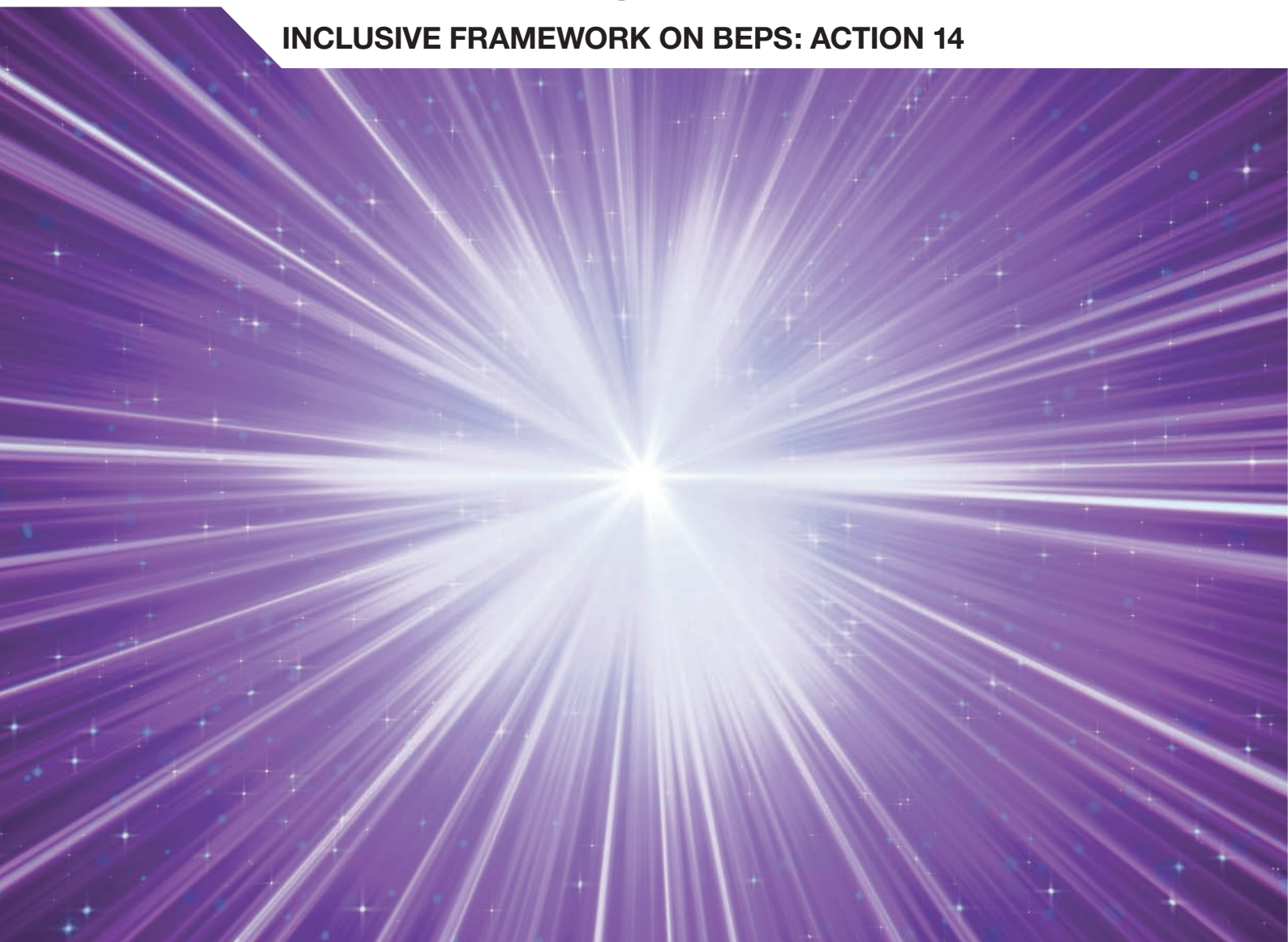


**OECD/G20 Base Erosion and Profit Shifting  
Project**



# **Making Dispute Resolution More Effective - MAP Peer Review Report, Korea (Stage 2)**

**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 BEPS planning strategies that rely on outdated rules or on poorly co-ordinated domestic measures will be rendered ineffective.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 90 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 135 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 12 May 2020 and prepared for publication by the OECD Secretariat.

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### *Abbreviations and acronyms*

<b>AITA</b>	Adjustment of International Taxes Act
<b>APA</b>	Advance Pricing Agreement
<b>BEPS</b>	Base Erosion and Profit Shifting
<b>EDAITA</b>	Enforcement Decree of the Adjustment of International Taxes Act
<b>FTA</b>	Forum on Tax Administration
<b>MAP</b>	Mutual Agreement Procedure
<b>NTS</b>	National Tax Service of Korea
<b>OECD</b>	Organisation for Economic Co-operation and Development



## Executive summary

Korea has an extensive tax treaty network with over 90 tax treaties and has an established MAP programme and considerable experience with resolving MAP cases. It has a large MAP inventory, with a modest number of new cases submitted each year and almost 120 cases pending on 31 December 2018. Of these cases, 78% concern allocation/attribution cases. The outcome of the stage 1 peer review process was that overall Korea met the majority of the elements of the Action 14 Minimum Standard. Where it had deficiencies, Korea worked to address them, which has been monitored in stage 2 of the process. In this respect, Korea solved some of them.

All of Korea's tax treaties include a provision relating to MAP. Those treaties mostly 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:

- Approximately 25% of its tax treaties does not contain 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 the alternative provisions for Article 9(1) and Article 7(2) to set a time limit for making transfer pricing adjustments.
- Approximately 10% of its tax treaties do not contain a provision stating that the competent authorities may consult together for the elimination of double taxation for cases not provided for in the tax treaty (which is required under Article 25(3), second sentence of the OECD Model Tax Convention).

In order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standard, Korea signed, without any reservations on the MAP article, the Multilateral Instrument, through which a number of its tax treaties will be potentially modified to fulfil the requirements under the Action 14 Minimum Standard. Where treaties will not be modified, upon entry into force and entry into effect of this Multilateral Instrument, Korea reported that it intends to update all of its tax treaties to be compliant with the requirements under the Action 14 Minimum Standard via bilateral negotiations. In this respect, Korea has initiated negotiations on the amendment/replacement of the treaties concerned or has approached the relevant treaty partners for such negotiations. Some of these negotiations have been completed, resulting in the treaty being compliant with these requirements.

Korea 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 roll-backs of bilateral APAs and such roll-backs are granted in practice.

Furthermore, Korea meets most of the requirements regarding the availability and access to MAP under the Action 14 Minimum Standard. It provides access to MAP in all eligible cases, although that access to MAP may be denied where domestic or foreign

courts have already rendered a decision on the issue for which a MAP request is submitted, even when the requirements for the initiation of the MAP process as specified in the applicable tax treaty have been met. In addition, Korea's domestic law allows its competent authority not to initiate a MAP where it is recognised that MAP is utilised for purposes of tax avoidance. This possibility bears the risk that in cases where anti-abuse provisions are being applied access to MAP will not be granted, which is considered not in line with the Action 14 Minimum Standard. Apart from these issues, Korea has in place a formal notification/consultation process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not justified. Korea also has clear and comprehensive guidance on the availability of MAP and how it applies this procedure in practice.

Concerning the average time needed to close MAP cases, the MAP statistics for Korea for the years 2016-18 are as follows:

2016-18	Opening inventory	Cases started	Cases closed	End inventory	Average time to close cases (in months) *
Attribution/allocation cases	86	76	92	70	30.50
Other cases	58	31	26	63	36.01
Total	144	107	118	133	31.71

\* The average time taken for closing MAP cases for post-2015 cases follows the MAP Statistics Reporting Framework. For computing the average time taken for closing pre-2016 MAP cases, Korea generally used as a start date the date on which Korea's competent authority received a notification from the other competent authority concerned of its intention to accept the MAP request. It generally used as the end date the date: (i) the date on which a MAP agreement is reached, the date of closure of a case if it is unilaterally closed, the date of providing unilateral relief, or date of withdrawal of a MAP request by the taxpayer, (ii) the date on which closing letters are exchanged in case no MAP agreement is reached, or (iii) the date of withdrawal of a MAP request by the taxpayer following the ruling of a domestic court on the same case.

The number of cases Korea closed in 2016-18 is approximately 91% as the number of all new cases started in those years. During these years, MAP cases were on average not closed within a timeframe of 24 months (which is the pursued average for closing MAP cases received on or after 1 January 2016), as the average time needed was 31.71 months. This both regards attribution/allocation cases and other cases, as for both type of cases the average is above 24-months, although the average time to close other cases is significantly longer. While in these years a dedicated MAP unit has been established alongside the addition of resources and other organisational and procedural steps have been taken, leading to a reduction of the average completion times and a reduction of 8% of its MAP inventory as per 31 December 2018 as compared to 1 January 2016, a number of peers experienced difficulties in resolving MAP cases with Korea. This in particular concerns timely obtaining position papers from Korea's competent authority as well as responses to position papers, or timely notifications throughout the MAP process. Further actions or addition of personnel are therefore necessary to be ensure that MAP cases are resolved in an timely, efficient and effective manner. Furthermore, Korea almost meets all of the other requirements under the Action 14 Minimum Standard in relation to the resolution of MAP cases. Its competent authority operates fully independently from the audit function of the tax authorities and the performance indicators used are appropriate to perform the MAP function.

Lastly, Korea in essence meets the Action 14 Minimum Standard as regards the implementation of MAP agreements and its competent authority monitors such implementation. However, where the other jurisdiction concerned initiated the MAP, Korea

requires taxpayers to ask for a rectification of the tax assessment within a period of two months as a prerequisite for implementation. In the stage 1 peer review report the period of two months was considered to bear the risk that not all MAP agreements are implemented. Korea has extended this period since then to three months and currently no impediments were identified in relation to this issue. Furthermore, in Korea a system is in place that a later ruling by a domestic court can annul an already implemented MAP agreement, although such have not occurred. Nevertheless, no issues have surfaced throughout the peer review process.



## *Introduction*

### **Available mechanisms in Korea to resolve tax treaty-related disputes**

Korea has entered into 95 tax treaties on income (and/or capital), of which 93 are in force.<sup>1</sup> These 95 treaties apply to an equal number of jurisdictions. All of these 95 treaties provide for a mutual agreement procedure for resolving disputes on the interpretation and application of the provisions of the tax treaty. None of Korea's tax treaties include an arbitration procedure as a final stage to the MAP process.

Under Korea's domestic law, specifically Article 22(1) of the Adjustment of International Taxes Act (“**AITA**”), the Minister of Economy and (the Director General for Tax Policy Co-ordination and the Director of the Tax Treaties Team) and the Commissioner of the National Tax Services (Assistant Commissioner for International Taxation, the Director of International Co-operation Division, and the Director of the MAP/APA team) are the designated competent authorities. The Minister of Economy and Finance is assigned competence to handle MAP cases of a general nature (e.g. the interpretation and application of tax treaties) and the Commissioner of the National Tax Service is assigned competence to handle taxpayer-specific MAP cases. Within the National Tax Service a reorganisation was performed in 2018, following which a dedicated Mutual Agreement Procedure division was established, which fully focuses on handling MAP and APA cases. This division in total employs 21 persons and is organised into the following five teams: (i) USA, (ii) China, (iii) Japan, (iv) Europe and (v) other treaty partners.

Korea's domestic law, specifically chapter 6 of the AITA and chapter 6 of the Enforcement Decree of the Adjustment of International Taxes Act (“**EDAITA**”) includes rules in relation to the MAP process. Furthermore, Korea issued and published MAP guidance in August 2017. This MAP guidance is available at (in both Korean and English):

[www.nts.go.kr/eng/resources/resour\\_21.asp?mbsinfokey=MBS20170825105756920&minfoKey=MINF7420080211223143&type=V](http://www.nts.go.kr/eng/resources/resour_21.asp?mbsinfokey=MBS20170825105756920&minfoKey=MINF7420080211223143&type=V)

### **Developments in Korea since 1 August 2017**

#### ***Developments relating to the tax treaty network***

In the stage 1 peer review report of Korea, it is reflected that in 2016 it signed a new tax treaty with Ethiopia, which has not yet entered into force. Since then this treaty has entered into force.

Furthermore, on 7 June 2017 Korea 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. Korea reported that it has initiated legislation for the ratification

of the instrument, which has been approved by Korea's National Assembly in December 2019. Korea reported it expects the instrument to be ratified shortly. With the signing of the Multilateral Instrument, Korea also submitted its list of notifications and reservations to that instrument. In relation to the Action 14 Minimum Standard, Korea has not made any reservations to Article 16 of the Multilateral Instrument (concerning the mutual agreement procedure).<sup>2</sup>

In addition, Korea reported that since 1 August 2017 the following developments took place with respect to its tax treaties:

- New treaties have been signed with the Czech Republic, Singapore and the United Arab Emirates. The treaties with the Czech Republic and Singapore have entered into force and have replaced the existing treaties, while Korea ratified the treaty with the United Arab Emirates. For the Czech Republic concerned the treaty with former Czechoslovakia that Korea until then continued to apply to the Czech Republic. The new treaties with the Czech Republic and the United Arab Emirates contain Article 9(2) and Article 25(1-3) of the OECD Model Tax Convention, allowing taxpayers to file a MAP request to the competent authorities of either contracting state. The new treaty with Singapore contains Article 9(2) and Article 25(1-3) of the OECD Model Tax Convention in its 2014 version (OECD, 2015), allowing taxpayers to file a MAP request in the state of which they are a resident.
- Amending protocols have been signed with Turkmenistan and Uzbekistan, which contain Article 25(1) of the OECD Model Tax Convention, allowing taxpayers to file a MAP request to the competent authorities of either contracting state.
- An amending protocol to the treaty with Switzerland has been signed to include Article 25(1) of the OECD Model Tax Convention, allowing taxpayers to file a MAP request to the competent authorities of either contracting state. Switzerland and Korea also negotiated with a view to include the alternative provisions in Article 9(1) and Article 7(2), but could not reach an agreement hereon.

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 currently will not be modified by the Multilateral Instrument, Korea reported that with the ratification of that instrument, it will update its lists of covered tax agreements and notifications following which three treaties that were not in line with the standard, will become so. Furthermore, Korea reported that it has finalised negotiations with Turkey on the replacement on the existing treaty currently in force, following which the treaty will be in line with the requirements under the Action 14 Minimum Standard. For the remaining nine treaties Korea reported that:

- Negotiations on the replacement/amendment of an existing treaty are pending for several years, which *inter alia* takes into consideration the requirements under the Action 14 Minimum Standard.
- It was approached by one treaty partner to initiate negotiations on the replacement/amendment of the existing treaty, which are now pending.
- It was approached by one treaty partner to enter into a memorandum of understanding to remedy the issue where due to a protocol provision taxpayers cannot request MAP irrespective of domestic remedy. In Korea's view a memorandum of understanding is not sufficient for such purposes as an amendment to the protocol would be necessary. Korea intends to approach the treaty partner with the proposal to revise the treaty.



- It has approached five treaty partners with the request to initiate negotiations on the replacement/amendment of the existing treaty, for which a response is pending for three treaty partners and with the fourth negotiations have been initiated. The fifth treaty partner responded to Korea that it is willing to enter into such negotiations, but not for purposes of the Action 14 Minimum Standard, as it will sign the Multilateral Instrument in 2020 and by doing so will make the required notifications in order to meet the requirements under the Minimum Standard. With this treaty partner an amending protocol was signed in November 2019, which *inter alia* contains Article 9(2) of the OECD Model Tax Convention (OECD, 2019).
- It has approached one treaty partner for a long time with the request to initiate negotiations on the replacement/amendment of the existing treaty, but so far no response has been given.

### ***Other developments***

In its stage 1 report, it is reflected that Korea increased staff in charge of MAP with six new persons in 2016 and one in 2017. In that regard Korea reported that it has in March 2018 established a Mutual Agreement Procedure Division at the level of the National Tax Service, which is fully dedicated to handle all MAP cases and APA cases. In addition thereto, five staff members were added to the competent authority function, bringing the total number to 21 persons that full-time handle these cases

Furthermore, Korea reported that in relation to the implementation process for MAP agreements, in February 2019 it extended the term for taxpayers to file for a reassessment of its tax position in line with that agreement from two to three months, where the MAP agreement relates to an adjustment made at the level of the treaty partner.

## **Basis for the peer review process**

### ***Outline of the peer review process***

The peer review process entails an evaluation of Korea'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 Korea and its peers.

The process consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). In stage 1, Korea'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 22 February 2018. This report identifies the strengths and shortcomings of Korea 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.<sup>3</sup> 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 Korea. In this update report, Korea 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 Korea 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, were taken into account, even if it concerns a replacement of an existing treaty. Reference is made to Annex A for the overview of Korea'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 Korea launched on 7 July 2017, with the sending of questionnaires to Korea and its peers. The FTA MAP Forum has approved the stage 1 peer review report of Korea in December 2017, with the subsequent approval by the BEPS Inclusive Framework on 22 February 2018. On 22 February 2019, Korea submitted its update report, which initiated stage 2 of the process.

While the commitment to the Action 14 Minimum Standard only starts from 1 January 2016, Korea opted to provide information and requested peer input concerning the period starting as from 1 January 2014 (the “**look-back period**”) and also requested peer input relating to the look-back period. The period for evaluating Korea's implementation of this standard ranges from 1 January 2016 up to 31 July 2017 and formed the basis for the stage 1 peer review report. The period of review for stage 2 started on 1 August 2017 and depicts all developments as from that date until 28 February 2019.

In total 17 peers provided input during stage 1: Australia, China, Denmark, France, Germany, India, Ireland, Italy, Japan, the Netherlands, Russia, Singapore, Spain, Sweden, Switzerland, Turkey and the United States. In stage 1, these peers represent approximately 45% of post-2015 MAP cases in Korea's inventory on 31 December 2016. During stage 2, the same peers provided input, apart from Russia. In addition, also Austria, Belgium, Canada, Egypt, Norway, Portugal and the Slovak Republic provided input during stage 2. For this stage, these peers represent approximately 82% of post-2015 MAP cases in Korea's inventory that started in 2016, 2017 or 2018.<sup>4</sup> Broadly all peers appreciated the easiness of contacts with Korea's competent authority and reported a good working relationship with them. Concerning the resolution of MAP cases, some peers, however, reported positive experience and some of them raising issues in terms of frequent change of personnel, difficulties in effectively conducting face-to-face meetings and resolving cases, delays in receiving position papers, limited authority to enter into MAP agreements due to competence at different government levels, and the possibility in Korea's domestic law to unilaterally end MAP cases after a certain period. Specifically with respect to stage 2, almost half of the peers that provided input reported that the update report of Korea fully reflects the experiences these peers have had with Korea since 1 August 2017 and/or that there was no addition to previous input given. A significant number of peers, however, reflected additional input or new experiences, which are reflected throughout this document under the elements where they have relevance. This input particularly relates to the resolution of MAP cases, for which some peers mentioned they still face difficulties in resolving MAP cases in terms of timely receiving position papers, while some of them also mentioned these difficulties or delays being due to changes in personnel within the competent authority.

### *Input by Korea and co-operation throughout the process*

Korea provided extensive answers in its questionnaire and provided detailed additional information, which was submitted on time. Korea 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, Korea provided the following information:

- MAP profile<sup>5</sup>
- MAP statistics according to the MAP Statistics Reporting Framework (see below).<sup>6</sup>

Concerning stage 2 of the process, Korea submitted its update report on time and the information included therein was extensive. Korea was very co-operative during stage 2 and the finalisation of the peer review process.

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

## Overview of MAP caseload in Korea

The analysis of Korea's MAP caseload for stage 1 relates to the period that started on 1 January 2016 and ended on 31 December 2016. For stage 2 the period ranges from 1 January 2017 to 31 December 2018. Both periods are taken into account in this report for analysing the MAP statistics of Korea. The analysis of Korea's MAP caseload therefore relates to the period starting on 1 January 2016 and ending 31 December 2018 (the “**Statistics Reporting Period**”).

According to the statistics provided by Korea, its MAP caseload was as follows:

2016-18	Opening inventory 1/1/2016	Cases started	Cases closed	End inventory 31/12/2018
Attribution/allocation cases	86	76	92	70
Other cases	58	31	26	63
Total	144	107	118	133

## General outline of the peer review report

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

- A. Preventing disputes
- B. Availability and access to MAP
- C. Resolution of MAP cases
- D. Implementation of MAP agreements.

Each of these sections is divided into elements of the Action 14 Minimum Standard, as described in the terms of reference to monitor and review the implementation of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (“**Terms of Reference**”).<sup>7</sup> Apart from analysing Korea's legal framework and its administrative practice, the report also incorporates peer input and responses to such input

by Korea, both during stage 1 and stage 2. Furthermore, the report depicts the changes adopted and plans shared by Korea 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 Korea 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, with a general description of the changes in the recent development sections.

The objective of the 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 Korea 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 Korea has entered into are available at: [www.nts.go.kr/eng/resources/resour\\_02.asp?minfoKey=MINF7620080220173406](http://www.nts.go.kr/eng/resources/resour_02.asp?minfoKey=MINF7620080220173406). The treaties that are signed but have not yet entered into force are with Nigeria (2006) and Sudan (2004). For the treaties with Nigeria and Sudan, Korea has already ratified the treaties in 2005 and 2007 respectively and is waiting for ratification by the respective treaty partners. Korea also signed a new treaty with the United Arab Emirates to replace the existing treaty in force, which has been ratified by Korea. Reference is made to Annex A for the overview of Korea's tax treaties regarding the mutual agreement procedure.
2. Available at: [www.oecd.org/tax/treaties/beps-mli-position-korea.pdf](http://www.oecd.org/tax/treaties/beps-mli-position-korea.pdf).
3. Available at: <https://www.oecd-ilibrary.org/docserver/9789264190184-en.pdf?expires=1566308009&id=id&accname=ocid84004878&checksum=70DD4DC5854C5272BC5930D9495E6F19>.
4. The breakdown of treaty partners on a jurisdiction-by-jurisdiction basis is only available for post-2015 cases under the MAP Statistics Reporting Framework. All cases falling within the *de minimis* rule do not fall in this percentage.
5. Available at: [www.oecd.org/tax/dispute/Korea-Dispute-Resolution-Profile.pdf](http://www.oecd.org/tax/dispute/Korea-Dispute-Resolution-Profile.pdf).
6. The MAP statistics of Korea are included in Annex B and C of this report.
7. 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).

## *Part A*

### Preventing disputes

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

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

1. Cases may arise concerning the interpretation or the application of tax treaties that do not necessarily relate to individual cases, but are more of a general nature. Inclusion of the first sentence of Article 25(3) of the OECD Model Tax Convention (OECD, 2017a) 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 Korea's tax treaties***

2. Out of Korea's 95 tax treaties, 92 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. In two of the remaining three treaties the term "interpretation" is not included, whereas in the other treaty the words "doubts" and "interpretation" are not included. For these reasons all three treaties are considered not containing the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.

3. Korea reported that when a tax treaty does not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention there are no obstructions for entering into interpretative mutual agreements. In fact, Korea indicated that it had experience with entering into MAP discussions with the treaty partners to the three treaties identified above that do not contain the equivalent of Article 25(3), whereby the absence of some terms did not pose any difficulties.

4. Most peers that provided input reported that their treaty with Korea meets the requirements under element A.1. For the three treaties identified above that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, two of the relevant peers provided input and considered their treaty with Korea conform to element A.1.

## *Recent developments*

### *Bilateral modifications*

5. Korea signed a new treaty with three treaty partners on the replacement of the existing treaty in force. Two of these new treaties have already entered into force and has replaced the previous treaty with the relevant treaty partner. The newly signed and previous treaties all contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention.

### *Multilateral Instrument*

6. Korea signed the Multilateral Instrument, which has been approved by the National Assembly in December 2019. Korea reported that the ratification of this instrument will be completed shortly.

7. 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 treaty has 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 of the fact that this tax treaty does not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.

8. In regard of the three tax treaties identified above that are considered not to contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, Korea listed two of them as a covered tax agreement under the Multilateral Instrument and for all did it make, pursuant to Article 16(6)(d)(i), a notification that they do not contain a provision described in Article 16(4)(c)(i). The relevant treaty partners are signatories to the Multilateral Instrument, listed their treaty with Korea as a covered tax agreement under that instrument and also made a notification on the basis of Article 16(6)(d)(i). Therefore, at this stage, the Multilateral Instrument will, upon entry into force for the treaties concerned, modify two of the three tax treaties identified above to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.

### *Other developments*

9. Korea reported that for those tax treaties that do not meet one or more elements of the Action 14 Minimum Standard and that will not be modified by the Multilateral Instrument, it will with the ratification of the instrument update its lists of covered tax agreements. In view of the remaining treaty that does not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, the envisaged update of the notifications under the Multilateral Instrument does not regard this treaty, due to the treaty partner not being a signatory to the Multilateral Instrument. Korea, however, reported that with this treaty partner negotiations on the replacement/amendment of the treaty have been pending for a long time, which will *inter alia* takes into consideration the requirements under the Action 14 Minimum Standard



### *Peer input*

10. Of the peers that provided input during stage 2, nine provided input in relation to their tax treaty with Korea. None of these peers concerns a treaty partner to one of the treaties identified above that does not contain Article 25(3), first sentence, of the OECD Model Tax Convention and which will not be modified by the Multilateral Instrument.

### *Anticipated modifications*

11. Korea 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>Three out of 95 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. Of these three treaties:</p> <ul style="list-style-type: none"> <li>Two are expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.</li> <li>One will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention. For this treaty negotiations on the replacement/ amendment thereof are pending <i>inter alia</i> with a view to include the required provision.</li> </ul>	<p>Korea should as quickly as possible complete the ratification process for the Multilateral Instrument to incorporate the equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention in two of the three treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned.</p> <p>For the remaining treaty 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 following its entry into force, Korea should continue pending bilateral negotiations with a view to include 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.

12. 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.<sup>1</sup> 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.

### *Korea’s APA programme*

13. Following the enactment of the Adjustment of International Taxes Act (“AITA”) in 1995, Korea introduced an APA programme in 1997. Article 6(1) of the AITA allows resident taxpayers to request for a (unilateral or bilateral) APA when it intends to apply the arm’s length principle for a specific period of fiscal years. The request has to be submitted to the Commissioner of the National Tax Service and before commencement of the first

fiscal year to which the APA request relates to. Article 6(2) of the AITA subsequently allows the Commissioner of the National Tax Service to enter into bilateral APAs with Korea's treaty partners under the mutual agreement procedure. The specific division handling requests for bilateral APA's is the Mutual Agreement Procedure Division within the National Tax Service.

14. Articles 9-14 of the Enforcement Decree of the Adjustment of International Taxes Act ("EDAITA") include more information on the practical application of Korea's APA programme. Article 9 sets forth the specific information taxpayers have to submit in their request for a bilateral APA and the basics of the process of obtaining such APA. Article 11(3) of the EDAITA further specifies that where competent authorities reach an agreement on the terms of the bilateral APA, the Commissioner of the National Tax Service shall notify the taxpayer hereof within 15 days from the date of conclusion and provide it with the details of the agreement reached. The taxpayer in turn has to inform in writing whether it agrees with the agreement reached within a period of two months from this notification. If the taxpayer gives its consent in due time, the Commissioner of the National Tax Service has, pursuant to Article 11(6) of the EDAITA, to execute the APA agreement within 15 days upon receipt of the approval letter.

15. Korea reported that it annually publishes a report on its APA programme, with the last available report concerning fiscal year 2017.<sup>2</sup> In this report, detailed information is included on *inter alia* the number of APA cases (requests received, pending requests and APAs concluded), period for completion of APAs, covered transactions, running period of APAs, a specification of APAs per industry sector and jurisdictions, and used transfer pricing method. Specifically concerning fiscal year 2017, the report reflects that Korea is in active APA discussions with competent authorities of 24 treaty partners.<sup>3</sup> Since 2008 it has received 595 APA requests (44 in 2017), of which 418 were granted and 177 are pending.<sup>4</sup> Typically, bilateral APAs run for a period of five years, but shorter or longer period are also allowed.

### ***Roll-back of bilateral APAs***

16. Korea reported its competent authority is, pursuant to Article 6(3) AITA, allowed to grant roll-back for bilateral APAs. Although no specific particularities or requirements are included in the AITA, a roll-back can generally be granted when the transactional conditions of the roll-back period are the same as for the prospective period to which the APA applies. Roll-back of bilateral APAs is thereby possible for a maximum period of five years immediately preceding the period subject to the application of the APA. So where a bilateral APA applies for the period 2015-20, a roll-back of such APA can be provided for the period 2010-14.

### ***Recent developments***

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

### ***Practical application of roll-back of bilateral APAs***

#### ***Period 1 January 2014-31 July 2017 (stage 1)***

18. Korea reported that in the period 1 January 2014-31 July 2017, it received 72 requests for a roll-back of a bilateral APA. Of these requests, four were granted and 68 were pending on 31 July 2017. Furthermore, for requests for a roll-back of a bilateral APA received prior



to 1 January 2014, 34 roll-back requests were granted. Most roll-backs thereby apply for five years, but roll-backs are also granted for lesser years. For example, of the 11 roll-back of bilateral APAs granted in 2015, six covered a roll-back of three years or less, whereas five concern a roll-back of five years.

19. All peers that provided input generally reported that they do negotiate and agree bilateral APAs with Korea. Most of these peers also have experience with Korea concerning roll-back of bilateral APAs in the period 1 January 2014-31 July 2017. A number of peers reported not having such experiences, as they did not receive any request for roll-backs concerning an APA with Korea as from 1 January 2014. One of these peers reported that in the past they had received such requests and mentioned that Korea was open to provide for roll-backs. Another peer reported that it was in the past able to agree with Korea on a roll-back in one case.

20. The eight peers that mentioned having experience with Korea in relation to granting roll-back of bilateral APAs, reported that in the period 1 January 2014-31 July 2017 they received 41 requests for such roll-back. For one peer this concerned 27 requests (of which 14 were received in 2014, eight in 2015 and five in 2016). For two other peers this concerned six respectively four requests, and for the remaining four peers this concerned one request. All peers reported positive experiences with Korea in agreeing on a roll-back of bilateral APAs. One peer in particular noted that the actual agreement of such roll-back depends on the facts and circumstances of each specific case, but that roll-backs with Korea are possible in appropriate cases. Another peer with a relatively high caseload of roll-back requests concerning Korea, reported that it has not found any difficulty in the implementation of roll-backs agreed on with Korea. A third peer also voiced positive experience with Korea and noted that the latter is generally able to provide for a roll-back of bilateral APAs and has in practice agreed to apply such roll-back in all cases. This latter input was echoed by another peer, which mentioned not having encountered any concerns with regard to providing for the roll-back request. Lastly, one peer mentioned that it has one roll-back request concerning a bilateral APA with Korea, which case is still under review, following which it could not share any experience.

#### *Period 1 August 2017-28 February 2019 (stage 2)*

21. Korea reported that since 1 August 2017 it has received 39 requests for a roll-back of a bilateral APA. One of these 39 requests has been granted, whereas the others are still in the process of being reviewed.

22. Further to the above, Korea also reported that for the 68 roll-back requests that were still in the negotiation process at the end of stage 1, 19 have been closed. In 16 of these 19 cases a roll-back was granted, while two were withdrawn by the taxpayer and the remaining request was closed without an agreement being reached. The 49 other requests are still in the process of review.

23. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or there are no additions to the previous input given. Specifically in relation to the roll-back of bilateral APAs, some peers mentioned that they did not have any experiences since that date with Korea. Three of the peers that provided input during stage 2 mentioned that they had experiences with Korea on roll-backs of bilateral APAs. One of these peers noted that it received three roll-backs requests, for which it considered that Korea is generally able to provide for such roll-backs. The second peer specified that roll-back of bilateral APAs with Korea is quite common and that it is currently in the process of negotiating three APAs that

also include roll-back. The last peer mentioned it has also three cases pending with Korea regarding a roll-back of a bilateral APA, but so far had not yet concluded an APA with Korea and could therefore not comment whether roll-backs are actually possible.

24. With respect to the input received from this last peer, Korea mentioned it has prior to 2014 already agreed on a roll-back of a bilateral APA with this peer.

### *Anticipated modifications*

25. Korea did not indicate that it anticipates any modifications in relation to element A.2.

### *Conclusion*

	Areas for improvement	Recommendations
[A.2]	-	-

## Notes

1. This description of an APA based on the definition of an APA in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD, 2017b).
2. Available at: [https://www.nts.go.kr/eng/wtsnts\\_skin/board\\_skin/mdl/mdlFileDown.asp?minfoKey=MINF7420080211223143&key=394766](https://www.nts.go.kr/eng/wtsnts_skin/board_skin/mdl/mdlFileDown.asp?minfoKey=MINF7420080211223143&key=394766).
3. Ibid, section II.
4. Ibid, section VII, paragraph 1.

## References

- OECD (2017a), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/g2g972ee-en>.
- OECD (2017b), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, <https://dx.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.

26. For resolving cases of taxation not in accordance with the provisions of the tax treaty, it is necessary that tax treaties contain 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 Korea's tax treaties***

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

27. Out of Korea's 95 tax treaties, five contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2017), as amended by the Action 14 final report (OECD, 2015b) and allowing taxpayers to submit a MAP request to the competent authority of either state when they consider that the actions of one or both of the treaty partners result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty and that can be requested irrespective of the remedies provided by domestic law of either state. Furthermore, 80 contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report, allowing taxpayers to submit a MAP request to the competent authority of the state in which they are resident.

28. The ten 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	9
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 submit a MAP request irrespective of domestic available remedies, but whereby pursuant to a protocol provision the taxpayer is also required to initiate these remedies when submitting a MAP request	1

29. The nine treaties included in the first row of the table are considered not to contain 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, 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 seven of these nine treaties are considered to be in line with this part of element B.1:

- The relevant tax treaty does not contain a non-discrimination provision (three treaties).
- 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 (four treaties).

30. For the remaining two of the nine treaties, the non-discrimination provision is based on Article 24(1) of the OECD Model Tax Convention and applies to both nationals that are and are not resident of one of the contracting states. The omission of the full text of Article 25(1), first sentence, of the OECD Model Tax Convention is therefore not clarified by a limited scope of the non-discrimination article, following which these two treaties are considered not to be in line with this part of element B.1.

31. Furthermore, with respect to the one treaty included in the second row of the table above, the provision incorporated in the protocol to this treaty reads:

... the expression “irrespective of the remedies provided by the domestic law” means that the mutual agreement procedure is not alternative with the national contentious procedure, which shall be, in any case, preventively initiated, when the claim is related with an assessment of the taxes not in accordance with the Convention.

32. As pursuant to this provision a domestic procedure has to be initiated concomitantly to the initiation of the mutual agreement procedure, a MAP request can in practice thus not be submitted irrespective of the remedies provided by the domestic law, even though the provision contained in the MAP article is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the final report on Action 14 (OECD, 2015b). This treaty is therefore also considered not in line with this part of element B.1.

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

33. Out of Korea’s 95 tax treaties, 83 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.

34. The remaining 12 treaties can be categorised as follows:

Provision	Number of tax treaties
No filing period for a MAP request	7
Filing period less than three years for a MAP request (two years)	5

### *Peer input*

35. Almost all peers that provided input reported that their tax treaty with Korea meets the requirements under element B.1, including two peers for which the treaty with Korea actually does not contain 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. Three other peers, however, reported that their treaty with Korea does not meet the requirements under element B.1, but did not further specify the reason hereof. This concerns those peers for which the treaty with Korea was identified as not being in line with element B.1. These peers noted that they recently signed the Multilateral Instrument with a view to incorporate the equivalent to Article 25(1) of the OECD Model Tax Convention as amended by the Action 14 final report. One of these peers thereby specified that when it is not possible that the relevant treaty be modified, it will strive to update the treaty with Korea via bilateral negotiations. Another peer noted that there are no ongoing negotiations with Korea to amend the treaty with a view to incorporate the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention, as it will be modified via the Multilateral Instrument. However, differently than for the other two peers, for this specific peer the Multilateral Instrument will only modify its treaty with Korea to incorporate the equivalent to Article 25(1), second sentence, not the first sentence.

36. Further to the above, one peer mentioned that its treaty with Korea does not contain a filing period for MAP requests, but did not further note whether actions were undertaken or whether it was contacted by Korea to update the treaty with a view to incorporate the required provision under element B.1.

### *Practical application*

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

37. As noted in paragraphs 31-32 above, in all but one of Korea's tax treaties taxpayers can file a MAP request irrespective of domestic remedies. In this respect, Korea reported that taxpayers are allowed to submit a MAP request in cases where taxpayers also have sought to resolve the dispute via domestically available administrative and judicial remedies. Access to MAP would be granted when administrative remedies have been completed, but access would be denied where judicial remedies have been completed. This policy is set forth in Article 22(2) AITA, which stipulates:

Upon receipt of an application for commencing the mutual agreement procedure under paragraph (1), the Minister of Economy and Finance or the Commissioner of the National Tax Service shall request the competent authority of the other Contracting State to commence the mutual agreement procedure and notify the applicant of the fact of such request, except in the following circumstances:

1. Where the final ruling has been made by a domestic or foreign court.

38. In view of this provision, Korea confirmed that its competent authority is not obliged to open a mutual agreement procedure with the other competent authority concerned upon receipt of a request from the taxpayer if for the case a final ruling has been made by a Korean court. To this Korea added that in practice it has so far not experienced any cases where access to MAP was denied due to a domestic or foreign court decision.

39. While Korea reported that its competent authority can open a mutual agreement in such a situation to allow the taxpayer to obtain relief of double taxation at the level of the treaty partner, Korea did not further clarify how such allowance would align with the legal rules included in Article 22(2) AITA. Korea's policy as set forth in Article 22(2) AITA is contrary to Article 25(1) of the OECD Model Tax Convention, which allows taxpayers to request for the initiation of the MAP process irrespective of domestic remedies. This is further clarified in paragraph 8 of the Commentary to Article 25, which stipulates that the MAP process is clearly a procedure outside of the domestic law. The mere fact of a court decision is thus not a ground to deny access to MAP, especially as it deprives taxpayers of having the case resolved through the MAP process due to the treaty partner being able to give relief of double taxation.

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

40. Korea reported that under its domestic law, Article 22(1) AITA, taxpayers should file a MAP request within three years as from the date they became aware of the tax assessed, generally the date on which taxpayers receive a taxation notice.<sup>1</sup> For those tax treaties that do not contain a period for filing of MAP requests, Korea reported that this general rule will apply, but that this term can be extended to ensure that no filing period for MAP requests applies. This policy is considered to be in line with element B.1.

41. One peer provided input in relation to the filing of a MAP request under its treaty with Korea, which does not contain a filing period for such requests. The peer referred to a provision in Korea's domestic law that allows the Korean competent authority to deny access to MAP unless: (i) the taxpayer files a MAP request and (ii) the other competent authority concerned and Korea's competent authority accept the MAP request within three years of an action in Korea that resulted for the taxpayer in taxation not in accordance with the treaty. In this respect, the peer stressed that the adherence to such provision in Korea may limit a taxpayer's access to MAP in its entirety or, in cases that concern multiple years, limit the number of fiscal years that can be resolved in MAP. This peer also noted that such time limitation is not intended by its treaty with Korea, as it does not contain a filing period for MAP requests, as also that denial of access to MAP due to late filing of a MAP request is only allowed if it is reflected in the terms of the treaty. That said, the peer also noted that it is not aware of any denial of access or limitations to MAP by Korea since 1 January 2014 in general and/or that is the result of the application of Korea's domestic law in relation to time limits.

42. In relation to this peer input, Korea responded that the provision included in Article 22(1) AITA concerning the three-year filing period for MAP requests will not be applied in relation to MAP requests submitted under the treaty with this specific peer or other treaties without a filing period. It further noted that under all these treaties a filing period of at least three years on the basis of Article 25(1), second sentence, of the OECD Model Tax Convention will be applied.



## *Recent developments*

### *Bilateral modifications*

43. Korea signed a new treaty with three treaty partners on the replacement of the existing treaty in force and further signed amending protocols to three existing treaties. Two of these newly signed treaties have already entered into force and have replaced the previous treaty with the relevant treaty partner. Two of the three new treaties and the amending protocols contain Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report, allowing the submission of MAP requests to the competent authority of either contracting state, which was not the case for the previous or current treaty in force. The other treaty contains in the previous and new version Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, allowing taxpayers to submit a MAP request to the competent authority of the contracting state of which it was a resident. As to the second sentence of Article 25(1), this treaty now also contains this sentence, which was not the case in the previous version. The effects of these newly signed treaties and the amending protocols have been reflected above where they have relevance.

### *Multilateral Instrument*

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

44. Korea signed the Multilateral Instrument, which has been approved by the National Assembly in December 2019. Korea reported that the ratification of this instrument will be completed shortly.

45. 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 both notified the depositary, pursuant to Article 16(6)(a), that this tax 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 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 its covered tax agreements.

46. With the signing of the Multilateral Instrument, Korea opted, pursuant to Article 16(4)(a)(i) of that instrument to introduce in all of its tax treaties 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. In other words, where under Korea's tax treaties taxpayers currently have to submit a MAP request to the competent authority of the contracting state in which they are a resident, Korea opted to modify these treaties allowing taxpayers to submit a MAP request to the competent authority of either contracting state. In this respect, Korea listed 63 of its 95 treaties as a covered tax agreement under the Multilateral Instrument and made, pursuant to Article 16(6)(a) of the Multilateral Instrument, for all of them a notification that they contain a provision 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. None of these 63 treaties concern the treaties mentioned in paragraph 27 above that already allows the submission of a MAP request to either competent authority.

47. In total, six of 63 relevant treaty partners are not a signatory to the Multilateral Instrument, whereas three have not listed their treaty with Korea as a covered tax agreement under that instrument and 20 reserved, pursuant to Article 16(5)(a), the right not to apply the first sentence of Article 16(1). All remaining 34 treaty partners listed their treaty with Korea as having a provision that is 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. Therefore, at this stage, the Multilateral Instrument will, upon entry into force for the treaties concerned, modify these 34 treaties to incorporate the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report.

48. In view of the above and in relation to the three treaties identified in paragraphs 30-31 that are considered not to contain 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, two are part of the 34 treaties that will be modified via the Multilateral Instrument.

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

49. 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 tax treaty as a covered tax agreement under the Multilateral Instrument and insofar both notified the depositary that this tax treaty does not contain the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention.

50. In regard of the five tax treaties identified in paragraph 34 above that contain a filing period for MAP requests of less than three years, Korea listed four as a covered tax agreement under the Multilateral Instrument and made for all of them, pursuant to Article 16(6)(b)(i), a notification that they do not contain a provision described in Article 16(4)(a)(ii). Of the four relevant treaty partners, one is not a signatory to the Multilateral Instrument. The remaining three partners listed their treaty with Korea as a covered tax agreement under that instrument and also made a notification on the basis of Article 16(6)(b)(i). Therefore, at this stage, the Multilateral Instrument will, upon entry into force for the treaties concerned, modify three of the five treaties to include the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention.

#### *Other developments*

51. With respect to the remaining tax treaty that does not contain Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report and that will not be modified by the Multilateral Instrument, Korea reported that it was approached by the relevant treaty partner to enter into a memorandum of understanding to remedy the issue where due to a protocol provision taxpayers cannot request MAP irrespective of domestic remedy. Korea clarified that while it responded



positively to the idea of taking action, from a legal perspective a modification to the treaty is necessary to effectively withdraw the protocol provision that also requires the initiation of domestic remedies when submitting a MAP request. Korea Further reported that it replied to the treaty partner with the proposal to use an amending protocol instead, but so far has not heard any response from the treaty partner.

52. With respect to the two remaining treaties that do not contain Article 25(1), second sentence, of the OECD Model Tax Convention and that will not be modified by the Multilateral Instrument, Korea reported that in 2018 it has approached one of the relevant treaty partners to enter into negotiations on the amendment of the treaty, for which it is awaiting a response. For the other treaty, it has approached one treaty partner for a long time with the request to initiate negotiations, but so far no response has been given.

### *Peer input*

53. Of the peers that provided input during stage 2, nine provided input in relation to their tax treaty with Korea. Two of these peers concerns a treaty partner to one of the treaties identified that does not contain Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report. One of them mentioned that its treaty with Korea will be modified by the Multilateral Instrument to include 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. This reporting conforms with the analysis outlined above.

54. The second peer confirmed that its treaty with Korea will not be modified by the Multilateral Instrument to contain the first sentence of Article 25(1), but that it has contacted Korea with the proposal to enter into a memorandum of understanding to address the issue of the protocol provision requiring taxpayers to initiate domestic remedies when submitting a MAP request.

### *Anticipated modifications*

55. Korea reported it will seek to include Article 25(1) of the OECD Model Tax Convention, as amended by the Action 14 final report, in all of its future tax treaties or future amending protocols.

### *Conclusion*

	Areas for improvement	Recommendations
[B.1]	Two out of 95 tax treaties do not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention, either as it read prior to the adoption of the Action 14 final report or as amended by that report. Both 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.	Korea should as quickly as possible complete the ratification process for the Multilateral Instrument to incorporate the equivalent to Article 25(1), first sentence of the OECD Model Tax Convention as amended by the Action 14 final report in those two treaties that currently do not contain such equivalent.

	Areas for improvement	Recommendations
[B.1]	<p>Four out of 95 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 four treaties:</p> <ul style="list-style-type: none"> <li>• Two are expected to be modified by the Multilateral Instrument to include Article 25(1), second sentence, of the OECD Model Tax Convention.</li> <li>• Two will not be modified by that instrument to include the Article 25(1), second sentence, of the OECD Model Tax Convention. For both treaties actions have been taken to initiate negotiations on their replacement/amendment.</li> </ul>	<p>Korea 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 two of the four treaties that currently do not contain such equivalent and that will be modified or superseded by the Multilateral Instrument upon its entry into force for the treaty concerned.</p> <p>For the remaining two treaties that will not be modified to include the equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention, Korea should continue with the process to request the inclusion of the required provision via bilateral negotiations.</p>
	<p>One out of 95 tax treaties does not contain 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, or as amended by that final report, and also the timeline to submit a MAP request is less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.</p> <p>This treaty is expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(1), second sentence, but not as regards the first sentence of that article. For the first sentence, actions have been taken to initiate negotiations on their replacement/amendment.</p>	<p>Korea 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 treaty that currently does not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for this treaty.</p> <p>For the first sentence of Article 25(1), Korea should continue with the process to request the inclusion of the required provision via bilateral negotiations. This concerns a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention either:</p> <ol style="list-style-type: none"> <li>a. as amended in the Action 14 final report; or</li> <li>b. as it read prior to the adoption of the Action 14 final report, thereby including the full sentence of such provision.</li> </ol>
	<p>Access to MAP may be denied in cases where domestic or foreign courts have already rendered a decision on the issue for which a MAP request is submitted, even when the requirements for initiating a MAP case under the treaty provision that is equivalent to Article 25(1) of the OECD Model Tax Convention are met.</p>	<p>Korea should ensure that access to MAP is given in all eligible cases where the requirements under Article 25(1) of the OECD Model Tax convention as incorporated in Korea's tax treaties have been met. This in particular, Korea concerns the situation where a domestic or foreign court has rendered a decision relating to the case for which a MAP request was submitted, as Article 22(2) of the Adjustment of International Taxes Act stipulates that access to MAP should be given, except in such a situation. As Korea has thus far not limited access to MAP in eligible cases where a domestic or foreign court has rendered a decision relating to the case for which a MAP request was submitted, it should continue this practice. Nevertheless, to avoid such a limitation of access, Korea should amend Article 22(2) of the Adjustment of International Taxes Act.</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).

56. 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 contain 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***

57. As discussed under element B.1, out of Korea's 95 treaties, five currently contain a provision 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 treaty partner. As was also discussed under element B.1, 34 of the remaining 90 treaties will, upon entry into force for the treaties concerned, be modified by the Multilateral Instrument to allow taxpayers to submit a MAP request to the competent authority of either treaty partner.

58. For the remaining 56 treaties that currently do or will not contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report, Korea reported that when its competent authority denies access to MAP, including those situations in which it considers an objection raised by the taxpayer in a MAP request as not being justified, the competent authority will, pursuant to Article 39(7) EDAITA, inform the taxpayer and the other competent authority concerned of this decision. Article 39(7) stipulates:

Where a request for commencing mutual agreement procedure is denied, the Minister of Economy and Finance or the Commissioner of the National Tax Service shall notify the applicant and the Contracting State of the fact.<sup>2</sup>

59. In view of the above, Korea did not have to introduce a separate notification/consultation process following the adoption of the Action 14 Minimum Standard, as such process is already provided for in Korea's domestic legislation.

***Recent developments***

60. There are no recent developments with respect to element B.2.

***Practical application******Period 1 January 2014-31 July 2017 (stage 1)***

61. From the 2016 MAP statistics provided by Korea it follows that there were no cases with the outcome “objection not justified”. In this respect, Korea reported that in the period 1 January 2014-31 July 2017 its competent authority for none of the MAP requests it received decided that the objection raised by taxpayers in such request as being not justified. It therefore did not have to apply Article 39(7) EDAITA nor did it have to notify/consult the other competent authority concerned.

62. All peers that provided input indicated not being aware of any cases for which Korea’s competent authority denied access to MAP in the period 1 January 2014-31 July 2017. They also reported not having been consulted/notified of a case where Korea’s competent authority considered the objection raised in a MAP request as not justified in that period. This can be explained by the fact that no such cases occurred in Korea in that period.

***Period 1 August 2017-28 February 2019 (stage 2)***

63. Korea reported that also in the period 1 August 2017-28 February 2019 its competent authority has for none of its MAP requests it received decided that the objection raised by taxpayers in such request was not justified. The 2017 and 2018 MAP statistics submitted by Korea confirm that indeed none of its MAP cases were closed with the outcome “objection not justified”.

64. All peers that provided input during stage 1 also indicated that since 1 August 2017 they are not being aware of any cases for which Korea’s competent authority considered the objection raised in a MAP request as not justified.

***Anticipated modifications***

65. Korea 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.

66. 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***

67. Out of Korea's 95 tax treaties, 64 contain a provision that is equivalent to 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. Furthermore, 29 treaties do not contain a provision that is based on or equivalent to Article 9(2) of the OECD Model Tax Convention.<sup>3</sup> For the remaining two treaties the following analysis is made:

- One treaty contains a provision that is based on Article 9(2) of the OECD Model Tax Convention, but deviates from this provision because granting of corresponding adjustments is only allowed through the mutual agreement procedure.
- One treaty contains a provision that is based on Article 9(2) of the OECD Model Tax Convention, but deviates from this provision because the granting of a corresponding adjustment is subject to domestic tax laws of the contracting states.

68. Access to MAP should be provided in transfer pricing cases regardless of whether the equivalent of Article 9(2) of the OECD Model Tax Convention is contained in Korea's tax treaties and irrespective of whether its domestic legislation enables the granting of corresponding adjustments. In accordance with element B.3, as translated from the Action 14 Minimum Standard, Korea reported that it will always provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments, such regardless of whether the equivalent of Article 9(2) of the OECD Model Tax Convention is contained in its tax treaties.

69. Paragraph 2.3 of Korea's MAP guidance stipulates that cases concerning transfer pricing adjustments are within the scope of MAP.

### ***Recent developments***

#### ***Bilateral modifications***

70. Korea signed a new treaty with three treaty partners on the replacement of the existing treaty in force and an amending protocol to an existing treaty. Two of these new treaties have already entered into force and have replaced the previous treaty with the relevant treaty partner. Both new treaties and the amending protocol contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention, which was not the case for the previous treaties. The effects of these treaties and the amending protocol have been reflected in the analysis above where they have relevance.

#### ***Multilateral Instrument***

71. Korea signed the Multilateral Instrument, which has been approved by the National Assembly in December 2019. Korea reported that the ratification of this instrument will be completed shortly.

72. 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 treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument. Furthermore, Article 17(2) of the Multilateral Instrument does not take effect if one or both of the signatory states to the tax treaty reserved, pursuant to Article 17(3),

the right not to apply Article 17(2) for those tax treaties that already contains 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, on the basis 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 partners have made such a reservation, or only for a specific number of tax treaties, Article 17(4) of the Multilateral Instrument stipulates that both have to make a notification of 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 not all treaty partners 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).

73. Korea has, pursuant to Article 17(3), reserved 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. In regard of the 31 treaties identified in paragraph 67 above that are considered not to contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention, Korea listed 26 of them as a covered tax agreement under the Multilateral Instrument and included two of them in the list of treaties for which Korea has, pursuant to Article 17(3), reserved the right not to apply Article 17(2) of the Multilateral Instrument. Furthermore, Korea did not make a notification on the basis of Article 17(4) for the remaining 24 treaties. Of the relevant 24 treaty partners, three are not a signatory to the Multilateral Instrument, whereas one has not listed its treaty with Korea as a covered tax agreement under that instrument and 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 Korea already contains the equivalent of Article 9(2). Therefore, at this stage, the remaining 19 treaties will, upon entry into force for the treaties concerned, 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 provision included in those treaties relating to the granting of corresponding adjustments is incompatible with Article 17(1).

#### *Peer input*

74. One peer mentioned it has recently finalised negotiations with Korea on an amending protocol to the existing treaty in force. This amending protocol includes Article 9(2) of the OECD Model Tax Convention, which is not the case for the current treaty. Korea confirmed the reporting by this peer.

### ***Application of legal and administrative framework in practice***

#### *Period 1 January 2014-31 July 2017 (stage 1)*

75. Korea reported that it has in the period 1 January 2014-31 July 2017 received 199 MAP requests relating to transfer pricing cases. It further reported it had not denied access to MAP for any of these requests on the basis that the case concerned was a transfer pricing case.

76. All peers that provided input indicated not being aware of a denial of access to MAP by Korea in the period 1 January 2014-31 July 2017 on the grounds that the case concerned was a transfer pricing case.



*Period 1 August 2017-28 February 2019 (stage 2)*

77. Korea reported that since 1 August 2017 it has received 47 MAP request relating to transfer pricing. For none of these requests it denied access to MAP on the basis that the case concerned was a transfer pricing case.

78. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or there are no additions to the previous input given. Three peers in particular noted that they did not experience any issues with Korea regarding access to MAP.

*Anticipated modifications*

79. Korea reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention in its tax treaties where possible and that it will seek to include Article 9(2) in all of its future tax treaties. Other than this, Korea did not indicate that it anticipates any modifications in relation to element B.3.

*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.

80. 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*

81. None of Korea's 95 tax treaties allows the 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 Korea do not contain a provision allowing its competent authority to limit access to 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.

82. Article 22(2) AITA stipulates that upon receipt of any MAP request submitted concerning the (possible) taxation not in accordance with the provisions of the tax treaty,

Korea's competent authority (either the Ministry of Economy and Finance or the National Tax Service) will request the competent authority of the treaty partner to commence the mutual agreement procedure, except in four specified circumstances.<sup>4</sup> One of these circumstances concern:

Where it is recognised that the taxpayer intends to utilise the mutual agreement procedure for tax avoidance.

83. It, however, is not specified in Article 22(2) whether this circumstance also concerns the question on whether a treaty anti-abuse provision applies or whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty. Nevertheless, there is a risk that in such circumstances access to MAP could be denied. In this respect, Korea noted that this provision is not interpreted as constituting a ground to preclude access to MAP in relation to element B.4.

### ***Recent developments***

84. In the stage 1 peer review report it was noted that Korea indicated that, although being hypothetical, the provision included in Article 22(2) AITA discussed above should in its view be retained as a last resource for the competent authority to prevent MAP to be misused for the purposes of tax avoidance. Nevertheless, Korea also indicated that it considers taking possible measures, including issuing an interpretative statement or similar measures, with a view to clarify in what situations Korea considers that access to MAP should be granted or denied in cases of tax avoidance. In relation hereto, Korea reported that since 1 August 2017, because there has not been a taxpayer's request for an interpretative statement, it has not taken any action or a further consideration of taking possible measures or providing clarifications in what situations Korea considers that access to MAP should be granted or denied in cases of tax avoidance on the basis of Article 22(2) AITA.

### ***Practical application***

#### ***Period 1 January 2015-31 July 2017 (stage 1)***

85. Korea reported that in the period 1 January 2014-31 July 2017 it has received two MAP requests concerning the question 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. For both cases, access to MAP was granted.

86. All peers that provided input indicated not being aware of a denial of access to MAP by Korea in relation to the application of treaty and/or domestic anti-abuse provisions in the period 1 January 2014-31 July 2017.

#### ***Period 1 August 2017-28 February 2019 (stage 2)***

87. Korea reported that since 1 August 2017 it has received one MAP request concerning the question 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. For this case, access to MAP was also granted.

88. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or there are no additions to the previous input given. Three peers in particular noted that they did not experience any issues with Korea regarding access to MAP.



### *Anticipated modifications*

89. Korea did not indicate that it anticipates any modifications in relation to element B.4.

### *Conclusion*

	Areas for improvement	Recommendations
[B.4]	Domestic law allows the competent authority not to initiate a MAP where it is recognised that MAP is utilized for purposes of tax avoidance, which bears the risk that in cases where anti-abuse provisions are being applied, access to MAP will not be granted.	Relating to the provision included in Article 22(2) of the Adjustment of International Taxes Act, Korea should without further delay take an appropriate measure to ensure that the article would not limit access to MAP in cases concerning the application of anti-abuse provisions.

## **[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.

90. 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 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*

91. Korea reported that under its domestic law the National Tax Service and the taxpayer cannot enter into a settlement agreement during the course of or after an audit has been concluded. In practice, after an audit has been concluded, the National Tax Services can make an adjustment on the basis of Article 16(3) of the Framework on National Taxes and issue a pre-assessment notice accordingly. In such situation, the taxpayer has, pursuant to Article 81(15) of the Framework on National Taxes, the possibility to request for a review of such pre-assessment notice with the head of a local tax office or the commissioner of the regional tax office. Such request should be made within 30 days upon receipt of the pre-assessment notice. This review process, however, does not constitute an audit settlement system.

#### *Administrative or statutory dispute settlement/resolution process*

92. Korea reported it has no administrative or statutory dispute settlement/resolution process in place, which is independent from the audit and examination functions and which can only be accessed through a request by the taxpayer.

***Recent developments***

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

***Practical application******Period 1 January 2014-31 July 2017 (stage 1)***

94. As it is in Korea not possible that the National Tax Service and the taxpayer enter into an audit settlement, Korea reported that in the period 1 January 2014-31 July 2017 it has not denied 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 tax administration.

95. All peers that provided input indicated not being aware of a denial of access to MAP by Korea in the period 1 January 2014-31 July 2017 in cases where there was an audit settlement between the taxpayer and the tax administration.

***Period 1 August 2017-28 February 2019 (stage 2)***

96. Korea reported that since 1 August 2017 it has also not denied access to MAP for cases where the issue presented by the taxpayer has already been dealt with in an audit settlement between the taxpayer and tax administration.

97. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or there are no additions to the previous input given. Three peers in particular noted that they did not experience any issues with Korea regarding access to MAP.

***Anticipated modifications***

98. Korea 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.

99. 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***

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

101. Korea reported that when taxpayers do not include all the required information and documentation in their MAP request, the National Tax Service will, pursuant to Article 39(5) EDAITA, not accept the request and deem that no such request has been filed.<sup>5</sup> Taxpayers then have the opportunity to submit a new MAP request that includes all the required information and documentation, which subsequently will be accepted into MAP, as long as the new request is filed within three years as from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty. In this respect, Korea stressed that an earlier filed MAP request, which was denied access, does not deter the submission of a subsequent MAP request by the taxpayer for the same case.

102. The above described system used in Korea is different from the system used when a case is already accepted into the MAP process and whereby during the course of the proceedings additional information is requested from taxpayers. The National Tax Service is, pursuant to Article 26(1) AITA, allowed to request such additional information.<sup>6</sup> It will then discuss with the taxpayer a specific timeframe to submit the requested information. When a taxpayer does not provide the information within the given timeframe, the National Tax Service will again ask for this information. Where a taxpayer does then still not provide the information, the National Tax Service is, pursuant to Article 26(2) of that act, allowed to terminate the MAP process.<sup>7</sup> In that regard, Korea reported that since 1 January 2014 no MAP cases were closed due to the fact that taxpayers did not provide the requested additional information.

### ***Recent developments***

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

### ***Practical application***

#### ***Period 1 January 2014-31 July 2017 (stage 1)***

104. Korea reported that it provides access to MAP in all cases where taxpayers have complied with the information or documentation requirements. It further reported that in the period 1 January 2014-31 July 2017 its competent authority has not denied access to MAP for cases where the taxpayer had not complied with documentation requirements under Korean domestic law.

105. All peers that provided input indicated not being aware of a limitation of access to MAP by Korea in the period 1 January 2014-31 July 2017 in situations where taxpayers complied with information and documentation requirements set out in its MAP guidance.

#### ***Period 1 August 2017-28 February 2019 (stage 2)***

106. Korea reported that since 1 August 2017 it has also not denied access to MAP for cases where the taxpayer had complied with documentation requirements under Korean domestic law.

107. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or

there are no additions to the previous input given. Three peers in particular noted that they did not experience any issues with Korea regarding access to MAP.

### *Anticipated modifications*

108. Korea 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.

109. 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 contain 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 Korea's tax treaties*

110. Out of Korea's 95 tax treaties, 85 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. Furthermore, one tax treaty contains a provision similar to Article 25(3), second sentence, of the OECD Model Tax Convention, but this provision refers to the *consultation regarding cases not provided for in the convention*, whereas the second sentence of Article 25(3) refers to the *consultation for the elimination of double taxation in cases not provided for in the convention*. As the particular tax treaty provides for a scope of application that is at least as broad as the second sentence of Article 25(3), it is considered to be in line with element B.7. The remaining nine treaties do not contain a provision that is based on or is the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention.

111. Almost all peers that provided input reported that their treaty with Korea meets the requirements under element B.7. For the nine treaties identified above that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, only four treaty partners provided peer input. All these four peers mentioned that their treaty with Korea does not contain the required provision. Three of these peers envisaged that the Multilateral Instrument will modify their treaty with Korea with a view to incorporate the equivalent of Article 25(3), second sentence. For two of these three peers the applicable treaty will indeed be modified via the Multilateral Instrument for this purpose. The fourth peer only mentioned that its treaty with Korea does not contain the required provision, but did not further specify whether actions were undertaken or whether it was contacted by Korea to update the treaty with a view to incorporate the required provision under element B.7.

## *Recent developments*

### *Bilateral modifications*

112. Korea signed a new treaty with three treaty partners on the replacement of the existing treaty in force and signed an amending protocol to an existing treaty. Two of these new treaties have already entered into force and have replaced the previous treaty with the relevant treaty partner. The new and previous treaties all contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention.

### *Multilateral Instrument*

113. Korea signed the Multilateral Instrument, which has been approved by the National Assembly in December 2019. Korea reported that the ratification of this instrument will be completed shortly.

114. 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 both notified, pursuant to Article 16(6)(d)(ii), the depositary of the fact that this tax treaty does not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention.

115. In regard of the nine tax treaties identified above that are considered not to contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, Korea listed seven of them as a covered tax agreement under the Multilateral Instrument and for all of them did it, pursuant to Article 16(6)(d)(ii), make a notification that they do not contain a provision described in Article 16(4)(c)(ii). All relevant seven treaty partners are a signatory to the Multilateral Instrument, listed their tax treaty with Korea as a covered tax agreement under that instrument and also made a notification on the basis of Article 16(6)(d)(ii). Therefore, at this stage, the Multilateral Instrument will, upon entry into force for the treaties concerned, modify seven of the nine tax treaties to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention.

### *Other developments*

116. Korea reported that for those tax treaties that do not meet one or more elements of the Action 14 Minimum Standard and that will not be modified by the Multilateral Instrument, it will with the ratification of the instrument update its lists of covered tax agreements. In view of the remaining two treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, the envisaged update of the notifications under the Multilateral Instrument only affects one treaty partner. For the other treaty this envisaged update does not have any effect, due to the treaty partner not being a signatory to the Multilateral Instrument. Korea, however, reported that with this treaty partner negotiations on the replacement/amendment of the treaty have been pending for a long time, which will *inter alia* take into consideration the requirements under the Action 14 Minimum Standard

### *Peer input*

117. Of the peers that provided input during stage 2, nine provided input in relation to their tax treaty with Korea. None of these peers concerns a treaty partner to one of the treaties identified above that does not contain Article 25(3), second sentence, of the OECD Model Tax Convention and which will not be modified by the Multilateral Instrument.

### *Anticipated modifications*

118. Korea 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>Nine out of 95 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. Of these nine treaties:</p> <ul style="list-style-type: none"> <li>Seven 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.</li> <li>One is expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention once Korea has amended its notifications.</li> <li>One will not be modified by the Multilateral Instrument to include the required provision. For this treaty negotiations on the replacement/amendment thereof are pending <i>inter alia</i> with a view to include the required provision.</li> </ul>	<p>Korea should as quickly as possible complete the ratification process for the Multilateral Instrument and with that ratification update its notifications, to incorporate the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention in eight of the nine treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned.</p> <p>For the remaining treaty that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, Korea should continue pending bilateral negotiations with a view to include the required provision.</p>

## **[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.

119. 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.

## *Korea's MAP guidance*

### *Guidance included in domestic legislation*

120. The rules relating to MAP, including the MAP function and the process, are laid down in Korea's domestic law, more specific in chapter 6 of the Adjustment of International Taxes Act ("AITA") and chapter 6 of the Enforcement Decree of the Adjustment of International Taxes Act ("EDAITA"). Furthermore, Article 3 of the Binding Administrative Guidance for International Taxation also includes rules for conducting the MAP process.

121. Chapter 6 of the AITA includes the following rules on the MAP process:

Provision	Content
Article 22	<ul style="list-style-type: none"> <li>• Description of cases that are eligible for MAP</li> <li>• The government authorities that perform the competent authority function</li> <li>• Grounds for denying access to MAP</li> <li>• Possibility to ex-officio initiation of MAP cases</li> </ul>
Article 23	Determination of the opening and closing date of MAP cases
Article 24	<ul style="list-style-type: none"> <li>• Interrelation with domestic available remedies</li> <li>• Possibility of suspension of tax collection during the period a MAP is pending</li> </ul>
Article 25	Exception to the application of statute of limitations in case a MAP agreement has been concluded
Article 26	<ul style="list-style-type: none"> <li>• Co-operation of taxpayers during the MAP process, including providing of additionally requested information</li> <li>• Possibility to terminate MAP in case of no compliance by taxpayers during the process</li> </ul>
Article 27	Process for implementing MAP agreements
Article 27-2	Possibility to grant roll-on effect of MAPs to future fiscal years

122. Chapter 6 of the EDAITA includes the following additional rules on the MAP process in Korea:

Provision	Content
Article 39	<ul style="list-style-type: none"> <li>• Basis for a MAP request</li> <li>• Information to be included in a MAP request</li> <li>• Consideration of the request, review of the possibility of unilateral relief and initiation of bilateral discussions</li> <li>• Process to follow when denying access to MAP</li> <li>• Progress reports on pending MAP cases</li> </ul>
Article 40	Suspension of tax collection during the period a MAP is pending
Article 41	Calculation of interest in relation to MAP
Article 41-2	Procedural rules in relation to suspension of tax collection and interest charges
Article 42	Rules in relation to the closure of MAP cases
Article 42-2	Process in relation to the possibility to grant roll-on effect of MAPs to future tax years



### *Newly introduced MAP guidance*

123. The National Tax Service issued MAP guidance in August 2017, which was made public in September 2017. This guidance can be found at:

[https://www.nts.go.kr/eng/resources/resour\\_21.asp?minfoKey=MINF7420080211223143&type=V](https://www.nts.go.kr/eng/resources/resour_21.asp?minfoKey=MINF7420080211223143&type=V)

124. Korea's MAP guidance does not replace the rules discussed above as laid down in its domestic law, but are intended to provide information on how the MAP process is conducted in Korea. In this respect, the following rules are included in the MAP guidance:

Subject	Content
General outline of the mutual agreement procedure	-
Application of MAP	<ul style="list-style-type: none"> <li>• Taxes covered in MAP</li> <li>• Persons eligible to submit MAP requests</li> <li>• Cases eligible for MAP</li> <li>• Outline of the governmental agencies acting as Korea's competent authority</li> <li>• Cases for which access to MAP may be denied</li> <li>• Filing period for MAP requests</li> <li>• Information and documentation to be included in a MAP request</li> <li>• Consideration and acceptance of a MAP request</li> </ul>
Proceedings and closing of MAP	<ul style="list-style-type: none"> <li>• Start date of MAP proceedings</li> <li>• Conducting the MAP process</li> <li>• Closing of a MAP case</li> <li>• Relationship with domestic available remedies</li> <li>• Availability of and rules for the suspension of tax collection</li> <li>• Position on arbitration</li> </ul>
Implementation of MAP outcome and period for implementation	-
Documentation	<ul style="list-style-type: none"> <li>• Application form for commencing the MAP process</li> <li>• Application form for suspension of tax collection</li> <li>• Application form for special cases of income calculation</li> <li>• Notice of closing a MAP case</li> </ul>

125. 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.<sup>8</sup> The above-described MAP guidance of Korea meets both requirements. Furthermore, the information included in Korea's MAP guidance is logically structured, detailed and comprehensive, especially as regards the various stages in the MAP. However, some subjects are not specifically discussed in this MAP guidance, although some of them are described in Korea's domestic law. 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; and (v) the consideration of interest and penalties in MAP.

***Information and documentation to be included in a MAP request***

126. Article 39(2) EDAITA includes rules on what information and documentation taxpayers should include in their MAP request.<sup>9</sup> This concerns:

- a. A written application for commencing MAP in the form prescribed by the Ministry of Economy and Finance
- b. Financial statements and tax returns that are relevant for the MAP request
- c. An appeal, if the taxpayer submitting the MAP request, or its foreign related party, lodges such appeal.

127. In addition to the above, paragraph 2.7 of Korea's MAP guidance, with a reference to Article 39(2), sets further rules on what information and documentation taxpayers should submit in their MAP request. This concerns:

- i. Any document that the competent authority may be able to identify the details of tax assessment including an advance notice of taxation, a notice of tax payment, and a notice of refusal disposition with a request of correction (where the applicant refused a request for correction)
- ii. Any document providing information on the applicable tax treaty including the provisions which the taxpayer considers incorrectly applied by either one or both contracting states
- iii. Any document providing information on the summary of tax assessment being imposed on the applicant, whether the statute of limitation of the covered transaction is expired in the Contracting State, the facts and circumstances of the transaction, the basis for making a claim that the provision of the specific tax treaty is not correctly applied by either one or both Contracting States, and the analysis of the applicant or his/her foreign related party concerning the tax assessment
- iv. Any document certifying tax payment where the applicant already paid the tax amount which is covered by the application for MAP
- v. A copy of submission including all documentations filed with that submission where the applicant submitted or will submit a MAP application to the competent authority of the other contracting state
- vi. A copy of submission or written decision including other relevant documentations filed where the applicant submitted or will submit an appeal to another authority under a mechanism to resolve treaty-related disputes, other than the mutual agreement procedure, that is provided to taxpayers in/out of Korea
- vii. A copy of submission, written decision, or other relevant documentations filed where the case was previously dealt or is currently being dealt by any other advanced dispute resolution process in/out of Korea.

128. Further to above, the appendixes to Korea's MAP guidance also include the application form referred to in Article 39(2) EDAITA, as discussed in paragraph 125 above. This form sets out in detail what information taxpayers should include in their MAP request, including the basis of the request, the years under review and taxpayer-specific information. It also gives an explanation how to fill in the form and what additional documentation should be attached to the MAP application form, which concerns the items discussed in paragraphs 125 and 126 above.

129. 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.<sup>10</sup> In light of this list, the requirements in Korea 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.

### *Recent developments*

130. Korea reported that in March 2018 it has reorganised its competent authority function within the National Tax Service, by establishing a dedicated Mutual Agreement Procedure Division (see element C.3). This organisational change has been reflected in an update to the MAP guidance in October 2018. Other than this, there are no further developments in relation to the MAP guidance.

131. One peer provided input to Korea's MAP guidance. It noted that Korea has not taken up the suggestion that was made in the stage 1 report to include in the MAP guidance the consideration of interest and penalties in the MAP process. The peer encouraged Korea to consider including such information in the guidance in the future, as it is aware of at least one case in which the taxpayer asked about the resolution of interest and penalties in MAP. In the peer's view, taxpayers could benefit from Korea detailing in its MAP guidance whether interest and penalties may be addressed in MAP.

### *Anticipated modifications*

132. Korea did not indicate that it anticipates any modifications in relation to element B.8.

### *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.

133. 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.<sup>11</sup>

### *Rules, guidelines and procedures on access to and use of MAP*

134. As discussed in element B.8, Korea recently issued MAP guidance. This guidance is made publically available and can be found at (in English):

[https://www.nts.go.kr/eng/resources/resour\\_21.asp?minfoKey=MINF7420080211223143&type=V](https://www.nts.go.kr/eng/resources/resour_21.asp?minfoKey=MINF7420080211223143&type=V)

135. As regards its accessibility, information on MAP can easily be found on the website of the National Tax Service in Korea, both in Korean and English. For example, when on the website of the National Tax Service a search is made for mutual agreement or mutual agreement procedure, the search result will directly show Korea's MAP guidance.

### *MAP profile*

136. Korea's MAP profile is published on the website of the OECD, which was last updated in October 2019.<sup>12</sup> This MAP profile is almost complete and very often with detailed information. It is also supplemented with an excerpt of the relevant legislation on mutual agreement procedures, to which is being referred to in the profile. Korea's MAP profile also includes external links which provide extra information and guidance.

137. Two peers provided input in relation to Korea's MAP profile. The first peer noted that the e-mail contacts of the Korean competent authority is not included in the profile, for which it consideration that it may be useful to do so. The second peer mentioned that in its understanding – as will be further discussed under element C.3 – that under Korea's domestic law pending mutual agreement procedures will be closed if after a period of five years no agreement is reached (whereby an extension to eight years as from the start of the procedure is possible). In relation to the MAP profile, this peer noticed that to the best of its knowledge information hereon is not included in Korea's MAP profile and suggested that Korea should mention this with a view to make stakeholders aware of it.

138. The issues identified by both peers are indeed not included in Korea's MAP profile. The excerpt of the relevant legislation on mutual agreement procedures annexed to the MAP profile does also not include the relevant section on the possibility to close MAP cases after a five-year period.

### *Recent developments*

139. Korea has updated its MAP profile in October 2019, which now includes the email address of its competent authority. As to the second issue raised by the peer mentioned in the paragraph above, Korea's update to the MAP profile also includes the relevant information in relation hereto. With these modifications, Korea's MAP profile is considered to be complete.

*Anticipated modifications*

140. Korea 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.

141. 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 previous mentioned processes.

*MAP and audit settlements in the MAP guidance*

142. As previously discussed under element B.5, Korea has no system in place that allows audit settlements between the National Tax Service and taxpayers. In that regard, there is no need to address in Korea's MAP guidance that audit settlements do not preclude access to MAP.

143. All peers that provided input raised no issues with respect to the availability of audit settlements and the inclusion of any information hereon in Korea's MAP guidance.

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

144. As previously mentioned under element B.5, Korea does not have an administrative or statutory dispute settlement/resolution process in place that is independent from the audit and examination functions and that can only be accessed through a request by the taxpayer. In that regard, there is no need to address in Korea's MAP guidance the effects of those processes with respect to MAP.

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

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

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

***Anticipated modifications***

147. Korea did not indicate it anticipates any modifications in relation to element B.10.

***Conclusion***

	Areas for improvement	Recommendations
[B.10]	-	-

## Notes

- Reference is also made to paragraphs 2.4 and 2.6 of Korea's MAP guidance.
- As mentioned in the Introduction, the competent authority function in Korea is performed at the level of two governmental agencies, being the Ministry of Economy and Finance and the National Tax Services. Reference is made to element C.3 for a more in-depth discussion of Korea's competent authority function.
- In the stage 1 peer review report, reference was made to 33 treaties. Following the peer review process of other assessed jurisdictions, another treaty was identified that does not contain the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017). Since two new treaties and an amending protocol were signed that contain such equivalent (see recent developments) and which was not the case under the previous treaties, the total number of treaties not containing this equivalent is now 31.
- This is also set out in Article 85(2) of the Binding Administrative Guidance.
- This is also set out in Article 85(7) of the Binding Administrative Guidance.
- This is also set out in Article 88(1) of the Binding Administrative Guidance.
- Ibid Article 88(2).
- Available at: [www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf).
- These rules are also set out in Article 85(5) of the Binding Administrative Guidance.
- Available at: [www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf).
- The shared public platform can be found at: [www.oecd.org/ctp/dispute/country-map-profiles.htm](http://www.oecd.org/ctp/dispute/country-map-profiles.htm).
- Available at: [www.oecd.org/tax/dispute/Korea-Dispute-Resolution-Profile.pdf](http://www.oecd.org/tax/dispute/Korea-Dispute-Resolution-Profile.pdf).

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## *Part C*

### **Resolution of MAP cases**

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

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

148. It is of critical importance that in addition to allowing taxpayers to request for a MAP, tax treaties also contain the equivalent of the first sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2017), which obliges competent authorities, in situations where the objection raised by taxpayers are considered justified and where cases cannot be unilaterally resolved, to enter into discussions with each other to resolve cases of taxation not in accordance with the provisions of a tax treaty.

#### ***Current situation of Korea's tax treaties***

149. Out of Korea's 95 tax treaties, 93 contain a provision 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. The remaining two treaties do contain a provision that is based on Article 25(2), first sentence, but does not incorporate several of its elements. For one treaty this concerns the fact that it includes additional language that limits the possibility to discuss cases bilaterally, as this additional language reads: "... provided that the competent authority of the other Contracting State is notified of the case within four and a half years from the due date or the date of filing of the return in that other State, whichever is later". For the other treaty *inter alia* the part of the sentence reading "... of the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution ..." is missing. Both provisions therefore are considered not being the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention.

150. All peers that provided input reported that their treaty with Korea meets the requirements under element C.1. For the two treaties identified above that are considered not to contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention, only one peer provided input and considered its treaty with Korea to be in line with element C.1.

### *Practical application*

151. As was discussed under element B.1 (paragraphs 38-40), Korea's policy is not to grant access to MAP once domestic or foreign courts have issued a ruling for the case for which also a MAP request is submitted. In addition, where a MAP case is already pending and a court renders a decision, Article 23(4) AITA stipulates that the date of a final court ruling will be the closing date of the MAP case. In such a situation, the MAP process will thus be ended automatically.

152. One peer provided input in relation hereto and referred to experience in one case whereby its competent authority sent a letter to Korea's competent authority in January 2013 to open a MAP, which the latter accepted in July 2013. Despite several reminders, Korea's competent authority did not provide a position paper, but in August 2016 responded that the case was not suitable for MAP due the fact that to a domestic court had issued a ruling on the case, such without the knowledge of the taxpayer resident in the peer's state. Korea responded to this input and stated that its domestic policy is to notify treaty partners when its competent authority becomes aware of the fact that when for the issue for which a MAP case is pending also domestic remedies were initiated. In the case being referred to by the peer, Korea explained that the peer's competent authority was already in a face-to-face meeting in September 2013 informed that a court procedure would be initiated.

153. The peer commented on this response and stated that its record of the September 2013 meeting did not cover any discussion of the court proceedings in Korea, but instead that Korea's competent authority required more information from the taxpayer resident in the peer's state, for which the peer's competent authority agreed to assist. In line with this, the peer's competent authority wrote to Korea's competent authority in January 2015 requesting what information would be required. In January 2016, Korea's competent authority replied that they wanted to resume discussions on the case, but needed more time and therefore would send their questions and the position paper by April 2016. In follow-up thereto, in August 2016 Korea's competent authority notified the peer's competent authority that the matter had been determined by a Korean court and that the competent authority could not derogate from that decision. It was up to that date that neither the peer's competent authority nor the taxpayer that submitted the MAP request was aware of pending court proceedings in Korea. The peer therefore concluded that it would have been helpful if Korea's competent authority informed the peer's competent authority and the taxpayer of pending domestic court proceedings to which the Korean taxpayer that made payments subject to withholding taxes (and not the taxpayer resident in the peer's state) was a party. It also requested Korea to endeavour to do so in future cases.

154. Korea provided for a final response and mentioned that its competent authority was in the same position as the taxpayer or the peer's competent authority on the status of the pending court case. It also stated that in the course of the case, both competent authorities did not meet often and communications were not smooth. This, however, has changed since 2017 and competent authorities now meet annually and there is also more frequent communication, for which Korea believes that this will ensure that a similar situation will not occur again.

155. In relation to this policy and practical experience, Article 25(2), first sentence, of the OECD Model Tax Convention clearly stipulates that competent authorities have an obligation to endeavour to resolve MAP cases with a view to come to taxation that is in accordance with the provisions of the convention. In this respect paragraph, 5.1 of the Commentary to Article 25 of the OECD Model Tax Convention notes that this obligation entails that competent authorities are obliged to seek to resolve the case in a fair and objective manner,

on its merits, in accordance with the terms of the convention and applicable principles of international law on the interpretation of treaties. While competent authorities may be bound by decisions of domestic courts for issues that are also under review in the MAP process, and which may cause that they are not able to resolve the case, the automatic termination of the case once domestic courts have rendered a decision is not in line with the obligations put on the competent authorities. Hence in such a situation this would deprive the taxpayer of relief of double taxation, whereas there may be a possibility that the other competent authority was able to resolve the case by providing for correlative relief.

### ***Recent developments***

#### ***Bilateral modifications***

156. Korea signed a new treaty with three treaty partners on the replacement of the existing treaty in force. Two of these new treaties have already entered into force and have replaced the previous treaty with the relevant treaty partner. The new and previous treaties all contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention.

#### ***Multilateral Instrument***

157. Korea signed the Multilateral Instrument, which has been approved by the National Assembly in December 2019. Korea reported that the ratification of this instrument will be completed shortly.

158. 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 tax treaty as a covered tax agreement under the Multilateral Instrument and insofar both notified the depositary of the fact that this tax treaty does not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention.

159. In regard of the two tax treaties identified above that are considered not to contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention, Korea listed one treaty as a covered tax agreement under the Multilateral Instrument and for this treaty made, pursuant to Article 16(6)(c)(i), a notification that it does not contain a provision described in Article 16(4)(b)(i). The relevant treaty partner is a signatory to the Multilateral Instrument, listed its tax treaty with Korea as a covered tax agreement under that instrument and also made a notification on the basis of Article 16(6)(c)(i). Therefore, at this stage, the Multilateral Instrument will, upon entry into force for the treaty concerned, modify one of the two treaties identified above to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention.

#### ***Other developments***

160. Korea reported that for those tax treaties that do not meet one or more elements of the Action 14 Minimum Standard and that will not be modified by the Multilateral Instrument, it will with the ratification of the instrument update its lists of covered

tax agreements. In view of the remaining treaty that does not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention, the envisaged update of the notifications under the Multilateral Instrument does not regard this treaty, due to the treaty partner not being a signatory to the Multilateral Instrument. Korea, however, reported that with this treaty partner negotiations on the replacement/amendment of the treaty have been pending for a long time, which will *inter alia* take into consideration the requirements under the Action 14 Minimum Standard

### *Peer input*

161. Of the peers that provided input during stage 2, nine provided input in relation to their tax treaty with Korea. None of these peers concerns a treaty partner to one of the treaties identified above that does not contain Article 25(2), first sentence, of the OECD Model Tax Convention and which will not be modified by the Multilateral Instrument.

### *Anticipated modifications*

162. Korea 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]	Two out of 95 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. Of these three treaties: <ul style="list-style-type: none"> <li>One is expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention.</li> <li>One will not be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. For this treaty negotiations on the replacement/amendment thereof are pending <i>inter alia</i> with a view to include the required provision.</li> </ul>	Korea should as quickly as possible complete the ratification process for the Multilateral Instrument to incorporate the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention in one of 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.  For the remaining treaty 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 following its entry into force, Korea should continue pending bilateral negotiations with a view to include the required provision.
	MAP cases are automatically terminated where domestic courts have rendered a decision on the issue for which a MAP request was submitted.	Korea should seek to resolve all MAP cases that were accepted into the MAP process and that meet the requirements under Article 25(1) and (2) of the OECD Model Tax Convention as incorporated in Korea's tax treaties. In that regard, Korea should not automatically terminate MAP cases on the grounds that there was already a final court decision, regardless of whether such decision relates to the MAP case or not.

## **[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).

163. 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***

164. Statistics regarding all tax treaty related disputes concerning Korea are published on the website of the OECD as of 2007.<sup>1</sup>

165. 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. Korea provided its MAP statistics pursuant to the MAP Statistics Reporting Framework within the given deadline, including all cases involving Korea and of which its competent authority was aware. The statistics discussed below include both pre-2016 and 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 Korea’s MAP caseload.<sup>2</sup>

166. With respect to post-2015 cases, Korea reported that for the years 2016-18 it contacted its MAP partners with a view to have their MAP statistics matching. It noted that such matching was successful with all its MAP partners that report their MAP statistics under the MAP Statistics Reporting Framework. For two MAP partners, who do not report their statistics under this framework, Korea noted that it used its own method to record MAP cases.

167. Six peers provided input on the matching of MAP statistics with Korea. Of these six, one peer mentioned it did not match its MAP statistics with Korea for the years 2016-18, as for these years it had only one pre-2016 case pending, so no post-2015 cases needed to be matched. All five other peers confirmed that they were able to match their statistics with Korea for the years 2016-18.

168. Based on the information provided by Korea’s MAP partners, its post-2015 MAP statistics for the years 2016-18 actually match those of its treaty partners as reported by the latter.

### ***Monitoring of MAP statistics***

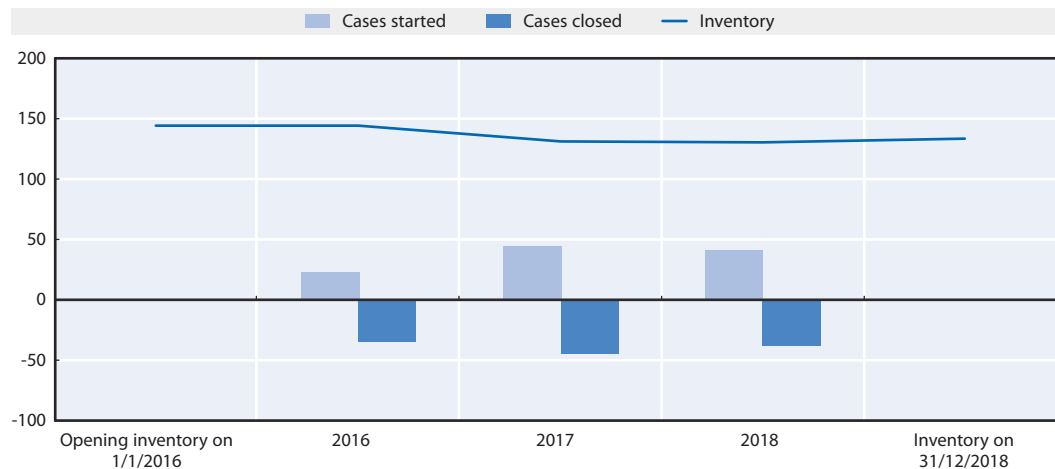
169. Korea reported having an internal monitoring system in place concerning pending MAP cases. The directors of the MAP/APA team and the International Co-operation Division within Korea’s competent authority receive on a periodic basis reports on progress of cases. The directors further keep track of the progress of each individual case and, where necessary, take actions to speed up its resolution. Furthermore, Korea reported that the director or deputy-director may on the basis of the monitoring system decide to re-allocate cases to other examiners.

### ***Analysis of Korea’s MAP caseload***

170. The analysis of Korea’s MAP caseload relates to the period starting on 1 January 2016 and ending on 31 December 2018.

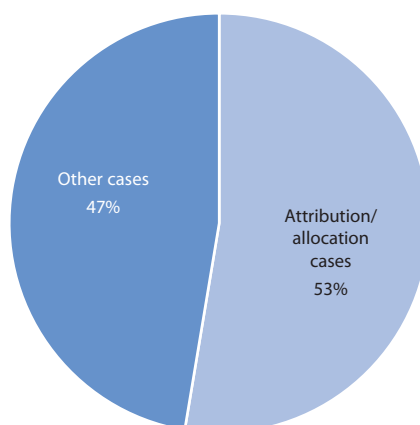
171. Figure C.1 shows the evolution of Korea’s MAP caseload over the Statistics Reporting Period.

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



172. At the beginning of the Statistics Reporting Period, Korea had 144 pending MAP cases, of which 86 were attribution/allocation cases and 58 other MAP cases.<sup>3</sup> At the end of the Statistics Reporting Period, Korea had 133 MAP cases in its inventory, of which 70 are attribution/allocation cases and 63 are other MAP cases. Consequently, Korea's pending MAP cases have decreased by 8% during the Statistics Reporting Period. This decrease can be broken down in a decrease of 19% for attribution/allocation cases and an increase of 9% for other cases. The breakdown of the end inventory can be shown as in Figure C.2.

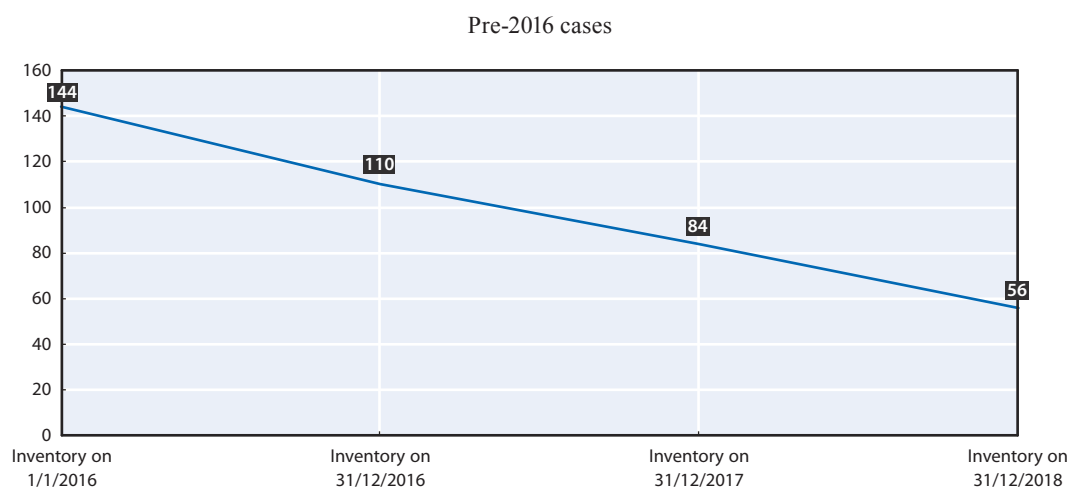
Figure C.2. End inventory on 31 December 2018 (133 cases)



### *Pre-2016 cases*

173. Figure C.3 shows the evolution of Korea's pre-2016 MAP cases over the Statistics Reporting Period.

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



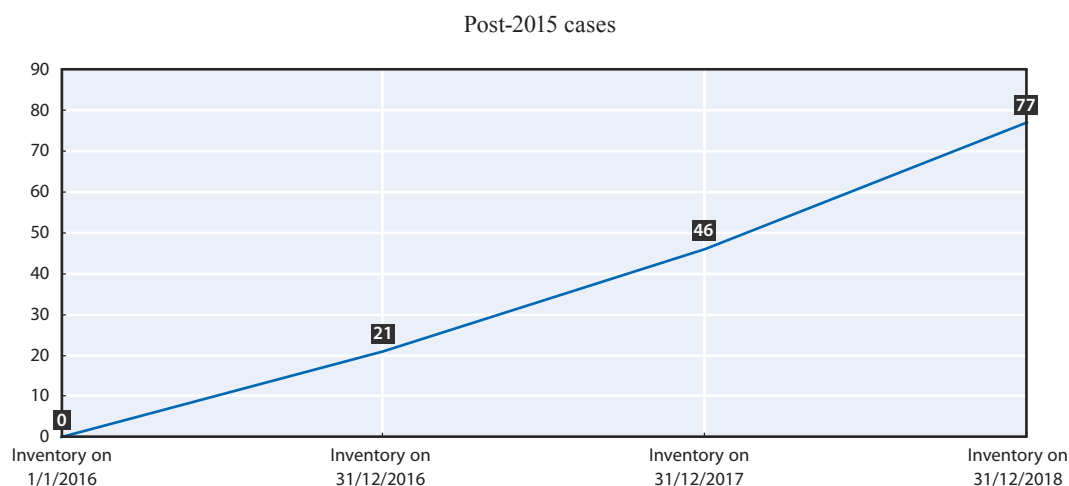
174. At the beginning of the Statistics Reporting Period, Korea's MAP inventory of pre-2016 MAP cases consisted of 144 cases, 86 of which were attribution/allocation cases and 58 other cases. At the end of the Statistics Reporting Period the total inventory of pre-2016 cases had decreased to 56 cases, consisting of 22 attribution/allocation cases and 34 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	Evolution of total MAP caseload in 2018	Cumulative evolution of total MAP caseload over the three years (2016-18)
Attribution/allocation cases	-29%	-34%	-45%	-74%
Other cases	-16%	-10%	-23%	-41%

### Post-2015 cases

175. Figure C.4 shows the evolution of Korea's post-2015 MAP cases over the Statistics Reporting Period.

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





176. In total, 107 MAP cases started during the Statistics Reporting Period, 76 of which concerned attribution/allocation cases and 31 other cases. At the end of this period the total number of post-2015 cases in the inventory was 77 cases, consisting of 48 attribution/allocation cases and 29 other cases. Conclusively, Korea closed 30 post-2015 cases during the Statistics Reporting Period, 28 of them being attribution/allocation cases and two other cases. The total number of closed cases represents 28% of the total number of post-2015 cases that started during the Statistics Reporting Period.

177. 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.

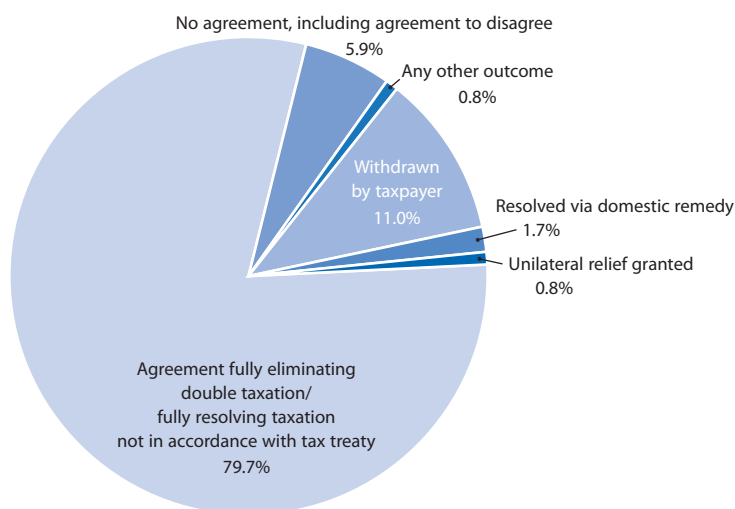
	% of cases closed in 2016 compared to cases started in 2016	% of cases closed in 2017 compared to cases started in 2017	% of cases closed in 2018 compared to cases started in 2018	Cumulative % of cases closed compared to cases started over the three years (2016-18)
Attribution/allocation cases	5%	53%	40%	37%
Other cases	No cases closed	17%	No cases closed	6%

### *Overview of cases closed during the Statistics Reporting Period*

#### *Reported outcomes*

178. During the Statistics Reporting Period Korea in total closed 118 MAP cases, for which the outcomes shown in Figure C.5 were reported.

Figure C.5. Cases closed during 2016, 2017 or 2018 (118 cases)



179. Figure C.5 shows that during the Statistics Reporting Period, 94 out of the 118 cases were closed 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*

180. In total, 92 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 (88%)
- withdrawn by taxpayers (4%)
- no agreement including agreement to disagree (4%)

*Reported outcomes for other cases*

181. In total, 26 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 (50%)
- withdrawn by taxpayers (35%)

*Average timeframe needed to resolve MAP cases**All cases closed during Statistics Reporting Period*

182. The average time needed to close MAP cases during the Statistics Reporting Period was 31.71 months. This average can be broken down as follows:

	Number of cases	Start date to End date (in months)
Attribution/Allocation cases	92	30.50
Other cases	26	36.01
<b>All cases</b>	<b>118</b>	<b>31.71</b>

*Pre-2016 cases*

183. For pre-2016 cases, Korea reported that on average it needed 40.33 months to close 64 attribution/allocation cases and 38.70 months to close 24 other cases. This resulted in an average time needed of 38.89 months to close 88 pre-2016 cases. For the purpose of computing the average time needed to resolve pre-2016 cases, Korea used the rules laid down in Article 23 AITA.<sup>4</sup> This concerns:

- *Start date:*
  - where a MAP request is filed in Korea, the date on which the Korean competent authority receives a notification from the other competent authority concerned of its intention to accept the request
  - where a MAP request is filed in the other contracting state concerned, the date on which the Korean competent authority notifies this other competent authority of its intention to accept the request.

- *End date:*
  - *MAP agreement:* the date on which an agreement is reached between the Korean competent authority and the other competent authority concerned, or the date on which Korea closes the case unilaterally if after five years of the start date no agreement is reached
  - *No agreement reached:* the date of exchange of closing letters
  - *Unilateral relief:* the date of notification to the taxpayer of the National Tax Service's intent to provide for unilateral relief
  - *Termination of MAP due to non-co-operation by taxpayers:* the date of notification to the taxpayer of such termination
  - *Resolved via domestic remedies:* the date of the final court ruling, or when relief is granted via administrative proceedings (e.g. examination or adjustment), the date of the subsequent withdrawal of a MAP request by the taxpayer; or
  - *Withdrawal by taxpayers:* the date of withdrawal of the MAP request.

### *Post-2015 cases*

184. For post-2015 cases, Korea reported it needed 8.02 months to close 28 attribution/allocation cases and 3.67 months to close two other cases. This resulted in an average time needed of 7.73 months to close 30 post-2015 cases.

### *Peer input*

185. Most peers that provided input to Korea's implementation of the Action 14 Minimum Standard reported a good working relationship with its competent authority, which is further discussed under element C.3 below. This concerns both jurisdictions that have a large MAP inventory with Korea, as also peers that have a moderate caseload. Most of these peers also appreciated the easiness of contacts with Korea's competent authority and scheduling of face-to-face meetings at regular intervals. A number of peers also reported positive experiences in the resolution of their MAP cases with Korea. Some peers, however, raised criticism, on the functioning of Korea's competent authority, which in their view slowed down the timely resolution of their mutual cases. The criticism put forward concerns several points, but mainly focused on frequent changes of personnel within Korea's competent authority, the difficulties in effectively conducting face-to-face meetings and transmission of position papers only closely before such meeting, insufficient preparation for meetings, less willingness to reach an agreement, and a limited authority for the National Tax Service to enter into MAP agreements due to the fact that it concerned a matter of treaty interpretation, for which competence is at the level of Korea's Ministry of Economy and Finance, which in the peers' view that raised these points, impede a timely and principled resolution of MAP cases.

### *Recent developments*

186. In the stage 1 peer review report, Korea was under element C.2 recommended to seek to resolve the remaining 95.45% of its post-2015 MAP cases that were pending on 31 December 2016 (21 cases), such within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.

187. With respect to this recommendation, Korea reported that in March 2018 it has established a dedicated MAP unit within the National Tax Service: the Mutual Agreement Procedure division. This division is specifically dedicated to handling all MAP and APA cases (apart from those assigned to the Ministry of Economy and Finance). With the creation of this division, five more staff was added to the MAP function.

188. Further to the above, with the creation of the new division and the adding of new staff, Korea mentioned it has increased the number of face-to-face meetings, with 24 meetings being held in 2018. In order to mitigate difficulties in organising such meetings, or to increase the efficiency of them, Korea specified that it worked with its partners through conference calls or working level meetings. Specifically relating the organising of conference calls, the stage 1 peer review report noted that where face-to-face meetings were not possible to be organised for whatever reason, Korea envisaged scheduling more conference calls. In this respect, Korea mentioned that in the period 1 August 2017-28 February 2019 it has held eight conference calls with treaty partners to discuss and resolve MAP cases. In Korea's view this has contributed to resolving old pending cases and to efficiently hold follow-up face-to-face meetings.

189. In view of these steps and the MAP statistics for the years 2016-18, Korea was able to reduce its MAP inventory with 8%, whereby the number of attribution/allocation cases was reduced with almost 20%. However, as also follows from these statistics, Korea has in the period 2016-18 not closed its MAP cases within the pursued average of 24 months. For these years, the number of post-2015 cases closed as compared to the cases that started in these years was 12%. Element C.3 will further consider these numbers in light of the adequacy of resources.

190. Almost all peers that provided input during stage 1 confirmed that this input holds equally relevance for the period starting on 1 August 2017, albeit that some peers provided detailed input on their experience with Korea concerning the resolution of MAP cases since that date. Their input is further discussed under element C.3.

### *Anticipated modifications*

191. Korea 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.

192. 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 Korea's competent authority*

### *Organisational structure*

193. Article 22(1) AITA stipulates that taxpayers can apply for the mutual agreement procedure with the following governmental agencies:<sup>5</sup>

- *Ministry of Economy and Finance*: cases concerning the application and interpretation of tax treaties
- *National Tax Service*: cases concerning taxation not in accordance with the treaty.

### *Ministry of Economy and Finance*

194. Within the Ministry of Economy and Finance, the competent authority is delegated to the Director General for Tax Policy Co-ordination and in practice performed by the Director of the Tax Treaties Team. This division employs 12 persons, which concern one director, three deputy directors, one assistant deputy director and one English advisor. The three deputy directors are responsible for handling MAP cases of a general nature, whereby each case handler is responsible for certain treaty partners.

### *National Tax Service*

195. Within the National Tax Service, the designated competent authority for Korea is the Assistant Commissioner for International Taxation. Until March 2018, the competent authority function was delegated to the Director of the International Co-operation Division and the Director of the MAP/APA team, under the International Taxation Bureau. As per March 2018, the competent authority function has been reorganised, whereby a specific Mutual Agreement Procedure Division was created, which fully focuses on handling MAP and APA cases. This division in total employs 21 persons and is organised into the following five teams: (i) USA, (ii) China, (iii) Japan, (iv) Europe and (v) other treaty partners.

196. Employees of the Mutual Agreement Procedure Division also participate in the work of the OECD, such as WP6 on transfer pricing and the FTA MAP Forum.

197. Concerning informing treaty partners of contact details of its competent authority, Korea reported it provides such information through its MAP profile as also on the website of the National Tax Service (only in Korean). When a new Assistant Commissioner for International Taxation is appointed, the National Tax Service also notifies this person's name to the relevant treaty partners via an official letter. Furthermore, for each individual MAP case, Korea reported that its competent authority informs its treaty partner with the contact details of individual case handlers, such via a signed notification letter of the MAP request.

198. Furthermore, regarding available resources for the MAP function, Korea reported that it increased its staff with six new persons in 2016 and one in 2017. In that regard Korea noted that it is continuously making efforts to have an adequate number of personnel available, as also that it is in a negotiation process with the relevant government agency (see below) to obtain more staff for the MAP function.

199. Where additional recourses are required, Korea mentioned that the MAP division should make a request to the division within the National Tax Service that is in charge of personnel resources. The responsible division in turn submits a request to the Ministry of

the Interior and enters into a negotiation process with this ministry, in which the Mutual Agreement Procedure Division then also participates. All participants will determine the number of additional personnel, which process usually takes about four months. If an agreement is reached, the division within the National Tax Service that is in charge of personnel resources and the Mutual Agreement Procedure Division will then enter into negotiations with the Ministry of Economy and Finance on the budget for these additional resources agreed upon, which process takes usually one month. If agreement on the budget is reached, the Budget Committee of the Korean Assembly will review it, after which the final notice is made to the National Tax Service.

200. In terms of resources available to perform its MAP function, apart from staffing, Korea reported that the relevant division prepares a budget plan, which is being negotiated with the Ministry of Economy and Finance and which takes usually four months. The budget so negotiated is being reviewed by the budget committee of the Korean Assembly. In that regard, Korea reported it has no difficulties in receiving budget to hold face-to-face meetings with other competent authorities.

### *Ending of MAP after a certain time-period*

201. Under element C.2 it was discussed what dates Korea considers as the start and end date for pre-2016 MAP cases. As mentioned there, the relevant rules relating hereto in Article 23 AITA. Article 23(2) stipulates that the closing date of a MAP case in the situation no agreement is reached is five years after the start date of such a case.<sup>6</sup> In other words, Korea can unilaterally decide to close a MAP case if no agreement is reached within five years after its initiation. Pursuant to Article 23(3), it is possible to extend this period to eight years if both Korea's competent authority and the other competent authority concerned agree to continue discussions.<sup>7</sup>

202. In view of the above, Korea reported that during the Review Period one case was closed (2014) on the basis of Article 23(2) AITA.

### *Recent developments*

203. Korea reported that in March 2018 it has established a dedicated MAP unit within the National Tax Service: the Mutual Agreement Procedure division. This division is specifically dedicated to handling all MAP and APA cases (apart from those assigned to the Ministry of Economy and Finance). With the creation of this division, five more staff were added to the MAP function, bringing the total number of staff to 21 persons. While previously within the two separate divisions that were responsible for handling MAP cases, 30 persons were employed, only 16 of them were involved in handling and resolving MAP and APA cases. The reorganisation has been reflected above in the description of the competent authority function.

204. In this respect, Korea reported that the reorganisation of the competent authority function has successfully ensured consistency and efficiency of the MAP/APA function. Korea further reported that it has worked hard to enhance and strengthen the capability of its staff, such by at regular intervals providing training to new and experienced staff members. In its view these steps have contributed to an efficient, effective and timely resolution of MAP cases.

205. Furthermore, as discussed under element C.2, Korea also increased the number of organised face-to-face meetings, with 24 of such meetings being held in 2018. In addition, Korea also made more frequent use of conference calls to resolve cases or in preparation



to face-to-face meetings. In Korea's view, this has contributed to resolving more cases in general and old cases in particular, but also has it led to more efficient face-to-face meetings.

206. In the stage 1 peer review report, under element C.3, specific recommendations were made in relation to the adequacy of resources at the level of Korea's competent authority. This regards that the governance within the competent authority enables that the resources available are adequate to resolve MAP cases in a timely, efficient and effective manner. Specific items for which recommendations were made are:

- avoiding that the frequent change in personnel does not affect progress of pending cases
- position papers are issued in due time and ahead of face-to-face meetings
- there is an endeavour to discuss and resolve cases in a timely, efficient and effective manner when these are being handled by the Ministry of Economy and Finance.

207. Concerning the first point, Korea reported that it introduced a system that is called "Specialised Post System", which aims at attracting staff to the Mutual Agreement Procedure Division for a longer period than the usual 3-4 year period. Under the system created, staff within the competent authority could stay in one position up to eight years. In addition, as was reflected in paragraph 195 above, the newly created division has five separate units specifically focussing on one or more treaty partners. In this respect, Korea reported that it is operating its working system to minimise unnecessary changes of staff working in a specific unit. When, however, staff moves to another unit within the division, Korea reported that the staff member will continue working on those cases handled by him until they are resolved.

208. Concerning the second point, Korea reported that it is making every effort to provide its position paper as quickly as possible, especially prior to face-to-face meetings. This has contributed in an increase of the number of position papers provided with 250% in 2018 as compared to the years 2015-17.

209. Lastly, concerning the third point, Korea mentioned that it is now established practice to resolve MAP cases of an interpretative nature in an efficient way, such by liaising with the Ministry of Economy and Finance on their position prior to a meeting with a treaty partner, as well as to share this opinion in advance with the treaty partner concerned, such to avoid a delay in the resolution of the case.

210. Further to the above, peers suggested in stage 1 to: (i) improve communications between the competent authorities by way of regular or more frequent exchange of positions via email or letters, (ii) put more focus on the resolution of MAP cases and (iii) have consistent communication at each level within the organisation to keep principled and practical solutions. In this respect, Korea reported that it agrees with the suggestions made by the peers and that it has been working to have better communications with its MAP partners. In more detail, Korea specified that it actively communicates with its MAP partners by using email and letters with a view to discuss meeting schedules, agendas and the exchange of positions on MAP cases. As already outlined above, the number of position papers exchanged with treaty partners has significantly increased in 2018. In addition, Korea mentioned it holds now various internal meetings to discuss MAP cases, both at a working level as at executive levels. Where it would be necessary to speed up the resolution of MAP cases, Korea noted that it prioritises such cases and puts more focus on them, for example, over APAs.

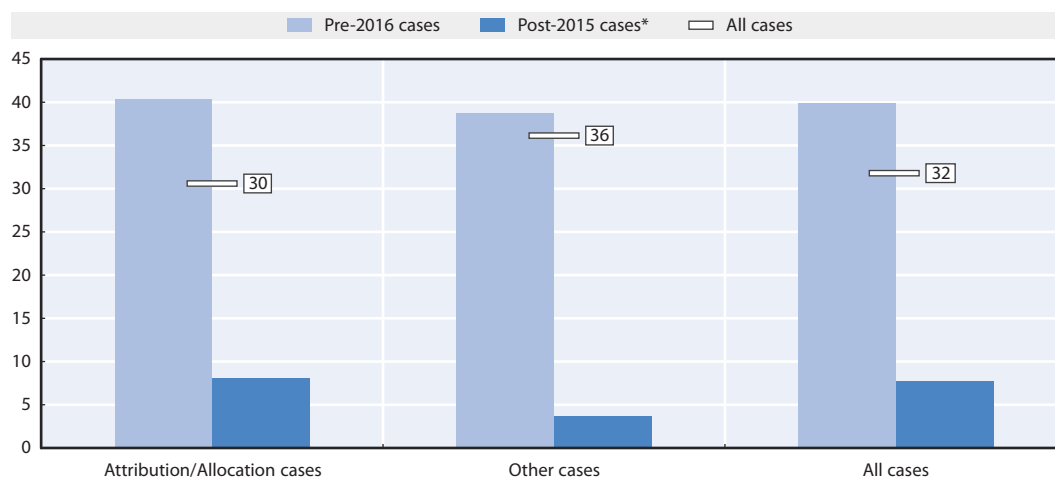


## Practical application

### MAP statistics

211. As discussed under element C.2, Korea has not closed its MAP cases during the Statistics Reporting Period within the pursued 24-month average. While both attribution/allocation cases and other cases are not resolved within this average, the average time to resolve other cases is significantly higher. This can be shown by Figure C.6.

Figure C.6. Average time (in months) to close cases in 2016-18



\* Note that post-2015 cases only concern cases opened and closed in 2016-18.

212. Based on these figures, it follows that on average it took Korea 31.71 months to close MAP cases. The average time needed to close attribution/allocation cases is 30.50 months, while the average time required to close other cases is 36.01 months.

213. The stage 1 peer review report of Korea analysed the 2016 statistics and showed an average of 37.60 months, which concerns an average of 40.24 months for attribution/allocation cases and 29.99 months for other cases. It was on that basis concluded that the overall average was above the pursued average of 24 months.

214. For stage 2, the 2017 and 2018 MAP statistics are also taken into account. The average time to close MAP cases can for these years be split as follows:

	2017	2018
Attribution/Allocation cases	24.44	29.68
Other cases	27.16	47.62
All cases	24.86	34.40

215. The 2017 statistics of Korea show that the average completion time of MAP cases decreased from 37.60 to slightly above the pursued average of 24 months. The average for attribution/allocation cases thereby decreased significantly, particularly due to the high number of post-2015 cases closed as compared to pre-2016 cases. However, in 2018 the average for both types of cases increased again, particularly due to a steady rising of the average for other cases.

216. Apart from the somewhat high average time needed to close MAP cases, Korea's MAP inventory – as analysed in element C.2 – decreased since 1 January 2016. This can be shown as follows:

	Opening inventory on 1/1/2016	Cases started	Cases closed	End inventory on 01/01/2018	Decrease by %
Attribution/allocation cases	86	76	92	70	-19%
Other cases	58	31	26	63	9%
<b>Total</b>	<b>144</b>	<b>107</b>	<b>118</b>	<b>133</b>	<b>-8%</b>

### *Clarifications by Korea*

217. During stage 1, Korea reported there being a variety of reasons why on average it took its competent authority on average longer than 24 months to close MAP cases in 2016. In particular it could find for 23 cases the following reasons for overstepping the 24-month average:

- a. gaps between initial positions of both competent authorities, for which a long time was necessary to reconcile and negotiate between them (17 cases)
- b. delays in replies by Korea's Ministry of Economy and Finance following a consultation by the Korean competent authority<sup>8</sup> (three cases)
- c. no frequent competent authority meetings (two cases)
- d. large MAP inventory at the level of the treaty partner (one case).

218. Korea further provided the median for resolving pre-2016 and post-2015 cases in 2016. The median was 40.27 months for attribution/allocation cases and 36.66 months for other MAP cases. The median for all resolved MAP cases on or after 1 January 2016 was 39.42 months.

219. For stage 2, Korea reported that for the 118 cases closed in the period 2016-18, it could identify in 61 cases the following reasons for overstepping the 24-month targeted timeframe to close such cases:

- gaps between initial positions of both competent authorities, for which a long time was necessary to reconcile and negotiate between them (45 cases)
- delays in replies by Korea's Ministry of Economy and Finance following a consultation by the Korean competent authority (3 cases)
- no frequent competent authority meetings (8 cases)
- large MAP inventory at the level of the treaty partner (5 cases).

### *Peer input*

#### *Period 1 January 2014-31 July 2017 (stage 1)*

##### *General*

220. In total 14 of the 17 peers that provided input, provided details in relation to their contacts with Korea's competent authority and their experiences in resolving MAP cases in the period 1 January 2014-31 July 2017. The other three peers had no MAP cases during this period and for that reason did not provide specific input. Most of these 14 peers

considered their MAP relationship with Korea to be important and their MAP caseload with Korea significant as compared to their total MAP inventory.

### *Contacts and correspondence with Korea's competent authority*

221. Most peers, who consider their MAP relationship with Korea as important, reported having good contacts with Korea's competent authority. One peer, for example, mentioned that it has regular contacts and negotiations with Korea's competent authority over the past years. Another peer noted that it meets regularly with Korea's competent authority, as also having frequent discussions by e-mail or during face-to-face meetings. A third peer addressed that it has a long and well-established relationship with Korea's competent authority on the resolution of MAP cases, whereby contacts are generally easy and frequent via letters, e-mail, conference calls and face-to-face meetings. The easiness of contacts has been echoed by other peers, thereby pointing out that there were no difficulties being encountered. One of these peers in particular noted that the co-operation and communication between the competent authorities is good and prospering, whereas another peer appreciated the prompt acknowledgment of receipt of MAP requests.

222. Peers with a more moderate MAP caseload with Korea generally also provided positive input on their contacts with Korea. One peer mentioned that during in the period 1 January 2014-31 July 2017 various communications took place, including a face to face meeting in November 2016 during which good progress was made on a transfer pricing case. With respect to a non-transfer pricing case, this peer, however, reported having one open case with Korea, which was initiated in 2012 and is still pending, as it awaits a position paper from Korea's competent authority. Another peer reported that contacts with Korea's competent authority normally take place via e-mail, to which is quickly responded. One peer, however, reported difficulties in resolving MAP cases with Korea, which experiences is further discussed in paragraph 226 below.

### *Organisation of face-to-face meetings*

223. A significant number of peers pointed out that they hold at regular intervals face-to-face meetings with Korea's competent authority and at least once a year. One of these peers reported organising such meetings twice a year, generally for three to four days. Another peer mentioned that face-to-face meetings are scheduled once a year, but on an ad-hoc basis, and that information communications also occur outside of scheduled face-to-face meetings.

### *Resolving MAP cases – major MAP partners*

224. Those peers that have a large MAP caseload with Korea generally reported positive experiences with Korea's competent authority in resolving MAP cases. One peer mentioned that it found Korea's competent authority to be open and readily available to discussions regarding MAP cases. A second peer reported that Korea's competent authority endeavours to resolve MAP cases in a reasonable timeframe, whereby written position papers are provided. This peer also reported the regular scheduling of face-to-face meetings and the frequent conference calls to prepare the discussions during such meetings. Similar input was given by another peer, who specified that both competent authorities have provided increasing input (in terms of working hours, negotiations and personnel) to improve the resolution of MAP cases. As new cases frequently arise, for which progress was made, the peer also noted it is awaiting Korea's official position on these cases. In that regard it hopes that both parties continue to work closely together and put increasing effectiveness and efficiency in resolving these cases.

225. Furthermore, one peer addressed that discussions with Korea's competent authority are frequent and also that they provide for a cordial setting for resolving complex issues. This peer, however, also noticed frequent personnel changes within Korea's competent authority, which in this peer's view causes a slowing down of the resolution of MAP cases. Apart from this, the peer did not identify any particular obstacles in the context of resolving MAP cases. This latter input was also reported by two other peers, who specifically mentioned that no impediments have been noticed so far.

226. Other peers raised some criticism regarding the resolution of MAP cases with Korea. For example, one peer mentioned that it is difficult to organise more face-to-face meetings with Korea and that its competent authority insufficiently prepares for such meetings. It thereby specifically referred to the late transmission of position papers before these face-to-face meetings. This peer considered that this may indicate that the available resources in Korea in relation to the MAP function are limited. As the number of MAP cases with Korea is increasing, this peer expressed the expectation that improvement could be made in this area. Korea responded to this input, in particular to the conducting of face-to-face meetings. It reported that in 2016 approximately 20 face-to-face meetings were held with more than ten treaty partners. For 2017 approximately also 20 meetings have been scheduled. Korea therefore believes that the number of face-to-face meetings is sufficient. Specifically relating to the peer input, Korea responded that with this peer also at regular occasions face-to-face meetings are held and at least twice a year, which it considered sufficient to effectively resolve pending MAP cases. Korea added that they already strive at scheduling an additional face-to-face meeting. As regards the preparation for such meetings, Korea mentioned that itself and the peer strive at conducting well-prepared meetings, including the sending of position papers in advance. It may be that for certain cases, the preparation is not satisfactory due to the number of cases to be discussed, but in Korea's view this occurs at both levels, not only at the level of its own competent authority.

227. Specifically concerning the approach by Korea to negotiate MAP agreements on certain issues, two peers provided input. One peer reported that for two pending MAP cases it was informed by the taxpayers concerned that Korea is currently in MAP discussions with another treaty partner on similar issues, whereby Korea's competent authority would only be ready to discuss the case with this peer once these discussions are (nearly) finalised. Although this partner expressed its appreciation for taking such approach, it also considered that this delays the resolution of its own pending MAP cases with Korea. Korea responded to this input by mentioning that in the meantime the relevant MAP discussions have been initiated with this peer.

228. The second peer reported that its experience in resolving MAP cases with Korea has been marked by success and challenges, particularly since a number of cases proved difficult to resolve. This peer provided several examples in relation hereto. This concerns:

- a. *Disagreement on technical and substantial issues*: the peer pointed out that it has expressed its concerns to Korea's competent authority over the application of its treaty with Korea, in particular the precedence Korean domestic law takes over the terms of the treaty and the effect that taxpayer-favourable judicial precedents take in relation to resolving MAP cases on similar issues
- b. *Alteration of common understandings*: the peer referred to experiences that after reaching a common understanding on the scope and limitations of governing Korean judicial precedents, Korea's competent authority altered its theories and negotiation positions to make new arguments

- c. *Handling and resolving of MAP cases by different governmental agencies:* the peer has put forward criticism on the assigning of competence to handle MAP cases to different Korean government entities in relation to resolving such cases. This specifically concerns the situation in which negotiations take place with the National Tax Services, which in the peer's view has only authority to make factual determinations and not to enter into MAP agreements on matters that are of an interpretative nature, as the competence in relation hereto has been assigned to the Korean Ministry of Economy and Finance. In the peer's view this situation impedes the timely and principled resolutions of MAP cases when the National Tax Services cites a lack of authority as a reason for not being able to resolve such cases
- d. *Closure of MAP cases after a certain period:* the peer indicated that the reported challenges have been compounded by a provision in Korea's domestic law (reference is made to paragraphs 201-202 for a description hereof) that limits Korea's competent authority to enter into MAP agreement if the case has been pending for more than five years, with a potential discretionary three-year extension. This peer concluded that this limitation is contrary to the obligations Korea entered into under its treaty with this peer and also contrary to the Action 14 Minimum Standard
- e. *Timely receiving position papers:* the peer reported having experienced some difficulties in timely obtaining position papers from Korea's competent authority.

229. Korea responded to the specific input given by this peer. In a general sense Korea mentioned that most of the comments of this peer relate to one individual issue while there are many pending MAP cases for which Korea's and the peer's competent authority hold a different view. Also for some of the input presented, Korea mentioned that some of the delays encountered by this peer in the resolution of MAP cases are not due to an inefficient allocation of resources or the other reasons cited by the peer, but merely caused by the complexity and the importance of the case under review. Concerning aspects a), c and d) of the input given by the peer, Korea responded as follows:

- a. *Disagreement on technical and substantial issues:* concerning the possible treaty override, Korea mentioned that it has repeatedly given an explanation to the peer that it does not share the peer's view on this point. On the effect of taxpayer-favourable judicial precedents, Korea mentioned that it also has delivered the fact that the judicial decision is not directly applicable to the MAP cases that are being negotiated
- b. *Handling and resolving of MAP cases by different governmental agencies:* Korea responded that the division of handling MAP cases between the Ministry of Economy and Finance and the National Tax Services (as described in paragraph 193) has its basis in Korea's domestic law and has been decided so on historical and institutional grounds. Further to this, Korea also mentioned that in its view the interrelation between the Ministry of Economy and Finance and the National Tax Services is well-functioning
- c. *Closure of MAP cases after a certain period:* Korea reported that the purposes of the specific law provision is to avoid that cases remain in the inventory, while they are in a standstill state and the chances of being resolved via a MAP agreement are little. To this end, a period of five years that can be extended to eight years should be considered as reasonable and in Korea's view does not impede the timely and effective resolution of MAP cases, all the more since the provision included in Article 23(2) AITA in relation hereto is rarely used.

230. Lastly, one peer mentioned that even though face-to-face meetings are organised on a regular basis, the resolution of MAP cases tend to be lengthy. This peer, however, also noted that the latter has definitely improved over the last years.

#### *Resolving MAP cases – other MAP partners*

231. Also peers with a more moderate caseload with Korea reported mixed experience with Korea's competent authority in resolving MAP cases. For example, one peer reported that it held a face-to-face meeting with Korea's competent authority in 2016, during which the case under review was resolved. This peer mentioned that this experience was positive, whereby the dialogue was constructive and based on facts. Other peers reported no impediments in resolving of MAP cases, whereby one mentioned that in the period 1 January 2014-31 July 2017 progress has been made on the pending MAP cases.

232. Two peers, however, raised specific criticism on the resolution of MAP cases with Korea's competent authority. One of these peers mentioned that sometimes it occurred that Korea did not provide all the relevant documentation to properly evaluate the case under review. Korea responded to this input by mentioning that in the said case there were no documents available to properly evaluate the case, as the peer imposed the tax for which a MAP request was being submitted. Korea added that it later identified that it did not provide a notification letter to this peer on the receipt of MAP request by the Korean taxpayer. The other peer reported that in the period 1 January 2014-31 July 2017 it had in total resolved four cases with Korea, whereby two were closed without any solution found, for which the financial amount can be substantial. The period to close these cases was for three of the four cases longer than two years. This peer in particular noted that during in the period 1 January 2014-31 July 2017 it had two face-to-face meetings with Korea's competent authority. This peer has experienced such negotiations as a slow process, a challenge to achieve progress and that most cases on the agenda remain unresolved. Although this peer considers scheduling regular competent authority meetings an efficient manner to resolve MAP cases, its experience learns that achieving progress with Korea's competent authority remains a challenge, even with regular face-to-face meetings.

#### *Suggestions for improvement*

233. A number of peers provided suggestion for improvements. One peer mentioned that better communication could contribute to improve the timeliness for resolving MAP cases in a principled manner. Other peers also referred to the communication with Korea's competent authority. One of these peers mentioned that apart from face-to-face negotiations, both competent authority could resort to regular exchange of positions via e-mail or letters with a view to improve the resolution of MAP cases. A second peer also mentioned that more frequent exchange of written position papers could speed up the process. Another peer stressed that Korea may consider to engage in concurrent MAP discussions to arrive at a more quick resolution of cases. Lastly, one peer reported that it would be beneficial if Korea's competent authority would improve their focus on the resolution of MAP cases.

234. Furthermore, one peer provided detailed input on the resolution of MAP cases. This peer recommended that both competent authorities continue to have consistent communication at each level of their organisations (e.g. analysts, managers and senior management/executives), both on procedural and substantive matters. In the peer's experience, consistency of communication at all levels facilitates the resolution of MAP cases and further that robust channels of communication between analysts and managers



ensure that cases are efficiently developed, discussed and resolved. To this the peer added that with respect to routine cases that where they need to be elevated to higher levels within the organisation, although they ideally should be resolved at operational levels within the competent authority organisations, frequent and fulsome discussions between senior management and executives can help ensure that principled and practical resolutions for MAP cases can be reached efficiently. With respect to the first suggestion made, Korea responded that it in principle can agree with this proposal, but also that at each level discussions need to be co-ordinated and supervised by a person that is competent to make decisions, such that the discussions on the technical content of the case can indeed be dealt with at an operational level.

*Period 1 August 2017-28 February 2019 (stage 2)*

235. Almost half of the peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or there are no additions to the previous input given. 13 peers, however, provided specific input on their experiences with Korea concerning the resolution of MAP cases since that date.

236. Of these 13 peers, one only provided general input and mentioned it has currently one case pending with Korea. Another peer mentioned that its experience with Korea since 1 August 2017 is at a nascent stage and therefore no specific comments could be mentioned. Furthermore, a third peer mentioned that in 2018 it conducted a face-to-face meeting with Korea and that during that meeting it had fruitful discussions on APAs, for which it hoped that a similar approach will be taken for MAP cases.

237. Other peers provided more details as to their experience with Korea in handling and resolving MAP cases since 1 August 2017. One of them mentioned that in some of the pending MAP cases following a Korean-initiated adjustment, more than two years elapsed between the submission of the MAP request and the provision of a position paper by Korea's competent authority. A second peer echoed similar comments and referred to a pre-2016 cases for which it sent a position paper in March 2016, whereby only in 2019 Korea's competent authority communicated that they accept the case and will discuss it in the scheduled face-to-face meeting. For this case, the peer reported it had not yet received a position paper. A third peer confirmed this and mentioned that, while it appreciates Korea's efforts in this respect, its experience is still that Korea's competent authority sends position papers immediately before face-to-face meetings, or, occasionally, not sends a position paper at all before such meetings. The peer therefore expressed that it would appreciate if Korea's competent authority could endeavour to provide position papers in a timely manner before a face-to-face meeting.

238. Korea responded to this particular input and mentioned that its competent authority has fully endeavoured to ensure adequate resources to provide position papers in a timely manner to its MAP partners. It further mentioned that it believes these resources have been well-prepared, with the exception of some cases. Korea thereby referred to the statement presented in paragraph 208 above on the increase in the number of position papers provided. Particularly on the delay or late receipt of position papers referred to by the peers, Korea mentioned that for those cases more time was needed to analyse the facts and circumstances of the cases under review, taking into consideration the complexity of interpretation of the treaty provisions and obtaining the relevant information.

239. Several peers also referred to the fact that a shift in personnel within Korea's competent authority led in their view to a delay in certain MAP cases. One of these peers



mentioned that while it could resolve an attribution/allocation case with Korea without any difficulties, but that for pending other cases, an agreement could not yet be reached due to a change in personnel within Korea's competent authority. In this respect, the peer noted that efforts are being made by Korea to schedule a conference call or organise a face-to-face meeting, for which it hopes that communications will facilitate the resolution of these pending cases.

240. Further to the above, one peer mentioned that in the period 1 August 2017-28 February 2019 it did not close any MAP case with Korea, while it had two pre-2016 and six post-2015 cases pending. The two pre-2016 cases were initiated in 2013 and 2014 respectively, but could not yet be resolved due to: (i) the issue involved was also subject to domestic court proceedings and (ii) similar issues were also pending before domestic courts in relation to other taxations than for which a MAP request was submitted. In a response, Korea mentioned that its competent authority has provided sufficient information to the peer in relation to the pending court cases initiated by the taxpayers as well as the background of the tax assessments, the views given by the court and the developments for these cases.

241. In addition, one peer presented some examples of delays it encountered in resolving MAP cases with Korea. It noted that with respect to other MAP cases (which case was also discussed under element C.1), its competent authority sent a letter to Korea's competent authority in January 2013 to open a MAP, which the latter accepted in July 2013. Despite several reminders, Korea's competent authority did not provide a position paper, but in August 2016 responded that the case was not suitable for MAP due to a domestic court had issued a ruling on the case, such without the knowledge of the taxpayer resident in the peer's state. For an attribution/allocation case, the peer specified that it took 28 months to resolve the case. This was due to a limited number of pending cases and in the absence of regular contacts between the respective competent authorities. The peer further mentioned it now has established a more regular programme of engagement with Korea's competent authority, which should facilitate a more swift resolution of future MAP cases.

242. Lastly, one peer, however mentioned that it continues to experience significant difficulties in resolving a set of MAP cases with Korea. It thereby referred to its input in stage 1, which is reflected in paragraph 228 under sub a above. This concerns cases where treaty issues have been litigated in Korea, whereby taxpayers have won their cases both at the level of high courts and the supreme court. The peer therefore believed these judicial decisions on the application of the treaty should be taken into account in order to reach principle resolution in similar cases in the MAP process. Korea's competent authority, however, has declined to give weight to the judicial decisions in reaching an appropriate solution in MAP. The peer therefore expressed that it has the impression that Korea's competent authority may face institutional hurdles to deviate in MAP from the litigation position of the auditors of the National Tax Service. In the peer's view, this raises question as to whether MAP at this stage can be a viable means of resolving these disputes, which affects eight of the 20 pending other MAP cases with Korea.

243. Korea responded to the input given and mentioned that – as is noted in its response in paragraph 229 – it has delivered the factual aspects that judicial decisions are not directly applicable to the MAP cases with this peer. It further stated that if its competent authority would be dependent on policy considerations, the cases being referred to would not have been closed with a resolution due to the litigation position of the National Tax Service. To this it added that it is Korea's impression that its competent authority has been working with the peer on the relevant cases to narrow the differences, which resulted in several

cases actually having been resolved since 2017, with the outcome of fully eliminating double taxation. Korea therefore concluded that the existence of such agreements alone already indicates that its competent authority acts absent from any policy considerations.

244. The relevant peer commented on this response and mentioned that it appreciates the concerted efforts of Korea's competent authority to resolve MAP cases despite the litigation position of the National Tax Service that Korea's courts have consistently not adopted in cases that are legally and factually similar as to the MAP cases this peer has pending with Korea. In that regard, the peer noted that these cases would be more efficiently resolved if competent authorities were to adopt a balanced framework approach that takes the consistently held legal principle of the court decisions into account, such notwithstanding factual differences that exist in individual cases.

245. Finally, one peer provided a suggestion for improvement, namely that in order to facilitate and expedite negotiations for at least non-attribution/allocation cases, other alternatives to face-to-face meetings should be considered, such as teleconferences.

### *Anticipated modifications*

246. Korea did not indicate that it anticipates any modifications in relation to element C.3.

### *Conclusion*

	Areas for improvement	Recommendations
[C.3]	<p>MAP cases were resolved in 31.71 months on average, which regards both attribution/allocation cases and other MAP cases. While the average completion time has decreased in the period 2017-218 as compared to 2016, it is still above the 24-month average (which is the pursued average for resolving MAP cases received on or after 1 January 2016). There is therefore a risk that post-2015 are not resolved within the average of 24 months.</p> <p>While the competent authority function has been reorganised, resulting in a dedicated MAP unit, and more resources have been added and while other organisational (assuring less frequency in changes of staff) and procedural steps (an increase in the number of face-to-face meetings and issued position papers) have been taken, some peers still experienced difficulties in resolving MAP cases in a timely efficient and effective manner, which in particular concerns:</p> <ul style="list-style-type: none"> <li>• timely submission of position papers to treaty partners and ahead of face-to-face meetings</li> <li>• timely responding to position papers issued by treaty partners</li> <li>• absence of timely notifications on relevant developments throughout the MAP process.</li> </ul> <p>This may indicate that the governance within the competent authority is still not conducive to ensure that post-2015 cases are resolved within the pursued average of 24 months.</p>	<p>While Korea has recently reorganised its competent authority function and established a dedicated MAP unit, as well as that it has taken several steps to improve the MAP process, resulting in more cases being closed and a reduction of the average completion time, further actions should be taken to ensure a timely resolution of MAP cases, which both regards attribution/allocation cases and other cases.</p> <p>In that regard, Korea should further work to ensure that the governance within its competent authority enables that the resources available are adequate in order to resolve MAP cases in a timely, efficient and effective manner. Where necessary, additional resources should be added to the competent authority, in particular to:</p> <ul style="list-style-type: none"> <li>• timely submit position papers to treaty partners and ahead of face-to-face meetings</li> <li>• timely respond to position papers issued by treaty partners</li> <li>• timely notify treaty partners of relevant developments throughout the MAP process.</li> </ul>

#### [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.

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

#### *Functioning of staff in charge of MAP*

248. With respect to handling and resolving MAP cases, Korea reported that there are four levels of officials within the National Tax Service: (i) examiners, (ii) deputy-director, (iii) director and (iv) the assistant commissioner. Both the examiners and the deputy-directors prepare a position paper. After having prepared this paper, it is being reviewed by the director, which subsequently needs to be approved by the assistant commissioner of the International Taxation Bureau within the National Tax Service. The assistant commissioner eventually takes a decision on the Korean position, which decision is independently made from the Tax Audit Bureau of the National Tax Service. With respect to the resolution of MAP cases, Korea reported that prior to entering into negotiations, for example during face-to-face meetings, the Korean delegates are given a mandate for finding solutions on a case. The delegates can enter into MAP agreements that are within this range without any approval afterwards by the assistant commissioner. Furthermore, it reported that since the International Tax Bureau and the Tax Audit Bureau function independently from one and another, the preparation of the Korean position, as the decision to enter into a MAP agreement is solely taken at the level of the competent authority.

249. Concerning handling of MAP cases of a general nature, Korea reported that within the Ministry of Economy and Finance, the Director of the Tax Treaty Team and subsequently the Director General for Tax Policy Co-ordination will approve all MAP agreements.

250. As to the relationship with local tax offices, Article 90 of Korea's Binding Administrative Guidance includes rules for conducting the mutual agreement procedure in this respect. Article 90(1) stipulates that after submission of a MAP request, the head of Korea's competent authority will notify the relevant directors of the regional tax offices of the National Tax Services, which imposed, or is likely to impose, the taxation that is deemed by the taxpayer not to be in accordance with the provisions of the tax treaty. It will in turn request the regional tax office to submit the following documents:

- documents relation to the imposition of taxes being referred to in the MAP request
- documents to provide the grounds of the imposition of taxes being referred to in the MAP request
- copies of written decisions, appeals (or court petitions), written defences and other relevant documents concerning the imposition of taxes that relate to the MAP request, and a specification on whether consultation on factual judgment of a tax assessment, pre-assessment review, objection, examination by the National Tax

Services or a judgment by the Tax Tribunal, a request for examination by the Board of Audit and Inspection, or litigation has been processed or is under review.

251. Article 90(2) of Korea's Binding Administrative Guidance further stipulates that the local tax office has to provide the requested information within seven days as from the date of receipt of the relevant request. During the course of a MAP a further explanation may be necessary of the documents submitted by the local tax office to Korea's competent authority. In such a case, Article 90(3) allows Korea's competent authority to request the local tax office to provide its opinion in writing. Pursuant to Article 90(4) the local tax office should provide this written opinion within one month from the request made. Furthermore, Article 90(5) determines that the local tax office shall designate an official that has been involved in the relevant tax audit alongside another official to handle requests under Article 90(3).

252. Further to the above, Article 90(3) of the Binding Administrative Guidance also allows personnel from the local tax office to attend competent authority meetings. Korea clarified that such attendance has not taken place in recent years, but when it will happen, it will comply with the rules agreed on by the FTA MAP Forum in relation hereto.

253. In view of the above, Korea reported that the decision making process for MAP cases is, both at the level of the National Tax Service and the Ministry of Economy and Finance, neither dependent on approval/direction by the audit department of the tax administration that is directly involved in the adjustment at issue, nor of any policy consideration. In other words, it reported that its competent authority can enter into MAP agreements absent from approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by policy considerations that it wants to see in future amendments to the treaty.

### ***Recent developments***

254. There are no recent developments with respect to element C.4.

### ***Practical application***

#### ***Period 1 January 2014-31 July 2017 (stage 1)***

255. All peers that provided input did not report any impediments in Korea to perform its MAP function absent from the approval or the direction of the tax administration personnel directly involved in the adjustments at issue or Korea being influenced by considerations of the policy that it would like to see reflected in future amendments to the tax treaty. One peer specifically mentioned that they are not being aware that staff in charge of the MAP in Korea is dependent on the approval of MAP agreements by the personnel within the tax administration directly involved in the adjustment at issue or being influenced by considerations of the policy.

#### ***Period 1 August 2017-28 February 2019 (stage 2)***

256. Almost all peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or there are no additions to the previous input given. In addition, one peer highlighted that it has resolved one case with Korea since that date and has not experienced any issues regarding the authority of Korea's competent authority to resolve MAP cases.

257. One peers noted that it does appreciate the efforts made by Korea to concurrently resolve related MAP and APA cases in a timely, efficient and effective manner. It also referred to experiences in a recent attribution/allocation case, involving both an APA and a MAP request, that resulted in a lengthy delay in finalising the terms of the agreements, due to the pending consultations between Korea's competent authority and the examination staff. In the peer's view this consultations seemed to prolong case closure beyond what it would have normally expected.

### *Anticipated modifications*

258. Korea 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.

259. 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 Korea*

260. Korea reported that it uses a two-tier performance indicator system. This concerns (i) an evaluation of the organisation and (ii) an evaluation of individual staff members.

261. With respect to the evaluation of the organisation, Korea reported that within the National Tax Service the Mutual Agreement Procedure Division is being evaluated, whereby the used performance indicators are divided into two parts: (a) a quantitative indicator, such as the increased rate of held face-to-face meetings as compared to previous years and (b) a qualitative indicator, such as the endeavour to resolve MAP cases. For fiscal year 2017, the number of face-to-face meetings was set at 130% of the average number over the past three fiscal years. For fiscal years 2018 and 2019, the performance indicator used was to the sending of position papers instead of face-to-face meetings. In 2018, the target for sending of such papers was 130% as compared to the previous three-year average. In 2019, the target was raised to 150% over the previous two-year average.

262. With respect to the evaluation of individual staff members, Korea reported that the used performance indicators are also divided into two parts; a quantitative indicator and a qualitative indicator. The quantitative indicator is thereby the same as the one used for the evaluation of the organisation. The qualitative indicators used are the endeavour to resolve MAP cases, integrity and work completeness.

263. The Action 14 final report (OECD, 2015) includes examples of performance indicators that are considered appropriate. From the above analysis it follows that Korea uses the following indicators:

- ☒ 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).

264. In view of the above, Korea mentioned that no performance indicators are used concerning the amount of sustained adjustments or maintaining of tax revenue.

### ***Recent developments***

265. There are no recent developments with respect to element C.5.

### ***Practical application***

#### *Period 1 January 2014-31 July 2017 (stage 1)*

266. All peers that provided input indicated not being aware that Korea uses performance indicators that are based on the amount of sustained audit adjustments or maintaining a certain amount of tax revenue.

#### *Period 1 August 2017-28 February 2019 (stage 2)*

267. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or there are no additions to the previous input given. One of the peers thereby specified that it is not aware of any performance indicators used by Korea to evaluate staff in charge of the MAP process.

### ***Anticipated modifications***

268. Korea 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.

269. 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***

270. Korea reported that there are no domestic law limitations for including MAP arbitration in its tax treaties. Inclusion of MAP arbitration, however, is not part of Korea's tax treaty policy. This is reflected in Korea's MAP profile. Furthermore, Korea's recently issued MAP guidance stipulates in paragraph 3.7 that MAP arbitration is not provided for in Korea's tax treaties. In addition, in the Commentary to Article 25 of the OECD Model Tax Convention, Korea reserved the right not to include the arbitration provision of Article 25(5) in its tax treaties.

### ***Recent developments***

271. There are no recent developments with respect to element C.6.

### ***Practical application***

272. Korea has not incorporated an arbitration clause in its tax treaties as a final stage to the MAP. However, one of its treaties includes a most-favoured nation clause on arbitration. This provision stipulates that if Korea includes an arbitration provision in one of its tax treaties, it shall enter into negotiations with its treaty partner with whom the most-favoured nation clause was agreed on with a view to include an arbitration provision in that treaty as well. Korea reported that the conditions under this clause have not been fulfilled.

### ***Anticipated modifications***

273. Korea did not indicate that it anticipates any modifications in relation to element C.6.

### ***Conclusion***

	Areas for improvement	Recommendations
[C.6]	-	-

## **Notes**

1. Available at: [www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm](http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm). These statistics are up to and include 2018.
2. For post-2015 cases, if the number of MAP cases in Korea'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 for any treaty partner, Korea reported its MAP caseload for such a treaty partner on a jurisdiction-by-jurisdiction basis. This rule applies for each type of cases (attribution/allocation cases and other cases).



3. Korea reported that for pre-2016 cases for determining whether a case is considered an attribution/allocation MAP case cases it followed the rules contained in Annex D of the MAP Statistics Reporting Framework. Annex D of MAP Statistics Reporting Framework defines such case as: “a MAP case where the taxpayer’s MAP request relates to (i) the attribution of profits to a permanent establishment (see e.g. Article 7 of the OECD Model Tax Convention [OECD, 2015a]); or (ii) the determination of profits between associated enterprises (see e.g. Article 9 of the OECD Model Tax Convention [OECD, 2015a]), which is also known as a transfer pricing MAP case”.
4. Reference is also made to paragraph 3.1 and 3.3 of Korea’s MAP guidance. The start and end date are also set out in Article 86 of the Binding Administrative Guidance.
5. For a description see also paragraph 2.4 of Korea’s MAP guidance and Article 85(1) of the Binding Administrative Guidance.
6. This is also set out in Article 86(2) of the Binding Administrative Guidance.
7. Ibid Article 86(3).
8. In Korea it is possible that the Korean competent authority consult the Korean Ministry of Economy and Finance for certain MAP cases, but there is not requirement to do so.

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## *Part D*

### **Implementation of MAP agreements**

#### **[D.1] Implement all MAP agreements**

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

274. 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***

275. Korea reported that MAP agreements are implemented regardless of any domestic statute of limitations.

276. Article 27 AITA includes specific rules in relation to the implementation of MAP agreements. In this respect, Article 27(2) stipulates that when Korea's competent authority enters into a MAP agreement with the competent authority of its treaty partner, it shall notify relevant governmental agencies (e.g. the tax authorities) and the taxpayer of this agreement, including the terms and conditions of that agreement. Such notification has to be given within 15 dates as from the date of entering into the MAP agreement. In relation hereto, Article 42(2) EDAITA determines that for such notification a standard form is to be used. This form is included in the appendixes to Korea's MAP guidance and includes information on: (i) the taxpayer, (ii) its associated enterprise(s), (iii) the start and end date of the MAP case (in accordance with the rules in Article 23 AITA), (iv) details of the MAP request and (v) details of the MAP agreement.

277. Concerning the implementation process of MAP agreements, Korea reported it makes a distinction between MAP cases whereby the underlying taxation is imposed in Korea and or at the level of its treaty partner. In the first situation, the National Tax Service will automatically implement the MAP agreement on the basis of an ex-officio tax assessment. In relation hereto, Korea reported that under its domestic law, an ex-officio tax assessment can be imposed when an initial tax assessment has been imposed in Korea. If the taxation under review is made at the level of the treaty partner, there, however, is no corresponding legal action in Korea for which an ex-officio assessment cannot be imposed. The relevant rules are detailed in Article 27(3) of the AITA, which stipulates that the tax authority or the head of a local government shall assess taxes, determine to make a rectification, or take other necessary action to implement such MAP agreement. In the second situation, a MAP agreement will not be automatically implemented, but implementation is subject to the taxpayer requesting the National Tax Service to rectify the tax assessment within two months as from the date of notification of the MAP

agreement. In this respect, Article 17(1) of the EDAITA requires taxpayers, who received a notification of the outcome of a MAP on the basis of Article 27(2) of the AITA, to request for a rectification of the tax assessment within a period of two months with the head of a tax office.

278. Further to the above, under Korean domestic law, taxpayers are allowed to initiate domestic available remedies alongside requesting for the mutual agreement procedure. When a tax assessment is issued, taxpayers have three options: (i) formally protest to the National Tax Service, (ii) lodge an appeal to the (administrative) Tax Tribunal, or (iii) formally protest to the Board of Audit and Inspection. In all three options, the government authority has to take a decision within 90 days. Afterwards, the taxpayer can initiate domestic court proceedings. In any case, initiating one of these three options is a prerequisite for initiating a domestic court procedure.<sup>1</sup> As long as the domestic court procedure is still pending, the case can also be dealt with in MAP. However, where the domestic court issues a ruling on the case, MAP proceedings will, pursuant to Article 23(4) AITA, be put to an end. Furthermore, Article 27(4) of this act stipulates that if a final decision is made after conclusion of a MAP agreement, which deviates from the terms and conditions of such agreement, the MAP agreement is deemed non-existent, even where it was already implemented. This practice bears the risk that even when a MAP agreement is implemented, the effect hereof is made redundant due to a deviating court decision afterwards. This is reinforced by the fact that taxpayers are not asked approval of the said agreement alongside with the requirement to withdraw any pending appeals in relation to the same case, if the MAP was initiated in Korea.

279. As mentioned in the stage 1 report, Korea reported that it has not experienced any cases where a final court ruling was issued after a MAP agreement has been entered into and/or was implemented. The same applies to the period starting on 1 August 2017 (stage 2).

### ***Recent developments***

280. With respect to the process for implementing MAP agreements, Korea reported that in February 2019 it has extended the period for taxpayers to request the National Tax Service to rectify the tax assessment from two to three months as from the date of notification of the MAP agreement, such when the underlying tax assessment was made by the other jurisdiction concerned. By doing so, and as will be discussed below, since Korea nor peers reported any impediments as regards the implementation of MAP agreements due to the time period for requesting to rectify the tax assessment, the recommendation made in stage 1 has been addressed.

281. Further to the above, as already noted in the anticipated modifications section of the stage 1 peer review report, Korea also reported that it has reviewed the adequacy of Article 27(4) AITA, stipulating that the MAP agreement shall be deemed non-existent from the beginning when for the same case a final court ruling has been issued after the MAP agreement was entered into and which deviates from the content of this agreement. The outcome of this review is that a MAP agreement cannot take precedence over a court ruling, such under the principle of the rule of law. Korea, however, also clarified that on procedural grounds it would be possible to prohibit taxpayers from initiating domestic court procedures or to allow a withdrawal of a pending procedure once a MAP agreement is entered into. As such a requirement would in Korea's view not be desirable in terms of protecting taxpayers' rights, it has not considered an amendment of its domestic law in this respect.

## ***Practical application***

### *Period 1 January 2014-31 July 2017 (stage 1)*

282. Korea reported that all MAP agreements that were reached in the period 1 January 2014-31 July 2017 have been (or will be) implemented. Article 42(3) EDAITA stipulates that tax authority or the head of a local government has to inform Korea's competent authority of such implementation within 15 days as from the date of implementing the MAP agreement. In this respect, Korea noted that such reporting has to be done via official letters, following which track is being kept of the actual implementation of MAP agreements. In that regard, it is not aware of any MAP agreement that has not been implemented.

283. All peers that provided input reported that they were not aware of any MAP agreement reached in the period 1 January 2014-31 July 2017 that was not implemented by Korea.

### *Period 1 August 2017-28 February 2019 (stage 2)*

284. Korea reported that all MAP agreements that were reached on or after 1 August 2017 have been (or will be) implemented.

285. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or there are no additions to the previous input given. One peer thereby added that it is not aware of any MAP agreement that has not been implemented by Korea.

## ***Anticipated modifications***

286. Korea did not indicate that it anticipates any modifications in relation to element D.1.

## ***Conclusion***

	Areas for improvement	Recommendations
[D.1]	Implemented MAP agreements may be annulled due to rulings of domestic courts.	Korea should ensure that implemented MAP agreements are not annulled by domestic court rulings after such implementation, for which it could consider amending its domestic law.

## **[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.

287. 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*

288. Further to the system in place in Korea for implementing MAP agreements discussed under element D.1, Korea's domestic law also include timing rules for implementing such agreements. In a general sense, Article 25 AITA stipulates that a MAP agreement has to be implemented within one year as from the date the MAP agreement was entered into, even if Korea's domestic statute of limitation already has expired. Where the MAP was initiated by the treaty partner, the taxpayer has to, as discussed under element D.1, request for a rectification of the tax assessment within three months as from the date of notification of the MAP agreement. Upon receipt of such request, the head of the relevant regional tax office should, pursuant to Article 17(3) of the EDAITA make such rectification within a period of two months from the date of receipt.

### *Recent developments*

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

### *Practical application*

290. Korea reported that all MAP agreements that were reached in the period 1 January 2014-31 July 2017 have been (or will be) implemented on a timely basis.

291. All peers that provided input have not indicated experiencing any issues with Korea regarding the implementation of MAP agreements reached on a timely basis in the period 1 January 2014-31 July 2017.

### *Period 1 August 2017-28 February 2019 (stage 2)*

292. Korea reported that generally all MAP agreements reached in the period 1 August 2017-28 February 2019 were implemented on a timely basis.

293. All peers that provided input during stage 1 stated in stage 2 that the update report provided by Korea fully reflects their experience with Korea since 1 August 2017 and/or there are no additions to the previous input given. Two peers specifically mentioned they are not aware of any delays in relation to the implementation of MAP agreements reached. Another peer mentioned that its experience with Korea is that MAP cases were implemented on a timely basis.

### *Anticipated modifications*

294. Korea 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.

295. In order to provide full certainty to taxpayers it is essential that implementation of MAP agreements is not obstructed by any time limits in the domestic law of the jurisdictions concerned. Such certainty can be provided by either including the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) 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 Korea's tax treaties***

296. Out of Korea's 95 tax treaties, 70 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. Furthermore, 22 treaties do not contain such equivalent or the alternative provisions in Article 9(1) and Article 7(2), setting a time limit for making adjustments.

297. For the remaining three treaties the following analysis is made:

- One treaty contains a provision that is based on Article 25(2), second sentence, but also includes wording that a MAP agreement may be implemented within six years from the date of presentation of the MAP request to the competent authority. As this bears the risk that MAP agreements cannot be implemented due to time constraints in domestic law of the treaty partners, this treaty therefore is considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention.
- One treaty contains a provision that is based on Article 25(2), second sentence, but a MAP agreement can only be implemented if the competent authority of the other contracting state is notified of a MAP request within four and a half years from the due date, or if later, the date of filing of a tax return in that other state. In that situation a MAP agreement shall be implemented within ten years from one of these dates, or a longer period if permitted under the domestic laws of that other state. As this provision also bears the risk that MAP agreements cannot be implemented due to time constraints in domestic law of the treaty partners, this treaty therefore is also considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention.
- One treaty contains a provision equivalent to Article 25(2), second sentence, but the implementation of MAP agreements is made subject to time limits as included in the domestic laws of the contracting states. As this treaty actually puts a time limit on the implementation of MAP agreements, the treaty considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention.

298. Almost all peers that provided input reported that their treaty with Korea meets the requirements under element D.3. This includes also those peers for which its treaty



with Korea actually does not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. Additionally, one peer reported being in the process of renegotiating the treaty with Korea with a view to *inter alia* bring it in line with the requirements under the Action 14 Minimum Standard, which also regards element D.3, as the equivalent of Article 25(2), second sentence is currently not contained in its tax treaty with Korea.

299. Furthermore, four peers specifically mentioned that their treaty with Korea does not meet the requirements under element D.3. Three of the four peers reported that there are no ongoing contacts or negotiations with Korea, nor were they contacted by Korea, to amend the treaty with a view to incorporate the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, as they envisage modifying it via the Multilateral Instrument. At this stage, only two of the four relevant treaties will indeed be modified via the Multilateral Instrument. One of these three peers further mentioned that where the treaty with Korea will not be modified to incorporate the equivalent of Article 25(2), second sentence, it will discuss possible solutions bilaterally. Additionally, the fourth peer noted that it will seek to update the treaty when it meets with Korea for bilateral discussions.

### ***Recent developments***

#### *Bilateral modifications*

300. Korea signed a new treaty with three treaty partners on the replacement of the existing treaty in force. Two of these new treaties have already entered into force and replaced the previous treaty with the relevant treaty partner. The new treaties all contain a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention, which was not the case for two of the three the treaties that will or have been replaced by these new treaties. The effects of these new treaties have been reflected above where they have relevance.

#### *Multilateral Instrument*

301. Korea signed the Multilateral Instrument, which has been approved by the National Assembly in December 2019. Korea reported that the ratification of this instrument will be completed shortly.

302. 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), second 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 tax treaty as a covered tax agreement under the Multilateral Instrument and insofar both notified the depositary of the fact that this tax treaty does not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. Furthermore, Article 16(4)(b)(ii) of the Multilateral Instrument does not take effect, if one or both of the signatory states to the tax treaty has, pursuant to Article 16(5)(c), reserved the right not to apply Article 16(2), second sentence, 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) of the OECD Model Tax Convention concerning the introduction of a time limit for making transfer pricing profit adjustments.

303. In regard of the 25 tax treaties 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), Korea listed 17 as covered tax agreements under the Multilateral Instrument, but only for 16 of them did it make, pursuant to Article 16(6)(c)(ii), a notification that they do not contain a provision described in Article 16(4)(b)(ii) of the Multilateral Instrument. Of the relevant 16 treaty partners, one is not a signatory to the Multilateral Instrument, whereas one did not list its treaty with Korea as a covered tax agreement under that instrument and one made a reservation on the basis of Article 16(5)(c). All remaining 13 treaty partners also made a notification on the basis of Article 16(6)(c)(ii). Therefore, at this stage, the Multilateral Instrument will, upon entry into force for the treaties concerned, modify 13 of the 25 treaties to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention.

### *Other developments*

304. Korea reported that for one of the remaining 12 treaties that will not be modified by the Multilateral Instrument to the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, the relevant treaty partner has informed Korea 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. Korea further reported that it will with the ratification of the instrument update its lists of covered tax agreements and notifications, following which two treaties that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, will be modified to include such equivalent.

305. In addition, Korea clarified that it has approached one treaty partner with the request to initiate negotiations on the replacement/amendment of the existing treaty, but that the relevant partner responded to Korea that it is willing to enter into such negotiations, but not for purposes of the Action 14 Minimum Standard, as it will sign the Multilateral Instrument in 2020 and by doing so will make the required notifications in order to meet the requirements under the Minimum Standard.

306. With respect to the remaining eight treaties, Korea reported the following developments:

- It has finalised negotiations with a treaty partner on the replacement of the existing treaty in force, which will also include Article 25(2), second sentence, of the OECD Model Tax Convention and which is not the case for the existing treaty.
- It has negotiated with one treaty partner on an amending protocol, which also regarded the inclusion of the second sentence of Article 25(2) or the alternative provisions for Article 9(1) and Article 7(2). While the amending protocol was signed, no agreement could be reached on the inclusion of one of the options.
- It was approached by one treaty partner to initiate negotiations on the replacement/amendment of the existing treaty, which are now pending.
- It has approached three treaty partners with the request to initiate negotiations on the replacement/amendment of the existing treaty, for which a response is pending for two treaty partners and with the third negotiations have been initiated.

- It has approached one treaty partner for a long time with the request to initiate negotiations, but so far no response have been given.
- Negotiations on the replacement/amendment of an existing treaty are pending for several years, which *inter alia* take into consideration the requirements under the Action 14 Minimum Standard.

### *Peer input*

307. Of the peers that provided input during stage 2, nine provided input in relation to their tax treaty with Korea. Three of these peers concern a treaty partner to one of the treaties identified above that does not contain Article 25(2), second sentence, of the OECD Model Tax Convention. Two of these three peers mentioned that their treaty with Korea will be modified by the Multilateral Instrument to include this second sentence, which conforms with the above analysis. The third peer is party to the treaty that currently will not be modified by the Multilateral Instrument to include Article 25(2), second sentence, of the OECD Model Tax Convention. This peer mentioned that it has conducted negotiations with Korea on an amending protocol, to also include the alternative provisions for Article 9(1) and Article 7(2). As reflected above, such negotiations did not lead to an agreement hereon.

### *Anticipated modifications*

308. Korea reported it will seek to include Article 25(2), second sentence, of the OECD Model Tax Convention in all of its future tax treaties.

### *Conclusion*

	Areas for improvement	Recommendations
[D.3]	<p>25 out of 95 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention, nor the alternatives provisions in Article 9(1) and Article 7(2).</p> <p>For one of these 25 treaties negotiations have been conducted, which did not result in the inclusion of the alternative provisions in both Article 9(1) and Article 7(2).</p> <p>With respect to the remaining 24 treaties:</p> <ul style="list-style-type: none"> <li>• For one negotiations have been completed to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention.</li> <li>• 13 are expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention.</li> <li>• Two are expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention once the treaty partner has amended its notifications or once the relevant treaty partner signs this instrument.</li> </ul>	<p>Korea should as quickly as possible sign the amendments to an existing treaty to effectively include Article 25(2), second sentence, of the OECD Model Tax Convention, which is not the case for the existing treaty.</p> <p>In addition, Korea should as quickly as possible complete the ratification process for the Multilateral Instrument, and with this ratification update its notifications under that instrument, to incorporate the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention in 17 of the 25 treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned and after the amendments to the notifications by Korea and its treaty partner.</p> <p>For six of the remaining seven 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 following its entry into force, Korea should continue with pending negotiations or with the process to initiate negotiations with a view to include the required provision or be willing to accept the inclusion of both alternative provisions.</p>

	Areas for improvement	Recommendations
[D.3]	<ul style="list-style-type: none"> <li>Two are expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention once Korea has amended its notifications.</li> <li>Six will not be modified by the Multilateral Instrument to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention. With respect to these six treaties:</li> <li>Negotiations are pending with two treaty partners with a view to include the required provision.</li> <li>Four treaties are included in the list of treaties for which negotiations are envisaged, scheduled or pending.</li> </ul>	

### Note

1. This rule is laid down in Article 56(2) of Framework Act on National Taxes.

### Reference

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



## Summary

	Areas for improvement	Recommendations
<b>Part A: Preventing disputes</b>		
[A.1]	<p>Three out of 95 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. Of these three treaties:</p> <ul style="list-style-type: none"> <li>Two are expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.</li> <li>One will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention. For this treaty negotiations on the replacement/ amendment thereof are pending <i>inter alia</i> with a view to include the required provision.</li> </ul>	<p>Korea should as quickly as possible complete the ratification process for the Multilateral Instrument to incorporate the equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention in two of the three treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned.</p> <p>For the remaining treaty 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 following its entry into force, Korea should continue pending bilateral negotiations with a view to include the required provision.</p>
[A.2]	-	-
<b>Part B: Availability and access to MAP</b>		
[B.1]	<p>Two out of 95 tax treaties do not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention, either as it read prior to the adoption of the Action 14 final report or as amended by that report. Both 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.</p>	<p>Korea should as quickly as possible complete the ratification process for the Multilateral Instrument to incorporate the equivalent to Article 25(1), first sentence of the OECD Model Tax Convention as amended by the Action 14 final report in those two treaties that currently do not contain such equivalent.</p>
	<p>Four out of 95 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 four treaties:</p> <ul style="list-style-type: none"> <li>Two are expected to be modified by the Multilateral Instrument to include Article 25(1), second sentence, of the OECD Model Tax Convention.</li> <li>Two will not be modified by that instrument to include the Article 25(1), second sentence, of the OECD Model Tax Convention. For both treaties actions have been taken to initiate negotiations on their replacement/amendment.</li> </ul>	<p>Korea 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 two of the four treaties that currently do not contain such equivalent and that will be modified or superseded by the Multilateral Instrument upon its entry into force for the treaty concerned.</p> <p>For the remaining two treaties that will not be modified to include the equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention, Korea should continue with the process to request the inclusion of the required provision via bilateral negotiations.</p>

	Areas for improvement	Recommendations
[B.1]	<p>One out of 95 tax treaties does not contain 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, or as amended by that final report, and also the timeline to submit a MAP request is less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.</p> <p>This treaty is expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(1), second sentence, but not as regards the first sentence of that article. For the first sentence, actions have been taken to initiate negotiations on their replacement/ amendment.</p>	<p>Korea 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 treaty that currently does not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for this treaty.</p> <p>For the first sentence of Article 25(1), Korea should continue with the process to request the inclusion of the required provision via bilateral negotiations. This concerns a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention either:</p> <ol style="list-style-type: none"> <li>as amended in the Action 14 final report; or</li> <li>as it read prior to the adoption of the Action 14 final report, thereby including the full sentence of such provision.</li> </ol>
	<p>Access to MAP may be denied in cases where domestic or foreign courts have already rendered a decision on the issue for which a MAP request is submitted, even when the requirements for initiating a MAP case under the treaty provision that is equivalent to Article 25(1) of the OECD Model Tax Convention are met.</p>	<p>Korea should ensure that access to MAP is given in all eligible cases where the requirements under Article 25(1) of the OECD Model Tax convention as incorporated in Korea's tax treaties have been met. This in particular, Korea concerns the situation where a domestic or foreign court has rendered a decision relating to the case for which a MAP request was submitted, as Article 22(2) of the Adjustment of International Taxes Act stipulates that access to MAP should be given, except in such a situation. As Korea has thus far not limited access to MAP in eligible cases where a domestic or foreign court has rendered a decision relating to the case for which a MAP request was submitted, it should continue this practice.</p> <p>Nevertheless, to avoid such a limitation of access, Korea should amend Article 22(2) of the Adjustment of International Taxes Act.</p>
[B.2]	-	-
[B.3]	-	-
[B.3]	-	-
[B.4]	<p>Domestic law allows the competent authority not to initiate a MAP where it is recognised that MAP is utilized for purposes of tax avoidance, which bears the risk that in cases where anti-abuse provisions are being applied, access to MAP will not be granted.</p>	<p>Relating to the provision included in Article 22(2) of the Adjustment of International Taxes Act, Korea should without further delay take an appropriate measure to ensure that the article would not limit access to MAP in cases concerning the application of anti-abuse provisions.</p>
[B.5]	-	-
[B.6]	-	-



	Areas for improvement	Recommendations
[B.7]	<p>Nine out of 95 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. Of these nine treaties:</p> <ul style="list-style-type: none"> <li>• Seven 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.</li> <li>• One is expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention once Korea has amended its notifications.</li> <li>• One will not be modified by the Multilateral Instrument to include the required provision. For this treaty negotiations on the replacement/amendment thereof are pending <i>inter alia</i> with a view to include the required provision.</li> </ul>	<p>Korea should as quickly as possible complete the ratification process for the Multilateral Instrument and with that ratification update its notifications, to incorporate the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention in eight of the nine treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned.</p> <p>For the remaining treaty that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, Korea should continue pending bilateral negotiations with a view to include the required provision.</p>
[B.8]	-	-
[B.9]	-	-
[B.10]	-	-
<b>Part C: Resolution of MAP cases</b>		
[C.1]	<p>Two out of 95 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. Of these three treaties:</p> <ul style="list-style-type: none"> <li>• One is expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention.</li> <li>• One will not be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. For this treaty negotiations on the replacement/amendment thereof are pending <i>inter alia</i> with a view to include the required provision.</li> </ul>	<p>Korea should as quickly as possible complete the ratification process for the Multilateral Instrument to incorporate the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention in one of 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 treaty 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 following its entry into force, Korea should continue pending bilateral negotiations with a view to include the required provision.</p>
	<p>MAP cases are automatically terminated where domestic courts have rendered a decision on the issue for which a MAP request was submitted.</p>	<p>Korea should seek to resolve all MAP cases that were accepted into the MAP process and that meet the requirements under Article 25(1) and (2) of the OECD Model Tax Convention as incorporated in Korea's tax treaties. In that regard, Korea should not automatically terminate MAP cases on the grounds that there was already a final court decision, regardless of whether such decision relates to the MAP case or not.</p>
[C.2]	-	-

	Areas for improvement	Recommendations
[C.3]	<p>MAP cases were resolved in 31.71 months on average, which regards both attribution/allocation cases and other MAP cases. While the average completion time has decreased in the period 2017-218 as compared to 2016, it is still above the 24-month average (which is the pursued average for resolving MAP cases received on or after 1 January 2016). There is therefore a risk that post-2015 are not resolved within the average of 24 months.</p> <p>While the competent authority function has been reorganised, resulting in a dedicated MAP unit, and more resources have been added and while other organisational (assuring less frequency in changes of staff) and procedural steps (an increase in the number of face-to-face meetings and issued position papers) have been taken, some peers still experienced difficulties in resolving MAP cases in a timely efficient and effective manner, which in particular concerns:</p> <ul style="list-style-type: none"> <li>• timely submission of position papers to treaty partners and ahead of face-to-face meetings</li> <li>• timely responding to position papers issued by treaty partners</li> <li>• absence of timely notifications on relevant developments throughout the MAP process.</li> </ul> <p>This may indicate that the governance within the competent authority is still not conducive to ensure that post-2015 cases are resolved within the pursued average of 24 months.</p>	<p>While Korea has recently reorganised its competent authority function and established a dedicated MAP unit, as well as that it has taken several steps to improve the MAP process, resulting in more cases being closed and a reduction of the average completion time, further actions should be taken to ensure a timely resolution of MAP cases, which both regards attribution/allocation cases and other cases.</p> <p>In that regard, Korea should further work to ensure that the governance within its competent authority enables that the resources available are adequate in order to resolve MAP cases in a timely, efficient and effective manner. Where necessary, additional resources should be added to the competent authority, in particular to:</p> <ul style="list-style-type: none"> <li>• timely submit position papers to treaty partners and ahead of face-to-face meetings</li> <li>• timely respond to position papers issued by treaty partners</li> <li>• timely notify treaty partners of relevant developments throughout the MAP process.</li> </ul>
[C.4]	-	-
[C.5]	-	-
[C.6]	-	-
<b>Part D: Implementation of MAP agreements</b>		
[D.1]	Implemented MAP agreements may be annulled due to rulings of domestic courts.	Korea should ensure that implemented MAP agreements are not annulled by domestic court rulings after such implementation, for which it could consider amending its domestic law.
[D.2]	-	-

	Areas for improvement	Recommendations
[D.3]	<p>25 out of 95 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention, nor the alternatives provisions in Article 9(1) and Article 7(2).</p> <p>For one of these 25 treaties negotiations have been conducted, which did not result in the inclusion of the alternative provisions in both Article 9(1) and Article 7(2).</p> <p>With respect to the remaining 24 treaties:</p> <ul style="list-style-type: none"> <li>• For one negotiations have been completed to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention.</li> <li>• 13 are expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention.</li> <li>• Two are expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention once the treaty partner has amended its notifications or once the relevant treaty partner signs this instrument.</li> <li>• Two are expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention once Korea has amended its notifications.</li> <li>• Six will not be modified by the Multilateral Instrument to include the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention. With respect to these six treaties:</li> <li>• Negotiations are pending with two treaty partners with a view to include the required provision.</li> <li>• Four treaties are included in the list of treaties for which negotiations are envisaged, scheduled or pending.</li> </ul>	<p>Korea should as quickly as possible sign the amendments to an existing treaty to effectively include Article 25(2), second sentence, of the OECD Model Tax Convention, which is not the case for the existing treaty.</p> <p>In addition, Korea should as quickly as possible complete the ratification process for the Multilateral Instrument, and with this ratification update its notifications under that instrument, to incorporate the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention in 17 of the 25 treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned and after the amendments to the notifications by Korea and its treaty partner.</p> <p>For six of the remaining seven 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 following its entry into force, Korea should continue with pending negotiations or with the process to initiate negotiations with a view to include the required provision or be willing to accept the inclusion of both alternative provisions.</p>



## Annex A

## Tax treaty network of Korea

		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?  If yes, submission to either competent authority? (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? (Note 1)  If no, please state reasons		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?  If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence? (Note 3)	Inclusion Art. 25(2) second sentence? (Note 4)  If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4)	Inclusion Art. 25(3) first sentence? (Note 5)	Inclusion Art. 25(3) second sentence? (Note 6)	Inclusion arbitration provision?
	Y = yes N = signed pending ratification	E = yes, either CAs O = yes, only one CA N = No	Y = yes i = no, no such provision ii = no, different period iii = no, starting point for computing the 3 year period is different iv = no, 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 N = no	Y = yes i = no, but have Art. 7 equivalent ii = no, but have Art. 9 equivalent iii = no, but have both Art. 7 & 9 equivalent N = no and no equivalent of Art. 7 and 9	Y = yes N = no	Y = yes N = no	Y = yes N = no
Albania	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Algeria	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Australia	Y	O	Y	N/A	Y	i	Y	Y	Y	N	N
Austria	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N
Azerbaijan	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Bahrain	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Bangladesh	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N
Belarus	Y	O	Y	N/A	Y	i	Y	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?  If yes, submission to either competent authority? (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? (Note 1)  If no, please state reasons		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?  If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence? (Note 3)	Inclusion Art. 25(2) second sentence? (Note 4)  If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4)	Inclusion Art. 25(3) first sentence? (Note 5)	Inclusion Art. 25(3) second sentence? (Note 6)	Inclusion arbitration provision?
Belgium	Y	O*	Y	N/A	i**	i	Y	N*	N*	N*	N
Brazil	Y	O	i	N/A	i	i	Y	N	Y	Y	N
Brunei Darussalam	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Bulgaria	Y	O*	Y	N/A	i	i	Y	Y	Y	Y	N
Canada	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Chile	Y	O	Y	N/A	Y	i	Y	N*	Y	N*	N
China (People's Republic of)	Y	O	Y	N/A	i**	i	Y	Y	Y	Y	N
Colombia	Y	O*	Y	N/A	Y	i	Y	Y	Y	N*	N
Croatia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Czech Republic	Y	E	Y	N/A	Y	i	Y	Y	Y	Y	N
Denmark	Y	N*	i	N/A	i**	i	Y	N*	Y	Y	N
Ecuador	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Egypt	Y	O*	Y	N/A	i	i	Y	Y	Y	Y	N
Estonia	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
Ethiopia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Fiji	Y	O*	Y	N/A	i**	i	Y	Y	Y	Y	N
Finland	Y	O*	Y	N/A	i**	i	Y	Y	Y	Y	N
France	Y	O*	Y	N/A	i**	i	Y	N*	N*	Y	N
Gabon	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Georgia	Y	O*	Y	N/A	Y	l	Y	Y	Y	Y	N
Germany	Y	O	Y	N/A	Y	i	Y	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?  If yes, submission to either competent authority? (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? (Note 1)  If no, please state reasons		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?  If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence? (Note 3)	Inclusion Art. 25(2) second sentence? (Note 4)  If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4)	Inclusion Art. 25(3) first sentence? (Note 5)	Inclusion Art. 25(3) second sentence? (Note 6)	Inclusion arbitration provision?
Greece	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
Hong Kong (China)	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
Hungary	Y	O	Y	N/A	i**	i	Y	Y	Y	Y	N
Iceland	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
India	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Indonesia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Iran	Y	O	ii	2-years	Y	i	Y	Y	Y	Y	N
Ireland	Y	O*	Y	N/A	i**	i	Y	N	Y	N*	N
Israel	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Italy	Y	N	ii*	2-years	i**	i	Y	N*	Y	N*	N
Japan	Y	O*	Y	N/A	i	i	Y	Y	Y	Y	N
Jordan	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
Kazakhstan	Y	O	Y	N/A	Y	i	Y	N*	Y	Y	N
Kenya	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Kuwait	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
Kyrgyzstan	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Lao People's Democratic Republic	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Latvia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Lithuania	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
Luxembourg	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
Malaysia	Y	O	Y	N/A	i	i	Y	N	Y	Y	N
Malta	Y	O*	Y	N/A	Y	i	Y	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?  If yes, submission to either competent authority? (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? (Note 1)  If no, please state reasons		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?  If no, will your CA accept a taxpayer’s request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence? (Note 3)	Inclusion Art. 25(2) second sentence? (Note 4)  If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4)	Inclusion Art. 25(3) first sentence? (Note 5)	Inclusion Art. 25(3) second sentence? (Note 6)	Inclusion arbitration provision?
Mexico	Y	O*	i	N/A	i**	i	N*	N	Y	Y	N
Mongolia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Morocco	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
Myanmar	Y	O	Y	N/A	Y	i	Y	N	Y	Y	N
Nepal	Y	O	Y	N/A	Y	i	Y	N	Y	Y	N
Netherlands	Y	N*	i	N/A	i**	i	Y	N*	Y	Y	N
New Zealand	Y	O*	Y	N/A	i**	i	Y	Y	Y	Y	N
Nigeria	N	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Norway	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N
Oman	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Pakistan	Y	O*	Y	N/A	i**	i	Y	Y	Y	Y	N
Panama	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Papua New Guinea	Y	O*	Y	N/A	Y	i	Y	N*	Y	Y	N
Peru	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Philippines	Y	O	ii	2-years	i	i	Y	N	Y	Y	N
Poland	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Portugal	Y	O	ii*	2-years	i**	i	Y	N*	Y	Y	N
Qatar	Y	O*	ii*	2-years	Y	i	Y	Y	Y	Y	N
Romania	Y	O	Y	N/A	Y	i	Y	N*	Y	Y	N
Russia	Y	O*	Y	N/A	i**	i	Y	Y	Y	Y	N
Saudi Arabia	Y	O*	Y	N/A	Y	i	Y	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?  If yes, submission to either competent authority? (new Art. 25(1), first sentence)	Inclusion Art. 25(1) second sentence? (Note 1)  If no, please state reasons		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?  If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Inclusion Art. 25(2) first sentence? (Note 3)	Inclusion Art. 25(2) second sentence? (Note 4)  If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4)	Inclusion Art. 25(3) first sentence? (Note 5)	Inclusion Art. 25(3) second sentence? (Note 6)	Inclusion arbitration provision?
Serbia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Singapore	N	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Slovak Republic	Y	O	Y	N/A	i**	i	Y	N*	Y	Y	N
Slovenia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
South Africa	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Spain	Y	O	Y	N/A	i**	i	Y	N*	Y	Y	N
Sri Lanka	Y	O	Y	N/A	i	i	Y	Y	Y	Y	N
Sudan	N	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Sweden	Y	O*	Y	N/A	i**	i	Y	Y	Y	Y	N
Switzerland	Y	E	Y	N/A	Y	i	Y	N	Y	Y	N
Tajikistan	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Thailand	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Tunisia	Y	O*	Y	N/A	i**	i	Y	Y	Y	Y	N
Turkey	Y	O	i	N/A	i	i	Y	N	Y	Y	N
Turkmenistan	Y	E	Y	N/A	Y	i	Y	Y	Y	Y	N
Ukraine	Y	O*	Y	N/A	Y	i	Y	Y	Y	N*	N
United Arab Emirates	N	E	Y	N/A	Y	i	Y	Y	Y	Y	N
United Kingdom	Y	O*	i	N/A	Y	i	Y	N*	Y	N*	N
United States	Y	O	i	N/A	i	i	N	N	N	N	N
Uruguay	Y	O*	Y	N/A	Y	i	Y	Y	Y	Y	N
Uzbekistan	Y	E	Y	N/A	Y	i	Y	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 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?		If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4)			
Venezuela	Y	O	Y	N/A	Y	i	Y	N	Y	Y	N
Viet Nam	Y	O	Y	N/A	Y	i	Y	N	Y	Y	N

### 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 reporting for the 2016, 2017 and 2018 Reporting Periods (1 January 2016 to 31 December 2018) for pre-2016 cases

2016 MAP Statistics													
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 on 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	86	0	0	1	0	0	20	0	0	4	0	61	41.68
Others	58	0	0	5	0	0	4	0	0	0	0	49	29.99
Total	144	0	0	6	0	0	24	0	0	4	0	110	38.59

2017 MAP Statistics													
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 on 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	61	0	0	3	0	0	18	0	0	0	0	40	39.58
Others	49	0	0	1	0	0	4	0	0	0	0	44	36.56
Total	110	0	0	4	0	0	22	0	0	0	0	84	39.00

2018 MAP Statistics													
Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2018	Number of pre-2016 cases closed during the reporting period by outcome										No. of pre-2016 cases remaining in on MAP inventory on 31 December 2018	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	40	0	0	0	0	0	18	0	0	0	0	22	39.34
Others	44	0	0	3	0	0	4	0	0	3	0	34	47.62
Total	84	0	0	3	0	0	22	0	0	3	0	56	42.30

# Annex C

## MAP statistics reporting for the 2016, 2017 and 2018 Reporting Periods (1 January 2016 to 31 December 2018) for post-2015 cases

2016 MAP Statistics														
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 taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/Allocation	0	19	0	0	0	0	0	1	0	0	0	0	18	4.18
Others	0	3	0	0	0	0	0	0	0	0	0	0	3	0.00
Total	0	22	0	0	0	0	0	1	0	0	0	0	21	4.18

2017 MAP Statistics														
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 taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/Allocation	18	32	0	0	0	1	0	16	0	0	0	0	33	5.73
Others	3	12	0	0	0	0	1	1	0	0	0	0	13	3.67
Total	21	44	0	0	0	1	1	17	0	0	0	0	46	5.52

Notes: There is a discrepancy between the number of post-2015 MAP cases in Korea's inventory as per 31 December 2016 and 1 January 2017.

- The reported number of MAP cases pending on 31 December 2016 was 21, which consists of 17 attribution/allocation cases and 4 other cases.
- The reported number of MAP cases pending on 1 January 2017 was 21, which consists of 18 attribution/allocation cases and 3 other cases.

In order to have matching numbers for 31 December 2016 and 1 January 2017, the number of post-2015 cases received in 2016 was corrected.

2018 MAP Statistics														
Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2018	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 2018	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 taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/Allocation	33	25	0	0	0	0	1	8	0	0	0	1	48	12.29
Others	13	16	0	0	0	0	0	0	0	0	0	0	29	0.00
Total	46	41	0	0	0	0	1	8	0	0	0	1	77	12.29

*Notes:* There is a discrepancy between the number of post-2015 MAP cases in Korea's inventory as per 31 December 2017 and 1 January 2018.

- The reported number of MAP cases pending on 31 December 2017 was 47, which consists of 34 attribution/allocation cases and 13 other cases.
- The reported number of MAP cases pending on 1 January 2018 was 46, which consists of 13 attribution/allocation cases and 3 other cases.

In order to have matching numbers for 31 December 2017 and 1 January 2018, the number of post-2015 cases received in 2017 was corrected.



## *Glossary*

<b>Action 14 Minimum Standard</b>	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Resolution Mechanisms More Effective
<b>Korea's competent authority</b>	Minister of Economy and Finance respectively the Commissioner of the National Tax Service
<b>MAP guidance</b>	Guidance on mutual agreement procedures for taxpayers of August 2017
<b>MAP Statistics Reporting Framework</b>	Rules for reporting of MAP statistics as agreed by the FTA MAP Forum
<b>Multilateral Instrument</b>	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
<b>OECD Model Tax Convention</b>	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
<b>Pre-2016 cases</b>	MAP cases in a competent authority's inventory that are pending resolution on 31 December 2015
<b>Post-2015 cases</b>	MAP cases that are received by a competent authority from the taxpayer on or after 1 January 2016
<b>Statistics Reporting Period</b>	Period for reporting MAP statistics that started on 1 January 2016 and that ended on 31 December 2018
<b>Terms of Reference</b>	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective





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

# **Making Dispute Resolution More Effective - MAP Peer Review Report, Korea (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 minimum standard is complemented by a set of best practices.

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 Korea.



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