

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

BEST PRACTICES

Malta

2021



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Making Dispute Resolution More Effective
MAP Peer Review Report

Malta
Best practices (2021)

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Table of contents

<i>Abbreviations and Acronyms</i>	5
Introduction	7
Part A Preventing Disputes	9
[BP.1] Implement bilateral APA programmes	9
[BP.2] Publish mutual agreements of a general nature	10
[BP.3] Provide guidance on APAs	10
[BP.4] Develop “global awareness” of the audit/examination functions	11
Part B Availability and access to MAP	13
[BP.5] Implement appropriate administrative measures to facilitate recourse to MAP	13
[BP.6] Provide access to MAP for bona fide taxpayer-initiated foreign adjustments	14
[BP.7] Provide guidance on multilateral MAPs	14
[BP.8] Provide for suspension of collection procedures for pending MAP cases	15
Part C Resolution of MAP Cases	17
[BP.9] Permit taxpayers to request multi-year resolution of recurring issues through the MAP ..	17
[BP.10] Publish explanation of the relationship between the MAP and domestic remedies	17
[BP.11] Provide guidance on consideration of interest and penalties in MAP	18
[BP.12] Include Article 9(2) of the OECD Model Tax Convention in tax treaties	19
Part D Implementation of MAP agreements	23
Glossary	24

Abbreviations and Acronyms

APA	Advance Pricing Arrangement
FTA	Forum on Tax Administration
MAP	Mutual Agreement Procedure
OECD	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 effective¹ 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.

The peer review process on the implementation of the Action 14 Minimum Standard consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). 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 Malta. This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices during stage 1 (period ranging from 1 January 2015 up to 31 December 2017) and stage 2 (ranging from 1 January 2018 up to 31 August 2019).

¹ 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 that 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 (OECD, 2017) as the legal basis for entering into such APAs. In that regard, Malta specified that 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 charged to taxpayers when submitting an APA request and there are 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. Malta reported that they can be renewed upon request by the taxpayer if no material changes to the facts and circumstances have occurred and insofar the treaty partner agrees therewith.
4. In practice, Malta reported having received three requests for a bilateral APA since 1 January 2015, two of which included a request for roll-back. The third request concerns a request for a multilateral APA. While one APA request has been superseded as the relevant years are being considered in a MAP case between Malta and the treaty partner, the other APA requests are 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. Two peers provided input relating to this best practice, one of them indicating that it is not 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. Another peer noted that in its experience Malta has been positive as regards the possibility of multilateral APA discussions.

[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.
8. Malta reported that it has signed a general competent authority agreement with Ireland in 2018 on the application / interpretation of the tax treaty, which has now been published.²
9. 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.

10. 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.
11. As previously mentioned under element BP.1, Malta has not implemented a formal 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.
12. Peers did not provide input relating to this particular best practice.

²Available at: <https://cfr.gov.mt/en/inlandrevenue/itu/Documents/Malta-Ireland%20Competent%20Authority%20Agreement.pdf>.

[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.

13. 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.

14. 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, seminar 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.

15. Malta reported that four members of its staff within the International & Corporate Tax Unit attended training sessions on transfer pricing organised by the competent authority and delivered by foreign transfer pricing experts. Malta further reported that one of these four staff members also attended a dedicated MAP training organised by the OECD.

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

17. 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.

18. 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.

19. 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 its competent authority 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.

20. 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.

21. 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.

22. 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.

23. Malta reported that it will grant access to MAP in cases of bona fide taxpayer-initiated foreign adjustments. Malta's MAP guidance was updated in June 2019. In section "MAP: How does it work?" it is now clarified that access to MAP will be granted in these cases.

24. 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.

25. 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.

26. Malta reported that it will grant access to MAP in cases of multilateral disputes. Malta's MAP guidance was updated in June 2019. In section "What is a MAP (MAP)?" it is now clarified that access to MAP will be granted in these cases.

27. Further, Malta reported that it would conduct multilateral MAPs according to the provisions included in the Revised Code of Conduct for the implementation of the EU Arbitration Convention³ This Code of Conduct includes approaches to deal with triangular transfer pricing cases when all associated enterprises are resident within an EU Member

³

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

State. Malta reported that it would also apply these approaches for multilateral disputes relating to bilateral tax treaties.

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

[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.

29. 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.

30. Malta reported that it allows 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 has to suspend collection of 100% of the amount involved. 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 can then provided upon discretion of Malta's tax administration.

31. 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".

32. 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.

33. 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.

34. Malta reported that taxpayers are permitted to request for the multi-year resolution of recurring issues through MAP. Malta's MAP guidance was updated in June 2019. In section "What is a MAP (MAP)?" it is now clarified that access to MAP will be granted in these cases.

35. Further, 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.

36. 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.

37. 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.

38. 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.

39. Further, Malta’s MAP guidance, under the section “Appeal Rights” states that where a MAP request follows from actions taken by Malta’s Commissioner for Revenue in specific cases, its competent authority cannot derogate in MAP from an assessment issued by this Commissioner and that such assessment would become final pursuant to Article 38 of the Income Tax Management Act. This involves cases where:

- a) The taxpayer objected to an assessment, but no agreement was reached and the taxpayer subsequently appealed before the administrative review tribunal and the tribunal has issued its decision on the case, which becomes final owing to the taxpayer choosing to not appeal it further
- b) The taxpayer appealed to the tribunal’s decision before the court of appeal and the court has issued its final decision on the case.

40. Malta clarified that while access to MAP will be granted in both situations, its competent authority is not in a position to derogate from the final decision issued by the tribunal or the court. In those situations, Malta’s competent authority will explain this position to the other competent authority concerned, which may provide for relief of double taxation.

41. 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.

42. 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.

43. 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.

44. 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”.

45. 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.

46. Article 9(2) of the OECD Model Tax Convention (OECD, 2017) 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.

Overview of tax treaties

47. Out of Malta's 81 tax treaties, 71 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017) requiring their state to make a correlative adjustment in case a transfer pricing adjustment is imposed by the treaty partner. Furthermore, seven tax treaties do not contain a provision that is based on or equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017), one of which does not contain in its entirety a provision that is based on Article 9 of the OECD Model Tax Convention (OECD, 2017) with regard to associated enterprises. For the remaining three treaties the following analysis is made:

- One tax treaty contains a provision that is based on Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but which does not contain the last part of the second sentence that allows competent authorities to consult each other where necessary
- Two tax treaties contain a provision that is based on Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but whereby a corresponding adjustment is only optional, as the phrase "(...) shall make an appropriate adjustment" is replaced by "may make an appropriate adjustment".

Recent developments

Bilateral modifications

48. Malta signed new treaties with five treaty partners, which are all newly negotiated treaties with treaty partners with which there were no treaties yet in place. All these treaties contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). Two of these newly signed treaties have already entered into force. The effect of these newly signed treaties has been reflected in the analysis above where they have relevance.

Multilateral Instrument

49. Malta reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention (OECD, 2017) in its tax treaties where possible and that it will seek to include Article 9(2) of the OECD Model Tax Convention (OECD, 2017) in all of its future tax treaties. In that regard, Malta signed the Multilateral Instrument and has deposited its

instrument of ratification on 18 December 2018. The Multilateral Instrument has entered into force for Malta on 1 April 2019.

50. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017) – 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 (OECD, 2017). 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(1) for those tax treaties that already contain the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), or not to apply Article 17(1) 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 (OECD, 2017). 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 (OECD, 2017)).

51. Malta has, pursuant to Article 17(3), not reserved the right not to apply Article 17(1) of the Multilateral Instrument for those tax treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). With regard to the nine tax treaties identified in paragraph 47 above that are considered not to contain this equivalent (disregarding the one treaty that does not contain Article 9 at all), Malta listed all of them as a covered tax agreement under the Multilateral Instrument and made, with respect to one treaty, a notification on the basis of Article 17(4) that it does contain a provision described in Article 17(2). The relevant treaty partner is a signatory to the Multilateral Instrument, listed its treaty with Malta as a covered tax agreement under this instrument, but has, on the basis of Article 17(3), reserved the right not to apply Article 17(1) as it considered that their treaty with Malta already contains the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017). Therefore, at this stage, the Multilateral Instrument will not replace the provisions in this treaty to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017).

52. With regard to the remaining eight treaties, all relevant treaty partners are a signatory to the Multilateral Instrument, listed their treaty with Malta as a covered tax agreement under this instrument, but two have, on the basis of Article 17(3), reserved the right not to apply Article 17(1). Of the remaining six treaties, three treaty partners have already deposited their instruments of ratification of the Multilateral Instrument, following which the Multilateral Instrument has entered into force for the treaties between Malta and these treaty partners, and therefore has superseded the relevant treaty provisions to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1). The provisions in the other three treaties will, upon the entry into force of the Multilateral Instrument for these treaties,

be superseded by the Multilateral Instrument to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

53. 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

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Resolution Mechanisms More Effective
MAP Guidance	Mutual Agreement Procedure – Guidelines issued under the provision of Article 96(2) of the Income Tax Act
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (CTPA/CFA/NOE2(2016)45/REV1)



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