such deadlines include the conclusion of a mutual agreement within two years or, in certain circumstances (e.g., imminent resolution of a case, par-

[182] *Id.*, no. 114.

[183] *Id.*, no. 115.

[184] In relation to the United Kingdom and Northern Ireland, this applies only to the extent that applications were submitted before January 1, 2021, as the transition phase of Brexit ended on December 31, 2020. S. *Id.*, no. 118.

[185] *Id.*, no. 116.

[186] *Id.*, no. 119.

[187] Additional information about disclosures may also be accessed from the BZSt's information sheets online at https://www.bzst.de/SharedDocs/Downloads/DE/Merkblaetter/uebersicht_erforderliche_unterlagen_unternehmer.pdf?__blob=publicationFile&v=2.

[188] *See* Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises 2009/C 322/01, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2009:322:TOC, point 5 a) (vii). *See also* Ministry of Finance, Circular of February 21, 2024, no. 120.

[189] *Id.*, no. 114.

[190] *Id.*, no. 124. S. also Revised Code of Conduct EU JTPF of December 30, 2009, no. 5 b).

[191] Ministry of Finance, Circular of February 21, 2024, no. 125.

[192] *Id.*, no. 126.

[193] *Id.*, no. 6. For a detailed discussion, *see* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.130–13.131.

[194] Revised Code of Conduct EU JTPF of December 30, 2009, no. 6.1. b).

ISBN 978-1-61746-885-8

ticularly complex transactions, or triangular constellations[195]), extension of this limit for one year at the most according to Art. 7(4) of the Arbitration Convention.[196] The two-year period is not likely to begin before pending domestic administrative or judicial proceedings have been terminated, with binding effect in the Contracting States being bound by the arm's length principle of Art. 4 of the EU Arbitration Convention.

Generally, the initiating competent authority submits a position paper, which includes: *(i)* a statement of the case by the applicant; *(ii)* the competent authority's assessment of the facts of the case (e.g., why it believes that double taxation exists or is likely to occur); and *(iii)* a proposal by the competent authority as to how the case could be resolved with a view to eliminating double taxation, together with a comprehensive explanation of the proposed solution. If necessary, appropriate means likely to achieve an agreement as quickly as possible, including face-to-face meetings, will be considered.[197] Face-to-face meetings will be organized on a regular basis, at least once a year.[198] The company requesting the mutual agreement procedure must be informed by the competent authority to which it has submitted the request of all significant developments concerning the proceeding; if necessary, the company will be asked to present its point of view to its competent authority.[199]

The federal and state tax authorities must, as far as possible, submit the opinions requested of them no later than one month before the expiry of the deadlines provided for in the Code of Conduct for the BZSt as the German competent authority.[200]

e. Implementation of a MAP

For details on the implementation of a MAP, *see* III.B.1.d., above, as they apply for MAPs under the EU Arbitration Convention, as well as for MAPs under bilateral tax treaties.

3. EU Directive on Tax Dispute Resolution Implemented as EU-DBA-SBG

a. MAP Application

The initial application procedure under EU-DBA-SBG, in particular, is different from the procedures already described above. The dispute resolution complaint ("*Streitbeilegungsbeschwerde*") must be filed within three years from the first notification of the taxpayer of the action that provoked or will provoke the issue in dispute.[201] The three-year time frame also applies if the taxpayer forgoes local legal remedies or if such local legal remedies are pending.[202] Furthermore, binding court decisions have no effect on the expiration of this time limit.[203]

Any complaint filed by a legitimate applicant must be based on a dispute according to §1(1) EU-DBA-SBG. Disputes in this sense may arise from the interpretation and application of treaties as well as conventions providing for the elimination of double taxation on income and, where applicable, on capital.

Complaints based on §4(1) of the EU-DBA-SBG should furthermore include the following information set out in §5 of the EU-DBA-SBG:[204]

- name, address, tax number, and any other information that is required for the identification of the applicant, such as the local tax office and for the identification of other persons concerned;
- Member States concerned by the complaint;
- taxable periods affected by the dispute;
- precise details of the relevant facts and circumstances of the case, with copies of all supporting documents and evidence. Including:
  - precise details of the structure of the relevant transactions and the relationships between the person concerned and the other parties involved in the relevant transactions, and if so, including all facts that have been disclosed in good faith in a mutually binding agreement between the applicant and the tax authorities;
  - detailed information with respect to the nature and timing of the actions of the tax authorities that have resulted or will result in a dispute, including details of the taxable income earned in the other Member State and the inclusion of same taxable income in the other Member State, and details of any taxes levied or to be levied on the income in the other Member State; and
  - the corresponding amounts in the currencies of the Member States concerned;
- reference to the applicable domestic tax law and international conventions or agreements; if more than one convention or agreement is applicable, also a statement indicating which convention or agreement is interpreted in relation to the relevant issue in dispute;
- a statement indicating the legal grounds on which a dispute exists;
- information on any domestic appeals lodged or legal proceedings filed by the applicant in relation to the issues in dispute, as well as of all court decisions relating to the dispute, with copies of all supporting documents;
- a statement by the applicant that he or she undertakes to fully and promptly comply with all reasonable requests made to competent authorities of the Member States concerned and to provide the competent authorities with all requested documents and evidence upon request;
- copies of the following documents if available:

[195] "Triangular constellations" refers to the involvement of more than two EU member states.

[196] Ministry of Finance, Circular of February 21, 2024, no. 129 and Revised Code of Conduct EU JTPF of December 30, 2009, no. 6.1. d).

[197] Ministry of Finance, Circular of February 21, 2024, nos. 6.1. c), 6.3. a), 6.4 a).

[198] *Id.*, no. 6.4. f).

[199] *Id.*, nos. 6.1. c), 6.3. b).

[200] Ministry of Finance, Circular of February 21, 2024, no. 130.

[201] *See* §4(3) sentence 1 of the EU-DBA-SBG.

[202] *See* §4(3) sentence 2 of the EU-DBA-SBG.

[203] *See* §4(3) sentence 2 of the EU-DBA-SBG.

[204] Ministry of Finance, Circular of February 21, 2024, nos. 161 et seq. Additional information about disclosures may again be accessed from the BZSt's information sheets online at https://www.bzst.de/SharedDocs/Downloads/DE/Merkblaetter/uebersicht_erforderliche_unterlagen_unternehmer.pdf?__blob=publicationFile&v=2.

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o tax assessment notices;

o tax audit reports or other comparable documents which, in the result, have led or will lead to the dispute; as well as

o copies of all other documents prepared by the tax authorities in connection with the matter in dispute; and if so, any details of any mutual agreement procedures requested by the person concerned or arbitration proceedings concerning the same dispute and the same taxable period, with copies of all supporting documents;

• a declaration by the applicant stating compliance with §4(4) of the EU-DBA-SBG;

• any other information deemed necessary for the substantive examination of the respective case with respect to the dispute or is deemed necessary by the person concerned.

The taxpayer's request (complaint) must be filed in writing with both competent authorities at the same time and include the same information.[205] Furthermore, other notifications within the meaning of margin 149 of the Ministry of Finance's circular (such as withdrawn complaints or other letters addressed to the competent authority by the applicant within the pending procedure) must generally be submitted simultaneously to all involved competent authorities.[206] In the case of filing complaints on different dates to the respective competent authorities, the applicant accepts differing procedural time frames toward each competent authority.[207] As the taxpayer must address any written or oral communication with the BZSt as competent authority in German as an official language,[208] the required simultaneous filing of the complaint with both competent authorities often implies the complaints will be drafted in two languages (unless the other competent authority also accepts German as an official language). If the complaint is addressed in a language other than German to the German competent authority, such a request is unlikely to be seen as complying with the deadline according to §4(3) sentence 1 of the EU-DBA-SBG.[209]

The BZSt must acknowledge receipt of the dispute resolution complaint to the applicant within two months from the receipt of the complaint.[210] The BZSt must also inform the competent authorities of the other Member States concerned of the receipt of the complaint within this time limit.[211] In doing so, it must also indicate toward the competent authorities of the other Member States the language or languages in which it intends to communicate during the proceedings. Within three months from the receipt of the dispute resolution complaint, the BZSt may request additional information for the substantive examination of the respective dispute resolution complaint from the applicant.[212] This request must be answered within three months from the day following the day on which the request for information was notified to the applicant. A copy of the answer must be submitted to the competent authorities of the other Member States at the same time.

A written withdrawal of the complaint may be declared at any time towards all competent authorities at the same time by the person filing the complaint and results in the termination of the proceedings ex officio.[213] The proceedings must also be terminated immediately if the issue in dispute becomes irrelevant for legal or factual reasons in Germany, and the BZSt must inform the person concerned without delay about the reasons for the termination of the proceedings.[214] A settlement in this sense is also given if the BZSt decides within six months from the receipt of the complaint (or, in the case of requests for information pursuant to §7 EU DBA-SBG, after six months from the day following the day on which the response was received) to resolve the dispute unilaterally ("*Abhilfe*" or a relief). In contrast to proceedings based on an income tax treaty or the EU Arbitration Convention, the novelty of §12(2) EU-DBA-SBG, in this respect, is that the BZSt is entitled to issue a corresponding remedy decision on its own authority directly. But according to §5(1) sentence 1 no. 5 of the German Tax Administration Act (*Finanzverwaltungsgesetz*), the remedial decision may only be made in agreement with the respective German state tax authority.

A complaint filed based on the EU-DBA-SBG has primary effect (i.e., the request for a MAP based on the EU-DBA-SBG terminates any pending proceedings based on a bilateral income tax treaty or the EU Arbitration Convention ex officio);[215] and, if the proceeding based on the EU-DBA-SBG was requested initially, this generally precludes any subsequent requests on other legal grounds.[216] But, in the view of the Ministry of Finance, initial requests based on the EU-DBA-SBG only then have this preclusive effect toward requests based on a bilateral tax treaty and/or the EU Arbitration Convention if the EU-DBA-SBG was applicable in matters on time (requests after July 1, 2019, for fiscal years beginning January 1, 2018) according to §33 EU-DBA-SBG.[217] Additionally, if requests concern issues with tax disputes affecting fiscal years beginning after January 1, 2018, as well as previous fiscal years, the competent authorities can agree on accepting the application of the EU-DBA-SBG for the entire issue.[218] As the implementation act of the EU Dispute Resolution Directive for the United Kingdom and Northern Ireland has been revoked in the meantime, the EU-DBA-SGB is no longer applicable in relation to the United Kingdom and Northern Ireland since January 1, 2021. Therefore, in the case of requests for a MAP based on the EU-DBA-SBG in relation to the United Kingdom and Northern Ireland after this date, such requests should not have preclusive effect toward an alternative proceeding based on Art. 25 income tax treaty with the United Kingdom and Northern Ireland initiated in the further course.

[205] *See* §4(2) of the EU-DBA-SBG.
[206] Ministry of Finance, Circular of February 21, 2024, no. 149.
[207] *Id.*, no. 155.
[208] *See* §3 of the EU-DBA-SBG; in contrast to the draft bill, the final bill is not legitimating English as official language for the purpose of the performance of the proceedings of the EU-DBA-SBG.
[209] *See* Ministry of Finance, Circular of February 21, 2024, nos. 60, 62 et seq.
[210] *See* §6(1) of the EU-DBA-SBG.
[211] *See* §6(2) of the EU-DBA-SBG.
[212] *See* §7 of the EU-DBA-SBG.
[213] *See* §11(1) of the EU-DBA-SBG.
[214] *See* §12(1) sentence 1 and 2 of the EU-DBA-SBG.
[215] *See* §4(4) sentence 1 of the EU-DBA-SBG.
[216] *See* §4(4) sentence 2 of the EU-DBA-SBG.
[217] *See* Ministry of Finance, Circular of February 21, 2024, no. 11.
[218] *Id.*, no. 147.

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If the conditions in §28(1) of the EU-DBA-SBG are provided, individuals and smaller companies listed in §28 of the EU-DBA-SBG[219] can apply for procedural simplifications, such as the submission of the complaint and other notifications referred to in the Ministry of Finance's circular,[220] only to the competent authority of the Member State in which the person concerned is resident (in Germany, to the BZSt). The respective applicant bears the burden of proof for meeting the criteria.[221] If the criteria is not met, the BZSt must inform the applicant within three months of the application of the general terms and the related obligation to file complaints in all Member States concerned at the same time and with the same content.[222] If the simplified procedural rules apply and if the applicant is domiciled in Germany, the BZSt must notify the competent authorities of the other Member States within two months from receiving the complaint or any other notifications within the meaning of margin 149 of the Ministry of Finance's circular as well as of its content.[223] As soon as a notification has been sent by the BZSt, a notification is deemed to have been sent to all Member States concerned as of the end of the day on which the notification was sent.[224] If the applicant provides additional information within the meaning of margin 163 of the Ministry of Finance's circular to the BZSt, the BZSt must forward a copy of the submitted information to the competent authorities of the other Member States immediately.[225] The information is deemed as having already been submitted to the other competent authorities with the original receipt of this information at the BZSt.[226]

b. Approval of a MAP Application

Each of the involved competent authorities must reject or accept the taxpayer's complaint within six months after the receipt of the complaint, or six months after the day following the receipt of additional information prepared by the applicant at the BZSt.[227] A complaint is deemed accepted if the competent authorities fail to agree to accept or reject it within the given time frame.[228] If any local remedies relating to the issue in dispute are pending, the six-month time limit does not begin before this domestic proceeding has either been terminated, with binding effect or otherwise definitively, or been suspended or put in abeyance or ordered as rested.[229] If both competent authorities directly accept the complaint within the period of six months, the initiation of discussions under the MAP is not subject to a time limit.

A rejection of a complaint can be based on four different and exclusively named reasons specified in §8(3) sentence 1 of the EU-DBA-SBG:

- lack of information prescribed in §5 of the EU-DBA-SBG;
- lack of information requested based on §7 of the EU-DBA-SBG;
- lack of an issue in dispute according to §1(1) of the EU-DBA-SBG; or
- disregard of the period for filing complaints according to §4(3) of the EU-DBA-SBG.

The rejection must be sent and justified to the applicant.[230]

c. Access to Legal Actions Against Rejection of the Complaint

If one or all competent authorities reject the complaint, the taxpayer is entitled to file a request for a legal remedy to the advisory commission (in cases of rejection by at least one, but not all involved competent authorities),[231] or to the respective local courts (rejection by all involved competent authorities).[232] The advisory commission or the local courts are mandated to review the rejection of the complaint.

A domestic review must be initiated based on the respective national procedural law for rejections if all involved competent authorities have rejected the complaint. For Germany, the BZSt's rejection constitutes an administrative act (§117 of the FCG) which is subject to appeal within the administrative appeals procedure within one month from the day following the notification of the rejection by the BZSt in Germany.[233] If the rejection gets confirmed within this procedure, the action is contestable before the local tax court of Cologne within one month from the day following the notification of the confirmation decision by the BZSt.[234] If the respective period for the initiation of the legal action against a rejection by the BZSt has passed before the rejection by the competent authority of another contracting state has been notified to the applicant in Germany, requests from the applicant for the restoration of prior status of the period for the initiation of the legal action against BZSt rejection must be granted to the applicant based on §110 of the GTCC.[235]

The application to the advisory commission to review the rejection can only be filed within 50 days following the notification of the applicant of one domestic court's decision replacing the rejection of the complaint by a competent authority of the Member States concerned.

Comment: If only one national court repeals the rejection by a competent authority, the advisory commission is entitled

[219] The simplified procedure applies for companies who meet the size criterion of §28(1), no. 2 of the EU-DBA-SBG at the end of the last completed assessment period prior to filing the application.

[220] *See* Ministry of Finance, Circular of February 21, 2024, no. 149.

[221] *Id.*, no. 151.

[222] *Id.*, no. 151.

[223] *See* §28(2) of the EU-DBA-SBG.

[224] *See* §28(3) of the EU-DBA-SBG.

[225] *See* §28(4) of the EU-DBA-SBG.

[226] This reading follows from the wording of §28(5) of the EU-DBA-SBG. As far as the Ministry of Finance is concerned, as the Circular of February 21, 2024, no. 153 slightly deviates from this understanding, it is still open to interpretation whether this deviation represents a different view of the German tax administration.

[227] *See* §8(1) sentence 1 and 2 of the EU-DBA-SBG. The application of §8(1) sentence 2 of the EU-DBA-SBG requires that both the BZSt and the applicant noted the respective time frame according to §7 of the EU-DBA-SBG.

[228] *See* §8(4) of the EU-DBA-SBG.

[229] *See* §8(1) sentence 3 of the EU-DBA-SBG.

[230] *See* §8(3) sentence 2 of the EU-DBA-SBG.

[231] *See* §10(1) of the EU-DBA-SBG.

[232] *See* §9 of the EU-DBA-SBG.

[233] *See* §347, 355 of the FCG.

[234] This court has exclusive jurisdiction according to §38(1) of the GTCC, as the BZSt as the defendant has its registered office in Bonn, which is in its district.

[235] *See* §9(1) of the EU-DBA-SBG.

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to finally decide on the rejection of the complaint or the acceptance of the complaint and the initiation of a MAP, as set out in §10 EU-DBA-SBG.[236] If, however, one domestic court confirms the rejection by a competent authority and if the tax authorities are not entitled to deviate from this decision, the complaint cannot be subject to review by the advisory commission and consequently not accepted for a MAP with binding effect.[237]

If, instead, the complaint has not been rejected by all competent authorities, the person concerned is entitled to request the composition of an advisory commission to review the rejection(s) in writing within 50 days following the day of the notification of the rejection of the respective competent authority.[238] This request is only admissible if the rejection cannot be subject to review at the domestic level, if a domestic appeals procedure is neither pending in administrative nor court proceedings, or if the applicant explicitly waived this right.[239] The complaint cannot be subject to another MAP if the advisory commission confirms the rejection. If the advisory commission accepts the complaint for the performance of a MAP, the competent authorities whose rejection was replaced are obliged to initiate a MAP within 60 days after the approval of the complaint.[240] If this time period is not met, the advisory commission is entitled to provide an arbitral opinion on the dispute (i.e., the MAP stage is skipped entirely in this case and is known as a "*Sprungschiedsverfahren*").[241]

Since the proceedings before the advisory commission fully corresponds to the arbitral proceedings conducted by the advisory commission following an unsuccessful MAP, procedural details are prescribed in that context.[242]

d. MAP Negotiations

As already noted, following the approval of the complaint by both competent authorities (or by the advisory commission), the competent authorities of the Member States concerned must endeavor to resolve a dispute via a MAP within a two-year period.[243] This period begins with the competent authorities notifying the receipt of their admission decision regarding the applicant's complaint the day following the receipt of the admission decision of the advisory commission.[244] If any local remedies relating to the issue in dispute are pending, the two-year period does not run before this domestic proceeding has either been terminated with binding effect, has been terminated definitively in another way, has been suspended, put in abeyance, or ordered to be rested.[245] The two-year period for settlement can be prolonged for one year only with a written and well-founded proposal for disposition by one involved competent authority.[246] Therefore, such a decision is in the discretion of the respective competent authorities; the applicant must be notified about this decision.[247] This unilateral option for prolongation has been incorporated only into German law. The EU Directive on Tax Dispute Resolution apparently requires, according to the wording of Art. 4(1), upon a unilateral request for prolongation of one competent authority, a bilateral agreement of both competent authorities to do so.[248] Reasons for this "tightened" implementation approach are not revealed in the legislative explanation of the implementing law.[249] The applicant is granted neither a right of enforcement nor prevention of such a prolongation of the settlement period. The applicant is nevertheless free to submit corresponding applications to the competent authorities regardless of the lack of procedural rights in this context. If deemed appropriate, the competent authorities may ask the taxpayer concerned to submit additional information in relation to the issue in dispute.[250] Such a request remains without effect for the calculation of the settlement period.[251]

If the competent authorities of the Member States concerned agree on a settlement of the dispute within the two-year period, the BZSt must notify each taxpayer concerned of the agreement without delay.[252] While the agreement is directly binding not only for the involved competent authorities but also for local tax authorities, the enforceability of the agreement in domestic law remains in the discretion of the taxpayer.[253]

If instead, the competent authorities fail to find a solution within the settlement period, the BZSt must inform the taxpayer concerned without delay about the termination of the MAP stage without an agreement and give reasons for the failure to do so.[254] In contrast to the EU Directive on Tax Dispute Resolution that requires the competent authorities to give "general reasons" for the failed settlement, the German legislature requires the BZSt to state "reasons" for the failure. Both, §16(1) of the EU-DBA-SBG and the Ministry of Finance's circular leave the questions open as to what level of detail in the justification must be considered by the BZSt in this respect and to what extent the details required by §16(1) of the EU-DBA-SBG correspond or deviate from the details required by the Art. 4(3) of the EU Directive on Tax Dispute Resolution.[255] Therefore, neither the EU Directive on Tax Dispute Resolution nor §16 of the EU-DBA-SBG gives an indication as to when the explanation for the competent authorities' failing to come to an agreement is sufficient.[256]

Furthermore, this MAP stage may be terminated for other reasons. Regardless of the maximum settlement period of two or three years, MAP negotiations must be terminated ex officio if a competent authority from one Member State concerned in-

[236] *See* §9(2) sentence 1 of the EU-DBA-SBG.

[237] *See* §9(2) sentence 2 of the EU-DBA-SBG and Ministry of Finance, Circular of February 21, 2024, no. 169.

[238] *See* §10(2) of the EU-DBA-SBG.

[239] *See* §10(1) sentence 3 of the EU-DBA-SBG.

[240] *See* §10(5) EU-DBA-SBG and Ministry of Finance, Circular of February 21, 2024, no. 170.

[241] *See* §17(2) of the EU-DBA-SBG.

[242] *See* III.C.3.a., below, for more details.

[243] *See* §13(1) of the EU-DBA-SBG.

[244] *See* §13(2) sentence 1 and 2 of the EU-DBA-SBG.

[245] *See* §13(3) of the EU-DBA-SBG.

[246] *See* §13(4) sentence 1 of the EU-DBA-SBG.

[247] *See* §13(4) sentence 2 of the EU-DBA-SBG.

[248] For further discussion *see* Flüchter, in: Schönfeld/Ditz, Doppelbesteuerungsabkommen, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 500.

[249] German parliament, Official Record (Bundestag Drucksache) no. 19/12112, p. 34.

[250] *See* §14 sentence 1 of the EU-DBA-SBG.

[251] *See* §14 sentence 3 of the EU-DBA-SBG.

[252] *See* §15(1) sentence 1 of the EU-DBA-SBG.

[253] *See* §15(1) sentence 2 of the EU-DBA-SBG and Ministry of Finance, Circular of February 21, 2024, nos. 84 et seq.

[254] *See* §16(1) of the EU-DBA-SBG.

[255] *See also* German Parliament, Official Record (Bundestag Drucksache) no. 19/12112, p. 34.

[256] For further discussion *see* Pit, *Intertax* 2019, p. 745 (758).

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forms the other involved competent authorities that a court or other judicial authority of the first Member State has made a final decision on the matter in dispute from which no derogation is permitted based on the domestic law of that Member State.[257] The negotiations may also be stopped at any time due to a withdrawal of the complaint by the taxpayer or due to a settlement on other ways.[258]

e. Implementation of the MAP

Generally, the comments concerning implementation mentioned in III.B.1.d., above, apply following a MAP under the EU-DBA-SBG.[259] The agreement will be enforced pursuant to §175a of the FCG if the taxpayer declares its consent to the bilateral settlement, waives in writing (or on record) the right to appeal against the tax assessments correctly implementing the dispute resolution procedure and, if necessary, withdraws any pending legal acts in domestic proceedings.[260]

In contrast to the other implementation procedures for MAP-settlements, the wording of §15(1) sentence 2 of the EU-DBA-SBG explicitly requires the taxpayer not only to declare the consent to the settlement of the competent authorities to the BZSt as the German competent authority but also — separately in writing — to withdraw the right to appeal to the BZSt against the tax assessments correctly implementing the dispute resolution. (The implementation procedures for settlements based on Art. 25 of income tax treaties or the EU Arbitration Convention, instead, require that the withdrawal of the right to appeal be made to the local tax authorities.)[261] The BZSt must inform the local tax authorities of the waiver of appeal.[262]

This waiver-related procedure is not to be confused with notifications about the termination of pending domestic legal proceedings concerning the subject matter of the dispute. This means that while it is the taxpayer's responsibility to inform the BZSt about the termination,[263] a withdrawal terminating such a proceeding must be declared to the body where the appeal is pending. The taxpayer must separately inform the BZSt about such a withdrawal within a period of 60 days following the day of the receipt of the BZSt's notification about the settlement.[264] That time frame is not mandated for implementation procedures involving settlements under Art. 25 of income tax treaties or the EU Arbitration Convention. Under those authorities, the BZSt must determine a time frame for the receipt of all notifications (consent, waiver, and withdrawals), but the length of the deadline remains under the BZSt's full discretion.[265]

If a taxpayer disregards the time frames without submitting the required declarations and evidence to the BZSt, the taxpayer risks the settlement not being implemented in Germany and/or in the other involved Member State with lasting effect.[266]

[257] *See* §16(3) of the EU-DBA-SBG.
[258] *See* §16(2) and §11 and §12 of the EU-DBA-SBG.
[259] Ministry of Finance, Circular of February 21, 2024, nos. 84 et seq.
[260] *See* §15(1) and (2) of the EU-DBA-SBG.
[261] Ministry of Finance, Circular of February 21, 2024, no. 86.
[262] *See* §15(1) sentence 3 of the EU-DBA-SBG.
[263] Ministry of Finance, Circular of February 21, 2024, nos. 86 et seq.
[264] *See* §15(2) sentence 2 and (1) sentence 1 of the EU-DBA-SBG.
[265] Ministry of Finance, Circular of February 21, 2024, no. 86.
[266] Ministry of Finance, Circular of February 21, 2024, no. 89.

C. Arbitration Proceedings

Most of the existing German income tax treaties do not require the tax authorities to avoid or eliminate double taxation. Their only obligation is to enter negotiations to meet this objective. If the tax authorities do not reach a mutual agreement, double taxation remains. Furthermore, income tax treaties without mandatory mechanisms for dispute resolution have no established time frames within which the negotiation process must be completed under the existing tax treaty provisions. Thus, procedures for resolving transfer pricing or other disputes can easily take several years and give rise to considerable administrative costs for the taxpayer.

To improve efficiency in the MAP processes with foreign tax authorities, Germany has agreed to implement binding arbitration procedures with several countries.[267] Eleven of Germany's income tax treaties, the EU Arbitration Convention and the EU-DBA-SBG contain mandatory arbitration provisions that significantly change the practical consequences of a MAP. Presumably as of January 1, 2025 four additional income tax treaties will be amended by the arbitration proceeding of Art. 18 et seq. of the MLI. One further income tax treaty will be amended respectively at a later stage due to ongoing domestic implementation proceedings in the other state. All disputes concerning transfer pricing and the allocation of profits to permanent establishments (PEs) involving EU Member States are covered by the EU Arbitration Convention (*see* III.C.1., below). Arbitration proceedings based on income tax treaties or the MLI with mandatory arbitration provisions or based on the EU-DBA-SBG cover other tax disputes for individuals and entrepreneurs as well. The main advantage of mandatory arbitration procedures is that they confer on taxpayers involved in double taxation disputes legal entitlement to final elimination of the double taxation concerned within a pre-defined time frame.

Arbitration as set out in German income tax treaties (and if applicable the MLI); the EU Arbitration Convention and the EU-DBA-SBG is described in III.C.1. to 3., below.

1. Arbitration Under Germany's Income Tax Treaties

a. Access to Arbitration Proceedings

Art. 25(5) of the OECD Model Tax Treaty provides a mechanism that allows a taxpayer to request arbitration proceedings if the competent authorities are unable to reach a mutual agreement within two years from the initiation of the MAP process. In the 2008 modification of the OECD Model Tax Treaty, Art. 25 arbitration was established as a second stage of the MAP and is no longer designed as an independent process.[268] As a result of these changes, the initiation of arbitration proceedings generally does not require prior authorization by the competent authorities.[269] Only the German treaties with Jersey (Art. 9(5)), and Canada (Art. 26(5)) still require the authorization of both competent authorities and can thus not be

[267] *See* III.C.2., below.
[268] Art. 25 of the OECD Model Tax Treaty, nos. 69 et seq.; Ministry of Finance, Circular of February 21, 2024, no. 108. *See also* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.231.
[269] Art. 25 of the OECD Model Tax Treaty, no. 63.

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qualified as mandatory arbitration provisions.[270] The same applies if the initiation requires a request from only one of the involved competent authorities (Art. 24(5) of the treaty with Armenia). The voluntary arbitration clause with Sweden has been repealed without substitution as of January 1, 2024.[271]

As of 2024, mandatory arbitration provisions are included in 11 of Germany's income tax treaties, with Australia, Austria, France, Japan, Liechtenstein, Mauritius, the Netherlands, Singapore, Switzerland, the United Kingdom, and the United States.[272] The mandatory arbitration clause with Luxembourg has been repealed without substitution as of January 1, 2024.[273] Germany's participation in the MLI and the commitment to mandatory arbitration[274] will presumably as of January 1, 2025 lead to the inclusion of additional mandatory arbitration clauses in its treaties with Greece, Hungary, Malta, and Spain. The treaty with Italy is by then not yet amended by the MLI. As the national implementation process of the MLI is not yet finished in Italy, the German application decree, the MLI-AnwG, does not cover Italy. Germany's position on arbitration under the MLI initially affected 14 treaties, but only effects five treaties in the end. Reasons for the gap include: (*i*) some treaty partners whose treaties were considered by Germany as CTAs are not respectively considered as CTAs;[275] (*ii*) other treaty partners did not opt for mandatory arbitration,[276] and (*iii*) other arbitration clauses in income tax treaties remain primary according to the German reservation against Art. 26(4) of the MLI.[277]

For all of the aforementioned income tax treaties, arbitration proceedings are limited to "unresolved issues" and exclude any other resolved issues between the parties.[278] In addition — and in contrast to the MAP stage — access to an arbitration process is only awarded if the taxation at issue results from the actions of one of the competent authorities that have already occurred (e.g., the tax has been paid, assessed or otherwise determined, or the taxpayer has received official notice that it will be taxed on a particular item of income). Thus, arbitration is not available to a taxpayer in cases when taxation is only likely to result from such actions.[279] The taxpayer also does not have the right to initiate arbitration proceedings if the competent authorities have reached an agreement. Mutual agreements are never subject to appeal within arbitration proceedings.

Mandatory arbitration proceedings either begin ex officio once the requisite procedural requirements are met or if the taxpayer files a request for arbitration with the competent authorities. An automatic initiation of the arbitration procedure — still — remains the exception in German income tax treaties.[280]

Therefore, based on German income tax treaties, the initiation of mandatory arbitration proceedings generally requires the expiry of the maximum settlement period for a MAP stage of two[281] or three[282] years and a request by the taxpayer.[283] Based on the treaties with Liechtenstein, Switzerland, and the United States, the period may be shortened upon agreement within the MAP stage. As far as the MLI is applicable as of January 1, 2025, the period is also three years as Germany declared a reservation to Art. 19(1)(b) of the MLI based on Art. 19(11) of the MLI and replaces the two-year period. Due to corresponding declarations of the treaty partners, the maximum agreement period of two years is replaced by a period of three years.[284] According to Art. 19(8) of the MLI, this period only runs once all requested documents have been submitted. Pursuant to Art. 19(2) of the MLI, ongoing court proceedings generally suspend the start of the period.

Only the treaties with Liechtenstein, Switzerland, and the United States do not require such request and oblige the competent authorities to start the arbitration process ex officio.[285] In this case, the initiation requires the compliance with confidentiality regulations set out in each in Art. 25(6)(d) of the treaty with the United States and the treaty with Liechtenstein and Art. 26(6)(d) of the treaty with Switzerland. The implementation of the MLI also requires the compliance with the respective confidentiality regulations. For German treaties, i.e. in relation to Greece, Hungary, Malta and Spain (and at a later stage also Italy), the strict regulations set out in Art. 23(4) and (5) of the MLI have to be acknowledged due to the notification of the reservation by Germany. In this respect Art. 23(4) sentence 2 of the MLI clarifies that the strict clause is applicable as long as the other states have not declared a reservation provoking a full exclusion of the arbitration proceedings based on Art. 23(6) of the MLI.[286]

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[270] Such regulations are therefore merely optional arbitration clauses. For details relating to the different characteristics of optional or mandatory arbitration clauses in international taxation *see* Strotkemper. Spannungsverhältnis zwischen Schiedsverfahren in Steuersachen und einem internationalen Steuergerichtshof — Möglichkeiten zur Verbesserung der Streitbeilegung im Internationalen Steuerrecht, p. 147 et seq., p. 161 et seq.

[271] *See* Federal Law Gazette (BGBl.) II 2023, p. 334.

[272] Ministry of Finance, Circular of February 21, 2024, Annex; Art. 26(5) of the treaty with Singapore became effective on March 29, 2021. See the respective bill, (BGBl.) II 2020, p. 1178 and II 2021, p. 437. For an overview of obligatory arbitration clauses, *see also* Worksheet 31 ("German Treaties with MAP and/or Arbitration Procedures"), below.

[273] *See* Federal Law Gazette (BGBl.) II 2023, p. 307.

[274] Twenty other countries declared their commitment to mandatory arbitration. *See* Strotkemper, in: *frauen@fgs: Vielfalt in der steuerzentrierten Rechtsberatung, Jüngste Entwicklungen zur Streitbeilegung von Doppelbesteuerungskonflikten: Einordnung als steuerverfahrensrechtlicher Perspektive*, p. 165 (168).

[275] The most recent case was Romania.

[276] These countries are the Czech Republic, Croatia, Slovakia, and Turkey. *See* §1(2) MLI-AnwG.

[277] The respective countries are France and Japan. *See* German Parliament, Official Record (Bundestag Drucksache) no. 19/20979, p. 86. This does not apply any longer for Austria and Luxembourg. See German Federal Council as of February 9, 2024, Official Record (Bundesrat Drucksache), no. 75/24, p. 2.

[278] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.235.

[279] Art. 25 of the OECD Model Tax Treaty, no. 72; Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.236.

[280] *See* Art. 25(5) of the treaty with Liechtenstein, Art. 26(5) of the treaty with Switzerland, and Art. 25(5) of the treaty with the United States.

[281] This period amounts two years for five treaties (Australia, Japan, Netherlands, United Kingdom and United States).

[282] This period amounts three years based on six treaties (Austria, France, Liechtenstein, Mauritius, Singapore, Switzerland).

[283] Ministry of Finance, Circular of February 21, 2024, no.109 for the treaties with Austria, Australia, France, Japan, Mauritius, Netherlands, Singapore and United Kingdom.

[284] See §6 no. 5 b) MLI-AnwG for Greece, §7 no. 3 b) MLI-AnwG for Hungary, §9 no. 4 b) MLI-AnwG for Malta and §11 no. 7 b) MLI-AnwG for Spain. The same applies to Italy according to the current status of the OECD Matching Database.

[285] The same is likely to apply for Liechtenstein. But, insofar a bilateral Memorandum of Understanding is missing.

[286] *See* §6 no. 9 of the MLI-AnwG for Greece, §7 no. 7 MLI-AnwG for Hungary, §9 no. 8 MLI-AnwG for Malta and §11 no. 11 MLI-AnwG for Spain. The same can be assumed for Italy. *See* OECD, MLI Matching Database,

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Beyond the conditioned expiry of the respective settlement period of the MAP stage, such requests are neither subject to the observance of further deadlines nor additional formal requirements.[287] Depending on the requirements set out by particular arbitration clauses incorporated in relevant German income tax treaties, this can vary, of course, for individual proceedings.

Like a MAP, arbitration proceedings are independent of domestic remedies. Thus, a taxpayer does not need to waive its right to appeal under domestic law in order to initiate arbitration proceedings.[288] Nevertheless, OECD guidance indicates that a taxpayer may not simultaneously pursue arbitration and participate in domestic proceedings.[289] Moreover, depending on the domestic laws of the involved countries, a taxpayer may not be permitted to arbitrate an issue that has already been resolved with final and binding effect through the domestic litigation process in either contracting state (i.e., if a court or an administrative tribunal has already made a decision).[290] This corresponds with the OECD's recommendation that, after a taxpayer has exhausted domestic litigation in one contracting state, the application of a MAP should only be limited to obtaining relief in the other contracting state.[291] Germany has implemented such clauses in its income tax treaties with Armenia, Australia, France, Japan, and the United Kingdom.[292] The same applies according to Art. 19(12) MLI to the treaties with Greece, Hungary, Malta and Spain (as well as in future to Italy) as indicated in Worksheet 43. Germany did not declare such reservation, but the other treaty partners.[293]

Comment: Based on the latest legislative announcement, it is likely that German law allows MAPs and arbitration decisions to override legal decisions that have been made in a particular case.[294] But most countries consider it as not admissible to override such decisions through MAPs or arbitration decisions, i.e. in the end, the access is in such cases not given regardless of the German domestic position on this question granting access to arbitration proceedings. Only if the other country also accepts to override such decisions through MAPs or arbitration decisions access to arbitration is granted irrespective of a binding court decision — in contrast to Art. 7(3) of the EU-Arbitration Convention (for further details *see* III.C.1.a., above) and §13(3) of the EU-DBA-SBG (for further details *see* III.C.3.a., below) — without differentiating and without requiring a result or termination or suspension of such domestic proceedings.

However, based on Art. 25(5) of the OECD Model Tax Treaty — and in correspondence with mutual agreements based on Art. 25(1) of the OECD Model Tax Treaty — a taxpayer has the right to reject the agreement or arbitration decision (and to pursue other domestic remedies) as well.[295]

Upon request by the taxpayer, the competent authorities are generally obliged to initiate the arbitration proceedings without discretion. This only varies if the arbitration clause includes a limitation or an extension in scope.

Such limitations in scope may be in the discretion of the competent authorities, depending on the particular arbitration clause. Access may be denied if tax offenses are already legally established at the domestic level, or if such proceedings are still pending,[296] or for other scenarios. Such limitations in scope are still rare. For example, the income tax treaty with Canada limits access due to tax offenses in Art. 25(6). As such, decisions in the discretion of the competent authorities are only reviewable for errors of judgment limitations, it is not yet entirely clear if German tax courts would follow the denial in access.[297] Furthermore, according to the respective circulars, such restrictions due to tax offenses or for other reasons are also valid for the arbitration provision with Switzerland.[298] The protocols with Singapore and Mauritius go beyond these examples and deny access as well if anti-abuse provisions of domestic law or of an income tax treaty apply; if assets were either not included in the assessment, or income was tax exempt or taxed at 0% based on domestic law; if the scope of the EU Arbitration Convention is given; if the double taxation is to be eliminated by the tax credit method (and not by the exemption method); or if a unilateral agreement affecting the dispute has been agreed upon.[299] Furthermore, arbitration can be limited to selected income distribution Articles without discretion by the competent authorities (i.e., according to Art. 25(5) b) aa) A) of the income tax treaty with the United States).[300]

In addition, several treaties also enable the competent authorities to exclude individual cases from arbitration due to a lack of suitability for arbitration.[301] Such an approach also corresponds to Germany's policy for income tax treaties.[302] Based on this policy, such limitations should only be considered as

available at http://www.oecd.org/tax/treaties/mli-matching-database.htm. Art. 23 (7) MLI is not relevant in this case.

[287] *Id.,* no. 109.

[288] Explicitly Ministry of Finance, Circular of February 21, 2024nos. 12 et seq. *See also* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.238.

[289] Art. 25 of the OECD Model Tax Treaty, no. 76 s. 3 (a).

[290] Art. 25 of the OECD Model Tax Treaty, no. 76.

[291] Art. 25 of the OECD Model Tax Treaty, no. 76 s. 3 (c).

[292] *See* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.190.

[293] See §6 no. 5 of the MLI-AnwG (Greece), §7 no. 3 MLI-AnwG (Hungary), §9 no. 4 MLI-AnwG (Malta) and §11 no. 7 MLI-AnwG (Spain).

[294] *See* III.C.1.a., above, for further details.

[295] Ministry of Finance, Circular of February 21, 2024, nos. 84 et seq.

[296] *Id.,* nos. 5 et seq.

[297] Whether and to what extent an exclusion from the procedure based on discretion by the competent authorities would withstand judicial review, however, remains still open. With regard to Art. 8(1) of the EU Arbitration Convention and the corresponding unilateral declaration by Germany, the exclusion from the procedure based on this provision recently withstood review by the BFH. *See* Federal Fiscal Court (Bundesfinanzhof), September 25, 2019, I R 82/17, Federal Tax Gazette (BStBl.) II 2020, p. 229.

[298] Denial may be justified due to a significant breach of tax obligations in the contracting states, for example in the case of lacking cooperation in the clarification of the facts, false information in a tax proceeding that is directly related to the case, or disproportionate and/or repeated delay in responding to information requests. *See* Ministry of Finance, Circular of March 3, 2017, IV B 2 — S 1301-CHE/07/10026-10, Federal Tax Gazette (BStBl.) I 2017, p. 379, no. 4 a) and Circular of October 30, 2019, IV B 2 — S 1301-CHE/07/10026-11, Federal Tax Gazette (BStBl.) I 2019, p. 1014.

[299] For further details see the respective bills in case of Singapore, Federal Law Gazette (BGBl.) II 2020, p. 1178 and in case of Mauritius, Federal Law Gazette (BGBl.) II 2022, p. 530.

[300] *See also* no. 22 of the protocol to Art. 25(5) and (6) of the treaty with the United States. For further details *see* Strotkemper, *Spannungsverhältniszwischen Schiedsverfahren in Steuersachen und einem internationalen Steuergerichtshof — Möglichkeiten zur Verbesserung der Streitbeilegung im Internationalen Steuerrecht,* p. 225 et seq.

[301] This affects the treaties with Japan, Switzerland, and the United States.

[302] *See* Art. 24(5) of the German Treaty Negotiations Model.

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exemptions (such as cases with abusive structures or the violation of the taxpayer of its duty to cooperate) and require a high level of justification.[303] In this respect, prospects for a judicial enforcement to grant access to arbitration by domestic courts may be higher than in concrete case scenarios for such limitations laid down in the treaty or the enclosed protocol. If there is a lack of suitability for arbitration, and this is considered as an indeterminate legal term — and not as a decision in the discretion of the competent authorities — courts have full authority over review processes.[304]

Very few arbitration clauses enable the competent authorities to extend the scope of arbitration if indicated and upon request (i.e., according to Art. 25(5)(b)(aa)(A) income tax treaty with the United States).[305]

With the applicability of the MLI, it is most likely that access to German arbitration clauses of the treaties with Greece, Hungary, Malta and Spain (at a later stage also Italy) is also limited due to individual reservations based on Art. 28(2)(a) of the MLI. Germany notified several reservations thereupon causing an exclusion from Part VI MLI (Arbitration). Such exclusion shall be indicated, if (*i*) an anti-abuse provision applies, (*ii*) persons act in a disorderly or criminal manner, (*iii*) there is no double taxation, (*iv*) the scope of application of the EU Arbitration Convention or the EU-DBA-SBG is given, (*v*) the application of the credit method instead of the exemption method is questionable or (*vi*) an actual understanding has been reached (for further details see also Worksheet 43).

In this respect, it is firstly not clarified whether Greece, Hungary, Malta and Spain have accepted this German reservation. However, such unilaterally notified reservations require acceptance by the other treaty partner upon Art. 28(2)(b) of the MLI. Non-acceptance is referred to as an "objection" in accordance with Art. 28(2)(b) of the MLI. As a result, non-acceptance is likely to result in the non-applicability of the arbitration procedure. Up until now, it is not yet known whether Greece, Hungary, Malta and Spain accepted the German reservations or if the acceptance is presumed by Art. 28(2)(b) sentence 2 of the MLI (for more details see Worksheet 43).

Comment: Regarding the respective reservations notified by Greece and Spain, only the EU Arbitration Convention shall have priority over any arbitration proceedings under income tax treaties, i.e. in case of transfer pricing disputes and not for other disputes.[306] Judging by the arbitration profiles on the OECD website, Hungary and Italy have declared similar reservations arbitration proceedings under the EU Arbitration convention or the scope of the EU-DBA-SBG are likely to generally block arbitration proceedings under tax treaties.[307] Malta has not declared any corresponding reservations and reserves the right not to conduct arbitration proceedings if a reservation of the treaty partner is based exclusively on its domestic law (including legislation, case law, judicial doctrines and sanctions). Therefore, to the extent that Germany does not wish to conduct arbitration proceedings if an anti-abuse provision is violated, persons act in a disorderly or criminal manner or an actual agreement has been reached in Germany, it is likely that Malta considers Art. 18 et seq. of the MLI as not applicable in relation to Germany.[308]

Secondly, as far as the MLI is applicable towards German treaties with European treaty partners (Greece, Hungary, Malta and Spain; at a later stage also Italy) it is not yet clarified by law or the tax administration with respect to reservation (*iv*), if the EU Arbitration Convention and the EU-DBA-SBG should generally prevail tax treaty dispute resolution clauses based on German reservations regarding Art. 28(2)(a) MLI or if this also ends up in a case-by-case decision of the taxpayer. Assuming an exclusion of access only on a case-by-case basis would correspond to the normative provisions of the EU Arbitration Convention (Art. 15 EU Arbitration Convention) and §4(4) EU-DBA-SBG and would also correspond to the previous practice of the tax authorities. Based on the legal concept of the right of the persons concerned to choose the preferred legal basis, this understanding also appears consistent. A decision on a case-by-case basis is also supported by the fact that the wording of Art. 28(2)(a) of the MLI assumes a discretionary decision by the competent authority of the state declaring the reservation. However, this view could be countered by the fact that Germany recommends the declaration of a general primacy of the EU Arbitration Convention in treaty arbitration clauses in Art. 24(5)(d) of the German Treaty Negotiations Model and that recent developments in treaty policy in relation to Luxembourg and Sweden suggest the same.[309] The outstanding clarification is most likely to be given by the tax administration in the synopses/application still to be released by the German Ministry of Finance.[310]

b. Arbitration Proceedings

The OECD commentary provides a sample agreement that contracting states may use as a basis for an agreement to implement the arbitration process provided for in Art. 25(5) of the OECD Model Tax Treaty.[311] Germany generally followed these guidelines in the past. Consequently, Germany incorporated corresponding arbitration clauses in its income tax treaties

[303] For further details *see* Strotkemper, *Spannungsverhältnis zwischen Schiedsverfahren in Steuersachen und einem internationalen Steuergerichtshof — Möglichkeiten zur Verbesserung der Streitbeilegung im Internationalen Steuerrecht*, p. 232.

[304] Even if a limited control authority is given due to the discretion of the competent authorities, it may be argued for good reasons that a barely reasoned or not reasoned refusal may be considered an error of judgment which can be replaced by court. *See* for further references Diete, *Das obligatorische Schiedsverfahren in der deutschen DBA-Praxis*, p. 145 et seq.

[305] *See also* no. 22 of the protocol to Art. 25(5) and (6) of the treaty with the United States.

[306] *See* MLI Positions of Greece deposited on March 30, 2021, p. 24 et seq., available at https://www.oecd.org/tax/treaties/beps-mli-position-greece-instrument-deposit.pdf and MLI Positions of Spain deposited on September 28, 2021, p. 63 et seq., available at https://www.oecd.org/tax/treaties/beps-mli-position-spain-instrument-deposit.pdf.

[307] *See* for Hungary: OECD, MLI Arbitration Profile of Hungary as of March 25, 2021, available at https://www.oecd.org/tax/treaties/beps-mli-arbitration-profile-hungary.pdf anf for Italy: OECD, MLI Arbitration Profile of Italy as of June 28, 2022, available at https://www.oecd.org/tax/treaties/beps-mli-arbitration-profile-italy.pdf.

[308] See OECD, MLI Arbitration Profile of Malta as of June 28, 2022, available at https://www.oecd.org/tax/treaties/beps-mli-arbitration-profile-malta.pdf.

[309] *See* for further reference Liebchen/Strotkemper, *Bulletin for International Taxation* 2024, No. 7, online publication as of July 12, 2024, at 3.1.

[310] *See* a detailed discussion on this at Strotkemper, in: *frauen@fgs: Vielfalt in der steuerzentrierten Rechtsberatung, Jüngste Entwicklungen zur Streitbeilegung von Doppelbesteuerungskonflikten: Einordnung als steuerverfahrensrechtlicher Perspektive*, p. 165 (170 et seq.).

[311] Art. 25 of the OECD Model Tax Treaty, Annex.

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and has also issued bilateral consultations corresponding to the sample agreement of the OECD with the Netherlands and the United Kingdom and Northern Ireland.[312] Only for the treaties with Liechtenstein, Switzerland, and the United States Germany has agreed to an arbitration process that deviates significantly from the guidelines.[313] Furthermore, the arbitration process provided in the income tax treaty with Austria is unique, as the Court of Justice of the European Union (CJEU) is entrusted by Art. 25(5) of the income tax treaty with Austria as the responsible arbitration body if the competent authorities have not come to an agreement within three years at the MAP stage. The upcoming application of Art. 16 et seq. of the MLI as of January 1, 2025 with regard to the treaties with Greece, Hungary, Malta and Spain (at a later stage, Italy as well) is likely to bring along further variations; not only in relation to arbitration clauses of tax treaties, but also among each other due to deviating notifications and reservations.

The proceedings may be summarized as follows:

After a start date is determined by both competent authorities, an arbitration panel is selected. The OECD commentary provides that the competent authorities may each appoint one arbitrator. Within two months of those selections, the arbitrators will appoint a third arbitrator who will function as a chairperson.[314] The OECD further requires the chairperson to be a national and resident of a country other than the two contracting states.[315]

Within three months after both competent authorities receive the request for arbitration, the competent authorities must agree on the issues that must be resolved by the arbitration panel and communicate this agreement to the taxpayer in what is known as the "Terms of Reference." The competent authorities' Terms of Reference may also provide procedural rules that are additional to, or different from, those in the OECD Model Tax Treaty for a mutual agreement on arbitration. If the competent authorities fail to agree on the Terms of Reference, the taxpayer or each competent authority may, within one month after the end of the three-month period, communicate to each other, in writing, a list of issues which need to be resolved by the arbitration.[316]

The OECD provides for the following two approaches to arbitration: the "independent opinion" approach and the "last best offer" approach, both of which are discussed below. However, in the past, the independent opinion approach was the method generally recommended by the OECD. According to the opinion expressed here, it is very likely that the independent opinion approach is still the applicable method for the treaties with France, Japan, the Netherlands and the United Kingdom by default. Only the treaties with Liechtenstein, Switzerland, and the United States initially opted for the last best offer approach. For the treaties with Austria, Australia, Singapore, and Mauritius, which were concluded after the update of the OECD Model Tax Treaty and the Commentary, the last best offer approach should be applicable by default as the latest update of the OECD Model Tax Treaty changed to recommending the last best offer approach as well.[317]

Comment: Such a change of the recommendations of the OECD causes questions for the interpretation and application of arbitration clauses. If the arbitration clause is not accompanied by a bilateral Memorandum of Understanding, the OECD recommends the use of the current version of the OECD Model Tax Treaty and the Commentary. But, if the domestic law requires a static interpretation, this approach requires the continuing authoritative nature of the version of the OECD Model Tax Treaty and the Commentary which was valid at the moment of the conclusion of the treaty. This scenario should be presumed for the German tax treaties with France, Liechtenstein and Japan as these treaties were concluded before the update in 2017 and German jurisprudence upholds the static approach.[318] As far as treaties were concluded or amended in 2017 or later (for the treaties with Austria, Australia, Mauritius and Singapore) the static approach is likely to lead to the application of the new version of the OECD Model Tax Treaty and the Commentary. In relation to Austria, it depends on whether the CJEU acting as arbitrator is willing to make use of the last best offer approach. The interpretation question gets even more complicated if a bilateral Memorandum of Understanding is in force and requires a dynamic interpretation. Germany disposes of such bilateral Memoranda of Understandings with the Netherlands, Switzerland, the United Kingdom and the United States on the application of the arbitration procedure for tax treaties that were concluded before the 2017 update of the OECD model commentary, i.e. the bilateral consultation deviates from the static interpretation required by German jurisprudence. German tax administration generally favors the dynamic approach.[319] Where the character of the legal norm is unknown

[312] *See* also the Memoranda of Understanding with the United Kingdom and Northern Ireland (Ministry of Finance, Mutual Agreement on the performance of arbitration procedures (*Verständigungsvereinbarung zur Regelung der Durchführung des Schiedsverfahrens*), between Germany and the United Kingdom and Northern Ireland, IV B 3-S 1301-GB/11/10003, Federal Tax Gazette (BStBl.) I 2011, p. 956), and with the Netherlands (Ministry of Finance, Mutual Agreement on the performance of arbitration procedures (*Verständigungsvereinbarung zur Regelung der Durchführung des Schiedsverfahrens*) between Germany and the Netherlands of October 13, 2015).

[313] Appendix 2 of the Income Tax Treaty with the Netherlands of April 12, 2012, Federal Law Gazette (BGBl.) II 2012, 1456 (Mutual Agreement on Arbitration with the Netherlands); Ministry of Finance, Circular of March 3, 2017, IV B 2 - S 1301-CHE/07/10026-10, Federal Tax Gazette (BStBl.) I 2017, p. 486 (Mutual Agreement on Arbitration with Switzerland); Ministry of Finance, Circular of October 10, 2011, IV B 3 - S 1301 - GB/11/10003, Federal Tax Gazette (BStBl.) I 2011, p. 956 (Mutual Agreement on Arbitration with the United Kingdom).

[314] *See id.*, no. 5. For a detailed discussion on the choice of arbitrators please refer to Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.252 et seq.

[315] *See* Art. 25 OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 3 para. 2).

[316] Art. 25 of the OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no.15.1 para. 2).

[317] *See* Art. 25 OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 5 para. 5), nos. 2 et seq. Before the 2017 Model Tax Treaty update the last best offer approach was only recommended for the streamlined procedure.

[318] *See* Federal Fiscal Court (Bundesfinanzhof), July 11, 2018, I R 44/16, Federal Tax Gazette (BStBl.) II 2023, p. 430; most recently Federal Fiscal Court (Bundesfinanzhof), December 5, 2023, I R 42/20, BFH/NV 2024, p. 817.

[319] At first sight the publication of the judgement of the BFH, which confirms the static interpretation of tax treaties, in the Federal Tax Gazette (BStBl.) II 2023, p. 430) indicates the confirmation of the static interpretation by the tax administration. But as a footnote refers to a non-application decree expressly referring to the dynamic significance to the OECD Model Commentary for the interpretation of tax treaties, German tax authorities obviously continue to reject the static approach. *See* also BMF as of April 19, 2023, IV B 2-S 1301/22/10002:004, Federal Tax Gazette (BStBl.) I 2023, p. 630 and BMF as

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and there is no transformation into domestic law, such bilateral mutual understandings are merely administrative agreements without binding effect for the jurisprudence. Therefore, it is unclear, if German jurisdiction would favor the static interpretation over the dynamic interpretation also in the scenario of on older bilateral Memorandum of Understanding requiring the dynamic interpretation.

Based on Art. 23(1) of the MLI, the last best offer approach is also the generally applicable method. With regard to the treaties with Spain[320] and at a later stage also Italy[321] the last best offer approach will apply in relation to Germany, as neither Germany nor Spain and Italy opted for the independent opinion approach corresponding to Art. 23(2) (a to c) of the MLI. Therefore, the independent opinion approach only applies — unless subject to a different agreement in individual cases — in relation to the treaties with Greece, Hungary and Malta as these treaty partners notified the reservation of Art. 23(2) (a to c) of the MLI.[322]

Under the last best offer approach, each competent authority must propose a resolution for the case under discussion (and may include an optional position paper) within 60 days of the chairperson being appointed and may also submit a response submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority within 120 days of the chairperson being appointed.[323] Having been provided with the two competent authorities' positions, the arbitrators then choose one or the other; an independent decision is not permitted. Under the independent opinion approach, arbitrators are allowed to deviate from the opinions of the competent authorities. Arbitrators are presented with arguments by both sides and then make an independent suggestion to resolve the dispute based on a written, reasoned analysis.[324]

Given the nature of the last best offer process, a face-to-face meeting of the arbitrators is typically not necessary.[325] The proposed resolution should be consistent with any prior agreements between the two competent authorities and should focus on the amount to be paid or owed by the taxpayer. In some instances, the issues may deal with "threshold" questions (e.g., the residence of an individual or the establishment of a PE), in which case the resolution may include proposed answers to those questions as well.[326] Some treaties, such as the income tax treaties between Germany-Switzerland and Germany-United States, only allow specific page limits and impose other procedural rules regarding the last best offer approach.[327]

In each case, the arbitrators may apply reasonable procedural rules in order to reach an arbitration decision (i.e., no formal procedural rules for arbitration are laid down).[328] The OECD commentary on the 2017 version of the OECD Model Tax Treaty notes that Part VI of the MLI serves as a good guideline for many of the procedural aspects of the arbitration process.[329]

Generally, the person requesting arbitration is not granted any rights to participate in the process with respect to proceedings based on the last best offer approach. Only with regard to the proceedings based on the independent opinion approach does the OECD entitle the taxpayer — either directly or through its representatives — to present a written submission of its position to the arbitrators to the same extent that the person can present such a submission during the mutual agreement procedure, and, if the competent authorities and arbitrators all agree, also to make an oral presentation during a meeting of the arbitrators.[330] Germany follows the recommendations of the OECD, as arbitration clauses applying the last offer approach included in German income tax treaties do not entitle the taxpayer to submit a position paper if the competent authorities fail to submit their position papers within the set time limit.[331]

Before the arbitration agreement has been reached, the arbitration proceedings may be terminated at any time if the competent authorities have resolved all the issues that were subject to arbitration, or if the person who presented the case has withdrawn the request for arbitration or the request for a MAP.[332]

According to the Sample Mutual Agreement on Arbitration from the OECD as well as to the agreements on arbitration under the income tax treaties with the United Kingdom, the Netherlands, the United States, and Switzerland, each competent authority and each applicant bears its own costs for participation in the arbitration proceedings and for its preparation and support. The competent authorities bear any costs for the remuneration of the appointed arbitrators as well as their travel, telecommunications, and office expenses.[333] But the remuneration for the chairperson of the arbitral tribunal and any further costs are borne equally by both parties to the proceedings. Based on the income tax treaties with Switzerland and the United States, the cost sharing principle between the two competent authorities applies to all arbitrators.[334]

By default, the competent authority to which the arbitration case was originally submitted is responsible for the organization of the meetings and provides the administrative

of June 6, 2023, IV B 5-S 1341/19/10017:003- VWG VP 2023, Federal Tax Gazette (BStBl.) I 2023, p.1093 no. 2.3.

[320] *See* §11 Nr. 11 LI-AnwG.

[321] *See* OECD, MLI Matching Database, available at: http://www.oecd.org/tax/treaties/mli-matching-database.htm.

[322] *See* §6 no. 9 MLI-AnwG for Greece, §7 no. 7 MLI-AnwG for Hungary and §9 no. 8 MLI-AnwG for Malta.

[323] OECD Art. 25 OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 4 para. 1 to 3).

[324] Art. 25 of the OECD Model Tax Treaty, Annex, nos. 2 and 20.

[325] Art. 25 of the OECD Model Tax Treaty, Annex, no. 23.

[326] Art. 25 of the OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 4 paragraph 1).

[327] Income Tax Treaty Germany-United States, Protocol to Art. 25(5) and (6), 22(e); Mutual Agreement on Arbitration with Switzerland, no. 13.

[328] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.193.

[329] Art. 25 of the OECD Model Tax Treaty, no. 65.1.

[330] Art. 25 of the OECD Model Tax Treaty, Annex, no. 28.

[331] Some treaties concluded by the United States with other countries allow such submission though. For further details in this respect, *see* the treaties of the United States with France and Switzerland Strotkemper. *Spannungsverhältnis zwischen Schiedsverfahren in Steuersachen und einem internationalen Steuergerichtshof — Möglichkeiten zur Verbesserung der Streitbeilegung im Internationalen Steuerrecht*, p. 278 et seq.

[332] Art. 25 of the OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 10).

[333] The same applies if the arbitrator is appointed at the request of the applicant by the most senior member of the Secretariat of the OECD's Centre for Tax Policy and Administration who is not a national of one of the contracting states.

[334] Income Tax Treaty Germany-United States, Protocol to Art. 25(5) and (6), no. 22(o); Mutual Agreement on Arbitration with Switzerland, no. 11.

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staff necessary for the arbitration proceedings.[335] Consequently, this competent authority bears those associated costs. All other costs, such as translation and documentation costs, are borne equally by the competent authorities.[336]

Cost regulations with regard to arbitration proceedings under the income tax treaty with Austria are based on procedural rules by the CJEU and may be summarized as follows: According to Art. 72 of the CJEU Procedure Rules, parties to the proceedings such as the competent authorities are not required to pay any court costs. Expenses for experts or witnesses as well as lawyer's fees, travel and accommodation expenses, however, must be reimbursed according to Art. 73 of the CJEU Procedure Rules. The CJEU will decide on the exact apportionment of costs between the parties, whereby, in principle, the unsuccessful party bears the entire costs, but only after a corresponding application by the successful party.[337]

c. Arbitration Agreement

The timeline for the arbitration panel to communicate its decision to the parties varies depending on the approach taken. If the decision has not been communicated to the competent authorities within the respective period, the competent authorities may agree to appoint new arbitrators.[338]

Under the last best offer approach, under the recommendation of the OECD, the arbitration decision should be delivered to the competent authorities within 60 days after receipt of the last response submission, without supporting reasoning being required. If there is no response submission, the deadline expires 150 days from the date on which the arbitration panel appointed the chairperson.[339] In practice though, German arbitration clauses referring to the last best offer arbitration grant a limit of nine months to reach the arbitration decision.[340] Under the independent opinion approach, the arbitration panel must communicate its decision as well as the reasoning leading to it within one year from the appointment of the chairperson.[341] In both cases, a decision is made by a simple majority of the arbitration panel and is directly with binding effect (i.e., the German tax authorities must implement the outcome of the arbitration proceedings).[342]

In contrast to the provision of the EU Arbitration Convention, the OECD Model Tax Treaty generally does not provide the option to defer from this decision in the event of agreement by the competent authorities on an alternative solution that would eliminate the double tax conflict.[343] But the OECD emphasizes that a treaty clause can provide for such an alternative agreement.[344] Germany has included such a clause only in its income tax treaties with Liechtenstein and Armenia. In contrast to Art. 12(1) of the EU Arbitration Convention, the time period for deviating from the arbitral award is not six months after the publication of the decision, but three months.[345] It is not publicly known if this mechanism has been used. Corresponding to the latter, Art. 24(2) of the MLI Germany entitles the competent authorities — just like the other treaty partners do — to agree on a different solution within three calendar months of the arbitration award being sent in a so-called second mutual agreement procedure.[346]

Based on German income tax arbitration clauses following the OECD approach, the competent authorities must implement the arbitration decision within 180 days after the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration.[347] In contrast, according to the arbitration clauses with Switzerland and the United States, the arbitral decision is automatically considered a mutual agreement without an additional transformation process if the taxpayer declares its consent to the arbitral decision (as well as the withdrawal of pending legal proceedings and the waiver of any appeal rights toward implementation of the outcome in German law) within a set time period (either 30 or 60 days upon notification).[348] Arbitral decisions based on income tax treaties are generally not subject to publication.[349]

2. Arbitration Under EU Arbitration Convention

a. Access to Arbitration Proceedings

Arbitration proceedings come into play if a MAP fails to lead to an agreement within the two-year negotiation period specified by Art. 7(1) of the EU Arbitration Convention. All disputes concerning transfer pricing and the allocation of profits to PEs involving EU Member States are covered by the EU Arbitration Convention (access to arbitration proceedings un-

[335] Art. 25 of the OECD Model Tax Treaty, no. 40 and Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 8 d).

[336] Art. 25 of the OECD Model Tax Treaty, no. 40 and Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 8 e).

[337] *See* Art. 69(1) of the ECJ Procedure Rules. *See also* ECJ, decision of September 12, 2017, C-648/15, Official Journal (ABl. EU) 2017, Nr C 382, 12, no. 59 et seq. Here the costs were borne by Germany as the unsuccessful party upon a corresponding application by Austria.

[338] Art. 25 of the OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 9).

[339] Art. 25 of the OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 4 paragraph 5).

[340] *See* Ministry of Finance, Agreement on the application of arbitration procedures (*Verständigungsvereinbarung über die Anwendung des Schiedsverfahrens*) between Germany and the United States, IV B 2-S 1301-USA/08/10001 2009/0013814, Annex 2, no. 16 (a); Ministry of Finance, Agreement on the performance of arbitration procedures (*Konsultationsvereinbarung über die Durchführung von Schiedsverfahren)* between Germany and Switzerland, IV B 2-S 1301-CHE/07/10026-10, Federal Tax Gazette (BStBl.) I 2017, p. 378, no. 13 (a).

[341] Art. 25 of the OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 5 para. 6).

[342] §175a(1) of the FCG for a more detailed discussion on the possibility of an implementation in cases of the expiration of the limitation period see Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.220.

[343] Art. 12(1) EU Arbitration Convention.

[344] *See* Art. 25 of the OECD Model Tax Treaty, no. 84.

[345] Art. 25(6) e) of the Income Tax Treaty with Liechtenstein and Art. 24(5) sentence 4 Income Tax Treaty with Armenia.

[346] See §6 no. 10 MLI-AnwG for Greece, §7 no. 8 MLI-AnwG for Hungary, §9 no 9 MLI-AnwG for Malta and §11 no. 12 MLI-AnwG for Spain. The same is most likely in relation to Italy at a later stage.

[347] Art. 25 OECD Model Tax Treaty, Annex, no. 1 (Sample Mutual Agreement on Arbitration no. 12).

[348] *See* Ministry of Finance, Agreement on the application of arbitration procedures (*Verständigungsvereinbarung über die Anwendung des Schiedsverfahrens*) between Germany and the United States, IV B 2-S 1301-USA/08/10001 2009/0013814, Annex 1, no. 17 (b); Ministry of Finance, Agreement on the performance of arbitration procedures (*Konsultationsvereinbarung über die Durchführung von Schiedsverfahren*) between Germany and Switzerland, IV B 2-S 1301-CHE/07/10026-10, Federal Tax Gazette (BStBl.) I 2017, p. 378, no. 13 (d) and (e).

[349] Art. 25 OECD Model Tax Treaty, Annex, no. 32.

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der it is limited to unresolved allocation disputes concerning entities or permanent establishments and corresponds completely to the access to a MAP based on Art. 6 of the EU Arbitration Convention).[350] But access to arbitration proceedings necessarily contemplates the failure of a bilateral mutual agreement procedure based on Art. 6 of the EU Arbitration Convention. In other words, the MAP stage cannot be skipped to initiate an arbitration proceeding.

If a country's domestic law does not permit its own competent authorities to derogate from binding decisions of their judicial bodies, access to arbitration implies that any time frames for out-of-court or judicial appeal procedures have expired or that the taxpayer withdraws the appeal before a decision has been made.[351] In Germany it has not always been entirely clear if this provision is applicable. Circulars from the tax authorities suggested, at least for arbitral decisions, that derogating from a binding court decision would be possible based on §110(2) of the GTCC and §175a of the FCG.[352] Formerly the tax authorities viewed such a derogation from a binding court decision by an MAP settlement as not being possible.[353] This corresponds with the view of the predominant opinion in literature which — even today — holds such derogations as being not admissible (neither by a MAP settlement nor by arbitral decision).[354] But based on the latest legislative acts — and preceding internal discussions[355] — regarding dispute resolution in international tax law, it is likely that such a derogation from a binding court decision is possible by both MAP settlements and arbitral decisions.[356]

b. *Arbitration Proceedings*

The competent authorities must set up an advisory commission whose mandate is to provide an arbitral opinion on the elimination of the double taxation in question.[357] The advisory commission is obliged to apply the OECD Guidelines, rather than national rules, when assessing compliance with the arm's length principle[358] and to reach its decision based on the independent opinion approach.[359]

The advisory commission generally consists of two (or one if the competent authorities agree to that) representative(s) of each competent authority of the Member States concerned, an even number of independent people (mostly two) independent people selected from a list maintained by the General Secretariat of the European Council,[360] and one independent chairperson.[361] This structure guarantees an arbitration committee with an uneven number of members. While the EU Arbitration Convention suggests an assignment of at least seven panelists, in practice a smaller panel consisting of five members is most common.

An applicant or any related company may ask to make an oral presentation during a meeting of the arbitration panel, and the panel itself may request an oral presentation from any applicant or related company during any of its meetings.[362]

All procedural costs of an advisory commission must be covered by the parties to the arbitration, regardless of the outcome or the course of the proceedings. The taxpayer must bear all of its legal and tax advice costs and other costs relating to MAP and arbitration proceedings.[363]

c. *Arbitration Agreement*

Within six months, the advisory commission must deliver its opinion on the avoidance of double taxation to the competent authorities. A simple majority is sufficient for an opinion to be made.[364] The competent authorities have a period of six months within which to agree to the proposed solution or to find an alternative independent solution that eliminates double taxation.[365] The opinion of the arbitration committee becomes binding for the involved Member States if the competent authorities fail to reach a solution within the six-month time period offered by the EU Arbitration Convention. The agreement between the competent authorities or the binding decision of the advisory commission must be implemented by the tax authorities under its domestic law upon consent of the taxpayer, accompanied by the respective withdrawals and waiver of legal acts with regard to the amending tax assessment that implements the arbitral decision or agreement.[366] The arbitral decision can be published at the discretion of the competent authorities, optionally only on an anonymous basis.[367]

Given that the EU Arbitration Convention is not an EU Directive, but a multilateral contract, it is not part of European Community Law and is therefore not subject to the jurisdiction of the CJEU. Thus, there is no appellate authority that ensures

[350] *See* III.B.2.b., above.

[351] Art. 7(3) of the EU Arbitration Convention.

[352] Ministry of Finance, Circular of October 9, 2018, no. 13.1.4; Ministry of Finance, Circular of July 13, 2006, no. 13.1.4; Ministry of Finance, Circular of July 1, 1997, IV C 5-S 1300-189/96, Federal Tax Gazette (BStBl.) I 1997, p. 717 (Ministry of Finance, Circular of July 1, 1997), no. 9.1 (all replaced by Ministry of Finance, Circular of February 21, 2024).

[353] Ministry of Finance, Circular of April 1, 1993, IV C 5 - S 1300 - 158/92, Federal Tax Gazette (BStBl.) I 1993, p. 332 (Ministry of Finance, Circular of April 1, 1993), no. 4.2.

[354] *See* Flüchter, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 182 for further details; Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no.13.190; Liebchen/Strotkemper, *Internationales Steuerrecht* 2022, p. 93 (96).

[355] *See* Blank, in: Kubik/Schmidjell-Dommes/Staringer, *Steuer und Wirtschaft International-Spezial* 12/2019, *Das EU-Besteuerungsstreitbeilegungsgesetz, XVI. Die Umsetzung der EU-Streitbeilegungsrichtlinie in Deutschland*, p. 180 (187 et seq.).

[356] *See* German Parliament, Official Record (Bundestag Drucksache) no. 19/20979, p. 148, where Germany declares no reservation to Art. 19(12) MLI.

[357] For a detailed discussion please refer to Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.196–13.199.

[358] Art. 11(1) EU Arbitration Convention.

[359] The content of the decision is laid down in EU JTPF, Revised Code of Conduct, December 30, 2009, no. 7.4.

[360] For details s. EU JTPF, Revised Code of Conduct, December 30, 2009, no. 7.1.

[361] Art. 9(1) of the EU Arbitration Convention. For a detailed discussion please refer to Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.200–13.203.

[362] Art. 10(2) of the EU Arbitration Convention.

[363] Art. 11(3) of the EU Arbitration Convention. For a detailed discussion, *see* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.221–13.223; Liebchen, in: Schönfeld/Ditz, Art. 25 OECD Model Tax Treaty, no. 319–321.

[364] Art. 11(2) of the EU Arbitration Convention.

[365] Art. 12(1) of the EU Arbitration Convention.

[366] §175a(1) of the FCG and Ministry of Finance, Circular of February 21, 2024, nos. 84 et seq. and no. 141. For a detailed discussion on the possibility of an implementation in the case of the expiration of the limitation period, *see* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.220.

[367] Art. 12(2) of the EU Arbitration Convention and EU JTPF, Revised Code of Conduct, December 30, 2009, no. 7.4 h) ii).

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compliance with procedural rules or the arbitration proceedings.[368]

3. *Arbitration Under the EU Directive on Tax Dispute Resolution Implemented as EU-DBA-SBG*

a. *Access to Arbitration Proceedings*

If the competent authorities have not reached a mutual agreement resolving the dispute within the time frame provided by §13(2) or (4) of the EU-DBA-SBG, the person who submitted the dispute resolution complaint is entitled to request the initiation of an arbitration proceeding (i.e., the establishment of an advisory committee to issue an arbitral opinion on how the dispute should be resolved).[369] The person concerned must submit this request in writing and within 50 days (calculated from the day following the day on which he or she was notified of the failure of a MAP) simultaneously to all competent authorities and with the same information.[370] As specifications for this request are not predefined by law or by the tax authorities, it is recommended to refer to the content of the dispute resolution complaint as well as to the failure of the MAP. The same conditions apply to the request of the person concerned requesting the review of the rejection of a complaint according to §10 of the EU-DBA-SBG (see III.B.3.b., above).[371] Only in the exceptional case of a skipped MAP stage (a "jump arbitration" or "*Sprungschiedsverfahren*" in German) is the advisory committee to be installed ex officio, without a separate request of the person concerned, in order to provide an arbitral agreement according to §17 of the EU-DBA-SBG. This is the case if the MAP has not been initiated by any of the competent authorities within 60 days from the date of receipt of the notification of the advisory committee on the admission of the complaint.[372] The MAP is replaced in full in this scenario.[373]

The commission must be established according to §21 and §24 of the EU-DBA-SBG upon a request of the person concerned in due time to all competent authorities provided that: *(i)* no mutual agreement has been reached within the relevant agreement period, *(ii)* access to the arbitration proceeding is not restricted or suspended, and *(iii)* the proceeding is not to be terminated for other reasons.[374] The composition of the advisory committee must be decided by the competent authorities within 120 days, calculated from the day following the day on which the application was received by the competent authorities.[375] The chairperson of the advisory commission must formally inform the person concerned of the appointment or the rejection of the appointment without delay.[376]

If these requirements are met, the advisory committee is entitled to issue an arbitral opinion on how the dispute should be resolved (or on the approval of the rejection or the admission of the complaint according to §10 of the EU-DBA-SBG). But the BZSt can restrict access to arbitration proceedings:

- if the person concerned has — based on a legally binding decision in a court or administrative proceeding — violated the tax laws and if this violation related to the issue in dispute.[377] If such proceedings are still ongoing, the BZSt may only — again upon its unilateral discretion — order the suspension of the dispute resolution proceedings according to §17 of the EU-DBA-SBG until the final decision has been issued with binding effect.[378] Vice versa, the composition of an advisory commission does not preclude the initiation or continuation of administrative or judicial criminal proceedings against the person concerned in the same matter;[379]

- if a dispute does not involve a question relating to a cross-border double taxation.[380]

Furthermore, it is to be assumed that the arbitral proceedings may also be terminated at this level immediately:[381]

- if the person withdraws the complaint within the arbitration stage;[382]

- if the arbitration proceedings is settled by other means on a unilateral level;[383] and/or

- if a final decision on the dispute has been issued in one of the contracting states in the case of an inadmissibility to deviate from this binding decision in an international dispute resolution proceeding.[384]

b. *Arbitration Proceedings*

The course of the arbitral proceedings before the advisory commission must be agreed on a case-by-case basis between the competent authorities involved according to §27 of the EU-DBA-SBG as the "rules of procedure." The rules of procedure will be made available to the person concerned within a period of 120 days, according to §22 and §27(2) of the EU-DBA-SBG. Among other things, these rules of procedure must always determine:

- the issue in dispute and its characteristics;

- the time frame for the arbitration procedure and, in particular, the day on which the deadline to reach a decision expires;

- the composition of the advisory commission or the alternative dispute resolution committee, including the number and names of the members, information on their competence and qualifications, and disclosure of any conflicts of interest of the members;

[368] For a detailed discussion, *see* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.216.

[369] §17 (1) sentence 1 of the EU-DBA-SBG.

[370] §17 (1) s.2 and 3 and §16(1) of the EU-DBA-SBG.

[371] §10 (2) of the EU-DBA-SBG.

[372] §10(4) and (5) of the EU-DBA-SBG.

[373] §17(2) of the EU-DBA-SBG.

[374] §20(2) s. 1 and (4) of the EU-DBA-SBG.

[375] §22 s. 1 of the EU-DBA-SBG.

[376] §22 s. 2 of the EU-DBA-SBG (appointment) and §20 (2) sentence 2 EU-DBA-SBG (rejection). *See also* Ministry of Finance, Circular of February 21, 2024, nos. 177 et seq.

[377] §20(1) sentence 12 of the EU-DBA-SBG. *See also* Ministry of Finance, Circular of February 21, 2024, no. 6.

[378] §20(1) sentence 2 of the EU-DBA-SBG.

[379] §20(3) of the EU-DBA-SBG.

[380] §20(2) of the EU-DBA-SBG. *See also* Ministry of Finance, Circular of February 21, 2024, no. 6.

[381] *See* Ministry of Finance, Circular of February 21, 2024, nos. 149, 158.

[382] §11(1) and §16(2) of the EU-DBA-SBG.

[383] §12 and §16(2) of the EU-DBA-SBG.

[384] *See* explicitly in this context §20(4) of the EU-DBA-SBG.

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- rules for the participation of any interested person and third parties in the proceedings;
- rules for the exchange of pleadings, of information, and of evidence;
- rules for the costs;
- rules for the nature of the dispute settlement procedure; as well as
- rules for other important procedural or organizational aspects;

not only for mandates upon §§17 et seq. of the EU-DBA-SBG, but also upon §10 of the EU-DBA-SBG.[385]

In the case of arbitration proceedings following mutual agreement procedures according to §17 et seq. of the EU-DBA-SBG, the determination of the legal and factual issues in dispute agreed upon by the competent authorities — if applicable — of the decisive national law according to §3(2) of the EU-DBA-SBG, the constitution of the dispute settlement body as an advisory commission or as a committee for alternative dispute resolution, together with the type of procedure for alternative dispute resolution, as well as logistical arrangements for the proceedings of the advisory commission and to form its opinion, are required, as well.[386]

If the rules of procedure are not agreed upon and provided to the person concerned in due time or not corresponding to the requirements, §27(5) of the EU-DBA-SBG regulates the application of standard rules of procedure agreed upon by the EU Commission or, if the rules of procedure do not meet the criteria of §27(1) to (4) of the EU-DBA-SBG, the rules of procedure must be revised by the independent commission members and the chairperson on the basis of the standard rules of procedure of the EU Commission within two weeks from the time of the establishment of the advisory commission. Where the requirements set out by §27(5) of the EU-DBA-SBG are also not met in due time, §27(6) of the EU-DBA-SBG provides for the right of the person concerned to file a legal action against the BZSt (or, in other countries, against the respective competent authority) requesting for an order for the application of the rules of procedure.

Each advisory commission is composed of a chairperson, one representative of each of the competent authorities involved, and one independent person selected by each of the competent authorities involved from a list maintained by the EU Commission (within the meaning of §26 of the EU-DBA-SBG).[387]

- The EU Commission maintains a list of independent people and chairpersons who may be elected to an advisory commission.[388] To make up this list, each EU Member State was entitled to nominate at least three appropriately qualified people and also to separately designate people qualified to hold the chair.[389] This list has to be updated regularly, i.e., changes to the people nominated by Germany can be communicated by the Ministry of Finance to the EU Commission at any time.[390] As the first edition of the list was published in the course of 2021, the publication was delayed. Nominations of Croatia, Italy, and Lithuania were not included and were considered as pending. Meanwhile as of January 19, 2024, the EU Commission released the newest edition of the list. Meanwhile also Italy — as last EU Member State — fulfilled its obligation to nominate respective persons. Some states have nominated even more people, and also marked people qualified for the chair.[391]
- In the event that the independence of one listed person is no longer guaranteed, the person's term ends.[392] Upon notification by an EU Member State of concerns regarding the independence of people nominated by other EU Member States to the EU Commission, the respective nominating authority is obliged to decide on this complaint within six months and, if necessary, must remove the person as a list candidate.[393]

Upon agreement by the competent authorities involved, both the number of representatives of the competent authorities and the number of independent people to be appointed by each competent authority may be increased to two individuals.[394] Furthermore, a deputy of each independent person must be selected by the appointing competent authority.[395]

The selection procedure for the appointment of independent people proceeds as follows:

- Generally, the requirements of the appointment of independent people and of a deputy must be determined by the competent authorities.[396] In cases of doubt, the independent people must be chosen by lot.[397] If a competent authority does not make its selection decision in due time, the person concerned is entitled to file a legal action against the respective competent authority with the competent national court within 30 days after the expiration of the 120-day period for the initiation of the arbitration proceedings, according to §22 of the EU-DBA-SBG, requesting for the replacement of the election of the independent person(s) plus deputy from the list specified in §26 of the EU-DBA-SBG by a judicial decision.[398] Following the BZSt's notification

[385] *See* explicitly in this context §27(3) and (4) of the EU-DBA-SBG.

[386] *See* explicitly in this context §27(2) and (3) of the EU-DBA-SBG.

[387] *See* §21 s. 1 of the EU-DBA-SBG.

[388] *See* §26 of the EU-DBA-SBG and Council Directive (EU) 2017/1852 of 10 October 2017 on Tax Dispute Resolution Mechanisms in the European Union — Art. 9 — List of independent persons of standing as of September 5, 2022, available at https://taxation-customs.ec.europa.eu/system/files/2022-09/DRM-Table%202022-09-05%20%283%29.pdf.

[389] At the domestic level, national tendering and application procedures are likely to have preceded each nomination. Persons on the list were to be nominated by the German BMF by June 30, 2019. *See* §26(1) and (2) EU-DBA-SBG.

[390] *See* §26(3) of the EU-DBA-SBG.

[391] Germany nominated 11 persons, with five persons being qualified to act as chairperson. Initially 13 persons were nominated. Thereof, the term of 3 persons already ended and one additional person was nominated meanwhile.

[392] *See* §26(4) of the EU-DBA-SBG.

[393] *See* §26(5) sentence 1 to 3 of the EU-DBA-SBG.

[394] *See* §21 s. 2 of the EU-DBA-SBG.

[395] *See* §24(1) sentence 2 of the EU-DBA-SBG.

[396] *See* §24(1) sentence 1 of the EU-DBA-SBG.

[397] *See* §24(1) sentence 2 of the EU-DBA-SBG.

[398] *See* §24(2) to (4) of the EU-DBA-SBG. Pursuant to §24(4) sentence 4 of the EU-DBA-SBG the court decision can be subject to appeal by the applicant (in the event of the dismissal of his or her claim) and by the BZSt (in the event of a court replacement).

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by the tax court of Cologne, the BZSt must inform the other competent authority (or competent authorities) about the judicial selection decision immediately.

• The BZSt may reject the appointment of an independent person selected according to §24(1) to (4) of the EU-DBA-SBG.[399] Such rejection may be based on

o an ongoing or recent membership in one of the financial administrations involved or in the case,

o a participation with a significant interest in the person concerned or a status as employee or consultant of the person concerned during the last five years prior to the appointment,

o legitimate doubts of the sufficient guarantee of impartiality in the specific dispute resolution proceedings, or

o an involvement as a tax consultant during the last three years prior to the appointment.

The competent authorities may agree on further grounds for refusal in advance.[400] Such activities or reasons may also not exist for a period of 12 months after the decision of the advisory commission.[401] If a court confirms the non-independence of the respective person, this will result in the non-implementation of an already-made decision by the advisory commission, and the proceedings before the advisory commission must be reinitiated.[402] It has not been clarified whether the proceedings must also be completely reinitiated or whether only the person concerned is replaced if no decision of the advisory commission has yet been reached.

As §24 of the EU-DBA-SBG does not specify requirements for the appointment of the representatives of the authorities, the competent authorities are only obliged to appoint their representatives within the 120-day period.

The chairperson of the advisory commission must be selected by the previously selected representatives of the competent authorities and the independent people appointed from the list specified in §26 of the EU-DBA-SBG.[403] Unless the competent authorities agree otherwise, this person must be qualified to hold a judicial office.[404] Further conditions for the selection decision or dealing with a tie are not prescribed in §24(5) of the EU-DBA-SBG. But the chairperson must be determined by lot if the independent people have previously been determined by judicial selection decisions in all the countries.[405]

All members of the advisory commission are bound by tax secrecy and corresponding duties of confidentiality.[406] The person concerned and his or her representative must also consent, upon request, to secrecy requirements with regard to all information and documents of which they become aware during dispute resolution proceedings.[407] Breaches of these confidentiality requirements are to be sanctioned by the BZSt, which is obliged to report to the EU Commission.[408]

The persons concerned with the matter before the advisory commission are only entitled to submit information, evidence, or documents that might be relevant to the opinion if this is approved by the competent authorities involved.[409] In contrast, the advisory commission may in principle request the submission of further information, evidence, or documents from the person concerned at any time.[410] Similarly, a person concerned may appear before an advisory commission in person or be represented at his or her own request only upon prior approval of the competent authorities,[411] while in contrast, the person concerned must appear before the advisory commission (him or herself or through his or her representative) upon an order by the advisory commission.[412] Compared to Art. 10(1) and (2) of the EU Arbitration Convention, the possibilities for participation are stricter, i.e., the person concerned may neither submit information nor be heard by the advisory committee on his own initiative within the scope of the EU-DBA-SBG and is invariably reliant on the approval of the competent authorities. Conversely, however, there is an obligation to make oral or written statement upon orders by the advisory commission.

The advisory commission is generally also entitled to file a request to the competent authorities for further information, evidence, or documents.[413] However, the BZSt may refuse the request on the grounds of: *(i)* inability to obtain the requested information under applicable law; *(ii)* any associated violation of commercial, business, trade, or professional privileges or of a business procedure; or *(iii)* a violation of public policy.[414]

By default, the costs of the dispute settlement proceedings, including the proceedings before the advisory commission or the alternative dispute resolution committee, will be borne in equal shares by the involved competent authorities.[415] This default rule fully corresponds to the cost provisions for dispute settlement proceedings under income tax treaties and the EU Arbitration Convention.[416] The person concerned bears any costs incurred by him or herself on his/her own.[417]

However, in cases of withdrawn dispute resolution complaints according to §11 of the EU-DBA-SBG or the rejection of a dispute resolution complaint by the advisory commission based on §10 of the EU-DBA-SBG, the competent authorities are entitled to charge any costs of the proceeding to the person concerned.[418] Comparable cost risks are not provided for in the dispute settlement clauses under income tax treaties or the EU Arbitration Convention.

c. Arbitration Agreement

The advisory commission is generally obliged to make the arbitral opinion within six months following its installation and

[399] *See* §25(1) sentence 1 of the EU-DBA-SBG.
[400] *See* §25(1) sentence 2 of the EU-DBA-SBG.
[401] *See* §25(3) of the EU-DBA-SBG.
[402] *See* §25(4) of the EU-DBA-SBG.
[403] *See* §25(5) sentence 1 of the EU-DBA-SBG.
[404] *See* §25(5) sentence 2 of the EU-DBA-SBG.
[405] *See* §24(3) of the EU-DBA-SBG.
[406] This is expressly imposed by §23(5) of the EU-DBA-SBG for persons who are not public officials within the meaning of §30(1) and §7 of the FCG.
[407] *See* §23(6) of the EU-DBA-SBG.
[408] *See* §23(7) of the EU-DBA-SBG.
[409] *See* §23(1) of the EU-DBA-SBG.
[410] *See* §23(2) of the EU-DBA-SBG.
[411] *See* §23(4) sentence 1 of the EU-DBA-SBG.
[412] *See* §23(4) sentence 2 of the EU-DBA-SBG.
[413] *See* §23(2) of the EU-DBA-SBG.
[414] *See* §23(3) of the EU-DBA-SBG.
[415] *See* §31(1) of the EU-DBA-SBG.
[416] *See* §31(1) of the EU-DBA-SBG.
[417] *See* §31(2) of the EU-DBA-SBG.
[418] *See* §31(3) of the EU-DBA-SBG.

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to provide it in written form to the competent authorities via the chairperson.[419] This period can be extended by three months to nine months by the advisory commission.[420] The competent authorities involved do not have a right to a veto in this respect and are merely to be informed of the extension of the deadline.[421] The same applies for the persons concerned.

The commission's decision must be based on the applicable agreement or convention and/or on applicable domestic provisions; the independent opinion approach is applied by default.[422] Therefore, the members of the advisory commission are not bound by the positions of the competent authorities. The decision of the advisory commission is made by a simple majority of the members. If there is not otherwise a majority of votes, the vote of the chairperson is considered as decisive.[423]

Generally, the final arbitral decision has binding effect on the German authorities.[424] However, within six months from the notification of the arbitral decision to the competent authorities, they are entitled to mutually decide whether the arbitral opinion should be accepted or how the dispute should be resolved differently (a "second MAP").[425] If they do not reach an agreement on the resolution of the dispute within this period, they are automatically bound by the opinion of the advisory commission. The BZSt, as the German competent authority, must notify the person concerned of the final decision within a period of 30 days, calculated from the day following the day of the decision.[426] If this notification is not carried out in due time, the person concerned may file an objection with the BZSt grounded on the failure to act in due time.[427] As the person concerned is — by law — neither to be informed about the transmission of the decision by the advisory commission to the competent authorities nor of the result of the final decision of the competent authorities, it is recommended that the person concerned keep his or her own log entries on the expiry of both periods in order to track the respective deadlines.

Comment: The competent authorities (CAs) can deviate from the arbitral opinion but only if they reach an agreement within six months from the notification of the arbitral decision to the competent authorities. The taxpayer will only be informed about the final decision but not about whether this final decision is based on: (*i*) the arbitral opinion or (*ii*) a different agreement between the CAs within the six-month period. Tracking the periods is necessary because arbitral opinion of the advisory commission becomes binding if a different agreement was not reached within the six-month period (but maybe later).

The implementation of the final decision of the advisory commission into domestic law corresponds to the implementation of mutual agreements in domestic law, i.e., the final decision is thus only implemented via tax assessment in accordance with §175a of the FCG if the person concerned officially approves of the decision, waives the right to appeal against the tax assessment notice implementing this decision separately to the BZSt and, if necessary, withdraws pending domestic administrative or judicial appeals relating to the issue(s) in dispute toward the body conducting the respective proceedings. The aforementioned declarations must be transmitted within 60 days from the day following the day on which the person concerned became aware of the final decision.[428] Consequently, the dispute resolution proceedings are not considered as terminated until the 60-day period has expired.[429]

The final decision resolving the dispute does not provide any precedential effect for other dispute resolution proceedings involving similar issues in dispute.[430] Nevertheless, by default, a summary of the final decision must be published with a specified minimum information level providing for a description of the facts and the subject matter of the dispute, the date of the final decision, the tax periods concerned, the legal basis of the decision, the economic sector, a brief description of the final decision, as well as the nature of the arbitration proceedings.[431] For this purpose, the competent authorities are entitled to use the respective model form prepared by the EU Commission.[432] However, the person concerned can, within a period of 60 days beginning with the day after the competent authority announces the contents of the minimum information to be disclosed, request the omission of any information linked to trade, business, commercial, or professional privileges or business procedures or information contrary to public policy.[433] At the discretion of the competent authorities — as well as with the consent of the person concerned — the full text of the final decision may be disclosed.[434] The BZSt is obliged to forward the information to be published to the EU Commission without delay.[435]

d. Alternative Dispute Resolution Proceedings

To conduct the arbitral proceedings according to §§17 et seq. of the EU-DBA-SBG on how the dispute should be resolved, the competent authorities are entitled to agree on the formation of an alternative dispute resolution commission instead of the establishment of the advisory commission.[436] In principle, this is a decision that is likely to be made separately for each individual case by the competent authorities. But the legal framework of the EU Tax Dispute Resolution Directive (as well as of the EU-DBA-SBG) also allows for the general performance of the alternative dispute resolution proceedings if the competent authorities agree on a standardized process for the performance of the proceedings.

The person concerned has neither a formal right to request the establishment of such an alternative dispute resolution process nor a right to prevent its establishment. Unaffected by this, the person concerned may suggest such an installation within the request for the initiation of the arbitral proceedings.

[419] *See* §17(3) sentence 1 and 6 of the EU-DBA-SBG.
[420] *See* §17(3) sentence 3 of the EU-DBA-SBG.
[421] *See* §17(3) sentence 4 of the EU-DBA-SBG.
[422] *See* §17(4) of the EU-DBA-SBG.
[423] *See* §17(5) of the EU-DBA-SBG.
[424] *See* §18(4) of the EU-DBA-SBG.
[425] *See* §18(1) and (2) of the EU-DBA-SBG.
[426] *See* §18(3) sentence 1 of the EU-DBA-SBG.
[427] *See* §18(3) sentence 2 of the EU-DBA-SBG and §347 (1) sentence 2 FCG.
[428] *See* §18(5) of the EU-DBA-SBG.
[429] *See* §18(5) sentence 4 of the EU-DBA-SBG.
[430] *See* §18(4) sentence 2 of the EU-DBA-SBG.
[431] *See* §19(2) sentence 1 and 2 of the EU-DBA-SBG.
[432] *See* §19(2) sentence 3 of the EU-DBA-SBG.
[433] *See* §19 s. 3 of the EU-DBA-SBG.
[434] *See* §19(1) of the EU-DBA-SBG.
[435] *See* §19(4) of the EU-DBA-SBG.
[436] *See* §29 of the EU-DBA-SBG.

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As §§29 et seq. of the EU-DBA-SBG do not regulate any procedural requirements for the characteristics of the alternative dispute resolution proceedings, the alternative dispute resolution process can generally take any form of dispute resolution mechanism (such as mediation, conciliation, or "final offer" arbitration).[437] Regardless of any adopted alterations, the application of several default rules set by §§17 et seq. of the EU-DBA-SBG is still required by law and includes:

- the compliance of the panel members with the independence criteria set out by §25(1) and (2) of the EU-DBA-SBG and any rules determining time limits;
- the rules of procedure;
- the entitlement of the competent authorities to determine an alternative final decision;
- the implementation of the decision in domestic law;
- and conditions for publications according to §§17, 19, 23, and 27 of the EU-DBA-SBG.[438]

If the competent authorities agree on an alternative dispute resolution process, the only deviation from the default arbitration proceedings may be the determination of a different composition of the arbitral panel or of an alternative dispute resolution procedure. With regard to possible deviations, they are likely to stick to the general composition regulations for advisory commissions, except to authorize the alternative dispute resolution committee to issue an opinion in accordance with the "final offer approach" (i.e., subject to a proposal for a solution by the competent authorities),[439] or to establish the committee only as a consultative body (mediation procedure or submission of a non-binding proposal for a solution). Beyond this, §29(2) of the EU-DBA-SBG also entitles the competent authorities to mutually agree on the establishment of a standing alternative dispute resolution body. By doing so, the activities of the advisory commission within the meaning of §§17 et seq. of the EU-DBA-SBG would be replaced for any dispute resolution proceedings between the respective EU Member States concerned, either on a permanent basis or only in selected case clusters. Such an approach might be considered as the starting point for the establishment of an institutionalized international dispute resolution body.[440] Different proposals for a permanent panel (full-time arbitrators, part-time arbitrators, or rotating roster system for arbitrators) as well as for options for operations of the alternative dispute resolution body on an ad hoc basis have been discussed on at an intergovernmental level as well as by several scholars.[441] Currently, one should assume that Alternative Dispute Resolution Proceedings will most likely only vary slightly from ordinary arbitration. The variations to be expected are a nomination of ad hoc arbitrators, as provided for by §§21 et seq. of the EU-DBA-SBG, and the limitation of the arbitrators' decision-making authority from the "independent opinion" approach to the "final offer" approach.

D. Evaluation of Dispute Resolution in Germany

1. Monitoring of the Implementation of the BEPS Actions 14 and 15 in Germany

Action 14 of the OECD's BEPS project addresses how countries can timeously implement effective and efficient dispute resolution mechanisms. As part of the project, the OECD issued a 2015 final report on Action 14 entitled "Making Dispute Resolution Mechanisms More Effective" that included a set of minimum standards and recommended measures for addressing obstacles preventing countries from resolving treaty-related disputes and ensuring that such disputes are ultimately resolved under the MAP.

Several OECD member countries have committed to implementing the minimum standards provided for in Action 14 and have taken steps to employ the measures effectively. Member countries also commit to a peer-review and monitoring process intended to assess their compliance with the minimum standards.[442] All peer review and monitoring is conducted by the Forum on Tax Administration MAP Forum (a subsidiary body of the OECD Committee on Fiscal Affairs) in accordance with previously agreed upon Terms of Reference and Assessment Methodology.[443]

The first peer-review report for Germany was published on December 15, 2017,[444] and the second on April 9, 2020.[445] The report assessing Germany's dispute resolution measures concluded that Germany meets most of the elements of Action 14's minimum standards. According to the report, all of Germany's tax treaties include provisions relating to MAP, and those treaties generally follow Art. 25(1) to (3) of the OECD Model Tax Treaty. On the other hand, the report criticized that a quarter of Germany's tax treaties neither included a provision indicating that mutual agreements could be implemented irrespective of time frames in domestic law (which is required

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[437] *See* Art. 9, 14(2) of the EU Tax Dispute Resolution Directive. For a detailed discussion, *see* Strotkemper, *Internationale Wirtschafts-Briefe* 2019, p. 55.

[438] *See* §30(2), (3) and (5) of the EU-DBA-SBG.

[439] *See* §30(4) of the EU-DBA-SBG. For a detailed discussion, *see* Lehner, *Internationales Steuerrecht* 2019, p. 277 (282).

[440] *See* Lehner, *Internationales Steuerrecht* 2019, p. 277 (284). *See* Strotkemper, *Spannungsverhältnis zwischen Schiedsverfahren in Steuersachen und einem internationalen Steuergerichtshof — Möglichkeiten zur Verbesserung der Streitbeilegung im Internationalen Steuerrecht,* p. 560 et seq., p. 721 et seq. for further references on ways for the institutionalization for arbitration bodies resolving international tax disputes.

[441] Working Paper of the Fiscalis Project Group (FPG) 093 on the Implementation of Art. 10 of Directive (EU) 2017/1852 on Tax Dispute Resolution Mechanisms in the European Union, available at https://ec.europa.eu/taxation_customs/system/files/2019-10/2019-tax-dispute-resolution-fiscalis-project-group-report.pdf and Piotrowski/Ismer/Baker u.a., *Intertax* 2019, p. 678 (687 et seq.).

[442] *See* http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf; *see also* "Making Dispute Resolution Mechanisms More Effective," OECD Action 14: 2015 Final Report available at http://www.oecd-ilibrary.org/docserver/download/2315391e.pdf?expires=1516720081&id=id&accname=guest&checksum=553F16EA74D75525AF1C49724CEE5A4A. The "Terms of Reference" are used to assess the implementation of the Action 14 minimum standards and the "Assessment Methodology" establishes the procedures and guidelines for the peer monitoring process. Both procedures are developed by the OECD Committee on Fiscal Affairs.

[443] *See* http://www.oecd.org/tax/beps/beps-action-14-peer-review-and-monitoring.htm.

[444] *See* OECD, Making Dispute Resolution More Effective — MAP Peer Review Report, Germany (Stage 1), available at https://doi.org/10.1787/9789264285804-en and http://www.oecd.org/tax/beps/beps-action-14-peer-review-and-monitoring.htm.

[445] OECD, Making Dispute Resolution More Effective — MAP Peer Review Report, Germany (Stage 2), available at https://doi.org/10.1787/9d6c280c-en.

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under Art. 25(2) sentence 2 of the OECD Model Tax Treaty) nor included alternative provisions establishing a time frame for making transfer pricing adjustments. Moreover, the report points out that one-ninth of Germany's tax treaties do not fully incorporate Art. 25(1) of the OECD Model Tax Treaty, and the majority of them do not allow taxpayers to submit a MAP request within three years of the notification of the taxation, resulting in taxation that is not in accordance with the treaty.[446] In response to these criticisms, Germany reported that it intends to update all of its treaties to comply with the minimum standard.[447] Essentially, isolated adjustments to old treaties with Italy, Greece, the Czech Republic, and Slovakia are meant in this respect.[448] For details *see* III.B.1 and C.1, above, for further details.

The peer-review report also noted the German Competent Authority's inability to resolve a high number of MAPs and its inability to resolve MAPs within the two-year time frame. This was especially the case regarding attribution and allocation cases (i.e., transfer pricing disputes), which took an average of 33.09 months to complete. All other cases were resolved within 22.1 months. Germany has added additional resources to handle attribution and allocation cases over the last few years but, in response to the reported findings, Germany indicated that it would designate additional resources to these types of cases in 2017.

2. *OECD MAP Statistics*

Germany was also unable to reduce its 2016 inventory of 1,117 open MAP cases (ending the year with 1,180), according to the report. The number of resolved cases in 2016 (350) closely matched the number of new cases (353). Of those 350 resolved cases, 66% led to an agreement that fully eliminated double taxation, 15% were resolved by granting unilateral relief, 11% were withdrawn by the taxpayer, 8% were resolved via domestic remedy, and 6% were denied MAP applications.[449] Only 1% led to no agreement or an agreement to disagree.[450]

The following tables provide an overview of MAP statistics for Germany in 2016 (which were the subject of the evaluation in the first peer review report),[451] as well as the latest statistics for 2021[452] and 2022[453].

[446] *See* http://www.oecd.org/tax/beps/beps-action-14-peer-review-and-monitoring.htm, p. 9.

[447] *Id.*, p. 9.

[448] *See* German Parliament, Official Record (Bundestag Drucksache) no. 19/20979, p. 84. *See also* Strotkemper, in: *frauen@fgs: Vielfalt in der steuerzentrierten Rechtsberatung, Jüngste Entwicklungen zur Streitbeilegung von Doppelbesteuerungskonflikten: Einordnung als steuerverfahrensrechtlicher Perspektive*, p. 165 (167 et seq.).

[449] *Id.*, p. 53.

[450] *Id.*, p. 53.

[451] *Id.*, p. 10. This table reports the total number of MAP cases in Germany, while the table in section III.D.3., below, reports only MAP cases under the EU arbitration convention.

[452] *See* OECD statistics for Germany 2016 to 2022, available at https://www.oecd.org/content/dam/oecd/en/topics/policy-issue-focus/map-statistics/map-statistics-germany.pdf.

[453] *Id.*

	Opening Inventory on 01/01/2016	Cases Initiated in 2016	Cases Resolved in 2016	Ending Inventory on 12/31/2016	Average Time to Resolve Cases (in Months)
Attribution/Allocation Cases	545	109	135	519	34.48
Other Cases	632	244	215	661	29.59
Total	**1,177**	**353**	**350**	**1,180**	**32.04**

	Opening Inventory on 01/01/2021	Cases Initiated in 2021	Cases Resolved in 2021	Ending Inventory on 12/31/2021	Average Time to Resolve Cases (in Months)	
					Pre 2016	Post 2016
Attribution/Allocation Cases	633	273	284	622	65.80	21.68
Other Cases	777	430	406	801	82.29	13.55
Total	**1,410**	**703**	**690**	**1,423**	**74.05**	**17.62**

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	Opening Inventory on 01/01/2022	Cases Initiated in 2022	Cases Resolved in 2022	Ending Inventory on 12/31/2022	Average Time to Resolve Cases (in Months)	
					Pre 2016	Post 2016
Attribution/Allocation Cases	624	325	272	677	100.00	22.23
Other Cases	800	399	445	754	112.00	18.15
Total	**1,424**	**724**	**717**	**1,431**	**106.00**	**20.19**

In 2022, Germany was again unable to reduce the number of unresolved cases. But the inventory is to be considered still rather stagnant as the comparison of the ending inventories on December 31, 2021 and December 31, 2022 of the statistics shows. The increase only amounts to 8 cases (1,423 cases to 1,431 cases). Compared to 2021, the number of completed cases (717) increased by 27 (from 690) for 2022 again. This yearly increase is to be acknowledged as a significant landmark with respect to accelerated and improved conductions of dispute settlement endeavors of the competent authorities. The number of new cases continued to increase again and counts 724 cases. Most of the post 2016 attribution and allocation cases (from January 1, 2016 on), relate to transfer pricing disputes with Italy (107), Spain (51), France (42), the United Kingdom (41), Austria (39), Switzerland (35), the United States (32), the Netherlands (32), India (30), and Poland (29).[454] Most of the other cases initiated after January 1, 2016, relate to MAPs with Switzerland (84), the United Kingdom (79), the Netherlands (61), France (58), Belgium (55), Spain (44), Austria (41), Italy (40), Luxembourg (31), and China (26).[455] The data shows a decrease by 25 other cases with European treaty partners (China excluded) compared to 2021. Interestingly, the number of other cases concluded with Switzerland, Austria, Italy, and Luxembourg decreased by 67 procedures in 2022, while in contrast the number of procedures concluded with the United Kingdom, the Netherlands, France, Belgium, and Spain increased by 42 procedures. Both, the aforementioned decreases and increases are likely to be due to changes in working conditions during the pandemic as well as after worth and cause difficulties in the interpretation and application of tax treaties.[456] .

Of those 717 resolved cases in 2022, 62% led to an agreement that fully eliminated double taxation. In this respect, the number and quote of successful MAP conduction is steadily increasing not only for allocation cases but also for other cases.[457] About 9% of the closed cases in 2022 were resolved by granting unilateral relief,[458] 12% were withdrawn by the taxpayer,[459] 4% were denied MAP applications,[460] 3% were not substantiated applications,[461] and 9% were resolved via domestic remedy.[462] Only 0.5% of the MAPs did not lead to an agreement or led to an agreement to disagree.

The computation of the average time to resolve a case has changed. Since 2016, the statistics are divided into the average time for cases started before January 1, 2016 (pre-2016), and those started on or after January 1, 2016 (post-2016). According to the 2022 statistics, the average time for cases started before January 1, 2016, amounts to 100 months for attribution and allocation cases (~ 8.5 years) and 112 months for other cases (~ 9.5 years). But the statistics for 2022 reveal again that the inventory for pre-2016 cases has decreased significantly, down to about 4% of all cases (86 cases, a decrease of 52 cases during 2022), thereof only 27 cases remaining are unresolved attribution/allocation cases (a decrease of 11 cases) and 59 concern other cases (a decrease of 41 cases).

The following table provides an overview of the average time in 2022 to complete a MAP with German participation for cases started on or after January 1, 2016.[463]

Cases Started as of January 1, 2016	Start to End (months)	Receipt to Start (months)
Attribution/Allocation Cases	22.23	5.56
Other Cases	18.15	4.16

The time to resolve a case turns out to be relatively stable with almost 2 years (22.23 months) for attribution and allocation cases and slightly increased from 1 year (13.55 months) in 2021 to 1.5 years (18.15 months) in 2022 for other cases. The average time from receipt of the taxpayer's MAP request to the start of a MAP case increased moderately from two to three months for cases started as of January 1, 2016, on average in 2021 to 4 to 5.5 months in 2022.

[454] *See* OECD statistics for Germany 2016 to 2022, available at https://www.oecd.org/content/dam/oecd/en/topics/policy-issue-focus/map-statistics/map-statistics-germany.pdf, p. 5.

[455] *See* OECD statistics for Germany 2016 to 2022, available at https://www.oecd.org/content/dam/oecd/en/topics/policy-issue-focus/map-statistics/map-statistics-germany.pdf, p. 6.

[456] For further analyses Liebchen/Strotkemper, *Bulletin for International Taxation* 2024, No. 7, online publication as of July 12, 2024.

[457] Of the attribution/allocation cases resolved in 2022 about 68% led to a full elimination of double taxation and for other cases almost in 58%.

[458] For the attribution/allocation cases resolved in 2022, unilateral relief was granted only in 3%, while such relief was granted for other cases in 13%.

[459] Withdrawals of the cases resolved in 2022 amounted to about 21% for attribution/allocation and 6% other cases.

[460] For the attribution/allocation cases resolved in 2022, access was denied in 1%, and for other cases in 5%.

[461] For the attribution/allocation cases resolved in 2022, applications were not substantiated in 0.5%, while this was the case for 9% in other cases.

[462] For the attribution/allocation cases resolved in 2022, settlements occurred in 4% of domestic proceedings but occurred more often in other cases, at 2%.

[463] *See* OECD statistics for Germany 2016 to 2022, available at https://www.oecd.org/content/dam/oecd/en/topics/policy-issue-focus/map-statistics/map-statistics-germany.pdf, p. 1.

ISBN 978-1-61746-885-8

3. EU Arbitration Convention Statistics

The following tables give an overview of the number of MAPs under the EU Arbitration Convention from 2014 to 2022 as published by the EU JTPF.[464] Respective tables have not been made available for 2023 yet. The overall number of initiated and uncompleted MAPs in the European Union substantially increased between 2014 and 2022. Between 2021 and 2022 slightly decreased from 2,303 MAPs to 2,233 MAPs (decrease of 70 MAPs). By the end of 2022, the German tax authorities were involved in approximately 20% of all EU MAPs (470 of 2,325 MAPs). Only Italy reports a higher inventory with 479 MAPs. However, a positive aspect for Germany is that the total number of proceedings was reduced by 47 from 517 proceedings as of December 31, 2021 to 470 proceedings — and thus even fell below the 2020 level.[465] An increase in inventories is also reported by most other Member States with high inventories such as Spain and France (inventories of around 320 MAPs). Other countries such as Belgium, Denmark and Sweden report a constant inventory of approximately 80 MAPs again.

Overall, about 47% of all uncompleted cases exceeded the two-year deadline in 2022 (1,056 cases); compared to 2021, the number of respective cases increased visibly (from 913 cases in 2021 representing 40% of all uncompleted cases). Uncompleted cases exceeding the two-year deadline resulted primarily from both parties and the taxpayer agreeing to an extension of the applicable time frame (261 cases),[466] from pending proceedings on the same issues conducted in a national court of one of the contracting states (333 cases) and due to a start-up delay resulting from an information request (27 cases), or from other reasons (337 cases). Practical experience reports that other reasons often result from lacking enforcements of time frames to be acknowledged during the arbitral procedure (such as punctually nominating the panel, etc.) and other institutional deficiencies in the procedural set-up.[467] On the other hand, some cases which are ready to be sent to arbitration get subject to a MAP before the case is effectively sent to arbitration.

Germany was involved in almost 18% of these cases in 2022 (186 cases); these cases present almost 40% of the German inventory. Compared to previous years, this number shows a slight decrease. The reasons for exceeding the time frame were reported at most due to pending national court procedures (55 cases) and to a start-up delay resulting from a request from the BZSt to the applicant dated from 2019 asking for further information relating to applications for the initiation of the MAP (25 cases). While the settlement period was only prolonged in 1 case and arbitration is to be initiated only in 2 cases, the BZSt reported that 102 cases exceeded the time frame for other reasons (almost 55% of the cases exceeding the two-year-deadline). In many of these 102 cases closure appears to be nearby and 45 of these cases were closed in 2023. In other cases, the reasons behind them were often that the position papers had not been exchanged at the MAP level by the foreign competent authority with the responsibility to do so. In a relevant part of these cases, the BZSt was either still waiting for the first position paper of the competent authority of the country where the primary adjustment had been made or had received such first position paper only very recently. If these delays were caused by the BZSt or the local or state tax authority instead, exact reasons behind those delays were not disclosed. In contrast to 2020, these reasons were no longer explained by a shortage of resources at the BZSt (staff turnover, longer illnesses).

Overall, arbitration proceedings under Art. 7 of the EU Arbitration Convention are still extremely rare in practice. At the end of 2022, there were only 2 arbitration proceedings in progress at all; presumably this reveals in practice only one proceeding between Spain (1 case) and France (1 case); since 2012, only up to 16 arbitration proceedings have been actively pursued. The cases that are intended to be sent to the arbitration phase appear to be subject to a settlement by agreement before the advisory commission is convened, or there still appears to be significant delays in initiating or conducting the proceedings. Otherwise, it is hard to explain why of the 475 proceedings scheduled for arbitration since 2012, only 16 have actually been carried out. This problem affects Italy annually in particular, i.e., almost all proceedings scheduled annually for arbitration involve Italian participation, but ultimately no arbitration proceedings have actually been initiated with Italian participation (in 2022 36 proceedings). The data for 2022 reveals many MAPs to be sent to arbitration for Denmark and Spain (7 and 11) and singular cases for Austria, Germany, Lithuania, Slovakia and Sweden. It is not known if one or two cases were subject to arbitration as each one active case was reported for 2018 and 2019 and if this case or these cases were terminated successfully.

[464] *See* EU JTPF (2023), Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the End of 2022, available at https://taxation-customs.ec.europa.eu/document/download/955bc56e-f316-4823-b62e-e564fa3a5d76_en?filename=AC%20MAP_2022_Final.pdf; EU JTPF (2023), Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the End of 2021, available at https://taxation-customs.ec.europa.eu/document/download/de7ada98-c794-40b2-a6e4-4d6874e5351b_en?filename=20230816_AC%20MAP_2021_FINAL.pdf; EU JTPF (2022), Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the End of 2020, available at https://ec.europa.eu/taxation_customs/system/files/2022-02/AC%20MAP_2020_FINAL%20%28002%29.pdf; EU JTPF (2021), Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the End of 2019, available at https://ec.europa.eu/taxation_customs/system/files/2021-04/map_2019.docx.pdf; EU JTPF (2019), Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the End of 2018, available at https://ec.europa.eu/taxation_customs/system/files/2019-07/apa-and-map-2019-1.pdf; JTPF (2018 und 2017), Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the End of 2017 and 2016, available at https://ec.europa.eu/taxation_customs/joint-transfer-pricing-forum_ro. *See also* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.372.

[465] For further analyses Liebchen/Strotkemper, BIT 2024, No. 7, online publication as of July 12, 2024.

[466] Art. 7(2) and 7(4) of the EU Arbitration Convention.

[467] For a detailed discussion *see* Strotkemper, *Spannungsverhältnis zwischen Schiedsverfahren in Steuersachen und einem internationalen Steuergerichtshof — Möglichkeiten zur Verbesserung der Streitbeilegung im Internationalen Steuerrecht*, p. 312 et seq., p. 320, 370 et seq., p. 409 et seq.

ISBN 978-1-61746-885-8

EU Total							
	Opening Inventory on 01/01	**Cases Initiated in the Year**	**Cases Completed in the Year**	**Ending Inventory on 12/31**	**Cases Pending in MAP for More Than 2 Years**	**Cases to Be Sent to Arbitration**	**Arbitration Proceedings**
2014	984	506	210	1,280	520	3	0
2015	1,319	439	245	1,513	684	73	2
2016	1,617	481	314	1,804	870	64	1
2017	1,899	547	534	1,907	996	80	2
2018	1,936	727	674	1,988	932	45	2
2019	1,991	839	752	2,084	778	42	1
2020	1,889	961	637	2,213	795	46	0
2021	2,246	803	746	2,303	913	54	3
2022	2,271	829	867	2,233	1,056	61	2

Germany							
	Opening Inventory on 01/01	**Cases Initiated in the Year**	**Cases Completed in the Year**	**Ending Inventory on 12/31**	**Cases Pending in MAP for More Than 2 Years**	**Cases to Be Sent to Arbitration**	**Arbitration Proceedings**
2014	232	129	46	315	137	0	0
2015	315	91	50	356	153	0	0
2016	356	133	91	398	195	1	0
2017	398	103	112	389	183	1	0
2018	389	123	166	346	166	1	1
2019	346	222	147	421	137	1	1
2020	421	212	134	499	118	1	0
2021	499	178	160	517	191	1	0
2022	517	161	208	470	186	2	0

4. EU Directive on Tax Dispute Resolution Statistics

To monitor compliance with the objectives set out in the preamble of the EU Directive on Tax Dispute Resolution as of June 30, 2024, the EU Commission annually collects statistics on the dispute resolution complaints filed on the basis of the EU Directive on Tax Dispute Resolution.[468] The statistics for 2022 were recently published in December 2023.[469] Prior to this, statistics were published by the EU Commission for 2020[470] and 2021.[471]

Currently, the statistics only reflect the complaint procedure and the MAP. In this context, the corresponding start-of-year and the end-of-year inventories are recorded along with the average processing time for the decision to admit or reject the complaint. Regarding rejected complaints, inventory fig-

[468] *See* Art. 21 of the EU Tax Dispute Resolution Directive.

[469] *See* EU Commission as of December 2023, Overview of numbers submitted for Statistics under the Directive on Tax Dispute Resolution Mechanisms ('DRM') at the end of 2022, available at https://taxation-customs.ec.europa.eu/system/files/2023-12/DRM_2022_FINAL.pdf.

[470] *See* EU Commission as of February 2022, Overview of numbers submitted for Statistics under the Directive on Tax Dispute Resolution Mechanisms ('DRM') at the end of 2020, available at https://ec.europa.eu/taxation_customs/system/files/2022-02/DRM_2020_FINAL.pdf.

[471] *See* EU Commission as of April 19, 2023, Overview of numbers submitted for Statistics under the Directive on Tax Dispute Resolution Mechanisms ('DRM') at the end of 2021, available at https://taxation-customs.ec.europa.eu/system/files/2023-05/DRM_2021_FINAL.pdf.

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ures on proceedings pending before national courts or before the Advisory Committee to review the rejection are also recorded. With regard to the MAP level, the start-of-year and end-of-year inventories are also recorded, along with the average processing time, as well as the number of complaints admitted in a year, the number of MAP agreements reached, and the number of failed settlements.

	2022							
	Inventory of Not Yet Admitted Complaints as of January 1	**Inventory of Not Yet Admitted Complaints as of December 31**	**Number of Rejections Under Appeal as of December 31**	**Number of Admitted Complaints**	**Inventory of MAP Proceedings as of January 1**	**Inventory of a MAP Proceedings as of December 31**	**Number of Successful MAP Agreements Accepted by the Affected Person**	**Number of MAP Agreements Not Yet Implemented by December 31**
Austria	12	40	1	28	2	17	13	2
Belgium	2	7	0	5	2	5	0	0
Denmark	0	0	0	1	3	4	0	0
Germany	**3**	**4**	**0**	**6**	**0**	**6**	**0**	**0**
Spain	1	0	0	12	3	15	0	1
Finland	0	0	0	4	1	5	0	0
France	0	0	0	4	2	4	2	0
Greece	0	0	0	1	0	1	0	0
Hungary	1	0	0	1	1	2	0	0
Ireland	0	1	0	1	0	1	0	0
Italy	1	0	0	14	7	21	0	0
Lithuania	1	1	0	1	1	2	0	0
Luxembourg	1	3	0	2	0	2	0	0
Latvia	0	0	0	1	1	2	0	0
Malta	0	4	0	0	0	0	0	0
Netherlands	2	3	0	2	1	3	0	0
Poland	1	0	0	1	0	1	0	0
Portugal	0	0	0	0	0	0	0	0
Romania	2	0	0	0	0	0	0	0
Sweden	0	0	0	2	1	3	0	0
Slovakia	0	1	0	0	0	0	0	0
EU total	**27**	**66**	**1**	**86**	**23**	**94**	**15**	**3**

The statistical data shows that the processes set out by the EU Directive on Tax Dispute Resolution are already well adopted by the EU Member States.

Data for complaint proceedings have been recorded as follows:

• Overall, the complaint proceeding can be considered as functioning. 86 complaints were admitted in 2022 and the inventory shows a notable increase from 23 cases as of January 1 to 66 MAPs as of December 31, 2022. In detail: the statistics report that the countries are likely to decide on complaints in due time during the course of the year. This trend was already documented in the statistics for 2021 and 2020. In 2022, Austria admitted the most complaints. The countries with the highest acceptance of complaints and the highest year-end inventory of complaints are Austria, Belgium, Germany and Malta. This indicates a good acceptance of the process in these countries.

ISBN 978-1-61746-885-8

• For Austria and Italy, the number of admitted complaints is not reflected in the final inventory of MAPs. In this respect, it should also be noted that the EU Directive on Tax Dispute Resolution does not provide for a time limit between the conclusion of the complaint procedure and the MAP. Only in the event that the Advisory Commission has approved the complaint in accordance with §10 and §17 (2) of the EU-DBA-SBG, obliges to implement of a direct arbitration procedure if the competent authorities have not initiated a MAP within 60 days upon the approval of the compliant. It remains to be seen whether such delays will also become apparent in the future and possibly indicate a systemic problem. For Romania, it is also surprising that one complaint procedure was recorded as of January 1, 2022, but neither a still pending complaint as of December 31, 2022, a pending appeal procedure, a MAP or an admission of the appeal. This might suggest that the data is incomplete; possibly the case documented by Austria in which rejections by both competent authorities are reviewed by national courts involves Romania.

• Only one national court affecting Austria was pending to review any rejecting decisions of both competent authorities. Surprisingly, the other treaty partner obviously did not report a national court proceeding vice versa.

Data for MAP proceedings is as follows:

• At a MAP level, 94 pending procedures were recorded as of December 31, 2022. Compared to 2021, this is an increase of 83 cases.

• Furthermore, more MAP proceedings were successfully terminated and implemented domestically during 2022. Of 109 pending cases (inventory of 23 MAP cases as of January 1, 2022 plus 86 admitted complaints) termination with domestic implementation is only reported for 15 cases involving the Austrian (13) and French (2) competent authorities; three additional MAPs were terminated but not yet implemented on the domestic level (two Austrian cases and one Spanish case). However, based on the reported data, especially of Austria it must be assumed that not all of Austria's negotiating partners reported completed MAPs properly. Also it is likely that not all approvals to accept the agreements have been reported or, in the case of existing approvals, national implementations have not yet been reported properly.[472]

• The 94 pending proceedings concern at most Austria (17), Italy (21), Spain (15). Countries such as Belgium, Germany, Denmark, Finland, France and Sweden follow with a year-end inventory of about 5 MAPs.

• None of the reported proceedings have yet arrived at the arbitration level. Therefore, the statistics do not report any cases in this respect.

• In 2022, six complaint proceedings involving Germany were recorded as of January 1 or December 31, 2022. Therefore, Germany gradually gets involved in more proceedings based on the EU Directive on Tax Dispute Resolution. Concluded MAPs have not been reported for 2022 though. This assumption is confirmed due to a year-end-inventory of six MAPs. Overall, the data reveals that German taxpayers obviously still prefer to request the initiation of MAP proceedings based on the EU Arbitration Convention and on German income tax treaties (1,431 pending proceedings were recorded by the OECD as of December 31, 2022). This number also includes the inventory documented by the EU Directive on Tax Dispute Resolution as well as by the EU Arbitration Convention). In 2022, based on OECD data, 724 cases were initiated based on all three legal bases; thereof 161 cases were initiated based on the EU Arbitration Convention and 94 cases based on the EU Directive on Tax Dispute Resolution. In addition to that, 86 complaints were also pending as of December 31, 2022. Therefore, the data reveals that the EU Directive on Tax Dispute Resolution is increasingly accepted as a legal basis and is very likely to increasingly supersede the arbitration convention. First steps in this direction were already reported in 2022: (*i*) due to the increase in complaint proceedings, 15 successfully terminated MAPs and a steadily increasing year-end-inventory all based on the EU Directive on Tax Dispute Resolution, and (*ii*) a decrease in the year-end-inventory based on the EU Arbitration Convention compared to 2021.[473]

[472] For further analyses Liebchen/Strotkemper, BIT 2024, No. 7, online publication as of July 12, 2024

[473] For further analyses: Liebchen/Strotkemper, BIT 2024, No. 7, online publication as of July 12, 2024.

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IV. Advance Pricing Agreements

A. *Objectives, Legal Basis, Procedural Forms, and Practical OECD Guidance*

1. Objectives of an APA

Inconsistent national transfer pricing rules, together with the growing volume of related-party transactions, have led to an increased focus on transfer pricing in tax audits and significantly increased the risk of transfer pricing disputes and double taxation for MNEs.

For taxpayers seeking to proactively manage double taxation exposure arising from inconsistent local transfer pricing rules, the OECD Guidelines recommend APAs as an efficient tool for mitigating transfer pricing risk.

While MAPs or arbitration proceedings are *ex post* instruments, APAs are *ex ante* tools that reduce transfer pricing risks by avoiding transfer pricing disputes before they arise.[474] The content of an APA addresses the appropriateness of a particular transfer pricing methodology for future related-party transactions ("covered transactions") and does not provide a solution in terms of a specific transfer price. An APA can take the form of a unilateral, bilateral, or multilateral agreement. A unilateral agreement is an agreement between the taxpayer and the domestic or foreign tax authority; a bilateral or multilateral agreement involves two or more competent authorities. Such agreements have been referred to as "MAP APAs" in the past because they involve mutual agreement negotiations between two or more competent authorities.[475] The OECD Guidelines recommend the application of bilateral or multilateral APAs to avoid double taxation.[476]

2. Legal Basis

Under Art. 25 of the OECD Model Tax Treaty, bilateral or multilateral APAs are traditionally governed by a MAP of the applicable income tax treaty.[477] Consequently, Art. 25 of the OECD Model Tax Treaty serves as the legal basis. In this respect, for Germany in the past — before §89a of the FCG entered into force in 2021 — it was not entirely clear if Art. 25(2) or Art. 25(3) of the OECD Model Tax Treaty was the legal basis.[478] Application aids had previously been published by the tax administration in the APA circular dated October 5, 2006.[479] In past years, a large number of countries have established independent national legal bases for APAs or regulated them within the framework of generally binding information. With §89a of the FCG entering into force as part of the Act to Modernize the Relief of Withholding Taxes and the Certification of Capital Gains Tax (*Abzugsteuerentlastungsmodernisierungsgesetz* — AbzStEntModG) of June 2, 2021, with effect from June 9, 2021, a national legal basis for the application for and execution of APAs with reference to existing income tax treaties has been implemented in Germany as well.[480] Meanwhile, in the application decree on Section 89a and Section 89 (hereinafter: AEAO to §89a FCG) as of June 26, 2024, the administration issued regulations on the application for and implementation of bi- or multilateral APA procedures for the first time.[481]

3. Bilateral APAs (BAPAs) and Multilateral APAs (MAPAs)

A bilateral or multilateral APA ("BAPA" or "MAPA") involves two or more tax authorities from different jurisdictions. In order to achieve legal certainty for periods not yet realized at the time of the application, the competent authorities of the jurisdictions concerned will develop a binding agreement either regarding the future treatment of a specific intercompany transaction or the avoidance of double taxation and the consistent interpretation of treaties in general.

In case of Germany, the legal certainty and acceptance by taxpayers and the German tax authorities increased as the APA procedures for the preventive avoidance of cross-border double taxation conflicts was laid down in a circular from the Ministry of Finance in the past.[482] With the implementation of §89a FCG as a national decree, the acceptance is expected to increase further. This should now apply even more, as bilateral or multilateral APAs are no longer only for transfer pricing issues but also for other cross-border taxation issues according to §89a(1) sentences 1 and 2 FCG.

Germany (like most other countries) follows the recommendation of the OECD and prefers the negotiation of bilateral and multilateral agreements. However, multilateral APAs are not a common tool for reducing global double taxation exposure.[483] While the German tax authorities are open to entering multilateral negotiations, the acceptability of a request for a MAPA will ultimately be decided on a case-by-case basis.[484] The German tax authorities traditionally conclude multilateral agreements by agreeing on a series of separate BAPAs. This approach is reflected in §89a(1) sentence 8 FCG, and the explanatory legal memorandum, which states that a combined application is accepted but that the performance of several bilat-

[474] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.50; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, 25 OECD Model Treaty, no. 506.

[475] OECD Guidelines 2022, no. 4.134.

[476] *Id.*, no. 4.140.

[477] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.54, Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Treaty, no. 510.

[478] For further details *see* Ministry of Finance, Circular of October 5, 2006, IV B 4-S 1341-38/06, Federal Tax Gazette (BStBl.) I 2006, 594, no. 1.2 (out of force) (hereinafter Ministry of Finance, Circular of October 5, 2006) and Ismer/Piotrowski in V/L7, Art. 25 OECD Model Tax Treaty no. 371 und 385; Kramer, *Internationales Steuerrecht* 2007, p. 175 f.; Schnorberger, *International Transfer Pricing Journal* 2007, p. 111.

[479] *See* Ministry of Finance, Circular of October 5, 2006, no. 1.2 (out of force).

[480] *See* AbzStEntModG of June 2, 2021, Federal Law Gazette (BGBl.) I 2021, p. 1259 (1272) and Federal Government of Germany, Official Record (Bundestag Drucksache) no. 19/27632, p. 79. It was promulgated in the Federal Law Gazette on June 8, 2021.

[481] *See* Ministry of Finance of June 26, 2024, amendment of the AEAO to the Fiscal Code to §§89 and 89a, IV B 5-S 1305/19/10003 :008, Federal Tax Gazette (BStBl.) I 2024, 1065 and repeal of Circular of October 5, 2006, IV B 4-S 1341-38/06.

[482] Ministry of Finance, Circular of October 5, 2006, no. 1.2 (out of force).

[483] However, according to German law, the exchange of information between all relevant competent authorities is possible if the taxpayer declares its consent, §30(4) sentence 3 of the FCG. *See* Hendricks, in: Wassermeyer/Baumhoff/Ditz, 2nd ed. 2022, no. 10.149.

[484] "First Two Multilateral European APAs Signed," 12 Tax Management Transfer Pricing Report, 1113, April 14, 2004 (giving an example of a multilateral APA that obtained by Airbus Consortium of European Aeronautic Defence and Space Co., involving France, Germany, Spain, and the United Kingdom).

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eral negotiations and APAs is still very likely.[485] This practice may lead to confidentiality conflicts in cases where not all competent authorities are involved in the same covered transaction.

4. Unilateral APAs

Some countries allow a unilateral APA to be put in place under which the taxpayer obtains a binding ruling from one tax authority. Given that a unilateral APA cannot bind the tax authority with jurisdiction over the foreign related party, the risk of potential double taxation cannot be mitigated by this sort of agreement.[486] Nevertheless, many EU Member States grant unilateral APAs more frequently than BAPAs or MAPAs[487], most likely because they are cheaper and less time-consuming to institute. In contrast, the German tax authorities generally discourage unilateral APAs. In the past, the tax administration held it possible to agree a unilateral APA if there is no legal basis for a MAP or BAPA because the countries concerned have not signed a tax treaty (treaties) with each other.[488] Literature identified further reasons as follows:[489]

- Seeking a MAPA would generally not be reasonable because it would require enormous administrative coordination with several countries to deal with transactions with a negligible volume;
- The taxpayer's request deals with the interpretation of a specific statutory requirement in only the country granting the (unilateral) APA; or
- The potential transfer pricing adjustment would trigger high penalties for only one company.

Unilateral APAs as such are not part of the German practice. But binding measures also exist. This includes mainly binding commitments following an audit, pursuant to §204 et seq. of the FCG (known as a "*verbindliche Zusage*") or a binding information independent of an audit, pursuant to §89 (2) of the FCG (known as a "*verbindliche Auskunft*") and information based on §42e of the German Income Tax Act (*Einkommensteuergesetz,* known as "*Anrufungsauskunft*"). Prior to §89a FCG entering into force, unilateral binding measures were mainly related to transfer pricing and allocation issues of permanent establishments. According to §89a(2) sentence 1 no. 7 and (5) of the FCG, APA procedures do not replace purely unilateral instruments based on §89 (2) FCG, §204 of the FCG and §42e of the German Income Tax Act (*Einkommensteuergesetz*). Rather, the wording expressly assumes that corresponding binding unilateral measures can already be effective at the time of the application for the BAPA or MAPA and must be revoked for a BAPA or MAPA to become effective (alternatively the BAPA or MAPA should not become effective if the binding measure is not revoked). §89a(1) sentence 1 of the FCG does not even indicate a restriction or reduction of the BZSt's discretion to initiate the BAPA procedure. If binding information or a binding commitment has already been established in Germany prior to the conclusion of a BAPA or MAPA, based on the explanatory legislative memorandum, it should depend on the individual case whether the BZSt agrees to the requested initiation of the BAPA or MAPA. In such cases, it should be estimated whether, in the individual case, there is a justified interest on the part of the applicant, but also on the part of the German tax administration, in a BAPA or MAPA.[490]

In the author's opinion, in clear contradiction to this wording, the German tax authorities surprisingly assume in their application decree that a BAPA or MAPA should always have preference over the beforementioned unilateral binding measures, if a summary examination (known as "*summarische Prüfung*") suggests that the BAPA or MAPA application is well-founded, in particular for transfer pricing or permanent establishment profit deferral matters.[491] This can only be the case if the countries have an effective tax treaty; with respect to other cases also only if the other state opened its BAPA or MAPA program for other cases as well.[492] If these conditions are not given, for other cases the beforementioned binding unilateral measures can be applied for.

Comment: Overall, most other countries have not opened their BAPA or MAPA programs for other cases respectively. The BAPA or MAPA is not given precedence in other cases. Only in relation to Italy, the scope of BAPAs or MAPAs is partly opened to other cases. Beyond transfer pricing issues, BAPAs or MAPAs are limited to questions of interpretation relating to dividends, interest, licenses, permanent establishments and residence in Italy.[493]

With respect to transfer pricing or permanent establishment profit deferral issues, the German tax administration also excludes the provision of binding information based on §89 (2) FCG for transfer pricing or permanent establishment profit deferral issues generally, irrespective of a rejection of the BAPA or MAPA application, i.e. only measures based on §204 of the FCG or §42e of the German income tax (*Einkommensteuergesetz*) can be applied for.[494] It is questionable if this restriction will withstand judicial review particularly if there is no tax treaty in existence and the scope of §89a of the FCG is not given. In transfer pricing matters, particularly in cases without income tax treaties, based on the prior German practice, a unilateral binding measure could be granted upon application, if the individual case was suitable for this, and if the applicant had a justified interest.[495] As unilateral measures do not

[485] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 79 et seq.

[486] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.55–13.58; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 of the OECD Model Treaty, no. 511–513.

[487] EU JTPF, Statistics on APAs in the EU at the End of 2020, 1 et seq. available at https://ec.europa.eu/taxation_customs/taxation-1/statistics-apas-and-maps-eu_en.

[488] *See* Ministry of Finance, Circular of October 5, 2006, no. 1.2 (out of force).

[489] Grotherr, *Betriebsberater* 2005, p. 855 (857); Ismer/Piotrowski in: V/L, 7th edition, Art. 25 OECD Model Tax Treaty, no. 365; Kurzewitz, *Die Wahl der geeigneten Verrechnungspreismethode zur Verringerung von Doppelbesteuerungsproblemen,* p. 387.

[490] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 80.

[491] *See* AEAO to §89a of the FCG, no. 1.3 et seq. and to §89 FCG no. 3.5.4. Cf. also Liebchen/Strotkemper, *Internationales Steuerrecht* 2024, p. 845 (846 and 852).

[492] *See* AEAO to §89a FCG, no. 1.6.

[493] *See* https://www.agenziaentrate.gov.it/portale/web/english/nse/invest-in-italy/advance-tax-agreements.

[494] *See* AEAO to §89a of the FCG, no. 1.5 and to §89 FCG no. 3.5.4.

[495] *See* Ministry of Finance, Circular of October 5, 2006, no. 1.2 (5) (out of force).

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reliably eliminate double taxation and can even cause taxation gaps, such applications were still rejected.[496]

Comment: In case of doubt, taxpayers are well advised to file an appeal against the rejection of a unilaterally requested measure. German jurisprudence will presumably have to take a position on the question of general priority assumed by the tax administration which is not laid out in the wording of §89a of the FCG.[497]

If unilateral binding measures are to be applied for, it has to be acknowledged that §204 of the FCG, as well as §89 (2) of the FCG have a concrete application to legal issues. But, it corresponds to the general view that such legal issues can also be established for arm's length conformity or appropriateness of a specific transfer pricing method.[498]

If a non-German unilateral APA already existed, the Ministry of Finance regarded an additional German unilateral APA in the past as inadmissible if it limited Germany's right to impose tax. If concluded, a taxpayer's request to comply with a foreign APA represented an independent unilateral APA.[499] A German taxpayer had to declare all pending or unilateral arrangements already agreed upon with foreign tax jurisdictions. Unilateral APAs could then only be concluded if it can be ascertained without special efforts that the APA with the other state does not affect German taxation interests.[500] Foreign unilateral APAs usually triggered tax audits because there is a presumption that they limit German taxing rights in favor of the foreign jurisdiction.[501] Meanwhile after the entry into force of §89a of the FCG it is not clear whether this old German practice will be uphold or not.

5. *Impact of the Entry into Force of §89a of the FCG in Germany*

BAPA or MAPA applications are exclusively to be based on §89a (1) of the FCG with effect on June 9, 2021, according to Art. 97 §34 of the Introductory Act of the Fiscal Code of Germany (*Einführungsgesetz zur Abgabenordnung* — "EGAO"). This legal basis no longer limits the scope of BAPA or MAPA procedures to transfer pricing conflicts but extends BAPA or MAPA procedures also to the preventive avoidance of any potentially international double taxation conflicts based on income tax treaties. Overall, it is not yet predictable whether and to what extent foreign states are willing to implement and conclude BAPAs or MAPAs for non-transfer pricing cases. The BZSt acts as competent authority based on §89a (1) sentence 1 FCG, but has to act in conjunction with the competent state tax authority.[502]

Until June 24, 2024 the circular for the performance of a BAPA or MAPA by the Ministry of Finance in 2006[503] was still applicable, as far as its content did not deviate from §89a of the FCG.[504] §178a of the FCG[505] (no longer applicable for requests as of June 9, 2021 or later) previously contained a cost regulation for BAPAs. This regulation was repealed with the entry into force of §89a of the FCG with effect from June 9, 2021. For applications received by the BZSt as competent authority until June 8, 2021, §178a of the FCG still applies as well as the circular from the Ministry of Finance of 2006.

Prior to the implementation of §89a of the FCG, Germany's BAPA or MAPA procedure had been designed as a two-part procedure.[506] In the first stage, the APA procedure was conducted between the BZSt as the German Competent Authority and the competent authorities of other contracting states involved, and in the second stage, an implementation of the APA by means of a binding preliminary commitment by the German tax authorities to the taxpayer followed. With the introduction of §89a FCG, however, the signed BAPA or MAPA is directly binding. This corresponds to the view of the German tax administration.[507] This means that from a German perspective, there is no longer a need for an additional binding preliminary commitment from the tax office to the applicant.[508] This effect is to be extracted from a reverse of §89a (3) sentence 1 of the FCG.[509]

6. *Practical OECD Guidance for the Conduct of BAPA or MAPA Proceedings*

Practical guidance for the conduct of APA proceedings is primarily given by the respective domestic legal ground and/or by circulars of the competent authorities of the contracting states.

Additionally, the OECD publishes recommendations for the conduct of APA proceedings as part of the OECD Commentary to Art. 25 of the OECD Model Tax Treaty[510] and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022 (Annex II to Chapter IV: Advance Pricing Arrangements) (hereinafter "OECD Transfer Pricing Guidelines"). Recently, at the end of 2022, the OECD also published a so-called "Bilateral Advance Pricing Arrangement Manual" ("BAPAM").[511] The BAPAM is intended to sup-

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[496] *See* Ministry of Finance, Circular of October 5, 2006, no. 1.2 (out of force).

[497] Cf. Liebchen/Strotkemper, *Internationales Steuerrecht* 2024, p. 845 (847. and 852).

[498] *See* Hendricks, in: Wassermeyer/Baumhoff/Ditz, 2nd ed. 2022, no. 10.164.

[499] *See* Ministry of Finance, Circular of October 5, 2006, no. 1.2 (7) (out of force). *See also* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.59, Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 515.

[500] §5(3) Decree Law (*Gewinnabgrenzungsaufzeichnungsverordnung*).

[501] *See* Ministry of Finance, Circular of October 5, 2006, no. 1.2 (out of force).

[502] *See* Ministry of Finance of June 26, 2024, amendment of the AEAO to the Fiscal Code to §§89 and 89a, IV B 5-S 1305/19/10003 :008, Federal Tax Gazette (BStBl.) I 2024, 1065, no. 1.1. The delegation of responsibility from the Ministry of Finance to the BZSt follows from §5(1) sentence 1 no. 5 German Tax Administration Act (*Finanzverwaltungsgesetz*).

[503] *See* Ministry of Finance, Circular of October 5, 2006, (out of force).

[504] *See* Ministry of Finance of June 26, 2024, amendment of the AEAO to the Fiscal Code to §§89 and 89a, IV B 5-S 1305/19/10003 :008, Federal Tax Gazette (BStBl.) I 2024, 1065 (hereinafter only AEAO to §89a of the FCG).

[505] JStG 2007 of December 19, 2006, Federal Law Gazette (BGBl.) I 2006, p. 2878 (2903).

[506] *See* Ministry of Finance, Circular of October 5, 2006, no. 1.2 para. 2 (out of force).

[507] *See* AEAO to §89a FCG, no. 3.1. Cf. also Liebchen/Strotkemper, *Internationales Steuerrecht* 2024, p. 845 (851).

[508] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 80.

[509] *See* Flüchter, *Internationale Steuer-Rundschau* 2021, p. 338 (342).

[510] OECD Commentary on Art. 25 OECD Model Tax Treaty, no. 38.5 and 52.

[511] OECD (2022), Bilateral Advance Pricing Arrangement Manual, OECD Forum on Tax administration OECD, available at https://doi.org/10.1787/4aa570e1-en (hereinafter "OECD (2022), BAPAM").

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plement the OECD Transfer Pricing Guidelines. This manual, as well as other manuals of the OECD ("MEMAP" and the "MoMA"), is not to be considered as a binding legal basis, but only as non-binding practical guidance providing best practices for streamlining the respective dispute resolution or prevention proceeding. If there are conflicting rules with provisions of income tax treaties, the OECD Model Tax Treaty or OECD Commentary's recommendations, or the OECD Transfer Pricing Guidelines, those generally supersede conflicting recommendations of the BAPAM.

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

- Mitigating delays created by differences in the BAPA processes in each jurisdiction, where possible.
- Avoiding information asymmetries between competent authorities by ensuring their access to the same information, in the same form, and at the same time.
- Increasing transparency between competent authorities and taxpayers throughout the BAPA process.

Overall, the BAPAM summarizes 29 Best Practices in Annex A. These Best Practices are supplemented by a "Sample BAPA Timeline" in Annex B, a "Sample Short-form Position Paper" in Annex C, a list of "Potential Critical Assumptions" in Annex D, a "Sample Position Matrix" in Annex E, and a "Sample BAPA Agreement" in Annex F. The table below provides a short overview of the content of the Best Practices by also pointing out at which procedural step each Best Practice is of importance:

Best Practices	Summary of Its Content	Relevance During the Process
No. 1	Principled, fair, objective, and transparent behaviour of Competent Authorities; decision on merits of each APA; analysis conducted in accordance with the applicable bilateral tax treaty, the domestic laws of the relevant jurisdictions, and the relevant international transfer pricing guidance.	General recommendation for Competent Authorities.
No. 2	Taxpayers should file their tax returns in the relevant jurisdictions in the proposed covered years based on the positions taken in their BAPA application.	General recommendation for taxpayers.
No. 3	Clear published domestic rules, guidelines, and procedures relating to access to a BAPA process and the relevant steps of the BAPA process.	General recommendation for Competent Authorities.
No. 4	Extensive use of technology throughout the BAPA process (meetings, applications, and requested information preferably by electronic means).	General recommendation for Competent Authorities as well as for taxpayers.
No. 5	Conclusion of a BAPA agreement within 30 months from the receipt of a complete application; ideally within 24 months in streamlined and optimized processes prospectively. Review of cases exceeding these periods by senior officials in the Competent Authorities by default.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 6	Minimum BAPA term of five years, including at least two prospective tax years, where the facts and circumstances are expected to be the same.	Recommendation for APA Application for taxpayers and BAPA Negotiations for Competent Authorities.
No. 7	Compliance with domestic BAPA programs and adequate training for BAPA case officers.	Recommendation for Pre-Filing Meeting, Approval of an APA Application, BAPA Negotiations for Competent Authorities.
No. 8	BAPA case officers (and Competent Authorities) and taxpayers should be in regular contact with each other during the BAPA process.	General recommendation for Competent Authorities as well as for taxpayers.
No. 9	Upon approval of a BAPA Application, regular contact of BAPA case officers and Competent Authorities with one another in relation to the specific case.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 10	Effective turnover of cases between case officers.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 11	Notification of potential BAPA application before filing formal re-	Recommendation for Pre-Filing Stage for taxpayers.

ISBN 978-1-61746-885-8

	quest of both Competent Authorities, formal or informal discussions possible; if they are only conducted with one Competent Authority, then notification of the other Competent Authority.	
No. 12	Neutral behavior of Competent Authorities prior to a formal request.	Recommendation for Pre-Filing Stage for Competent Authorities.
No. 13	Simultaneous submission of the BAPA request to both Competent Authorities containing same information.	Recommendation for APA Application for taxpayers.
No. 14	Provision of a translation of the BAPA request in the absence of a common language between Competent Authorities, unless either one working language or submissions only in local languages is agreed upon in advance.	Recommendation for APA Application for taxpayers.
No. 15	Notification of treaty partner of receipt of a BAPA application accompanied with engagement of potential parameters of BAPA application, further information to be requested from the taxpayer and if relevant, discussion of any domestic limitations.	Recommendation for Approval of an APA Application for Competent Authorities.
No. 16	Decision on approval of BAPA application within 30 days of receipt of a complete BAPA application; notification of taxpayer if this timeframe is likely to be exceeded.	Recommendation for Approval of an APA Application for Competent Authorities.
No. 17	Determination of a project plan outlining the timelines for each stage of the processes between both Competent Authorities and the taxpayer(s).	Recommendation for BAPA Negotiations for Competent Authorities and for taxpayers.
No. 18	Coordinate the information gathering process of both Competent Authorities to limit duplication; in particular, if necessary joint interviews or site-visits.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 19	Simultaneous provision of requested information from taxpayers to both Competent Authorities.	Recommendation for BAPA Negotiations for taxpayers.
No. 20	Limitation of requested information.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 21	Behavior if one Competent Authority disagrees with delineation of the covered transactions outlined in the BAPA application.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 22	Preparation of position papers based on the latest financial information available; determination of date of exchange of position papers prior to discussions.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 23	No access of position papers to taxpayers.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 24	If a Competent Authority raises an issue, that Competent Authority should provide its treaty partner with a recommendation as to how to resolve the issue.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 25	Responsibility of drafting the BAPA between the Competent Authorities.	Recommendation for BAPA Negotiations for Competent Authorities.
No. 26	Competent Authorities and taxpayers should complete finalization and implementation of a BAPA as soon as possible.	Recommendation for Implementation of BAPA for Competent Authorities and for taxpayers.
No. 27	The terms of any domestic agreement implementing a BAPA entered into by a competent authority and the taxpayer should be sim-	Recommendation for Implementation of BAPA for Competent Authorities and for taxpayers.

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	ilar to those in the BAPA, subject to domestic law requirements.	
No. 28	Jurisdictions should ensure that they have adequate policies/practices in place to ensure that its audit and BAPA functions communicate and coordinate effectively.	General recommendation for Competent Authorities.
No. 29	Consideration of requests for renewals of a BAPA in the final year of the BAPA.	General recommendation for Competent Authorities.

The most important practical guidance for the initiation and conduct of MAPAs is summarized as follows (*see* III.A.5., above, for a more detailed description of the contents of the MoMA with respect to multilateral MAPs):

• According to the MoMA, Art. 25(3) sentence 1 of the OECD Tax Treaty Model is most likely to be assumed as legal basis for the initiation and conduct of MAPAs.[512] The handling of arising constitutional issues is not addressed by the MoMA though. Affected countries are not mentioned as well.

• Furthermore, it remains uncertain if the competent authorities are still likely to conduct de facto, two or more bilateral proceedings, or if it is intended to only conduct one multilateral proceeding in the future. If the competent authorities still prefer the conduct of several bilateral proceedings instead of one multilateral proceeding, the question of the multiple accruals of the application fee is not dealt with in the MoMA.[513]

• Apart from that, the recommendations of the MoMA for the initiation and conduct of MAPAs correspond to those for BAPAs, i.e., in particular, the conduct of pre-filing meetings in all involved countries (and the conduct of the first pre-filing meeting with the competent authority in the country of residence)[514] and the agreement of a timeline[515]

Some jurisdictions allow the "roll-forward" of multilateral MAP agreement(s) by means of MAPAs 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 finalize MAPAs on identical terms as soon as possible.[516]

B. BAPA or MAPA Process

In accordance with international principles, the German tax authorities carry out a BAPA or MAPA procedure in five phases. The implementation of §89a of the FCG has not led to any alterations in this respect, as the regulation refrains from specifying details on the procedure. This has also been clarified by the German tax administration meanwhile.[517] These five phases of a BAPA or MAPA procedure are briefly illustrated with the example of a BAPA process in the table below and subsequently discussed at length:

[512] *See* No. 26 MoMA. This is also assumed for countries who — still — do not dispose over BAPA or MAPA programs.

[513] Bühl, *NWB Internationales Steuer- und Wirtschaftsrecht (IWB)* 2023, p. 264.

[514] No. 41 MoMA.

[515] No. 70 MoMA.

[516] No. 97 MoMA.

[517] *See* Ministry of Finance of June 26, 2024, amendment of the AEAO to the Fiscal Code to §§89 and 89a, IV B 5-S 1305/19/10003 :008, Federal Tax Gazette (BStBl.) I 2024, 1065.

1. Pre-Filing Meeting	2. BAPA Application	3. Approval of a BAPA Application	4. BAPA Negotiations	5. Implementation of a BAPA
• Upon request of taxpayer • Exchange of information on an underlying issue or transaction, parties, BAPA period, and in allocation cases the transfer pricing method. • Likelihood of success is evaluated. • BZSt asked to advise on the working language of the BAPA proceeding.	• Formal application is filed. • Proposed interpretation or application of income tax treaty or in allocation cases the transfer pricing method is detailed. • Critical assumptions are defined.	• Competent Authority initiates BAPA proceedings after payment of the fee; or • Competent Authority rejects application (procedure ends).	• Tax authorities analyze and evaluate data submitted if necessary further investigations. • Documentation is requested (if necessary). • Position papers are exchanged. • Personal negotiations in order to conclude BAPA • Upon discretion of competent authorities' applicant may attend the meeting.	• Taxpayer agrees to terms of BAPA and waives legal remedies against implementing tax assessments. • APA binds taxpayer and local tax office directly; if necessary, revoke of unilateral binding measures. • Duty of taxpayer to document compliance with BAPA in annual reports. • Possibility to extend term of BAPA.

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BAPAM Best Practices Nos. 7, 11, and 12	BAPAM Best Practices Nos. 6, 13, and 14	BAPAM Best Practices Nos. 7, 15, and 16	BAPAM Best Practices Nos. 5 to 7, 9 and 10, 17 to 25	BAPAM Best Practices Nos. 26 and 27
See IV.B.1., below.	*See* IV.B.2., below.	*See* IV.B.3., below.	*See* IV.B.4., below.	*See* IV.B.5., below.

1. Pre-Filing Meeting

The pre-filing phase begins before the taxpayer files a formal application. This phase is intended to help all parties evaluate the BAPA request's prospects of success. A pre-filing meeting should be held with the competent authorities of each country involved in the prospective BAPA or MAPA separately.[518] Only the taxpayer is entitled to request such pre-filing meeting. It is questionable whether the BZSt has the discretion to schedule a preliminary meeting.[519] In the past the BZSt was bound to decide ("*should*").[520]

Comment: Anonymized prefiling meetings are no longer addressed by the German tax administration. Unlike in the past, the pre-filing meeting can only be initiated by the applicant and the subject of the preliminary meeting must be a specific — and not an abstract — issue, together with a tax assessment.[521]

The taxpayer must submit all relevant information concerning the planned BAPA or MAPA, including the applicants and other parties involved; the locally competent tax authorities together with tax and identification numbers; the contracting states concerned; a description of the facts of the case including the desired period of validity of the BAPA or MAPA and where applicable the request for a Roll Back for years already realized prior to the application; potential critical assumptions; reasons for the risk of double taxation; as well as a statement on existing national agreements within the meaning of §204 of the FCG or §89(2) FCG. As far as possible and desired, it is recommended to align the information to be submitted already with the application content required by §89a(2) sentence 1 FCG in a presentation. In cross-border allocation cases, information including the covered intercompany transaction(s), and the proposed transfer pricing methodology, together with critical factors that might have an impact on the appropriateness of the envisaged transfer pricing mechanism, should be presented.

Building on the clarification in §89a (3) of the FCG, the BZSt should indicate to the prospective applicant in this stage that it will only conclude the BAPA or MAPA if the taxpayer agrees to the contents of the BAPA or MAPA and waives the right to file an objection against future tax assessments that implement the results of the mutual agreement for the term (§354(1b) of the FCG). Furthermore, if indicated, the BZSt must inform about the working language of the BAPA or MAPA proceeding.[522]

The German Competent Authority is not required to agree to the BAPA or MAPA proposal after the pre-filing meeting. Moreover, as the tax authorities are allowed to use the confidential information that was disclosed during the meeting in a tax audit. Nevertheless, the taxpayer needs to provide sufficient information about the facts and figures of the potential transaction under review to have a meaningful discussion with the German Competent Authority.[523]

While the German tax authorities will not provide any binding statements or written comments during the pre-filing phase, this phase will give a taxpayer an indication of its prospects of success, the documents required for the formal BAPA or MAPA application, an estimate of the time it will take to get a BAPA or MAPA, and the next steps involved in the process.

The obligation to pay fees only arises after the BAPA or MAPA request is submitted, according to §89a(7) sentence 1 of the FCG (formerly §178a(1) sentence 1 FCG). Neither the informal request for the preliminary pre-filing meetings at the BZSt nor holding those meetings will yet trigger any fees.

It is recommendable to conduct pre-filing meetings with all competent authorities involved.

2. BAPA or MAPA Application

a. Eligibility

§89a(1) sentence 1 FCG legally defines BAPAs as intergovernmental proceedings on the tax assessment of precisely defined facts, which are not yet realized at the time of the application for a specific period of validity, usually not exceeding five years.

The wording in §89a(1) sentence 1 of the FCG ("*not yet realized fiscal years at the time of the application*") is identical to that in §89(2) of the FCG, the legal basis for unilateral binding information (known as a "*verbindliche Auskunft*"). It is questionable whether the threshold for a BAPA application was increased compared to the requirements applicable before §89a FCG was implemented. Prior to the implementation of §89a(1) FCG, there was no requirement to point out the forward-looking fulfillment of the facts. The German tax administration confirms that the explanations in no. 3.4.2 sentence 2 of the AEAO to §89 FCG on "*matters not yet realized*" applies to §89a FCG accordingly, even in the case of permanent matters.[524] The facts underlying the BAPA applications must therefore not yet have been realized at the time the application is submitted and the applicant must still be able to make the corresponding dispositions. But, the question of appropriate dispositions should only be relevant in the case of continuing matters, if a "*seriously planned reorganization*" is intended, but not for those matters

[518] *See* AEAO to §89a FCG, no. 1.18. For a detailed description of the pre-filing meeting please refer to Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.62; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 518.

[519] *See* AEAO to §89a of the FCG, no. 1.18. Cf. also Liebchen/Strotkemper, Internationales Steuerrecht 2024, p. 845 (850).

[520] *See* Ministry of Finance, Circular of October 5, 2006, no. 2.2 (out of force).

[521] *See* AEAO to §89a of the FCG, no. 1.18.

[522] *See* AEAO to §89a of the FCG, nos. 2.2, 2.5.

[523] *See* AEAO to §89a of the FCG, no. 2.3.

[524] *See* AEAO to §89a of the FCG, no. 1.11.

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in which an already existing matter is to be secured by an BAPA. For permanent matters, the German tax administration also clarifies that the period of validity of the APA can begin at the start of the assessment period in question.[525] This view clarifies the fact that BAPAs can include requests for Roll Back years, which address past but not yet audited years (see §89a(6) sentence 2 of the FCG)[526] and the possibility confirms already applied transfer pricing systems or other facts via a BAPA.

Pursuant to §89a (1) sentence 1 of the FCG, the scope of the application for BAPAs only covers situations with a connection to income tax treaties concluded by Germany. Accordingly, taxpayers are entitled to file an application only if they are personally eligible based on the applicable income tax treaty.[527] The German tax administration gives helpful examples and exceptions.[528] If a matter concerns several affected persons and if the matter can only be assessed for tax purposes uniformly, the BAPA procedure pursuant to §89a(1) sentence 4 of the FCG can only be applied for jointly by all affected persons concerned.[529] If the application is not submitted by all persons concerned, there is a risk that the application will be rejected. The German tax administration indicates that a joint application is only required if a matter concerns several partners of the partnership, the matter is only to be assessed uniformly and the same DTA is applicable to the partners. Accordingly, they cannot initiate a BAPA procedure unless they opted for Corporate Taxation in Germany.[530] According to the explanatory memorandum, this provision simplifies the procedure and is to be applied in particular in the case of co-entrepreneurs of a partnership, as German partnerships are — regardless of the treatment of partnerships as corporations for the purpose of making transfer pricing adjustments[531] — still not qualified as tax subjects in Germany, and are therefore not eligible for benefits under the income tax treaty. This is expressly clarified in the explanatory memorandum to §89a(1) sentence 4 of the FCG.[532] At the same time, the memorandum emphasizes that a jointly filed BAPA procedure by the co-entrepreneurs can also concern the business relations between a partnership and an affiliated company in another state.

Similarly, a joint application by a controlling company and its controlled company is likely to be required under §89a (1) sentence 4 of the FCG for matters relating to business relationships of a fiscal unity.[533] For tax group cases, the German tax administration clarifies that a uniform and joint application by the parent company and the controlled company is not the rule.[534] The mere attribution of the controlled company's income to the controlling company does not constitute a uniform situation resulting in a joint application. This should only be the case for business transactions of the controlled company that directly affect the controlling company and lead to its own income.

In the case of a required joint application, §89a (7) sentence 9 of the FCG assumes one application (i.e., only one fee is triggered). If on the other hand, several treaty partners submit a joint application and the underlying facts cannot be assessed for tax purposes in a uniform manner, there are legally several applications, also triggering more fees.[535]

In contrast, in cases concerning tax deductions, the remuneration debtor is qualified as solely — and detached from the actions of the taxpayer — eligible to apply for the BAPA.[536]

Furthermore, §89a(1) sentence 8 of the FCG explicitly states that the performance of MAPA procedures is possible. But the explanatory memorandum to the law assumes that several BAPA procedures will still predominantly be conducted between the countries concerned.[537] Based on this assumption, §89a(7) sentence 10 of the FCG clarifies that a separate fee will be set and paid for each of these bilateral proceedings. Nevertheless, the applicant is entitled to only submit one summarized application meeting the beforementioned criteria towards all countries involved.

The request must relate to precisely defined facts in which there is a risk of double taxation with respect to these specific facts and it is likely that double taxation can be avoided by the BAPA or MAPA and a corresponding treaty interpretation of the competent authority of both contracting states. Insofar as §89a(1) sentence 1 of the FCG assumes a maximum term of five years for the BAPA or MAPA by default, but the applicant can also refer to another term. In particular, a shorter term is likely if the case does not involve continuous facts, i.e. in other cases (for details *see* IV.D., below).

Language-wise, applications generally have to be filed in German. Applications can also be submitted in English if German is not the common working language of the competent authorities.[538] This does not have to be officially approved by the BZSt; in this respect the German tax administration clarifies that only applications submitted abroad do not constitute an effective application in accordance with §89a(1) of the FCG.[539] Otherwise, applications for the initiation of the BAPA or MAPA procedure are to be rejected according to §89a(1) sentences 1 and 2 of the FCG without discretion by the competent authority.[540] The application must be submitted to the BZSt in writing or electronically.[541] The taxpayer must file a detailed BAPA or MAPA application with the BZSt in the fiscal year for which the BAPA is applicable for the first time if the facts are contin-

[525] *See* AEAO to §89a of the FCG, no. 1.11.

[526] *See* §89a (6) sentence 2 of the FCG. *See also* Flüchter, *Internationale Steuer-Rundschau* 2021, p. 338 (340).

[527] *See* AEAO to §89a of the FCG, no. 1.7.

[528] *See* AEAO to §89a of the FCG, nos. 1.8 and 1.9. Cf. also Liebchen/Strotkemper, *Internationales Steuerrecht* 2024, p. 845 (848).

[529] For details *see* §89a(1) sentences 5 and 6 of the FCG.

[530] See §1a of the Corporate Tax Act Germany.

[531] *See* §1(1) sentence 2 of the German Foreign Transaction Tax Act (*Außensteuergesetz* — AStG).

[532] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 80.

[533] *See* AEAO to §89a of the FCG, no. 1.9. This presumption is supported by corresponding qualification in the updated circular of the Ministry of Finance for dispute resolution proceedings of February 21, 2024. *See* Ministry of Finance, Circular of February 21, 2024, no. 42.

[534] *See* AEAO to §89a of the FCG, no. 1.9.

[535] *See* AEAO to §89a of the FCG, no. 7.3.

[536] *See* AEAO to §89a of the FCG, no. 1.10. *See* also Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 81.

[537] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no.19/27632, p. 81.

[538] *See* AEAO to §89a of the FCG, no. 2.3.

[539] *See* AEAO to §89a of the FCG, no. 2.4. Cf. also Liebchen/Strotkemper, Internationales Steuerrecht 2024, p. 845 (850).

[540] *See also* Flüchter, *Internationale Steuer-Rundschau* 2021, p. 338 (340).

[541] *See* §89a(2) sentence 3 of the FCG.

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uous facts.[542] In other cases the application must be filed before the facts are realized, either in prior years to realization or in the year of the expected realization.

Comment: It is recommended that the taxpayer file the BAPA or MAPA application with the German and foreign competent authorities simultaneously and provides the same document(s) to all competent authorities involved in the procedure.

b. Required Documents

§89a(2) sentence 1 of the FCG determines the content of the application.[543] All documents necessary for the presentation of the facts to be assessed to substantiate the risk of double taxation must be included, as the competent authority must be able to initiate and conduct a BAPA or MAPA procedure based on the information and documents submitted. The obligation to submit documents is laid out in §90 (2) and (3) of the FCG for cases with a cross-border reference.[544]

In detail, §89a(2) sentence 1 of the FCG requires the submission of the application together with the following information:

- the particulars of the applicant and all other parties involved;
- the locally responsible tax authority and the relevant tax number;
- the identification number pursuant to §139b of the FCG or the business identification number pursuant to §139c of the FCG; if the business identification number has not yet been assigned, the tax number;
- the contracting states concerned;
- a comprehensive and self-contained description of the facts including the desired period of validity of the advance pricing agreement;
- the explanation of why there is a risk of double taxation; and
- a statement as to whether binding information pursuant to §89 (2) of the FCG, a binding commitment pursuant to §204 of the FCG, a referral information pursuant to §42e of the German Income Tax Act (*Einkommensteuergesetz*), or comparable information or commitments have been requested or granted in Germany or in the other concerned state.

The German tax administration clarifies that this information reflects the minimum information level.[545] If a coordinated tax audits (joint audit) was conducted beforehand, it is also clarified that factual information from the joint audit and, if applicable, the minutes of the joint audit results (MLC report) should also be provided for the BAPA procedure.[546]

The application should contain suggestions for possible conditions of validity of the BAPA or MAPA (critical assumptions, discussed in IV.B.2.c., below). The question remains open as to whether and to what extent the BZSt will provide taxpayers with additional guidelines for submitting applications and accompanying documents. In the past, the BZSt published supplementary information sheets for the application. Currently, this is not available for BAPAs as the BZSt's webpage for BAPAs or MAPAs is still under construction. The explanatory memorandum to §89a(2) of the FCG, as well as the German tax administration point out that the necessary documents may differ in individual cases (i.e., the BZSt is likely to determine the required information and documents on a case-by-case basis).[547] This will ideally already have been addressed within the pre-filing meeting,[548] but the BZSt is also entitled to request additional information after the receipt of the application throughout the procedure — either directly before the formal approval of the application or at a later stage during the negotiations stage.[549]

Especially with respect to BAPA or MAPA requests for allocation cases, the well-established principles should continue to apply.[550] Thereafter, the BAPA or MAPA application can include any issues covered by Art. 7 and 9 of the OECD Model Tax Treaty, such as transfer pricing issues resulting from a planned business migration, a transfer of functions, highly integrated business transactions, high volume of transactions with related parties, and the relocation of tangible or intangible assets within an MNE group. In the past, the BAPA or MAPA application should include all necessary supporting information, including:[551]

- information with respect to ownership structure;
- information about the organizational and operational structure of the affiliated companies;
- an explanation of the relevant activities;
- information pertaining to the relevant transactions and any contract(s);
- information pertaining to a function and risk analysis;
- a description of the relevant assets (particularly, intangible assets that are used in the underlying transactions);
- a description of the market and competition conditions, as well as the business strategy;
- a description of the value chain and the value adding activities of the parties involved in the transaction; and
- identification of all outstanding tax issues that apply to the BAPA or MAPA.

The taxpayer must provide evidence that the proposed transfer pricing mechanism will ensure an arm's length allocation of profits between the related parties listed in the BAPA or MAPA application. The taxpayer can prove this by providing a detailed description of the transfer pricing methodology and disclosing all documentation relevant to the transac-

[542] *See* AEAO to §89a of the FCG, no. 1.11.
[543] *See* AEAO to §89a of the FCG, nos. 2.1 et seq.
[544] *See* AEAO to §89a of the FCG, no. 2.2.
[545] *See* AEAO to §89a of the FCG, no. 2.1.
[546] *See* AEAO to §89a of the FCG, no. 2.7.
[547] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 82; *See* AEAO to §89a of the FCG, no. 2.2.
[548] *See* AEAO to §89a of the FCG, no. 1.18.
[549] *See* AEAO to §89a of the FCG, no. 2.1.
[550] *See* also Flüchter, *Internationale Steuer-Rundschau* 2021, p. 338 (342).
[551] *See* Ministry of Finance, Circular of October 5, 2006, no. 3.5 para. 3 (out of force) no.

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tion, including a computation of the planned impact on the financial performance and profitability of entities related to the MNE concerned. To support the arm's length assumption, the taxpayer may either present comparable unrelated transactions for the covered transactions or provide a benchmark study of comparable transactions between unrelated parties with comparable functional and risk profiles.[552] The application should be accompanied by a list of relevant documents published on the BZSt's website.

It is questionable to what extent the BZSt may grant simplifications in the application procedure for small and medium-sized companies upon request. It is likely that this prior practice is unchanged, as §89a(7) sentence 8 of the FCG determines special fees if these criteria are met. But the German tax administration has not yet addressed this issue in public. In the past, such simplifications could be granted for companies whose business transactions covered by the BAPA or MAPA are expected to remain below the amounts of §6(2) German Regulations regarding the Documentation of Profit Allocations (*Gewinnabgrenzungsaufzeichnungs-Verordnung* — GAufzV) [remuneration from the delivery of goods or goods to related companies in the amount of 6 million EUR and the remuneration from other payments to related companies in the amount of 600,000 EUR]. As the tax questions to be assessed by the BAPA or MAPA are mostly less complex in other non-transfer pricing cases than in transfer pricing cases, it is very likely that a lower information level should be necessary in other cases. The reduced fee rate stated in §89a(7) sentence 6 of the FCG for other cases supports this assumption.

c. Critical Assumptions

§89a(4) sentence 1 no. 1 of the FCG obliges the competent authorities to base the BAPA or MAPA on validity conditions, referred to as "critical assumptions" which are subject to negotiation in individual cases. Based on §89a(1) sentence 1 of the FCG the applicant shall already point out suitable critical assumptions. If the applicant identifies a need for an adjustment of the named critical assumption (as the underlying facts are likely to be realized differently) during a pending procedure, the German tax administration holds the view that this is a major amendment, i.e. a completely new application and a withdrawal of the initial application.[553]

These critical assumptions constitute an expressly agreed contractual basis for the BAPA or MAPA. §89a(4) of the FCG determines this explicitly by stating that the binding effect of a signed and effective BAPA ceases immediately if at least one of the conditions within the meaning of §89a(4) sentence 1 nos. 1 to 3 of the FCG has materialized.

While §89a(4) sentence 1 no. 1 of the FCG does not provide any examples, the German tax administration gives few examples of possible validity conditions within the meaning of §89a(4) sentence 1 no. 1 of the FCG for allocation cases.[554] The explanatory memorandum to §89a FCG suggests examples, referring to unchanged shareholding ratios, unchanged ratios regarding the market conditions or the market share, unchanged distributions of functions and risks as well as the capital structure of the companies involved, an unchanged business model, or unchanged general tax conditions in the other state.[555]

As the calculations in transfer pricing and other allocation matters are traditionally based on budgeted figures, the taxpayer must disclose all relevant underlying assumptions. These critical assumptions specify the conditions for the validity of the terms of a BAPA or MAPA. The critical assumptions define economic and operational conditions for the covered transactions that must be fulfilled by the parties over the total duration of the BAPA or MAPA. These assumptions define the threshold at which the transfer pricing methodology leads to an appropriate arm's length result.[556] According to the German tax administration, the following is a non-exclusive list of conditions that could represent critical assumptions:[557]

- comparable conditions in terms of market conditions, market share, business volume, sales prices, in each case with a framework;
- comparable conditions, e.g. with regard to supervisory law, customs duties, import and export restrictions, international payment transactions;
- comparable conditions with regard to exchange rates and interest rates;
- implementation of taxation in accordance with the preliminary agreement in other countries involved;
- transfer price corrections by a third country not involved in the advance pricing arrangement that have an impact on the advance pricing arrangement;
- no significant changes to the tax framework in the other country (e.g. introduction or extension of preferential tax arrangements).

Consequently, §89a(4) sentence 1 no. 1 of the FCG assumes for all BAPAs or MAPAs that the competent authorities are not bound to a successfully concluded and effective BAPA or MAPA if the conditions or assumptions underlying the BAPA or MAPA do not materialize or materialize differently during the period of validity of the BAPA or MAPA, with effect for the future according to §89a(4) sentence 3 of the FCG. Prior to the implementation of §89a FCG, the binding effect was not dispensed automatically.

d. Relation to National Proceedings

BAPA or MAPA proceedings can be conducted simultaneously with national appeal proceedings. However, the German tax administration emphasizes that the suspension of an appeal procedure within the meaning of §363(2) sentence 1 of the FCG may be appropriate if the BAPA or MAPA application also contains a request for a Roll Back.[558]

Ongoing audit should generally be conducted irrespective of a BAPA or MAPA application and procedure as well. Nevertheless, the German tax administration admits that a suspen-

[552] *Id.*, no. 3.4.
[553] *See* AEAO to §89a of the FCG, no. 4.6.
[554] *See* AEAO to §89a of the FCG, no. 4.4.
[555] *Id.*
[556] For further discussion, *see* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.72; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 of the OECD Model Tax Treaty, no. 528.
[557] *See* AEAO to §89a FCG, no. 4.4.
[558] *See* AEAO to §89a FCG, no. 1.16.

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sion of the audit may be indicated if the results of the BAPA or MAPA (possibly due to a Roll Back) are also relevant for the audit. However, the tax authorities are not granted an initiative for suspending the audit, i.e. such suspension should only be decided upon the initiative of the taxpayer.[559]

3. Approval of a BAPA or MAPA Application

Applicants for a BAPA or MAPA have no enforceable right to the initiation of the BAPA or MAPA procedure by the competent authorities according to §89a(1) sentence 1 of the FCG. Therefore, the initiation is subject to the BZSt's discretion if the requirements set out by §89a(1) sentences 1 and 2 of the FCG are met in the relevant case.[560]

But it is conditional that the eligibility requirements set out by §89a(1) sentence 1 of the FCG, and the formal requirements set out by §89a(2) sentence 1 of the FCG, be complied with. In addition to that, the formal initiation of the BAPA or MAPA procedure is not opened until the BZSt's fee assessment becomes final and the fee has been paid according to §89a(1) sentence 3 of the FCG.[561] If the requirements are not met, the request for the initiation of an BAPA procedure must be rejected without the discretion of the competent authorities (i.e., if there is no risk of double taxation pursuant to §89a(1) sentence 2 no. 1 of the FCG).

If the criteria set out by §89a(1) sentences 1 and 2 of the FCG are met, the BZSt in turn will decide on the initiation after and in coordination with the competent state tax authority upon its discretion. The German Competent Authority will institute the BAPA or MAPA proceedings after balancing the interests of the tax authorities and the taxpayer. Therefore, the decision must weigh the interests of the taxpayer in the avoidance of a future double taxation, and the interests of the tax authorities in a consensual settlement of the tax issue preventing disputes in audits or dispute resolution procedures.[562]

The German tax administration outlines typical grounds for refusal. However, these examples are not conclusive.[563] Thereafter, BAPA or MAPA applications should be rejected if the application is aimed at obtaining an unjustified tax advantage (such as double non-taxation, double use of losses or use of preferential tax regimes); if there is a breach of the duty to cooperate (in particular in the context of external audits); if it is unlikely that agreement on the interpretation of the agreement will be reached; or if the application is not based on a suitable transfer pricing method.

Furthermore, it is explicitly stated that applications can also be rejected due to non-payment of the fee.[564] It should not be underestimated that non-payment of the fee may not only result in the application being rejected, but that the fee must also be paid in this case.

In the case of a rejection of the application, the decision constitutes a contestable[565] administrative act within the meaning of §118 of the FCG.[566]

4. BAPA or MAPA Negotiations

While there is no set timeline within which a BAPA or MAPA procedure is to be completed under either German or OECD BAPA principles, the competent authorities should set and follow their own time frames with a view to proceeding in an on-time fashion.[567] The proposal of the EUJTPF suggests that the respective tax authority should present the first independent evaluation of the BAPA application within 12 months from the pre-filing stage, and that a BAPA should be finalized after no more than 18 months.[568] However, the average BAPA involving German authorities lasts over four, to more than five years.[569]

The German Competent Authority will set up a BAPA or MAPA team, consisting of representatives from the BZSt and one or more tax auditors who are familiar with the company or the industry. §89a(1) sentence 1 of the FCG as well as the German tax administration clarify the joint competence.[570] The team will evaluate the BAPA or MAPA proposal and the supporting documentation and may request additional information and analysis. The EU JTPF recommends that the competent authorities involved exchange position papers containing their tax administrations' evaluation of the covered transaction as soon as possible after the application is received.[571]

The BAPA represents a bilateral administrative procedure; a MAPA represents several aligned bilateral administrative procedures in Germany (*see* IV.B.2.a., above). The terms are negotiated between the involved — regularly two — competent authorities and it is up to the German Competent Authority to agree with the foreign competent authority on the content of, and time frame for, BAPA or MAPA negotiations. It is recommended by the EU JTPF that the competent authorities prepare a position paper pointing out the position of the tax authorities concerned.[572]

If the involved parties can reach an agreement, they will sign the BAPA (or several BAPAs in case of a MAPA). Such bilateral agreement terminates the respective bilateral administrative proceeding. The finalization of the agreement is subject to the approval of the taxpayer according to §89a (3) no. 1 of the FCG and to a waiver of any administrative or juridical appeal proceedings against subsequent implementation decisions

[559] *See* AEAO to §89a FCG, no. 1.17.

[560] *See* AEAO to §89a of the FCG, no. 1.14.

[561] *See* §89a(1) sentence 3 and (7) sentence 4 of the FCG, formerly §178a(1) sentence 4 FCG (out of force).

[562] The decision mainly depends on the specific interest of each tax authority and how it interprets the MAP clause of the relevant income tax treaty. *See* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.80 *et seq*; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 536 et seq.

[563] *See* AEAO to §89a of the FCG, no. 1.14.

[564] *See* AEAO to §89a of the FCG, nos. 7.5 and 7.7.

[565] *See* §347 et seq. of the FCG and §40 et seq. GTCC.

[566] *See* AEAO to §89a of the FCG, no. 1.14.

[567] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.82; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 538.

[568] Communication From The Commission To The Council, The European Parliament And The European Economic And Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU ("COM"), February 26, 2007, COM(2007) 71 final, Appendix C, available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0071:FIN:ENG:PDF (hereinafter: COM (2007) 71 final).

[569] *See* IV.F., below.

[570] *See* AEAO to §89a of the FCG, no. 1.1.

[571] COM (2007) 71 final., no. 7.3, points 40 and 41.

[572] COM (2007) 71 final, no. 7.3, points 40 and 42.

ISBN 978-1-61746-885-8

of the local tax authorities according to §89a (3) no. 2 of the FCG.[573]

The EUJTPF recommends that the agreement should, at a minimum, include the following:[574]

- the duration of the BAPA and the day of its entry into effect;
- details of the methodology acceptable for determining transfer prices and the critical assumptions that must be followed for the BAPA to apply;
- an agreement that the BAPA will be binding on the tax authorities involved;
- an agreement with respect to the manner in which the BAPA will be monitored;
- an agreement regarding a set of documentation that will be maintained throughout the BAPA process for audit purposes (e.g., an annual report);
- any agreement on any retrospective treatment;
- circumstances that will require the BAPA to be revised; and
- circumstances that will result in the BAPA being rescinded prospectively or retrospectively (e.g., in the event false information is provided).

In the past, the Ministry of Finance provided a sample of such an agreement in the Appendix to its October 2006 circular.[575] Currently, the German tax administration is no longer providing comparable examples.

While it would be desirable to disclose BAPA agreements to the general public and other taxpayers, it is usually difficult for the tax authorities to keep all relevant information in an BAPA confidential without redacting the relevant facts.[576] Thus, only Belgium, France, Spain, Poland, and Sweden disclose summaries of finalized BAPAs, leaving out certain sensitive information.[577]

While the taxpayer is not a party to these negotiations,[578] it should support BAPA negotiations by providing relevant documentation and records at the competent authorities' request during the negotiation process. Beyond the taxpayer's involvement within the pre-filing and the application procedures and the duty to cooperate, obtain information, submit documents, and record the domestic implementation of the BAPA (or of all BAPAs in case of a MAPA), its consent is required as well as waivers of legal remedies according to §89a (3) of the FCG. In addition to that it should be noted that the taxpayer can play a more active role in a BAPA negotiation relating to a retroactive MAP under Art. 25 of the OECD Model Tax Treaty that concerns finalized transactions.[579] The German tax administration clarifies that it is at the discretion of the competent authorities to decide on the personal attendance of the applicant or his representative at bilateral negotiations.[580] The participation of the applicant is to be decided together with the other competent authority and is intended to facilitate the presentation or clarification of the facts or to give the applicant the opportunity to present his factual or legal arguments. Also, the OECD Guidelines explicitly clarify that the participation of the taxpayer in the bilateral negotiations is in each case in the discretion of the competent authorities.[581]

But the German tax administration is not obliging the BZSt to regularly inform the applicant about the status of the procedure.

5. Implementation of a BAPA or MAPA

At the international level, a BAPA does not become effective before the competent authorities sign the agreement; in multilateral cases several bilateral agreements are likely to be signed in one document according to German practice. The proceedings under international law are thus terminated. However, §89a(3) sentence 1 nos. 1 and 2 of the FCG require that the BAPA or MAPA is only issued under the reservation of the consent of the taxpayer and the waiver of local remedies against the tax assessment implementing the BAPA or MAPA at a later point in time.[582] In the case of uniformly assessed tax matters with joint applications, the declarations must be submitted by all persons; in tax group cases interestingly always both by the controlled company and the controlling company irrespective of a joint application.[583]

The German tax administration specifies that the required declarations by the applicant must be submitted to the BZSt within two months and that failure to meet the deadline will result in the failure of the BAPA or MAPA, unless the time limit is subject to an extension on the basis of §109(1) sentence 1 of the FCG in exceptional cases.[584] Upon receipt of the relevant declarations, the reservation shall cease to apply and the BAPA or MAPA shall become effective at the time of their receipt, and the other competent authority shall be notified of the entry into force.[585]

Based on §89a(5) sentence 1 of the FCG, the effectiveness of the BAPA or MAPA is subject to a further condition in cases where a unilateral measure is already in force. In this respect, the German tax administration clarifies that the BAPA or MAPA only gets effective if the unilateral measure gets revoked — either before the bilateral conclusion or afterwards.[586] If such revocation is not declared, §89a(5) sentence 2 of the FCG confirms that the BAPA or MAPA will not be effective and regarded as failed.

In contrast to the legal situation before the implementation of §89a FCG, the local tax authority must no longer issue an

[573] §354(1a) and (1b) of the FCG and §50(1a) GTCC. *See* also AEAO to §89a FCG, nos. 3.1 and 3.2.

[574] COM (2007) 71 final, of February 26, 2007, Appendix E.

[575] Ministry of Finance, Circular of October 5, 2006, Appendix 1 (out of force).

[576] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.92.

[577] Grotherr, *Internationales Steuerrecht* 2015, 296; Grotherr, *Internationale Wirtschafts-Briefe Fach 10, Gruppe 2*, 337. *See also* VI.B.1., below, for the automatic exchange of APAs between competent authorities in the EU.

[578] *See* AEAO to §89a of the FCG, no. 1.15.

[579] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.88; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Treaty, no. 544.

[580] *See* AEAO to §89a of the FCG, no. 1.15.

[581] OECD Guidelines 2022, no. 4.58.

[582] *See* AEAO to §89a of the FCG, nos. 3.3 and 3.4.

[583] *See* AEAO to §89a of the FCG, no. 3.5.

[584] *See* AEAO to §89a of the FCG, no. 3.3.

[585] *See* AEAO to §89a of the FCG, nos. 3.1 and 3.2.

[586] *See* AEAO to §89a of the FCG, nos. 5.1 and 5.2.

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additional binding advance ruling (known as a "v*erbindliche Vorabzusage*") at the request of the taxpayer in a second stage that reflects the terms and conditions of the BAPA.[587] The explanatory memorandum to §89a(3) sentence 1 no. 2 of the FCG as well as the German tax administration explicitly points out that the applicant is directly bound by the content of the agreement.[588]

The implementation of the BAPA will be carried out by the local tax authority according to §89a(4) sentence 1 of the FCG.

It is notable that the waiver of a taxpayer's right to appeal a tax assessment which complies with the terms of a BAPA for the duration of the BAPA according to §354 (1a) and (1b) of the FCG and §50(1a) of the GTCC is no longer to be declared to the local tax office[589] but to the BZSt, according to §89a(3) sentence 3 of the FCG within a time frame set out by the BZSt. Taxpayers should be aware of this amendment to avoid any risk of non-compliance with the deadline and an unsuccessful termination of the proceeding according to §89a (3) sentence 6 of the FCG. This waiver leads to the inadmissibility of an appeal against the proper implementation of the BAPA via tax assessment. By contrast, if the taxpayer complains about an improper implementation of the BAPA, appeals remain admissible.

6. Non-completion of the Procedure

Either the competent authorities or the taxpayer may withdraw from the process at any time.[590] §89a(1) sentence 1 and (3) sentences 4 and 5 of the FCG clarify this explicitly for the time after the formal initiation of the procedure. According to §89a(3) sentences 4 to 6 of the FCG, the negotiations may also be terminated due to a lack of willingness of the other competent authority to reach an agreement or due to the awareness of a lacking fulfillment of the requirements set out by §89a(1) sentences 1 and 2 of the FCG or if the taxpayer does not carry out the necessary declarations on time. Insofar the German tax administration refers to the same applicable standards as for the initiation of the BAPA or MAPA.[591] The German tax administration also clarifies that a breach of the duty to cooperate under §90 of the FCG can lead to the termination of the proceedings.[592]

If a BAPA or MAPA procedure fails for the aforementioned reasons, after the fee notice, §89a(8) sentence 2 of the FCG states that there is no possibility for applicants to receive a refund of fees already paid. A refund is only possible by discretion of the competent authorities if the withdrawal has been declared before the notification of the fee notice according to §89a (8) sentence 1 of the FCG.

In the case of a non-completion of the BAPA or MAPA declared by the BZSt, the decision constitutes a contestable administrative act within the meaning of §118 of the FCG.[593]

Building on §89a (8) sentence 2 of the FCG a paid fee is not subject to reimbursement.[594]

C. Validity of the BAPA or MAPA and Compliance During the Period Covered by a BAPA or MAPA

1. Validity of the BAPA or MAPA

The later implementation of the BAPA or MAPA is linked to the effectiveness of the BAPA or MAPA. §89a(4) sentence 1 no. 1 to no. 3 of the FCG clarifies in this context that the BAPA or MAPA is no longer to be implemented if:

- the conditions set out by the BAPA or MAPA are not or are no longer fulfilled (so-called critical assumptions; *see* IV.B.2.c., above, for further details);
- the other contracting state involved is not or is no longer complying with the BAPA or MAPA; or if
- the legislation on which the BAPA or MAPA is based has been repealed or amended. In this respect, the German tax administration clarifies that this might affect domestic law of the respective countries, but also treaty law as well as general international law.[595]

These conditions are not to be understood cumulatively (i.e., if one condition is fulfilled the binding effect of the BAPA or MAPA is no longer given).[596] The implementation of a BAPA or MAPA in Germany is independent of its implementation in the other country (countries). A BAPA or MAPA will generally be effective for the fiscal year in which the formal request is filed and will remain valid for the next three to five years.

The tax authorities will not make any adjustments to the taxpayer's income (insofar as it is connected with the issue and the related parties involved in the BAPA or MAPA), as long as each taxpayer and related party comply with the terms of the BAPA or MAPA.[597] If the applicant is aware of changes to the validity criteria of §89a(4) sentence 1 no. 1 of the FCG, it is recommended by the German tax administration to file a new BAPA or MAPA application. However, the concluded BAPA or MAPA has no precedential value.[598]

2. Compliance During the Period Covered by a BAPA or MAPA

Tax audits of transactions covered by a BAPA or MAPA will be limited to issues of compliance and whether the representations in the BAPA or MAPA application and in the Annual Compliance Reports ("ACR") are still valid for the duration of the BAPA or MAPA. There should be no re-evaluation of the agreed transfer pricing methodology or other agreed in-

[587] *See* with respect to the previous practice of such "two-parted" APA procedure Ministry of Finance, Circular of October 5, 2006, no. 4.6, 5.1 (out of force).

[588] Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 82; AEAO to §89a of the FCG, no. 3.1.

[589] Ministry of Finance, Circular of October 5, 2006, no. 4.6 (out of force).

[590] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.85; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 541.

[591] *See* AEAO to §89a of the FCG, nos. 3.6, 1.14.

[592] *See* AEAO to §89a of the FCG, no. 2.8.

[593] *See* AEAO to §89a of the FCG, no. 3.6.

[594] *See* AEAO to §89a of the FCG, no. 7.7.

[595] *See* AEAO to §89a of the FCG, no. 4.5.

[596] Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 83.

[597] OECD Guidelines 2022, no. 4.146.

[598] *See* AEAO to §89a of the FCG, no. 4.6.

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terpretations or applications of the respective income tax treaty provisions.[599]

The competent authority in Germany is the BZSt, according to §89a(4) sentence 2 of the FCG, and holds the responsibility for the verification of the materialization of the conditions and assumptions underlying the respective BAPA or MAPA for its term. The German tax authorities require the taxpayer to file an ACR detailing the taxpayer's compliance with the agreed terms of the BAPA or MAPA.[600] Such ACR should confirm that the underlying facts of the BAPA or MAPA were realized in the relevant financial year and that the (validity) conditions pursuant to §89a(4) sentence 1 of the FCG were met. If any deviations have occurred, this must also be documented.

In this context, the German tax authorities require the taxpayer to explicitly point out any deviation from the facts and the fulfillment of critical assumptions as well as further disclose which adjustments the taxpayer has made. In the event of non-compliance with the conditions for validity or the critical assumptions underlying the BAPA or MAPA, the taxpayer was traditionally required to make proposals for appropriate adjustments to the mutual agreement and to answer subsequent information requests without delay. As such, the tax authorities assumed that an adjustment was only to be considered in the case of insignificant or minor deviations, and an amendment if deviations of significant or major relevance were given. In the latter case, the taxpayer was asked to make a proposal for the respective amendment of the BAPA or MAPA (accompanied by a request for amendment). Even with the entry into force of §89a FCG, such differentiation between major (significant) or minor (insignificant) seems to be maintained by the German tax administration. Thereafter, only major deviations must be considered as a realization of a violation of the validity condition according to §89a(4) sentence 1 no. 1 of the FCG, i.e. an event that leads to the invalidity of the BAPA or MAPA. But, in contrast to the past, the BAPA or MAPA cannot be amended; any request for amendment will be treated as new application.[601] The BAPA or MAPA only then remains valid without formal amendment if the alterations of the facts and conditions are minor.[602] Definitions of minor or major deviations have not been formulated though. It is therefore recommended that affected taxpayers stick with the known compliance duties and particularly continue to file the aforementioned applications in case of minor or major deviations. These risks associated with the non-compliance of validity conditions sufficiently illustrate that any critical assumptions must be used with thoughtfulness. Too many validity conditions may lead to a jeopardization of the purpose of a BAPA or MAPA.

The report must be submitted simultaneously to the BZSt and the local tax office in German or in another language with a German translation within the agreed deadline. In any case, it must be submitted together with the submission in the other country.[603] The German tax administration assumes that additional questions can be asked by the tax authorities and must be answered in a timely manner.[604] If the BZSt and the local tax office assume an invalidity of the BAPA or MAPA at a later stage according to §89a(4) of the FCG, it must be noted that the applicant is likely to be notified thereof. But any information or notification will not constitute a contestable administrative act. In other words, applicants cannot directly appeal a repeal of the binding effect of the BAPA or MAPA within the meaning of §89a(4) sentence 1 of the FCG. Consequently, the applicant must first wait for a tax assessment notice to be issued at a later date. Only in the context of the examination of the legality of this tax assessment — usually years later — it is decisive whether the lapse of the binding effect was rightly assumed.[605]

D. Duration, Roll Back, and Renewal of a BAPA or MAPA

1. Duration

§89a(1) sentence 1 of the FCG stipulates a maximum duration of five years for the validity period of a BAPA or MAPA. This default time frame of five years, at most, for the initial duration of a BAPA or MAPA is assumed in §89a(1) sentence 1 of the FCG and corresponds to the practice of the German tax authorities.[606] In Germany, the period covered by a BAPA or MAPA generally starts in the fiscal year in which the request is filed (*see* IV.B.2.a., above, for details).

The German tax administration intends to determine the period of validity individually, taking into account the permanence and stability of the business relationship, the applicant's interest in a long-term commitment and any concerns of the tax authorities as well as the practice of the countries involved.[607] A minimum validity period of three years is no longer stipulated by the German tax administration. Accordingly, shorter periods of validity are likely as well.

Comment: The risk of limiting the term at the discretion of the tax authorities should not be underestimated. It is unclear whether the administration would make terms of less than three years the subject of a BAPA or MAPA for cases with continuous facts and whether there is still a willingness to change the term in favor of the applicant after an excessive length of proceedings.[608] In cases of doubt it is recommended that the BAPA or MAPA be accepted and combined this declaration with an application for extension. The request for extension triggers an extension fee of 15,000 EUR in accordance with §89a(7) sentence 5 of the FCG. In contrast, it is not recommendable to amend the application as major amendments always constitute a new application (and a withdrawal of the initial application).[609]

[599] *Id.*, no. 6.3.

[600] *See* AEAO to §89a of the FCG, no. 4.2; Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 84.

[601] *See* AEAO to §89a of the FCG, nos. 4.6, 7.6. *See* also Seer, in: Tipke/Kruse, Abgabenordnung, §89a AO, no. 38.

[602] *See* AEAO to §89a of the FCG, no. 7.6.

[603] *See* AEAO to §89a of the FCG, no. 4.2.

[604] *See* AEAO to §89a of the FCG, no. 4.3.

[605] Critically Seer, in: Tipke/Kruse, Abgabenordnung, §89a AO, no. 42,

[606] *See* AEAO to §89a of the FCG, no. 1.12.

[607] *See* AEAO to §89a FCG, no. 1.12.

[608] This was possible in the past. *See* Ministry of Finance, Circular of October 5, 2006, no. 3.8 Abs. 3 and 4 (out of force).

[609] *See* AEAO to §89a of the FCG, nos. 2.1, 7.6.

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2. Roll Back

While a BAPA or MAPA generally addresses future transactions, the taxpayer may also apply for a Roll Back of the BAPA or MAPA terms to fiscal years that have not yet been audited. Accordingly, §89a(6) sentence 2 of the FCG expressly provides for the possibility of applying the BAPA or MAPA to past years (a "Roll Back").[610]

Technically and legally, a Roll Back of the BAPA or MAPA terms involves a separate MAP corresponding to Art. 25 of the OECD Model Tax Treaty or other MAP clauses, which can run simultaneously with or after the BAPA procedure.[611] A Roll Back requires the taxpayer to comply with the initiation period for the MAP provided by the tax treaty and to provide documentation on comparable conditions in previous years. Roll Backs are generally only granted if:

- Roll Backs are admissible abroad as well and if the other state consents;
- the facts of the Roll Back years correspond to the facts of the BAPA or MAPA years;
- documentation is provided for the Roll Back years that correspond to the records for the BAPA or MAPA term.

However, the negotiations will be conducted together with the BAPA or MAPA negotiations. The German tax administration clarifies further that the declarations to accept both the BAPA or MAPA and the Roll Back as well as the respective waiver of appeals relating to later tax assessments implementing the effect of the BAPA or MAPA must be declared simultaneously towards the BZSt.[612] In this respect, the German tax administration is silent on whether the waiver of legal remedies for the settlement in the context of Roll Backs pursuant to §89a(3) sentence 2 of the FCG must also be declared to the BZSt.

Comment: In the author's opinion, this is obvious. Clarification would have been useful here because, according to the circular on dispute resolution procedures, waivers of legal remedies must still be declared to the locally competent tax office.[613]

3. Renewal of a BAPA or MAPA

After the formal expiry of the BAPA or MAPA term, §89a(6) sentence 1 of the FCG entitles the taxpayer to apply for an extension of the term.[614] This request must be filed before the end of the initial BAPA or MAPA period.[615] An application for a renewal of a BAPA or MAPA gives rise to a separate, individual BAPA or MAPA requiring the approval of all involved parties. However, the German tax authorities require only a simplified application without the extensive documentation requirements of the initial BAPA application, as lower investigations of the facts are associated with this application. The German legislature intends to simplify the taxation procedure with the possibility of the extension of the term.[616] As the methodology and terms and conditions of the renewed BAPA or MAPA are likely to be identical to the initial BAPA or MAPA, the German tax administration assumes a fast-track negotiation stage. But the methodology and terms and conditions may also differ from those of the original BAPA or MAPA.[617]

E. Fees

The Tax Act of 2007 introduced fees for BAPAs and MAPAs in §178a of the FCG for this purpose. With §89a FCG entering into force for applications received by the BZSt as of June 9, 2021, the fee regulation of §178a FCG has been repealed. However, according to Art. 97 §34 of the EGAO, and §178a of the FCG still apply without restriction to applications received by the BZSt by June 8, 2021. §89a(7) of the FCG contains the current legal basis for fees for BAPAs and MAPAs.[618]

The fee arises upon receipt of the BAPA or MAPA request by the BZSt and, pursuant to §89a (1) sentence 3 and (7) sentences 1 and 2 of the FCG, must be assessed before the BAPA or MAPA procedure is initiated or an extension request is processed.[619] The fee must be paid by the applicant within one month of notification of the assessment according to §89a(7) sentence 3 of the FCG. The BAPA or MAPA application can only be processed, and the proceeding can only be initiated if the fee has been paid and the fee assessment got binding.[620]

According to §89a(7) sentence 1 of the FCG (or §178a(2) FCG), a lump-sum of 30,000 EUR is generally charged for each application. In the case of renewals, a reduced lump sum of 15,000 EUR is to be assessed as well, but the norm no longer contains cost regulations for amendments. §89a FCG no longer contains a fee for an amendment. The German tax administration clarifies that major amendment are considered as completely new applications (along with a withdrawal of the initial application); in case of minor amendment, no fee is assessed.[621] Apart from this, it remains to be noted that the fees were adjusted upwards in comparison to §178a FCG. But §89a(7) sentences 6 to 8 of the FCG also establish reduced fee rates for non-transfer pricing cases (cost reduction of 75%), for BAPA requests with a preceding joint audit[622] (cost reduction of 75%), and for small companies (costs of 10,000 EUR or 7,500 EUR), i.e., where the related-party goods transactions do not exceed 6 million EUR per year and all other related-party transactions (e.g., services, licenses, and interest) do not exceed 600,000 EUR per year. §89a(7) of the FCG no longer provides for a fee reduction according to §178a(4) of the FCG at the request of the taxpayer based on undue hardship. If a joint application is made as provided for in §89a(1) sentence 4 and 6 of the FCG, only one fee is triggered according to §89a(7) sentence 9 of the FCG. As a MAPA is treated as a sequence of BAPAs un-

[610] *See* AEAO to §89a FCG, no. 6.3.

[611] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 85.

[612] *See* AEAO to §89a of the FCG, no. 6.3.

[613] Ministry of Finance, Circular of February 21, 2024, no. 86.

[614] *See* AEAO to §89a of the FCG, no. 6.2.

[615] *Id.*, no. 6.2. *See* also Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.89, Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 of the OECD Model Tax Treaty, no. 535.

[616] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) 19/27632, p. 85.

[617] OECD Guidelines, no. 4.151.

[618] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 85.

[619] *See* AEAO to §89a of the FCG, no. 7.4.

[620] *See* AEAO to §89a of the FCG, no. 7.5.

[621] *See* AEAO to §89a of the FCG, no. 7.6.

[622] This exception rule is likely to only concern transfer pricing cases or allocation of profits to permanent establishments cases.

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der German tax law, in the case of a MAPA an application fee applies to each individual bilateral procedure, according to §89a(7) sentence 10 of the FCG.[623]

The table below provides an overview of all fees:

[623] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.124, Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Treaty, no. 559.

	Transfer Pricing or Allocation Cases		**Non-allocation Cases**	
	§89a(7) sentence 5 FCG	*§178a(2) FCG*	*§89a(7) sentence 6 FCG*	*§178a(2) FCG*
Initial lump sum	30,000 EUR	20,000 EUR	7,500 EUR	—
Renewal lump sum	15,000 EUR	15,000 EUR	3,750 EUR	—
Amendment lump sum	—	10,000 EUR	—	—
Cost reduction for small companies	10,000 EUR for initial requests and no fee regulated for renewals	10,000 EUR for initial requests, 7,500 EUR for renewals, and 5,000 EUR for amendments	7,500 EUR for initial requests and no fee regulated for renewals	—
Cost reduction for preceding joint audits	7,500 EUR for initial requests and 3,750 EUR for renewals	—	1,875 EUR for initial requests and 937.50 EUR for renewals	—

According to §89a(7) and (8) sentence 2 of the FCG — and in line with §178a(5) of the FCG — there will be no refund if the BAPA or MAPA application is denied, the applicant withdraws the application after the proceedings have been initiated, the BAPA or MAPA proceedings fail, or the BAPA or MAPA loses its effect before the end of the agreed period of validity.[624] Only if the application is withdrawn prior to the notification of the fee assessment, the BZSt has the discretion to refrain from assessing the fee according to §89a(8) sentence 1 of the FCG. In this respect, the explanatory memorandum to §89a(8) of the FCG recommends that applicants be notified in good time that the APA request was unsuccessful.[625]

BAPA or MAPA fees are generally rather high in Germany compared to other countries. Most countries either charge no fees for a BAPA or MAPA procedure[626] or charge only marginal fees. However, compared to the fee rates in the United States of 113,500 USD for initial requests and 62,000 USD for renewals,[627] the German fee rates are still rather moderate.

By comparison, in Germany unilateral measures can be issued as a binding commitment (as previously explained, known as a "v*erbindliche Zusage*") after a tax audit or as an advance ruling (as previously explained, known as a "*verbindliche Auskunft*") prior to the implementation of the planned transaction. Only the latter will be subject to a fee ranging from 241 EUR (minimum) to 109,736 EUR (maximum). The amount of the fee is derived from the value,[628] which is considered to be 10,000 EUR at a minimum and a maximum of 30 million EUR.[629]

F. APA, BAPA and MAPA Statistics

The EU JTPF publishes statistics on APA, BAPA and MAPA (together APA) procedures annually, such as the number of applications made in, the number of APAs issued by, and the number of effective APAs of EU Member States. The JTPF also publishes statistics on the average duration of APA proceedings for countries that disclose this information.[630] The most recent statistics were published in December 2023 for the year 2022.

[624] *See* AEAO to §89a FCG, no. 7.7. *See* also Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.123, Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 of the OECD Model Tax Treaty, no. 558.

[625] *See* Federal Government of Germany of March 17, 2021, Official Record (Bundestag Drucksache) no. 19/27632, p. 86.

[626] Examples include Belgium, Canada, China, France, Italy, Japan, the Netherlands, Switzerland, Spain, and the United Kingdom. *See* IBFD Database, Tax Research Platform, Transfer Pricing Chapter of each state, available at https://online.ibfd.org/kbase/#topic=d&N=3+10+5302+4927&ownSubscription=true&Ne=4912&Nu=global_rollup_key&Np=2&colid=4927&Ns=chaporder%257C0%257C%257Csort_country_one%257C0%257C%257Csort_collection%257C0&rpp=25&WT.i_s_=Navigation.

[627] *See* IRS of February 6, 2018, Statement (2-6-18), available at https://www.irs.gov/businesses/corporations/irs-statement-2-6-18.

[628] This is the object value (value of the case) representing the tax risk (cash tax) compared to the opposite tax assessment.

[629] §89(3) to (5) FCG and §39(3) German Court Costs Act (*Gerichtskostengesetz* — GKG). For a detailed discussion, *see* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.104.

[630] *See* https://taxation-customs.ec.europa.eu/document/download/d96e1bc2-a820-45d6-b26d-187514bffdde_en?filename=APAs_2022_FINAL.pdf (for 2022); https://taxation-customs.ec.europa.eu/system/files/2023-04/APA_consolidated_2021.pdf (for 2021); https://ec.europa.eu/taxation_customs/taxation-1/statistics-apas-and-maps-eu_en (for 2019 and 2020); https://ec.europa.eu/taxation_customs/system/files/2019-07/apa-and-map-2019-3.pdf (for 2018); https://ec.europa.eu/taxation_customs/system/files/2018-10/statistics_on_advance_pricing_agreements_2017_en.pdf (for 2017); https://ec.europa.eu/taxation_customs/system/files/2018-03/2016_jptf_apa_statistics_en.pdf (for 2016); https://ec.europa.eu/taxation_customs/system/files/2016-12/jtpf0152016enapastatistics.pdf (for 2015); https://ec.europa.eu/taxation_customs/system/files/2016-09/jtpf0092015apastatistics2014.pdf (for 2014); https://ec.europa.eu/taxation_customs/system/files/2016-09/jtpf_007_2014_en.pdf (for 2013); https://ec.europa.eu/taxation_customs/system/files/2022-03/jtpf_013_2013_en_on%20webpage_0.pdf (for 2012).

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The following tables provide an overview of the number of APA applications, issued APAs, and effective APAs in each year from 2012 to 2022 for the European Union and Germany.[631]

[631] *See* Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.106 and *see* sources in footnote 488.

EU Total (Including APAs Involving Both EU and Non-EU Countries)					
	Number of APA Requests Received	Number of APAs Granted	Number of APAs in Force at Year End		
	Uni-, Bi-, and Multilateral	Uni-, Bi-, and Multilateral	Uni-, Bi-, and Multilateral	Bi- and Multilateral	Bi- and Multilateral
2012	680	438	390	125	32.1%
2013	859	503	545	148	27.2%
2014	1,123	749	912	168	18.4%
2015	1,412	1,178	1,444	192	13.3%
2016	1,384	1,587	2,262	212	9.4%
2017	1,096	1,133	1,421	217	15.3%
2018	1,105	713	1,241	271	21.8%
2019	1,487	1,136	1,634	286	17.5%
2020	1,753	1,716	2,151	230	10.7%
2021	1,182	1,212	1,497	254	14.8%
2022	1,281	1,362	1,951	298	15.3%

Germany				
	Number of APA Requests Received	Number of APAs Granted	Number of APAs in Force at Year End	
	Unilateral, Bilateral, and Multilateral	Unilateral, Bilateral, and Multilateral	Unilateral	Bilateral
2012	29	13	—	22
2013	27	10	—	21
2014	34	11	—	24
2015	61	9	—	25
2016	65	44	—	45
2017	36	28	—	39
2018	56	34	—	43
2019	89	25	—	42
2020	70	39	—	34
2021	73	59	—	51
2022	95	38	—	52

The average number of BAPAs (or MAPAs) increased from 2012 to 2022, the number more than doubled in 2020, the number decreased from 286 at the end of 2019 to 230 BAPAs at the end of 2020, but increased in 2021 to 254. At the end of 2022, the amount of 298 was the highest amount of BAPAs or MAPAs since counting.

The statistics reveal a large variation in APA activities across the Member States. Unilateral APAs still dominate mostly. In 2022, the majority of BAPAs or MAPAs were — again — effective in Denmark, France, and Germany (see table below); in 2022 Italy followed with 36 BAPAs or MAPAs.[632]

[632] *See* EU JTPF (2021), Statistics on APAs in the EU at the End of 2021, p. 1 et seq.

ISBN 978-1-61746-885-8

Number of Bilateral or Multilateral APAs Effective at Year End											
	2012	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
EU Total	**125**	**148**	**168**	**192**	**212**	**217**	**271**	**286**	**230**	**254**	**298**
Denmark	12	12	11	16	12	19	24	21	24	33	44
France	33	33	39	40	36	29	27	27	29	40	49
Germany	22	21	24	25	45	39	43	42	34	51	52

The APA procedures concluded in 2022 with the participation of Member States took an average of 38 months, i.e. 3 years. In 2022, the duration of finalized BAPA or MAPA procedures in Germany averaged 42 months, i.e. 3.5 years (in the case of BAPAs or MAPAs involving other EU Member States) and 54 months, i.e. 4.5 years (in the case of APAs involving non-EU Member States).[633] Compared to the evaluations for BAPAs and MAPAs concluded in 2019, 2020 and 2021 (2019: almost 4 years with non-EU states and 3.5 years with EU states; 2020: 4 years with non-EU states and almost 6 years with EU member states; 2021: 4 years with non-EU states and 3.5 years with EU member states), the duration of proceedings with non-EU states has decreased again. Other member states that conclude many BAPAs or MAPAs — such as Denmark, France, Italy, Sweden, Spain, and the Czech Republic — report even longer-than-average procedure durations compared to the EU average. Denmark, Spain and Sweden even stand out here with almost over 5 years or, in the case of Sweden, almost 10 years. In contrast, the duration of proceedings involving Finland, Luxembourg, Austria and the Netherlands is significantly shorter at around two years or less, which is more in line with the legal and planning certainty sought with a BAPA or MAPA. But these countries have lower inventories compared to Germany.

G. Evaluation of BAPAs and MAPAs

1. Advantages

BAPAs and MAPAs are successful instruments for managing tax risks because they mitigate transfer pricing risks and reduce the risk of double taxation. This leads to more security for taxpayers when conducting their legal and tax planning. Additionally, the possibility of implementing BAPAs and MAPAs retroactively may resolve transfer pricing disputes that arose in previous years without costly and time-consuming MAPs or arbitration proceedings. Nevertheless, BAPAs and MAPAs cannot fully eliminate compliance risks because they depend on conditions and critical assumptions that are usually not subject to the taxpayer's discretion. Thus, the ability of an BAPAs and MAPAs to reduce tax risk mainly depends on the rigidity of the underlying critical assumptions. German literature on this identifies the following advantages:[634]

- avoidance of costly and time-consuming tax audits;
- avoidance of costly and time-consuming appeal proceedings;
- avoidance of penalties and interest on arrears;
- constructive discussion in a cooperative environment of all participants; and
- full disclosure with respect to the planned transaction to all tax authorities involved, which can lead to a better understanding of the difficulties of the ex-ante computation of an adequate transfer price.

In addition to those benefits listed above, the EU-JTPF and the OECD have identified the following (among others) as benefits of a BAPA or MAPA:[635]

- taxpayers benefit from the certainty achieved with respect to the agreed transfer pricing methodology;
- an APA allows the taxpayer to participate more actively than a MAP does;
- an APA affords more flexibility than a transfer pricing examination or a MAP; and
- a BAPA OR MAPA averts the risk of double taxation by encouraging mutual agreement.

The increased scope of BAPAs and MAPAs complying with the implementation of §89a FCG in Germany extends legal and planning certainty and the other aforementioned advantages associated with BAPAs and MAPAs also apply to non-allocation cases. Increased tax certainty is then in particular derived from the consistent income tax treaty interpretation or application of the involved treaty partners.

2. Disadvantages

a. Taxpayer Disadvantages

A BAPA or MAPA has the potential to limit corporate decision-making to some extent but is binding only to the extent that the taxpayer agrees to the underlying facts and as long as the critical assumptions are fulfilled.[636] During the BAPA or MAPA period, the taxpayer must ensure corporate decisions do not violate the terms of the BAPA or MAPA conditions and

[633] EU JTPF (2021), Statistics on APAs in the EU at the End of 2021, p. 1 et seq.

[634] *See* Grotherr, *Betriebs-Berater* 2005, 855, 863; Menck, *Finanz-Rundschau* 2007, 304 et seq.; Schmid, in: Grotherr, *Handbuch der internationalen Steuerplanung,* no. 755; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 565.; Jacobs, Internationale Unternehmensbesteuerung, 8th ed. 2016, pp. 883 et seq.; Rasch, in: Kroppen/Rasch, *Handbuch Internationale Verrechnungspreise,* OECD-Kap. IV, no. 449; Kurzewitz, *Wahl der geeigneten Verrechnungspreismethode zur Verringerung von Doppelbesteuerungsproblemen,* 392 et seq.

[635] COM (2007) 246 final dated February 26, 2007, §3.2, no. 24–31; OECD Guidelines 2022, nos. 4.153–4.157.

[636] *See* Kurzewitz, *Wahl der geeigneten Verrechnungspreismethode zur Verringerung von Doppelbesteuerungsproblemen,* p. 393.

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endanger the agreement's binding effect. This is especially important in Germany because the tax authorities are allowed to use all information that was disclosed by the taxpayer during the BAPA or MAPA process to pursue future tax audits.

Another disadvantage for a taxpayer seeking a BAPA or MAPA may lie in the process itself. According to the OECD, lengthy BAPA or MAPA proceedings (see IV.F., above) prevent BAPAs and MAPAs from providing legal certainty for contemporaneous business transactions. The burdens associated with a lengthy BAPA or MAPA process may ultimately outweigh the benefit of the BAPA's or MAPA's short duration. Additionally, small firms in particular may be discouraged from pursuing BAPAs or MAPAs because of what they perceive to be costly and time-consuming reporting requirements.[637]

b. Tax Authority Disadvantages

The EU-JTPF and the OECD also note that BAPAs and MAPAs may be disadvantageous for tax authorities because the requests place a strain on transfer pricing resources that were previously earmarked for other purposes (e.g., examination, advising, litigation). Monitoring compliance with BAPAs or MAPAs may also be a disadvantage because BAPAs and MAPAs tend to require highly experienced and often specialized staff.[638]

[637] *See* Grotherr, *Betriebs-Berater* 2005, p. 855 (863); Menck, *Finanz-Rundschau* 2007, p. 307 et seq.; Schmid in Grotherr, *Handbuch der internationalen Steuerplanung*, p 755; Liebchen, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 567; Jacobs, Internationale Unternehmensbesteuerung, 8th ed. 2016, pp. 883 et seq.; Rasch in Kroppen/Rasch, *Handbuch Internationale Verrechnungspreise*, OECD-Kap. IV, nos. 454 et seq.; Kurzewitz, *Wahl der geeigneten Verrechnungspreismethode zur Verringerung von Doppelbesteuerungsproblemen*, 392 et seq.; Puscher in Festgabe Wassermeyer, p. 22; OECD Guidelines 2022, nos. 4.164–4.169.

[638] *See* COM (2007) 246 final dated February 26, 2007, Section 3.2, no. 33 et seq.; OECD Guidelines 2022, nos. 4.158–4.163.

ISBN 978-1-61746-885-8

V. Consultation Agreements

A. Content of Consultation Agreements

Art. 25(3) sentence 1 OECD Model Tax Treaty invites and authorizes the competent authorities of the two contracting states to consult with one another to resolve conflicts regarding the interpretation or application of the tax treaty by means of mutual agreement. These are essentially difficulties of a general nature which may concern a category of taxpayers, such as difficulties that arose in connection with an individual case that was subject to a MAP.[639] In some cases a specific taxpayer's MAP may be accompanied by a consultation procedure dealing with the issue from a more general perspective, distinct from the specific taxpayer case at hand. Other difficulties could arise from issues pointed out by associations or disputes arising from a controversial tax treatment of the competent authority in the contracting state.[640]

The consultation provision is a forward-looking and preemptive procedure that aims to resolve issues or disputes regarding the interpretation or application of an income tax treaty to ensure a consistent interpretation and application of the treaty.

For example, the Germany-United States income tax treaty lists a number of instances in which consultation agreements may be warranted with a view to helping the competent authorities of the two contracting states to give advance consideration to (and possibly to come to an agreement on) issues that may affect taxpayers on a recurring basis. Under the treaty, the competent authorities may agree:[641]

- to the same attribution of income, deductions, credits, or allowances of a taxpayer of a contracting state to its PE situated in the other contracting state;
- to the same allocation of income, deductions, credits, or allowances between related parties;
- to the settlement of conflicts in the application of the treaty, including conflicts regarding:
  - — the characterization of particular items of income or persons;
  - — the application of source rules with respect to particular items of income; and
  - — the qualification of income as debt or equity.
- to the common meaning of a term;
- to the application of the procedural provisions of domestic law including those regarding penalties, fines, and interest, in a manner consistent with the purposes of the treaty; and
- to increase the amounts referred to in Art. 17 (Artistes and Athletes) and Art. 20 (Visiting Professors and Teachers, Students and Trainees) to reflect economic or monetary developments.

Competent authorities may also consult with each other regarding the elimination of double taxation in scenarios that are not specifically listed in the treaty according to Art. 25(3) sentence 2 of the OECD Model Tax Treaty. With the upcoming application of the MLI as of January 1, 2025, for German tax treaties Art. 16(3) sentence 2 of the MLI amends the old German treaty with Greece correspondingly (and at a later stage also the treaty with Italy).[642]

B. Legal Effect of Consultations and Existing Agreements

While the BZSt acts as the competent authority for mutual agreement procedures and BAPAs, the Ministry of Finance acts as the competent authority for consultation agreements.[643] The Ministry of Finance usually works and consults with each of the supreme tax authorities of Germany's federal states.[644] Neither the OECD nor the Ministry of Finance has released any recommendation as to the process or timeline of consultation agreements.[645]

Under Art. 59(2) sentence 2 of the German Federal Constitution (*Grundgesetz* — GG), a consultation agreement (as referred to in Art. 25(3) of the OECD Model Tax Treaty) is treated as an ordinary administrative agreement between the tax authorities of the two countries concerned. Because such an agreement is not approved by Parliament, it changes neither the applicable income tax treaty nor the domestic German tax law and is therefore not binding on German courts.[646] In 2010, policymakers attempted to give these agreements greater effect by authorizing the Ministry of Finance to issue decrees[647] that could make the agreements binding under German domestic tax law if approved by the Federal Council of Germany.[648]

The Ministry of Finance subsequently issued several decrees making consultation agreements with a number of countries (including the United States, Austria, Belgium, France, and Luxembourg) binding under Germany's domestic tax law.[649] However, on June 10, 2015, the German Federal Fiscal Court ruled that consultation agreements implemented by decrees are not legally binding because the decrees do not satisfy

[639] *See* Art. 25 of the OECD Model Tax Treaty, no. 50.

[640] *See* Flüchter, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 214.

[641] *See* Germany-U.S. Income Tax Treaty, Art. 25(3) sentence 2.

[642] *See* §6 no. 3 MLI-AnwG.

[643] Ministry of Finance, Circular of June 20, 2011 — IV B 5 - O 1000/09/10507-04, 2011/0048553, Federal Tax Gazette (BStBl.) I 2011, p. 674 (Ministry of Finance, Circular of June 20, 2011); Flüchter, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 229.

[644] Stiewe, *Die verfahrensrechtliche Umsetzung internationaler Verständigungsvereinbarungen*, 2010, p. 161–171.

[645] Flüchter, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 226.

[646] Federal Fiscal Court, February 1, 1989, I R 74/86, Federal Tax Gazette (BStBl.) II 1990, p. 4; Federal Fiscal Court, July 10, 1996, I R 4/96, Federal Tax Gazette (BStBl.) II 1997, p. 15; Federal Fiscal Court, September 2, 2009, I R 111/08, Federal Tax Gazette (BStBl.) II 2010, p. 387.

[647] For a detailed discussion, *see* Drüen, in: Tipke/Kruse, AO/GTCCP, §2 AO, no. 43a et seq.

[648] *See* §2(2) FCG; Legislative Draft of June 21, 2010, Official Record (Bundestag Drucksache) no. 17/2249, p. 86; Flüchter, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 243.

[649] German-U.S. Consultation Agreement Decree of December 12, 2010, Federal Law Gazette (BStBl.) I 2010, p. 2136; Flüchter, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 25 OECD Model Tax Treaty, no. 244 (Austria, Belgium, France, the Netherlands and Switzerland (December 20, 2010); Luxembourg and the United Kingdom (July 8, 2012)).

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the constitutional requirements set forth under §2(2) of the FCG.[650]

Prior to the court's ruling, an additional consultation agreement was signed (but not implemented into German domestic tax law) by Germany and the United States regarding the eligibility of certain pension arrangements for benefits under Art. 10(3) (b) of the Germany-United States income tax treaty.[651]

The latest consultation agreement was signed by Germany and Switzerland regarding the interpretation of Art. 15(4) of the Germany-Switzerland income tax treaty.[652]

[650] *See* Federal Fiscal Court, June 10, 2015, I R 79/13, Federal Tax Gazette (BStBl.) II 2016, p. 326.

[651] Signed March 19, 2012; IRS Announcement 2012-19 I.R.B. 898; Ministry of Finance, Circular of April 4, 2012, IV B 5-S 1301-USA/09/10001.

[652] *See* Circular of April 25, 2023, IV B 2-S 1301-CHE/21/10018:001, 2023/0363435, Federal Tax Gazette (BStBl.) I 2023, p. 632.

ISBN 978-1-61746-885-8

VI. Exchange of Information

Globalization and the increased cross-border activities of MNEs and individuals have led to more demand for cross-border cooperation among tax authorities. The basis for this cooperation is the global exchange of international tax information agreements.

A. Legal Basis

1. Income Tax Treaties

Art. 26 of the OECD Model Tax Treaty regulates the exchange of information between the competent authorities of contracting states. The contracting states must exchange all information necessary for carrying out the provisions of the relevant income tax treaty. The information exchanged should be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment, enforcement, or collection of taxes. All shared information will be subject to the tax confidentiality provisions of the contracting state receiving it.[653]

In conformity with international practice, Germany negotiates the exchange of information under its income tax treaties based on Art. 26 of the OECD Model Tax Treaty.[654]

In three different instances, information may be exchanged between the competent authorities of the contracting states of an income tax treaty:[655]

- Information exchange on request: One competent authority discloses important tax information to the other competent authority at the latter's request for factual information relating to a specific case. This on-request information exchange is considered traditional administrative cooperation under §111 et seq. of the FCG.
- Spontaneous information exchange: One competent authority discloses important tax information that it has acquired through certain investigations to the other competent authority. The other competent authority has not raised any specific questions but may benefit from the information it receives.
- Automatic information exchange: The automatic exchange of information is a regular, systematic supply of information that is non taxpayer-specific. In principle, the competent authorities exchange information that is relevant to a particular category of payments or income, or information that is specific to certain industries.

In the following circumstances, a competent authority is not required to disclose information under Art. 26 of the OECD Model Tax Treaty if:[656]

- the disclosure would violate the law or administrative practice of either contracting state;
- the information requested cannot be lawfully obtained or acquired in the normal course of the administration of either contracting state;
- the disclosure would reveal protected trade, business, industrial, commercial, or professional secrets or trade processes; or
- the disclosure of the information requested is contrary to public policy.[657]

Section 117 of the FCG is the applicable German rule governing requests for information on tax matters. This rule authorizes the German tax authorities to exchange information with foreign tax authorities under income tax treaties and international exchange of information agreements ("TIEAs"). Under this provision, the German tax authorities may both request information from foreign tax authorities to shed light on the cross-border transactions of domestic taxpayers and provide information to foreign authorities. That being said, the competent authorities must respect the principle of proportionality and abide by laws protecting the confidentiality of every taxpayer during the information exchange.[658]

2. Tax Information Exchange Agreements (TIEAs)

In general, tax information may be exchanged pursuant to TIEAs, which are standalone agreements containing information-sharing provisions equating to those in income tax treaties. Together with Art. 26 of the OECD Model Tax Treaty, TIEAs represent internationally accepted and broadly applied standards for an effective and transparent information exchange.[659]

The OECD published a Model Agreement on Exchange of Information on Tax Matters ("Model TIEA") and an accompanying Commentary ("TIEA Model Commentary") in 2002.[660] The purpose of the Model TIEA is to enhance international cooperation in tax matters through the exchange of information, even in the absence of a full income tax treaty. The Model TIEA provides guidelines for the conclusion of bilateral and multilateral agreements. It provides a mechanism for the exchange of information relating to a specific civil or criminal tax matter under investigation. While the Model TIEA is not legally binding, it has been the basis for over 1,000 bilateral agreements on exchange of information over the last 15 years.[661]

Alongside other OECD countries, Germany applies the Model TIEA for agreements with countries with which it has not entered an income tax treaty (e.g., tax havens).[662] As of Jan-

[653] In Germany, all information will be subject to the tax secrecy under §30 FCG. For a detailed discussion, please refer to Czakert, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 26 OECD Model Tax Treaty, no. 64 et seq.

[654] Czakert, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 26 OECD Model Tax Treaty, no. 1; Kraft/Ditz/Heider, Der Betrieb 2017, p. 2243 (2245).

[655] Art. 26 of the OECD Model Tax Treaty, no. 9; Czakert, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 26 OECD Model Tax Treaty, no. 43 et seq. *See also* Worksheet 41 ("Overview of the Spontaneous information Exchange").

[656] Art. 26(3) of the OECD Model Tax Treaty.

[657] Referring to the "*ordre public*."

[658] Ministry of Finance, Circular of May 29, 2019, IV B 6-S 1320/07/10004:008, Federal Tax Gazette (BStBl.) I 2019, 480 (Ministry of Finance Circular of May 29, 2019), no. 1.1; Czakert, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 26 of the OECD Model Tax Treaty, no. 30.

[659] OECD Publishing, Exchange of Information on request, Handbook for Peer reviews 2016-2010, Third Edition, available at http://www.oecd.org/tax/transparency/global-forum-handbook-2016.pdf.

[660] *See* OECD, Agreement on Exchange of Information on Tax Matters, 2002, available at https://www.oecd.org/ctp/harmful/2082215.pdf. *see also* Worksheet 40 ("List of German TIEAs as of January 1, 2023").

[661] *Id.,* 38.

[662] Czakert, *Institut Finanzen und Steuern* 2017, 38.

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uary 1, 2024, Germany had signed TIEAs with 27 countries.[663] In addition, Germany is currently negotiating agreements on exchange of information with Aruba, Barbados, Brazil, Brunei, Dominica, Panama, and the United States, as well as a supplementary protocol to the existing agreement with the Bahamas.[664] All other German TIEAs (i.e., those with countries with which Germany has signed an income tax treaty) are also based on the TIEA Model, but may vary as to the areas they cover.[665] For example, the agreements with Bermuda, Guernsey, the Isle of Man, and Jersey cover information exchanges relating to personal income tax, corporate tax, trade income tax, property tax, and inheritance tax. Similarly, the agreement with Liechtenstein covers insurance tax, and those with Gibraltar, Anguilla, St. Vincent and the Grenadines, and the Bahamas cover VAT.

Art. 5 of the TIEA Model requires that, upon request, a contracting state must provide information: (1) held by banks, other financial institutions, and other people including trustees and nominees; and (2) regarding the ownership of companies, partnerships, trusts, foundations, and other people, including information on people in the chain of ownership.[666] Currently, the exchange of information under German TIEAs is limited to the exchange of information on request. In 2015, the OECD published a model protocol that allows the automatic and spontaneous exchange of information under TIEAs. The German tax authorities will attempt to include these modifications in future TIEAs to provide a legal basis for an automatic exchange of information on financial account data with tax havens that is comparable to the Common Reporting Standard.[667] Additionally, like Art. 26(3) of the OECD Model Tax Treaty, the TIEA Model does not require a competent authority to disclose any information that reveals trade, business, industrial, commercial, or professional secrets, or trade processes.[668]

The TIEA Model also allows representatives of the competent authority of either contracting state to enter the territory of the other to interview individuals and examine records with the written consent of the persons concerned.[669] Additionally, under the TIEA Model, representatives of the requesting country can attend tax audits of the other country upon request ("Joint Audit-Clause").[670]

3. *EU Directive on Administrative Cooperation*

The exchange of information between EU Member States was initially based on the EU Directive on Administrative Cooperation in the Field of Taxation, issued on February 15, 2011 ("2011 Directive").

The 2011 Directive indicates that an EU Member State must provide information to another Member State upon "a reasoned request for a specific administrative enquiry."[671] The request must be of "likely material importance" and be likely to enable each contracting state to obtain valuable and pertinent information; its purpose should not be to engage in a "fishing expedition."[672] The 2011 Directive requires the competent authority of a Member State to turn over relevant information to the competent authority without being requested to do so when the first competent authority has detected possible tax evasion in the other Member State. Similarly, if a taxpayer receives a tax deduction in one Member State that requires a corresponding adjustment in another Member State, relevant information can be exchanged between the competent authorities of the two States regardless of whether either has requested the information.[673]

Art. 8 of the Directive regulates the automatic exchange of information for taxable periods beginning on January 1, 2014, with respect to the following types of income:[674]

- Income from employment;
- Director's fees;
- Life insurance products not covered by other EU legal instruments on the exchange of information and other similar measures;
- Pensions; and
- Ownership of and income from immovable property.

In Germany, the EU Directive on Administrative Cooperation was originally implemented by the German EU Administration Cooperation Act (*EU-Amtshilfegesetz* — EUAHiG) of June 26, 2013, and came into force on January 1, 2013.[675]

According to §7(2) of the EUAHiG, information on financial accounts is also systematically transmitted to other EU Member States in accordance with §2 of the Act on the Automatic Exchange of Information on Financial Accounts in Tax Matters (*Gesetz zum automatischen Austausch von Informationen über Finanzkonten in Steuersachen).*

4. *Exchange of Information in the Absence of Agreements*

While requesting an exchange of information is also valid if it is not based on international or European law, in such circumstances it will be limited to exceptional cases.[676] In the absence of laws or agreements, the tax authorities have the discre-

[663] Ministry of Finance, Circular of January 15, 2024, IV B 2 - S 1301/21/10048:003, Federal Tax Gazette (BStBl.) I 2024, 193 (Ministry of Finance Circular of January 18, 2023), *See also* Worksheet 40 ("List of German TIEAs as of January 1, 2024").

[664] *Id.*

[665] The Germany-Switzerland TIEA provides for a broader exchange of information protocol than what is required under Art. 26 OECD Model Tax Treaty.

[666] *See* Art. 5(4) of Model TIEA.

[667] Czakert, *Institut Finanzen und Steuern* 2017, 43 and VI.B.2.b., for further details.

[668] Art. 7(2) Model TIEA.

[669] Art. 6(1) Model TIEA.

[670] Art. 6(2) Model TIEA; Kraft/Ditz/Heider, Der Betrieb 2017, p. 2243 (2246).

[671] §6(2) EU Directive 2011/16/EU of the Council of February 15, 2011, L 64/1.

[672] Czakert, ifst 2017, p. 49.

[673] For a detailed discussion, *see* §9(1) EU Directive of February 15, 2011; Czakert, *Institut Finanzen und Steuern* 2017, p. 50.

[674] §8(1) EU Directive of February 15, 2011.

[675] Federal Law Gazette (BGBl.) I 2013, p. 1809.

[676] Ministry of Finance, Circular of May 29, 2019, no. 1.3.10; Czakert, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 26 OECD Model Tax Treaty, Marginal no. 30. German requests for information are subject to the domestic law of the other state. For foreign requests to Germany, the BZSt provides information under the requirements of Sec. 117(3) FCG only.

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tion to provide information to another country on a unilateral basis if:[677]

- the tax authority of the other country grants reciprocity;
- the information is needed for (criminal) tax proceedings and the other country ensures that the information is only disclosed to people, authorities, or courts that are concerned with the case;
- the other country guarantees that it will ensure the avoidance of double taxation; and
- no commercial, industrial, or professional secrets of the taxpayer will be disclosed.

B. Scope of Information Exchange

1. Exchange of APAs and Rulings Within the European Union

As a result of a number of proceedings on prohibited state aid initiated against Member States that issued APAs or advance cross-border rulings in favor of MNEs, the Council of the European Union amended the 2011 Directive on December 8, 2015, in an attempt to adhere to the principles of BEPS Action Point 5 (regarding harmful tax practices).[678] The amended Directive requires the competent authority of each Member State to disclose basic information on the issuance, renewal, or modification of each type of APA (unilateral, bilateral, or multilateral) and advance cross-border ruling. It also requires the exchange of information between the competent authorities of all Member States and the EU Commission. The amended Directive entered into force on January 1, 2017. Hitherto, the exchange of information regarding APAs and advance cross-border rulings was at the discretion of each Member State.

The amended Directive was implemented into German law on December 8, 2016, and is formally regulated by the EUAHiG.[679] Most recently, the EUAHiG was amended by Art. 4 of the "Act on the Introduction of an Obligation to Notify Cross-Border Tax Arrangements" in 2019.[680] Under German law, the following information is subject to automatic exchange:[681]

- advance rulings on the legal assessment of specific transactions that have not yet been realized (§89(2) of the FCG), including rulings on transfer pricing issues;
- binding commitments following tax audits (§204 FCG); and
- advance rulings concerning continuing future transfer pricing transactions (i.e., APAs).

The reporting requirement encompasses all rulings and APAs that were issued, modified, or renewed between January 1, 2012, and January 1, 2013, if they were binding as of January 1, 2014. Germany excludes any advance ruling or APA issued before April 1, 2016 if the revenue of the corporate group of the taxpayer concerned did not exceed 40 million EUR.[682] Bilateral or multilateral APAs with third countries are excluded from the scope of the automatic exchange of information pursuant to §7(5) of the EUAHiG if the international tax treaty under which the APA was negotiated does not permit disclosure to third parties. Otherwise, §8 of the EUAHiG permits the disclosure under the condition that the competent authority of the third country gives its approval.

Automatic exchange of information does not apply with respect to an advance cross-border ruling that exclusively concerns the tax affairs of one or more natural people.[683] However, a corresponding limitation of disclosure only to APAs granted to legal entities is not provided for in §7(6) of the EUAHiG. In this respect, in particular after the broadening of the scope of the application of BAPAs and MAPAs according to §89a FCG, it is very likely that the disclosure is also applicable to natural people or non-transfer pricing cases.

In general, to facilitate the automatic exchange of information, the competent authorities must provide basic information on each advance ruling and the unilateral, bilateral or multilateral APA issued, modified, or renewed to the EU Commission within three months of the calendar year-end in which those issuances, modifications, or renewals took place.[684] The automatic exchange of information must include the following:[685]

- information on the taxpayer;
- a summary of the advance ruling or APA, including an abstract description of the relevant business activity and the transactions without compromising commercial, industrial, or professional secrets;
- the date of issue, modification or renewal of the advance ruling or APA, and its duration;
- the type of advance ruling or APA;
- the number of transaction(s) covered;
- in the case of an APA, the underlying critical assumptions and the applied transfer pricing method;
- information on all other people affected by the advance ruling or an APA in other EU Member States; and
- an explanation of whether the disclosed information is based on an APA itself or if it represents the result of a request that led to a bilateral or multilateral meeting with third-party countries.

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[677] *See* §117(3) FCG. For a detailed discussion *see* Czakert, in: Schönfeld/Ditz, 2nd ed. 2019, Art. 26 OECD Model Tax Treaty, Marginal no. 78 et seq.; Kraft/Ditz/Heider, *Der Betrieb* 2017, p. 2243 (2244).

[678] *See* EU Directive of December 8, 2015, Introduction; Directive (EU) 2015/2376/EU of the Council of December 8, 2015, L 332/1.

[679] *See* "*Gesetz zur Umsetzung der Änderung der EU-Amtshilferichtlinie und von weiteren Maßnahmen gegen Gewinnkürzungen- und verlagerungen (BEPS UmsG)*" of December 20, 2006, Federal Law Gazette (BGBl.) I 2016, p. 3000.

[680] *See* "*Gesetz zur Einführung einer Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*" of December 21, 2019, Federal Law Gazette (BGBl.) I 2019, p. 2875.

[681] *See* Ministry of Finance, Circular of May 29, 2019, nos. 6.3 et seq.; Czakert, *Internationales Steuerrecht* 2016, p. 985; Grotherr, *Internationales Steuerrecht* 2015, p. 195 f.; Mückl/München, *Betriebs-Berater* 2015, p. 2778.

[682] *See* §7(4) of the sentence 3 EUAHiG.

[683] *See* §7(4) of the EUAHiG. For a more detailed discussion on the treatment of cross-border partnerships, *see* Seer, *Internationale Wirtschaftsbriefe* 2015, 875.

[684] *See* §5(2) of the EUAHiG.

[685] *See* §7(7) of the EUAHiG; Circular of December 20, 2016, Appendix 1.

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A Member State may also request further information including the full text of the ruling or the APA concerned.[686]

A Member State could reject an information request from another Member State if the exchange would: *(i)* lead to the disclosure of a commercial, industrial, or professional secret; *(ii)* lead to the disclosure of a commercial process; or *(iii)* be contrary to public policy.[687] For this reason, the competent authority can only provide a high-level description of the covered transaction in the first step.[688] Moreover, all information provided to another Member State under an exchange of information agreement is subject to any applicable confidentiality provisions regarding tax laws in the Member State that receives the information.[689]

The primary purpose of the automatic exchange of information with a view to monitoring potential state aid cases has changed over the course of the amended 2011 Directive's implementation period. While the draft version of the Directive allowed the EU Commission unlimited access to the central directory of all advance rulings and APAs with a view to monitoring potential state aid cases, the final version of the Directive denies the EU Commission access to the content of advance rulings and APAs and their addressees.[690] The role of the EU Commission is therefore limited to monitoring the effectiveness of the exchange of information rather than monitoring state aid issues.[691] The EU Member States must evaluate the effectiveness of the automatic exchange of information and report the achieved practical results annually to the EU Commission.[692]

2. *Exchange of Financial Account Information*

a. *FATCA*

The goal of the U.S. Foreign Account Tax Compliance Act ("FATCA"), enacted on March 18, 2010, was to create greater oversight and tax accountability for U.S. citizens with foreign financial accounts. This unilateral action posed legal challenges for German and other country financial institutions because of the restrictive data protection rights to which their account holders are entitled.[693] France, the United Kingdom, Italy, Spain, and Germany therefore developed a bilateral model agreement for purposes of implementing FATCA on July 26, 2012.[694]

The Germany-United States Intergovernmental Agreement ("Germany-U.S. IGA") for the implementation of FATCA was signed on May 31, 2013, and follows this model agreement.[695] The purpose of the Germany-U.S. IGA is to facilitate the monitoring of information pertaining to U.S. account holders with German financial institutions and non-financial foreign entities. According to the terms of the Model 1 IGA, once the information is collected by the German financial institutions, it is turned over to the BZSt, and then transferred to the United States Internal Revenue Service ("IRS") via the respective competent authorities.

The Germany-U.S. IGA entered into force on December 11, 2013, and came into effect on June 30, 2014. On July 23, 2014, the FATCA Implementation Decree ("FATCA USA-UmsV") codified the coordination and collection of data to be turned over to the United States in German law. Additional procedural rules were subsequently published in a circular of the Ministry of Finance dated November 3, 2015.[696] This 2015 circular was replaced with a circular dated February 1, 2017, addressing issues with the implementation of the OECD's Common Reporting Standard ("CRS"), which regulates the exchange of information with other OECD countries and FATCA and partly amended in 2018 as well as in 2022 with legal effect as of January 1, 2023.[697]

While assistance from external service providers is permitted to enable FATCA reporting requirements to be met, German financial institutions are ultimately responsible for complying with the reporting requirements.[698] To that end, each German foreign financial institution(s) must implement procedures to identify its account holders who are U.S. persons in certain categories (i.e., based on value and threshold(s)).[699]

If the financial institution fails to disclose all relevant information of a "reportable account" within 90 days of the account opening, a fine of up to 50,000 EUR will be charged by the Ministry of Finance unless the financial institution proves that no transactions have been carried out for this business relationship.[700]

A German foreign financial institution must disclose the following information with respect to "reportable accounts":[701]

- the name, address, and U.S. Tax ID number of each person who is the owner of a "reportable account," or of each U.S. resident person who controls the non-U.S. owner of such an account;
- the financial account number;
- the name and identification number of the German financial institution;

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[686] §6(2) of the EUAHiG.

[687] §4(3) s. 3 of the EUAHiG. This is contrary to the draft version of the document; EU Directive of December 8, 2015, Introduction (9); for a detailed discussion, *see* Grotherr, *Internationales Steuerrecht* 2015, p. 299.

[688] Seer, *Internationale Wirtschaftsbriefe* 2015, p. 879.

[689] §19(1) of the EUAHiG and Art. 16(1) of the EU Directive of December 8, 2015.

[690] COM (2015) 135 final dated March 18, 2015, no. 21(5).

[691] Liebchen, in: Mössner/Lampert et al., 6th ed. 2023, no. 13.117.

[692] §23(3) EU Directive of December 8, 2015; §20 EUAHiG.

[693] Czakert, *Institut Finanzen und Steuern* 2017, p. 54.

[694] *Id.,* 54.

[695] Agreement between the United States of America and the Federal Republic of Germany to Improve International Tax Compliance and with respect to the United States Information and Reporting Provisions Commonly Known as the Foreign Account Compliance Act, Model 1 (hereafter, "Germany-U.S. IGA"), June 30, 2014.

[696] Ministry of Finance, Circular of November 3, 2015, BMF IV B 6 - S 1316/11/10052:133, Federal Tax Gazette (BStBl.) I 2015, p. 897.

[697] Ministry of Finance, Circular of February 1, 2017, III C 3 - S 7329/17/10001, Federal Tax Gazette (BStBl.) I 2017, p. 305 (Ministry of Finance Circular of February 1, 2017); Ministry of Finance, Circular of September 21, 2018, IV B 6 - S 1315/13/10021:044, Federal Tax Gazette (BStBl.) I 2018, p. 305, (Ministry of Finance Circular of September 21, 2018) and Ministry of Finance, Circular of June 15, 2022, IV B 6-S 1315/19/10031:005, Federal Tax Gazette (BStBl.) I 2022 p. 963, (Ministry of Finance Circular of June 15, 2022).

[698] *See* §3 of the FATCA USA-UmsV.

[699] FATCA Agreement, Annex I, Section II.

[700] *See* §28 of the FKAustG; Ministry of Finance, Circular of September 21, 2018, IV B 6 - S 1315/13/10021:044, Federal Tax Gazette (BStBl.) I 2018, p. 305, (Ministry of Finance Circular of September 21, 2018).

[701] For a detailed description, please refer to §8 of the FATCA USA-UmsV.

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• the account balance(s); and

• the income from capital investment that was generated with respect to the financial account and credited to the account during the reporting period.

The foreign financial institution must turn the information over to the BZSt by July 31 of the calendar year following the notification period[702] and the BZSt will then transfer the information to the IRS by September 30.[703]

The automatic exchange of information under the FATCA Agreement began in September 2015. The exchange of information is implemented in three steps over a three-year period. Starting in the first year (2015), basic information about the account owner was exchanged; in the second year (2016), information on current earnings (especially interest and dividend income) was exchanged; and starting in the third year (2017), capital gains information was exchanged.[704]

In Art. 6(I) of the FATCA Agreement, the federal government of the United States acknowledged the need to achieve equivalent levels of reciprocal automatic exchange of information with Germany. However, the federal government of Germany confirmed, upon the request of a group of members of the German Parliament, that the exchange of information under FATCA so far has not been reciprocal. While Germany provides information on interest, dividends, capital gains, and account balances, the United States only transfers information on interest and dividends of German residents with accounts in the United States. In addition, Germany transfers information on the economic benefits of this income, while the United States does not transfer corresponding information to Germany.[705] The German government stated that it is engaging in negotiations with the federal government of the United States on how the exchange relationship can be enhanced in the future.[706]

b. Common Reporting Standard (CRS)

While FATCA is a mechanism by which the United States obtains information from its treaty partners with respect to U.S. account holders, the OECD has implemented the Common Reporting Standard ("CRS") with a view to enforcing global compliance. The CRS is an information standard for the automatic exchange of tax and other financial account information between countries.[707] It is inspired by FATCA, Model 1 IGA, and also tracks information pertaining to accounts. The CRS requires financial institutions to report extensive information on the identity of their account holders, account numbers, the reporting financial institution, and the activities on the accounts.[708]

The legal basis for the exchange of information is the Multilateral Competent Authority Agreement ("MCAA"). As of May 16, 2024, 123 countries have signed the agreement.[709] About 45% of those countries (including Germany) began exchanging information in September 2017; 40% began in September 2018, and 15% at a later point (including one country in September 2019, six countries in September 2020, two countries in September 2021, three countries in September 2022, four countries in September 2023, Georgia and Ukraine in September 2024, Armenia, Rwanda and Senegal in September 2025, and then Cameroon in September 2026).[710] The MCAA was signed by Germany on October 29, 2014.[711] About 50% of the countries (including Germany) began exchanging information in September 2017; 40% began in September 2018.[712] The EU Directive on the automatic exchange of information was adjusted accordingly to ensure uniform implementation within the European Union. Germany incorporated the provisions of the EU Directive and the MCAA into its domestic law on December 21, 2015, via the Financial Account Exchange of information Act (*Finanzkonten-Informationsaustauschgesetz* — FKAustG)).[713] The Ministry of Finance issued additional guidance on this law in two circulars dated April 6, 2017, and June 22, 2017 which were updated by the circular dated February 23, 2023.[714]

On June 26, 2019, the Ministry of Finance published a final list of 94 countries which participated in the automatic exchange of financial account information on September 30, 2019.[715] On February 23, 2023, the Ministry of Finance published a preliminary list of 119 countries which participate in the automatic exchange of financial account information as of September 30, 2023. This list, finalized by a circular dated June 13, 2024, contains 111 countries that participate in the automatic exchange of financial account information as of September 30, 2024, and is included in Worksheet 42.[716]

The OECD's information standards seem to be more demanding than the reporting standards laid down in FATCA, resulting in an additional administrative burden on German financial institutions.

3. Country-by-Country Reporting

Action 13 of the OECD BEPS project introduces the country-by-country reporting requirement ("CbC Report or Reporting"). Under CbC Reporting, large multinational companies must report enumerated financial information, such as the geo-

[702] *See* §8(3) of the FATCA USA-UmsV.

[703] *See* §9(1) of the FATCA USA-UmsV.

[704] Schmidt/Ruckes, Internationales Steuerrecht 2014, p. 652, footnote 75.

[705] Federal Government of Germany, March 28, 2018, Official Record (Bundestag Drucksache) no. 19/1438, p. 13.

[706] Federal Government of Germany, March 28, 2018, Official Record (Bundestag Drucksache) no. 19/1438, p. 12.

[707] Czakert, ifst 2017, p. 56.

[708] For a more detailed description of the information exchanged under CRS, *see* OECD, Standard for Automatic Exchange of Financial Account Information in Tax Matters, 2nd edition, 2017, no. 24; Czakert, ifst 2017, p. 72.

[709] *See* http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf.

[710] *See* http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf.

[711] For a current list of signatories, *see* http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf.

[712] *See* http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf.

[713] Federal Tax Gazette (BStBl.) II 2015, p. 1630.

[714] Ministry of Finance, Circular of April 6, 2017, IV B 6-S 1315/13/10021:046, Federal Tax Gazette (BStBl.) I 2017, p. 708; Ministry of Finance, Circular of July 22, 2017, IV B 6-S 1315/13/10021:046 2017/0489358; Ministry of Finance, February 23, 2023, IV B 6-S 1315/19/10030:051, Federal Tax Gazette (BStBl.) I 2023, p. 339.

[715] Ministry of Finance, Circular of June 26, 2019, IV B 6-S 1315/13/10021:052, Federal Tax Gazette (BStBl.) I 2019, p. 648.

[716] Ministry of Finance, Circular of February 23, 2023, IV B 6-S 1315/19/10030:051, Federal Tax Gazette (BStBl.) I 2023, p. 339; Federal Ministry of Finance, Circular of June 13, 2024, IV D 3 — S 1315/19/10030 :067, Federal Tax Gazette (BStBl.) 2024, 1037.

ISBN 978-1-61746-885-8

graphic location of their sales and profits, to the competent authorities. CbC Reporting is intended to help tax authorities assess transfer pricing risks and other tax risks potentially leading to base erosion and profit shifting and to reduce information asymmetries between tax authorities.

German policymakers have implemented the CbC Reporting requirement developed by the OECD into §138a of the FCG.[717] CbC Reporting applies to German-headquartered multinational groups with at least one foreign firm or foreign PE that have annual consolidated group revenues of 750 million EUR or more.[718] The CbC Report consists of three parts. The first part includes aggregate information relating to: the amount of revenue; the profit or loss before income tax; income tax paid and accrued; the number of employees; the stated capital; and accumulated earnings and tangible assets other than cash or cash equivalents in each jurisdiction in which the group operates. The second part requires the multinational company to list all enterprises and PEs controlled by the German entity, including their main business activity or activities, divided up by tax jurisdiction. The third part includes additional information that the German multinational group deems relevant to the understanding of the information provided in the first two parts of the report. While parts one and two of the CbC Report may be submitted in either German or English, the third section must be submitted in English.

CbC Reports must be filed for financial years beginning after December 31, 2015, and within 12 months from the end of the fiscal year to which they relate. Non-compliance with the CbC Reporting obligation may subject the taxpayer to a penalty of up to 5,000 EUR.[719] Until June 30, 2019, reports could be sent electronically to the BZSt in XML format via "De-Mail" (a German government communications service). After that, the data can only be transmitted via a mass data interface called ELMA.[720]

CbC Reports are filed with the relevant competent authority of the country of residence (the BZSt in the case of Germany). That competent authority shares the reports with other countries in which the taxpayer has at least one subsidiary or PE.[721] The taxpayer does not have a right to be heard in the case of an automatic information exchange.[722] Nevertheless, the taxpayer should inform the competent authority if the CbC Report (or data from the report) is used in another country in violation of any restrictions.[723]

The CbC Multilateral Competent Authority Agreement ("CbC MCAA"), signed on January 27, 2016, is the legal basis for the automatic exchange of CbC Reports. On October 19, 2016, the CbC MCAA was implemented into German law.[724] The Ministry of Finance issued a circular dated July 11, 2017, in which it specified the reporting requirements under CbC.[725] A full list of bilateral exchange relationships is provided on the OECD website.[726]

The United States has not signed the CbC MCAA. The United States exchanges CbC Reports only with countries where the income tax treaty or TIEA was complemented by a Competent Authority Arrangement (CAA). The competent authorities of Germany and the United States concluded a CAA to allow an automatic exchange of CbC Reports on August 14, 2020.[727] As of March 24, 2023, both countries published a more substantiating additional arrangement between the competent authorities of the United States and Germany on the exchange of country-by-country reports.[728] The CAA entered into force as of April 4, 2023.[729]

Comment: Before the CAA became effective, both countries annually publish a joint statement with guidance on the spontaneous exchange of CbC Reports for the interim period.[730] Consequently, on August 16, 2018, the competent authorities of the United States and Germany issued the first joint statement on the implementation of the spontaneous exchange of CbC Reports based on Art. 26 of the Germany-United States income tax treaty for fiscal years beginning on or after January 1, 2016, before the conclusion of the CAA negotiations.[731] On December 13, 2018, the two competent authorities signed a joint statement for fiscal years beginning on or after January 1, 2017.[732] The latest joint statement concerned the fiscal years beginning in 2021 and was signed on December 30, 2022.[733] The competent authorities agreed that the exchange of CbC Reports should not be postponed due to their importance for assessing high-level transfer pricing risks and other base erosion and profit shifting risks, as well as their importance for economic and statistical analysis. The joint statements were used for the annual spontaneous exchange of CbC Reports for the respective financial

[717] An English description of the provision and the process is available at the BZSt's website: https://www.bzst.de/EN/Businesses/Country_by_Country_Report/Country_by_Country_Reporting/cbcr.html; a respective handbook is only available on German though at https://www.bzst.de/SharedDocs/Downloads/EN/CbCR/KHB_CbCR.pdf?__blob=publicationFile&v=4; for related downloads *see also* https://www.bzst.de/EN/Businesses/Country_by_Country_Report/Communication_manual/communication_manual_node.html.

[718] §138a(1) of the FCG.

[719] §162(4) of the FCG.

[720] A detailed explanation of the registration process for ELMA is available on the BZSt's website at https://www.bzst.de/EN/Businesses/Country_by_Country_Report/electronic_data_transmission/electronic_data_transmission_node.html#js-toc-entry1; a respective handbook is only available on German though at https://www.bzst.de/SharedDocs/Downloads/EN/CbCR/KHB_ELMA.pdf?__blob=publicationFile&v=3; for related downloads *see also* https://www.bzst.de/EN/Businesses/Country_by_Country_Report/Communication_manual/communication_manual_node.html.

[721] §138a(7) of the FCG.

[722] §117c(4)(2) FCG. Schreiber/Greil, *Der Betrieb* 2017, p. 10 (16).

[723] One typical case is during a tax audit in which a foreign-affiliated company is presented with data and conclusions from the CbCR.

[724] Federal Law Gazette (BGBl.) II 2016, 1178.

[725] Ministry of Finance, Circular of July 11, 2017, IV B 5-S 1300/16/10010:002, Federal Tax Gazette (BStBl.) I 2017, p. 974.

[726] *See* http://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm.

[727] *See* https://www.state.gov/wp-content/uploads/2023/11/23-404-Germany-Tax-CbC-Reports-8.20.2020-TIMS-62877.pdf.

[728] *See* https://www.irs.gov/pub/irs-utl/germany-competent-authority-arrangement.pdf; Ministry of Finance, Circular of March 16, 2023, IV B 6-S 1315/19/10050:007, Federal Tax Gazette (BStBl.) I 2023, p. 396.

[729] *See* https://www.state.gov/wp-content/uploads/2023/11/23-404-Germany-Tax-CbC-Reports-8.20.2020-TIMS-62877.pdf.

[730] *See* https://www.irs.gov/businesses/country-by-country-reporting-jurisdiction-status-table.

[731] *See* https://www.irs.gov/pub/irs-utl/germany_competent_authority_arrangement_cbc.pdf for FY years as from January 1, 2016. For a critical discussion on the exchange of CbC Reports based on Art. 26 Germany-United States income tax treaty, see, e.g., Ditz/Heider, *Internationale Steuer-Rundschau* 2018, p. 399.

[732] *See* https://www.irs.gov/pub/irs-utl/CbC%20-%20Germany%20-%20Joint%20Declaration%2012.11.2018%202017.pdf (beginning 2017).

[733] Ministry of Finance, Circular of March 16, 2023, IV B 6-S 1315/19/10050: 007, Federal Tax Gazette (BStBl.) I 2023, p. 396.

ISBN 978-1-61746-885-8

years of multinationals concerned (initially the statement concerned the fiscal years beginning on or after January 1, 2016, and before January 1, 2017; the statement of 2021 concerns the fiscal year beginning on or after January 1, 2021, and before January 1, 2022, correspondingly; the latest statement of 2023 for fiscal year beginnings on or after January 1, 2021).

With the entry into force of the CAA of August 14, 2020, the spontaneous exchange was replaced on the date the automatic exchange of information by the CAA became effective (April 4, 2023) for any relevant fiscal years.

The exchange of CbC Reports with EU Member States is based on Art. 8aa(2) of the Council Directive 2014/107/EU amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (*see* VI.A.3., above), which was implemented into German law under §7(10) sentence 1 of the EUAHiG.[734]

4. Reportable Cross-Border Arrangements

On May 25, 2018, the ECOFIN Council, composed of the EU-28 Finance Ministers, formally accepted the Council Directive EU 2018/822 amending Directive 2011/16/EU (see VI.A.3., above) to provide for the mandatory exchange of information regarding reportable cross-border arrangements.[735] The Directive entered into force on June 25, 2018, 20 days after its publication in the Official Journal of the EU.

The new Directive obligates intermediaries and taxpayers to disclose potentially aggressive tax planning arrangements.

The EU considers the disclosure of reportable cross-border arrangements necessary because:[736]

- Member States find it increasingly difficult to protect their national tax bases from erosion due to the increased mobility of both capital and people within the internal market;
- the reporting of cross-border arrangements helps the legislature to implement rules and regulations to prevent aggressive tax planning and thereby ensure the effectiveness of the internal market;
- the automatic exchange of arrangements will deter aggressive tax-planning practices.

The term "intermediary" refers to any person that designs, markets, organizes, makes available for implementation, or manages the implementation of a reportable cross-border arrangement.[737] Taxpayers may be obliged to report themselves where, for example, they have developed the reportable cross-border arrangement themselves or where the intermediary is exempt because of legal professional privilege.

A cross-border arrangement will be reportable if at least one of the "hallmarks" (as defined in the Annex IV of the Directive) is fulfilled.[738] These hallmarks may be generic or specific. The generic hallmarks and a number of specific hallmarks are only taken into account if they meet the "main benefit test" (i.e., if obtaining a tax advantage constitutes the main benefit or one of the main benefits of an arrangement).[739]

Generic hallmarks include, for example, an arrangement where the taxpayer undertakes to comply with a condition of confidentiality which may require not disclosing how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities or when the intermediary receives a fee for its services proportionate to the amount of the tax advantage.[740]

Specific hallmarks linked to the main benefit test include (but are not limited to) the trade in loss-making companies, conversion of income into lower-taxed revenue streams, and circular transactions.[741]

Specific hallmarks related to cross-border transactions between associated companies include transactions where:[742]

- the recipient is not resident for tax purposes in any jurisdiction, or
- the recipient is resident for tax purposes in a jurisdiction levying corporate income tax at the rate of zero or almost zero, or
- the recipient is resident for tax purposes in a jurisdiction which is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as non-cooperative, or
- the payment benefits from full exemption from tax in the jurisdiction where the recipient is resident for tax purposes, or
- the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.

Other specific hallmarks related to cross-border transactions include deductions for the same depreciation in more than one jurisdiction, relief from double taxation in more than one jurisdiction, and material difference in the valuation of assets transferred between two jurisdictions.

Other specific hallmarks are linked to the automatic exchange of information and beneficial ownership or to transfer pricing.[743]

The following table describes the hallmarks in more detail:

[734] For a detailed analysis of the exchange of CbC Reports in the EU, see *Kraft/Ditz/Heider,* Der Betrieb 2017, p. 2243 (2251).
[735] EU Directive 2018/822 of May 25, 2018, L 139/1.
[736] Preamble, no. 2, 6, 8, 10, 11 of EU Directive of May 25, 2018.
[737] §1(1) b) no. 21 EU Directive of May 25, 2018.
[738] §1(1)(b) no. 19 EU Directive of May 25, 2018.
[739] Annex IV Part I of EU Directive of May 25, 2018.
[740] Annex IV Part II A of EU Directive of May 25, 2018.
[741] Annex IV Part II B of EU Directive of May 25, 2018.
[742] Annex IV Part II C of EU Directive of May 25, 2018.
[743] Annex IV Part II D and E of EU Directive of May 25, 2018.

ISBN 978-1-61746-885-8

Generic Hallmarks	Specific Hallmarks			
	Linked to Main Benefit Test	Cross-border Transactions	Automatic Exchange of Information	Transfer Pricing
• Arrangement with a confidentiality clause; • The intermediary's fee is proportionate to the amount of the tax advantage; • Standardized documentation/structure; available to more than one relevant taxpayer.	• Trade in loss-making companies; • Conversion of income into lower-taxed revenue streams; • Circular transactions.	• Intra-group arrangements where the recipient is: i. not resident for tax purposes in any jurisdiction; ii. resident in a jurisdiction levying (almost) no corporate income tax; iii. resident in a non-cooperative jurisdiction; or iv. resident in a jurisdiction where the payment benefits from full or partial tax exemption. • Intra-group arrangements if i. depreciation is deductible in more than one jurisdiction; ii. relief from double taxation is available in more than one jurisdiction; iii. there is a material difference in the valuation of assets transferred between two jurisdictions.	• Arrangements which undermine reporting obligations (e.g., to circumvent agreements on the automatic exchange of financial account information); • Arrangements involving a non-transparent legal or beneficial ownership chain.	• Arrangements involving the use of unilateral safe harbor rules; • Arrangements involving the transfer of hard-to-value intangibles; • Arrangements involving an intragroup cross-border transfer of functions/risks/assets if the transfer leads to a decline in EBIT of more than 50%.
See Annex IV Part II A of EU Directive of May 25, 2018.	*See* Annex IV Part II B of EU Directive of May 25, 2018.	*See* Annex IV Part II C of EU Directive of May 25, 2018.	*See* Annex IV Part II D of EU Directive of May 25, 2018.	*See* Annex IV Part II E of EU Directive of May 25, 2018.

Reportable cross-border arrangements must be disclosed within 30 days beginning on the day after the arrangement is made available or is ready for implementation by the taxpayer or when the first step of the arrangement has been implemented.

The reporting requirements include reportable cross-border arrangements implemented as of June 25, 2018, irrespective of the time of implementation of the Directive into national law. Thus, all reportable cross-border arrangements implemented between June 25, 2018, and July 1, 2020, were to be reported until August 31, 2020. Member States were obliged to transpose the Directive into their national laws by December 31, 2019.

The Member State in which the information on a reportable cross-border arrangement was filed will, by means of an automatic exchange, communicate that information to all other Member States. The automatic exchange of information shall take place quarterly. The automatic exchange of information was supposed to begin on October 31, 2020.

The mandatory reporting of cross-border arrangements according to the new EU Directive was intensively criticized in the literature.[744] The EU directive is very broad and could potentially affect a large number of cases, including simple and standard structures. Thus, it is important for national legislatures to clearly define the arrangements affected by the new reporting requirement and exchange of information when transposing the Directive into national law in order to reduce the administrative effort for both the taxpayer and the tax authorities.

[744] *See, e.g.,* Debus, *Deutsches Steuerrecht* 2017, p. 2520; Hey, *Finanz-Rundschau* 2018, p. 633; Osterloh-Konrad, *Finanz-Rundschau* 2018, p. 621; Richter/Welling, *Finanz-Rundschau* 2018, 628; Stöber, *Betriebs-Berater* 2018, p. 1559.

ISBN 978-1-61746-885-8

In Germany, the EU Directive was transposed on December 21, 2019, by publication of the Tax Act implementing the EU Directive without major modifications and without any limitations to the reportable arrangements.[745] The German legislature had originally planned to extend the scope of the EU Directive by including reporting requirements for purely domestic arrangements but has since abandoned this plan.

The intermediary must disclose any reportable arrangement to the BZSt, which will in turn assign a registry number to the arrangement. The taxpayer must disclose this registry number on its tax return. The BZSt will provide the federal states' tax authorities with an overview of the reported arrangements and will upload this information to the central registry of the European Commission.

Non-compliance with the reporting obligations could lead to penalties of up to 25,000 EUR. These penalties will apply only to cross-border tax arrangements concluded after June 30, 2020.

On March 2, 2020, the Ministry of Finance published a discussion draft for a circular regarding the application of the regulations on reporting obligations for cross-border arrangements. The final circular was published on March 29, 2021.[746]

[745] *See* Implementation Act (*Gesetz zur Einführung einer Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*) of December 21, 2019, Federal Law Gazette (BGBl.) I 2019, p. 2875.

[746] Ministry of Finance, Circular of March 29, 2021, IV A 3-S 0304/19/10006:010, Federal Tax Gazette (BStBl.) I 2021, p. 582; amended with Circular of July 26, 2022, IV A 3-S 0304/19/10006:012, Federal Tax Gazette (BStBl.) I 2022, p. 1224; with Circular of January 23, 2023, IV A 3-S 0304/19/10006:013, Federal Tax Gazette (BStBl.) I 2023, p. 183.

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VII. Assistance in Tax Collection and Coordinated Tax Audits

A. Assistance in Tax Collection

Most tax agreements and domestic tax laws contain provisions regarding assistance in tax collection (i.e., one country assisting another country in collecting any outstanding amounts owed by a taxpayer). For example, Art. 27 of the OECD Model Tax Treaty provides for comprehensive assistance in tax collection and details the process that contracting states should adopt in providing such assistance. On its own, Germany has concluded separate mutual assistance agreements with Finland,[747] Italy,[748] Austria,[749] and the Netherlands,[750] including provisions on assistance in tax collection.[751]

Assistance in tax collection can take a variety of forms but typically encompasses requests for enforcement of title, formal notification or service of process, and collection actions against people or property in the territory of the other state. The minimum amount of tax which must be owed for the collection provision to be enforced will vary depending on the applicable law or agreement. For example, the EU guidelines require a minimum amount of 1,500 EUR,[752] while Germany's treaties and agreements with other countries require different amounts (for example, in the case of Belgium, 760 EUR; in the case of the Netherlands, 700 EUR; in the case of Norway, 1,022 EUR; in the case of Austria, 255 EUR; and in the case of Sweden, 1,022 EUR). Generally, Germany will not request administrative assistance if the outstanding tax due is less than 1,500 EUR.[753]

B. Coordinated Tax Audits

The OECD and the European Union have sought to reduce base erosion and profit shifting in a variety of different ways. For example, both have imposed additional reporting requirements for MNEs, and both promote international cooperation among tax authorities through the automatic exchange of tax relevant information. Another mechanism employed to reduce base erosion takes the form of coordinated tax audits, either in the form of a "simultaneous audit/tax examination" or "joint tax audit/multilateral control."[754] Coordinated tax audits are generally completed within a few months.[755] Such audits allow the tax authorities of one country to be involved in a tax audit of another country. Roughly simplified both forms differentiate as follows: while simultaneous audits only enable simultaneous domestic audits, joint audits enable to conduct one audit with authorizes the tax authorities to act abroad and not only within its country.

Both the OECD and the European Union have developed rules regarding coordinated tax audits. In the European Union, simultaneous tax audits were initially authorized by EU Directive 2011/16/EU, which was issued on February 25, 2011. Germany implemented the Directive along with the EUAHiG of June 26, 2013.[756] In general, these rules govern tax audits among EU Member States. Agreements with non-EU member countries should rely on Art. 26 of the OECD Model Tax Treaty, which notes that the competent authorities of two contracting states can conduct simultaneous tax audits provided they agree.[757] While Art. 26 of the OECD Model Tax Treaty allows representatives of one contracting state to attend tax audits in the other contracting state, some countries prevent any active participation that is within the scope of the rights granted to tax officials of the other contracting state.[758] But, in its report, the OECD still criticized joint tax audits by auditors of different countries for lacking a clear legal basis.

Germany implemented its own regulations for coordinated tax audits with foreign competent authorities in EU Member States and other foreign countries in a Ministry of Finance circular dated January 9, 2017.[759] §12 of the EUAHiG was implemented and only enabled simultaneous unilateral audits in several countries in cross-border cases, but did not enable a true "Joint Audit" conducted together by auditors of all involved countries. However, with the amendment of the EU directive of 2011 by March 2022 with the 2021 EU Directive 2021/514 on Administrative Cooperation (the "DAC 7-Directive"),[760] the (political) consensus of the Member States was to enable a more intense cooperation of all involved tax authorities. Finally, the Member States are obliged to implement the EU Directive 2021/514 by December 31, 2024 and a respective legal basis for a true "Joint Audit."[761] In Germany, in this respect, §12 of the EUAHiG (simultaneous audits) was amended and §12a of the EUAHiG (joint audits) was implemented domestically in order to include a legal basis for joint audits (*Gemeinsame Prüfungen*) in German law.[762] Based on the implementing law, Art. 35(4) of the German Growth Opportunities Act (*Wachstumschancengesetz*) the amended §12 and the new §12a of the EUAHiG are applicable as of January 1, 2024 with retroactive

[747] Agreement between Germany and Finland on Legal Protection and Legal Assistance in Tax Matters of September 25, 1935, Federal Tax Gazette (BStBl.) I 1954, p. 404.

[748] Agreement between Germany and Italy on Legal Protection and Legal Assistance in Tax Matters of September 6, 1938, Federal Tax Gazette (BStBl.) I 1957, p. 149.

[749] Agreement between Germany and Austria on Legal Protection and Legal Assistance in Tax Matters of October 4, 1954, Federal Tax Gazette (BStBl.) I 1955, p. 434.

[750] Agreement on the Cooperation of Tax Authorities in the Collection of Tax Claims and the Disclosure of Documents between Germany and the Netherlands of May 21, 1999, Federal Tax Gazette (BStBl.) I 2001, p. 66. *See* Czakert, in: Schönfeld/Ditz, DBA, 2nd ed. 2019, Art. 27 OECD Model Tax Treaty, no. 17.

[751] Czakert, in: Schönfeld/Ditz, DBA, 2nd ed. 2019, Art. 27 OECD Model Tax Treaty, no. 17.

[752] §18(3) EU Directive; §14(1) EUBeiTG.

[753] Czakert, in: Schönfeld/Ditz, DBA, 2nd es. 2019, Art. 27 OECD Model Treaty, no. 62.

[754] Cf. OECD, Joint Audit 2019 — Enhancing Tax Co-operation and Improving Tax Certainty, p. 19 et seq., available at https://www.oecd-ilibrary.org/docserver/17bfa30d-en.pdf?expires=1732091326&id=id&accname=guest&checksum=037B9A36D9DA83E60326E74B6C921FAD.

[755] Hendricks, in: Wassermeyer/Baumhoff/Ditz, *Verrechnungspreise international verbundener Unternehmen*, 2nd ed. 2022, no. 9.40 et seq.

[756] Federal Law Gazette (BGBl.) I 2013, p. 1809.

[757] Ministry of Finance, Circular of January 9, 2017, Federal Tax Gazette I (BStBl. I) 2017, p. 89, no. 2.1.2.

[758] OECD, Commentary to Art. 26 OECD Model Tax Treaty, no. 9.

[759] . Ministry of Finance, Circular of January 9, 2017, Federal Tax Gazette I (BStBl. I) 2017, p. 89.

[760] Abl. EU L 104/1 of March 25, 2021, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021L0514.

[761] *See* Art. 2(2) EU Directive 2021/514.

[762] *See* Oertel, in: Hruschka/Peters/von Freeden, Steuerliche Betriebsprüfung, 2022, no. 7.246.

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effect. Furthermore, in 2022 Germany implemented the DAC 7-Directive with the Act on the Reporting Obligation and the Automatic Exchange of Information in Tax Matters by Reporting Platform Operators (so-called "Platform Tax Transparency Act," in German "*Plattformen-Steuertransparenzgesetz*" or "PStTG"). The German Platform Tax Transparency Act was agreed upon on December 20, 2022, promulgated on December 28, 2022, and is applicable as of January 1, 2023.[763] As of February 2, 2023, a circular of the German Ministry of Finance was published specifying application issues.[764]

As of January 1, 2024 the following rules are applicable:

• §12(1) of the EUAHiG authorizes the German competent authorities to perform simultaneous tax audits with tax authorities of other Member States and to exchange relevant information with foreign tax authorities. Under §12(1) of the EUAHiG, each competent authority disposes over its own audit team and are only authorized for audit measures in its own country, but the tax auditors of one country are allowed to actively participate in tax audits in another EU Member State in the presence of domestic auditors, i.e. abroad they only have observer status. Therefore, §12(1) and (4) of the EUAHiG are not enabling one Joint Audit, but only simultaneous domestic audits in each country as well as the presence of foreign auditors in the audit abroad.[765] Furthermore, § 12(3) of the EUAHiG obliges to name a responsible auditor. According to §12(5) of the EUAHiG, the taxpayer being subject of the audit has to be informed about a rejection of a simultaneous audit; §12(6) of the EUAHiG grants further information rights to the taxpayer. Information resulting from these simultaneous audits will be exchanged immediately, provided the information is likely to be of material importance for taxation in the other state.[766] According to §12(7) of the EUAHiG, a hearing of domestic parties prior to the transmission of information in the context of a simultaneous audit, in deviation from §117(4) sentence 3 of the FCG, is no longer required. As a result, the legal conclusions are drawn separately in each case as the objective of the simultaneous only concerns the exchange of information according to § 12(2) of the EUAHiG.

• By contrast, §12a(1) of the EUAHiG authorizes German tax authorities to conduct a joint audit whose objective concerns reaching a joint understanding between the states on the relevant facts and the legal consequences of the audit matter.

o §12a(1) of the EUAHiG provides in detail that the central liaison office ("*zentrales Verbindungsbüro*") can request one or more Member States to carry out a joint request with one or more Member States to conduct a joint audit according to §12a(1) sentence 1 of the EUAHiG. The central liaison office may also accept a request from another Member State or of several other Member States to carry out a joint audit according to §12a(1) sentence 2 of the EUAHiG. A joint audit may also be carried out if a simultaneous audit in relation to the same person on identical or different facts is already being carried out (§12a(1) sentence 3 of the EUAHiG).

o §12a(2) sentence 1 of the EUAHiG defines a joint audit. Overall, the requirements are identical to those of a simultaneous audit. But, while a simultaneous audit aims at the pure exchange of information of the audits, a Joint Audit strives for finding a mutual agreement on the facts and circumstances that are the subject of the official investigations (§12a(2) sentence 2 of the EUAHiG)

o Coordination is carried out by the central liaison offices according to §12a(2) sentence 2 of the EUAHiG.

o In §12a(3) of the EUAHiG, the auditors are urged to conclude an agreement on the details of the conduction of the joint audit, which will at least determine the decisive working language.

o §12a(4) of the EUAHiG stipulates the following: (*i*) the auditors is to endeavor to reach an agreement (sentence 1), (*ii*) the documentation of the results of the Joint Audit in an audit report (sentence 2), (*iii*) the implementation of the factual and legal findings (sentence 3) and (*iv*) the presentation of evidence (sentence 4).

o The domestic person concerned to whom the Joint Audit relates must be informed of the result of the audit upon 60 days of the finalization of the audit report (§12a(5) sentence 1 EUAHiG).

In the past, regardless of the discussions relating to the legal basis of simultaneous or joint audits, Germany has generally allowed the tax audit process to go forward and some German courts have made decisions that may affect the way information is exchanged in the context of a tax audit. For example, in September 2015, the local tax court of Cologne by order, prevented the BZSt from participating in a coordinated exchange of information with Canada, the United Kingdom, France, Australia, and Japan. The purpose of the exchange was to gather data on certain digital companies, with a view to developing more effective policies to combat their BEPS strategies. The court ultimately ruled that the exchange came into conflict with German tax secrecy laws, noting that the exchange was only allowed to the extent it complied with the relevant tax treaty or the EU Mutual Assistance Directive and that the information sought was not relevant to enforcing any applicable tax laws.[767]

However, in a more recent decision, on May 23, 2017, the same court denied a taxpayer's request for a preliminary injunction sought on the basis of a potential violation of tax secrecy laws.[768] The court held that requests for the exchange of information between the German competent authority and the competent authority of another EU Member State were justified prior to a simultaneous tax audit. The exchange of information was necessary to assess the extent of profit shifting by a multi-

[763] Federal Law Gazette (BGBl.) I 2022, p. 2730.

[764] Ministry of Finance, Circular of February 2, 2023, IV B 6-S 1316/21/10019:025, Federal Tax Gazette (BStBl.) I 2023, p. 241.

[765] §10(3) of the EUAHiG.

[766] Ministry of Finance, Circular of January 9, 2017, no. 2.2.1; §1, §4, §6, §8, §12 EUAHiG.

[767] Local tax court of Cologne, September 7, 2015, 2 V 1375/15. *See also* https://www.lexology.com/library/detail.aspx?g=128e3436-43e8-4272-a64c-cc04af0d6f9c.

[768] Local tax court of Cologne, May 23, 2017 — 2 V 2498/16.

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national firm with a subsidiary in Hong Kong. The court further ruled that bilateral simultaneous agreements do not need the taxpayer's approval. Given that the local tax court of Cologne did not permit an appeal to the Federal Fiscal Court, similar decisions were to be expected in comparable future cases.[769] In two subsequent decisions, the local tax court of Cologne again denied taxpayers' requests for preliminary injunctions. The court affirmed the opinion that the necessity of an exchange of information must be evaluated from an *ex-ante* perspective, meaning that the German Competent Authority documentation of the requested information is relevant for German tax purposes.[770] This was confirmed in the latest decision by the local tax court of Cologne on December 28, 2020.[771]

According to the BZSt, the number of taxpayer requests for coordinated information exchanges is increasing, even though the taxpayer is not legally entitled to participate in an information exchange.[772] The increasing number of requests is probably attributable to the fact that coordinated information exchanges took an average of 290 days by 2018[773] and more recently between 12 to 18 months, while MAPs and court cases can take much longer.

C. International Compliance Assurance Program (ICAP) and Related International Risk Assessment Programs

1. Overview of ICAP

The International Compliance Assurance Program ("ICAP") is a voluntary risk assessment and assurance program by the Forum on Tax Administration ("FTA") of the OECD to facilitate open and cooperative engagements between MNEs willing to engage actively and transparently, and tax authorities in their local jurisdictions. It is sometimes referred to as an "APA light."[774] ICAP facilitates the effective use of transfer pricing documentation, including CbC Reports, and thereby increases tax certainty of MNEs with respect to certain activities and transactions. In the long run, ICAP intends to reduce the resource burden on both MNEs and the tax authorities and reduce the number of tax disputes requiring a resolution through a MAP.[775]

The first ICAP pilot was launched in January 2018. Eight tax administrations including Australia, Canada, Italy, Japan, the Netherlands, Spain, the United Kingdom, and the United States, and a number of MNEs headquartered in these jurisdictions participated in the ICAP pilot. Germany did not participate in the pilot project due to legal concerns.[776] ICAP 2.0, an updated version of the ICAP pilot which includes the experience and feedback of the tax authorities and MNEs from the first round, was announced at the OECD Forum on Tax Administration Plenary held in Santiago, Chile, in March 2019. For ICAP 2.0, 19 tax administrations (including tax authorities from Austria, Belgium, Denmark, Finland, Germany, Ireland, Luxembourg, Norway, and Poland) joined the project.[777] Since 2021, the OECD no longer differentiates between ICAP and ICAP 2.0 and offers to file submissions of MNEs to participate in ICAP on a regular basis (i.e. two times a year as of 31 March and 30 September). Moving forward, the program has enabled not-yet participating countries to join the program by providing several application dates (latest published application dates: September 30, 2024, March 31, 2025 and September 30, 2025). Future deadlines will be released in due course. Therefore, participating countries[778] are now listed together without differentiation of the beginning of the ICAP program in their respective country. The following 23 countries are currently listed as participating countries; Russia left the program in 2022:

1. Argentina
2. Australia
3. Austria
4. Belgium
5. Canada
6. Chile
7. Colombia
8. Denmark
9. Finland
10. France
11. Germany
12. Ireland
13. Italy
14. Japan
15. Luxembourg
16. The Netherlands
17. Norway
18. Poland
19. Portugal
20. Singapore
21. Spain
22. The United Kingdom
23. The United States

[769] Schäffkes/Fechner/Schreiber, *Der Betrieb* 2017, p. 1668 (1672).

[770] Local tax court of Cologne, October 20, 2017, 2 V 1055/17 and tax court of Cologne, February 23, 2018, 2 V 814/17.

[771] Local tax court of Cologne, December 28, 2020, 2 V 1217/20.

[772] Schäffkes/Fechner/Schreiber, *Der Betrieb* 2018, p. 1624 (1630).

[773] Schäffkes/Fechner/Schreiber, *Der Betrieb* 2018, p. 1624 (1630).

[774] *See* Heidecke/Lülf/Panchenko, *Internationale Wirtschaftsbriefe* 2018, p. 284 (287).

[775] *See* OECD, Forum on Tax Administration, International Compliance Assurance Program, Handbook, available at https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf.

[776] See Federal Government of Germany of August 16, 2018, Official Record (Bundestag Drucksache) no. 19/3842.

[777] *See* https://www.oecd.org/content/dam/oecd/en/about/programmes/icap/icap-statistics-january-2024.pdf.

[778] *See* https://www.oecd.org/en/about/programmes/icap.html.

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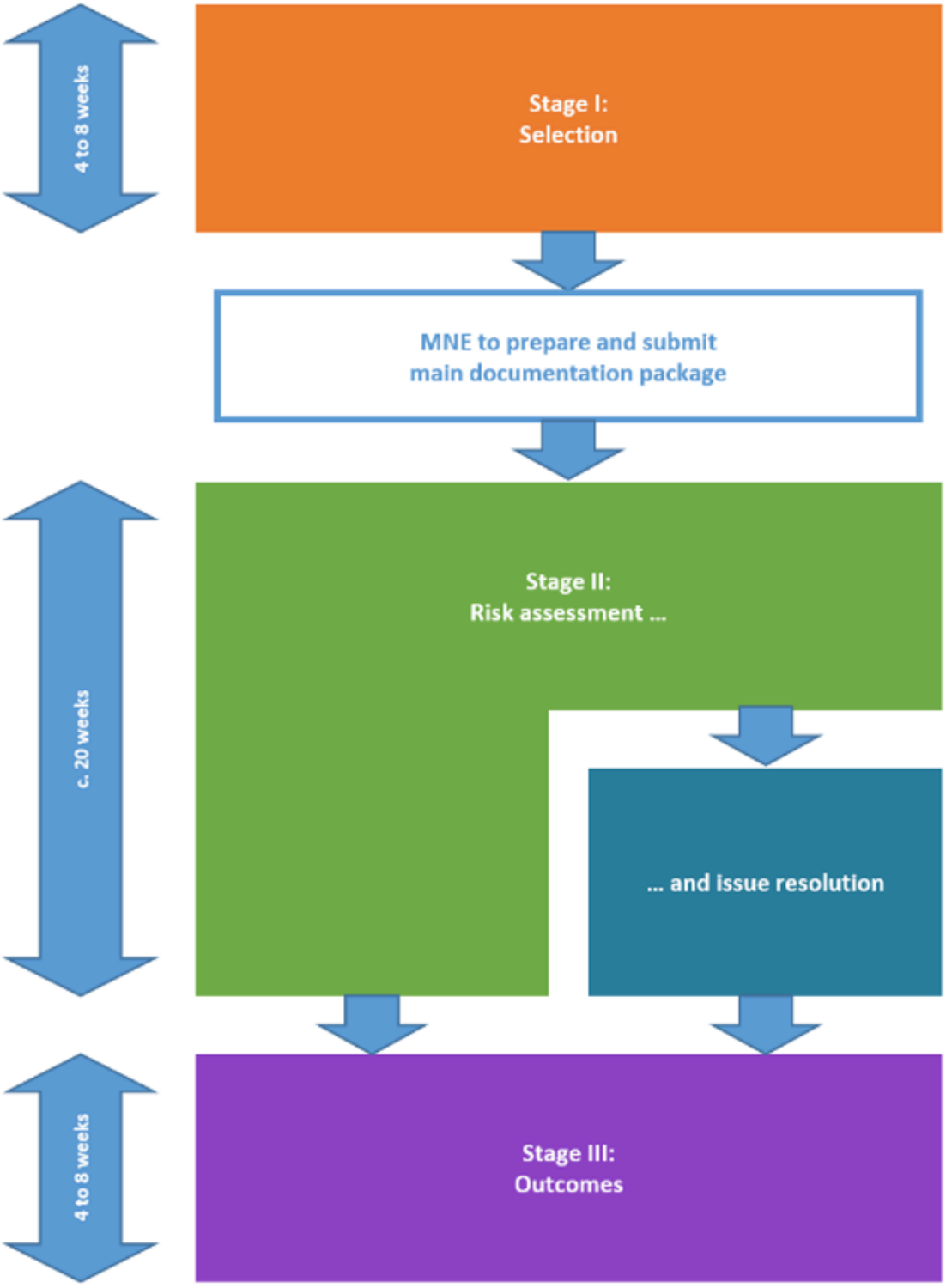
2. Process and Timeframe of the ICAP Risk Assessment

The following chart provides an overview of the process and timeframe of ICAP.[779]

[779] *See* OECD, Forum on Tax Administration, International Compliance Assurance Program, Handbook, available at https://web-archive.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf, Annex A.



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The stages are described in more detail below.

a. Stage I: Selection

An MNE may indicate its interest in participating in the ICAP to the tax authorities in the jurisdiction of its ultimate parent entity or may be asked by its tax authorities to participate in the program. These tax authorities are considered as (potential) lead tax authorities according to the ICAP program. This stage is typically initiated by the respective MNE group submitting a selection documentation package — corresponding to Chapter 6 of the ICAP handbook[780] — to the (potential) lead tax administration. This documentation package includes items that an MNE group typically already possesses (e.g., most recent CbC report and master file) and/or a completed standard ICAP template provided by the lead tax administration. The OECD website continuously provides information about respective deadlines for the submission of such documentation packages to participating tax administrations.

Therefore, this initial selection stage predominantly serves two functions. First, it provides a simple and cost-effective way for the interested MNE, if the tax authorities concerned are generally able and willing to take part in their ICAP risk assessment. Second, it offers an opportunity for the tax authorities concerned to review the MNE group's transactions at a high level regarding the covered risks and determine whether any risks should be excluded from the scope of the ICAP risk assessment. The target time limit for the selection stage is four to eight weeks from receipt of the selection documentation package.

If the potential lead tax authorities are willing to act as the lead tax administration, they will review the selection documentation package for completeness and then generally provide the documentation package to other tax authorities participating in the ICAP of the countries where the applying MNE group has constituent entities. In order to determine the participation of the respective tax authorities in the MNE group's ICAP risk assessment, multilateral calls are held between the respective competent authorities. The concerned tax authorities also decide on any transactions that should be excluded from the scope of that risk assessment (e.g., due to the coverage by an effective APA). The outcomes of these alignments of the concerned tax authorities are communicated to the MNE group, which decides whether it wishes to proceed to the risk assessment stage with the tax authorities willing to participate and under the communicated scope. The MNE can then decide whether it wishes to proceed to the risk assessment stage with the agreed scope and terms of its ICAP risk assessment.

If all parties agree on the participation of the MNE group in the ICAP process, the covered transactions included in the ICAP risk assessment, the target timeframe for the risk assessment stage and any changes that are required to the standard main documentation package can be agreed upon within this scope.

b. Stage II: Risk Assessment

The risk assessment stage involves a multilateral risk assessment and assurance of the covered risks by the covered tax administrations. This stage begins with the submission of the main documentation package by the MNE. In most cases, the risk assessment stage includes at least one multilateral call or meeting between the MNE and the tax administrations. The tax authorities discuss their findings until each tax authority finds that the covered risks pose a low risk, or determines that such a finding is not possible.

Where, as a result of a risk assessment, one or more covered tax authorities conclude that a covered transaction requires a further compliance review, the MNE may be approached and asked to consider entering an optional issue resolution process, during which an agreement is sought with the MNE on the tax treatment of one or more covered transactions, including whether any tax adjustments are needed.

The target time frame for the risk assessment stage (including issue resolution, if needed) varies, but should be less than 20 weeks.

c. Stage III: Outcomes

In the "outcomes stage," the MNE receives a completion letter from the lead tax administration, informing the MNE that the ICAP risk assessment and assurance process have been completed. The MNE also receives an outcome letter from each covered tax administration, explaining the results of the tax administration's risk assessment and assurance of the covered risks for the covered periods. The design, content, and wording of each outcome letter may vary depending on the legal requirements of each jurisdiction.

Where covered tax authorities are not able to conclude that a covered risk is low risk or are not able to reach a conclusion with respect to a covered risk, this is reflected in the outcome letter. In such a case, any understanding and information gained during the ICAP process should facilitate any future domestic or multilateral action taken.

3. ICAP Statistics

As of October 2023, 20 ICAP cases have been completed, including those within the two pilots, with others ongoing. The average time taken from the start of an ICAP process to the issuing of risk assessment outcomes to an MNE group was about 1.25 years (about 65 weeks). The maximum target time frame of 52 weeks described in the ICAP handbook was not met, in part due to the impact of Covid-19 on the second pilot. The selection stage in ICAP lasted for an average of 10.4 weeks; the risk assessment stage 42.4 weeks (including issue resolution, where relevant) and the outcomes stage 8.3 weeks.[781]

For 40% of MNE groups, all the main risk areas covered were considered low-risk by all tax administrations that included them in the scope of the risk assessment. 80% of MNE groups received either low-risk outcomes in all of the main covered risk areas, or a mix of low-risk and not low-risk outcomes in just one or two of these risk areas. The risk area

[780] *See* OECD, Forum on Tax Administration, International Compliance Assurance Program, Handbook, p. 36 et seq., available at https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf.

[781] *See* https://www.oecd.org/content/dam/oecd/en/about/programmes/icap/icap-statistics-january-2024.pdf, p. 20.

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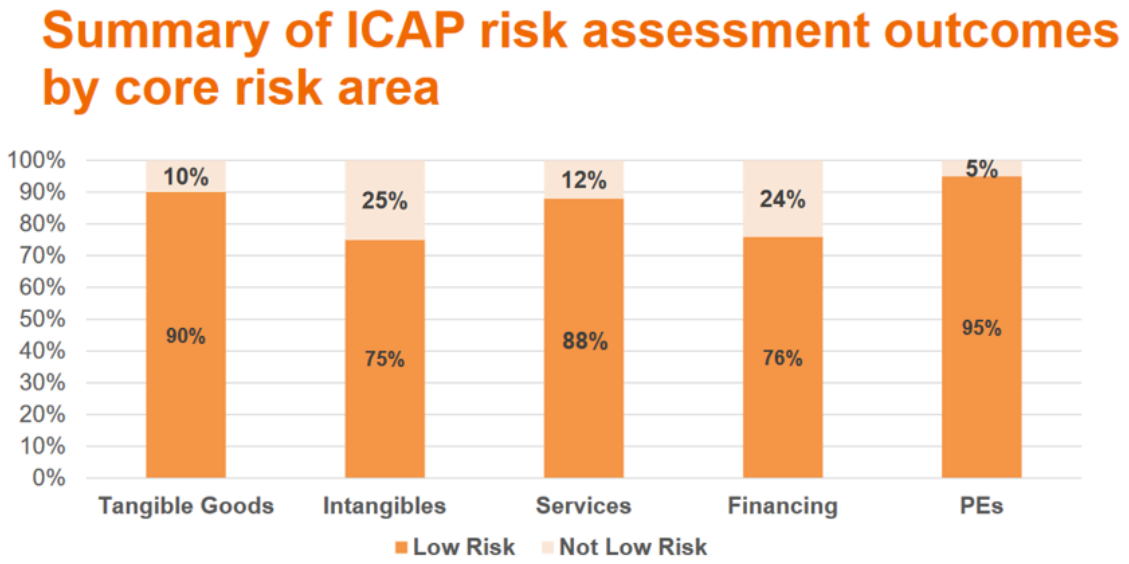
that received the highest proportion of low-risk outcomes was permanent establishments (considered low-risk in 95% of instances where the topic was included in the scope of a tax administration's risk assessment), followed by tangible property (90%), intragroup services (88%), financing (76%) and intangible property (75%). The ICAP risk assessment outcomes by core risk areas may be summarized as follows:[782]

[782] *See* https://www.oecd.org/content/dam/oecd/en/about/programmes/icap/icap-statistics-january-2024.pdf, p. 15.



In 32% of cases, issue resolution such as transfer pricing adjustment and corresponding adjustment during ICAP was applied to one or more issues identified in the risk assessment. Alternatively issue resolution within ICAP was prevented by undertaking the issue resolution outside ICAP and requesting for a BAPA or MAPA in order to reach tax certainty for this issue. Overall, in approximately one third of cases, at least one issue identified during a risk assessment was addressed and resolved within the ICAP process, avoiding an audit and a MAP.[783]

4. Benefits of ICAP

ICAP facilitates multilateral engagements between MNEs and their local tax administrations, providing the following benefits:[784]

• **Fully informed and targeted use of CbC Reports and other information held for risk assessment**: ICAP facilitates multilateral engagements between MNEs and their local tax authorities to help tax authorities gain a better understanding of the MNEs' cross-border activities and to align their interpretation of the transactions under review with the other tax authorities involved. This should help tax authorities to reach an early decision about the level of an MNE's tax risk and to improve their understanding of MNEs with similar transactions in multiple jurisdictions.

• **An efficient use of resources**: Tax administrations discuss the information provided by an MNE for its ICAP risk assessment, share their findings with each other, and coordinate any follow-up questions. An MNE can thus engage with several tax authorities simultaneously.

• **A faster, clearer route to multilateral tax certainty**: The ICAP is a managed process with clear and agreed timeframes. Working multilaterally, tax authorities gain a comprehensive picture of an MNE's cross-border activities and can be assured either that the tax position is satisfactory or that any tax risk has been identified. As any identified tax risk is communicated to the MNE at an early stage, it can use the insights from the ICAP more broadly in managing its affairs across its global operations.

• **Cooperative relationships between MNEs and tax administrations**: The ICAP includes a commitment by MNEs and tax authorities to work together through the ICAP risk assessment and assurance process in a transparent, open, and cooperative manner, which develops into a relationship of mutual trust.

• **Fewer disputes entering into an MAP**: Mechanisms for a more cooperative and collaborative risk assessment and assurance of MNEs should help tax authorities to discuss their perception and treatment of transactions with other tax authorities at a risk assessment stage. This can help tax authorities to align their interpretation and treatment of transactions, reducing the number of tax disputes that require a resolution through a MAP.

5. Comparison of ICAP, BAPAs or MAPAs and MAPs

ICAP, BAPAs or MAPAs and MAPs provide certainty to an MNE, but each with a different focus. The specific advantages are summarized by the OECD as follows:[785]

[783] *See* https://www.oecd.org/content/dam/oecd/en/about/programmes/icap/icap-statistics-january-2024.pdf, p. 16.

[784] *See* OECD, Forum on Tax Administration, International Compliance Assurance Program, Handbook, p. 7 et seq., available at https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf.

[785] *See* https://www.oecd.org/content/dam/oecd/en/about/programmes/icap/icap-statistics-january-2024.pdf, p. 27.

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• ICAP provides an opportunity for tax administrations to identify low-risk transactions relatively quickly across the five core risk areas, and other risk areas agreed between the MNE and participating tax administrations, and allows an MNE to focus limited resources on higher-risk transactions, for example by requesting a MAPA or BAPA;

• BAPAs or MAPAs provide a high degree of legal certainty over complex transactions where a low-risk outcome may not be achievable through ICAP;

• MAPs are generally the only bilateral or multilateral tool to resolve existing disputes and to relieve double taxation that has already arisen;

• An efficient framework for tax certainty does not view these tools as substitutes for one another, but as complementary measures to be used as appropriate by an MNE wishing to control its overall transfer pricing risk profile.

ICAP is only implemented in 43% (23 of 53) Forum on Tax Administration member tax administrations, while BAPA or MAPA programs are available in 83% (44) member tax administrations and MAP to resolve disputes is available in 100% (53) member tax administrations.[786]

A BAPA or MAPA or an audit followed by MAP leads to more legal certainty. But a BAPA or MAPA or a MAP are more time-consuming compared to ICAP. Furthermore, the scope of ICAP is typically a wide multilateral initiative to review a broad range of intercompany transactions and permanent establishment risks and not only focusing on a narrower range of transactions and jurisdictions as in a BAPA or MAPA or a MAP.[787]

6. *International Risk Assessment Initiatives of the European Union*

Meanwhile, comparable international risk assessment initiatives are currently developed at the EU level. The European Trust and Cooperation Approach (ETACA) is to be established as a comparable procedure at EU level and will focus on MNE transactions as well.[788] A pilot project has been installed since 2022, in which Germany ist participating.[789]

In addition to that the EU level goes a atep further and started an initiative for creating a corresponding program for SMEs with the so-called Cross-Border Dialogue (CBD) relating to questions regarding the allocation of profits to permanent establishments, transfer pricing issues or cross-border losses.[790]

7. *International Risk Assessment in Germany*

In the past, the provisions of the Fiscal Code of Germany did not include a legal basis for the conduction of ICAP in Germany. Therefore, several provisions of the Fiscal Code of Germany as well as the provisions regarding the cross-border administrative cooperation, in particular the international exchange of information, constituted the legal basis for the participation in the ICAP process in Germany. Meanwhile, the German Act to Strengthen Growth Opportunities, Investments and Innovation as well as Tax Simplification and Tax Fairness (*Wachstumschancengesetz*) of March 27, 2024, introduced, a new §89b of the FCG on international risk assessment procedures in Germany.[791]

§89b(1) of the FCG confirms that the aim of a risk assessment is to arrive at a preliminary evaluation of risks through a targeted and structured approach. Detailed checks of supporting documents are not part of the assessment. Such a risk assessment aims at excluding low risk matters out of a subsequent tax audit. §89(2) of the FCG provides that ICAP is a joint assessment of tax risks of already realized situations with one or more states or territories in a procedure based on cooperation and transparency. It is the responsibility of the taxpayer to provide the necessary information and documents.

According to §89b(3) sentence 1 of the FCG, the initiation of an ICAP procedure can be requested by the taxpayer towards the local tax office if the parent company with obligation to file CbCR according to §138a of the FCG is headquartered in Germany or if a controlling company of a multinational group for which master file is required according to §90(3) sentence 3 of the FCG is headquartered in Germany. If there are several companies, the company that manages the entire domestic part of the group of companies is decisive according to §89b(7) sentence 3 of the FCG.[792]

Alternatively, another state can encourage the initiation of the procedure.

In the application, the taxable person authorized to submit the application must

1. enclose all documents required to check whether the respective international risk assessment procedure is applicable,

2. ensure to fulfill all cooperation obligations including the obligations of the respective international risk assessment procedure,

3. give consent for the disclosure and exchange of personal and company-related data within the framework of the international risk assessment procedure in accordance with the respective international and national procedural principles; as well as give consent pursuant to Section 87a (1) sentence 3 second half-sentence of the FCG with regard

[786] *See* https://www.oecd.org/content/dam/oecd/en/about/programmes/icap/icap-statistics-january-2024.pdf, p. 25.

[787] *See* https://www.oecd.org/content/dam/oecd/en/about/programmes/icap/icap-statistics-january-2024.pdf, p. 24.

[788] Cf. European Commission, European Trust and Cooperation Approach — ETACA Pilot Project for MNEs. Cf. also Hendricks/Kern, *Internationales Steuerrecht* 2024, p. 795 (800).

[789] Cf. Gmoser, *NWB Internationales Steuer- und Wirtschaftsrecht (IWB)* 2022, p. 143 (150); Andree/Heider, Internationale Steuer-Rundschau 2023, p. 411 (412).

[790] Cf. for further details Ismer in DStJG, Bd. 45 (2023), p. 89 (101 et seq.); Andree/Heider *Internationale Steuer-Rundschau* 2023, p. 411 (412); Hendricks/Kern, *Internationales Steuerrecht* 2024, p. 795 (801).

[791] Cf. Federal Law Gazette (BGBl.) I 2024, No. 108. *See* also Federal Government of Germany, Official Record (Bundestag Drucksache), no. 20/8628, p. 145 et seq.

[792] If there is no such company, the Federal Central Tax Office (BZSt) must inform all tax offices concerned and work towards reaching an agreement on the responsibility for carrying out the international risk assessment procedure according to §89b(7) sentence 4 FCG.

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to company-related data for all affected companies in the group of companies, and

4. ensure that the technical infrastructure required for the procedure is made available to all participating domestic and foreign tax authorities in compliance with the statutory provisions on data protection and information security in the processing of personal data, unless a suitable technical infrastructure is provided by these tax authorities.

If ICAP is initiated abroad, the controlling company of a multinational group headquartered abroad must also consent to the disclosure requirements as described under point 3, above.

An international risk assessment procedure should only be open to taxpayers for whom it is expected that the requested procedure can be completed promptly, cooperatively, economically and with a successful risk assessment according to §89b(4) sentence 1 of the FCG; i.e. if a potential non-compliance is indicated, §89b(4) sentences 2 to 4 of the FCG exclude the conduct of the ICAP. Non-compliance is likely not to be given according to §89b(4) sentence 2 of the FCG:

- in cases of non-cooperation,
- if the leading company within the meaning of paragraph 7 sentence 3 does not agree to fulfill the additional obligations for the procedure and to provide the technical infrastructure necessary for the procedure for all participating tax authorities,
- if the principle of administrative efficiency is not upheld,
- if it is unlikely to reach an agreed risk assessment with the competent authority of the other state or territory, or
- if not enough states or territories participate in an international risk assessment procedure or the economic activity of domestic companies in the states wishing to participate is insignificant.

Non-compliance due to non-cooperation is estimated according to §89b(4) sentence 2 no. 1, sentence 3 and sentence 4 nos. 1 to 3 of the FCG if

- the tax obligations to cooperate were culpably not fulfilled, not sufficiently fulfilled or not fulfilled on time, or
- tax cooperation obligations were not timely submitted within the last three to five years (i.e. tax returns, the CbCR or the master file), fines for delay in cooperation (§200a(2) FCG) or other penalties were charged (§162(4) or (4a) of the FCG), a surcharge under Section 162 (4) or (4a) of the AO or the taxpayer or his representatives (§34 or §79 of the FCG) were committed a tax offence confirmed by a binding judgment.

The taxpayer must be informed about an initiation of the procedure as well about a rejection according to §89b(5) sentence 1 of the FCG. As a rule, a risk assessment procedure is concluded by preparing and sending a risk assessment report according to §89b(5) sentence 2 and (6) of the FCG. But §89b(5) sentence 3 of the FCG clarifies that taxpayers as well as tax administrations can terminate the procedure at any time.

The Federal Central Tax Office (*BZSt*) must be informed immediately of the receipt of an application for an international risk assessment procedure according to §89b(7) sentence 1 of the FCG. If the BZSt receives a suggestion for an international risk assessment procedure from another state or territory, it informs the tax office responsible for taxing the company according to the income that is to be involved in the procedure according to §89b(7) sentence 2 of the FCG. The BZSt shall decide on the implementation of an international risk assessment procedure in agreement with the competent supreme state tax authority. The BZSt shall be responsible in particular for coordinating the international risk assessment procedure and for carrying out intergovernmental administrative assistance. The risk assessment and its implementation shall be carried out by the locally competent tax authority with the cooperation, and in coordination with the BZSt.

Based on the outcome letters issued by the German tax authorities under the ICAP procedure, relief from tax audits can be achieved. Based on §89b(1) of the FCG, the local tax office has the respective discretionary power.

The BZSt has not yet amended the website, i.e. the alternations due to the introduction of §89b FCG are — unfortunately — not reflected there currently.[793]

The belated formal procedural implementation of ICAP through §89a of the FCG offers globally active groups the opportunity for faster legal and tax planning certainty for cross-border income taxes.[794] Access to these procedures is widened based on §89b FCG compared to the situation under ICAP 2.0 without a formal legal base.[795] This is reflected by the formal application right granted by §89b(3) sentence 1 of the FCG which can be subject to judicial review in case of a rejection. This reduces the phenomenon that occurred with ICAP 2.0 that — according to reports, some interested German groups were denied access by their own federal state without reasoning.[796] The aim to accelerate and modernize the taxation procedure is also demonstrated by §89b of the FCG.

Since the launch of ICAP 2.0 in 2019, it is publicly known that Germany acted in four cases as the lead tax administration[797] and in four other cases as a covered tax administration. The ICAP program involves the participation of different departments of the German tax authorities (the Ministry of Finance as leading authority, local tax authorities of the federal states involved, and the Joint Audit Department of the Federal Central Tax Office (BZSt) for the purposes of collecting the information for organizational matters, and tax auditors from the federal states, as well as the BZSt's federal auditors).[798]

The ICAP pilot cases were initiated in 2019. Due to the COVID-19 pandemic, the processes mostly lasted longer than

[793] *See* https://www.bzst.de/DE/Unternehmen/Aussenpruefungen/ICAP/icap_node.html#js-toc-entry2.

[794] Kowallik, *Der Konzern* 2024, p. 304 (306).

[795] See Kowallik, *Der Betrieb* 2023 p. 2343 (2344).

[796] See Kowallik, *Der Betrieb* 2020, p. 412 (415).

[797] For MNE groups headquartered in Germany, tax authorities from the federal states Baden-Württemberg, Hesse, North Rhine-Westphalia, and Rhineland-Palatinate were involved as the lead tax administrations. If Germany was involved as a covered tax administration, this concerned MNE groups from Baden-Württemberg, Bavaria, and Hamburg. *See* Belau, ICAP — In der Mache, December 22, 2021, available at https://www.juve-steuermarkt.de/branche/in-der-mache/.

[798] *See* Belau, ICAP — In der Mache, December 22, 2021, available at https://www.juve-steuermarkt.de/branche/in-der-mache/.

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intended by the timeline proposed[799] and/or were complicated.[800] For example, the MNE group Boehringer Ingelheim successfully finished the ICAP process and expects to have tax certainty for at least, the next four years. There will be no adjustments in the context of its intercompany transactions affected from ICAP in tax audits, and disputes demanding national or international dispute settlement proceedings should also be avoided.[801] According to reports, other participating German companies are Merck and SAP.[802] Further involved companies were not yet released.

[799] *See* Interview with Malte Fidler, Head of Transfer Pricing of Boehringer Ingelheim of February 3, 2021, available at https://dastaxquartett.podigee.io/4-international-compliance-assurance-programme-icap.

[800] *See* Belau, Interview with Thomas Eisgruber vom Bundesfinanzministerium "*Die BP ist in Coronazeiten nicht systemrelevant!*," April 2, 2020, available at https://www.juve-steuermarkt.de/branche/thomas-eisgruber-vom-bundesfinanzministerium-die-bp-ist-in-coronazeiten-nicht-systemrelevant/.

[801] *See* Interview with Malte Fidler, Head of Transfer Pricing of Boehringer Ingelheim of February 3, 2021, available at https://dastaxquartett.podigee.io/4-international-compliance-assurance-programme-icap.

[802] *See* Belau, ICAP — In der Mache, December 22, 2021, available at https://www.juve-steuermarkt.de/branche/in-der-mache/.

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