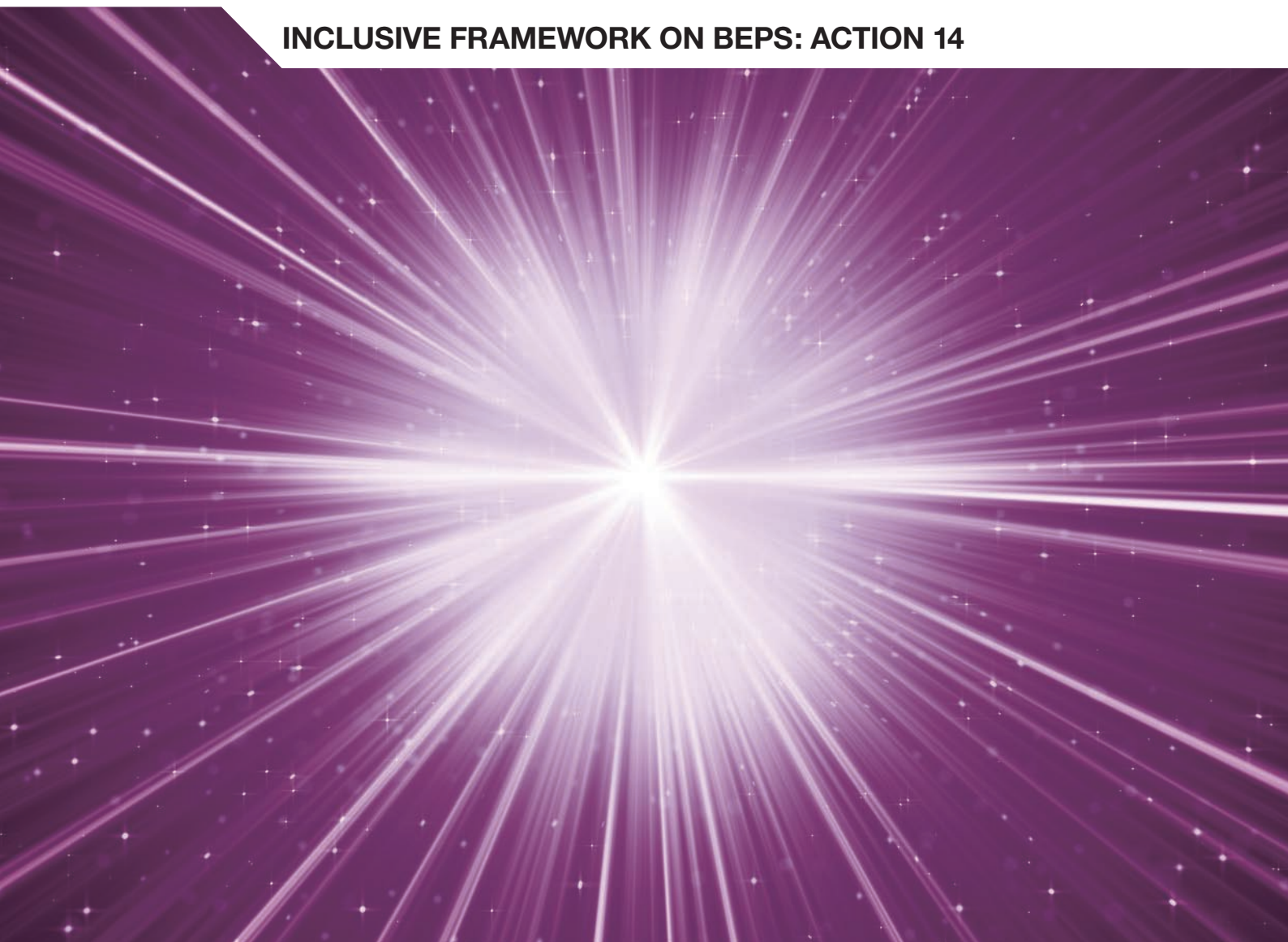


**OECD/G20 Base Erosion and Profit Shifting
Project**



Making Dispute Resolution More Effective – MAP Peer Review Report, Germany (Stage 2)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14



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INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

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Foreword

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

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

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 BEPS planning strategies that rely on outdated rules or on poorly co-ordinated domestic measures will be rendered ineffective.

Implementation is now the focus of this work. The BEPS package is designed to be implemented via changes in domestic law and practices, and in tax treaties. With the negotiation of a multilateral instrument (MLI) having been finalised in 2016 to facilitate the implementation of the treaty related BEPS measures, over 85 jurisdictions are covered by the MLI. The entry into force of the MLI on 1 July 2018 paves the way for swift implementation of the treaty related measures. OECD and G20 countries also agreed to continue to work together to ensure a consistent and co-ordinated implementation of the BEPS recommendations and to make the project more inclusive. Globalisation requires that global solutions and a global dialogue be established which go beyond OECD and G20 countries.

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

As a result, the OECD established the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework), bringing all interested and committed countries and jurisdictions on an equal footing in the Committee on Fiscal Affairs and all its subsidiary bodies. The

Inclusive Framework, which already has more than 136 members, is monitoring and peer reviewing the implementation of the minimum standards as well as completing the work on standard setting to address BEPS issues. In addition to BEPS members, other international organisations and regional tax bodies are involved in the work of the Inclusive Framework, which also consults business and the civil society on its different work streams.

This report was approved by the Inclusive Framework on 11 December 2019 and prepared for publication by the OECD Secretariat.

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Abbreviations and acronyms

APA	Advance Pricing Arrangement
FTA	Forum on Tax Administration
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development

Executive summary

Germany has an extensive tax treaty network with over 90 tax treaties and has signed and ratified the EU Arbitration Convention. Germany has an established MAP programme and has long-standing and large experience with resolving MAP cases. It has a very large MAP inventory, with a substantial number of new cases submitted each year and almost 1250 cases pending on 31 December 2017. Of these cases, 44% concern allocation/attribution cases. The outcome of the stage 1 peer review process was that overall Germany met most of the elements of the Action 14 Minimum Standard. Where it has deficiencies, Germany worked to address them, which has been monitored in stage 2 of the process. In this respect, Germany has solved almost all identified deficiencies.

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

Almost 25% of its tax treaties does not include a provision stating that mutual agreements shall be implemented notwithstanding any time limits in domestic law (which is required under Article 25(2), second sentence), or include the alternative provisions for Article 9(1) and Article 7(2) to set a time limit for making transfer pricing adjustments; and

Approximately 10% of its tax treaties does not include the full equivalent of Article 25(1) of the OECD Model Tax Convention, whereby the majority of these treaties do not allow taxpayers to submit a MAP request within a period of at least three years as from the first notification of the taxation resulting in taxation not in accordance with the provisions of the tax treaty.

In order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standard, Germany signed the Multilateral Instrument, through which a number of its tax treaties will potentially be modified to fulfil the requirements under the Action 14 Minimum Standard. Furthermore, Germany opted for part VI of the Multilateral Instrument concerning the introduction of a mandatory and binding arbitration provision in tax treaties. Where treaties will not be modified, upon entry into force of this Multilateral Instrument for the treaties concerned, Germany reported that it has put a plan in place for the bilateral renegotiations of these treaties and already finalised negotiations with a number of treaty partners through which the respective treaties will be in line with the requirements under this standard. Germany also is currently in negotiations with 11 treaty partners and with seven treaty partners negotiations are envisaged or planned.

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

Germany also meets the requirements regarding the availability and access to MAP under the Action 14 Minimum Standard. It provides access to MAP in all eligible cases. It further has in place a notification/consultation process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not justified. Germany also has clear and comprehensive guidance on the availability of MAP and how it applies this procedure in practice, both under tax treaties and the EU Arbitration Convention. In its stage 1 peer review it was identified that this guidance did not specify the contact details of Germany's competent authority. In 2018 Germany published an update of its MAP guidance, which now also reflects these contact details.

Concerning the average time needed to resolve MAP cases, the MAP statistics for Germany for the years 2016-17 are as follows:

2016-17	Opening inventory on 1/1/2016	Cases started	Cases Closed	End inventory on 31/12/2017	Average time to resolve cases (in months)*
Attribution/allocation cases	545	288	291	542	31.62
Other cases	632	648	581	699	20.33
Total	1 177	936	872	1 241	24.10

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

The number of cases Germany closed is less than the number of all new cases started in 2016 and 2017. Its MAP inventory as per 31 December 2017 increased with 5% as compared to its inventory as per 1 January 2016. While Germany's competent authority did for the years 2016 and 2017 not close MAP cases on average within a timeframe of 24 months (which is the pursued average for resolving MAP cases received on or after 1 January 2016), as the average was 26.34 months, it managed to reduce this average in 2017 as compared to 2016: from 26.34 months to 22.59 months. Furthermore, the recent submitted 2018 MAP statistics show that the inventory as per 31 December 2018 as well as the average timeframe decreased to 1 198 cases and 22.21 months respectively. In this respect, Germany added during the period 2016-17 additional staff to its competent authority and increased the number of face-to-face meetings and communications with its treaty partners. Nevertheless the average timeframe to close attribution/allocation cases remains to be above 24 months and has since 2016 increased. Germany should therefore closely monitor whether these additions in resources to the MAP function and other actions taken will be sufficient to ensure a timely, effective and efficient resolution of MAP cases, in particular in relation to attribution/allocation cases. Where the outcome of this monitoring is that this is not ensured, Germany is recommended to hire or assign more staff to the competent authority, such also to ensure that delays in (i) the co-ordination between the Federal Tax Office and the tax administration of the Länder and (ii) in providing position papers and responses to such papers can be avoided, as well as to enable a more frequent liaising with its treaty partners.

In addition, Germany meets all of the other requirements under the Action 14 Minimum Standard in relation to the resolution of MAP cases. Germany's competent authority uses a pragmatic approach to resolve MAP cases in an effective and efficient manner, and the performance indicators used are appropriate to perform the MAP function. In its stage 1

peer review report it was analysed personnel of tax administrations of the Länder directly involved in the adjustment at issue can participate in competent authority meetings during which MAP cases are resolved, for which the risk was identified that this bears the risk that the competent authority function is not performed entirely independent from the approval or direction of the tax administration personnel directly involved in the adjustment at issue concerning the resolution of MAP cases during such meetings. Since then, Germany has instructed staff in charge of MAP cases to follow the guiding principles agreed by the FTA MAP Forum on the co-operation between the tax administration personnel directly involved in the adjustment at issue and the competent authority prior to and throughout the MAP process with a view to ensure independency of the competent authority in handling and resolving MAP cases. This staff is regularly reminded to follow these principles. With this action taken, the identified risk has been sufficiently addressed.

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

Reference

OECD (2016), *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. <https://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf>.

Introduction

Available mechanisms in Germany to resolve tax treaty-related disputes

Germany has entered into 93 tax treaties on income (and/or capital), of which 91 are in force.¹ These 93 treaties apply to 97 jurisdictions.² All of these 93 treaties provide for a mutual agreement procedure for resolving disputes on the interpretation and application of the provisions of the tax treaty. In addition, 13 of the 93 treaties provide for an arbitration procedure as a final stage to the mutual agreement procedure.³

Germany is also a signatory to the EU Arbitration Convention, which provides for a mutual agreement procedure supplemented with an arbitration procedure for settling transfer pricing disputes and disputes on the attribution of profits to permanent establishments between EU Member States.⁴ Furthermore, Germany adopted Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, which has been implemented in its domestic legislation on 1 July 2019.⁵

The mutual agreement procedure provisions in tax treaties and the EU Arbitration Convention are implemented directly in Germany's domestic law and as such take, pursuant to Section 2 of the German Fiscal Code (Abgabenordnung), precedence over German tax law.⁶

Further to the above, the competent authority functioning is under German tax treaties mandated to the Federal Ministry of Finance (Bundesministerium der Finanzen). Pursuant to circular of 20 June 2011 (Bundessteuerblatt ("BSStBl") I 2011, 674, which replaced an earlier similar circular) this function was delegated to the Federal Central Tax Office (Bundeszentralamt für Steuern) for: (i) mutual agreement procedures relating to individual cases, (ii) the EU Arbitration Convention and (iii) bilateral APAs.⁷ The Federal Ministry of Finance, however, remains the competent authority to conduct mutual agreement procedures of a general nature which concern (or may concern) a category of taxpayers.

Within the Federal Central Tax Office there are two divisions handling MAP cases. The portfolio of one of the divisions focuses on EU Member States and the other on the remaining treaty partners. At the end of 2016, staff in charge of MAP within the Federal Central Tax Office consisted of 43 positions, which concerns two heads of division, six deputy-heads, 32 case analysts and three staff assistants. Furthermore, eight additional persons have been assigned to the divisions concerned for a temporary period. In 2016, roughly 33% of combined staff working time was dedicated to handle requests for APAs and roughly 66% to handle MAP cases other than APAs.

Germany issued guidance on the governance and administration of the mutual agreement procedure in a Federal Ministry of Finance circular on mutual agreement and arbitration procedures (BSStBl I 2006, 461) of 13 July 2006 ("2006 MAP guidance"), which was recently replaced by an updated circular of 9 October 2018 (BSStBl I 2018, 1122; "2018 MAP guidance"). The current guidance is available at:⁸

https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2018-10-09-Verstaendigungsverfahren-Schiedsverfahren-Merkblatt.pdf

Developments in Germany since 1 April 2017

Developments relating to the tax treaty network

In the stage 1 peer review report of Germany it is reflected that it signed in 2016 new treaties with Armenia, Finland and Turkmenistan. Since then these treaties all have entered into force.

Furthermore, on 7 June 2017 Germany signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“**Multilateral Instrument**”), to adopt, where necessary, modifications to the MAP article under its tax treaties with a view to be compliant with the Action 14 Minimum Standard in respect of all the relevant tax treaties. It further opted in for part VI of that instrument, which contains a mandatory and binding arbitration procedure as a final stage to the MAP process. With the signing of the Multilateral Instrument, Germany also submitted its list of notifications and reservations to that instrument.⁹ In relation to the Action 14 Minimum Standard, Germany reported it did not make any reservation on the application of Article 16 of the Multilateral Instrument (concerning the mutual agreement procedure), except for Article 16(5)(a) regarding the modification of existing treaties to allow the submitting a MAP request to the competent authorities of either contracting state.¹⁰ This reservation is in line with the requirements under the Action 14 Minimum Standard. Germany reported that it is currently in the preparation process for ratifying the Multilateral Instrument, which is now foreseen for 2020.

In addition, Germany reported that since 1 April 2017 it signed a new treaty with Tunisia, which will replace the existing treaty upon entry into force. The treaty includes Article 25(1-3) of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report. Furthermore, Germany also reported that it finalised negotiations with Belgium and Portugal on the replacement of the existing treaties currently in force and amending protocols to the treaties with Denmark, Sweden and the United Kingdom. While for none a new treaty or amending protocol has been signed, Germany confirmed that they all will be in line with the requirements under the Action 14 Minimum Standard. Germany also mentioned it is in negotiations, or has scheduled such negotiations with a substantial number of treaty partners either on a new treaty or the replacement of the existing treaty currently in force. One of these treaty partners is the Slovak Republic for which Germany currently continues to apply the 1980 treaty with former Czechoslovakia.

For those tax treaties that were in stage 1 of the peer review report considered not to be in line with one or more elements of the Action 14 Minimum Standard and that have not been or will not be modified by the Multilateral Instrument, and insofar not mentioned above, Germany reported that it is in negotiations with Argentina, Canada, Ecuador, Greece, Iceland, India, Iran, Jersey, Mexico, Morocco, Sri Lanka, Switzerland, Thailand, and Trinidad and Tobago on either the replacement of an existing tax treaty or amending protocols to existing treaties *inter alia* to be compliant with this standard. Furthermore, such negotiations are envisaged or planned with Bolivia, Cote d’Ivoire, Jamaica, Kenya, Pakistan, the United Arab Emirates and Venezuela. In this regard, save for three treaties, Germany has covered all of those tax treaties for which bilateral actions are needed to bring them in line with the Action 14 Minimum Standard in its plan for the short and medium term. For these three treaties, Germany specified that they will approach the relevant treaty partners at a later stage, at the latest once the above-mentioned negotiations have been completed. One of these treaties concerns the 1980 treaty with the former USSR that Germany continues to apply to Moldova and for which, however, such renegotiations are not necessary.

Other developments

As is already reflected in Germany's stage 1 peer review report, in April 2017, a circular regarding the revision of paragraph 5 of its MAP guidance mentioned above was published.¹¹ This circular explains the current tax administration position in relation to waiver of the right to MAP or arbitration (further discussed under element B.5). Germany also reported that in October 2018 some small updates to its MAP guidance have been made, which concerns the reflection of: (i) the contact details of Germany's competent authority, (ii) an update of the jurisdictions to which the EU Arbitration Convention is applicable and (iii) an update regarding the time limits for filing MAP requests that can be found in treaties.¹² The 2018 MAP guidance also incorporates the contents of the April 2017 circular referred to above. A more comprehensive review and revision of Germany's MAP guidance is foreseen after the Directive on Tax Dispute Resolution Mechanisms is implemented in Germany's domestic law, for which the due date is 30 June 2019.

In addition, Germany also reported that the resources for the competent authority function at the level of the Federal Central Tax Office have been substantially increased during recent years and a further increase has already been decided and will be implemented. In 2017, staff in Germany's competent authority was increased from 43 to 55 persons. A further increase has been decided in 2018, with 11 positions having been made available, which are currently being filled in. Taking these additions into account, the number of staff will amount to 66.

Lastly, Germany reported that based on the discussions within the FTA MAP Forum staff in charge of MAP cases has been instructed to follow the guiding principles agreed by the forum on the co-operation between the tax administration personnel who made the adjustment at issue and the competent authority prior to and throughout the MAP process with a view to ensure independency of the competent authority in handling and resolving MAP cases.

Basis for the peer review process

Outline of the peer review process

The peer review process entails an evaluation of Germany's implementation of the Action 14 Minimum Standard, through an analysis of its legal and administrative framework relating to the mutual agreement procedure, as governed by its tax treaties, domestic legislation and regulations, as well as its MAP programme guidance and the practical application of that framework. The review process performed is desk-based and conducted through specific questionnaires completed by Germany, its peers and taxpayers.

The process consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). In stage 1, Germany's implementation of the Action 14 Minimum Standard as outlined above is evaluated, which has been reflected in a peer review report that has been adopted by the BEPS Inclusive Framework on 13 October 2017. This report identifies the strengths and shortcomings of Germany in relation to the implementation of this standard and provides for recommendations on how these shortcomings should be addressed. The stage 1 report is published on the website of the OECD.¹³ Stage 2 is launched within one year upon the adoption of the peer review report by the BEPS Inclusive Framework through an update report by Germany. In this update report, Germany reflected (i) what steps it has already taken, or are to be taken, to address any of the shortcomings identified in the peer review report and (ii) any plans or changes to its legislative and/or administrative framework concerning the implementation of the Action 14 Minimum

Standard. The update report forms the basis for the completion of the peer review process, which is reflected in this update to the stage 1 peer review report.

Outline of the treaty analysis

For the purpose of this report and the statistics below, in assessing whether Germany is compliant with the elements of the Action 14 Minimum Standard that relate to a specific treaty provision, the newly negotiated treaties or the treaties as modified by a protocol, as described above, were taken into account, even if it concerns a replacement of an existing treaty. Furthermore, the treaty analysis also takes into account the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, the treaty with the former USSR Germany continues to apply to Moldova, and the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia. As it concerns three tax treaties that are applicable to multiple jurisdictions, each of these treaties are only counted as one treaty for this purpose. Reference is made to Annex A for the overview of Germany's tax treaties regarding the mutual agreement procedure.

Timing of the process and input received by peers and taxpayers

Stage 1 of the peer review process was for Germany launched on 7 March 2017, with the sending of questionnaires to Germany and its peers. The FTA MAP Forum has approved the stage 1 peer review report of Germany in September 2017, with the subsequent approval by the BEPS Inclusive Framework on 13 October 2017. On 13 October 2018, Germany submitted its update report, which initiated stage 2 of the process.

The commitment to the Action 14 Minimum Standard starts from 1 January 2016. The period for evaluating Germany's implementation of this standard ranges from 1 January 2016 to 31 March 2017 and formed the basis for the stage 1 peer review report. While the commitment to the Action 14 Minimum Standard only starts from 1 January 2016, Germany opted to provide information on the period starting as from 1 January 2015. The period of review for stage 2 started on 1 April 2017 and depicts all developments as from that date until 30 September 2018.

In total 24 peers provided input: Australia, Belgium, Canada, Denmark, France, Greece, India, Ireland, Italy, Japan, Liechtenstein, the Netherlands, Portugal, Russia, Singapore, the Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. In stage 1, these peers represent approximately 75% of post-2015 MAP cases in Germany's inventory on 31 December 2016. Input was also received from taxpayers. During stage 2, apart from Greece, Liechtenstein and the Slovak Republic, the same peers provided input on the update report of Germany. Furthermore, also Austria, China (People's Republic of), Korea and Luxembourg provided input during stage 2. For this stage, these peers represent approximately 88% of post-2015 MAP cases in Germany's inventory that started in 2016 or 2017.¹⁴ Broadly all peers indicated having good working relationships with Germany with regard to MAP and their willingness to settle cases, but some peers also raised issues regarding the (close) relationship of Germany's competent authority with the tax administrations of the Länder and the long time it can take for receiving a position paper. Specifically with respect to stage 2, a number of peers that provided input reported that the update report of Germany fully reflects the experiences these peers have had with Germany since 1 April 2017 and/or that there was no addition to previous input given. 18 peers, however, reflected additional input or new experiences, which are reflected throughout this document under the elements where they have relevance.

Input by Germany and cooperation throughout the process

During stage 1, Germany provided extensive answers in its questionnaire and provided detailed additional information, which was submitted on time. Germany was very responsive in the course of the drafting of the peer review report by responding timely and comprehensively to requests for additional information, and provided further clarity where necessary. In addition, Germany provided the following information:

- MAP profile¹⁵
- MAP statistics¹⁶ according to the MAP Statistics Reporting Framework (see below).¹⁷

Concerning stage 2 of the process, Germany submitted its update report on time and the information included therein was extensive. Germany was co-operative during stage 2 and the finalisation of the peer review process. It has provided, where relevant, peer input in stage 2 of the process.

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

Overview of MAP caseload in Germany

The analysis of Germany's MAP caseload for stage 1 relates to the period starting on 1 January 2016 and ending on 31 December 2016. For stage 2 the period ranges from 1 January 2017 to 31 December 2017. Both periods are taken into account in this report for analysing the MAP statistics of Germany. According to the statistics provided by Germany, its MAP caseload was as follows:

2016-17	Opening inventory on 1/1/2016	Cases started	Cases closed	End inventory on 31/12/2017
Attribution/allocation cases	545	288	291	542
Other cases	632	648	581	699
Total	1 177	936	872	1 241

General outline of the peer review report

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

- Preventing disputes
- Availability and access to MAP
- Resolution of MAP cases
- Implementation of MAP agreements.

Each of these sections is divided into elements of the Action 14 Minimum Standard, as described in the terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective ("**Terms of Reference**").¹⁸ Apart from analysing Germany's legal framework and its administrative

practice, the report also incorporates peer input and responses to such input by Germany, both during stage 1 and stage 2. Furthermore, the report depicts the changes adopted and plans shared by Germany to implement elements of the Action 14 Minimum Standard where relevant. The conclusion of each element identifies areas for improvement (if any) and provides for recommendations how the specific area for improvement should be addressed.

The basis of this report is the outcome of the stage 1 peer review process, which has identified in each element areas for improvement (if any) and provides for recommendations how the specific area for improvement should be addressed. Following the outcome of the peer monitoring process of stage 2, each of the elements have been updated with a recent development section to reflect any actions taken or changes made on how recommendations have been addressed, or to reflect other changes in the legal and administrative framework of Germany relating to the implementation of the Action 14 Minimum Standard. Where it concerns changes to MAP guidance or statistics, these changes are reflected in the analysis sections of the elements, which a general description of the changes in the recent development sections.

The objective of Action 14 Minimum Standard is to make dispute resolution mechanisms more effective and concerns a continuous effort. Where recommendations have been fully implemented, this has been reflected and the conclusion section of the relevant element has been modified accordingly, but Germany should continue to act in accordance with a given element of the Action 14 Minimum Standard, even if there is no area for improvement and recommendation for this specific element.

Notes

1. The tax treaties Germany has entered into are available at: www.bundesfinanzministerium.de/Web/DE/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/staatenbezogene_info.html. The treaties that are signed but have not yet entered into force are with Armenia (2016), Finland (2016), South Africa (2008) and Turkmenistan (2016). The newly signed treaty with South Africa concerns the replacement of the existing treaty currently in force and which has been ratified by Germany. Annex A includes an overview of Germany's tax treaties with respect to the mutual agreement procedure. For purpose of this report and Annex A, the newly negotiated treaty is taken into account.
2. Germany continues to apply the 1980 treaty with former Czechoslovakia to the Czech Republic and the Slovak Republic, the 1981 treaty with the former USSR to Moldova, and the 1987 treaty with former Yugoslavia to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
3. This concerns treaties with Armenia, Australia, Austria, Canada, France, Japan, Liechtenstein, Luxembourg, the Netherlands, Sweden, Switzerland, United Kingdom and the United States. See for a discussion element C.6 of this report. Reference is made to Annex A for the overview of Germany's tax treaties that include an arbitration clause.
4. Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC) of 23 July 1990.
5. Available at: <https://eur-lex.europa.eu/eli/dir/2017/1852/oj>.
6. See in this respect also the circular of Germany's Federal Ministry of Finance on mutual agreement and arbitration procedures of 9 October 2018 (BStBl I 2018, 1122), par. 1.1.4.
7. The circular is available at: https://www.bzst.de/SharedDocs/BMF/DE/Downloads/bmf_Erlass_20110620.pdf.

8. An non-binding English translation is available at: <https://www.bundesfinanzministerium.de/Content/EN/Downloads/Guidance-note-on-international-mutual-agreement-and-arbitration-procedures-in-the-field-of-taxes-on-income-and-capital.pdf>.
9. Available at: www.oecd.org/tax/treaties/beps-mli-position-germany.pdf.
10. Ibid. This reservation on Article 16 – Mutual Agreement Procedure reads: “Pursuant to Article 16(5)(a) of the Convention, the Federal Republic of Germany reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer’s objection to be justified”.
11. Circular of Germany’s Federal Ministry of Finance of 5 April 2017 (BStBl I 2017, 707).
12. Circular of Germany’s Federal Ministry of Finance of 9 October 2018 (BStBl I 2018, 1122). The circular is available at: https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2018-10-09-Verstaendigungsverfahren-Schiedsverfahren-Merkblatt.html. A non-binding English translation is available at: <https://www.bundesfinanzministerium.de/Content/EN/Downloads/Guidance-note-on-international-mutual-agreement-and-arbitration-procedures-in-the-field-of-taxes-on-income-and-capital.pdf>.
13. Available at: <https://www.oecd.org/tax/beps/making-dispute-resolution-more-effective-map-peer-review-report-germany-stage-1-9789264285804-en.htm>.
14. The breakdown of treaty partners on a jurisdiction-by-jurisdiction basis is only available for post-2015 cases under the MAP Statistics Reporting Framework.
15. Available at: www.oecd.org/tax/dispute/Germany-Dispute-Resolution-Profile.pdf.
16. The 2016 and 2017 MAP statistics of Germany are included in Annex B and C of this report.
17. MAP Statistics Reporting Framework, in *Peer Review Documents* (OECD 2016): www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
18. Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (CTPA/CFA/NOE2(2016)45/REV1).

Reference

OECD (2016), *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. <https://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf>.

Part A

Preventing disputes

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

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

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

Current situation of Germany's tax treaties

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

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

4. Several peers reported that the provisions of their tax treaty with Germany meets some or all of the requirements of the relevant elements of the Action 14 Minimum Standard. One peer mentioned that it is about to conclude a new treaty with Germany, which includes all the required elements under the Action 14 Minimum Standard. Some peers also reported that their treaty with Germany does not meet some or all of the requirements of the relevant elements of the Action 14 Minimum Standard. In this respect, four peers indicated that they envisage implementing these elements by signing the Multilateral Instrument.

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

Recent developments

Bilateral modifications

6. Germany signed a new treaty with a treaty partner on the replacement of an existing treaty currently in force. Both the new and the current treaty contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. Germany ratified this new treaty already and is awaiting ratification from the treaty partner.

Multilateral Instrument

7. Germany signed the Multilateral Instrument and is currently preparing the ratification of this instrument, which is now foreseen for 2020.

8. Article 16(4)(c)(i) of that instrument stipulates that Article 16(3), first sentence – containing the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. In other words, in the absence of this equivalent, Article 16(4)(c)(i) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(d)(i), the depositary that this treaty does not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.

9. In regard of the two tax treaties identified above that are considered not to contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, Germany listed none as a covered tax agreement under the Multilateral Instrument. Therefore, at this stage, the Multilateral Instrument will not modify these two treaties to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.

Other developments

10. As is described in the Introduction, for those treaties that are not in line with this element of the Action 14 Minimum Standard and will not be modified by the Multilateral Instrument, Germany is either already in negotiations with the relevant treaty partners or such negotiations are envisaged or planned with a view to bring them in line with the Action 14 Minimum Standard. Concerning the two treaties identified above that do not contain a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention, for one negotiations on the replacement of the existing treaty already have been completed, which includes this equivalent and one is currently being renegotiated *inter alia* to include such equivalent.

Peer input

11. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with Germany. Six of these peers mentioned that their treaty with Germany is in line with the requirements under the Action 14 Minimum Standard, which also regards element A.1 and which conforms with the above analysis. Of the two treaties that are considered not to be in line with the requirements under element A.1, one did not provide input, while the other mentioned there are no additions to the previous input given.

Anticipated modifications

12. Germany reported it will seek to include Article 25(3), first sentence, of the OECD Model Tax Convention in all of its future tax treaties.

Conclusion

	Areas for improvement	Recommendations
[A.1]	<p>Two out of 93 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. None of these two treaties are expected to be modified by the Multilateral Instrument to contain the required provision. With respect to these treaties:</p> <ul style="list-style-type: none"> • For one negotiations on the replacement of the existing treaty currently in force have been completed, which includes the required provision. • One is included in the list of treaties for which negotiations are envisaged, scheduled or pending. 	<p>Germany should for one of the two treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, continue discussions or negotiations to include the required provision. For the other treaty, Germany should as quickly as possible sign and ratify the new treaty to have in place the required provision.</p>

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

Jurisdictions with bilateral advance pricing arrangement (“APA”) programmes should provide for the roll-back of APAs in appropriate cases, subject to the applicable time limits (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.

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

Germany’s APA programme

14. Germany reported that it has in place an APA programme, under which it is allowed to enter into bilateral and multilateral APAs, but only for those cases for which a tax treaty is applicable, as Germany considers the provision concerning the mutual agreement procedure in tax treaties as the legal basis for bilateral and multilateral APAs.³

15. Germany further reported that by decree of 29 November 2004, the Federal Ministry of Finance, in its role as competent authority, transferred the responsibility to conclude bilateral or multilateral APAs to the Federal Finance Office (Bundesamt für Finanzen). This responsibility was subsequently transferred to the Federal Central Tax Office as from its formation on 1 January 2006. Germany has run since that date an APA programme.

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

17. Further to the above, paragraph 3.8 of Germany’s APA guidance stipulates that an APA term generally commences at the beginning of the fiscal year in which the formal APA request is filed. In addition, this paragraph also sets out that an earlier commencement date may be allowed if on the date on which the APA request is filed no tax return has been submitted for an earlier fiscal year and the due date for such return has not yet expired.⁵ In paragraph 2.3 and 3.1 of the APA guidance it is further addressed that the date on which the APA request is received by the Federal Central Tax Office determines the earliest date on which the term of the APA may commence. Typically, the term of application is three to five years.⁶

18. Concerning the process for entering into APAs, Germany explained that the Federal Central Tax Office co-ordinates the content of an APA with the competent tax administrations of the Länder.⁷ These latter are responsible for granting the domestic advance approval of transfer prices that implements the bilateral or multilateral agreement and for issuing the relevant tax assessment notes. As described in paragraph 4.3 of Germany’s APA guidance, the Federal Central Tax Office will immediately inform the tax administration of the Länder when a taxpayer files an APA request. Thereafter, it will form an APA team with the tax administration(s) of the Land or Länder concerned, whereby the Federal Central Tax Office functions as team co-ordinator and communicates and negotiates with the competent authority of the treaty partner concerned. When a bilateral or multilateral APA is reached between the competent authorities, and once accepted by taxpayers, then the competent tax administrations of the Länder are obliged – as described in paragraph 5.1 of Germany’s APA guidance – to issue binding advance approval to the same effect.

Roll-back of bilateral APAs

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

20. From a formal perspective the preceding fiscal years, however, cannot be covered by the APA, as a roll-back of such APA to preceding fiscal years is in Germany only possible through the mutual agreement procedure. Paragraph 7.3 of Germany’s APA guidance

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

Recent developments

21. There are no recent developments with respect to element A.2.

Practical application of roll-back of bilateral APAs

Period 1 January 2015-31 March 2017 (stage 1)

22. Germany publishes statistics on APAs in relation to EU and non-EU Member States on the website of the EU Joint Transfer Pricing Forum (in English).⁸
23. Germany reported that in the period 1 January 2015-31 March 2017 taxpayers requested for the roll-back of an APA in 19 cases (six in 2015 and 13 in 2016). The actual number of APAs for which a roll-back was granted is two in 2015 and 13 in 2016.
24. Peers generally reported that they do negotiate and agree bilateral APAs with Germany. Not all peers, however, have experience with roll-backs of such bilateral APAs for the years under review or in general. In total six peers reported they have experiences with Germany regarding roll-back of bilateral APAs. Their experience point out that Germany is open to provide for roll-back of existing bilateral APAs in appropriate cases. These peers further reported positive working experiences with Germany in the process of effectively providing for roll-backs and indicated that they did not encounter any issues in relation hereto.
25. In this respect, the six peers reported that in the period 1 January 2015-31 March 2017 taxpayers have in approximately 10-15 cases requested for roll-back of their bilateral APAs to which Germany is a signatory party. As regards those requests, peers reported that in a number of these cases a roll-back was already agreed on by the competent authorities and for the remaining cases the request is still under consideration.

Period 1 April 2017-30 September 2018 (stage 2)

26. Germany reported that for the full year 2017, it has received 11 requests for roll-back of bilateral APAs, which relate to seven different treaty partners. In the period 1 January 2018-30 September 2018, Germany received seven of such requests, relating to six different treaty partners. Germany further reported that all of these request were accepted in the process, but are still pending, as the related APA procedures are also still pending.
27. Further to the above, Germany also reported that in the full year 2017 in 11 cases a roll-back was agreed on with the treaty partner, which concerned four different treaty partners. For the period 1 January 2018-30 September 2018, this concerned seven cases, with four different treaty partners. All agreed roll-backs for these years concern requests by taxpayers that were received prior to 2017.

28. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given. Furthermore, one peer added that it received in 2017 a request for a roll-back of a multilateral APA, which was accepted into the process and is currently being negotiated. A second peer reported that it has received in total three requests for a roll-back of a bilateral APA since 1 April 2017 that involve Germany. Two other peers mentioned that since 1 April 2017 no request for a roll-back of a bilateral APA involving Germany has been received, one of which added that so far no issues have been encountered concerning the roll-back of bilateral APAs.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[A.2]	-	-

Notes

1. These 91 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, the treaty with the former USSR that Germany continues to apply to Moldova, and the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
2. This description of an APA based on the definition of an APA in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.
3. See paragraph 1.2 of Germany's APA guidance (next footnote).
4. Available at: https://www.bzst.de/SharedDocs/BMF/DE/Downloads/bmf_Schreiben_20061005_apa.pdf. A non-binding English translation is available at: <https://www.oecd.org/ctp/dispute/47655669.pdf>.
5. Other commencement dates may also be agreed on in order to take into account normal practice in other jurisdictions, if this other date does not impair the interest of the Germany tax authorities. See paragraph 3.8 of Germany's APA guidance.
6. Paragraph 3.8 of Germany's APA guidance also addresses that care should be taken to avoid the expiry of all or most of the term before the APA is concluded. If necessary, the taxpayer should alter its APA request accordingly.
7. See paragraph 2.1 of Germany's APA guidance.
8. Available at: https://ec.europa.eu/taxation_customs/news/statistics-apas-and-maps-eu_en.

References

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

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

Part B

Availability and access to MAP

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

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

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

Current situation of Germany's tax treaties

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

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

26. The 27 remaining tax treaties can be categorised as follows:

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

*These 24 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, and the treaty with Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.

**This treaty is the treaty with the former USSR that Germany continues to apply to Moldova.

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

- The relevant tax treaty does not include a non-discrimination provision and only applies to residents of one of the states (three treaties).
- The non-discrimination provision only concerns the taxation of permanent establishments, which are not considered residents for treaty purposes (one treaty).
- The non-discrimination provision of the relevant tax treaty only covers nationals that are resident of one of the contracting states, following which it is logical to only allow for the submission of MAP requests to the state of which the taxpayer is a resident (19 treaties).

28. The non-discrimination provision in the remaining treaty is almost identical to Article 24(1) of the OECD Model Tax Convention and applies to both nationals that are resident of one of the contracting states as to nationals that are not. The omission of the full text of Article 25(1), first sentence, of the OECD Model Tax Convention is therefore not clarified by the absence or a limited scope of the non-discrimination article, following which this treaty is considered not to be in line with this part of element B.1.

29. Further to the above, the three treaties separately mentioned in the second, third and fourth row of the table are also not considered to have the full equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention, as they are not granted the specific right to request for MAP, or limit access to MAP to cases of “double taxation” instead of “taxation not in accordance with the provisions of the convention”.

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

30. Out of Germany's 93 tax treaties, 66 contain a provision equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention allowing taxpayers to submit a MAP request within a period of three years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty.¹

31. The remaining 27 treaties that do not contain such provision can be categorised as follows:

Provision	Number of tax treaties
No filing period for a MAP request*	19
Filing period less than 3 years for a MAP request (two years)	7
Filing period longer than 3 years for a MAP request (four years)	1

*These 19 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, and the treaty with former USSR that Germany continues to apply to Moldova.

Peer input

32. Several peers reported that the provisions of their tax treaty with Germany meets all of the requirements of element B.1, which also includes one treaty that was above-identified as not meeting these requirements. One peer thereby mentioned that its treaty with Germany is regarding the timeline for submission of MAP requests less demanding than Article 25(1), second sentence, of the OECD Model Tax Convention, as it does not include a period for such submission. Another peer reported it recently negotiated a new treaty with Germany, which includes a provision as is required under element B.1. Furthermore, two peers, for whom their treaty with Germany is identified as not having the full equivalent of Article 25(1) of the OECD Model Tax Convention noted that they currently are negotiating a new treaty with Germany that will be in line with the requirements under element B.1. Other peers reported that their treaty with Germany is not fully in line with these requirements, but that they envisage updating their treaties via the Multilateral Instrument so as to be in line with element B.1. Of these peers, one mentioned that its treaty with Germany does not allow for the submission of a MAP request to the state of nationality in case of the application of the non-discrimination clause and that it does not include a filing deadline. Furthermore, one peer specifically mentioned that where such modification via this instrument is not possible, it will discuss updating the treaty with Germany bilaterally.

Practical application

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

33. As noted in paragraph 32 above, in all but one of Germany's tax treaties taxpayers can file a MAP request irrespective of domestic remedies. In this respect, Germany reported that access to MAP is available regardless of whether for the relevant case under review domestic available remedies have or have not been exhausted. Furthermore, Germany reported that its competent authority is, pursuant to section 175a of the Fiscal Code, allowed to deviate from court decisions in order to implement a MAP agreement or the outcome of an arbitration procedure.

34. Sections 2.15 of Germany's MAP guidance specifically confirms that the fact that domestic remedies under either Germany's domestic law or that of the treaty partner have

been exhausted will not obstruct taxpayers from access to the MAP process. It is there also noted that, unlike in Germany, domestic law of treaty partners may not permit the implementation of a MAP agreement that deviates from decisions of domestic courts. Furthermore, section 13.1.4 of Germany's MAP guidance stipulates, specifically in relation to the EU Arbitration Convention, that there is no restriction under its domestic law for competent authorities to deviate from a court decision in an arbitration procedure.

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

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

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

37. Germany responded that the consequence of this ruling in relation to the intended update of Germany's MAP guidance is currently under review and that the relevant tax treaty is under negotiation to be in line with element B.1.

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

Recent developments

Bilateral modifications

39. Germany signed a new treaty with a treaty partner on the replacement of an existing treaty current in force. The new treaty contains a provision that is equivalent to Article 25(1), first and second sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, while the treaty currently in force did not include the second sentence. Germany ratified this new treaty already and is awaiting ratification from the treaty partner. The effect of this newly signed treaty has been reflected in the analysis above where it has relevance.

Multilateral Instrument

40. Germany signed the Multilateral Instrument and is currently preparing the ratification of this instrument, which is now foreseen for 2020.

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

41. Article 16(4)(a)(i) of that instrument stipulates that Article 16(1), first sentence – containing the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report and allowing the submission of MAP requests to the competent authority of either contracting state – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this tax treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified the depositary, pursuant to Article 16(6)(a), that this treaty contains the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report. Article 16(4)(a)(i) will not take effect for a tax treaty if one of the treaty partners has, pursuant to Article 16(5)(a), reserved the right not to apply the first sentence of Article 16(1) of that instrument to all of its covered tax agreements.

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

43. In view of the above, following the reservation made by Germany, those four tax treaties identified in paragraphs 34-35 above that are considered not containing the

equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, will not be modified via the Multilateral Instrument with a view to allow taxpayers to submit a MAP request to the competent authority of either contracting state.

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

44. With respect to the period of filing of a MAP request, Article 16(4)(a)(ii) of the Multilateral Instrument stipulates that Article 16(1), second sentence – containing the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention – will apply where such period is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of a tax treaty. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(b)(i), the depositary that this treaty does not contain the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention.

45. In regard of the seven tax treaties identified in paragraph 37 above that contain a filing period for MAP requests of less than three years, Germany listed one as a covered tax agreement under the Multilateral Instrument and made, pursuant to Article 16(6)(b)(i), a notification that it does not contain a provision described in Article 16(4)(a)(ii). The relevant treaty partner is a signatory to the Multilateral Instrument, listed their tax treaty with Germany under that instrument and also made such a notification. Therefore, at this stage, the Multilateral Instrument will, upon entry into force for this treaty, modify one of the seven treaties to include the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention.

Other developments

46. As is described in the Introduction, for those treaties that are not in line with this element of the Action 14 Minimum Standard and will not be modified by the Multilateral Instrument, Germany is either already in negotiations with the relevant treaty partners or such negotiations are envisaged or planned with a view to bring them in line with the Action 14 Minimum Standard. Concerning the treaties identified above that do not contain a provision equivalent to Article 25(1), first and/or second sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, Germany reported the following:

- For the three treaties that are considered not to contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention, negotiations on the replacement of the treaty currently in force is ongoing for one treaty partner, while with another partner is envisaged or planned. In these negotiations, Germany strives at including the first sentence of Article 25(1) of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report.
- For the five treaties that do not contain a filing period of at least three years for MAP requests, negotiations on the replacement of the treaty currently in force have been completed in 2018 for one treaty, while for two other treaties such negotiations are pending and for the remaining two negotiations are envisaged or planned to include the second sentence of Article 25(1) of the OECD Model Tax Convention.
- For the one treaty that is considered not to contain the equivalent of Article 25(1), first and second sentence, of the OECD Model Tax Convention, negotiations on the

replacement of the treaty currently in force have been completed in 2018. The new treaty will contain Article 25(1), first and second sentence as it read prior to the adoption of the Action 14 final report.

Peer input

47. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with Germany. Six of these peers mentioned that their treaty with Germany is in line with the requirements under the Action 14 Minimum Standard, which also regards element B.1 and which conforms with the above analysis. Of the treaties that are considered not to be in line with the requirements under element B.1, only one provided input and mentioned there are no additions to the previous input given.

48. Further to the above, one peer referred to the court cases and Germany's clarification given, discussed in paragraphs 42-43 above, and mentioned it looked forward to learn about the outcomes of the review. In this respect, Germany mentioned that the issue has been on the agenda of a November 2018 meeting between representatives in charge of international taxation at the level of the German Federal Ministry of Finance and the 16 German Länder. The outcome is that the issue will be further looked at again, such in connection with the comprehensive review of Germany's MAP guidance that is foreseen in 2019.

Anticipated modifications

49. For the one treaty that is not in line with all requirements under element B.1 and will not be modified by the Multilateral Instrument, bilateral negotiations are envisaged in the medium-term. This treaty, however, concerns the 1980 treaty with the former USSR that Germany continues to apply to Moldova and for which such renegotiations are not necessary. Regardless, Germany reported it will seek to include Article 25(1) of the OECD Model Tax Convention, either as it read prior to the adoption of the final report on Action 14 or as amended by that report, in all of its future tax treaties.

Conclusion

	Areas for improvement	Recommendations
[B.1]	<p>Three out of 93 tax treaties do not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention. None of these three treaties will be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report. With respect to these three treaties,</p> <ul style="list-style-type: none"> Two treaties are included in the list of treaties for which negotiations are envisaged, scheduled or pending. For the remaining treaty no actions have been taken nor are any actions planned to be taken, but is included in the plan for renegotiations. 	<p>For two of the three treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention, as it read as amended in the Action 14 final report, Germany should initiate or continue such negotiations with respect to the two treaty partners to include the required provision.</p> <p>In both instances this concerns a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention either:</p> <ul style="list-style-type: none"> as amended in the Action 14 final report; or as it read prior to the adoption of the Action 14 final report, thereby including the full sentence of such provision. <p>Specifically with respect to the treaty with the former USSR that Germany continues to apply to Moldova, Germany should ensure that, once it enters into negotiations with this jurisdiction in accordance with its plan for renegotiations, it includes the required provision.</p>

	Areas for improvement	Recommendations
[B.1]	<p>Six out of 93 tax treaties do not contain a provision that is equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention, as the timeline to file a MAP request is in these treaties shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. Of these six treaties:</p> <ul style="list-style-type: none"> • One is expected to be modified by the Multilateral Instrument to include Article 25(1), second sentence, of the OECD Model Tax Convention. • For one negotiations on the replacement of the existing treaty currently in force have been completed, which includes Article 25(1), second sentence, of the OECD Model Tax Convention. • Four are included in the list of treaties for which negotiations are envisaged, scheduled or pending. 	<p>Germany should as quickly as possible complete the ratification process for the Multilateral Instrument to incorporate the equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention in the one treaty that currently does not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaty concerned.</p> <p>Furthermore, for one of the remaining five treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, Germany should as quickly as possible sign and ratify the new treaty to have in place the required provision.</p> <p>For the remaining four treaties that also will not be modified by the Multilateral Instrument to include such equivalent, Germany should initiate or continue such negotiations with respect to the treaty partner to include the required provision.</p>
	<p>One out of 93 tax treaties does not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to or as amended by the Action 14 final report, and provide that the timeline to file a MAP request is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. This treaty will not be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report and a three year filing period for MAP request. For this treaty negotiations on the replacement of the existing treaty currently in force have been completed and include the required provisions.</p>	<p>For this treaty that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first and second sentence, of the OECD Model Tax Convention, Germany should as quickly as possible sign and ratify the new treaty to have in place the required provisions.</p>

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

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

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

- i. of either treaty partner; or in the absence of such provision,
- ii. where it is a resident, or to the competent authority of the state of which they are a national if their cases come under the non-discrimination article. In such cases,

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

Domestic bilateral consultation or notification process in place

51. As discussed under element B.1, out of Germany's 93 treaties, one treaty contains a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as changed by the Action 14 final report, allowing taxpayers to submit a MAP request to the competent authority of either treaty partner. In addition, as was also discussed under element B.1, none of these other 92 tax treaties will, following Germany's reservation according to Article 16(5)(a) of the Multilateral Instrument, be modified by that instrument to allow taxpayers to submit a MAP request to the competent authority of either treaty partner.

52. Germany reported that when its competent authority preliminary concludes that in the case for which a MAP request was submitted there is no taxation not in accordance with the provision(s) of the applicable tax treaty, it will inform the taxpayer hereof and explain the rationale for this preliminary conclusion. Germany explained that this way of hearing taxpayers was already practice prior to 2016, thus before adoption of the Action 14 Minimum Standard. Germany further explained that its competent authority will subsequently invite the taxpayer to reconsider the request or otherwise to provide any additional information that might have been overlooked. If the final conclusion is that the objection raised by the taxpayer in its MAP request is indeed not justified, then Germany's competent authority will issue a notice of rejection to taxpayers, which includes information on the possibility of an administrative appeal to this decision.

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

Recent developments

54. Germany reported that in 2017 its competent authority provided instructions to case handlers on how to proceed when they arrive at the preliminary conclusion that an objection raised by the taxpayer in its MAP request is considered not justified. In this respect, Germany clarified that in order to ensure that the instructions are followed, rejections of MAP request have to be signed by at least a Deputy Head of Division within the competent authority.

Practical application

Period 1 January 2015-31 March 2017 (stage 1)

55. Germany reported that in the period 1 January 2015-31 March 2017 its competent authority considered in eight cases that the objection raised by taxpayers in their MAP requests was not justified. This concerns six cases in 2015 and two cases in 2016. For the six cases in 2015, Germany provided the following reasons for the consideration objection not justified: (i) the taxation concerned was not covered by the relevant tax treaty (two cases); (ii) failure to meet the time limit in the tax treaty for refunding of withholding taxes (one case), and (iii) other situations of no taxation not in accordance with the tax treaty (three cases), for which further details were provided. For the two cases in 2016, Germany reported that it considered that there was no taxation not in accordance with the tax treaty, for which further details were provided. In one of these two cases it notified/consulted the other competent authority concerned, as for the other case the decision on the objection not justified was already made prior to the introduction of the notification system in 2016. The 2016 MAP statistics submitted by Germany show that three of its MAP cases were closed with the outcome “objection not justified”, which includes the two cases discussed above. In the third case it was the competent authority of the treaty partner that made the decision.

56. Peers have indicated not being aware of any cases for which Germany’s competent authority denied access to MAP. They also reported not having been consulted/notified of a case where Germany’s competent authority in 2016 considered the objection raised in a MAP request as not justified. This for the one case mentioned above can be clarified by the fact that it concerned a notification/consultation to the competent authority of a jurisdiction that did not provide peer input. Furthermore, one peer reported one case for which both the Germany’s and its own competent authority agreed to close the case in 2017, because the taxpayer provided differing and conflicting information to the competent authorities.

Period 1 April 2017-30 September 2018 (stage 2)

57. Germany reported that in the full year 2017 it has considered in two cases that the objection raised by taxpayers in their MAP requests was not justified, both of which concerned pre-2016 cases. Germany further reported that in both cases the other competent authority concerned were notified/consulted before the case was closed with the outcome “objection not justified”. Germany also provided for a reasoning its competent authority arrived at this conclusion, which are: (i) the complaint that source taxation was not fully credited in the resident state, was not considered justified as both the source taxation and the credit were in accordance with the terms of the treaty and, for the other case, (ii) the taxpayer could not substantiate his claim that there was source taxation on income received. The 2017 MAP statistics submitted by Germany show that 16 of its MAP cases were closed with the outcome “objection not justified”, for which Germany clarified that in two cases the decision hereto was made by its competent authority and in 14 cases by the competent authority of its treaty partners.

58. For the period 1 January 2018-30 September 2018, Germany reported that also in two cases it has considered that the objection raised by taxpayers in their MAP requests was not justified, both of which concerned post-2015 cases. Also for these cases, the other competent authority concerned were notified/consulted before the case was closed with the outcome “objection not justified”. The reason its competent authority arrived at this conclusion were that: (i) the taxation of one part of the income in in one of the contracting states and another part of the income in the other contracting state was in accordance with

the terms of the treaty and, in the other case, (ii) the taxpayer should apply for a refund of source taxation at the level of the treaty partner as prescribed in the treaty before pursuing a MAP. The taxpayer, however, refused to do so.

59. Almost all of the peers that provided input during stage 1 also indicated that since 1 April 2017 they are not being aware of any cases for which Germany's competent authority considered the objection raised in a MAP request as not justified. Concerning the four cases mentioned above where Germany's competent authority in either 2017 or 2018 arrived at such a conclusion, the relevant peers mentioned they were notified. Furthermore, one of these four peers mentioned that it was consulted by Germany's competent authority in two cases instead of one. In a response Germany mentioned that the consultation was initiated before 30 September 2018, but that the case was not yet closed because the taxpayer concerned on that date had not yet had the opportunity to present its views on the intended closing of the case.

60. Further to the above, one peer, who is not among the four peers mentioned above, mentioned that it was notified by Germany in one pre-2016 case for which Germany's competent authority considered the objection raised in a MAP request as not justified. Germany confirmed this notification, but stated that the case was closed with the outcome "objection not justified" in the second half of 2018 and had not yet been registered as such by 30 September 2018. Lastly, another peer mentioned that it has received a notification of Germany's competent authority for one case in which the taxpayer did not include in its MAP request the required information, but that according to its knowledge such information was eventually submitted upon which the case was accepted into the MAP process.

Anticipated modifications

61. Germany did not indicate that it anticipates any modifications in relation to element B.2.

Conclusion

	Areas for improvement	Recommendations
[B.2]	-	-

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

Jurisdictions should provide access to MAP in transfer pricing cases.

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

Legal and administrative framework

63. Out of Germany's 93 tax treaties, 50 contain a provision that is the equivalent of Article 9(2) of the OECD Model Tax Convention, requiring their state to make a correlative adjustment in case a transfer pricing adjustment is imposed by the other treaty partner.³

Furthermore, 40 tax treaties do not contain a provision that is based on or equivalent to Article 9(2) of the OECD Model Tax Convention.⁴ The remaining three treaties include a provision that is based on Article 9(2), but whereby the granting of a corresponding adjustment is only allowed through the mutual agreement procedure and for that reason are not considered to be equivalent thereto.

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

65. Access to MAP should be provided in transfer pricing cases regardless of whether the equivalent of Article 9(2) is included in Germany's tax treaties and irrespective of whether its domestic legislation enables it to do corresponding adjustments. In accordance with element B.3, as translated from the Action 14 Minimum Standard, Germany indicated that it will always provide access to MAP for transfer pricing cases, provided that the general requirements under the MAP article of the applicable tax treaty are met.

66. Paragraph 2.3.2 of Germany's MAP guidance includes examples of situations where there can be taxation not in accordance with the provisions of a tax treaty, which also include transfer pricing adjustments. Paragraph 2.3.2 specifically addresses that access to MAP is available for transfer pricing cases even in the absence of specific provisions in the applicable tax treaty.

Recent developments

Bilateral modifications

67. Germany signed a new treaty with a treaty partner on the replacement of an existing treaty current in force. Both the new and the current treaty contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention. Germany ratified this new treaty already and is awaiting ratification from the treaty partner.

Multilateral Instrument

68. Germany signed the Multilateral Instrument and is currently preparing the ratification of this instrument, which is now foreseen for 2020.

69. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the OECD Model Tax Convention – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 9(2) of the OECD Model Tax Convention. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument. Article 17(2) of the Multilateral Instrument does not take effect for a tax treaty if one or both of the treaty partners have, pursuant to Article 17(3), reserved the right not to apply Article 17(2) for those tax treaties that already contain the equivalent of Article 9(2) of the OECD Model Tax Convention, or not to apply Article 17(2) in the absence of such equivalent under the condition that: (i) it shall make appropriate corresponding adjustments or (ii) its competent authority shall endeavour to resolve the case under mutual agreement procedure of the applicable tax treaty. Where neither treaty partner has made such a reservation, Article 17(4) of the Multilateral Instrument stipulates that both have to notify the depositary whether the applicable treaty already contains a provision equivalent to Article 9(2) of the OECD Model Tax Convention. Where such a

notification is made by both of them, the Multilateral Instrument will modify this treaty to replace that provision. If neither or only one treaty partner made this notification, Article 17(1) of the Multilateral Instrument will supersede this treaty only to the extent that the provision contained in that treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1) (containing the equivalent of Article 9(2) of the OECD Model Tax Convention).

70. In regard of the 43 tax treaties identified in paragraph 69 above that are considered not to contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention, Germany listed seven as a covered tax agreement under the Multilateral Instrument. For one of these seven treaties, Germany has reserved, pursuant to Article 17(3), the right not to apply Article 17(2) of the Multilateral Instrument for those treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention. For one of the remaining six treaties Germany made a notification on the basis of Article 17(4).

71. All six treaties are a signatory to the Multilateral Instrument and listed their treaty with Germany as a covered tax agreement under that instrument, but one has, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as it considered that its treaty with Germany already contains the equivalent of Article 9(2). For the remaining five treaties, one treaty partner made for the treaty with Germany a notification on the basis of Article 17(4), which is the same treaty as the one for which Germany made such a notification. Therefore, this treaty will, upon its entry into force of the Multilateral Instrument for this treaty, be modified by the Multilateral Instrument to include the equivalent of Article 9(2) of the OECD Model Tax Convention. The remaining four treaties will, upon the entry into force of the Multilateral Instrument for these treaties, be superseded by the Multilateral Instrument to include the equivalent of Article 9(2) of the OECD Model Tax Convention, but only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

Other developments

72. Regarding those treaties for which the equivalent of Article 9(2) of the OECD Model Convention is not included and that will not be modified or superseded by the Multilateral Instrument, Germany reported that in 2018 it finalised negotiations on the replacement of the existing treaty currently in force with two treaty partners and signed an amending protocol to two existing treaties, which all include Article 9(2) of the OECD Model Tax Convention.

Practical application

Period 1 January 2015-31 March 2017 (stage 1)

73. Germany reported that it has in the period 1 January 2015-31 March 2017 not denied access to MAP on the basis that the case concerned was a transfer pricing case.

74. All peers that provided input indicated not being aware of a denial of access to MAP by Germany in the period 1 January 2015-31 March 2017 on the basis that the case concerned was a transfer pricing case. Also taxpayers reported not being aware of such denial. One peer mentioned that there is a hurdle in discussing transfer pricing cases in MAP with Germany due to the fact that its treaty with Germany does not include the equivalent of Article 9(2) of the OECD Model Tax Convention. This, however, is not caused because Germany does not grant or is not willing to grant access to MAP for these cases,

but this follows from the position of the peer. This peer also mentioned it is negotiating amendments to the treaty with Germany and that the issue could be satisfactorily resolved when the Multilateral Instrument is signed. The analysis above, however, leads to the conclusion that the treaty with this peer will not be modified by the Multilateral Instrument to include Article 9(2) of the OECD Model Tax Convention.

Period 1 April 2017-30 September 2018 (stage 2)

75. Germany reported that since 1 April 2017 it has also not denied access to MAP on the basis that the case concerned was a transfer pricing case. While for two transfer pricing cases, access to MAP was denied, this was due to the fact that the MAP requests were not filed within the three-year filing period included in the respective tax treaties.

76. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given. In addition, one peer mentioned that Germany granted access to all transfer pricing cases involving this peer.

Anticipated modifications

77. Germany reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention in its tax treaties where possible. In addition, Germany indicated that it will seek to include Article 9(2) of the OECD Model Tax Convention in all of its future tax treaties.

Conclusion

	Areas for improvement	Recommendations
[B.3]	-	-

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

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

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

Legal and administrative framework

79. None of Germany's 93 tax treaties allows competent authorities to restrict access to MAP for cases when a treaty anti-abuse provision applies or when there is a disagreement between the taxpayer and the tax authorities as to whether the application of a domestic

law anti-abuse provision is in conflict with the provisions of a tax treaty. In addition, also the domestic law and/or administrative processes of Germany do not include a provision allowing its competent authority to limit access to the MAP for cases in which there is a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty.

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

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

81. This provision, or a variation thereto, has been included in 37 of Germany's 93 tax treaties. Irrespective of whether this provision is included in tax treaties, Germany reported that it considers issues relating to the application of a treaty anti-abuse provision and the question whether the application of a domestic anti-abuse provision is in conflict with the provision of a tax treaty within the scope of MAP, provided that the general requirements under the MAP article of the applicable tax treaty are met. This policy, however, is not addressed in Germany's MAP guidance.

Recent developments

82. There are no recent developments with respect to element B.4.

Practical application

Period 1 January 2015-31 March 2017 (stage 1)

83. Germany reported that in the period 1 January 2015-31 March 2017 it did not deny access to MAP in cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic law anti-abuse provision is conflict with the provisions of a tax treaty. To this Germany added that it does not systematically screen whether a MAP request relates to the application of a domestic or treaty anti-abuse provision, but confirmed that none of the cases where its competent authority denied access to the MAP process or considered that the objection raised by taxpayers is not justified, was rejected on the basis that the case would regard the application of a domestic or treaty anti-abuse provision.

84. All peers that provided input indicated not being aware of a denial of access to MAP by Germany in relation to the application of treaty and/or domestic anti-abuse provisions in the period 1 January 2015-31 March 2017. Also taxpayers reported not being aware of such denial.

Period 1 April 2017-30 September 2018 (stage 2)

85. Germany reported that since 1 April 2017 it has also not denied access to MAP in cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic law anti-abuse provision is conflict with the provisions of a tax treaty. Like for the period up to 1 April 2017, Germany mentioned that it does not systematically screen whether a MAP request relates to the application of a domestic or treaty anti-abuse provision, but confirmed that in none of the cases where its competent authority denied access to the MAP process or considered that the objection raised by taxpayers is not justified, the rejection was on the basis that the case would regard the application of a domestic or treaty anti-abuse provision.

86. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.4]	-	-

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

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

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

*Legal and administrative framework**Audit settlements*

89. Germany reported that under its domestic law there is no formal audit settlement process available. In other words, there is no process in existence that allows auditors and taxpayers to enter into settlements during the course or after and audit has been completed. Germany also reported that it is nevertheless possible that taxpayers and auditors of the concerned tax administration of the Länder agree on the findings of the audit. Germany clarified that such agreements, however, will generally not be binding on taxpayers and that

they retain the right to file at a later stage an objection against the tax assessment notice that implements the outcome of the audit process.

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

Waiver of rights to request MAP assistance

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

92. When taxpayers declared such waiver, Germany reported that it will not grant access to MAP. However, as such waiver is only one-sided, it may, for example, occur that in transfer pricing cases the associated enterprise resident in the other treaty jurisdiction submits a MAP request. Paragraph 5 of Germany's MAP guidance, as it read prior to the update in April 2017, stipulated that in such situation and where both the German and the foreign associated enterprise waived their right on MAP, Germany will not consent to conduct a mutual agreement procedure.⁶

93. In relation hereto, Germany noted that element B.5 only requires that audit settlements should not preclude access to MAP, and that as explicit waivers by taxpayers are not audit settlements, the practice described in the MAP guidance as it read prior to the update in April 2017 was in line with element B.5. However, it also reported that the Federal Ministry of Finance is aware that some may consider that this practice is not in line with the spirit of the Action 14 Minimum Standard. In that regard Germany reported that during a meeting in March 2017 between the representatives from the Federal Ministry of Finance in charge of international tax matters and the representatives from ministries of Finance of the sixteen Länder it was decided to revise paragraph 5 of Germany's MAP guidance (which is discussed separately under element B.8 and in relation to audit settlements under element B.10). This revised version was published on 5 April 2017 and does no longer include a reference on waiver of rights on requesting MAP assistance. Instead it is stated that access to MAP (and arbitration) is a right for taxpayers that is enshrined in German law, which may not obstructed by tax administrations.⁷ In the meanwhile, the April 2017 update mentioned above has been incorporated into the 2018 MAP guidance.⁸

Agreement on facts

94. Germany further reported that it has an instrument in place, which was developed in case law and which is confirmed in Germany's administrative practice. This instrument allows formal agreements between taxpayers and the local tax administration on the facts of a case. The circumstances under which such agreements are possible, as also the consequences of entering into such agreements, are laid down in a circular of Germany's Federal Ministry of Finance of 30 July 2008 (BStBl I 2008, 831).⁹ In paragraph 2.3 of this circular it is noted that an agreement on facts is permissible within the context of a legal

ruling to the extent that it is necessary to decide on a preliminary question concerning facts. This instrument can be used both in audit situations as well as in other situations (such as in the course of an administrative appeals procedure) for reaching an agreement on facts where establishing the detailed facts of the case would require disproportionate efforts.¹⁰

95. Once an agreement has been reached, it has, pursuant to paragraph 5.3 of the circular, to be signed by the tax official in charge of the taxpayer's tax assessment before it becomes effective. This tax official is not the same person as the auditor. In that regard Germany reported that in many cases, particularly those concerning large taxpayers, the tax official is not part of the same local tax administration office. Taxpayers and the local tax administration office are both bound by an agreement on facts, which is also set out in paragraph 1 and 6.1 of the circular of 30 July 2008 as mentioned above.¹¹

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

Administrative or statutory dispute settlement/resolution process

97. Germany reported that it does not have an administrative or statutory dispute settlement/resolution process in place that allows its competent authority to deny access to MAP for issues resolved through that process.

Recent developments

98. There are no recent developments with respect to element B.5.

Practical application

Period 1 January 2015-31 March 2017 (stage 1)

99. Germany reported that in the period 1 January 2015-31 March 2017 it had not received any MAP requests where the taxpayer had waived its right to request MAP assistance in the context of an agreement on facts or any other agreement with the findings of an audit. Germany indicated that waivers have occurred in the context of audits in Germany, but that the Federal Central Tax Office is not aware of the actual number of explicit waivers of the right to request MAP assistance that have occurred in the context of audits, as audits are generally a matter with state tax administrations. It further reported that it did not

deny access to MAP for cases where the issue presented by the taxpayer has already been resolved through an audit settlement between the taxpayer and the local tax administration.

100. To this Germany added that it does not systematically screen whether a MAP request relates to cases where the taxpayer had waived its right to request MAP assistance or entered into an agreement on facts or agreed with the findings of an audit, but confirmed that in none of the cases where its competent authority denied access to the MAP process or considered that the objection raised by taxpayers is not justified, was rejected on the basis that the taxpayer had waived its right to request MAP assistance or entered into an agreement on facts or in any other way agreed with the findings of an audit. All peers that provided input generally indicated that they were not aware of a denial of access to MAP by Germany in the period 1 January 2015-31 March 2017 in case where there was already an agreement on facts between the taxpayer and the local tax administration. Also taxpayers reported not being aware of such denial.

101. Some peers, however, also noted that taxpayers are in Germany offered settlements in the course of an audit under the condition that they waive their rights on MAP. In this respect, one peer indicated that it has seen examples where the German tax administration proposed an audit settlement entailing taxpayers that they accept a given (part of the) transfer pricing adjustment and waive their right to submit a MAP request for the case under review. Another peer reported being informed of a number of cases that longstanding practice at the level of local tax administrations in Germany to propose audit settlements under the condition that taxpayers waive their rights on MAP continued throughout 2016. In these cases the peer's competent authority was asked to grant unilateral relief whereby the taxpayer already entered into a settlement agreement with the German local tax administration. This peer also reported that it has discussed the practice of the local tax administrations with the Germany's competent authority, which informed the peer that such settlement proposals are not valid and that this was also communicated to the relevant audit teams. This peer, however, acknowledged that, from its perspective, Germany's competent authority had no power to compel local auditors to desist from such practices. Furthermore, a third peer noted having encountered one situation where a taxpayer had claimed that Germany had discouraged access to MAP. This concerned a case where the local tax administration in Germany proposed an agreement with the unwritten condition that the taxpayer would not seek MAP assistance.

102. Germany responded to this input and stated that if such a situation (i.e. auditors offering a reduced adjustment if a taxpayer waives its right to MAP) should occur, such auditor behaviour would in its view be inappropriate and is not suggested in or endorsed by any of Germany's official guidance. Germany added to this respect that taxpayers experiencing such behaviour have the opportunity to complain to the auditor's superiors, such as to the head of the relevant local tax administration, to the relevant regional tax office or to the highest tax authority of the relevant Land (generally the State Ministry of Finance). In case of federal auditors, such complaint could be lodged with the relevant superiors in the Federal Central Tax Office (up to the head of that office), or to the Federal Ministry of Finance. To this Germany added that the same applies where auditors inappropriately suggest reduced adjustments in exchange for a waiver of the right to domestic appeals, be it in treaty matters or any other tax matter. Germany further clarified that in cases of wilful deceit or illegal threat (i.e. where a tax official tricked or threatened a taxpayer into a waiver) a waiver is ineffective. Furthermore, Germany stated that the Federal authorities know only of a very limited number of situations in which taxpayers (or other jurisdiction's competent authorities, based on information that they received from taxpayers) reported such auditor behaviour.

Period 1 April 2017-30 September 2018 (stage 2)

103. Germany reported that since 1 April 2017 it has also not denied access to MAP on the basis that there was already an agreement on facts between the taxpayer and the local tax administration or where the taxpayer had waived its right to request MAP assistance or agreed with the findings of an audit. Like for the period up to 1 April 2017, Germany mentioned that it does not systematically screen whether a MAP request relates to cases where the taxpayer had waived its right to request MAP assistance or entered into an agreement on facts or agreed with the findings of an audit, but confirmed that none of the cases where its competent authority denied access to the MAP process or considered that the objection raised by taxpayers is not justified, concerned a case where the taxpayer had waived its right to request MAP assistance, and that there was no rejection based on the reasoning that the taxpayer had entered into an agreement on facts or agreed with the findings of an audit.

104. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given. One peer added that it has been notified by Germany's competent authority of a case where there is an agreement on facts between the taxpayer and the local tax administration. For this case, the peer mentioned that in its notification Germany's competent authority has stated that they are clarifying the impact of the agreement on the MAP process, but also that the case has been accepted into the process.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.5]	-	-

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

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

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

Legal framework on access to MAP and information to be submitted

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

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

109. Where a taxpayer eventually does not provide the required information, even after being requested so, Germany reported its competent authority may decide to close the case with the outcome “objection not justified”. Germany also reported that a final denial on access to MAP on the basis that taxpayers have not complied with the information and documentation requirements for MAP requests is very exceptional.

Recent developments

110. There are no recent developments with respect to element B.6.

Practical application

Period 1 January 2015-31 March 2017 (stage 1)

111. According to Germany it provides access to MAP in all cases where taxpayers have complied with the information or documentation required requirements as set out in its MAP guidance. In this respect, Germany reported that in the period 1 January 2015-31 March 2017 its competent authority has for this reason limited access to MAP only in one case. In this case the taxpayer claimed to have a place of management in the other jurisdiction concerned and paid tax accordingly, but could neither establish any relevant facts sustaining this claim nor could it show proof of tax assessment or tax payment. Germany’s competent authority requested the taxpayer at multiple occasions to provide evidence sustaining its claim, which it did not do. Eventually, Germany’s competent authority denied access to MAP for this specific case.

112. All peers that provided input have generally indicated not being aware of a limitation of access to MAP by Germany in the period 1 January 2015-31 March 2017 in situations where taxpayers complied with information and documentation requirements set out in its MAP guidance.

Period 1 April 2017-30 September 2018 (stage 2)

113. Germany reported that since 1 April 2017 it has also not limited access to MAP on the grounds that information in the MAP request was not the information or documentation required by its competent authority.

114. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.6]	-	-

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

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

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

Current situation of the Germany's tax treaties

117. Out of Germany's 93 tax treaties, 87 contain a provision equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention allowing their competent authorities to consult together for the elimination of double taxation in cases not provided for in their tax treaties.¹² The remaining six treaties do not contain a provision that is based on, or equivalent to, Article 25(3), second sentence, of the OECD Model Tax Convention.

118. One of these six treaties has a limited scope of application.¹³ This concerns a tax treaty that only applies to a certain category of income or a certain category of taxpayers, whereby the structure and articles of the OECD Model Tax Convention are not followed. As these treaties were intentionally negotiated with a limited scope, the inclusion of Article 25(3), second sentence, of the OECD Model Tax Convention would contradict the object and purpose of those treaties and such inclusion would also be inappropriate, as it would allow competent authorities the possibility to consult in cases that have intentionally been excluded from the scope of a tax treaty. For this reason, therefore, there is a justification not to contain Article 25(3), second sentence, of the OECD Model Tax Convention for this treaty.

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

Recent developments

Bilateral modifications

120. Germany signed a new treaty with a treaty partner on the replacement of an existing treaty current in force. Both the new and the current treaty contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. Germany ratified this new treaty already and is awaiting ratification from the treaty partner.

Multilateral Instrument

121. Germany signed the Multilateral Instrument and is currently preparing the ratification of this instrument, which is currently foreseen for 2020.

122. Article 16(4)(c)(ii) of that instrument stipulates that Article 16(3), second sentence – containing the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. In other words, in the absence of this equivalent, Article 16(4)(c)(ii) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(d)(ii), the depositary that this treaty does not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention.

123. In regard of the five comprehensive tax treaties identified above that are considered not to contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, Germany listed two as a covered tax agreement under the Multilateral Instrument and made, pursuant to Article 16(6)(d)(ii), for all of them a notification that they do not contain a provision described in Article 16(4)(c)(ii). The relevant treaty partners are a signatory to the Multilateral Instrument, listed their treaty with Germany as a covered tax agreement and also made a notification pursuant to Article 16(6)(d)(ii). Therefore, at this stage, the Multilateral Instrument will, upon entry into force for these treaties, modify them to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention.

Other developments

124. As is described in the Introduction, for those treaties that are not in line with this element of the Action 14 Minimum Standard and will not be modified by the Multilateral Instrument, Germany is either already in negotiations with the relevant treaty partners or such negotiations are envisaged or planned with a view to bring them in line with the Action 14 Minimum Standard. Concerning the comprehensive treaties identified above that do not contain a provision equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention, for two negotiations on the replacement of the existing treaty already have been completed and includes this equivalent and one is currently being renegotiated *inter alia* to include such equivalent.

Peer input

125. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with Germany. Six of these peers mentioned that their treaty with Germany is in line with the requirements under the Action 14 Minimum Standard, which

also regards element B.7 and which conforms with the above analysis. Of the six treaties that are considered not to be in line with the requirements under element B.7, three did not provide input, while the other three mentioned there are no additions to the previous input given (two of them mentioning that they were in negotiations with Germany as reflected in paragraph 125).

Anticipated modifications

126. Germany reported it will seek to include Article 25(3), second sentence, of the OECD Model Tax Convention in all of its future tax treaties.

Conclusion

	Areas for improvement	Recommendations
[B.7]	<p>Six out of 93 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. Of these six treaties, one treaty has a limited scope of application. With respect to the five remaining comprehensive treaties:</p> <ul style="list-style-type: none"> Two are expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. Three treaties will not be modified by the Multilateral Instrument to include the required provision. With respect to these three treaties: <ul style="list-style-type: none"> For two negotiations on the replacement of the existing treaty currently in force have been completed, which include the required provision. For one negotiations is envisaged, scheduled or pending 	<p>Germany should as quickly as possible complete the ratification process for the Multilateral Instrument, to incorporate the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention in the two treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaty concerned.</p> <p>For the remaining three comprehensive treaties that will not be amended by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, Germany should:</p> <ul style="list-style-type: none"> continue such negotiations to include the required provision for the treaty for which such negotiations are envisaged, scheduled or pending as quickly as possible sign and ratify the new treaties to have in place the required provision.

[B.8] Publish clear and comprehensive MAP guidance

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

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

Germany's MAP guidance

128. Germany's rules, guidelines and procedures relating to the MAP function are included in the circular of the Federal Ministry of Finance (BStBl I 2006, 461) of 13 July 2006 ("2006 MAP guidance"), which was recently replaced by an updated circular of

9 October 2018 (BStBl I 2018, 1122; “2018 **MAP guidance**”). The current guidance in German is available at:¹⁴

https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2018-10-09-Verstaendigungsverfahren-Schiedsverfahren-Merkblatt.pdf

129. This document includes information on how taxpayers can access MAP and the availability and practical application of the MAP under the tax treaties Germany entered into. A specific section deals with the availability and practical application of the EU Arbitration Convention in Germany.

130. More specific, Germany’s MAP guidance contains information on:

Topic	Content
General	<ul style="list-style-type: none"> • General outline of the legal status and legal basis of mutual agreement and arbitration procedures • Availability of the mutual agreement procedure under tax treaties and the EU Arbitration Convention • A brief outline of the subject and purpose of MAP • Competence to handle MAP cases.
MAP under tax treaties	<ul style="list-style-type: none"> • Application for MAP by taxpayers, including the content of a MAP request, the timelines for filing of such request and the government authority to which the request should be submitted • Relationship with domestic available remedies and audit procedures • Examples of possible situations of taxation not in accordance with the provisions of tax treaties • How the MAP functions in terms of timing, the role of the competent authorities and the rights and role of taxpayers • Confidentiality and exchange of information during the MAP process • The process for implementing MAP agreements, including the methods of granting relief and the right for taxpayers to accept or reject these agreements • Consequences when a MAP does not lead to an agreement to avoid taxation not in accordance with the provisions of the tax treaty • Bearing of costs during MAP by competent authorities and taxpayers.
MAP/ arbitration under the EU Arbitration Convention	<ul style="list-style-type: none"> • Application for the procedures under the EU Arbitration Convention, including the content of a request, the timelines for filing of such request and the government authority to which the request should be submitted • How the process functions in terms of timing, steps to be taken, the role of the competent authorities, and sending of position papers • The applicable legal principles for determining the correct arm’s length price • The functioning of the arbitration procedure, including the starting-point of the two-year deadline for MAP, the composition of the advisory commission, appointment of its members, procedural rules, timing and content of the commission’s opinion, and sharing of costs of the arbitration procedure • Final decision by the competent authorities.

131. The FTA MAP Forum agreed on what information should be included in a jurisdiction’s MAP guidance, which concerns: (i) contact information of the competent authority or the office in charge of MAP cases and (ii) the manner and form in which the taxpayer should submit its MAP request.¹⁵ The above-described 2018 MAP guidance of Germany includes those two requirements. Further to the above, the information included in Germany’s MAP guidance is detailed and comprehensive, especially as regards the procedural aspects of MAP. However, some subjects are not specifically discussed in this

MAP guidance. This concerns whether MAP is available in cases of: (i) the application of anti-abuse provisions, (ii) multilateral disputes and (iii) bona fide foreign-initiated self-adjustments; (iv) whether taxpayers can request for the multi-year resolution of recurring issues through MAP; (v) the possibility of suspension of tax collection during the period a MAP case is pending; and (vi) the consideration of interest and penalties in MAP.

132. Next to the MAP guidance, Germany also issued a circular on co-ordinated external audits with tax administrations of other states/jurisdictions.¹⁶ This circular includes inter alia in paragraph 5 a description of the relationship between such co-ordinated audits and MAP.

Information and documentation to be included in a MAP request

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

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

134. Further to the above, Germany has entered into mutual agreements with the Netherlands, Switzerland, the United Kingdom and the United States on what information should be included in a MAP request in order to have the two-year (or three-year) deadline for the mutual agreement procedure commence in order for cases to become eligible for arbitration under the treaties with these jurisdictions.¹⁷

135. To facilitate the review of a MAP request by competent authorities and to have more consistency in the required content of MAP requests, the FTA MAP Forum agreed on guidance that jurisdictions could use in their domestic guidance on what information and documentation taxpayers need to include in a request for MAP assistance.¹⁸ In light of this list, the requirements in Germany on what information and documentation should be included in a MAP request are checked below:

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

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

Recent developments

137. As was already reflected in Germany's stage 1 peer review report, in April 2017, a circular regarding the revision of paragraph 5 of its MAP guidance was published.¹⁹ This circular explains the current tax administration position in relation to waiver of the right to MAP or arbitration (in summary: the waiver of the right to arbitration is considered appropriate in certain narrow circumstances – so called domestic “mutual agreements on facts”).

138. Germany reported that in October 2018 some small updates to its MAP guidance have been made, which concerns the reflection of: (i) the contact details of Germany's competent authority, (ii) an update of the jurisdictions to which the EU Arbitration Convention is applicable and (iii) an update regarding the time limits for filing of MAP requests that can be found in Germany's tax treaties.²⁰ The 2018 MAP guidance also incorporates the contents of the April 2017 circular mentioned above.

139. The content of this updated MAP guidance has been reflected above.

Anticipated modifications

140. Germany indicated that it is in the process of updating its MAP guidance, which will take into account all developments in Germany's tax treaties, developments at the level of the OECD and developments at the level of the EU in the field of dispute resolution. This revision is foreseen after the Directive on Tax Dispute Resolution Mechanisms is implemented in Germany's domestic law, for which the due date is 30 June 2019.

Conclusion

	Areas for improvement	Recommendations
[B.8]	-	-

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

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

141. The public availability and accessibility of a jurisdiction's MAP guidance increases public awareness on access to and the use of the MAP in that jurisdiction. Publishing MAP profiles on a shared public platform further promotes the transparency and dissemination of the MAP programme.²¹

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

142. The MAP guidance of Germany is published in German and can be found at:²²

https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerecht/Allgemeine_Informationen/2018-10-09-Verstaendigungsverfahren-Schiedsverfahren-Merkblatt.pdf

143. As regards its accessibility, Germany's MAP guidance is easily found on the website of Germany's Federal Ministry of Finance. The section dealing with international taxation contains a general overview that includes a link to the MAP guidance.²³

MAP profile

144. Germany's MAP profile is published on the website of the OECD, which was last updated in September 2019.²⁴ This MAP profile is complete and very often with detailed information. This profile includes external links which provide extra information and guidance.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.9]	-	-

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

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

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

MAP and audit settlements in the MAP guidance

147. As previously discussed under B.5, Germany has no system in place that allows audit settlements between local tax administrations and taxpayers, but that in practice taxpayers and the auditors of the concerned tax administration agree on the findings of the audit. Furthermore, as was also discussed under element B.5, in Germany the possibility exist for the local tax administration in charge of the taxpayer's tax assessment and the taxpayer to enter into an agreement on facts.

148. Germany updated its MAPs guidance in April 2017. In paragraph 5 it has set out its policy on agreements on facts in relation to MAP, whereby it is clearly stated that access to MAP is a right for taxpayers enshrined in law and that access to MAP will be granted in cases where the local tax administration in charge of the taxpayer's tax assessment and the taxpayer entered into an agreement on facts. It is further stipulated that discussions in MAP cannot alter what has been reflected in the agreement and that Germany will only seek correlative adjustment from the other competent authority concerned. Furthermore, it is also addressed that MAP arbitration is not open for cases where there is already an agreement on facts between the local tax administration and the taxpayer.

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

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

150. As previously mentioned under element B.5, Germany does not have an administrative or statutory dispute settlement/resolution process available in place that is independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, following which there is no need to include information hereon in Germany's MAP guidance.

151. All peers that provided input indicated not being aware of the existence of an administrative or statutory dispute settlement/resolution process in Germany, which can be clarified by the fact that such process is not in place.

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

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

Recent developments

153. There are no recent developments with respect to element B.10.

Anticipated modifications

154. Germany did not indicate it anticipates any modifications in relation to element B.10.

Conclusion

	Areas for improvement	Recommendations
[B.10]	-	-

Notes

- These 66 treaties include the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
- This reservation on Article 16 – Mutual Agreement Procedure reads: “Pursuant to Article 16(5)(a) of the Convention, the Federal Republic of Germany reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating

- to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified".
3. These 52 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic.
 4. These 40 treaties include the treaty with the former USSR that Germany continues to apply to Moldova and the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
 5. Paragraph 5 of Germany's MAP guidance, as it read prior to the update in April 2017, specifically addressed that waiving rights on MAP could avoid delays and costs that would arise from determining the facts and circumstances, which would be necessary for the purpose of any mutual agreement procedure.
 6. This paragraph further addresses that such non-consent only applies in case the foreign affiliated enterprises declared such waiver for a permanent establishment in Germany, or in cases of associated enterprises such declaration is made by both the foreign and German associated enterprise.
 7. Available at: www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2017-04-05-neufassung-der-textziffer-5-des-merkblatts-zum-internationalen-verstaendigungs-und-schiedsverfahren-auf-dem-gebiet-der-steuern-vom-einkommen-und-vom-vermoege-ergaenzung-des-BMF-Schreibens-vom-13-Juli-2006.html.
 8. Circular of Germany's Federal Ministry of Finance of 9 October 2018 (BStBl I 2018, 1122). The circular is available at: https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2018-10-09-Verstaendigungsverfahren-Schiedsverfahren-Merkblatt.html. A non-binding English translation is available at: <https://www.bundesfinanzministerium.de/Content/EN/Downloads/Guidance-note-on-international-mutual-agreement-and-arbitration-procedures-in-the-field-of-taxes-on-income-and-capital.pdf>.
 9. Germany additionally mentioned that such agreements are only possible on factual issues and not on questions of law. The purpose of these agreements is to allow both taxpayers and the tax administration to limit the time effort devoted to establish the detailed factual situation where such establishment would require disproportionate efforts.
 10. In this respect, paragraph 3 of the circular notes: "reaching a mutual agreement on facts requires the existence of facts that can be determined only with great difficulty. This is the case, for example, when the determination of certain facts would require an unjustifiable amount of work or time".
 11. As described in paragraph 8 of the circular, there are some restrictive circumstances in which an agreement on facts is not binding. This, for example, may be the case where a taxpayer entered into such agreement under disallowed pressure or that the case concerns a sham transaction.
 12. These 87 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, the treaty with the former USSR that Germany continues to apply to Moldova, and the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
 13. This treaty is with Jersey.

14. An non-binding English translation is available at: <https://www.bundesfinanzministerium.de/Content/EN/Downloads/Guidance-note-on-international-mutual-agreement-and-arbitration-procedures-in-the-field-of-taxes-on-income-and-capital.pdf>.
15. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
16. Federal Ministry of Finance circular of 6 January 2017 on co-ordinated external tax audits (BStBl I 2017, 89), available online at https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2017-01-06-Merkblatt-ueber-koordinierte-steuerliche-Aussenpruefungen-mit-Steuerverwaltungen-anderer-Staaten-und-Gebiete.pdf.
17. The agreement with the Netherlands is available at:
www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Niederlande/2012-12-10-Niederlande-Abkommen-DBA-Gesetz.pdf?__blob=publicationFile&v=3.
 The agreement with Switzerland is available at:
www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Schweiz/2017-03-03-DBA-Schweiz-Schiedsverfahren.html
 The agreement with the United Kingdom is available at:
www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Grossbritannien/2011-10-10-Grossbritannien-Abkommen-DBA-Verstaendigungsvereinbarung-Schiedsverfahren.html
 The agreement with the United States is available at:
www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Verein_Staaten/2009-01-16-USA-Abkommen-DBA-Verstaendigungsvereinbarung.html”.
18. Ibid.
19. Circular of Germany’s Federal Ministry of Finance of 5 April 2017 (BStBl I 2017, 707).
20. Circular of Germany’s Federal Ministry of Finance of 9 October 2018 (BStBl I 2018, 1122) The circular is available at: https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2018-10-09-Verstaendigungsverfahren-Schiedsverfahren-Merkblatt.html. A non-binding English translation is available at: <https://www.bundesfinanzministerium.de/Content/EN/Downloads/Guidance-note-on-international-mutual-agreement-and-arbitration-procedures-in-the-field-of-taxes-on-income-and-capital.pdf>.
21. The shared public platform can be found at: www.oecd.org/ctp/dispute/country-map-profiles.htm.
22. A non-binding English translation is available at: <https://www.bundesfinanzministerium.de/Content/EN/Downloads/Guidance-note-on-international-mutual-agreement-and-arbitration-procedures-in-the-field-of-taxes-on-income-and-capital.pdf>.
23. Available at: www.bundesfinanzministerium.de/Web/DE/Themen/Steuern/Internationales_Steuerrecht/Allgemeine_Informationen/allgemeine_informationen.html.
24. Available at: www.oecd.org/tax/dispute/Germany-Dispute-Resolution-Profile.pdf.

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- OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://doi.org/10.1787/g2g972ee-en>.
- OECD (2016), *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, <https://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf>.

Part C

Resolution of MAP cases

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

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

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

Current situation of Germany's tax treaties

144. Out of Germany's 93 tax treaties, 90 contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention requiring its competent authority to endeavour – when the objection raised is considered justified and no unilateral solution is possible – to resolve by mutual agreement with the competent authority of the other treaty partner the MAP case with a view to the avoidance of taxation which is not in accordance with the tax treaty.¹ For the remaining three treaties the following analysis can be made:

- Two treaties contain a provision that is based on Article 25(2), first sentence, of the OECD Model Tax Convention, but do not incorporate all elements, as the sentence "... if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution" is missing and is therefore considered not to be the equivalent thereof.²
- One treaty also contains a provision that is based on Article 25(2), first sentence, of the OECD Model Tax Convention, but is also not considered to be equivalent thereto, as the objective of the mutual agreement procedure is to avoid *double taxation* and not *taxation not in accordance with the treaty*.

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

Recent developments

Bilateral modifications

146. Germany signed a new treaty with a treaty partner on the replacement of an existing treaty current in force. Both the new and the current treaty contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention. Germany ratified this new treaty already and is awaiting ratification from the treaty partner.

Multilateral Instrument

147. Germany signed the Multilateral Instrument and is currently preparing the ratification of this instrument, which is currently foreseen for 2020.

148. Article 16(4)(b)(i) of that instrument stipulates that Article 16(2), first sentence – containing the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. In other words, in the absence of this equivalent, Article 16(4)(b)(i) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(c)(i), the depositary that this treaty does not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention.

149. In regard of the three tax treaties identified above that are considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, Germany listed none of them as a covered tax agreement under the Multilateral Instrument. Therefore, at this stage, the Multilateral Instrument will not modify any of these three treaties to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention.

Other developments

150. As is described in the Introduction, for those treaties that are not in line with this element of the Action 14 Minimum Standard and will not be modified by the Multilateral Instrument, Germany is either already in negotiations with the relevant treaty partners or such negotiations are envisaged or planned with a view to bring them in line with the Action 14 Minimum Standard. Concerning the three treaties identified above that do not contain a provision equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention, for one negotiations on the replacement of the existing treaty already have been completed, which includes this equivalent and one is currently being renegotiated *inter alia* to include such equivalent.

Peer input

151. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with Germany. Six of these peers mentioned that their treaty with Germany is in line with the requirements under the Action 14 Minimum Standard, which also regards element C.1 and which conforms with the above analysis. Of the three treaties that are considered not to be in line with the requirements under element B.7, two did not provide input, while the other mentioned there are no additions to the previous input given.

Anticipated modifications

152. For the one treaty that is not in line with element C.1 and will not be modified by the Multilateral Instrument, bilateral negotiations are envisaged in the medium-term. This treaty, however, concerns the 1980 treaty with the former USSR that Germany continues to apply to Moldova and for which such renegotiations are also not necessary. Regardless, Germany reported it will seek to include Article 25(2), first sentence, of the OECD Model Tax Convention in all of its future tax treaties.

Conclusion

	Areas for improvement	Recommendations
[C.1]	<p>Three out of 93 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. None of these three treaties will be modified by the Multilateral Instrument to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention With respect to these three treaties,</p> <ul style="list-style-type: none"> • For one negotiations on the replacement of the existing treaty currently in force has been completed, which includes the required provision. • One treaty is included in the list of treaties for which negotiations are envisaged, scheduled or pending. • For the remaining treaty no actions have been taken nor are any actions planned to be taken. 	<p>Germany should for one of the three treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention, continue discussions or negotiations to include the required provision. For another treaty, Germany should as quickly as possible sign and ratify the new treaty to have in place the required provision.</p> <p>Specifically with respect to the treaty with the former USSR that is being applied to Moldova, Germany should, once it enters into negotiations with the jurisdiction for which it applies this treaty, request the inclusion of the required provision.</p>

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

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

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

Reporting of MAP statistics

154. Statistics regarding all tax treaty related disputes concerning Germany are published on the website of the OECD as of 2007.³ Germany also publishes MAP statistics regarding transfer pricing disputes with EU Member States also on the website of the EU Joint Transfer Pricing Forum.⁴

155. The FTA MAP Forum has agreed on rules for reporting of MAP statistics (“**MAP Statistics Reporting Framework**”) for MAP requests submitted on or after 1 January 2016 (“**post-2015 cases**”). Also, for MAP requests submitted prior to that date (“**pre-2016 cases**”), the FTA MAP Forum agreed to report MAP statistics on the basis of an agreed template. Germany provided their MAP statistics pursuant to the MAP Statistics Reporting Framework within the given deadline, including all cases involving Germany and of which its competent

authority was aware. The statistics discussed below include both post-2015 and pre-2016 cases and the full statistics are attached to this report as Annex B and C respectively and should be considered jointly for an understanding of Germany's MAP caseload.⁵

156. With respect to post-2015 cases, Germany reported that for the year 2016 it has reached out to all its MAP partners with a view to have their MAP statistics matching. In that regard, Germany reported it received a response from most of its MAP partners and was able to match statistics with most of them. There are with a few MAP partners small differences left where there has not yet been a common conclusion on the MAP statistics. For the year 2017, Germany mentioned it has reached out to all of its MAP partners, for which it was able to match the statistics.

157. Ten peers provided input on the matching of MAP statistics with Germany, all of which confirmed that they were able to match their statistics with Germany. One of these peers mentioned that in its experience Germany was responsive during the process, which included arranging a telephone call. Another peer mentioned that Germany quickly answered any enquires regarding the MAP statistics.

158. Based on the information provided by Germany's MAP partners, its post-2015 MAP statistics for 2016 and 2017 actually match those of its treaty partners as reported by the latter.

Monitoring of MAP statistics

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

Timelines for the mutual agreement procedure under the EU Arbitration Convention

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

Submission of the MAP request in Germany	Submission of the MAP request in the other state concerned
Measure taken in Germany A position paper will normally be sent within four months after the date on which the decision on the increase in income is/was established, or, if later, four months after the date on which Germany's competent authority receives the MAP request and all required information and documentation from the taxpayer.	Measure taken in Germany A position paper will normally be sent within four months after the date on which the decision on the increase in income is/was established, or, if later, four months after the date on Germany's competent authority received the institution of the mutual agreement procedure by the other competent authority concerned and the necessary information.

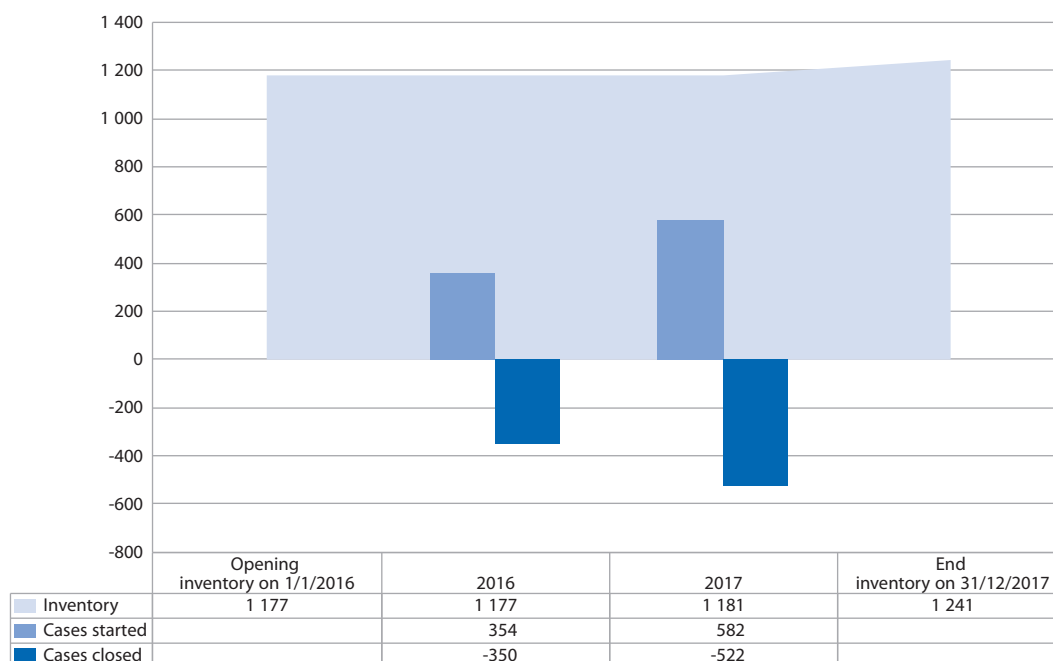
Submission of the MAP request in Germany	Submission of the MAP request in the other state concerned
Measure taken in the other state concerned If there is an agreement between Germany's competent authority and the other competent authority concerned on the solution proposed by this latter authority, Germany's competent authority will inform the other competent authority concerned within six months. In the absence of such agreement, Germany's competent authority will send a responsive position paper within six months after receipt of the position and the relevant information of the case from the other competent authority concerned.	Measure taken in the other state concerned If there is an agreement between Germany's competent authority and the other competent authority concerned on the solution proposed by this latter authority, Germany's competent authority will inform the other competent authority concerned within six months after receipt of the position and the relevant information of the case from the other competent authority concerned, or, if later, within six months after the date on which the decision on the increase of the taxable income was established. In the absence of such agreement, Germany's competent authority will send a responsive position paper within six months of the later of the dates mentioned in the previous sentence.
Where Germany's competent authority has to send a position paper, paragraphs 12.2.1 and 12.2.2 of Germany's MAP guidance oblige the responsible tax administration of the Länder to send to the Federal Central Tax Office a corresponding statement with the necessary documents and a proposed solution for the case no later than one month before the Federal Central Tax Office is expected to act under sub a).	Where Germany's competent authority has to send a position paper, paragraphs 12.3.1 and 12.3.2 of Germany's MAP guidance oblige the responsible tax administration of the Länder to send to the Federal Central Tax Office a corresponding statement with the necessary documents and a proposed solution for the case no later than one month before Federal Central Tax Office is expected to act under sub b).

Analysis of Germany's MAP caseload

161. The analysis of Germany's MAP caseload relates to the period starting on 1 January 2016 and ending on 31 December 2017.

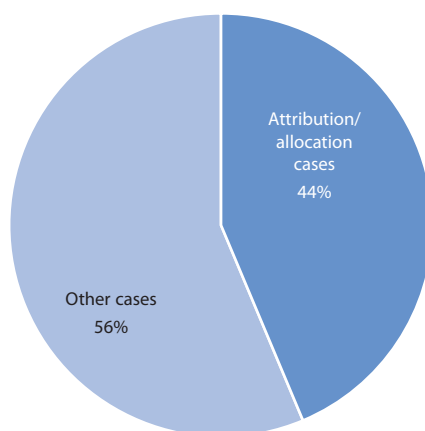
162. The following graph shows the evolution of Germany's MAP caseload over the Statistics Reporting Period.

Figure C.1. Evolution of Germany's MAP caseload



163. At the beginning of the Statistics Reporting Period, Germany had 1 177 pending MAP cases, of which 545 are attribution/allocation cases and 632 other MAP cases. At the end of the Statistics Reporting Period, Germany had 1 241 MAP cases in its inventory, of which 542 are attribution/allocation cases and 699 other MAP cases. Consequently, Germany's pending MAP cases have increased by 5% during the Statistics Reporting Period. This increase can be broken down into a decrease of 1% for attribution/allocation cases and an increase by 11% for other cases. The breakdown of the end inventory can be shown as follows:

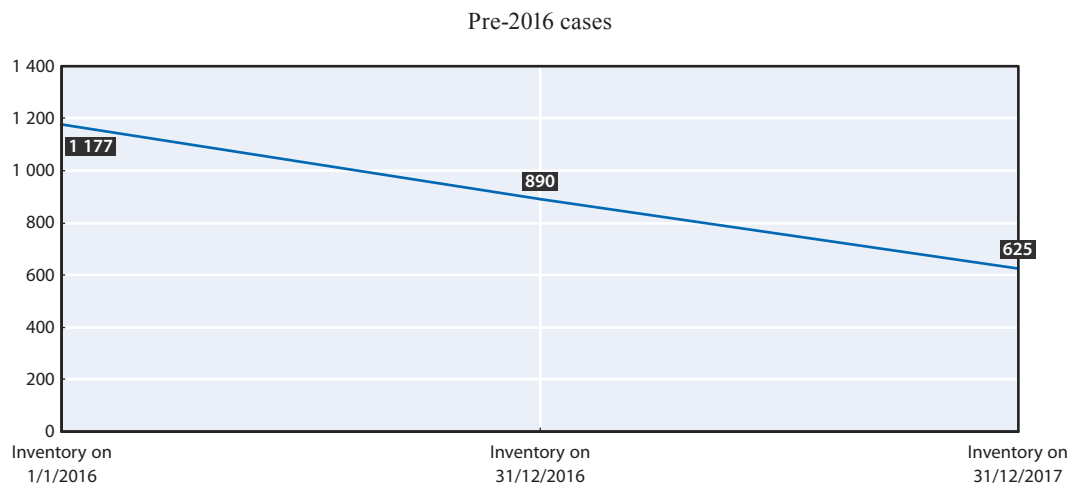
Figure C.2. End inventory on 31 December 2017 (1 241 cases)



Pre-2016 cases

164. The following graph shows the evolution of Germany's pre-2016 MAP cases over the Statistics Reporting Period.

Figure C.3. Evolution of Germany's MAP inventory



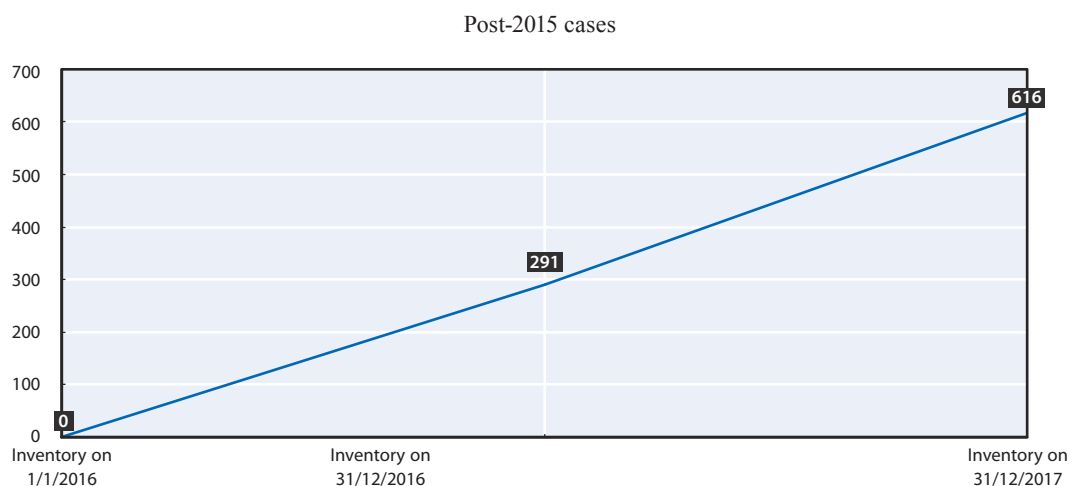
165. At the beginning of the Statistics Reporting Period, Germany's MAP inventory of pre-2016 MAP cases consisted of 1 117 cases, 542 of which were attribution/allocation cases and 632 other cases. At the end of the Statistics Reporting Period the total inventory of pre-2016 cases had decreased to 625 cases, consisting of 303 attribution/allocation cases and 322 other cases. The decrease in the number of pre-2016 MAP cases is shown in the table below.

	Evolution of total MAP caseload in 2016	Evolution of total MAP caseload in 2017	Cumulative evolution of total MAP caseload over the two years (2016 + 2017)
Attribution/allocation cases	-24%	-27%	-44%
Other cases	-25%	-32%	-49%

Post-2015 cases

166. The following graph shows the evolution of Germany's post-2015 MAP cases over the Statistics Reporting Period.

Figure C.4. Evolution of Germany's MAP inventory



167. In total, 936 MAP cases started during the Statistics Reporting Period, 288 of which concerned attribution/allocation cases and 648 other cases. At the end of this period the total number of post-2015 cases in the inventory was 616 cases, consisting of 239 attribution/allocation cases and 377 other cases. Conclusively, Germany closed 320 post-2015 cases during the Statistics Reporting Period, 49 of them being attribution/allocation cases and 271 other cases. The total number of closed cases represent 34% of the total number of post-2015 cases that started during the Statistics Reporting Period.

168. The number of post-2015 cases closed as compared to the number of post-2015 cases started during the Statistics Reporting Period is shown in the table below.

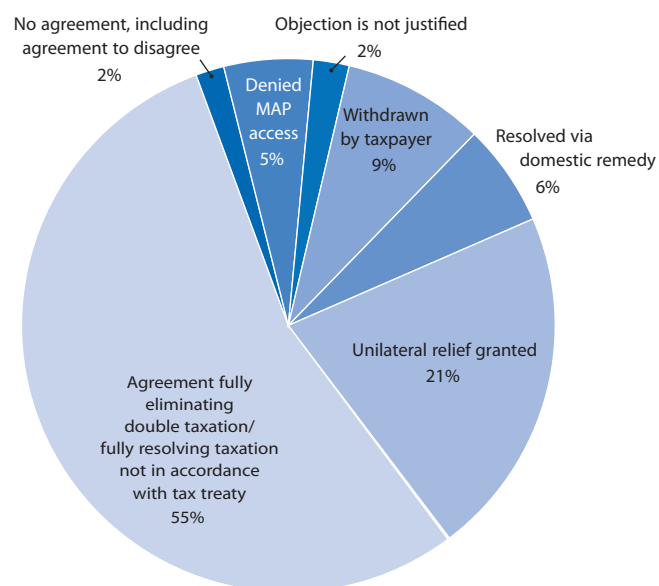
	% of cases closed in 2016 compared to cases started in 2016	% of cases closed in 2017 compared to cases started in 2017	Cumulative % of cases closed compared to cases started over the two years (2016 + 2017)
Attribution/allocation cases	5%	24%	17%
Other cases	23%	53%	42%

Overview of cases closed during the Statistics Reporting Period

Reported outcomes

169. During the Statistics Reporting Period Germany in total closed 872 MAP cases for which the following outcomes were reported:

Figure C.5. Cases closed during 2016 and 2017 (872 cases)



170. Figure C.5 shows that during the Statistics Reporting Period, 476 out of 872 cases were resolved through an agreement that fully eliminated double taxation or fully resolved taxation not in accordance with the tax treaty.

Reported outcomes for attribution/allocation cases

171. In total, 291 attribution/allocation cases were closed during the Statistics Reporting Period. The main reported outcomes for these cases are:

- agreement fully eliminating double taxation/fully resolving taxation not in accordance with the tax treaty (79%)
- withdrawn by taxpayers (7%)
- resolved via domestic remedy (5%)

Reported outcomes for other cases

172. In total, 581 other cases were closed during the Statistics Reporting Period. The main reported outcomes for these cases are:

- agreement fully eliminating double taxation/fully resolving taxation not in accordance with the tax treaty (42%)
- unilateral relief granted (30%)
- withdrawn by taxpayers (9%)
- resolved via domestic remedy (7%)
- denied MAP access (6%)

Average timeframe needed to resolve MAP cases

All cases closed during the Statistics Reporting Period

173. The average time needed to close MAP cases during the Statistics Reporting Period was 24.10 months. This average can be broken down as follows:

	Number of cases	Start date to End date (in months)
Attribution/allocation cases	291	31.62
Other cases	581	20.33
All cases	872	24.10

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

Pre-2016 cases

175. For pre-2016 cases Germany reported that on average it needed 36.49 months to close 242 attribution/allocation cases and 35.06 months to close 310 other cases. This resulted in an average time needed of 36.59 months to close 552 pre-2016 cases. For the purpose of computing the average time needed to resolve pre-2016 cases, Germany used:

- *Start date*: the date its competent authority received a MAP request, or where the MAP request was submitted with the competent authority of the treaty partner, the date Germany's competent authority was informed about the request
- *End date*: the date an agreement was reached or, for the cases closed with other outcomes, the date of the other outcome (or, where not available, the date Germany's competent authority learned about the other outcome).⁷

Post-2015 cases

176. As a preliminary remark, it should be noted that the period for assessing post-2015 MAP statistics only comprises 24 months.

177. For post-2015 cases, Germany reported that on average it needed 7.59 months to close 49 attribution/allocation cases and 3.47 months to close 271 other cases. This resulted in an average time needed of 4.10 months to close 320 post-2015 cases.

Peer input

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

Recent developments

179. Further to the above, in the stage 1 peer review report Germany was under element C.2 recommended to seek to resolve the remaining 82% of its post-2015 MAP cases that were pending on 31 December 2016 (105 cases), such within a timeframe that results in an average timeframe of 24 months for all post-2015 cases. With respect to the recommendation, Germany reported that there was already significant increase in the number of closed cases from 2016 to 2017. For attribution/allocation cases, the increase was from 135 to 165 cases closed and for other cases it was from 215 to 366. It further reported the steps to further increase the number of closed cases and to achieve a net reduction of its MAP inventory:

- The addition of resources to the competent authority in 2017 and 2018. In 2017, 12 persons were added, by which the number increased from 43 to 55. A further addition of personnel has been decided on in 2018, by which the number will further increase to 66. The hiring process for the additional personnel is still ongoing. In that regard, Germany noted that it will take some time before the effects of the increase in the staff on the number of closed MAP cases and the average timeframe can be measured.
- A continuation of the efforts in the area for training and exchange of experiences of staff in charge of MAP
- Asking for more face-to-face meetings with treaty partners with which there was a significant backlog of pending pre-2016 MAP cases. These treaty partners were also repeatedly asked to provide their position papers when they were not yet submitted in cases concerning foreign adjustments.

180. As follows from the MAP statistics discussed above, Germany has during 2016 and 2017 almost closed its MAP cases within the pursued average of 24 months. In 2016 it closed 18% of the post-2015 cases started in that year. By the end of 2017, Germany closed in total 44% of the post-2015 cases that started in 2016 and 2017. Its MAP inventory has increased by 5% since 1 January 2016. These changes will be further discussed under element C.3.

181. Most of the peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 January 2017 and/or there are no additions to the previous input given. Some peers, however, provided specific input as to their experience in resolving MAP cases with Germany. This will be further discussed under element C.3.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[C.2]	-	-

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

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

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

Description of Germany's competent authority

General outline

184. Germany reported that it is a federal state, following which there are federal and state tax administrations (of the German Länder, hereinafter referred to as "tax administrations of the Länder"). The tax administrations of the Länder, under which auspices the local tax administrations function, are in principle responsible for conducting audits and issuing tax assessment.⁸ The head of the tax administrations of the Länder is in most cases the Ministers of Finance of the Länder. The Federal Central Tax Office is the federal tax authority under the supervision of the Federal Ministry of Finance.

185. Under the tax treaties Germany has entered into, the competent authority function to handle MAP cases is attributed to the Federal Ministry of Finance. Pursuant to a circular of 20 June 2011 (BStBl I 2011, 674) (which replaced an earlier similar circular), the competent authority function was delegated to the Federal Central Tax Office to handle: (i) mutual agreement procedures relating to individual cases, (ii) the EU Arbitration Convention and (iii) bilateral and multilateral APAs.⁹ The Federal Ministry of Finance remains the competent authority to conduct mutual agreement procedures of a general nature which concern (or may concern) a category of taxpayers.

186. Further to the above, Germany reported that taxpayers have to submit their MAP requests under tax treaties in Germany to the Federal Central Tax Office. Alternatively, they can also submit this request to the local tax administration that is in charge of the

taxpayer's tax assessment, the local tax administration then has to forward the request to the Federal Central Tax Office (via the relevant regional tax administration, where applicable, and via the relevant superior state tax administration). If taxpayers submit a request for the application of the procedures under the EU Arbitration Convention, they, however, have to submit such request to the Federal Central Tax Office directly.

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

Organisational structure within the Federal Central Tax Office

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

189. At the end of 2017, staff in charge of MAP within the Federal Central Tax Office consisted of 55 positions. This concerns two heads of division, nine deputy-heads, 40 case analysts and four staff assistants. In addition, eight additional persons have been assigned for a temporary period to the relevant divisions of the Federal Central Tax Office. Altogether, this staff devotes approximately one third of its time to handle APA cases and two thirds of its time to handle MAP cases other than APA cases. Germany reported that the resources for the competent authority function at the level of the Federal Central Tax Office have been substantially increased during recent years, with the most important increases in 2016-18 when nine, 12 and 11 new positions were added.

Relationship with local tax administrations/tax administrations of the Länder

190. As discussed above, when taxpayers submit their MAP request to the local tax administration, it is obliged to immediately forward this request to the Federal Central Tax Office, thereby using a standard form.¹⁰ Paragraph 2.1.4 of Germany's MAP guidance stipulates that the local tax administration has to make a statement on the request when the case concerns taxation in Germany. Said statement considers: (a) the time limit for filing of MAP requests, (b) whether the request contains the required information and documentation and (c) whether the objection raised by the taxpayer is considered justified.¹¹ When a MAP request is submitted to the competent authority of the treaty partner, the Federal Central Tax Office will, at first, merely assess whether the formal conditions for MAP have been met and, pursuant to paragraph 2.5 of Germany's MAP guidance, will immediately forward the initiation letter by the other competent authority to the highest responsible office in the tax administration of the Länder concerned, and will also ask for a statement on the case.¹² The relationship with the local tax administrations/tax administrations of the Länder when taking a position on the case and when resolving MAP cases is further discussed under element C.4.

Working on prevention of disputes

191. Next to providing certainty in advance to taxpayers through bilateral APAs (including allowing roll-backs), Germany reported it also tries to prevent disputes by making use of co-ordinated external tax audits. In this respect, Germany published a circular on 6 January 2017, which sets out its policy on co-ordinated external tax audits with tax administrations of other jurisdictions.¹³ In this respect, paragraph 1.1 of that circular particularly notes that achieving consensus on the facts of the case can also help to avoid international tax conflicts and connected therewith MAP cases, or to make these conflicts simpler and their resolution more efficient.

Monitoring mechanism

192. Germany reported that the framework for determining staff requirement is set at the federal level by the Federal Ministry of the Interior, which issued a handbook for organisation analyses and determination of staff requirement. Based on the guidance in this handbook, and in co-operation with the staff of the previous Federal Office of Central Services and Unresolved Property Issues (Bundesamt für zentrale Dienste und offene Vermögensfragen¹⁴) specialised in staff requirement determinations, the Federal Central Tax Office established the average time needed for resolving cases by case analysts and other personnel involved (with a distinction between APAs, attribution/allocation MAP cases and other MAP cases) and average time frames for activities that are indirectly related to MAP cases. The so established averages are multiplied with the expected number of new MAP cases (also with a distinction between APAs, attribution/allocation MAP cases and other MAP cases) so as to calculate the number of needed case analysts and other staff. This expected number of new MAP cases is recalculated on an annual basis in order to take into account the most recent number of new cases.

193. If based on the above-mentioned calculations it turns out that additional staff is required, a communication is made to the senior management of the Federal Central Tax Office. If they after review approve the additional staff requirements, they will communicate these requirements – along with the calculations that support them – to the German Federal Ministry of Finance. This ministry collects and weights all requirements for additional staff and on the basis thereof prepares a political decision on the staff budget. It is ultimately the German federal parliament (Bundestag) that decides on the annual federal budget, which then becomes binding on all federal authorities. In this respect, Germany indicated that the process for obtaining additional resources takes approximately 18 months, as, for example, the new cases received in 2016 constitute the basis for the calculations in 2017 relating to the budget for 2018. Germany further reported that since 2013 additional budget has been made available to the competent authority function in Germany and staff will have increased from 23 in 2012 to 66 at the end of 2018.

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

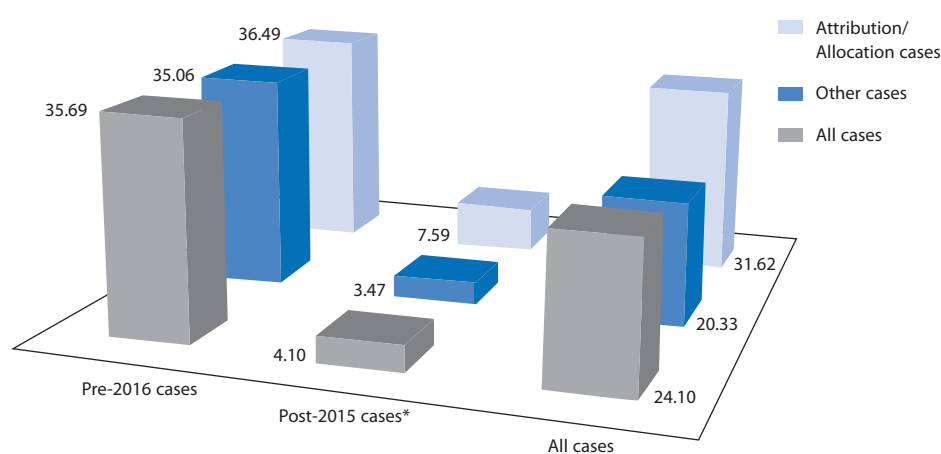
195. In terms of resources available to perform its MAP function, apart from staffing, Germany reported that it has sufficient resources for travelling, translation of documents and conducting face-to-face meetings with other competent authorities.

Practical application

MAP statistics

196. As discussed under element C.2, in 2016 and 2017 Germany did almost close its MAP cases within the pursued 24-month average, as the average is 24.10 months. However, a discrepancy exists between the average time taken to solve attribution/allocation cases and other cases. This can be illustrated by the following graph:

Figure C.6. Average time (in months) to close cases in 2016 or 2017



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

The average time to close MAP cases for 2016 and 2017 can be broken down as follows:

	2016	2017
Attribution/allocation cases	33.09	30.35
Other cases	22.11	19.28
All cases	26.34	22.59

197. The stage 1 peer review report of Germany analysed the 2016 statistics and showed an average of 26.34 months. It was on that basis concluded that it did not close MAP cases within the pursued average of 24 months. However, there was also a discrepancy identified between attribution/allocation cases and other MAP cases. Attribution/allocation cases took Germany more than 24 months to resolve them, while for other cases the average was below 24 months. In this respect, it was concluded that this may indicate that Germany's competent authority is not adequately resourced and that, due to the close working relationship with the tax administrations of the Länder, the resources available at that level might also not be adequate. In the stage 1 peer review report Germany was therefore recommended to closely monitor whether the additional resources recently provided to the competent authority and the further envisaged addition of such resources will contribute to the resolution of MAP cases in a timely, efficient and effective manner.

198. The 2017 statistics show that Germany reduced the average completion time of MAP cases to 22.59 months, resulting in an average for both years of 24.10 months. However, also in 2017 the average completion time for attribution/allocation cases was above 24 months and furthermore – as analysed in element C.2 – the MAP inventory of Germany increased slightly since 1 January 2016. This can be shown as follows:

2016 + 2017	Opening inventory on 1/1/2016	Cases started	Cases closed	End inventory on 31/12/2016 Start inventory on 01/01/2017	Cases started	Cases closed	End inventory on 31/12/2017	Evolution of total MAP caseload over the two years (2016 + 2017)
Attribution/allocation cases	545	111	135	521	177	156	542	-1%
Other cases	632	243	215	660	405	366	699	11%
Total	1 177	354	350	1 181	582	522	1 241	5%

199. The increase in the number of MAP cases with 5% (65 cases) indicates that more resources or additional actions may be necessary to cope with this increase and to ensure that for the current and future MAP cases Germany will be able to resolve them within the pursued average of 24 months.

Recent developments

200. As was discussed under element C.2, Germany reported that there was already significant increase in the number of closed MAP cases from 2016 to 2017. For attribution/allocation cases, the increase was from 135 to 165 cases closed and for other cases it was from 215 to 366. It further reported the steps to further increase the number of closed cases and to achieve a net reduction of its MAP inventory:

- The addition of resources to the competent authority in 2017 and 2018. In 2017, 12 persons were added, by which the number increased from 43 to 55. A further addition of personnel has been decided on in 2018, by which the number will further increase to 66. The hiring process for the additional personnel is still ongoing. In that regard, Germany noted that it will take some time before the effects of the increase in the staff on the number of closed MAP cases and the average timeframe can be measured.
- A continuation of the efforts in the area for training and exchange of experiences of staff in charge of MAP.
- Asking for more face-to-face meetings with treaty partners with which there was a significant backlog of pending pre-2016 MAP cases. These treaty partners were also repeatedly asked to provide their position papers when they were not yet submitted in cases concerning foreign adjustments.

201. In addition to the input reflected above and under element C.2, Germany also reported that the number of face-to-face meetings increased. It further reported the steps to further increase the number of closed cases and to achieve a net reduction of its MAP inventory.

Peer input

Period 1 January 2015-31 March 2017 (stage 1)

General

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

Contacts with Germany's competent authority

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

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

Issuing of position papers

205. Several peers criticised the long time it takes in Germany, from their perspective and in some cases, to issue position papers. One peer noted that although Germany quickly informs its competent authority of a MAP request received it takes a long time before Germany's competent authority issues a position paper, even if it concerns a German-initiated adjustment. In particular this peer mentioned that in its experience it is an exception that position papers are sent within six months after taxpayers submitted their MAP request and sometimes it takes more than two years. This input was echoed by another peer that mentioned that it waited considerable time to receive an analysis by Germany's competent authority on the case under review. This peer mentioned an example

of a case that was submitted in mid-2015, for which at the time of providing the input no position paper had yet been received. The case reported concerns the same case as referred to in the last sentence of the previous paragraph. Germany responded to this input and stated that it concerned an exceptional case and that it has provided a position paper in the meantime.

206. The same peer also mentioned that it encountered a situation in which a taxpayer submitted a MAP request in Germany, but was instructed to first seek the position from the peer's competent authority before it was willing to proceed with the case. On the last case referred to by this peer, Germany responded that its competent authority only learned of that case through the peer input received. Upon receiving additional information on this case from the peer, its competent authority became aware that the MAP request was filed at the local tax administration in Germany, which had not forwarded the request to Germany's competent authority (and which was contrary to the MAP guidance and established practice). Instead the local tax administration advised the taxpayer to request a refund in the other contracting state concerned. Germany noted that such advise can be useful, thereby remarked that another peer had suggested in its peer input that it would be desirable to initiate MAP cases only after completion of refund procedures under their domestic law.¹⁵ In this respect, Germany stated that in practice it rarely happens that MAP requests received by the local tax administrations are not timely forwarded to the competent authority. However, based on the peer input given, Germany also stated that the tax administrations of the Länder will be reminded that MAP requests at a local level have to, without delay, be forwarded to Germany's competent authority in all cases. Since then Germany reported that such reminder indeed has been given to the tax administrations of the Länder.

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

Resolving MAP cases

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

209. One peer also raised some criticism on resolving of MAP cases with Germany. This peer, which input was echoed by another peer for an individual case, noted that, from the

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

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

211. One peer specifically mentioned that it is aware of the complexities that the German federal tax system creates for the MAP process. The same peer also raised issues concerning for the clear determination of substantive completion and resolution dates of MAP cases. Germany responded that the remark concerning the substantive completion concerns the application of the general mutual agreement entered into (memorandum of understanding) on the details for implementing the arbitration clause in the bilateral tax treaty. In that regard, Germany reported that both competent authorities have discussed the issue and will endeavour to improve the communication on this matter between them. Regarding the comment on resolution dates of MAP cases, Germany responded that it discussed with the peer that staff in charge of MAP does not issue tax assessments notes implementing MAP agreements and that the length of time sometimes required before a MAP can be finally closed on both sides (closed here not for MAP statistical reporting purposes, but only in the sense of closing the files after the taxpayer has accepted or rejected a MAP solution) is not solely attributable to the German federal tax system.

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

213. Several other peers raised concerns about the relationship between Germany's competent authority and the local tax administrations. One peer mentioned in this respect that Germany has entered into MAP cases based on the preliminary views of the auditors, without having prepared a position paper or analysis to support the auditors' positions. On this remark, Germany noted that having an early initial discussion, even without having fully developed an own position and without having provided a position paper, can often be useful and is often suggested by other peers. It does in Germany's view not mean that its competent authority will not develop its own position on the case under review. A second peer noted that in general it takes a long time to resolve MAP cases with Germany, due to insufficient resources in both jurisdictions, but also due to the involvement of the tax authorities of the Länder in Germany. In this peer's view the perception exists that Germany's competent authority is dependent on the decisions and approval of the regional tax authorities for each step of the process. This applies both to attribution/allocation cases and other MAP cases. Several peers made the same comment and mentioned that Germany's competent authority appears to have little room to manoeuvre on its proposed solution for the case, whereby also delays occur by the systematic consultation of the tax administration of the Länder. In this respect, one peer particularly noted that in its view it appears that Germany's competent authority has to consult this tax administration during MAP discussions. In relation hereto, Germany responded that the involvement of the tax administrations of the Länder in the MAP process is described in detail in paragraph 208.

Suggestions for improvement

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

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

216. Furthermore, one peer suggested that more resources should be attributed to Germany's competent authority, less involvement by the tax administrations of the Länder in informing the cases and more frequent communication between the competent authorities in between face-to-face meetings. Another peer suggested that it would be desirable to initiate MAP cases only after completion of refund procedures under domestic law, this to avoid unnecessary duplicate of MAP cases. Fourthly, one peer made several recommendations. This concerns: (i) acknowledgment of correspondence, including receipt of communications

and acceptance into the German MAP programme, (ii) providing updates to treaty partners if it is expected that agreed deadlines for a case will not be met, (iii) informing treaty partners of changes to contacts (including contact details), alternate contacts and avenues to resolve any issues or delays, and (iv) seeking to provide a position paper as expeditiously as possible. To the last made suggestions, Germany responded that these proposals were made by the peer whose input is also comprehensively discussed in paragraphs 223 and 224 of this report, and that the proposals made are based on bad experience in one exceptional case. Germany thereby pointed out that in general (i) reception of correspondence is acknowledged, (ii) treaty partners are informed if previously agreed deadlines cannot be met, (iii) treaty partners are informed where case handlers change and (iv) that position papers are always provided as quickly as possible

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

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

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

Period 1 April 2017-30 September 2018 (stage 2)

220. A number of peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given. 18 peers gave additional input for stage 2. Of these 18 peers, 11 provided input as to their experience in handling and resolving MAP cases with Germany since 1 April 2017. These are discussed below.

Handling and resolving MAP cases

221. Four peers voiced positive input. One of them mentioned that it is able to resolve MAP cases with Germany in a timely manner, without providing further details. The second peer mentioned that its experience in handling MAP cases with Germany since 1 April 2017 has been very positive and that progress on pending MAP cases has been made via conference calls, email and fax. The peer further noted that negotiations have been scheduled by the end of 2018, for which a further progress is expected. The third peer

noted that it continues to have a good working relationship with Germany's competent authority, as also that it is informed on MAP requests and being provided with position papers in due time. The peer further mentioned that recently Germany's competent authority has shown additional endeavours to resolve MAP cases in an effective and efficient manner. Lastly, one of these peers confirmed that Germany has followed-up on the suggestions made during stage 1 of the peer review process and their competent authorities have increased the use of conference calls in between face-to-face meetings with a view to follow-up on pending cases, as also that communications between their competent authorities is more frequent in general.

222. A fifth peer mentioned that as regards attribution/allocation cases, it has recognised a progress at the level of Germany's competent authority, for which it hopes that this will continue. For other cases, the peer concluded that there is a backlog of pending pre-2016 cases. In that regard, the peer expressed that it shares Germany's call for more frequent face-to-face meetings and shares the comparable urge for partner's position papers for these pre-2016 cases. In a response, Germany mentioned that the number of pending pre-2016 other MAP cases with this peer is now below ten cases. It further mentioned that the remaining cases raised particular difficulties due to being related to criminal procedures in Germany or because they relate to employment income where the employee did not file the MAP request. Germany concluded by stating that addressing these remaining pre-2016 cases is a priority for 2019.

223. Two other peers reported the number of pending pre-2016 and post-2015 cases with Germany and the number of cases that were resolved in the period 1 April 2017-30 September 2019. One of these peers specified that closed post-2015 cases were all resolved within 24 months, while this was not the case for pre-2016 cases. The peer further reported that it is awaiting a position paper from Germany for a case started in 2016, while for a case started in 2018 a position paper was provided. The other peer mentioned that pending MAP cases with Germany are progressing in due form, whereby a face-to-face meeting is scheduled for the second half of 2019.

224. Another peer voiced a different input and mentioned that its competent authority experienced delays in receiving correspondence and position papers from Germany's competent authority. In this respect, the peer gave the example of one case for which it has provided an acknowledgement letter to Germany's competent authority upon receipt of a MAP request, but that it did not receive a response until 12 months later. With the assigning of a new case handler, matters for this case have improved and responses are now prompt, including the sending of a position paper within one month of contact. For some other cases, the peer also noted experiencing delays, due to Germany's competent authority having to consult with or obtaining information from the local tax office.

225. Lastly, one peer provided extensive input as to its experiences in handling and resolving MAP cases with Germany, in general and since 1 April 2017. The peer started by stating that Germany is one of the peer's main MAP partners, which comprises approximately half of its MAP inventory and half of its new MAP requests. It further mentioned that in the period 1 April 2017-30 September 2018, it closed 32 MAP cases with Germany, six of which via unilateral relief and the other 26 via an agreement that fully resolved double taxation/taxation not in accordance with the convention. As to its working relationship with Germany's competent authority, the peer noted that while being good, it could be improved in several aspects. The two aspects mentioned relate to attribution/allocation cases and concern:

- *Timely resolution of cases:* the peer mentioned that while there are (sometimes fairly long) delays in the resolution of MAP cases, which are caused at the level of both competent authorities, there have also been several instances where Germany's competent authority only submitted their responses with respect to cases after significant delays. There are several very long-pending MAP cases that are waiting resolution, for which the peer reported that it is very eager to finally resolve them and for which it has not yet received the required responses from Germany's competent authority. The peer thereby gave an example of a case for which a MAP request was submitted in 2009, for fiscal years starting at the end of the 1990s. While for this case the competent authorities could almost reach an agreement in 2015, the peer noted that Germany's competent authority could eventually not agree on a compromise, following which the case is still pending. At the end of September 2018, the peer reported its competent authority is still waiting on a reply to its last proposed solution submitted in January 2018. Apart from this example, the peer also reported that the general response times by Germany's competent authority for attribution/allocation cases have become longer and in certain cases exceed a 12-month period, which causes further delays due to the fact that staff in charge of MAP at the level of the peer's competent authority has to re-acquaint themselves with the case once a response is eventually received. To be able to resolve the long-pending attribution/allocation MAP cases, the peer suggested:
 1. Scheduling a face-to-face meeting for only discussing these old cases with the aim of clearing at least 90% of these cases that are in their mutual MAP inventory. Such meeting should ideally be scheduled in the first part of 2019 and should be preceded by preparatory work and discussions at the level of both competent authorities so that the to be discussed cases can either be resolved or, if applicable, be sent to arbitration
 2. Discussing cases at a the level of individual case-handlers, such by using conference calls and with a view to clear up any misunderstandings and reach a very broad consensus on the cases. Such consensus could speed up resolution
- *Scheduling of face-to-face meetings and conference calls:* with Germany at least bi-annual face-to-face meetings or conference calls are scheduled, which are preceded by a prepared joint list of pending cases that are to be discussed during the meeting. Such list is usually sent well in advance of the meeting to agree on a common list of to be discussed cases. Recently, the preparation of face-to-face meetings has been rather difficult, for two reasons. The first reason is the high number of cases, for which more meetings are necessary to be able to effectively resolve them. The second reason is that Germany's competent authority close to the meeting adds or removes cases from such list. In that regard, it is difficult to receive responses in a timely manner. Furthermore, sometimes cases are kept on the list, but could eventually not be discussed during face-to-face meetings, as Germany's competent authority only informed the peer's competent authority during the meeting that there was still no sufficient basis to start discussing these cases. Lastly, some last-minute changes to the list of to be discussed cases were made, despite prior agreements on the exact list of cases that could be discussed. Conclusively, it is in practice hard to conscientiously prepare for a face-to-face meeting and resolve as many cases as possible. As a result, a quick and efficient resolution of pending cases is often not possible.

226. The peer further reacted to Germany's statement (reflected in paragraphs 218-219 above) that those treaty partners with which Germany has a significant backlog of pending pre-2016 cases have been asked for more frequent meeting and (repeatedly) have been asked to provide their position papers. The peer stated that by the end of 2017 there were 44 pre-2016 cases pending with Germany, eight of which were pending for seven years. In that regard, it could not confirm that Germany has taken the actions mentioned concerning attribution/allocation cases, but instead the opposite happened. It gave the example of a face-to-face meeting held early 2017, whereby the peer wanted to follow-up as soon as possible in order to close more MAP cases. It therefore proposed scheduling another meeting in the second half of 2017, which could, however, only be scheduled in January 2018, with another meeting in November 2018. The peer concluded that the interval between these meetings is too long for attribution/allocation cases. It further mentioned that in-between scheduled conference calls were repeatedly cancelled at the last-minute.

227. Germany responded to the input by this peer. It mentioned it shares the view with respect to the need of improvement of procedural issues and of the working relationship. Germany further stated that it acknowledges that there is a certain amount of backlog in solving MAP cases in relation to this peer, which are various and cannot be traced back to one competent authority only. For the sake of completeness, Germany also referred to a recent structural change in the organisation of the peer's competent authority, which in the peer's view caused some start-up difficulties in the recent past, but which will certainly run out over time. Nevertheless, Germany reported that it sees a need to clarify procedural standards as well as communication routines due to that structural change. Germany concluded that from its point of view, it is of utmost importance to remove the existing backlog of pending MAP cases and to establish a common procedure which would enable both competent authorities to speed up the resolution of future attribution/allocation cases.

228. In a reaction, the peer stated that the structural change in its organisation has not led to difficulties, but instead to an improvement of the situation. The peer also stated that it is not aware of any need to clarify procedural standards as well as communication routines due to that structural change, in particular because its competent authority has established single points of contacts and also procedures that are clear and efficient. The peer concluded by mentioning that it welcomes all suggestions to remove the pending pre-2016 cases and to speed up the process.

Adequacy of resources

229. Several peers identified a resource constraint at the level of Germany's competent authority. One of these peers mentioned that these constraints appear to be resulting from delays in issuing or responding to position papers by the local tax offices in Germany. This peer further referred to communications it received from Germany's competent authority where it was mentioned that delays are expected to be due to heavy workloads and, in one particular case, staff leaving the competent authority. A second peer noted that Germany's competent authority has suffered a temporary problem in staff due to a number of staff leaving in 2018, but also that they appreciate and do recognise Germany's efforts to restore its capacity in a timely manner.

230. Further to the above, one peer also referred to staff leaving the competent authority and noted that while in its view Germany's competent authority is considered to have adequate resources, it can be observed that staff in charge of handling non-attribution/allocation cases are subject to a faster personnel turnover. In the peer's view, this has a negative effect on the development of a common understanding of the case regarding

technical questions and to build a relationship of trust. Germany responded to this input and recognised that in 2017 and 2018 an unusual high number of changes in the staff in charge of handling other MAP cases occurred. Germany further mentioned that this was due to reasons beyond the control of the competent authority and that it expects that the situation will be more stable in the near future.

231. Further to the above, one peer mentioned that it is pleased to hear that additional staff has been (and will be) added to Germany's competent authority, but that it has not yet observed any effects of this increase regarding its pending cases with Germany. It further stated that Germany could benefit from an increase in staff, as well as to provide case and managerial support, such to ensure that the lines of communication between the competent authorities remain open.

232. Lastly, one peer commented on Germany's statement of recent developments in paragraphs 218-219 above that the number of face-to-face meetings and the frequency of communications has further increased. The peer's experience in handling and resolving MAP cases with Germany since 1 April 2017 has been reflected in paragraphs 243-244 of this report. Concerning this statement, the peer mentioned it has not yet experienced the positive effects of the increase in staff at the level of Germany's competent authority. It further mentioned that it cannot confirm that an increase in the frequency of communication has taken place as regards conference calls and face-to-face meetings. In this respect, the peer noted that on the contrary, despite its efforts, the frequency of face-to-face meetings for attribution/allocation cases has not increased. The peer on the other hand also concluded that it is possible that the increase in staff at the level of Germany's competent authority may have a more pronounced effect in the future, all the more since it is envisaged that more staff will be added. The peer also clarified that its input only regards attribution/allocation cases and that its competent authority has not requested more frequent face-to-face meetings for other MAP cases, as these are considered adequate.

233. This peer also provided input as to the relationship between Germany's competent authority and the tax administrations of the Länder, which specifically regards the expectation to act in agreement with the responsible supreme or commissioned tax administration of the Länder and the possibility to enter into MAP agreements that deviate from the position that has previously been discussed with the tax administration of the Länder (see element C.4 for a discussion). The peer mentioned that the constitutional constraints under which Germany's competent authority is operating, are not new. It highlighted that although it may impact the time needed to resolve MAP cases, such constraints have thus far not impeded the good functioning of the MAP process between the peer and Germany, and further that Germany's competent authority has in its view generally worked effectively given these constraints. Nevertheless, this peer also voiced some criticism as to its experience with Germany in relation to attribution/allocation cases. The peer mentioned that since the establishment of its transfer pricing team, staff within this team is facing certain difficulties in reaching agreements with Germany's competent authority on pending MAP cases. In this respect, the peer reported that during face-to-face meetings and conference calls, discussions were fruitful and productive, whereby in principle a consensus could be agreed in many cases. However, the peer also reported that Germany's competent authority expressed that they could not immediately agree on any solution for the cases under discussion, because they always require a further consultation. In the peer's view, such consultations are very time-consuming, for which it presented examples. In the cases concerned, a proposal for the resolution thereof was sent on 31 January and 18 April 2018 respectively, for which a response is still due. The peer further pointed to two other cases, for which the consultations took more than a year, and

another case where a proposal for solution was submitted by the peer's competent authority, for which a final answer is still awaited from Germany's competent authority.

234. In view of the above, the peer questions whether, in light of the significant investment of human and financial resources by competent authorities to hold face-to-face meetings and the time needed to prepare and arrange such meetings, consultations with other functions of the tax administrations of the Länder are needed in every pending MAP case. Should this question be answered in the affirmative, the peer questions whether such consultations cannot take place either before face-to-face meetings are held or as quickly as possible after such meetings. In the peer's view, this would enable a better use of its recourses, especially since it would be avoided that case-handlers have to re-read the information on the case each time a response is received, since in between a substantial time-period has elapsed. For this specific issue, the peer suggested to broaden the scope of MAP discussions, such in line with the agreed guiding principles by the FTA MAP Forum on presences of tax administration personnel during face-to-face meetings, so that staff in charge of the MAP case in Germany can directly liaise with the tax administration personnel after discussions and consensus reached in a face-to-face meeting, which would facilitate a binding MAP agreement

Suggestions for improvement

235. Several peers made suggestions for improvement. One of these peers mentioned that its relationship with Germany could potentially be further enhanced by the secure use of email with a view of more frequent and easier exchange of information. In a response, Germany mentioned it will contact the peer regarding this suggestion and that it already with several competent authorities exchanges via email or other means of electronic forms of communication (see also paragraph 233 above for comments on this issue made in stage 1 of the process). The peer reacted to this response and mentioned it really appreciates Germany's initiative.

236. Further to the above, one of the peers addressed the timely issuing of (substantive) position papers for cases where it was Germany that made that adjustment that is subject of the MAP case. The peer encouraged Germany to provide such papers early on in the process. It mentioned in particular that a close co-ordination between Germany's competent authority and the local tax offices could help in this regard, especially to ensure that sufficient information and documentation that is needed to initiate the MAP process is received from taxpayers. The peer specifically noted that it encourages Germany's competent authority to more quickly address specific deficiencies found in submitted MAP requests in light of the requirements listed in Germany's MAP guidance, and also to leverage existing information with a view to more quickly confirm the acceptance of a case into the MAP process (e.g. in cases where the MAP request follows from an audit conducted in Germany). The peer further referred to its input in stage 1 of the process (reference is made to paragraph 235 above), where the suggestion was made that regular communications between the competent authorities, even on the status of the pending case, could help to facilitate the MAP process.

237. Lastly, one peer made a suggestion, next to the ones already reflected in paragraphs 243 and 252 above. It suggest matching of pending attribution/allocation cases on a quarterly basis and the setting of a common list of priorities for the resolution of pending cases based on *inter alia*: (a) the time the case is already pending, (b) circumstances of the case, (c) how well the competent authorities developed their positions and (d) the availability of case-handlers. The peer further noted that such matching should ideally be conducted by

conference calls and should be included in the written minutes of face-to-face meetings, which minutes should also include a list of to be discussed cases during the next meeting. In regard of this latter, the peer also suggested that the list of pending cases to be discussed in a face-to-face meeting should be communicated as early as possible. Furthermore, the peer ended by stating that although its competent authority has communicated its dissatisfaction to Germany repeatedly in 2017 and 2018, thereby signalling its flexibility for a compromise in pending cases, Germany's competent authority has not taken up the comments or suggestions for improvement.

Anticipated modifications

238. The review period for stage 2 ended on 30 September 2018, following which the MAP statistics for the full year of 2018 have not been taken into account in the peer review report. In 2019, Germany submitted its 2018 MAP statistics, which show that it has decreased its MAP inventory on 31 December 2018 as compared to 31 December 2017 from 1 241 cases to 1 198. This concerns a decrease in the number of attribution/allocation cases (from 542 to 493), as the number of pending other MAP cases roughly stayed the same (from 699 to 705 cases). Furthermore, the 2018 statistics shown that Germany also decreased the average time to close MAP cases to 22.21 months on average. Also here a deviation exist between attribution/allocation cases and other cases. The average time to close attribution/allocation cases is 39.14 months, while for other cases this average is 13.29 months. For attribution/allocation cases this is an increase as compared to the 2016-17 period.

Conclusion

	Areas for improvement	Recommendations
[C.3]	<p>While Germany has significantly reduced the average completion time of MAP cases in 2017 as compared to 2016, resulting in an average for 2017 below 24 months (which is the pursued average for resolving MAP cases received on or after 1 January 2016) and for both years combined is almost below this average, there is still a risk that post-2015 cases are not resolved within the average of 24 months. This in particular regards attribution/allocation cases, for which the average timeframe is 31.62 months and which may indicate that the competent authority is not adequately resourced.</p> <p>For these cases, the main issues identified by peers were delays in communication, specifically the issuing of position papers and responses to position papers and delays caused in the context of the close working relationship with the tax administrations of the Länder in handling and resolving MAP cases.</p> <p>Furthermore, as the MAP caseload relating to other cases has increased from 1 January 2016 to 31 December 2017, this indicates that at least until 2017 the competent authority may not have been adequately resourced to cope with this increase, although several actions have been taken to address this in the meantime.</p>	<p>While since 1 January 2016 Germany has added a substantial number of new staff to the competent authority function, has increased the number of face-to-face meetings and communications with its treaty partners, Germany should closely monitor whether the addition of resources recently provided and foreseen will be sufficient to ensure a timely, effective and efficient resolution of MAP cases. If this would not be the case, Germany should, in particular for attribution/allocation cases, hire or assign more staff to its competent authority, such also with a view to ensuring that delays in the co-ordination between the Federal Central Tax Office and the tax administrations of the Länder can be avoided, that delays in providing position papers and responses to position papers can be avoided, and to enable Germany's competent authority to more frequently liaise with treaty partners' competent authorities.</p>

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

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

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

Functioning of staff in charge of MAP

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

241. In terms of the process of handling and resolving MAP cases, as was already described in element C.3 above, Germany reported that the following process is followed:

a. *Statement on the facts of the case under review:*

When a new MAP case is submitted, staff in charge of MAP will request the relevant Ministry of Finance of the Länder or the relevant regional tax office of the Länder for a statement on the facts of the case under review and on what, in their view, domestic law and, in particular, the applicable tax treaty, requires. This request is generally sent on to the local tax administration, which then will send a statement to the regional tax administration or the Ministry of the relevant Land, which will in turn report back the local tax administration's statement on the case under review (possible with additions or amendments) to the Federal Central Tax Office.

b. *Preparing a position on the case under review:*

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

c. *Autonomy to prepare a position on the case under review:*

Although staff in charge in MAP is not bound by the statement of the local tax administration/tax administration of the Länder, it is expected to act in agreement

with the responsible supreme or commissioned tax administration of the Länder.¹⁶ In practice, this expectation implies that if there is a difference of view between the Federal Central Tax Office and the tax administration of the Länder, both have to reconcile to ensure that both parties are aware of all relevant facts of the case under review and all relevant guidance. Subsequently, they have to try to arrive at a common position. Should this not be possible, the case under review is to be dealt with at management level. Where at this level also no common position can be arrived at, the case is to be referred to the Federal Ministry of Finance. Germany reported that this system follows from the application of general principles of tax administration in Germany and is based on the German constitution. In a simplified manner, for the taxes where the Federation and Länder share the tax revenue (which includes personal and corporate income tax), the constitution assigns competence to the tax administrations of the Länder to administer federal tax laws, with certain supervisory rights by the Federation and certain specific tasks, including the relations to other countries, are assigned to the Federation.

d. *Interaction with the Federal Ministry of Finance:*

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

e. *Negotiating a solution:*

In principle, Germany's competent authority has autonomy to enter into MAP agreements. When, after thorough examination and discussion, differences of view remain to exist on how to resolve the case with the other competent authority concerned, the Federal Central Tax Office will consider compromise solutions to avoid double taxation. Whether in that regard consultation with the tax administration of the Länder is necessary depends on what has been arranged in an individual case. This, for example, may not be necessary if during a competent authority meeting an agreement can be reached that does not substantially deviate from the position that has previously been discussed with the tax administration of the Länder. Furthermore, Germany mentioned that in practice auditors are invited to attend competent authority meetings in a small number of cases. The reasons hereof are twofold. First, auditors have factual knowledge of the cases that are being discussed during such meetings, which knowledge may be helpful for resolving cases. Second, they can learn from the discussions, which can be beneficial to them for future audits.

242. The above description points out, as clarified by the federal structure in Germany, that there is a close relationship between the competent authority function in Germany, at the level of the Federal Central Tax Office, and the tax administrations of the Länder

and/or the local tax administrations. This relationship causes that Germany's competent authority has to develop a position for an individual MAP case in collaboration with these tax administrations and de facto often (in those cases where the Länder tax administrations give little leeway) has to agree with them before communicating this position to the other competent authority concerned. When negotiating MAP agreements, Germany's competent authority has autonomy to enter into MAP agreements, but the margins to negotiate can (depending on the leeway pre-agreed in the individual case) in some cases be small in terms of deviating from a position which has been agreed with the tax administrations of the Länder and/or the local tax administrations.

Recent developments

243. Germany reported that based on the discussions within the FTA MAP Forum staff in charge of MAP cases has been instructed to follow the guiding principles agreed by the forum on the co-operation between the tax administration personnel directly involved in the adjustment at issue and the competent authority prior to and throughout the MAP process with a view to ensure independency of the competent authority in handling and resolving MAP cases. Germany further reported that staff is regularly reminded to follow these principles.

244. As to the attendance of tax administration personnel directly involved in the adjustment at issue during face-to-face meetings, Germany mentioned that it is not aware that since 1 April 2017 such personnel would have taking part in such a meeting without prior agreement with the other competent authority concerned.

Practical application

Period 1 January 2015-31 March 2017 (stage 1)

245. As discussed under element C.3, several peers raised concerns and criticised Germany on the close relationship with the local tax administrations/tax administrations of the Länder when handling MAP cases and negotiating agreements. Several peers provided particular input with respect to the question on whether staff in charge of MAP in Germany can resolve cases without being dependent on the approval or the direction of the tax administration that made the adjustment. One of these peers noted that Germany entered into MAP discussions based on the preliminary views of the original auditors, without having prepared a position paper or analysis themselves. On this remark, as indicated previously, Germany responded that having an early initial discussion, even without having fully developed an own position and without having provided a position paper, can often be useful and is often suggested by other peers. It, however, does not imply that Germany's competent authority will not develop an own position in the case. Another peer reported that Germany's competent authority has to seek approval from the auditors that made the original adjustments. This peer, however, mentioned that it is not clear whether this concerns all MAP cases or only the largest and most significant cases. On this peer's comment, Germany responded that there appears to be a misunderstanding and that the Germany's competent authority does not have to seek approval from the auditors that made the original adjustments. Its competent authority, however, does involve the tax administration of the Länder in the way described in paragraph 259. The intensity of that involvement can vary depending on the arrangement in the particular case. The last two peers noted that they did not identify any particular issues in relation to this question or that Germany has the authority to resolve MAP cases in accordance with the treaty.

Period 1 January 2017-31 August 2018 (stage 2)

246. Most of the peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given. Of these peers, one mentioned specifically that it has no experience of Germany's competent authority being dependent on the direction of the tax administration personnel directly involved in the adjustment at issue, or being influenced by policy considerations.

247. A few peers provided additional input. One of them mentioned that the tax administration personnel directly involved in the adjustment at issue attended a face-to-face meeting with this peer, but that such attending was upfront agreed and in line with the agreed guiding principles by the FTA MAP Forum, which conforms with Germany's reporting as reflected in paragraph 261 above.

248. A second peer noted that in its view Germany's competent authority is acting fairly independent, but that in some instances it considered that the influence of the local tax administration's personnel that made the adjustment is not negligible. In that regard, the peer noted that Germany's competent authority is under the obligation to reach an agreement with the local tax administration before entering into a MAP agreement in an individual case. Germany responded to this input and reported that it has liaised with the peer's competent authority, which informed Germany that the peer's statement relates to non-attribution/allocation cases. Germany clarified that for these cases Germany did not make any adjustment that resulted from an audit. It further pointed to the reflections in paragraph 259 of this report, where it is stated that Germany's competent authority is expected to act in agreement with the supreme or commissioned tax administration of the Länder, but that it is in any case not dependent on the approval/direction of the tax administration directly involved in the adjustment at issue.

249. Further to the above, another peer mentioned that it recognised the process for handling and resolving MAP cases in Germany, as described in paragraph 259 of this report and that it appreciated Germany's reporting that staff in charge of handling MAP cases was instructed to follow the guiding principles agreed by the FTA MAP Forum. The peer further mentioned that for the sake of resolving disputes via the MAP process in a timely manner, it would appreciate if Germany could continue to ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being dependent on the personnel of the tax administrations of the Länder directly involved in the adjustments at issue. Also to this input Germany responded and referred to paragraph 251 for an explanation on how its competent authority operates, particularly the relationship with the tax administrations of the Länder. It highlighted that the personnel of the supreme or commissioned tax administration of the Länder are not identical with the personnel of the local tax authorities of these Länder, who made the adjustments. Germany therefore concluded that it can continue to ensure that its competent authority is not being dependent on the personnel of the tax administration of the Länder directly involved in the adjustments at issue.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[C.4]	-	-

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

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

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

Performance indicators used by Germany

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

253. Germany further reported it does not use any performance indicators for staff in charge of MAP processes that are based on the amounts of sustained audit adjustments or maintaining an amount of tax revenue. In that regard it noted that the Federal Careers Ordinance constitutes the basis for performing regular performance reviews of staff of the Federal Central Tax Office. Such review takes place at least once every three years and aims at evaluating each civil servant's suitability, qualification and performance in his or her area of expertise. In this respect, Germany clarified that it will measure the performance of staff in charge of MAP in accordance with the Guidelines for performance reviews of civil servants employed by the Federal Office for Central Services and Unresolved Property Issues, the Federal Equalisation of Burdens Office, the Federal Central Tax Office and the Centre for Data Processing and Information Technology. In more detail, such measuring is based on 20 categories, which are clustered into following four groups: basic requirements, core competencies, requirements for dealing with others and special requirements. In addition, Germany reported that bonuses may be granted to staff for special performance. Such granting is independent from the performance review, but cannot contradict the current performance review.¹⁷

254. The Final Report on Action 14 includes examples of performance indicators that are considered appropriate. These indicators are shown below and presented in the form of a

checklist for Germany. They are checked when they are taken into account by Germany's competent authority:

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

Practical application

Period 1 January 2015-31 March 2017 (stage 1)

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

Period 1 April 2017-30 September 2018 (stage 2)

256. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[C.5]	-	-

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

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

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

Position on MAP arbitration

259. Germany reported that it has no domestic law limitations for including MAP arbitration in its tax treaties. The inclusion of an arbitration provision based on Article 25(5) of the OECD Model Tax Convention is part of its tax treaty policy.¹⁸

260. In addition, Germany is a signatory to the EU Arbitration Convention and has adopted the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union. This directive has been implemented in Germany's domestic legislation on 1 July 2019. Its MAP guidance includes in section C information on the availability of the EU Arbitration Convention and how Germany applies that convention in practice.

Recent developments

261. Germany reported that in 2018 it finalised negotiations of the replacement of an existing treaty with one treaty partner and also agreed on an amending protocol with another treaty partner. Both the new treaty and the amending protocol include a mandatory and binding arbitration procedure based on Article 25(5) of the OECD Model Tax Convention.

262. Germany also signed the Multilateral Instrument and is currently preparing the ratification of this instrument, which is currently foreseen for 2020. With the signing of that instrument, Germany also opted in for part VI, which includes a mandatory and binding arbitration provision. The effects of this opting in is further described below.

Practical application

263. Germany has incorporated an arbitration clause in 13 tax treaties as a final stage to the MAP. These clauses can be specified as follows:

- In seven treaties the arbitration clause is based on Article 25(5) of the OECD Model Tax Convention, whereby in some treaties deviations from this provision were agreed (i.e. a three-year period for the MAP instead of a two-year period or that the arbitration procedure is initiated at the request of either competent authority instead of at the request of the taxpayer). In this respect, Germany included in a Protocol with Japan rules for conducting the arbitration procedure and entered into a competent authority agreement with the Netherlands and the United Kingdom to detail the rules to be applied during the arbitration procedure, which follow the Sample Mutual Agreement on Arbitration as included in the Annex to the Commentary on Article 25 of the OECD Model Tax Convention.¹⁹
- In four further treaties the arbitration clause provides for a mandatory and binding arbitration procedure. Under one of these treaties, the arbitration procedure is conducted by the European Court of Justice. For the other three treaties, a main difference from Article 25(5) of the OECD Model Tax Convention is that they include substantially more rules on the arbitration procedure in the treaty itself, where the model refers to a mutual agreement on the application of the arbitration clause to be concluded between the competent authorities. Further, for two of the other three treaties, Germany entered into a mutual agreement on the application of the arbitration clause that further specifies how the arbitration procedure will be applied.²⁰
- In two treaties the arbitration clause provides for a voluntary and binding arbitration procedure.

264. In addition, with respect to the effect of part VI of the Multilateral Instrument on Germany's tax treaties, there are next to Germany in total 28 signatories to this instrument that also opted for part VI. Concerning these 28 signatories, Germany listed 15 as a covered tax agreement under the Multilateral Instrument. However, 12 of these 15 treaty partners also listed their treaty with Germany under that instrument.

265. With respect to these 12 treaties, Germany already included an arbitration provision in six of them. For these six treaties, Germany opted, pursuant to Article 26(4) of the Multilateral Instrument, not to apply part VI. For the other six treaties, Germany reported it expects that part VI of the Multilateral Instrument will introduce a mandatory and binding arbitration procedure in two of these treaties.

Anticipated modifications

266. Germany reported that it is currently in the process of analysing which of its tax treaties, and to what extent, will be modified to incorporate the arbitration provision of part VI of the Multilateral Instrument.

Conclusion

	Areas for improvement	Recommendations
[C.6]	-	-

Notes

1. These 90 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, and the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
2. One of these two treaties concerns the treaty with the former USSR that Germany continues to apply to Moldova.
3. Available at: www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm. These statistics are up to and include fiscal year 2017.
4. Available at https://ec.europa.eu/taxation_customs/news/statistics-apas-and-maps-eu_en.
5. For post-2015 cases, if the number of MAP cases in Germany's inventory at the beginning of the Statistics Reporting Period plus the number of MAP cases started during the Statistics Reporting Period was more than five, Germany reported its MAP caseload on a jurisdiction-by-jurisdiction basis. This rule applies for each type of cases (attribution/allocation cases and other cases).
6. Original 2006 Code of Conduct available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ:C:2006:176:TOC>. 2009 Revised Code of Conduct available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ:C:2009:322:TOC>.
7. Germany in addition mentioned that the dates on which the taxpayers who submitted the MAP requests were informed about the outcome were not available for a large number of pre-2016 cases, in particular where the request had been submitted with the competent authority of the treaty partner.
8. See Articles 85(3-4) and 108(3) of the German constitution.
9. Available at: https://www.bzst.de/SharedDocs/BMF/DE/Downloads/bmf_Erlass_20110620.pdf. See also paragraph 1.4 of Germany's MAP guidance.

10. The form is published as an annex to the German MAP guidance (circular of the German Federal Ministry of Finance of 9 October 2018, BStBl I 2018, 1122). The local tax administration has to forward the request through the official channel, which means via the relevant tax administration of the Länder, where applicable, and via the relevant superior tax administration of the Länder, generally the Ministry of Finance of the Länder.
11. Such immediate forwarding also has to be made when the local tax administration is not yet able to make a final statement, for example, because the final result of a pending investigation must be awaited or where taxpayers initially pursue domestic available remedies.
12. Where a request is submitted to the other competent authority concerned under the EU Arbitration Convention, Germany's competent authority will, pursuant to paragraph 11.5 of its MAP guidance, also examine the formal requirements and forward the initiation letter by the other competent authority to the highest responsible office in the tax administration of the Länder. If necessary, Germany's competent authority will request the other competent authority concerned to send the information and documentation as listed in paragraph 11.3.2, which concerns the information and documentation Germany generally requires taxpayers to include in their request under the EU Arbitration Convention, as also (i) a confirmation that the request was submitted within the three-year deadline and (ii) a notification of the start-date of the two-year deadline for the mutual agreement procedure.
13. Federal Ministry of Finance circular of 6 January 2017 on co-ordinated external tax audits (BStBl I 2017, 89), available online at https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2017-01-06-Merkblatt-ueber-koordinierte-steuerliche-Aussenpruefungen-mit-Steuerverwaltungen-anderer-Staaten-und-Gebiete.pdf.
A non-binding English translation is available at: https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2017-01-06-Merkblatt-ueber-koordinierte-steuerliche-Aussenpruefungen-mit-Steuerverwaltungen-anderer-Staaten-und-Gebiete-englische-Version.pdf.
14. Since 2017, the tasks of the Bundesamt für zentrale Dienste und offene Vermögensfragen which are relevant in this context are dealt with by another authority, the Bundesverwaltungsamt.
15. Reference is made to paragraph 234 of this report for this specific suggestion.
16. This also follows from paragraph 1.4 of Germany's MAP guidance, which stipulates that: "the BZSt acts in agreement with the responsible supreme or commissioned state tax authority".
17. Germany refers to the Federal Ordinance on Performance-related civil service remuneration for the rules relating to performance bonuses.
18. Article 24 of the document Basis for negotiation for agreements for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital of 2013. A non-binding English translation is available at: https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Allgemeine_Informationen/2013-08-22-Verhandlungsgrundlage-DBA-englisch.html.
19. Reference is made to footnote 46 for the links to these agreements.
20. Reference is made to footnote 46 for the links to these agreements.

References

- OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://doi.org/10.1787/g2g972ee-en>.
- OECD (2016), *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. <https://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf>.

Part D

Implementation of MAP Agreements

[D.1] Implement all MAP agreements

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

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

Legal framework to implement MAP agreements

241. Germany reported that effectively there is no domestic law statute of limitations for implementing MAP agreements. In relation to the amendment of otherwise final and time-barred tax assessment, section 175a of the German Fiscal Code notes in this respect that:

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

242. Concerning the process for implementing MAP agreements, Germany reported that when its competent authority reaches an agreement with the other competent authority concerned, the agreement will be communicated without undue delay to the local tax administration as well as to the taxpayer. The taxpayer is subsequently invited to either accept or reject the agreement reached, for which there is no time limit. If the taxpayer accepts the agreement reached, he should submit a written declaration containing his consent to the implementation of the MAP agreement, to terminate any pending appeals and to declare a waiver of appeals against the tax assessment that reflects the MAP agreement.²

243. Paragraph 4.2 of Germany's MAP guidance also includes information on the process for implementing MAP agreements, which stipulates:³

When implementing the mutual agreement procedure, the locally responsible tax office must ensure, within the scope of reservation of consent that:

- the applicant declares their agreement to implementation in writing
- any pending appeals are terminated

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

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

245. Germany further reported that its competent authority does not actively monitor the actual implementation of MAP agreements, as this – as noted in paragraph 1.4 of Germany's MAP guidance – is a matter to be dealt with by the tax administrations of the Länder. While the competent authority generally asks the tax administrations of the Länder to report back once a MAP agreement has been implemented, active monitoring where such reports are not received is only being done when a taxpayer or the other competent authority concerned raises issues in a specific case. Germany noted that such cases are extremely rare.

Recent developments

246. There are no recent developments with respect to element D.1.

Practical application

Period 1 January 2015-31 March 2017 (stage 1)

247. Germany reported that all MAP agreements reached in the period 1 January 2015-31 March 2017, once accepted by taxpayers, have been implemented.

248. All peers that provided input indicated not being aware of any MAP agreement reached on or after 1 January 2015 that were not implemented by Germany. Two peers particularly noted that it is their impression that Germany implemented MAP agreements correctly. Another peer voiced that Germany effectively and efficiently implements MAP agreements. One taxpayer provided input and mentioned that in its case an agreement was reached that was communicated by Germany's competent authority in due time.

Period 1 April 2017-30 September 2018 (stage 2)

249. One peer that did not provide input in stage 1 reported that all MAP agreements that were reached on or after 1 April 2017, once accepted by taxpayers, have been (or will be) implemented.

250. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given. One peer thereby added that in its knowledge all MAP agreements reached with Germany's competent authority have been duly implemented by Germany. Two other peers mentioned that it is not aware of any MAP agreements that were not implemented by Germany.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[D.1]	-	-

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

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

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

Theoretical timeframe for implementing mutual agreements

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

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

Recent developments

255. There are no recent developments with respect to element D.2.

*Practical application**Period 1 January 2015-31 March 2017 (stage 1)*

256. Germany reported that all MAP agreements reached in the period 1 January 2015-31 March 2017 were implemented on a timely basis.

257. All peers that provided input indicated not experiencing any problems with Germany regarding the implementation of MAP agreements reached in the period 1 January 2015-31 March 2017 in general or not on a timely basis. One peer specifically mentioned that it considered that MAP agreements with Germany have been implemented both timely and

correctly. Another peer reported that for non-allocation/attribution cases implementation of MAP agreements takes a long time, as the implementation is to be performed by the local tax administration in Germany. This peer, however, did not provide specific examples of such delays.

Period 1 April 2017-30 September 2018 (stage 2)

258. Germany reported that generally all MAP agreements reached in the period 1 April 2017-30 September 2018 were implemented on a timely basis.

259. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by Germany fully reflects their experience with Germany since 1 April 2017 and/or there are no additions to the previous input given. Several of these peers mentioned that they have not experienced any delays in the implementation of MAP agreements by Germany. One peer thereby added that in its experiences, implementation of MAP agreement by Germany has always been very positive. Although this peer mentioned that in some cases implementation may take time, delays are due to taxpayer's lack of acceptance of the MAP agreement and not due to delays at the level of Germany's local tax administrations.

260. The remaining peer mentioned it has experienced a delay in the implementation of a MAP agreement reached with Germany since 1 April 2017. The peer clarified that for this case, after the agreement was reached, Germany's competent authority explained to the peer's competent authority that it was required to wait for their examination function to amend the adjustment before Germany's competent authority could send their closing letter for the case. The peer added that in the 15 months since the MAP agreement was reached, its competent authority had not received the closing letter.

261. Germany responded to this latter input and stated that it has consulted with the peer's competent authority to identify the case being referred to. Based on this consultation, Germany's competent authority came to the conclusion that there has not been any undue delay in implementing the MAP agreement in Germany, but that, on the contrary, the implementation was dependent on several actions to be undertaken by the taxpayer (i.e. the filing of amended tax returns in the peer's state), which took considerable time. Germany further mentioned that its competent authority informed the peer's competent authority about the steps that were still necessary to be made by the taxpayer to ensure implementation of the MAP agreement and on the status of the implementation. It also informed the peer's competent authority when the agreement was implemented. Germany also mentioned that it has contacted the peer to understand why it arrived at the conclusion that the delay in implementation was caused by Germany and why the peer's competent authority was of the opinion that it did not receive sufficient information on the implementation. In a reaction, the peer stated that based on Germany's response it now understands the situation better and does not think the implementation of the MAP agreement was unduly delayed in the case.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[D.2]	-	-

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

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

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

Legal framework and current situation of Germany's tax treaties

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

265. Out of Germany's 93 tax treaties, 68 contain a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law.⁴

266. For the remaining 25 treaties, the following analysis is made:

- In 23 tax treaties neither equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention is contained, nor the alternative provisions in Article 9(1) and Article 7(2) setting a time limit for making transfer pricing adjustments.⁵
- One tax treaty does not contain a provision that is based on Article 25(2), second sentence, of the OECD Model Tax Convention, but a provision stipulating that any MAP agreement shall be implemented within ten years. This treaty therefore is considered not having the full equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention.
- One tax treaty contains an equivalent provision to Article 25(2), second sentence, of the OECD Model Tax Convention, but this provision is supplemented with wording that may limit the implementation of MAP agreements due to constraints in the domestic legislation of the contracting states (e.g. "except such limitations as apply for the purposes of giving effect to such an agreement"). Although Germany's domestic legislation includes a section that provides that otherwise final and time-barred tax assessments can be amended in order to implement MAP agreements, such statute of limitation may be in existence in the domestic legislation of the

treaty partner. This treaty therefore is also considered not having the full equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention.

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

Recent developments

Bilateral modifications

268. Germany signed a new treaty with a treaty partner on the replacement of an existing treaty current in force. The new treaty contains a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention, while the treaty currently in force did not include the second sentence. Germany ratified this new treaty already and is awaiting ratification from the treaty partner. The effect of this newly signed treaty has been reflected in the analysis above where it has relevance.

Multilateral Instrument

269. Germany signed the Multilateral Instrument and is currently preparing the ratification of this instrument, which is currently foreseen for 2020.

270. Article 16(4)(b)(ii) of that instrument stipulates that Article 16(2), second sentence – containing the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. In other words, in the absence of this equivalent, Article 16(4)(b)(ii) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both, pursuant to Article 16(6)(c)(ii), notified the depositary that this treaty does not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. Article 16(4)(b)(ii) of the Multilateral Instrument does will for a tax treaty not take effect if one or both of the treaty partners has, pursuant Article 16(5)(c), reserved the right not to apply the second sentence of Article 16(2) of that instrument for all of its covered tax agreements under the condition that: (i) any MAP agreement shall be implemented notwithstanding any time limits in the domestic laws of the contracting states, or (ii) the jurisdiction intends to meet the Action 14 Minimum Standard by accepting in its tax treaties the alternative provisions to Article 9(1) and 7(2) concerning the introduction of a time limit for making transfer pricing profit adjustments.

271. In regard of the 25 tax treaties identified above that are considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention or both alternatives provided for in Articles 9(1) and 7(2), Germany listed five treaties as covered tax agreements under the Multilateral Instrument and for all of them did it make a notification, pursuant to Article 16(6)(c)(ii), that they do not contain a provision described

in Article 16(4)(b)(ii).⁶ All relevant five treaty partners are a signatory to the Multilateral Instrument, but one did not list its treaty with Germany under that instrument and one made a reservation on the basis of Article 16(5)(a). The remaining three treaty partners made a notification pursuant to Article 16(6)(c)(ii). Therefore, at this stage, the Multilateral Instrument will, upon entry into force for these treaties, modify three treaties to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention.⁷

Other developments

272. As is described in the Introduction, for those treaties that are not in line with this element of the Action 14 Minimum Standard and will not be modified by the Multilateral Instrument, Germany is either already in negotiations with the relevant treaty partners or such negotiations are envisaged or planned with a view to bring them in line with the Action 14 Minimum Standard. Concerning the 25 treaties identified above that do not contain a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention, Germany reported the following:

- Negotiations on the replacement of the treaty currently in force were completed in 2018 for two treaties, while with a third party such negotiations were finalised concerning an amending protocol, which all will include Article 25(2), second sentence.
- Negotiations on the replacement of the treaty currently in force are ongoing with 11 treaty partners, while with four treaty partners such negotiations is envisaged or planned. In these negotiations, Germany strives at including the second sentence of Article 25(2) of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report.
- One treaty partner has informed Germany that it will withdraw its reservation under the Multilateral Instrument, following which it is expected that the treaty with that treaty partner will be modified by the instrument to include the second sentence of Article 25(2) of the OECD Model Tax Convention.

Peer input

273. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with Germany. Six of these peers mentioned that their treaty with Germany is in line with the requirements under the Action 14 Minimum Standard, which also regards element D.3 and which conforms with the above analysis. Of the 25 treaties that are considered not to be in line with the requirements under element B.7, 19 did not provide input. Of the remaining six treaty partners, five mentioned there are no additions to the previous input given, while the sixth peer mentioned that negotiations on the amendment of the treaty with Germany are ongoing and that three rounds of negotiations were held since 1 April 2017. The reporting of this latter peer conforms with Germany's reporting mentioned above.

Anticipated modifications

274. The remaining three treaties that are not in line with element D.3 and will not be modified by the Multilateral Instrument, no bilateral negotiations are envisaged, scheduled or pending. One of these treaties concerns the 1980 treaty with the former USSR that Germany continues to apply to Moldova and for which such renegotiations are also not necessary. Regardless, Germany reported it will seek to include Article 25(2), second sentence, of the OECD Model Tax Convention in all of its future treaties.

Conclusion

	Areas for improvement	Recommendations
[D.3]	<p>25 out of 93 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention, nor both alternative provisions in Article 9(1) and Article 7(2). Of these 25 treaties:</p> <ul style="list-style-type: none"> • Three are expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. • One is expected to be modified by the Multilateral Instrument to include the required provision once the treaty partner has amended its notifications. • 21 will not be modified by the Multilateral Instrument to include the required provision. With respect to these 21 treaties: <ul style="list-style-type: none"> - For three negotiations on the replacement of the existing treaty currently in force have been completed, which includes the required provision. - 15 treaties are included in the list of treaties for which negotiations are envisaged, scheduled or pending. - For the remaining three treaties no actions have been taken, but are included in the plan for renegotiations. 	<p>Germany should as quickly as possible complete the ratification process for the Multilateral Instrument, to incorporate the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention in the four treaties that currently do not contain such equivalent or the alternative provisions and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned and upon amendment of the notifications by one of the treaty partners.</p> <p>For 20 of the remaining 21 treaties that will not be amended by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, Germany should:</p> <ul style="list-style-type: none"> • continue such negotiations to include the required provision for the 15 treaties for which such negotiations are envisaged, scheduled or pending • as quickly as possible sign and ratify the three new treaties or amending protocols to have in place the required provision • also request the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions in two treaties, in accordance with its plan for renegotiations. <p>Specifically with respect to the treaty with the former USSR, Germany should, once it enters into negotiations with the jurisdictions for which it applies this treaty, in accordance with its plan for renegotiations, request the inclusion of the required provision or its alternatives.</p>

Notes

1. A treaty or convention within the meaning of Section 2 of the German Fiscal Code concerns a tax treaty or convention, including bilateral tax treaties or the EU Arbitration Convention.
2. Section 354(1a) of the German Fiscal Code enables taxpayers to waive an appeal to a tax assessment for only those issues that are subject of a MAP agreement and subsequently to initiate or pursue domestic appeals for those issues that are not related to the issues covered in a MAP agreement.
3. See also paragraph 3.4 of Germany's MAP guidance.
4. These 68 treaties include the treaty with former Yugoslavia that Germany continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.
5. These 23 treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic, and the treaty with the former USSR that Germany continues to apply to Moldova.
6. These five treaties include the treaty with former Czechoslovakia that Germany continues to apply to the Czech Republic and the Slovak Republic.
7. Ibid.

Reference

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

Summary

	Areas for improvement	Recommendations
Part A: Preventing disputes		
[A.1]	<p>Two out of 93 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. None of these two treaties are expected to be modified by the Multilateral Instrument to contain the required provision. With respect to these treaties:</p> <ul style="list-style-type: none"> • For one negotiations on the replacement of the existing treaty currently in force have been completed, which includes the required provision. • One is included in the list of treaties for which negotiations are envisaged, scheduled or pending. 	<p>Germany should for one of the two treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, continue discussions or negotiations to include the required provision. For the other treaty, Germany should as quickly as possible sign and ratify the new treaty to have in place the required provision.</p>
[A.2]	-	-
Part B: Availability and access to MAP		
[B.1] ↓	<p>Three out of 93 tax treaties do not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention. None of these three treaties will be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report. With respect to these three treaties:</p> <ul style="list-style-type: none"> • Two treaties are included in the list of treaties for which negotiations are envisaged, scheduled or pending. • For the remaining treaty no actions have been taken nor are any actions planned to be taken, but is included in the plan for renegotiations. 	<p>For two of the three treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention, as it read as amended in the Action 14 final report, Germany should initiate or continue such negotiations with respect to the two treaty partners to include the required provision.</p> <p>In both instances this concerns a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention either:</p> <ul style="list-style-type: none"> • as amended in the Action 14 final report; or • as it read prior to the adoption of the Action 14 final report, thereby including the full sentence of such provision. <p>Specifically with respect to the treaty with the former USSR that Germany continues to apply to Moldova, Germany should ensure that, once it enters into negotiations with this jurisdiction in accordance with its plan for renegotiations, it includes the required provision.</p>

	Areas for improvement	Recommendations
↓ [B.1]	<p>Six out of 93 tax treaties do not contain a provision that is equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention, as the timeline to file a MAP request is in these treaties shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. Of these six treaties:</p> <ul style="list-style-type: none"> One is expected to be modified by the Multilateral Instrument to include Article 25(1), second sentence, of the OECD Model Tax Convention. For one negotiations on the replacement of the existing treaty currently in force have been completed, which includes Article 25(1), second sentence, of the OECD Model Tax Convention. Four are included in the list of treaties for which negotiations are envisaged, scheduled or pending. 	<p>Germany should as quickly as possible complete the ratification process for the Multilateral Instrument to incorporate the equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention in the one treaty that currently does not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaty concerned.</p> <p>Furthermore, for one of the remaining five treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, Germany should as quickly as possible sign and ratify the new treaty to have in place the required provision.</p> <p>For the remaining four treaties that also will not be modified by the Multilateral Instrument to include such equivalent, Germany should initiate or continue such negotiations with respect to the treaty partner to include the required provision.</p>
	<p>One out of 93 tax treaties does not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to or as amended by the Action 14 final report, and provide that the timeline to file a MAP request is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. This treaty will not be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report and a three year filing period for MAP request. For this treaty negotiations on the replacement of the existing treaty currently in force have been completed and include the required provisions.</p>	<p>For this treaty that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first and second sentence, of the OECD Model Tax Convention, Germany should as quickly as possible sign and ratify the new treaty to have in place the required provisions.</p>
[B.2]	-	-
[B.3]	-	-
[B.4]	-	-
[B.5]	-	-
[B.6]	-	-
[B.7]	<p>Six out of 93 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. Of these six treaties, one treaty has a limited scope of application. With respect to the five remaining comprehensive treaties:</p> <ul style="list-style-type: none"> Two are expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. Three treaties will not be modified by the Multilateral Instrument to include the required provision. With respect to these three treaties: <ul style="list-style-type: none"> For two negotiations on the replacement of the existing treaty currently in force have been completed, which include the required provision. For one negotiations is envisaged, scheduled or pending. 	<p>Germany should as quickly as possible complete the ratification process for the Multilateral Instrument, to incorporate the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention in the two treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaty concerned.</p> <p>For the remaining three comprehensive treaties that will not be amended by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, Germany should:</p> <ul style="list-style-type: none"> Continue such negotiations to include the required provision for the treaty for which such negotiations are envisaged, scheduled or pending. As quickly as possible sign and ratify the new treaties to have in place the required provision.
[B.8]	-	-

	Areas for improvement	Recommendations
[B.9]	-	-
[B.10]	-	-
Part C: Resolution of MAP cases		
[C.1]	<p>Three out of 93 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. None of these three treaties will be modified by the Multilateral Instrument to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention With respect to these three treaties,</p> <ul style="list-style-type: none"> • For one negotiations on the replacement of the existing treaty currently in force has been completed, which includes the required provision. • One treaty is included in the list of treaties for which negotiations are envisaged, scheduled or pending. <p>For the remaining treaty no actions have been taken nor are any actions planned to be taken.</p>	<p>Germany should for one of the three treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention, continue discussions or negotiations to include the required provision. For another treaty, Germany should as quickly as possible sign and ratify the new treaty to have in place the required provision.</p> <p>Specifically with respect to the treaty with the former USSR that is being applied to Moldova, Germany should, once it enters into negotiations with the jurisdiction for which it applies this treaty, request the inclusion of the required provision.</p>
[C.2]	-	-
[C.3]	<p>While Germany has significantly reduced the average completion time of MAP cases in 2017 as compared to 2016, resulting in an average for 2017 below 24 months (which is the pursued average for resolving MAP cases received on or after 1 January 2016) and for both years combined is almost below this average, there is still a risk that post-2015 cases are not resolved within the average of 24 months. This in particular regards attribution/allocation cases, for which the average timeframe is 31.62 months and which may indicate that the competent authority is not adequately resourced.</p> <p>For these cases, the main issues identified by peers were delays in communication, specifically the issuing of position papers and responses to position papers and delays caused in the context of the close working relationship with the tax administrations of the Länder in handling and resolving MAP cases.</p> <p>Furthermore, as the MAP caseload relating to other cases has increased from 1 January 2016 to 31 December 2017, this indicates that at least until 2017 the competent authority may not have been adequately resourced to cope with this increase, although several actions have been taken to address this in the meantime.</p>	<p>While since 1 January 2016 Germany has added a substantial number of new staff to the competent authority function, has increased the number of face-to-face meetings and communications with its treaty partners, Germany should closely monitor whether the addition of resources recently provided and foreseen will be sufficient to ensure a timely, effective and efficient resolution of MAP cases. It this would not be the case, Germany should, in particular for attribution/allocation cases, hire or assign more staff to its competent authority, such also with a view to ensuring that delays in the co-ordination between the Federal Central Tax Office and the tax administrations of the Länder can be avoided, that delays in providing position papers and responses to position papers can be avoided, and to enable Germany's competent authority to more frequently liaise with treaty partners' competent authorities.</p>
[C.4]	-	-
[C.5]	-	-
[C.6]	-	-
Part D: Implementation of MAP agreements		
[D.1]	-	-
[D.2]	-	-

	Areas for improvement	Recommendations
[D.3]	<p>25 out of 93 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention, nor both alternatives provisions in Article 9(1) and Article 7(2). Of these 25 treaties:</p> <ul style="list-style-type: none"> • Three are expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. • One is expected to be modified by the Multilateral Instrument to include the required provision once the treaty partner has amended its notifications. • 21 will not be modified by the Multilateral Instrument to include the required provision. With respect to these 21 treaties: <ul style="list-style-type: none"> - For three negotiations on the replacement of the existing treaty currently in force have been completed, which includes the required provision. - 15 treaties are included in the list of treaties for which negotiations are envisaged, scheduled or pending. - For the remaining three treaties no actions have been taken, but are included in the plan for renegotiations. 	<p>Germany should as quickly as possible complete the ratification process for the Multilateral Instrument, to incorporate the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention in the four treaties that currently do not contain such equivalent or the alternative provisions and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned and upon amendment of the notifications by one of the treaty partners.</p> <p>For 20 of the remaining 21 treaties that will not be amended by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, Germany should:</p> <ul style="list-style-type: none"> • Continue such negotiations to include the required provision for the 15 treaties for which such negotiations are envisaged, scheduled or pending. • As quickly as possible sign and ratify the three new treaties or amending protocols to have in place the required provision. • Also request without further delay the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions in two treaties, in accordance with its plan for renegotiations. <p>Specifically with respect to the treaty with the former USSR, Germany should, once it enters into negotiations with the jurisdictions for which it applies this treaty in accordance with its plan for renegotiations, request the inclusion of the required provision or its alternatives.</p>

Annex A

Tax treaty network of Germany

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

Treaty partner	Column 2		Column 3		Column 4		Column 5		Column 6		Column 7		Column 8		Column 9		Column 10		Column 11	
	Article 25(1) of the OECD Model Tax Convention ("MTC")		Article 25(1) of the OECD MTC		Article 9(2) of the OECD MTC		Anti-abuse		Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration							
	B.1	B.2	B.3	B.4	B.5	B.6	B.7	B.8	B.9	B.10	B.11	B.12	B.13	B.14	B.15	B.16	B.17	B.18	B.19	B.20
	Article 25(1) of the OECD Model Tax Convention ("MTC")		Article 9(2) of the OECD MTC		Anti-abuse		Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration									
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10		B.11		B.12	
	B.1		B.3		B.4		B.5		B.7		B.8		B.9		B.10					

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

	Article 25(1) of the OECD Model Tax Convention ("MTC")		Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
	B.1	B.3	B.4	C.1	D.3	A.1	B.7	C.6		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11
Treaty partner	DTC in force?	Inclusion Art. 25(1) first sentence?	Inclusion Art. 25(1) second sentence? (Note 1)	Inclusion Art. 9(2) (Note 2) if no, will your CA provide access to MAP in TP cases?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the abuse of the DTC or of the domestic tax law?	Inclusion Art. 25(2) first sentence? (Note 3)	Inclusion Art. 25(2) second sentence? (Note 4)	Inclusion Art. 25(3) first sentence? (Note 5)	Inclusion Art. 25(3) second sentence? (Note 6)	Inclusion arbitration provision?
		If yes, submission to either competent authority? (new Art. 25(1), first sentence)	If no, please state reasons		If no, will your CA accept a taxpayer's request for MAP in relation to such cases?		If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4)			
Philippines	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Poland	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Portugal	Y	O	ii	2-years	i	Y	N	Y	N	N
Romania	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Russia	Y	O	Y	N/A	i**	Y	Y	Y	Y	N
Serbia	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Singapore	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Slovak Republic	Y	O	i	N/A	Y	Y	N*	Y	Y	N
Slovenia	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
South Africa	N	O	Y	N/A	i	Y	Y	Y	Y	N
Spain	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Sri Lanka	Y	O	i	N/A	i	Y	N	Y	Y	N
Sweden	Y	O	i	N/A	Y	Y	Y	Y	Y	N
Switzerland	Y	O	i	N/A	i	Y	N	Y	Y	Y
Syrian Arab Republic	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Chinese Taipei	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Tajikistan	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Thailand	Y	O	i	N/A	i	Y	N	Y	Y	N
Trinidad and Tobago	Y	O	i	N/A	i	Y	N	Y	Y	N

	Column 1	Column 2	Column 3		Column 4		Column 5	Column 6		Column 7		Column 8		Column 9		Column 10	Column 11																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																						
			Article 25(1) of the OECD Model Tax Convention ("MTC")	Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																													
			B.1	B.3	B.4	C.1	D.3	A.1	B.7	C.6																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																													
Treaty partner	DTC in force?	Inclusion Art. 25(1) first sentence?	Inclusion Art. 25(1) second sentence? (Note 1)	Inclusion Art. 9(2) (Note 2) If no, will your CA provide access to MAP in TP cases?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?	Inclusion Art. 25(2) first sentence? (Note 3)	Inclusion Art. 25(2) second sentence? (Note 4)	Inclusion Art. 25(3) first sentence? (Note 5)	Inclusion Art. 25(3) second sentence? (Note 6)	Inclusion arbitration provision?																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																													

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

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

Legend

E*	The provision contained in this treaty was already in line with the requirements under this element of the Action 14 Minimum Standard, but has been modified by the Multilateral Instrument to allow the filing of a MAP request in either contracting state.
E**	The provision contained in this treaty was not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty has been modified by the Multilateral Instrument and is now in line with this standard.
O*	The provision contained in this treaty is already in line with the requirements under this element of the Action 14 Minimum Standard, but will be modified by the Multilateral Instrument upon entry into force for this specific treaty and will then allow the filing of a MAP request in either contracting state.
Y*	The provision contained in this treaty was not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty has been modified by the Multilateral Instrument and is now in line with this element of the Action 14 Minimum Standard.
Y**	The provision contained in this treaty already included an arbitration provision, which has been replaced by part VI of the Multilateral Instrument containing a mandatory and binding arbitration procedure.
Y***	The provision contained in this treaty did not include an arbitration provision, but part VI of the Multilateral Instrument applies, following which a mandatory and binding arbitration procedure is included in this treaty
I*/II*/IV*/N*	The provision contained in this treaty is not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty will be modified by the Multilateral Instrument upon entry into force for this specific treaty and will then be in line with this element of the Action 14 Minimum Standard.
I**/IV**/N**	The provision contained in this treaty is not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty will be superseded by the Multilateral Instrument upon entry into force for this specific treaty only to the extent that existing treaty provisions are incompatible with the relevant provision of the Multilateral Instrument.
I***	The provision contained in this treaty is not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty will be superseded by the Multilateral Instrument only to the extent that existing treaty provisions are incompatible with the relevant provision of the Multilateral Instrument.

Annex B

MAP Statistics pre-2016 cases

Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2016	Number of pre-2016 cases closed during the reporting period by outcome										No. of pre-2016 cases remaining in MAP inventory on 31 December 2016	Average time taken (in months) for closing pre-2016 cases during the reporting period
		Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14
Attribution/Allocation	545	3	0	7	3	4	111	0	0	1	0	416	34.48
Others	632	12	2	19	12	12	99	0	0	2	0	474	29.59
Total	1177	15	2	26	15	16	210	0	0	3	0	890	31.79

Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2017	Number of pre-2016 cases closed during the reporting period by outcome										No. of pre-2016 cases remaining in MAP inventory on 31 December 2017	Average time taken (in months) for closing pre-2016 cases during the reporting period
		Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14
Attribution/Allocation	416	5	1	4	6	6	90	0	0	1	0	303	38.78
Others	474	11	4	13	2	10	102	0	0	10	0	322	40.75
Total	890	16	5	17	8	16	192	0	0	11	0	625	39.91

Annex C

MAP statistics post-2015 cases

Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2016	No. of post-2015 cases started during the reporting period	Number of post-2015 cases closed during the reporting period by outcome										No. of post-2015 cases remaining in on MAP inventory on 31 December 2016	Average time taken (in months) for closing post-2015 cases during the reporting period
			Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no agreement, including agreement to disagree	Any other outcome			
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/ Allocation	0	111	1	0	1	0	0	4	0	0	0	0	105	3.26
Others	0	243	2	1	8	34	11	1	0	0	0	0	186	1.36
Total	0	354	3	1	9	34	11	5	0	0	0	0	291	1.54

Note: The numbers of pre-2016 cases in the inventory on 1 January 2016 and 31 December 2016 in the table above are different from the number of pre-2016 cases in Germany's published 2016 MAP statistics. This results from the reclassification of one case from others to attribution/allocation and the recognition of one case notified to Germany's competent authority after 31 December 2016.

Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2017	No. of post-2015 cases started during the reporting period	Number of post-2015 cases closed during the reporting period by outcome										No. of post-2015 cases remaining in on MAP inventory on 31 December 2017	Average time taken (in months) for closing post-2015 cases during the reporting period
			Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no agreement, including agreement to disagree	Any other outcome			
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/ Allocation	105	177	2	1	8	3	4	25	0	0	0	0	239	8.19
Others	186	405	11	10	15	125	7	44	1	0	1	0	377	4.03
Total	291	582	13	11	23	128	11	69	1	0	1	0	616	4.73

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Resolution Mechanisms More Effective
AO	Abgabenordnung (German Tax Code)
APA guidance	Information on bi- or multilateral mutual agreement procedures under double taxation agreements for reaching Advance Pricing Agreements (“APA”) aimed at granting binding advance approval of transfer prices agreed between international associated enterprises (German original: <i>Merkblatt für bilaterale oder multilaterale Vorabverständigungsverfahren auf der Grundlage der Doppelbesteuerungsabkommen zur Erteilung verbindlicher Vorabzusagen über Verrechnungspreise zwischen international verbundenen Unternehmen (sogenannte “Advance Pricing Agreements”)</i>), Federal Ministry of Finance circular of 5 October 2006 (BStBl I 2006, 594)
Federal Ministry of Finance	Bundesministerium der Finanzen
BStBl	Bundessteuerblatt (Federal Tax Gazette)
Federal Central Tax Office	Bundeszentralamt für Steuern
Look-back period	Period starting from 1 January 2015 and ending on 31 December 2015 for which Germany wished to provide information and requested peer input
MAP guidance	Memorandum on international mutual agreement and arbitration procedures in the field of taxes on income and capital (German original: <i>Merkblatt zum internationalen Verständigungs- und Schiedsverfahren auf dem Gebiet der Steuern vom Einkommen und vom Vermögen</i>), Federal Ministry of Finance circular of 13 July 2006 (BStBl I 2006, 461)
MAP Statistics Reporting Framework	Rules for reporting of MAP statistics as agreed by the FTA MAP Forum
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
Pre-2016 cases	MAP cases in a competent authority’s inventory that were pending resolution on 31 December 2015
Post-2015 cases	MAP cases that are received by a competent authority from the taxpayer on or after 1 January 2016
Statistics Reporting Period	Period for reporting MAP statistics that started on 1 January 2016 and ended on 31 December 2017
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (CTPA/CFA/NOE2(2016)45/REV1)

OECD/G20 Base Erosion and Profit Shifting Project

Making Dispute Resolution More Effective – MAP Peer Review Report, Germany (Stage 2)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

Under Action 14, countries have committed to implement a minimum standard to strengthen the effectiveness and efficiency of the mutual agreement procedure (MAP). The MAP is included in Article 25 of the OECD Model Tax Convention and commits countries to endeavour to resolve disputes related to the interpretation and application of tax treaties. The Action 14 Minimum Standard has been translated into specific terms of reference and a methodology for the peer review and monitoring process. The peer review process is conducted in two stages. Stage 1 assesses countries against the terms of reference of the minimum standard according to an agreed schedule of review. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report. This report reflects the outcome of the stage 2 peer monitoring of the implementation of the Action 14 Minimum Standard by Germany.

Consult this publication on line at <https://doi.org/10.1787/9d6c280c-en>.

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