

**Inclusive Framework on BEPS: Action 14  
Making Dispute Resolution More Effective  
MAP Peer Review Report**

**BEST PRACTICES**  
**Malta**





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## **Malta**



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## *Abbreviations and Acronyms*

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



## Introduction

The final report on BEPS Action 14: “Making Dispute Resolution Mechanisms More Effective” identified a number of best practices related to the three general objectives of the Action 14 Minimum Standard.

Paragraph 9 of the Terms of Reference to monitor and review the implementation of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective<sup>1</sup> stipulates that:

*The best practices are not part of the minimum standard and whether or not a jurisdiction has implemented the best practices will not be peer reviewed or monitored, nor will it affect the assessment of the assessed jurisdiction. Jurisdictions are free, however, to identify best practices they have adopted.*

Malta has provided information and requested feedback by peers on how it has adopted best practices. In that regard, the FTA MAP Forum agreed on an optional best practices feedback form that peers have used to provide feedback on Malta’s adoption of the best practices.

This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices.

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<sup>1</sup> 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

#### [BP.1] Implement bilateral APA programmes

*Jurisdictions should implement bilateral APA programmes.*

1. APAs concluded bilaterally between competent authorities provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. Malta reported that it does not have established a formal bilateral APA programme, but its competent authority is authorised to enter into bilateral and multilateral APAs. Malta reported further that it considers Article 25(3) of the OECD Model Tax Convention as the legal basis for entering into a bilateral/multilateral APA. In that regard, the provisions of Article 52 of the Income Tax Act, providing for unilateral advance revenue rulings, are interpreted broadly to allow Malta's competent authority to enter into bilateral and multilateral APAs.
3. Malta further reported that there are no fees involved with APA requests and that Malta has no specific timelines for filing such requests. However, it also noted that the application should ideally be made before the start of the first fiscal year to be covered by the APA. In that regard, Malta reported that a unilateral advanced ruling takes effect as of the date of issuing the ruling, which rule also applies to bilateral APAs (e.g. the date of signing the agreement). Typically, in Malta bilateral APAs run for a period of no more than five years, but Malta reported that they can be renewed for an additional period of five years.
4. In practice, Malta reported having received one request for a bilateral APA since 1 January 2015, which included a request for roll-back. The APA request is still under consideration. Overall, Malta mentioned having limited experience with bilateral APAs. In relation hereto, Malta indicated that it anticipates introducing a formal bilateral APA programme in the future, but Malta has not taken any specific action or set a timeline, yet.
5. One peer provided input relating to this best practice, indicating not being aware of a formal APA programme being in existence in Malta. The peer additionally noted that Malta is willing to conclude APA based on the MAP article of their bilateral tax treaty.

#### [BP.2] Publish mutual agreements of a general nature

*Jurisdictions should have appropriate procedures in place to publish agreements reached by competent authorities on difficulties or doubts arising as to the interpretation or application of their tax treaties in appropriate cases.*

6. Agreements reached by competent authorities to resolve difficulties or doubts arising as to the interpretation or application of their tax treaties in relation to issues of a general nature which concern, or may concern, a category of taxpayers reflect the competent authorities' mutual understanding of the meaning of the convention and its terms. As such agreements provide information that might be useful to prevent difficulties or doubts in the interpretation or application of tax treaty provisions, publication of these agreements is valuable.

7. Malta reported that competent authority agreements may be published on the website of the Commissioner for Revenue, if they are of a general nature or if they concern agreements that regard a category of taxpayers. The legal basis for such publication is Article 96(2) of the Income Tax Act. This is also reflected in Malta's guidelines on the mutual agreement procedure ("**MAP Guidance**"), in the chapter "Concluding the MAP", which stipulates that such MAP agreements may be published on the website of Malta's Revenue if both competent authorities consider that such publication is appropriate. However, so far no such general MAP agreement has been concluded by Malta's competent authority.

8. Peers did not provide input relating to this particular best practice.

### [BP.3] Provide guidance on APAs

*Jurisdictions' published MAP guidance should provide guidance on APAs.*

9. Guidance on a jurisdiction's APA programme facilitates the use of that programme and creates awareness for taxpayers on how the APA process functions. As APAs may also prevent future disputes from arising, including information on APAs in a jurisdiction's MAP guidance is relevant.

10. As previously mentioned under element BP.1, Malta has not implemented a bilateral APA programme and has not published guidance on APAs. Malta's MAP Guidance also does not include information on the possibility for Malta's competent authority to enter into bilateral and multilateral APAs.

11. Peers did not provide input relating to this particular best practice.

### [BP.4] Develop "global awareness" of the audit/examination functions

*Jurisdictions should develop the "global awareness" of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration's "Global Awareness Training Module" to appropriate personnel.*

12. Making audit/examination function of tax administrations that are involved in international matters aware of: (i) the potential for creating double taxation, (ii) the impact of a proposed adjustment on the tax base of one or more jurisdictions and (iii) the process and principles by which competing juridical claims are reconciled by competent authorities, may be useful to prevent disputes from arising. Using the Global Awareness Training Module developed by the Forum on Tax Administration (FTA) can be helpful in this respect.

13. Malta reported that it does not provide formal trainings to officials involved in the audit/examination of taxpayers to ensure that any assessment made by them are in accordance with the provisions of the relevant tax treaties. However, tax auditors in Malta can request training with regard to the interpretation and application of tax treaties on an ad hoc basis. This means in practice that they are encouraged to participate in conferences, seminars or workshops held in Malta with regard to the aforementioned topics. Malta further reported that occasionally, if issues are encountered repeatedly, an internal workshop might be organised within Malta's tax administration.

14. Malta further indicated it would welcome training based on the "Global Awareness Training Module" performed by external expert for tax auditors in Malta.

15. Peers did not provide input relating to this particular best practice.



## *Part B*

### Availability and access to MAP

#### **[BP.5] Implement appropriate administrative measures to facilitate recourse to MAP**

*Jurisdictions should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes, recognising the general principle that the choice of remedies should remain with the taxpayer.*

16. Under Article 25(1) of the OECD Model Tax Convention, the mutual agreement procedure is a dispute settlement procedure in annex to domestic available remedies and not a substitute for such remedies. Reference is made to inter alia paragraph 7 of the Commentary to Article 25 of the OECD Model Tax Convention, which specifies that the right to submit a MAP request is available to taxpayers *without depriving them of the ordinary legal remedies available*. Facilitating recourse to the MAP through appropriate administrative measures, under the general principle that the choice of remedies remains with taxpayers, enables them to effectively resort to such dispute settlement procedure.

17. Malta reported that no fees are charged to taxpayers when submitting a MAP request. Moreover, it reported that taxpayers are allowed to request MAP assistance and at the same time seek to resolve the same dispute via domestically available judicial and administrative remedies. A MAP request can also be made regardless of whether the issue under dispute has already been decided via these judicial and administrative remedies. However, where in Malta a domestic court already has decided on a case for which also a MAP request was submitted, Malta reported that it is bound to such a decision and therefore cannot deviate from such a decision in MAP. It therefore will only enter into MAP discussions with the relevant treaty partner in order to allow its competent authority to provide for relief of double taxation.

18. In view of the above, Malta specified that in practice domestic remedies would be put on hold while MAP is pursued first. In case MAP does not lead to a satisfactory resolution from the taxpayer's perspective, it might withdraw its MAP request or not accept the agreement. The taxpayer is then subsequently able to continue domestic available remedies. Malta also specified that it is possible for taxpayers to file a "protective" MAP claim, such to enable taxpayers to file a MAP request in due time and at the same time asking Malta's competent authority to put the MAP request on hold while pursuing domestic remedies first.

19. Peers did not provide input relating to this particular best practice.

**[BP.6] Provide access to MAP for bona fide taxpayer-initiated foreign adjustments**

*Jurisdictions' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments.*

20. A taxpayer-initiated foreign adjustment is considered bona fide where it reflects the good faith effort of the taxpayer to report correctly, timely and properly the adjusted taxable income from a controlled transaction or the profits attributable to a permanent establishment with a view to reflect an arm's length result, and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the laws of the treaty partners. As such taxpayer-initiated foreign adjustments may lead to cases of double taxation, it is relevant that there is access to MAP for resolving these cases. Furthermore, specifying whether there is access to the MAP for these adjustments in a jurisdiction's MAP guidance also provides additional clarity.

21. Malta reported that it will grant access to MAP in cases of bona fide taxpayer initiated foreign adjustments. However, its MAP Guidance does not specifically address that access to MAP will be granted in such cases.

22. Peers did not provide input relating to this particular best practice.

**[BP.7] Provide guidance on multilateral MAPs**

*Jurisdictions' published MAP guidance should provide guidance on multilateral MAPs.*

23. In recent years, globalisation has created unique challenges for existing tax treaty dispute resolution mechanisms. Whilst the mutual agreement procedure provided for in Article 25 of the OECD Model Tax Convention has traditionally focused on the resolution of bilateral disputes, phenomena such as the adoption of regional and global value chains as well as the accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes. In that regard, it is for clarity purposes relevant that jurisdiction's MAP guidance includes information on availability of and access to multilateral MAPs.

24. While Malta's MAP guidance does not contain any information on possibility for taxpayers to request the initiation of MAPs concerning disputes of a multilateral nature, Malta reported that it would conduct multilateral MAPs according to the provisions included the Revised Code of Conduct for the implementation of the EU Arbitration Convention.<sup>2</sup> This Code of Conduct includes approaches to deal with triangular transfer pricing cases when all associated enterprises are resident within a EU Member State. Malta reported that it would also apply these approaches for multilateral disputes relating to bilateral tax treaties.

25. Peers did not provide input relating to this particular best practice.

<sup>2</sup>

Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:322:0001:0010:EN:PDF>.

**[BP.8] Provide for suspension of collection procedures for pending MAP cases**

*Jurisdictions should take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending. Such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.*

26. If, following an adjustment taxpayers immediately have to pay the tax due, whereas the same amount was already paid to the tax administration of the other jurisdiction involved, double taxation will in fact occur. As taxpayers may then face significant cash-flow issues, at least for the period the MAP case is pending, it is relevant that jurisdictions provide for suspension of collection procedure for this period under at least the same conditions as available for domestic remedies.

27. Malta reported that it does allow for the suspension of tax collection procedures during the period a MAP case is pending, for which the relevant rules are included Article 41 of the Income Tax Management Act. This provision stipulates that where a taxpayer has filed a notice of objection or lodged an appeal against the relevant assessment, the Commissioner of Malta's Revenue may keep not less than 90% of that part of the tax assessed that is in dispute in abeyance. In this respect, Malta clarified that a taxpayer who has filed a MAP request can ask for a suspension of collection under the condition that the taxpayer has also filed an objection or lodged an administrative appeal. In practice, staff in charge of handling the MAP case has to inform the Director in charge of tax collection within Malta's tax administration to activate the suspension procedure. Suspension of tax collection is provided upon discretion of Malta's tax administration.

28. Information on the possibility to suspend tax collection during the period a MAP case is pending can be found in Malta's MAP Guidance in chapter "Suspension of Collection of Tax During a MAP".

29. Peers did not provide input relating to this particular best practice.



## *Part C*

### Resolution of MAP Cases

#### **[BP.9] Permit taxpayers to request multi-year resolution of recurring issues through the MAP**

*Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayer which are within the time period provided for in the tax treaty for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.*

30. In certain cases, a MAP request with respect to a specific adjustment to income may present recurring issues that may be relevant in previous or subsequent tax years. Allowing taxpayers to submit requests for the multi-year resolution through MAP with respect to such recurring issues, where the relevant facts and circumstances are the same, may help avoid duplicative MAP requests and facilitate a more efficient use of competent authority resources.

31. Malta reported that taxpayers are permitted to request for the multi-year resolution of recurring issues through MAP. While Malta has not provided for specific guidance hereon, the internal instruction notes for staff in charge of MAP specify that taxpayer may submit a MAP request in such situation if the request is made within the time period provided for in the applicable tax treaty.

32. Peers did not provide input relating to this particular best practice.

#### **[BP.10] Publish explanation of the relationship between the MAP and domestic remedies**

*Jurisdictions should publish an explanation of the relationship between the MAP and domestic law administrative and judicial remedies.*

33. As mentioned under BP.5, pursuant to Article 25(1) of the OECD Model Tax Convention taxpayers are allowed to submit a MAP request irrespective of available domestic remedies. This, however, does not further specify how to proceed if both available remedies are initiated and the case is dealt with in the bilateral phase of the MAP. Publicly available guidance on the relationship between the MAP and domestic remedies provides clarity to taxpayers as well as treaty partners.

34. Malta has included in its MAP Guidance an explanation addressing the relationship between MAP and domestic available remedies. In this respect, the chapter “Appeal Rights” states that Malta’s competent authority acknowledges that a MAP provides a

dispute resolution process in addition to domestic available remedies and that taxpayers can submit a MAP request irrespective of domestic available remedies. Nevertheless, the same chapter also notes that the consideration of a MAP request might be conditional upon the taxpayer having put in abeyance, exhausted or rescinded its domestic objection, review and appeal rights. Furthermore, it is stated that if a MAP request follows from a decision taken by the Commissioner for Revenue under the Income Tax Acts, Malta's competent authority can in a MAP not derogate from that decision as reflected in a tax assessment that has already become final. This is the case where:

- No valid objection or appeals has been lodged against the tax assessment within the given timeframes;
- The amount of taxable income has been agreed on by means of a settlement between the Inland Revenue and the taxpayer;
- The taxpayer has withdrawn or discontinued an appeal; or
- The taxable income has been determined following the outcome of an objection process or an appeal.

35. Furthermore, the MAP guidance states that Malta cannot derogate from a final and conclusive tax assessment or court decision within a MAP.

36. Peers did not provide input relating to this particular best practice.

#### **[BP.11] Provide guidance on consideration of interest and penalties in MAP**

*Jurisdictions' published MAP guidance should provide guidance on the consideration of interest and penalties in the mutual agreement procedure.*

37. As interests and penalties may concern substantial amounts, providing clarity in a jurisdiction's MAP guidance on whether interest and penalties are in the scope of the MAP is relevant to ensure that a taxpayer is well-informed on this issue.

38. Malta reported it that interest and penalties are not taken in consideration in MAP. Malta further reported that its tax administration will apply the general provision of Article 44(2B)(c) of the Income Tax Management Act, which provides that interest will not accrue during the period a MAP case is pending under either the applicable tax treaty or the EU Arbitration Convention.

39. Information regarding the consideration of interest during the period a MAP case is pending is included in Malta's MAP Guidance under chapter "Consideration of Interest During a MAP".

40. Peers did not provide input relating to this particular best practice.

#### **[BP.12] Include Article 9(2) of the OECD Model Tax Convention in tax treaties**

*Jurisdictions should include paragraph 2 of Article 9 of the OECD Model Tax Convention in their tax treaties.*

41. Article 9(2) of the OECD Model Tax Convention allows competent authorities to make a corresponding adjustment to unilaterally eliminate double taxation arising from primary adjustments. Including this provision in tax treaties provides taxpayers the possibility to obtain the elimination of such double taxation via a unilateral corresponding adjustment.

42. Out of Malta's 76 tax treaties, 66 contain a provision 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 treaty partner. Furthermore, six tax treaties do not contain Article 9(2) of the OECD Model Tax Convention. For the remaining four treaties the following analysis is made:

- One tax treaty does not contain in its entirety a provision that is based on Article 9 of the OECD Model Tax Convention with regard to associated enterprises;
- One tax treaty contains a provision that is based on Article 9(2) of the OECD Model Tax Convention, but which does not include the last part of the second sentence that allows competent authorities to consult each other where necessary; and
- Two tax treaties contain a provision that is based on Article 9(2) of the OECD Model Tax Convention, but whereby a corresponding adjustment is only optional, as the phrase "(...) shall make an appropriate adjustment" is replaced by "may make an appropriate adjustment".

43. Malta 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 this provision in all of its future tax treaties. In that regard, Malta recently signed the Multilateral Instrument. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the OECD Model Tax Convention – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 9(2) of the OECD Model Tax Convention. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument. Article 17(2) of the Multilateral Instrument does for a tax treaty not take effect if one or both of the treaty partners to the tax treaty have, pursuant to Article 17(3), reserved the right to not apply Article 17(2) for those tax treaties that already contain the equivalent of Article 9(2) of the OECD Model Tax Convention, or not to apply Article 17(2) in the absence of such equivalent under the condition that: (i) it shall make appropriate corresponding adjustments or (ii) its competent authority shall endeavour to resolve the case under mutual agreement procedure of the applicable tax treaty. Where neither treaty partner has made such a reservation, Article 17(4) of the Multilateral Instrument stipulates that both have to make a notification whether the applicable treaty already contains a provision equivalent to Article 9(2) of the OECD Model Tax Convention. Where such a notification is made by both of them, the Multilateral Instrument will modify this treaty to replace that provision. If neither or only one treaty partner made this notification, Article 17(1) of the Multilateral Instrument will supersede this treaty only to the extent that the provision contained in that treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1) (containing the equivalent of Article 9(2) of the OECD Model Tax Convention).

44. Malta has, pursuant to Article 17(3), not reserved the right not to apply Article 17(2) of the Multilateral Instrument for those tax treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention. In regard of the ten tax treaties identified in paragraph 42 above that are considered not to contain this equivalent,

Malta listed nine treaties as a covered tax agreement under the Multilateral Instrument and for one did it make, a notification on the basis of Article 17(4) that it does not include a provision described in Article 17(2). With regard to this treaty, the treaty partner has, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as it considered that their treaty with Malta already contains the equivalent of Article 9(2). Therefore, at this stage, the Multilateral Instrument will, upon entry into force, not replace the provisions in this treaty to include the equivalent of Article 9(2) of the OECD Model Tax Convention. With regard to the remaining eight treaties, one treaty partner is not a signatory to the Multilateral Instrument, and one has, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as they considered that its treaty with Malta already contains the equivalent of Article 9(2). Therefore, at this stage, the Multilateral Instrument will, upon entry into force, supersede the remaining six treaties only to the extent that the provisions included in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

45. Peers did not provide input relating to this particular best practice.

*Part D*

**Implementation of MAP agreements**

There are no best practices for Part D.



## 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>Look-back period</b>	Period starting from 1 January 2015 and ending on 31 December 2017 for which the Assessed jurisdiction wished to provide information and requested peer input
<b>MAP Guidance</b>	Mutual Agreement Procedure – Guidelines issued under the provision of Article 96(2) of the Income Tax Act
<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>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 ( <a href="#">CTPA/CFA/NOE2(2016)45/REV1</a> )



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