

Unofficial English

translation of the German Guidance

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Mutual Agreement and Arbitration Procedures under Double Taxation Treaties, EU Arbitration Convention and EU Tax Dispute Resolution Act

This guidance deals with mutual agreement and arbitration procedures which are initiated upon request of a covered person under the double taxation treaties (hereafter the "DTT") and the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter "the MLI") or ex officio, as well as mutual agreement and arbitration procedures under Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC) (hereinafter "EU Arbitration Convention") and Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (hereinafter "EU Tax Dispute Resolution Directive"). It provides an overview of the formal and substantive premises for these procedures in Austria and is intended to provide covered persons under DTTs, MLI and EU Arbitration Convention as well as affected persons under EU Dispute Resolution Directive with a guide on the process and functioning of mutual agreement and arbitration procedures and on requests for such procedures. This notice replaces the Federal Ministry of Finance (FMF) guidance of 24 July 2019, BMF-010221/0237-IV/8/2019, which is deemed repealed.

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A. General remarks on mutual agreement and arbitration procedures

A.1. Objective of procedures

The aim of double taxation treaties (hereinafter "DTTs") is to avoid double taxation and double non-taxation. In rare cases, however, the allocation rules and methods for the elimination of double taxation alone cannot achieve this objective. Disputes can arise, for example, from the fact that contracting states apply different allocation rules to the same factual situation, or because of their differing views on the facts of the case and subsequently a different allocation of taxing rights, or even they may have different legal opinions on how those allocation rules should be interpreted.

If contracting states subject income of a person to multiple taxation due to different legal opinions or different assessments of the facts, e.g. because both contracting states are of the opinion that the affected person is a resident of the respective state, this leads to a **juridical double taxation** that is not consistent with the wording and purpose of an applicable DTT.

Economic double taxation may arise if contracting states have different views on the transfer prices applicable between associated enterprises within the meaning of Art. 9 OECD Model Tax Convention for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Tax Evasion and Avoidance (hereinafter: "OECD Model Convention") or on the allocation of profits between a permanent establishment located in a contracting state and the head office located in the another contracting state within the meaning of Art. 7 OECD Model Convention or Art. 4 EU Arbitration Convention.

To facilitate the resolution of these international conflicts, DTTs, the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter "the MLI"), Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC) (hereinafter "EU Arbitration Convention") and Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (hereinafter "EU Tax Dispute Resolution Directive") contain provisions that allow contracting states to communicate with each other within mutual agreement and arbitration procedures. The **goal** of these **four legal**

instruments is to implement the right of the covered persons (affected persons, enterprises, taxpayers) to be taxed in accordance with the applicable DTT.

A.2. Legal bases and types of procedures

A.2.1. Procedures according to DTTs including MLI

A.2.1.1. General remarks

All **DTTs** concluded by Austria contain provisions on mutual agreement procedures. In principle, they are based on Art. 25 OECD Model Convention (2017). All statements concerning DTTs are thus made with reference to the OECD Model Convention (2017), unless explicitly stated otherwise. An overview of the network of Austrian DTTs as well as the associated texts of DTTs can be found under the following link: <https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/doppelbesteuerungsabkommen/dba-liste.html>.

The mutual agreement provisions under DTTs represent an opportunity for the competent authorities of the contracting states to contact one another directly. It is therefore not necessary to go through the diplomatic channels, which are customarily used for communications between states.

A.2.1.2. Types of procedures

DTTs and MLI provide for three types of mutual agreement procedures:

1. **Individual mutual agreement procedure (or mutual agreement procedure on request)**, pursuant to Art. 25 (1) and (2) OECD Model Convention, which aim is to resolve taxation not in accordance with the applicable DTT in individual cases. Individual mutual agreement procedure, which represents the main application of mutual agreement procedures, is undertaken solely upon request of a covered person (taxpayer).
2. **General consultation procedure**, pursuant to Art. 25 (3) first sentence OECD Model Convention, which aim is either to achieve a uniform interpretation of the DTT (i.e. accept a certain meaning of a treaty provision in its context between contracting states) or to reach an agreement on application of the DTT (e.g. in relation to the used forms, the repayment procedure or the issuance of residence certificates, etc.). General consultation procedures, which typically concern questions of general importance, are initiated *ex officio*. Consequently, the results of these procedures are usually made

public by the Federal Ministry of Finance by issuing an administrative guidance or a regulation to that effect.¹

3. **Supplementary consultation procedure**, pursuant to Art. 25 (3) second sentence OECD Model Convention, which aim is to avoid double taxation, which is not covered by the scope of the applicable DTT, e.g. mutual agreement procedure concerning the question of transfer pricing adjustments between two permanent establishments of a head office resident in a third country (see: Commentary on OECD Model Convention, Art. 25, para. 55).

A mutual agreement procedure can be conducted **on a multilateral basis** if the situation affects more than two countries and all concerned countries have concluded DTTs with one another and each of these DTTs contains a mutual agreement provision.

A.2.1.3. Arbitration procedures

Article 25 (5) OECD Model Convention includes a **binding arbitration clause**, which aim is to avoid lengthy mutual agreement procedures and thus to increase the effective resolution of cases of double taxation. If competent authorities of contracting states have been unable to reach a solution during the mutual agreement procedure within two years from the date when the request had been submitted, the covered person may submit an application to initiate an arbitration procedure, pursuant to Art. 25 (5) OECD Model Convention (see: Commentary on OECD Model Convention, Art. 25, paras. 63, 70, 75). The arbitration procedure builds onto the mutual agreement procedure and aims to clarify the outstanding questions, which have not been resolved within the mutual agreement procedure (see: Commentary on OECD Model Convention, Art. 25, paras. 5, 64, 68).

Several **Austrian DTTs** already provide for arbitration under their mutual agreement provisions when double taxation could not be avoided by mutual agreement between tax authorities within a certain period of time. The structure and characteristics of such arbitration **clauses** are dependent on a specific DTT (see: **Annex 3**), but in general those clauses are based **on Art. 25 (5) OECD Model Convention**. In addition, new arbitration clauses are introduced into DTTs by MLI (see Chapter A.2.1.5).

¹ Administrative guidance is published in FINDOK and is also available on the Federal Ministry of Finance homepage under <https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/doppelbesteuerungsvertrag/dba-liste.html> under the respective DTT.

Special case Germany: If a mutual agreement procedure under DTT Austria - Germany is not concluded within three years from the date of its initiation, Art. 25 (5) DTT Austria – Germany entitles the covered person to request that the dispute be referred to the **Court of Justice of the European Court** for arbitration under Art. 239 EC Treaty (Art. 273 TFEU).

A.2.1.4. OECD recommendations

In 2007 the OECD published a **Manual on Effective Mutual Agreement Procedures – MEMAP**,² which contains a compilation of 24 "best practices" for improving mutual agreement procedures. Austria follows these OECD recommendations within mutual agreement procedures.

In addition, from the comprehensive package of measures included into 15 Actions to Prevent Base Erosion and Profit Shifting under the OECD/G20 Project entitled **Base Erosion and Profit Shifting** (hereinafter: BEPS) in 2013, **BEPS Action 14** put forward recommendations for improving the effectiveness of dispute resolution mechanisms.³ The 2015 BEPS Action 14 Final Report described recommendations, which suggest effective and timely dispute resolution by means of mutual agreement procedure, whereby many of those OECD recommendations in this context are modelled after the "best practices" described previously in the MEMAP. As a member of the OECD, Austria has expressed commitment to implementing all BEPS measures as quickly and comprehensively as possible.

A.2.1.5. MLI

In order to implement the proposals developed as part of the BEPS Action Plan into existing DTTs, the OECD/G20 developed the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting⁴. The MLI was ratified by Austria and entered into effect for the first Austrian treaties already in 2019.⁵ The MLI contains measures to improve dispute resolution mechanisms of DTTs.

² The MEMAP is available at <http://www.oecd.org/ctp/dispute/manualoneffectivemutualagreementprocedures-index.htm>.

³ See OECD, Making Dispute Resolution Mechanisms More Effective, Action 14 - Final Report 2015, OECD/G20 BEPS Project, <https://doi.org/10.1787/9789264190122-de>.

⁴ BGBl. III No. 93/2018, see also: <https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/massnahmen-gewinnverkuerzung-gewinnverlagerung.html>.

⁵ The DTTs are shown separately in the DTT list and the impact of the MLI is shown clearly by means of so-called "synthesised versions", see: <https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/doppelbesteuerungsvertrag/dba-liste.html>.

38 of the DTTs concluded by Austria are scheduled to be modified by the MLI.⁶ **Part V (Art. 16 and Art. 17) MLI**, entitled "Improving Dispute Resolution", aligns the existing mutual agreement clauses with Art. 25 OECD Model Convention. **Part VI (Art 18 to Art. 26) MLI**, entitled "Arbitration", introduces an arbitration clause in some cases.⁷ The online list of Austrian DTTs (see above) additionally shows **synthesised versions of the DTTs** that highlight the modifications that were introduced by the MLI.

A.2.2. Procedures according to EU Arbitration Convention

The **EU Arbitration Convention**⁸ is applicable between EU member states. Its purpose is to avoid and eliminate **double taxation** which arises by making a **profit adjustment** to the profits of a company established **in the EU or a permanent establishment of a company established in the EU**. The EU Arbitration Convention addresses only the resolution of double taxation in individual cases in the area of transfer pricing (**individual mutual agreement procedure**).

The starting point of the procedure is always a **transfer pricing adjustment which does not** comply with the **arm's length principle** (Art. 4 EU Arbitration Convention) **or** on the basis of which **double taxation** of the profits of a company occurs in two (or more) contracting states. **Art. 4** EU Arbitration Convention includes transfer pricing adjustments between **associated companies** (para 1) and between a **company** and its **permanent establishment** (para 2).

If an EU member state makes – as part of a transfer pricing correction – a profit adjustment to a permanent establishment or an associated enterprise, double taxation of the profits of a company or of a group of companies will generally occur, since the same profit is usually taxed both at the level of the respective permanent establishment or the respective associated enterprise and at the level of a different permanent establishment in another EU Member State or the head office or an associated enterprise in another EU Member State.

⁶ The list of affected DTTs can be found in the reservations and notifications of the Republic of Austria (Annex to the MLI, see <https://www.ris.bka.gv.at/eli/bgb/III/2018/93/20180611>).

⁷ See Annex 3.

⁸ Convention of 23.7.1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises [90/436/EEC], OJ L 225/10 as amended by Convention of 21.12.1995 [1996/C 26/01], Protocol of 25.5.1999 [1999/C 202/01] and the Convention of 8.12.2004 [2005/C 160/01].

The procedure under EU Arbitration Convention consists of **two phases**: a **mutual agreement procedure** similar to that under OECD Model Convention, and, if applicable, subsequent **arbitration procedure** (Art. 6 et seq. EU Arbitration Convention). To make the application of EU Arbitration Convention more effective, the Council of the European Union developed a **Code of conduct** in cooperation with contracting states (i.e. EU Member States).⁹

A.2.3. Procedures according to EU Tax Dispute Resolution Act

A.2.3.1. General remarks

Since 1 September 2019 cases of double taxation within the EU in relation to tax periods starting from 1 January 2018 can also be resolved under the **Federal Law on Procedures for Settlement of Taxation Disputes in the European Union (hereinafter: "EU Tax Dispute Resolution Act")**¹⁰, through which Austria implemented EU Tax Dispute Resolution Directive¹¹ into its domestic legislation. The EU Tax Dispute Resolution Act aims to ensure a timely and effective resolution of tax disputes in the EU in order to facilitate cross-border activities of companies and individuals within the EU internal market.

The EU Tax Dispute Resolution Act defines procedural rules for conducting mutual agreement procedures in the EU. It includes only the procedural rules on how to undergo an individual mutual agreement procedure. Double taxation is avoided in accordance with substantive rules provided for under an applicable **DTT** or **EU Arbitration Convention**.

Similar to arbitration clauses in DTTs (A.2.1.3) and EU Arbitration Convention (A.2.2.), EU Tax Dispute Resolution Act establishes a **two-stage procedure**, which is initiated by a submission of a **complaint** (§§ 8 - 13 EU Tax Dispute Resolution Act) by the affected person (taxpayer). The first stage encompasses a **mutual agreement procedure** (§§ 22 - 25 EU Tax Dispute Resolution Act). If necessary, the second stage is a subsequent **arbitration procedure** (§§ 32 - 65 EU Tax Dispute Resolution Act).

⁹ Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in case of adjustment of profits between associated enterprises (2009/C 322/01) of 30.12.2009, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:322:0001:0010:DE:PDF%20>.

¹⁰ Bundesgesetz über Verfahren zur Beilegung von Besteuerungsstreitigkeiten in der Europäischen Union (EU-Besteuerungsstreitbeilegungsgesetz – EU-BStbG), BGBl. I No. 62/2019.

¹¹ Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265, 14.10.2017, p. 1–14.

The EU Tax Dispute Resolution Act provides the affected person (taxpayer) with remedies, e.g. in the event of non-compliance with deadlines (compare C.3.4.).

A.2.3.2. Scope of EU Tax Dispute Resolution Act

The EU Tax Dispute Resolution Act covers **disputes between EU Member States** arising from differences in **interpretation and application** of DTTs and EU Arbitration Convention. This principle is expressed in § 2 EU Tax Dispute Resolution Act, under which the **objective scope of application** of EU Tax Dispute Resolution Act encompasses disputes arising from differences in application or interpretation of DTTs or EU Arbitration Convention between Austria and other EU Member State(s). The objective scope of application is therefore primarily determined by the scope of the applicable DTT or EU Arbitration Convention. Disputes relating to indirect taxes and excise duties are therefore not covered.

The **personal scope of application** of EU Tax Dispute Resolution Act is firstly determined by the personal scope of application of the affected DTT or the EU Arbitration Convention. In addition to that, § 8 EU Tax Dispute Resolution Act foresees that only **affected persons** have the right to file a complaint. Affected persons are described as natural and legal persons who are residents in one of the EU Member States and whose taxation is directly affected by the question in dispute. Abstract questions of interpretation without a specific reason (i.e. such as defined in Art. 25 (3) OECD Model Convention, see: Chapter A.2.1.2) are therefore not covered.

The **territorial scope of application** is limited to double taxation arising between Austria and other EU Member State(s) (§ 2 (1) EU Tax Dispute Resolution Act). The EU Tax Dispute Resolution Act is therefore not applicable to disputes stemming from differences in the interpretation and application of any DTTs with third countries (i.e. non-EU Member States).

In addition, only those complaints, which the affected person filed after 1 September 2019 in connection with taxable periods beginning on or after 1st January 2018, are covered pursuant to § 82 EU Tax Dispute Resolution Act.

The following examples illustrate how EU Tax Dispute Resolution Act is applied:¹²

Example 1:

¹² The examples are taken from ErIRV 116/ME XXVI. GP, S 2.

The parent company X AG has its registered office in EU Member State A. The subsidiary Y AG has its registered office in EU Member State B.

A dispute between two EU Member States concerning interpretation or application of the DTT between A and B is within the scope of Austrian domestic EU Dispute Resolution Act, if one of the states concerned is Austria.

Example 2:

The parent company X AG has its registered office in EU Member State A and, through a permanent establishment located in EU Member State B, carries out transactions with the subsidiary Y AG, which has its registered office in EU Member State C.

A dispute between EU Member States A, B and C concerning interpretation or application of DTTs is within the scope of Austrian domestic EU Dispute Resolution Act, if one of the states concerned is Austria.

Example 3:

The head office X AG has its registered office in third country A and carries out transactions with the associated company Y AG, which has its registered office in EU Member State C via a permanent establishment located in EU Member State B.

Since only affected persons who are resident for tax purposes in an EU Member State can file a complaint (§ 8 in conjunction with § 3 (1) no. 3 EU Tax Dispute Resolution Act) and the affected person cannot be designed as a permanent establishment, the head office of this permanent establishment would have to lodge the dispute resolution complaint. However, if the head office is resident in a third country for tax purposes, this situation is not covered by the scope of EU Tax Dispute Resolution Act.

Example 4:

The head office X AG has its registered office in EU Member State A and carries out transactions with the associated company Y AG, which has its registered office in EU Member State C via a permanent establishment located in third country B.

The dispute in this situation concerns, on the one hand, a dispute between two EU Member States on interpretation or application of the DTT between A and C and, in this respect, is within the scope of EU Tax Dispute Resolution Act, if one of the states concerned is Austria. Disputes, which, on the other hand, relate to interpretation or application of the DTT between the third country B and the EU member state C are not covered by the scope of EU Tax Dispute Resolution Act.

A.2.4. Applicable legal instrument

Since all above mentioned legal instruments could generally be applied to a single dispute, it is up to the covered person (affected person, taxpayer) to select the applicable mechanism. If the covered person (affected person, taxpayer) has selected the EU Tax Dispute Resolution

Act as applicable to a specific dispute, any other ongoing mutual agreement procedures in relation to the same dispute (i.e. the same issue concerning the same taxable period) is considered to be terminated at the moment when the complaint is filed, pursuant to § 13 EU Tax Dispute Resolution Act.

B. Mutual agreement procedure

B.1. Request for a mutual agreement procedure

B.1.1. Application, deadlines for application and country of application

B.1.1.1. Mutual agreement procedures according to DTT, MLI and EU Arbitration Convention

The request to initiate a mutual agreement procedure under Art. 25 (1) DTT (modelled after OECD Model Convention 2017) should be submitted to the competent authority (B.1.3.) of the contracting state in which the covered person (taxpayer) is resident, or, if it is a case of discrimination based on nationality within the meaning of Art. 24 (1) OECD Model Convention, to the competent authority of the contracting state which they are a national of.¹³ The application may be made by the covered person himself or by his authorised representative. In case of **associated companies**, a mutual agreement procedure must generally be applied for in the state of residence of the parent company if it was a transaction partner. The application requires that a **taxation not in accordance with the convention has occurred or there is a risk that it will occur.**

In contrast to the mutual agreement procedure under an applicable DTT, **Art. 6 (1) EU Arbitration Convention** foresees that the request to initiate mutual agreement procedure must be submitted in the country of residence of the enterprise or in the country of a permanent establishment. In the case of **associated companies**, the request can also be submitted in the country of the residence of the subsidiary. In case a request to initiate a mutual agreement procedure does not contain any reference to EU Arbitration Convention, such a request is deemed to constitute a request for a mutual agreement procedure under an applicable DTT.

¹³ Austria continues to follow Art. 25 (1) 1st sentence OECD Model Convention 2014, with regard to the place of application and therefore does not allow the application to be made in both Contracting States as provided for in the OECD Model Convention 2017.

The following examples substantiate the above statements in relation to the question of the country of application:

Example 5:

An individual works in Liechtenstein. He lives in Vorarlberg and on every working day he commutes to Liechtenstein. His earnings were taxed in both Liechtenstein and Austria. If he intends to submit a request for a mutual agreement procedure to eliminate this double taxation, such a request needs to be submitted in Austria under Art. 25 (1) DTT Austria - Liechtenstein since the individual is an Austrian resident in accordance with Art. 4 (1) and (2) DTT Austria - Liechtenstein.

Example 6:

An individual works in Switzerland (Bern) and owns an apartment in Vorarlberg. Since the distance to his place of work is too far to allow him to commute daily, he also rents an apartment in Bern. He therefore drives to Bern every Sunday evening and returns to Vorarlberg every Thursday evening. On Fridays, he works from home. His family, including his children, live in Vorarlberg. Since both Austria and Switzerland assume that he is resident in each of respective countries under the terms of DTT Austria - Switzerland, the individual is taxed as a resident by both Austria and Switzerland. However, he believes to be domiciled in Austria under Art. 4 (1) and (2) DTT Austria - Switzerland.

In such a case, i.e. an unresolved residence under DTT Austria - Switzerland, the individual is entitled to submit a request to initiate a mutual agreement procedure in accordance with Article 25 (1) DTT Austria - Switzerland to the state of his alleged residence. The individual can therefore submit his request in Austria.

Example 7:

In the course of an external tax audit of a domestic group company, the company is requested, pursuant to § 138 Abgabenordnung (hereinafter: "Federal Fiscal Code" or "FFC"), to provide a clarification on sales price for the transfer of self-created patents to a related foreign patent exploitation company. Since a request to initiate a mutual agreement procedure can already be submitted in case of a risk of double taxation, it is already possible to submit a relevant request during the external tax audit if an increase in the proceeds from the sale is already expected at that time.

If the parent company of an Austrian company is a foreign entity, a request to initiate the mutual agreement procedure should, as a rule, be submitted to a contracting state in which that parent company is a resident. However, if the foreign company is an associated enterprise with a common parent company in a third country, the proceedings can be initiated either in the residence state of the associated enterprise or in Austria.

According to Art. 25 (1) OECD Model Convention and Art. 6 (1) EU Arbitration Convention, a request to initiate a mutual agreement procedure must be submitted to the competent

authority (see B.1.2.) **within three years after the first notification** of the action that has resulted or will result in taxation not in accordance with an applicable DTT.¹⁴ The date of receipt of the request by the competent authority shall be decisive to verify compliance with this time limitation. The deadline for the request begins at the latest with the delivery of the first notification that resulted in taxation not in accordance with the DTT or EU Arbitration Convention. The first notification typically occurs at the latest at the moment when a person receives **a relevant tax decision**, so from this moment on a person needs to observe the above-mentioned deadline.

However, a mutual agreement procedure can be requested also **before a decision based on a tax assessment is issued**, because it is sufficient that there is a mere risk of double taxation, i.e. taxation not in accordance with an applicable DTT. For example, a taxpayer can submit a request to initiate a mutual agreement procedure after he has filed his tax return or a final discussion during the tax audit has taken place (see: Commentary on OECD Model Convention, Art. 25, para. 14). If a request to initiate a mutual agreement procedure is submitted by a taxpayer before a decision based on a tax assessment is issued and delivered to a taxpayer, that decision can be of a provisional character (§ 200 FFC) since it is still uncertain whether or not a tax liability has arisen.

Some DTTs concluded by Austria contain **special clauses under which deadlines for submitting a request to initiate a mutual agreement procedure** deviate from the OECD Model **Convention** (see Annex 2). Also in such cases the deadline begins to run from the date of the first notification or knowledge of the tax measure that is contrary to an applicable DTT. In addition, if an applicable DTT **does not contain any rules concerning the deadline**, taxpayers are entitled to submit a request to initiate a mutual agreement procedure within the national procedural limitation periods.

If the facts leading to taxation not in accordance with an applicable DTT cover a period of **several tax years** for which tax returns have already been filed, a single request can be submitted for all these tax years altogether. If in the course of an ongoing mutual agreement procedure it becomes apparent that the question under investigation is relevant for facts covering multiple tax years, it is possible to expand the request retrospectively to encompass

¹⁴ This is also in line with the BEPS Action 14 Minimum Standard, which is implemented by Art. 16 (1) MLI.

those relevant previous years. Such a request (see below) needs to be submitted within the deadline for purposes of the respective tax year as defined by the DTT.

It is not possible to submit a request to initiate a mutual agreement procedure **in lieu of a refund application for foreign withholding taxes**. Consequently, a mutual agreement procedure regarding the refund of foreign withholding taxes can only be considered if a refund request has been rejected by a foreign tax administration or if a refund request does not appear to be successful for other reasons, e.g. due to a lack of response from the foreign tax administration.

The mutual agreement procedure can be initiated in Austria for transfer pricing cases, irrespective of whether or not a particular DTT contains a provision modelled after Art. 9 (2) OECD Model Convention. Austria grants a secondary adjustment also in the absence of such a provision if the primary adjustment complies with the arm's length principle (see Annex 2.1). Subsequent transfer pricing adjustments **from previous years** requested by **the (foreign) taxpayer** can also be the subject of a mutual agreement procedure. The **Austrian Transfer Pricing Guidelines and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations**, in the applicable versions, are applicable with regard to special issues in connection with transfer pricing.

For Austria, a request to initiate a mutual agreement **procedure is not deemed to be precluded** simply by the possibility to invoke a legal remedy or because of pending proceedings triggered by a **legal remedy** in Austria. Nevertheless, the **rulings** of the national **courts in Austria have a binding effect for the Austrian competent authority** (see § 278 (3) and § 279 (3) FFC for judgements of the Federal Tax Court and Art. 63 Austrian Supreme Administrative Court Act for judgements of the Supreme Administrative Court). If the judgement has been given before a particular mutual agreement procedure is complete, the procedure, from the Austrian perspective, can only be finalized with an agreement in line with the judgement or without an agreement (and therefore without avoiding taxation not in accordance with the applicable DTT). In addition, the existence of a judgement **prevents access** to the **arbitration procedure** (see Chapter C.1.1.).

According to § 271 FFC, the taxpayer can apply for a **suspension** of the **appeal procedure** until the end of the mutual agreement procedure. If the legal remedy is still pending before the competent tax office, this tax office may suspend the decision on the **complaint**

preliminarily until the completion of the mutual agreement procedure, provided that the necessary requirements according to § 271 (1) FFC are **met**. Similar regulations can also be found in other states.¹⁵ If the mutual agreement procedure fails, the covered person may continue to enforce any suspended legal remedies.

The covered person may **withdraw the application to initiate a mutual agreement procedure at any time**. The **procedure** is then **completed effective immediately**.

B.1.1.2. Consultation procedure according to DTT

Consultation procedure according to Art. 25 (3) OECD Model Convention is initiated *ex officio* (see A.2.1.2). In certain circumstances, particularly in connection with transfer pricing issues affecting several jurisdictions, it may be appropriate for the taxpayer to initiate such a procedure:

Example 8:

A German GmbH (limited liability company) holds 100% of the shares in an Austrian KG (limited partnership) and therefore has a permanent establishment in Austria. This KG maintains sales branches in Eastern European countries. As part of local tax audits, the profits share declared in Eastern European countries was increased. No secondary adjustment can be made in Austria, because the findings of the Eastern European tax authorities - applying the relevant OECD Transfer Pricing Guidelines - turn out to be unjustified.

The German GmbH may submit a request to initiate a mutual agreement procedure in Germany. However, this procedure could only concern the relationships between the German GmbH and its permanent establishment in Austria and the relationships between the German GmbH and permanent establishments in the Eastern European countries. The relationships between the permanent establishment in Austria and the sales branches in the Eastern European countries are, however, not covered since the German GmbH cannot claim treaty benefits under DTTs concluded between Austria and respective Eastern European countries, and it is therefore not entitled to submit a request for a mutual agreement procedure under those DTTs.

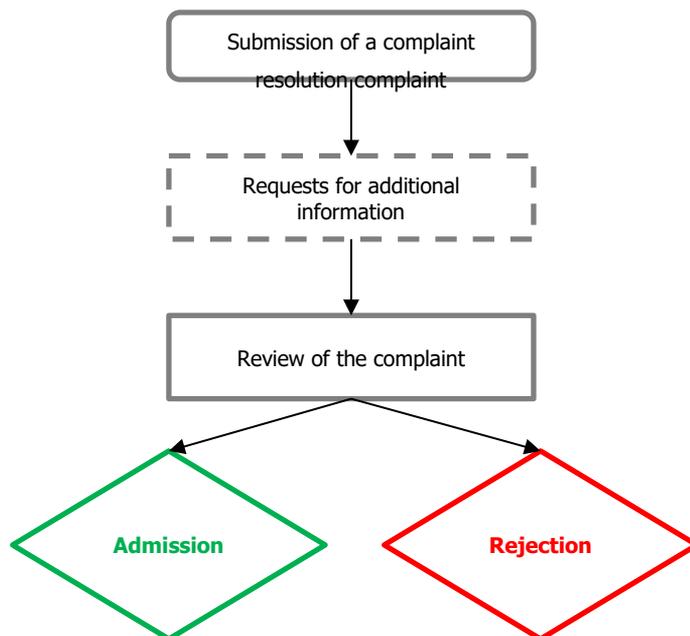
The German GmbH can indeed only encourage Austria to initiate and conduct consultation procedures between Austria and the respective Eastern European countries. In this respect, Austria could invoke Art. 25 (3) second sentence of DTTs concluded by Austria with those Eastern European countries (which are modelled after Art. 25 (3) OECD Model Tax Convention) since according to this provision a mutual

¹⁵ The OECD database "Mutual Agreement Procedure (MAP) Profiles" contains information on competent authorities and procedural regulations of foreign states, which can be accessed at: <http://www.oecd.org/tax/dispute/country-map-profiles.htm>.

agreement procedure can also be initiated and conducted in cases "not dealt with in the DTT" (EAS 2796).

B.1.1.3. Dispute resolution complaint according to EU Tax Dispute Resolution Act

Fig. 1: Procedure for the submission of a complaint according to EU Tax Dispute Resolution Act



The procedure according to the EU Tax Dispute Resolution Act is initiated once an affected person (taxpayer) has submitted his complaint to tax authorities. The complaint may concern interpretation or application of a DTT or EU Arbitration Convention, which is disputed between EU Member States. For instance, a dispute can concern the affected person's residence under a specific DTT (see § 3 (1) no. 6 EU Tax Dispute Resolution Act). Therefore, the affected person has a right to apply to initiate a mutual agreement procedure as provided for in § 8 (1) EU Tax Dispute Resolution Act. The complaint needs to be written in German or English (§ 4 EU Tax Dispute Resolution Act) and must be submitted to the competent **authority (B.1.2.) of each Member State concerned** at the same time and with the same information (§ 8 (3) and (6) EU Tax Dispute Resolution Act).

A special regime applies to **individuals or smaller undertakings** (that are residents in Austria or in any other EU Member States) who shall submit their complaints only to the competent authority of the EU Member State, in which they are resident (§ 8 (4) EU Tax Dispute Resolution Act). If the residence of such an individual or small undertaking is disputed,

the complaint needs to be sent to the EU Member State of the alleged residence. The effects of this regime are illustrated by the following examples:¹⁶

Example 9:

Individual X, resident in France, wishes to submit a complaint concerning a question in dispute in a case between France and Austria. X can make use of the special regime under § 8 (4) EU Tax Dispute Resolution Act, and therefore submit his complaint only in France as its country of residence. However, X must ensure that each EU Member State concerned ultimately receives the complaint either in its official language or in a language that this EU Member State accepts for the purposes of the Directive. Therefore, X's complaint needs to be drafted either in German or in English, and this language version needs to be submitted to the competent authority in France. The competent authority in France is then obliged to send the complaint to Austria.

Example 10:

A large Y AG based in Austria seeks to submit a complaint concerning a question in dispute in a case between Austria and Germany. Y AG cannot make use of the special regime under § 17 Directive (see § 8 (4) EU Tax Dispute Resolution Act). Therefore, Y AG must submit his complaint to the competent authority of all EU Member States concerned, i.e. in Austria as well as in Germany. The difference to example 9 is only the mode of the submission. For the consequences of submission in the wrong language, see B.1.3.3.

The complaint must be submitted no later than **three years after the notification of a decision relevant for double taxation** (§ 10 (1) EU Tax Dispute Resolution Act). Such decisions can in particular be assessment or declaratory decisions. However, the complaint can also be submitted with the first notification of a measure that has resulted or will result in double taxation (i.e. **even** in the case of **mere threat of double taxation**).

Similar to mutual agreement procedures under DTTs and EU Arbitration Convention (see B.1.1.1.), **the possibility to submit** a complaint under the EU Tax Dispute Resolution Act is not precluded by the fact that **the affected person** has lodged another **legal remedy** according to domestic law (§ 10 (3) EU Tax Dispute Resolution Act) or that the relevant **taxation** has already become **final** (§ 10 (4) EU Tax Dispute Resolution Act). However, the **binding effects of court rulings** must be considered since they restrict the Austrian competent authority's actions during the mutual agreement procedure and block the access to arbitration procedure (see chapter B.1.1.1. or C.1.4.). If a **court ruling** is issued **before**

¹⁶ The examples are taken from ErIRV 116/ME XXVI. GP, S 4.

the deadline for the **examination** of the **complaint** by the competent authority expires (see chapter B.2.2.2.), the complaint shall be dismissed by the competent authorities. In such a case **the taxpayer has no access to the arbitration procedure under the EU Tax Dispute Resolution Act** (§ 15 (2) no. 3 EU Tax Dispute Resolution Act).

Judicial, administrative or criminal proceedings concerning the same matter **may** be initiated and/or continued despite the submission of a complaint (§ 71 EU Tax Dispute Resolution Act).

The submission of a complaint (see chapter A.2.4.) has an important effect on **all other** ongoing **mutual agreement procedures** or arbitration procedures, which the affected person have initiated. Those other ongoing procedures are deemed as terminated **ex lege** at the time when a complaint under the EU Tax Dispute Resolution Act is submitted, provided that those procedures concern the same issue and the same (taxable) period (§ 13 EU Tax Dispute Resolution Act).

The affected person can withdraw the **complaint at any time** (§ 68 EU Tax Dispute Resolution Act). The withdrawal of the complaint must be in writing and reflect the same procedural regime as the submission of the complaint (see above). As a result, the Austrian competent authority declares that a question in dispute lacks **its subject matter** (§ 67 and § 68 (5) EU Tax Dispute Resolution Act). This results in termination of the procedure under EU Tax Dispute Resolution Act. The rules for **bearing the costs** must be observed (see chapter C.5.).

B.1.2. Austrian competent authority and submission of the application

As a rule, the competent authorities are the central offices of respective tax administrations (see: Art. 3 OECD Model Convention and the DTT provisions modelled after it, Art. 3 EU Arbitration Convention, § 3 (1) no. 8 EU Tax Dispute Resolution Act).

As far as the Austrian competent authority is concerned, it is generally speaking defined as *"the Federal Minister of Finance or its authorised representative"*. As of 1 January 2021, the Federal Minister of Finance has delegated *"the conduct of a mutual agreement procedure initiated by a taxpayer and the completion of all tasks associated with such a mutual agreement procedure or arbitration procedures"* to a special tax office called *Finanzamt für Großbetriebe* (in accordance with § 61 (4) no 7 FFC). However, some tasks described in an exhaustive list

in § 61 (4) no 7 FFC are excluded, and so they continue to be reserved for the Federal Minister of Finance.

The term "competent authority" refers therefore to either the Federal Minister of Finance or his authorised representative, i.e. *Finanzamt für Großbetriebe* (Tax Authority for Large Traders), depending on their respective tasks and applicable rules.

Applications for the initiation of a mutual agreement procedure must always be submitted to *Finanzamt für Großbetriebe* (Tax Authority for Large Traders), in writing or by e-mail.

Contact address for mutual agreement procedures and APA applications:

Tax Authority for Large Traders

Department II - Mutual agreement procedure

1000 Vienna, Post office box 251

E-Mail: post.fag-verstaendigungsverfahren@bmf.gv.at

The **submission of a complaint** in Austria in accordance with the EU Tax Dispute Resolution Act needs to take place electronically via FinanzOnline (§ 8 (2) EU Tax Dispute Resolution Act). To submit a complaint, the "International mutual agreement procedure" function in the "Other functions" tab shall be selected. Detailed step-by-step instructions for filling out the electronic form are available online at FinanzOnline. Only in those cases when an electronic submission is unreasonable due to lacking technical requirements (e.g. a lack of IT infrastructure or in the case of foreign taxpayers) or due to lack of eligibility (e.g. due to withdrawal of the right to use the online platform), the complaint may be submitted in paper using an official form. The submission on paper needs to be filed on an official form. Such forms are available on the official webpage of the Federal Ministry of Finance.¹⁷

¹⁷ See the Federal Ministry of Finance homepage: <https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/verstaendigungsverfahren.html>. See Fn. 13.

B.1.3. Content of the application

B.1.3.1. Mutual agreement procedure according to DTTs and MLI

A request to initiate a mutual agreement procedure must refer to relevant articles of an applicable DTT (or MLI). The request shall always contain the following information:

- name of the covered person and, if applicable, their date of birth;
- address/registered office;
- tax identification number;
- competent local tax office;
- contact person for queries (incl. telephone number and e-mail address, if applicable);
- contact details of the representative of the covered person and a copy of their power of attorney, if applicable in a particular case;
- precise description of the facts, including, if applicable, information on relationships between the covered person and other parties concerned (e.g. shareholding structure and relationships);
- taxable period(s) concerned;
- tax assessment base that the covered person indicates as not in accordance with an applicable DTT;
- explanation of the covered person on how taxation does not comply with an applicable DTT;
- information on pending, planned or already decided legal remedies that the covered person has already submitted or wishes to submit for the subject matter covered by the request to initiate a mutual agreement procedure in Austria and/or abroad as well as information on mutual agreement procedures covering the same subject matter applied for in other countries (including related documents);
- suitable documentation (e.g. tax assessment decisions, tax audit reports, any preliminary information, APAs, etc.) from the covered person's residence jurisdiction and from the other jurisdiction(s) concerned that may be significant for the mutual agreement procedure (e.g. evidence of double taxation), including information facilitating a review of whether the request was submitted within the time constraints;
- declarations that the submitted documents are correct and complete and that the covered person will contribute to the completion of the mutual agreement procedure within a reasonable period of time.

It is advisable to submit English translations of the submitted documents if the procedure is conducted in this language.

The competent authority in Austria acknowledges the receipt of the complaint and informs the competent authority of the other contracting state to an applicable DTT about the complaint as soon as possible.

If the submitted application is incomplete or if additional information is required, the competent authority may issue a **supplementary notice obliging the covered person to provide additional information**. A deadline for the covered person's response will be set in the light of the complexity of the requested information. A period of six weeks is often applied as a rule of thumb. Upon the covered person's request, this deadline may be extended once. An application for a deadline extension may be submitted in writing or by e-mail.

If the documents submitted in response to the supplementary notice still do not contain all the necessary information to assess the application on its merits, the competent authority may either issue a new notice obliging the covered person to provide additional information or reject the application as unfounded. This decision is at the discretion of the competent authority. The discretion shall be based, *inter alia*, on the complexity of the requested information and the elapsed time.

For those DTTs, which are modified by Part VI **MLI** (see Annex 3), the **special provisions** in Art. 19 MLI need to be observed. Pursuant to Art. 19 (5) and 6 MLI, the competent authority that received the request for a mutual agreement procedure shall, within two calendar months of the receipt of the request, send a notification to the covered person and also inform the competent authority of the other contracting state about the request. In addition to that, within three calendar months after a competent authority received the request for a mutual agreement procedure or a copy thereof from the competent authority of the other contracting state(s) concerned, the competent authority needs to either request additional information from the covered person or to notify the covered person that the necessary information for a substantive examination of the case has been received.

B.1.3.2. Mutual agreement procedure according to EU Arbitration Convention

A request for a mutual agreement procedure under EU Arbitration Convention shall contain the documents and information (minimum information) specified in Chapter B.1.3.1. According to the **Code of Conduct**, a case is only considered to have been submitted if the following information is also available (Point 5 Code of Conduct):

- an explanation by the enterprise of why it considers that the (arm's length) principle set out in Art. 4 EU Arbitration Convention has not been observed;
- any specific additional information requested by the competent authority within two months of the receipt of the taxpayer's application.

If all the requirements are met, the competent authority shall inform the enterprise that the mutual agreement procedure has been initiated. The competent authority shall also inform the enterprise about the date on which the case was first submitted to one of the competent authorities, from which the two-year period for reaching an agreement with the competent authority of the other contracting state(s) began (Art. 7 (1) EU Arbitration Convention). The **time limit** for initiating the **arbitration proceedings** starts only when the required information has been submitted and a final decision has been issued (see also C.1.2.).

B.1.3.3. Complaint according to EU Tax Dispute Resolution Act

The **contents** of the complaint are precisely regulated in § 9 EU Tax Dispute Resolution Act.

The complaint must contain the following information:

- name(s), address(es), tax identification number(s) and any other information necessary for identification of the affected person(s);
- the EU Member States concerned;
- the taxable periods concerned;
- details of the relevant facts and circumstances of the case, as well as the nature and the date of the actions giving rise to the question in dispute and details of the related amounts in the currencies of all EU Member States concerned, with a copy of all supporting documents;
- reference to the applicable national rules and to (applicable) DTT(s) or conventions;
- a statement by the affected person with an explanation of why the affected person considers that there is a question in dispute;
- details of any appeals or judicial proceedings (litigation) initiated by the affected person and any court rulings concerning the question in dispute, with a copy of all supporting documents;
- a declaration by the affected person that they commit to respond, as fully and as quickly as possible, to any reasonable notices issued by the Austrian competent authority and to provide all documentation upon request of the competent authorities;

- if applicable, a copy of final tax assessment decision(s), the audit report(s) or other comparable documents that lead or led to the question in dispute, as well as a copy of all other documents issued by the tax authorities with regard to the question in dispute;
- if applicable, details on any complaints submitted by the affected person under any other mutual agreement procedures or dispute resolution procedures on the same subject matter for the same (taxable) period(s), with a copy of all supporting documents, and
- if applicable, a declaration by the affected person in which they commit to comply with § 13 EU Tax Dispute Resolution Act (automatic termination of other dispute resolution procedures).

The complaint constitutes an **application** within the meaning of § 85 FFC. If the information contained therein is not complete (within the meaning of § 9 EU Tax Dispute Resolution Act), the competent authority shall issue a **notice obliging the affected person to remedy the incomplete application** in accordance with § 85 (2) FFC. The same applies if the application does not meet formal requirements (e.g. the use of an impermissible language) or if the signature is missing. The response to such a notice must be submitted only to the Austrian competent authority within the deadline specified in this notice, also when the special regime for individuals and smaller undertakings applies (§ 8 (4) EU Tax Dispute Resolution Act).

If the **incomplete complaint is not remedied within the given time**, the complaint is deemed as **withdrawn** (also known as "deemed withdrawal"), in accordance with § 85 (2) FFC. However, the procedure in accordance with the EU Tax Dispute Resolution Act is not completed upon such a deemed withdrawal. The affected person may make use of the same **remedies** against the notice of deemed withdrawal as against a notice of **rejection** (see Chapter B.2.2.3.).

The competent authority may also order the affected person to provide additional information which goes beyond § 9 EU Tax Dispute Resolution Act within three months of receipt of the **complaint** (or, if applicable, after the incomplete application has been remedied in accordance with § 85 (2) FFC). Such additional information, including copies to the competent authorities of all other EU Member States concerned, must then be submitted to the Austrian competent authority within three months of the receipt of the notice, pursuant to § 14 (3) EU Tax Dispute Resolution Act. However, under the special regime for individuals and smaller undertakings, it is sufficient to submit such information only to the Austrian competent authority or the

competent authority of the other EU Member State concerned which is the country of residence of the affected person (§ 14 (4) EU Tax Dispute Resolution Act). The competent authority of Austria or of the other EU Member State shall then immediately send the information to the other competent authorities of all other EU Member States concerned.

Affected person may only refuse to submit additional information if the disclosure thereof involves the disclosure of a **trade, business, industrial or professional secrets** or business procedures and this would violate Austrian law. The Austrian competent authority must nevertheless be informed of the reason for the refusal. If the affected person does not respond to the order to provide additional information without any justification, the complaint **is to be rejected** pursuant to § 15 (2) no 2 EU Tax Dispute Resolution Act.

B.2. Review of application and initiation of mutual agreement procedure

B.2.1. Review of application for mutual agreement procedure according to DTTs, MLI and EU Arbitration Convention

In Austria a request to initiate a mutual agreement procedure according to DTTs and EU Arbitration Convention represents merely a procedural suggestion. Once a complete request is submitted, it is examined whether such a request may be given effect unilaterally. If this is the case, then there is no need for a mutual agreement procedure, and the case may be finished by applying domestic measures.

If the request cannot be fulfilled unilaterally by applying domestic measures in Austria, and so a cooperation with the other contracting state would be needed, the Austrian competent authority (see chapter B.1.2.) checks whether the **requirements to initiate a mutual agreement procedure** are met, which include:

- a question of the applicability of a DTT;
- whether taxation not in accordance with DTT (usually double taxation) has already occurred or may occur in the future;
- compliance with any deadlines;
- grounds for an objection;
- whether the request is complete from a formal standpoint.

If the competent authority considers the **objection for the mutual agreement procedure** to be **justified**, it will initiate the mutual agreement procedure and inform the other concerned contracting state(s) about it. The Austrian competent authority also checks that the requirements are met when a request originates in the other contracting state, even if the competent authority of that other contracting state considers the requirements to initiate a mutual agreement procedure to be met. A mutual agreement procedure can only be initiated if competent authorities of all contracting states concerned agree on it.

Any agreement between the taxpayer and the tax administration reached in the course of a **tax audit** does not preclude the **initiation** of a mutual agreement procedure (see: Commentary on OECD Model Convention 2017, Art. 25, para. 45.1). Similarly, the initiation of a mutual agreement procedure is not precluded by the fact that a domestic or treaty-based anti-abuse rule (e.g. § 22 FFC) may be applicable to the case at hand (see: Commentary on OECD Model Convention 2017, Art. 25, para. 26).

The competent authority is **not obliged** to initiate a mutual agreement procedure under **EU Arbitration Convention**, if it was **conclusively determined** by domestic court or administrative proceedings that the covered person has violated tax regulations and is liable to serious penalty (Art. 8 (1) EU Arbitration Convention).

B.2.2. Review of complaint according to EU Tax Dispute Resolution Act

B.2.2.1. Criteria and results of the review

The Austrian competent authority shall decide on acceptance or rejection of the **complaint** within the time limit provided for by law (see Chapter B.2.2.2.).

A complaint is accepted if it meets all the requirements and there are no grounds for rejection.

§ 15 (2) EU Tax Dispute Resolution Act lists **the grounds** for **rejection**:

- a request was submitted too late (no 1, see § 10 (1) EU Tax Dispute Resolution Act);
- an (unjustified) lack of response or too late response to the order for additional information (no 2, see also B.1.3.3.);

A **lack of response** is **unjustified** if the affected person wrongly relies on any trade, business, industrial or professional secret.

- absence of a question in dispute (no 3).

There is **no question in dispute** if the complaint is **unfounded**, for instance, because the disputed subject matter itself does not fall within the scope of application of EU Tax Dispute

Resolution Act (see Chapter A.2.3.2). In addition to this, there is **no question in dispute** if an Austrian **court** has already **finally** decided on the disputed subject matter.

Furthermore, the competent authority can also decide on a **unilateral solution** if the request can be given effect through an application of purely domestic measures and the cooperation with the other EU Member State(s) concerned is not required (§ 15 (4) EU Tax Dispute Resolution Act). For example, a competent authority may resolve the question in dispute unilaterally by agreeing with the legal view of the competent authority of the other EU Member State(s) concerned on interpretation and application of an applicable DTT and thus adjusting taxation of the affected person accordingly. If a unilateral solution is chosen, the complaint **ceases to exist** within the meaning of § 67 EU Tax Dispute Resolution Act, since there is no question in dispute any longer. The competent authority issues a relevant notice to this effect, mentioning the lack of subject matter, which also ends the procedure according to EU Tax Dispute Resolution Act. The affected person has the right to a legal remedy against this decision under § 243 et seq. FFC.

A **mutual agreement procedure** is **initiated** when the complaint has been admitted in **all EU Member States concerned** (see Chapter B.4.3.). Quite importantly, a **rejection** of the complaint **does not necessarily result in termination** of the procedure under the EU Tax Dispute Resolution Act. The EU Tax Dispute Resolution Act provides the affected person with different **legal remedies** against such a notice of rejection (see Chapter B.2.2.3).

B.2.2.2. Deadline for the review

The competent authority decides on acceptance or rejection of the complaint **within six months** (§ 16 EU Tax Dispute Resolution Act) **from the receipt** of the complaint or **from** the receipt of the response to the **notice obliging the affected person to remedy the incomplete complaint** (§ 85 (2) FFC) or **from the receipt** of the response to the order for **additional information** (§ 14, § 16 (3) and (4) EU Tax Dispute Resolution Act). Therefore, the time within which the competent authority decides on acceptance or rejection of the complaint is interrupted by a notice obliging the affected person to remedy the incomplete complaint or by an order for additional information.

Furthermore, **domestic administrative appeal proceedings** regarding the subject matter of the question in dispute **interrupt** time within which the competent authority decides on acceptance or rejection of the complaint, according to § 16 (5) EU Tax Dispute Resolution Act.

The deadline for the competent authority **begins to run only** as soon as the appeal proceedings **have been finally concluded** or **suspended**. This applies to both the administrative appeal proceedings in Austria and to such proceedings in the other EU Member State(s) concerned.

In Austria, the final conclusion of the proceedings is deemed to take place upon:

- the ruling of the Federal Tax Court in accordance with § 279 FFC or the ruling of the Supreme Administrative Court (§ 16 (5) no 1 EU Tax Dispute Resolution Act); or
- the decision on appeal given by the tax office in accordance with § 262 FFC; or
- the ruling of the Federal Tax Court pursuant to § 278 FFC or the ruling of the Supreme Administrative Court (§ 16 (5) no 2 EU Tax Dispute Resolution Act).

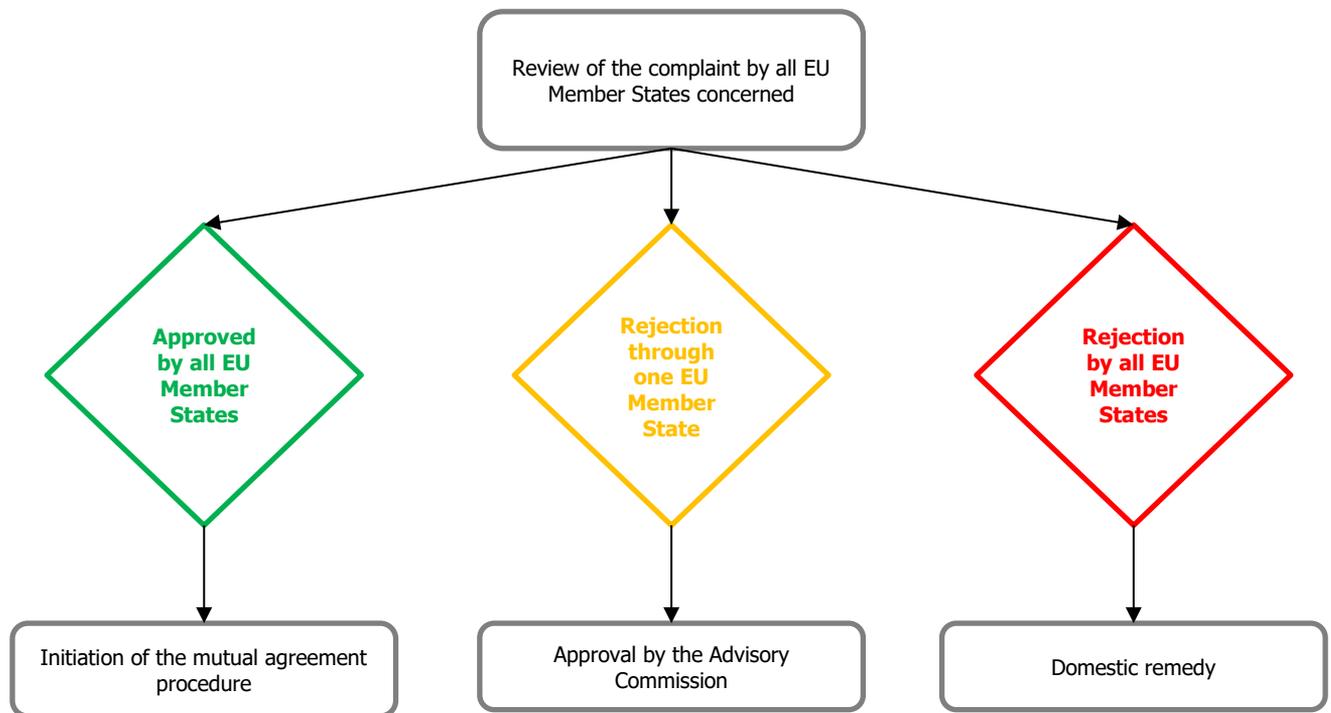
Suspension of the elapse of time for the Austrian competent authority to decide on acceptance or rejection begins with:

- a ruling of the Federal Tax Court; or
- a ruling the Supreme Administrative Court; or
- a decision of the tax office according to § 271a FFC (§ 16 (5) no 3 EU Tax Dispute Resolution Act).

If the Austrian competent authority **did not act within the proscribed deadline**, the **complaint** is **automatically** deemed to have been accepted in Austria in accordance with § 15 (4) EU Tax Dispute Resolution Act.

B.2.2.3. Legal remedies for affected person in case of rejection

Fig. 2 Legal remedies in case of rejection



The EU Tax Dispute Resolution Act provides the affected person with two **alternative legal remedies** against the decision on rejection of the complaint (§ 18 (2) and (3) EU Tax Dispute Resolution Act):

1. an administrative **appeal against the decision** according to § 243 et seq. FFC; and
2. an **application for approval of the complaint by the Advisory Commission** in accordance with § 17 et seq. EU Tax Dispute Resolution Act (for details on the Advisory Commission see C.3.4)

If all competent authorities have rejected the complaint, the only available remedy for the affected person is to **appeal against the decision on rejection** in accordance with § 243 et seq. FFC and to apply a comparable domestic legal remedy in the other EU Member State(s) concerned. If one of these appeals results in the decision on rejection being overturned, the recourse to the Advisory Commission is open again. However, if an **Austrian court or a court in the other EU Member State(s) concerned**, whose decision has a **binding effect** on the competent authority in that other EU Member State concerned, has already **confirmed** the decision on rejection, the recourse to the **Advisory Commission is no longer permissible** (§ 18 (2) no 4 EU Tax Dispute Resolution Act).

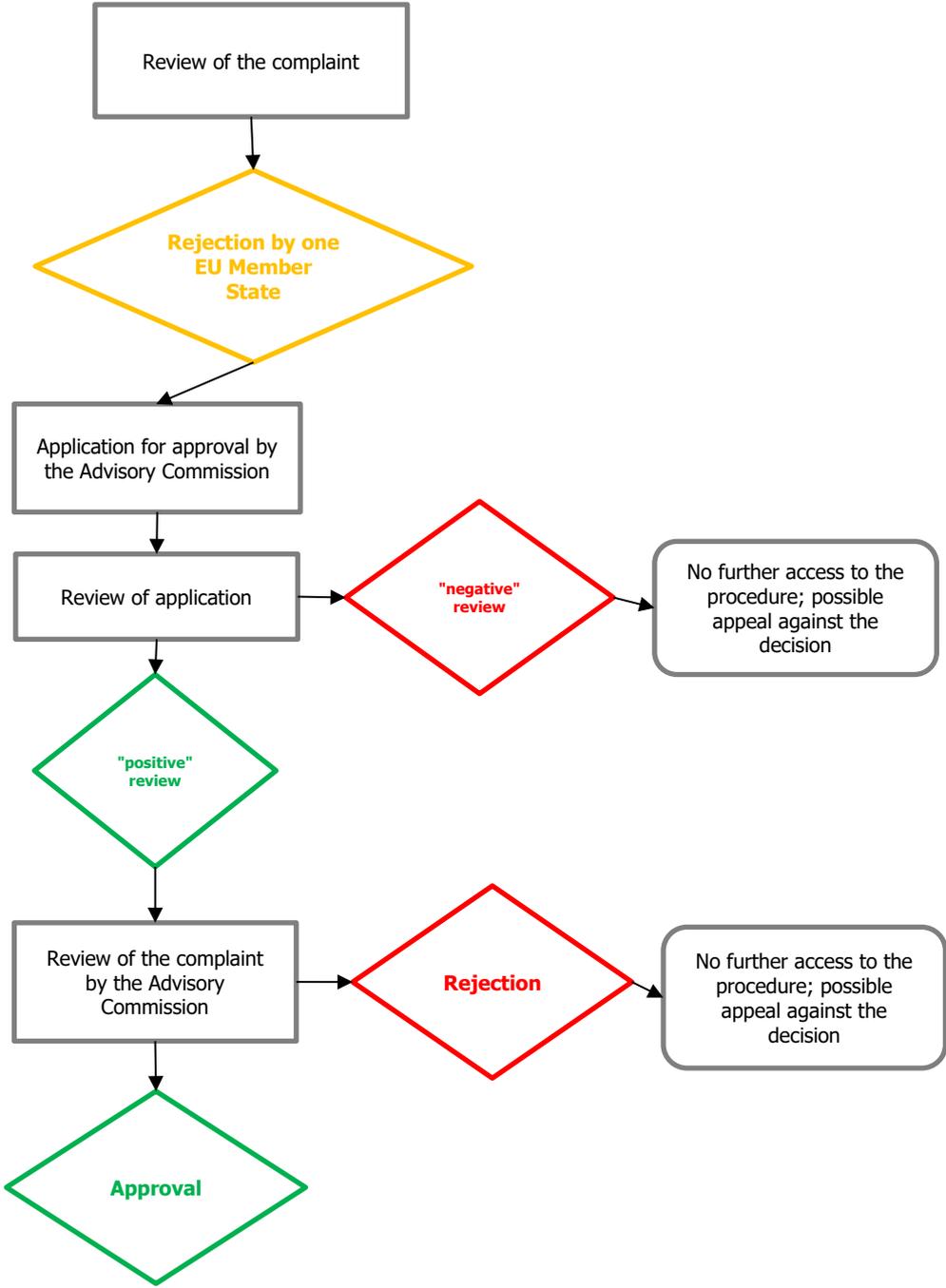
The **application for approval** of the complaint by the Advisory Commission (§ 17 et seq. EU Tax Dispute Resolution Act) is only open to the affected person if at least one of the competent

authorities of the EU Member States concerned has **accepted** the case or, in the case of decisions on rejection given by the competent authorities of all EU Member States concerned, at least one of the decisions on rejections is overturned by a domestic court (§ 17 (1) EU Tax Dispute Resolution Act). In this case, however, the affected person may also lodge a complaint against the decision on rejection.

Both remedies are also available **in the case of a deemed withdrawal** due to failure to respond completely, in due time, to the notice obliging the affected person to remedy the incomplete complaint **according to § 85 (2) FFC** (see Chapter B.1.3.3.), provided that the issues, which **have not been remedied** in due time, are exclusively **of substance**. In this case, the (deemed) withdrawal decision is formally considered a rejection of the complaint within the meaning of § 15 (2) EU Tax Dispute Resolution Act, which means that the basic requirement for an application for approval of the dispute resolution complaint by the Advisory Commission is met.

The interactions between two legal protection options are illustrated below by the following figure and examples:

Fig. 3 Approval procedure by the Advisory Commission



Example 11:¹⁸

The competent authority of the EU Member State A has rejected the complaint because it was not submitted in a timely manner. The competent authority of the EU Member State B approved the complaint. In this case, the affected person is entitled to submit an application for approval by the Advisory Commission pursuant to § 17 (1) EU Tax Dispute Resolution Act or to appeal the decision on rejection in the EU Member State A.

¹⁸ The examples are taken from ErIRV 116/ME XXVI. GP, S 14.

Example 12:

The competent authorities of the EU Member States A and B have rejected the complaint because it was not submitted in a timely manner. The affected person appealed against the decisions on rejection in both the EU Member States. The court in the EU Member State A overturns the decision on rejection. However, the court in the EU Member State B confirms the decision on rejection. In the EU Member State B, it is not allowed to deviate from the court's ruling. Therefore, the affected person cannot submit an application for the approval by the Advisory Commission. The procedure under this domestic law is complete.

Example 13:

The facts of the case are the same as in example 12, but the EU Member State B can deviate from the court's ruling. Here the affected person can apply for the approval by the Advisory Commission.

The affected person may not make use of both legal protection options **at the same time**. Therefore, **as long as a domestic appeal** against the decision on rejection **is pending** or **can be filed, no application for an approval** by the Advisory Commission is admissible (§ 18 (2) no 2 and no 3 EU Tax Dispute Resolution Act). In Austria, the affected person must therefore either **waive the right to appeal** (§ 18 (2) no 2 EU Tax Dispute Resolution Act) or - if they have already lodged an appeal against the decision on rejection - **withdraw such appeal**. In these cases, however, the **time limit** to apply for the approval by the Advisory Commission must be observed (see Chapter B.2.2.4.1.). If either the waiver of appeal or the withdrawal thereof is made too late, the affected person gets no access to the Advisory Commission and has no right to appeal.

If an Austrian court has already given a ruling in relation to the complaint, the legal protection options depend on the circumstances of the dispute and the content of such a ruling:

- If the Austrian court has confirmed the decision on **rejection**, then it is no longer possible to make an application for the approval by the Advisory Commission and **procedure under** the EU Tax Dispute Resolution Act is **ended** (§ 18 (2) no 4 EU Tax Dispute Resolution Act).
- If the Austrian court has overturned the decision on **rejection**, but there is (at least) one decision on **rejection** given in another EU Member State, then the taxpayer may apply for the **approval** by the Advisory Commission (§ 17 EU Tax Dispute Resolution Act). In this case, the deadline for an application to the Advisory Commission begins anew when the ruling is given (see Chapter B.2.2.4.1.);

- if the Austrian court has overturned the **rejection** and no other concerned EU Member State has given the decision on rejection, then the mutual agreement procedure must be initiated (§ 22 EU Dispute Resolution Act, see Chapter B.4.).

B.2.2.4. Approval of the complaint by the Advisory Commission

B.2.2.4.1. Application, content and deadlines

An application for the approval of the complaint by the Advisory Commission must be submitted to the competent authorities **of all Member States concerned. Individuals and smaller undertakings** falling under the special regime can submit the application to the competent authority of the EU Member State in which they have their (alleged) residence (§ 17 (3) EU Tax Dispute Resolution Act).

The application, which must meet the requirements of § 85 (2) FFC, must be submitted **in writing** and contain **the following information**:

- a declaration by the affected person that at least one competent authority involved has given the decision on acceptance or - in the case of decisions on rejection given by all EU Member States concerned - that at least one of the decisions on rejection has been overturned by a domestic court (§ 17 (1) EU Tax Dispute Resolution Act) and
- a waiver of legal remedies and/or a proof of the withdrawal of legal remedies (§ 18 (3) EU Tax Dispute Resolution Act).

The **deadline for an application** is **50 days from the date on which the affected person receives the last notification of decisions on acceptance or rejection** from the competent authority of EU Member States concerned (§ 17 (6) EU Tax Dispute Resolution Act). This deadline applies as well if a **domestic appeal** against a decision on rejection was lodged but later withdrawn. However, if a **domestic court of** one of the EU Member States concerned has confirmed the decision on rejection, then the deadline **starts from the notification** of this ruling (§ 17 (6) no 2 EU Tax Dispute Resolution Act). In Austria, the date of notification is the date on which the decision on rejection is served, or the date of the court's ruling if it has been issued in writing, or the date on which the ruling has been notified to the affected person orally.

B.2.2.4.2. Review of the application

The access to the Advisory Commission is granted only if **competent authorities of all concerned EU Member States** have agreed on the **application** for the approval by the

Advisory **Commission**. The deadline for the Austrian competent authority to decide upon such an application is 30 days from the receipt of the application. Should the application be incomplete, the deadline is extended for the time within which the application is successfully remedied (§ 18 (1) EU Tax Dispute Resolution Act). The decision to reject an application for the review by the Advisory Commission is notified to the affected person, and the affected person may appeal such a decision.

The reasons upon which the Austrian competent authority may decide to reject the application are listed **exhaustively** in § 18 (2) EU Tax Dispute Resolution Act (see C.1.4. and C.2.4.):

- inadmissibility (§ 33 (2) EU Tax Dispute Resolution Act) (no 1);
- late submission (no 1, See chapter B.2.2.4.1. on the deadline);
- no waiver of legal remedies while deadline to submit an appeal against the decision on rejection of the complaint is still open (no 2);
- pending legal remedy against the decision on rejection of the complaint (no 3);
- Federal Tax Court's ruling confirming the decision on rejection of the complaint (no 4).

B.2.2.4.3. Procedure before the Advisory Commission

If an application for the approval of the complaint by the Advisory Commission is granted by competent authorities of all EU Member States concerned, the Advisory Commission is set up to decide on the **admissibility** of the complaint (§ 19 et seq. EU Tax Dispute Resolution Act). See Chapter C.3.4. for details on composition and functioning of the Advisory Commission.

If the Advisory Commission decides that the complaint is **admissible**, then the **mutual agreement procedure shall be initiated** (§ 23 EU Tax Dispute Resolution Act). If, within 60 days after the positive decision of the Advisory Commission was notified to the competent authorities of all EU Member States concerned, these competent authorities do not notify the Advisory Commission of their willingness to conduct the mutual agreement procedure, the **resolution of the question in dispute will be further undertaken by the Advisory Commission** (§ 73 (2) (b) EU Tax Dispute Resolution Act). However, if the Advisory Commission does not accept the complaint, the **procedure is completed**. The same question in dispute may not be resubmitted under a mutual agreement or arbitration procedure. In addition to this, the **costs** generated during the procedure before the Advisory Commission **may be imposed** on the taxpayer upon an agreement between competent authorities of the EU Member States concerned in this regard (§ 77 (4) EU Tax Dispute Resolution Act).

In the case of **criminal tax proceedings**, the **effects** regarding **arbitration proceedings** explained in chapter C.2.4. **also apply** to the **procedure** concerning the **approval** of the complaint by the Advisory Commission.

B.3. Application for tax relief for the duration of mutual agreement procedure or enforcement of interest claims

For the duration of a mutual agreement procedure or arbitration procedure in accordance with all available legal mechanisms, the covered person (affected person) may - if the tax has not been collected yet - obtain a **temporary suspension of tax collection in accordance with § 212a (2a) FFC**. However, such a temporary suspension can only be granted if the covered person (affected person) has not yet made use of the general possibility of **applying for a deferral (§ 212 FFC)** or a **suspension of tax collection (§ 212a (1) FFC)**. An **application** for a temporary unilateral relief **on the basis of § 48 (5) FFC is not possible**.

In order to obtain a tax relief, the covered person (affected person) must first - after initiating a mutual agreement procedure in accordance with an applicable DTT or EU Arbitration Convention or after lodging a complaint in accordance with § 8 EU Tax Dispute Resolution Act - submit an **application pursuant to § 48 (1) FFC** to the competent authority (see Chapter B.1.2). This application shall indicate:

- the type and amount of tax which is the subject of the mutual agreement procedure or the complaint,
- the period for which tax is to be charged or has been paid, and
- the date of the initiation of the mutual agreement procedure or the submission of the complaint.

Pursuant to § 212a (2a) FFC, the covered person (affected person) can submit an **application for the suspension of tax collection** to the competent tax authority, enclosing the assessment decision given pursuant to § 48 (1) FFC. The tax authority checks the conditions for a suspension of tax collection. As far as the question on the amount of tax is concerned, the tax authority checks whether the amount determined under § 48 (1) FFC has not already been (partially) suspended under § 212a (1) FFC. In addition to that, it is verified whether the covered person (affected person) aims to jeopardise the collectability of tax (see § 212a (2) FFC). Moreover, a suspension of tax collection under § 212a (2a) FFC can only be

granted if the tax has not been collected yet and no exception is applicable under § 212a (6) FFC.

The **end of the suspension** of tax collection must be determined by the competent tax office at the time when the decision regarding the completion of the mutual agreement procedure or arbitration procedure becomes final (decision of the competent authority pursuant to § 48 (2) or (3) FFC) (see also § 212a (5a) FFC).

If the disputed tax has already been (partially) collected (upon its payment) and a suspension of tax collection is therefore (partially) no longer possible, it is possible to **determine interest** on the tax already paid in the event of a possible reduction of the tax amount as a result of the mutual agreement procedure or arbitration procedure.

For this purpose, an **application for the determination of interest pursuant to § 205a (2a) FFC** must be lodged with the competent tax office. Interest accrues for the period from the payment of the tax and up to the date of the decision reducing the tax due, i.e. the derived decision in accordance with § 295 (2a) FFC (usually the relevant decision regarding personal income tax/corporate income tax, see Chapter B.5.).

B.4. Course of mutual agreement procedure and position of covered person (affected person)

B.4.1. Mutual agreement procedure according to DTTs and MLI

The Austrian competent authority conducts the mutual agreement procedure in direct communication with the competent authority of the other contracting state. The **covered person** is informed about the essential **progress within this procedure**. The competent tax office can be instructed to (additionally) investigate the facts. The Austrian competent authority can also demand **further information** or evidence from the covered person during the mutual agreement procedure.

The competent authorities of the contracting states exchange position papers within the mutual agreement procedure; nevertheless, face-to-face meetings may also be held.

All information that becomes known to the competent authority within the framework of a mutual agreement procedure is subject to **confidentiality requirement** in accordance with

§ 48a FFC. The data protection provisions in § 48d et seq. FFC are applicable, as well. In addition to this, any secrecy obligations under an applicable DTT (e.g. Art. 26 OECD Model Convention) need to be observed.

As far as **part VI MLI is concerned** (see chapter A.2.1.5 and Annex 3), Art. 19 (2) MLI clarifies the relationship between the mutual agreement procedure and (ongoing judicial) appeal procedures. A **competent authority may** suspend a **mutual agreement procedure** until a court ruling is issued. Such a suspension of the procedure is also possible for other reasons, e.g. if the competent authorities and the covered person agree on it.

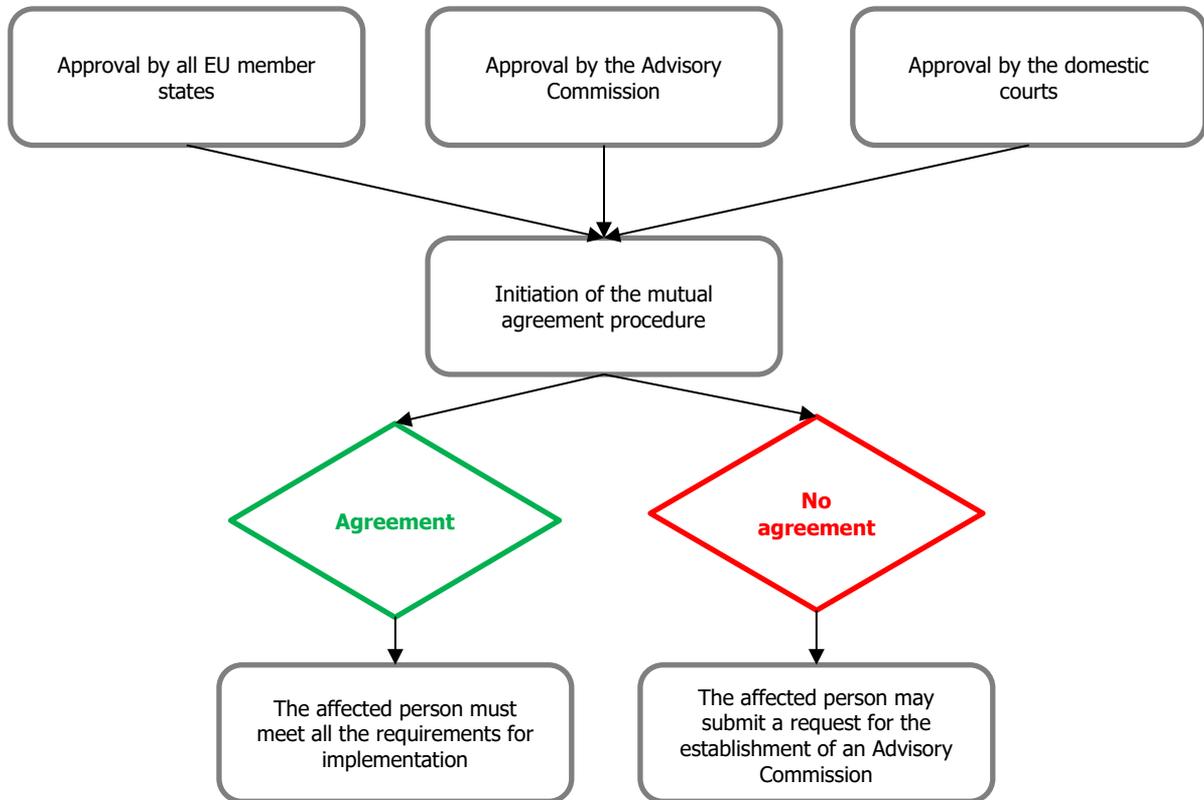
B.4.2. Mutual agreement procedure according to EU Arbitration Convention

Please refer to chapter B.4.1. Article 7 (1) EU Arbitration Convention stipulates that a mutual agreement procedure may last a maximum of **two years from** the date on which the case was first fully und comprehensively submitted to a competent authority. This is the point in time when **all necessary information according to Chapter B.1.3.2.** is available. An exception applies only if the competent authorities extend this period in agreement with the enterprises involved or if these enterprises have made use of a domestic legal remedy (see Chapter C.1.2.).

According to Art. 8 (2) EU Arbitration Convention, the competent authorities may suspend the proceedings until the judicial or administrative proceedings have been concluded, which are intended to determine whether enterprises have committed a severely punishable violation of tax regulations (in particular an intentional or negligent reduction in taxes to be punished under the Austrian Fiscal Penal Code) by actions that result in a profit adjustment according to Art. 4 EU Arbitration Convention.

B.4.3. Mutual agreement procedure according to EU Tax Dispute Resolution Act

Fig. 4 Course of mutual agreement procedure according to EU Tax Dispute Resolution Act



Please refer to chapter B.4.1. A mutual agreement procedure **is initiated** if the complaint has been accepted by the competent authorities or upon court's ruling of all EU Member States concerned or by the Advisory Commission (§ 22 and § 23 EU Tax Dispute Resolution Act).

The Austrian competent authority may demand **further information or evidence** from the affected person during the mutual agreement procedure (§ 25 (1) EU Tax Dispute Resolution Act). § 14 EU Tax Dispute Resolution Act applies accordingly. The **affected person** may request the Austrian competent authority to be **heard, to provide information, to present further evidence or to indicate witnesses** (§ 25 (2) EU Tax Dispute Resolution Act).

If an Austrian court or a **court** of another EU Member State, whose rulings cannot be deviated from, **has ruled on the dispute**, the dispute can be **deemed as finished**. The **mutual agreement procedure is immediately terminated** (§ 31 EU Tax Dispute Resolution Act) and, consequently, it is inadmissible to submit an application for **arbitration** (§ 33 (2) no. 1 in conjunction with § 34 EU Tax Dispute Resolution Act).

If **criminal tax proceedings** are pending against the affected person because of an intentional or grossly negligent **tax offence**, with the exception of administrative tax violations, the Austrian competent authority suspends the **mutual agreement procedure** if

such criminal tax proceedings are related to the income or assets forming a question in dispute (§ 69 EU Tax Dispute Resolution Act). There is no legal remedy against such a suspension. Consequently, this also interrupts the elapse of time for reaching an agreement under the mutual agreement procedure. The **suspension ends only once the criminal tax proceedings are completed** (§ 69 (3) EU Tax Dispute Resolution Act). Thereafter, the **mutual agreement procedure is continued** and needs to be completed within the time limit according to § 24 EU Tax Dispute Resolution Act (§ 69 (4) EU Tax Dispute Resolution Act). However, if the result of the **criminal tax proceedings** is a criminal **punishment**, **there is no access to arbitration** (§ 33 in conjunction with § 35 EU Tax Dispute Resolution Act, see also C.1.4.).

B.4.4. Role of covered person during mutual agreement procedure

DTTs and EU Arbitration Convention do not contain any provisions regarding the procedural position of the covered person during the mutual agreement procedure. Thus, in those cases the general principles of FFC are applicable. EU Tax Dispute Resolution Act contains provisions that expressly provide for the rights and obligations of the affected person (see B.4.3.). If these provisions are not applied, then the general principles of the FFC will apply.

The mutual agreement procedure is divided into two stages: a purely unilateral stage between the Austrian competent authority and the covered person and a bilateral stage between the competent authorities of the Contracting States. FFC is applicable only to the unilateral stage of the mutual agreement procedure. During the unilateral stage of the mutual agreement procedure the covered person has a status of a party as provided for under § 78 FFC, and is therefore entitled to all rights connected to that status. That means, for instance, that the competent authority must grant the covered person access to files if the requirements of § 90 FFC are met. Such an access to files does not cover those documents that were created or sent in by tax authority of the other Contracting State (e.g. their position papers) since those documents belong to the bilateral stage of the mutual agreement procedure. Indeed, documents sent by tax authorities of the other Contracting State do not constitute a part of the (tax) case file.

In the unilateral stage of the mutual agreement procedure, the covered person also needs to fulfil all obligations vis-à-vis the competent authority, which are provided for in the FFC, such as a duty to disclose (§ 119 and § 139 FFC), a duty to cooperate (§ 115 FFC), duties to notify (§ 120 et seq. FFC), etc. Therefore, the covered person is obliged to contribute to the mutual

agreement procedure by explaining their circumstances and, if necessary, by submitting further evidence.

The second stage of the mutual agreement procedure, i.e. the bilateral communications and negotiations between tax authorities of both contracting states, takes place outside the scope of FFC. Therefore, at this stage the covered person has neither a status of a party within the meaning of FFC nor the rights connected to that status.

This approach, upon which the covered person does not have the status of a party during the bilateral stage of the mutual agreement procedure, is in line with the principles adopted by the OECD (see Commentary on OECD Model Convention 2017, Art. 25, paras. 36 et seq.). At the same time, the OECD recommends (especially in transfer pricing cases) that the competent authorities of both contracting states give the covered person the opportunity to represent their position orally and to provide the relevant documents (see Commentary on OECD Model Convention 2017, Art. 25, para. 40).

B.5. Completion of the mutual agreement procedure

B.5.1. General remarks

A mutual agreement procedure can be completed by reaching an agreement, or can be terminated for various reasons (e.g. a unilateral solution by a state, a withdrawal of the request or the complaint by the covered person / affected person, etc.) or it can be also completed simply by a lapse of time when the covered person requests arbitration, if there is an arbitration clause provided for under an applicable DTT (MLI).

In the case of **EU Tax Dispute Resolution Act**, all of these circumstances are regulated separately:

- agreement (§ 26 et seq. EU Tax Dispute Resolution Act);
- lapse of time (§ 29 EU Tax Dispute Resolution Act);
- termination (§ 30 EU Tax Dispute Resolution Act);
- discontinuation, i.e. court ruling (§ 31 EU Tax Dispute Resolution Act), and
- lack of a question in dispute, e.g. due to withdrawal by the affected person (§ 68 EU Tax Dispute Resolution Act).

B.5.2. Positive outcome of the mutual agreement procedure

The mutual agreement procedure generally ends with a **written agreement** between the competent authorities of both contracting states (e.g. final exchange of letters between both contracting states which are parties to an applicable DTT). If the applicable DTT provides for the subsequent arbitration procedure, the written agreement should ideally be reached **within** the specified **time frame** (generally 2 years, with possible extensions or deviations). For information about the respective deadlines and how they are calculated, see C.1. in detail. However, the agreement between the competent authorities of the Contracting States can also be reached at any time after the start of the arbitration procedure but before the announcement of the arbitration decision (for details see B.5.3.).

The result of a mutual agreement procedure is – if a court has not yet decided on the subject matter of the procedure – to be implemented by the competent authority *ex officio* in a tax notice in accordance with **Section 48 (2) FFC**. For the implementation of that notice, see B.6.

B.5.3. Negative outcome of the mutual agreement procedure

An unsuccessful outcome of the mutual agreement procedure occurs in the event of a failure to reach an agreement, a termination by the lapse of time or any other reasons for termination without an agreement. If the competent authorities of both contracting states cannot agree on a solution, the mutual agreement procedure has **failed**. This failure to reach an agreement is generally recorded in writing and communicated to the covered (affected) person. In the case of the **EU Tax Dispute Resolution Act**, it is mandatory to notify the **affected person of the failure to reach an agreement, providing also the reasons** why no agreement could be reached (see C.1.4.). The deadline for the affected person to request the arbitration begins with the receipt of this notification (see C.1.4.).

If a decision was issued in accordance with **§ 48 (1) FFC** and the mutual agreement procedure results in the failure to reach an agreement, the competent authority determines *ex officio* the date on which the mutual agreement procedure came to the end by issuing a tax assessment decision, in accordance with **§ 48 (3) FFC**, in order to determine, as a result and if necessary, the final date for **the suspension of tax collection**, according to § 212a (2a) FFC. This approach is applicable in all mutual agreement procedures according to DTTs, EU Arbitration Convention and EU Tax Dispute Resolution Act.

If it is possible to request the arbitration, the decision in accordance with § 48 (3) FFC may be issued only if no request for the establishment of an arbitral panel has been made within 50 days from the notification, despite the fact that a decision issued under § 48 (1) FCC is legally binding. If a request to establish an arbitration panel has been submitted within the 50-day-long period, a declaratory decision pursuant to § 48 (3) FFC may **be issued only** if it is certain that the **request to establish an arbitration panel will be rejected** and no arbitral panel will be appointed. The 50-day-long period corresponds to the period to submit a request for arbitration pursuant to § 32 (3) EU Tax Dispute Resolution Act (see also C.1.4.). **If a request has been made after** the elapse of the **50-day-long period**, this has no effect on the decision, which was already issued. This means that, in the event of a reduction in the Austrian tax liability as a result of the arbitration, the suspension of tax collection or any claim for interest will be determined after the date of the decision, regardless of when the arbitration is actually completed.

The **mutual agreement procedure** is completed merely upon the **lapse of time**, if:

- arbitration is provided for in the applicable legal instrument;
- the competent authorities have not reached an agreement within the time limit set for this purpose; and
- the affected person requests the initiation of arbitration (see also § 29 EU Tax Dispute Resolution Act).

The length of a period relevant for the completion of the mutual agreement procedure upon the lapse of time depends on the applicable legal instrument (see C.1.). However, the competent authorities of the Contracting States may also end the mutual agreement procedure earlier **without agreement** if it is evident that no agreement is possible within the prescribed period. As far as the **EU Tax Dispute Resolution Act** is concerned, this principle is explicitly laid down in § 30 EU Tax Dispute Resolution Act.

B.5.4. Subsequent annulment of a tax assessment decision pursuant to § 48 (4) FFC

A tax assessment decision in accordance with § 48 (2) FFC must be **nullified** *ex officio* in accordance with § 48 (4) FFC, if the Austrian competent authority becomes aware that **within seven years** the **other** Contracting State has failed to implement either the agreement reached with the Republic of Austria during the mutual agreement procedure or **the arbitration decision**.

B.6. Implementation of the agreement reached during mutual agreement procedure

B.6.1. Information for the covered person, their consent and waiver of appeal

The covered person (affected person) is informed about the content of the agreement reached during the mutual agreement procedure as soon as possible.

If the agreement is reached during a **mutual agreement procedure according to EU Tax Dispute Resolution Act**, the **consent** of the affected person and their **waiver of legal remedies** are necessary for the effectiveness of the agreement. The waiver of legal remedies must include also a possible appeal against the (declaratory) decision pursuant to § 48 (2) FFC and all legal remedies against the agreement and/or its implementation under the domestic laws of the EU Member States concerned. Furthermore, any ongoing **domestic legal remedies** must be terminated (§ 27 EU Tax Dispute Resolution Act). The consent may be expressed by completing the form, which is attached to the notification the affected person receives about the agreement. As long as the affected person has not consented to the agreement, such an agreement is not binding and cannot be implemented (§ 28 (2) EU Tax Dispute Resolution Act). If the affected person does not give their consent within the period of **60 days** (of the notification of the agreement), the procedure is considered to be completed without an agreement. In such a case the affected person does not have a right to **request** the establishment of the **Advisory Commission**.

If the agreement is reached during a mutual agreement procedure according to **an applicable DTT or EU Arbitration Convention**, the consent of the covered person and the waiver of legal remedies **do not constitute any mandatory preconditions** for the conclusion of the mutual agreement procedure. However, if the affected person does not waive their right to legal remedies expressly (in accordance with § 255 (2) FFC), the agreement can be implemented domestically only after the one-month-long deadline for an appeal has elapsed (in accordance with § 245 FFC).

B.6.2. Information for the competent local tax office and implementation of the agreement

The result of a mutual agreement procedure is notified to the competent local tax authority. The competent local tax authority is obliged *ex officio* to **implement** the agreement, which

was determined due to the tax assessment decision in accordance with § 48 (2) FFC (§ 295 (2a) FFC). This tax assessment decision has the important function as a basis for further domestic proceedings. This principle also applies to decisions in accordance with § 118 FFC and § 188 FFC. § 118 (9) (c) FFC provides *expressis verbis* for the annulment or modification of a decision issued in accordance with § 118 FFC if a different solution is provided as the result of the agreement reached during the mutual agreement procedure. If no decision concerning the tax withheld at source has ever been issued, the result of the agreement is implemented by paying back the excess of the taxes withheld at source upon the affected person's request.

The agreement is implemented in all concerned contracting states, **regardless** of the deadlines provided for under their domestic legislations, in particular those deadlines that regulate the binding force of decisions and the **statute of limitation** (Art. 25 (2) last sentence OECD Model Tax Convention, see also § 295 (2a) FFC). In addition to that, the agreed adjustments can be implemented irrespective of the absolute statute of limitation of ten years.

B.7. Costs

Each contracting state bears its own costs arising from the mutual agreement procedure. The costs incurred by the covered person (affected person) are not reimbursed.

C. Arbitration procedure

C.1. Initiation of arbitration procedure

C.1.1. Arbitration procedure according to OECD Model Tax Convention (Art. 25 (5))

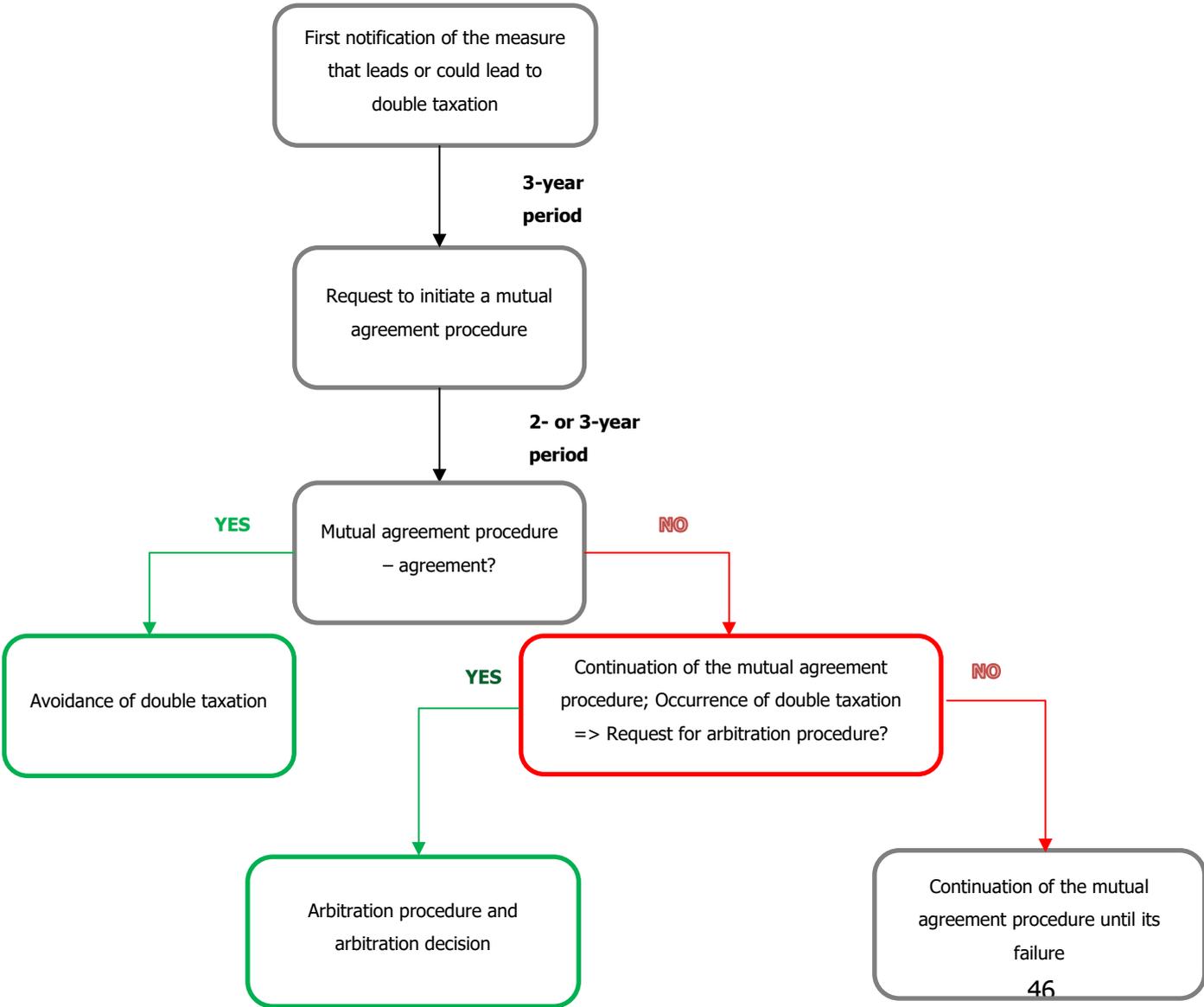
If the mutual agreement procedure does not lead to an agreement within **two years**, the covered person may **request** the establishment of an arbitral tribunal. If such a request is submitted, the competent authorities of the contracting states are obliged to appoint the arbitral tribunal and obtain its opinion.

The competent authorities may extend this two-year-long period through an **agreement** with the covered person and **continue with** the mutual agreement procedure (instead of initiating the arbitration procedure). Furthermore, the two-year-long deadline to request the initiation of the arbitration procedure **does not begin to run** so long as the **taxation** not in accordance

with the applicable DTT has not occurred, i.e. the tax has already been assessed or otherwise finally notified to covered person (Commentary on OECD Model Tax Convention, Art. 25, para. 72).

The **bilateral arbitration clauses**, which are included in the DTTs concluded by Austria (see Annex 3), do not always follow the exact wording of the OECD Model Tax Convention. Some of those DTTs, such as the DTT concluded with Switzerland, provide for a three-year-long deadline to request the initiation of the arbitration procedure. Some of those DTTs may also include deviations with regard to the arbitration procedure in general and/or additional conditions regarding (the submission of) the request. Furthermore, Austria has also concluded **bilateral consultation agreements with other contracting states (e.g. Switzerland)**, which contain more detailed provisions regarding essential procedural principles, such as deadlines to submit a request for arbitration procedure and its contents (see Annex 3).

Fig. 5. Course of arbitration procedure according to OECD Model Tax Convention

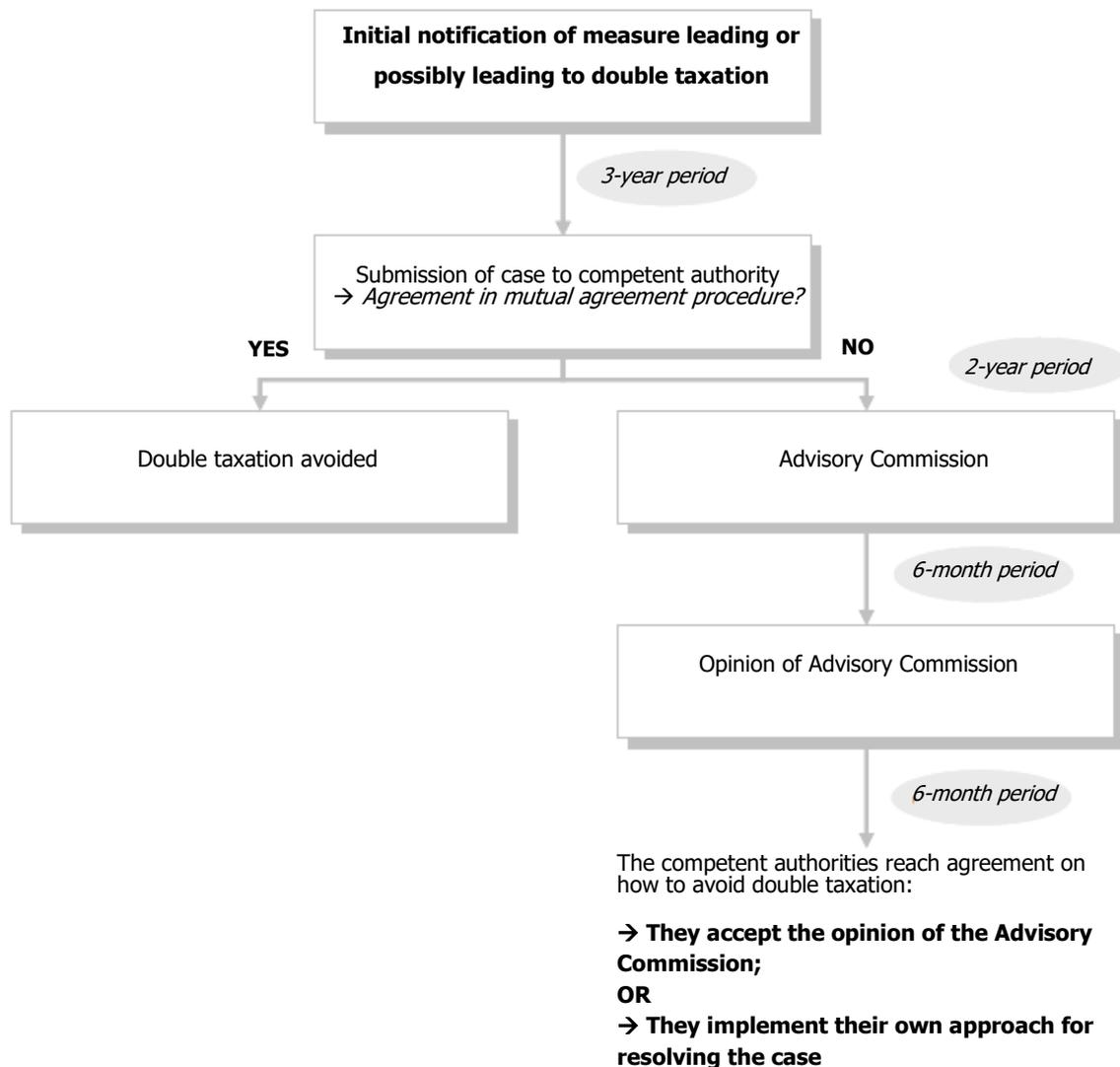


C.1.2. Arbitration procedure according to EU Arbitration Convention

If the mutual agreement procedure initiated under EU Arbitration Convention does not lead to an agreement within **two years from** the date upon which the request **was fully and comprehensively submitted** to the competent authorities of the concerned contracting states, these competent authorities are **obliged** to set up an **Advisory Commission** and obtain its opinion. The competent authorities of the concerned contracting states **may extend** this **period** upon an **agreement** with the **enterprise(s)**. If the enterprise does not submit their request **to initiate the arbitration procedure within the prescribed deadline, it** is understood that it has given their **consent** to extend the deadline for further deliberations during the mutual agreement procedure.

The two-year-long **deadline begins** only once **all necessary minimum information**, including clear references to the legal basis, **is disclosed** to the competent authorities and the **final tax assessment**, i.e. a final tax assessment decision has been given. However, the **deadline** is **suspended** as long as a domestic appeal is pending. The time begins to run anew only as soon as a legally binding decision has been given (Art. 7 (1) (2) EU Arbitration Convention). The restrictions in Art. 7 (3) EU Arbitration Convention must nevertheless be taken into account (see Chapter C.2.2.)

Fig. 6. Course of arbitration procedure according to EU Arbitration Convention



C.1.3. Arbitration procedure according to MLI

Art. 18 to 26 MLI (Part VI) contain a specially designed arbitration clause. Austria decided to apply the arbitration clause to its existing DTTs. However, this arbitration clause can be applied only if both Contracting States of a particular DTT:

- apply MLI to that DTT,
- had opted in for the application of Part VI MLI to that DTT, and
- the application of this arbitration clause is not prevented by options and reservations.

Annex 3 contains a list of DTTs to which Part VI MLI applies or will apply so soon as the other Contracting State has also ratified MLI.

The functioning of the arbitration clause of Part VI MLI is based on **Art. 25 (5) OECD Model Tax Convention**. Therefore, the **principles** set out in C.1.1., such as the requirement that

the taxation has already occurred, must be observed. However, Part VI MLI is different in such a way that it provides for the introduction of detailed procedural regulations that can be designed individually by the contracting states. All contracting states to MLI that opted in for the application of Part VI MLI indicated their **structuring options**. Their positions for each case are summarised by the OECD as the depositary of MLI in a so-called "**Arbitration Profile**", which is publicly available.¹⁹ The effects of these positions on DTTs concluded by Austria are shown in Annex 3.

Austria limited the **scope of application** of the arbitration clause from Part VI MLI by expressing a reservation under **Art. 28 (2) MLI** in order to exclude abuse cases (see Annex 3). In addition to this, when applying the arbitration clause, the respective reservations formulated by the other contracting state need to be observed.²⁰

The **scope of application** of the arbitration clause is also **limited in time**. Due to the reservation exercised by Austria under Art. 36 (2) MLI, arbitration procedure resulting from the mutual agreement procedure, which was initiated upon a request submitted to the competent authority of a contracting state prior to the entry into force of MLI in relation to an applicable DTT, may be carried on only upon an agreement to that respect between the competent authorities of both contracting states.

The **deadline to request the initiation of** arbitration procedure was also modified. In contrast to Art. 25 (5) OECD Model Tax Convention, under Art. 19 (11) MLI Austria indicated that the **initiation** of the arbitration procedure **can generally only take place after three years**. Furthermore, **changes to this deadline** are possible **in individual cases**: the **competent authorities** may agree on a case-by-case basis that a **longer or shorter period** applies to a particular case, provided that they agree on this topic before the end of the general period and inform the covered person (Art. 19 (1b) MLI). In addition, MLI includes detailed rules for calculating this deadline (see Art. 19 (8) and (9) MLI). These rules are missing from Art. 25 (5) OECD Model Tax Convention, but, if necessary, can be agreed bilaterally between contracting states.

¹⁹ See OECD, Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting, <https://www.oecd.org/ctp/treaties/beps-mli-signatories-and-parties.pdf> in the current version.

²⁰ A full and current list of MLI reservations can be accessed at: <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>.

Many rules of MLI are **default rules** and thus only apply in the **absence of a consultation agreement** between the competent authorities of the contracting states, which, according to Art. 19 (10) MLI, must be concluded for each arbitration clause introduced by MLI before the start of the arbitration procedure for the first case carried out under Part VI MLI. Therefore, Austria concludes consultation agreements on the conduct of arbitration procedure with each of the contracting states, to which the arbitration clause under MLI is applicable. These arbitration agreements (competent authorities' agreements, CAAs) are announced in the Arbitration Profile of Austria and by the respective contracting state, and are also published in Austria in Findok.

C.1.4. Arbitration procedure according to EU Tax Dispute Resolution Act

If the mutual agreement procedure according to EU Tax Dispute Resolution Act **ended without an agreement** (§ 29 or § 30 EU Tax Dispute Resolution Act), the affected person can submit a written request to set up an Advisory Commission. This request shall be sent to the same authorities as the complaint (§ 32 (2) and (6) EU Tax Dispute Resolution Act, see also B.1.1.3 and B.2.). There is a deadline to submit this request of **50 days** of the **notification that the mutual agreement procedure ended without reaching an agreement** (§ 32 (3) EU Tax Dispute Resolution Act).

The request to set up an advisory commission can be submitted **as soon as** the **deadline for reaching an agreement** in the mutual agreement procedure has **elapsed** (§ 24 EU Tax Dispute Resolution Act), **even if** it was not yet communicated to the affected person that the mutual agreement procedure had been completed without an agreement. The deadline according to § 32 EU Tax Dispute Resolution Act remains unaffected. The deadline for reaching an agreement during the mutual agreement procedure is generally **two years** and begins with the **last notification of a decision on acceptance** of the complaint (§ 24 (1) EU Tax Dispute Resolution Act). However, this period can be **extended by a maximum of one year**, if a competent authority of one EU Member State sends a request in writing to the competent authority of the other EU Member State, stating the reasons therefor. The affected person must be informed about such an extension (§ 24 (3) EU Tax Dispute Resolution Act). The elapse of time for the mutual agreement procedure is suspended in the case of **ongoing domestic appeal proceedings** and begins to run again only when these appeal proceedings are finally concluded or suspended (§ 24 (4) EU Tax Dispute Resolution Act).

The request is **reviewed firstly** by the Austrian competent authority (§ 33 EU Tax Dispute Resolution Act). The competent authority must either accept the request (formlessly) within **30 days of its receipt** or notify the rejection. The notification of a rejection can be appealed. The request must meet the requirements of § 85 (2) FFC (written form, signature, etc.). If the request is incomplete, the deadline for the competent authority to decide is extended until the request is successfully remedied within the period set by the tax authority (§ 33 (1) EU Tax Dispute Resolution Act). If the incomplete request is remedied too late or inadequately, the application is deemed to be withdrawn in accordance with § 85 (2) FFC (see also B.1.3.3.).

The **reasons upon which a request may be rejected** by the Austrian competent authority are **exhaustively** listed in § 33 EU Tax Dispute Resolution Act:

- failure to submit **within the deadline** (§ 33 (1) EU Tax Dispute Resolution Act);
- **a question in dispute can no longer be resolved** (§ 33 (2) no 1 in conjunction with § 34 EU Tax Dispute Resolution Act);

The question in dispute (§ 34 EU Tax Dispute Resolution Act) can no longer be resolved if the Federal Tax Court or a **court** of another EU Member State, whose rulings cannot be deviated from, has **ruled on the issue**.

- imposition of a **penalty or association fine** on the basis of a tax offence (§ 33 (2) no 2 in conjunction with § 35 EU Tax Dispute Resolution Act);

The penalty for a tax offence (with the exception of tax regulatory infringements) must have been imposed within the **five-year-long period before** submitting the **complaint** for **an intentionally or grossly negligent tax offence** committed **within the seven-year-long period** preceding the lodging **of the complaint**. The tax offence must be related to the income or assets affected by the question in dispute (§ 37 EU Tax Dispute Resolution Act).

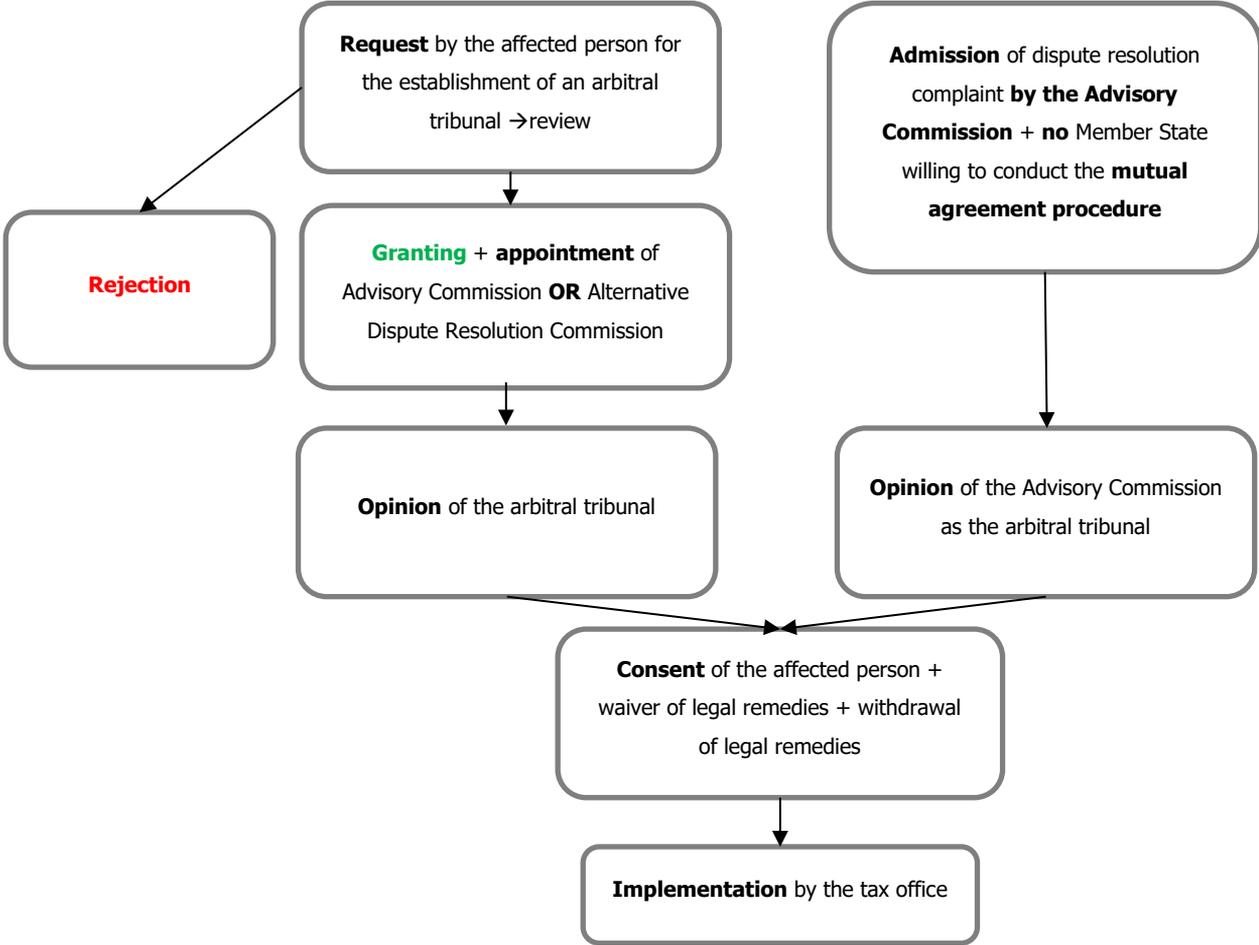
- **no double taxation** (§ 33 (2) no 3 in conjunction with § 36 EU Tax Dispute Resolution Act).

The term "double taxation" is defined in § 3 (1) no 4 of the EU Tax Dispute Resolution Act, and it includes both **juridical and economic** double taxation. Thus, transfer pricing conflicts can also be the subject of arbitration.

In addition, the **arbitration procedure** according to EU Tax Dispute Resolution Act are **automatically initiated** if the **Advisory Commission** has accepted the complaint **but the competent authorities have not initiated the mutual agreement procedure** (see

B.2.2.4.3.). In this case, the Advisory Commission, which has already been set up and accepted the complaint, acts further as the arbitral tribunal.

Fig. 7 Course of arbitration procedure according to EU Tax Dispute Resolution Act



C.2. Relation to domestic legal remedies

C.2.1. Arbitration procedure according to OECD Model Tax Convention (Art. 25 (5))

It is not possible to **initiate** arbitration procedure under Art. 25 (5) **if a ruling of a court or administrative tribunal** has already been issued in the case in one of the contracting states (Commentary on OECD Model Tax Convention, Art. 25, para. 76). Thus, the request to conduct arbitration proceedings should include a **written declaration** by the covered person that so far no court ruling has been issued on the questions submitted under these procedures in either of the two contracting states (see point 1 of the Sample Mutual Agreement on Arbitration in the Annex to the Commentary on Art. 25 of OECD Model Tax Convention).

Once the appeal proceedings are **suspended**, there are no reservations to start arbitration procedure. After the conclusion of the arbitration procedure, the covered person has the option of either accepting the **arbitral decision or pursuing the appeal proceedings** (Commentary on OECD Model Tax Convention, Art. 25, para. 77).

C.2.2. Arbitration procedure according to EU Arbitration Convention

Pending domestic appeals suspend the elapse of time to file a request to initiate arbitration proceedings (see C.1.3.). However, if the **competent authorities of the EU Member States** are **bound** by domestic (court) rulings, **no arbitration** procedure may be initiated if the covered person has made use of a domestic legal remedy and has not withdrawn this legal remedy before a court ruling has been issued (Art. 7 (3) EU Arbitration Convention). If there is a ruling by an Austrian court, no arbitration procedure can be conducted (see also B.1.1.1.)

The competent authority is **not obliged to set up an advisory commission if** it was conclusively determined during domestic judicial or administrative proceedings **that one of the enterprises concerned** is liable to a serious penalty (Art. 8 (1) of the EU Arbitration Convention).

C.2.3. Arbitration procedure according to MLI

In principle, arbitration procedure under MLI and domestic appeal proceedings can be conducted in parallel, but the following restrictions apply:

- if a court's ruling is given **prior to** the request for the arbitration procedure, **access to the arbitration is denied** (Austria has exercised the reservation pursuant to Art. 19 (12) MLI);
- if a court's ruling is issued **before the arbitral award**, the arbitration procedure **ends automatically** (Art. 19 (12) (b) MLI);
- if a court's ruling is given **after the arbitral award**, the **arbitral award** is no longer binding and **does not have to be implemented** (see Art. 19 (4) (ii) MLI).

The requirements regarding the implementation of the arbitral award that the covered person needs to fulfil must also be observed (see C.4.5.).

C.2.4. Arbitration procedure according to EU Tax Dispute Resolution Act

If an Austrian court or a **court** of another EU Member State, whose decisions cannot be deviated from, **has ruled on the question in dispute**, this question in dispute is **deemed to have ceased to exist** (§ 62 EU Tax Dispute Resolution Act). The **arbitration procedure is terminated immediately**. The complaint ceases to exist (§ 67 EU Tax Dispute Resolution Act). It should also be considered how the appeal proceedings **impact** on the **implementation** of arbitral awards (see C.4.3.1. and C.4.5.).

If **criminal tax proceedings** are pending against the affected person for an intentionally or grossly negligent **tax offence**, with the exception of tax regulatory infringements, the Austrian competent authority shall suspend the **arbitration procedure**, if the criminal tax proceedings are related to the income or assets affected by the question in dispute (§ 69 EU Tax Dispute Resolution Act). There is no legal remedy against this suspension. The **suspension is lifted** only once **the criminal tax proceedings are completed** (§ 69 (3) EU Tax Dispute Resolution Act). **After that**, the arbitration proceedings **continue** and shall be completed within the deadline set in accordance with § 47 EU Tax Dispute Resolution Act. However, if at the **end of the criminal tax proceedings the affected person is held liable (effectively punished)**, then the arbitration procedure is completed immediately, and the **complaint** is declared to have ceased to exist (§ 69 (5) in conjunction with § 67 EU Tax Dispute Resolution Act).

C.3. Course of arbitration procedure

C.3.1. Arbitration procedure according to the OECD Model Tax Convention

The course of the arbitration procedure according to the OECD Model Tax Convention is not regulated in a detailed manner in Art. 25 (5) OECD Model Tax Convention. The course of this procedure is the responsibility of the competent authorities of both contracting states, which can conclude a consultation agreement. A template for such a consultation agreement is provided in the Annex to the Commentary on Art. 25 of OECD Model Tax Convention. The bilateral consultation agreements, which Austria has concluded with other contracting states under the existing DTTs, are listed in Annex 3.

C.3.2. Arbitration procedure according to EU Arbitration Convention

Arbitration procedure under EU Arbitration Convention is conducted by the **Advisory Commission**. The Advisory Commission may request the **competent authorities** of the

contracting states **involved in the case** to appear before it **or** to provide **information, evidence and documents**, unless this is contrary to domestic law and/or administrative practice, the information cannot be obtained or a trade, industrial, commercial or professional secret would be violated (Art. 10 (1) EU Arbitration Convention). While preparing its arbitral decision, the Advisory Commission may also hear **witnesses** or **experts**. The Advisory Committee is bound to **secrecy** (Art. 9 (6) EU Arbitration Convention).

The **covered person (enterprise)** may provide the Advisory Commission with any information, **evidence** or documents and have the **right** to be heard by the **Advisory Commission** upon request. In addition to that, the enterprise is obliged to do so upon request of the Advisory Commission. The covered person can **bring their own positions on the factual and legal situation to the Advisory Commission** and submit such evidence and documents they deem necessary or are **obliged to do so** upon the request of the Advisory **Commission** (Art. 10 EU Arbitration Convention). Any positions and documents, which are submitted by the enterprise, must be translated by that enterprise into the language of the proceedings.

Pursuant to Art. 8 (2) EU Arbitration Convention, **arbitration procedure may be suspended** if the enterprise is subject to judicial or administrative proceedings to determine whether it has committed a **severely punishable violation** of tax legislation (in particular an intentional or negligent tax evasion punishable under the Austrian Fiscal Penal Code) by actions that result in an adjustment of profits pursuant to Art. 4 EU Arbitration Convention.

C.3.3. Arbitration procedure according to MLI

Art. 23 MLI specifies the types of arbitration proceedings. Art. 23 (1) MLI provides for the **“final offer” procedure as a rule** (also known as the “last-best offer procedure” or “baseball arbitration”). In this type of procedure, the decision of the arbitrators is based on selecting one of the proposed resolutions submitted by the competent authorities of each contracting state concerned. However, contracting countries may also reserve the right to use the **independent opinion procedure**, in which the arbitrators decide the case on the basis of the information available to them. Austria is open to apply both types of procedures (see Annex 3).

C.3.4. Arbitration procedure according to EU Tax Dispute Resolution Act

If the request to set up the arbitral tribunal is admissible (see C.1.4.), the Austrian competent authority establishes such an arbitral tribunal (§ 38 EU Tax Dispute Resolution Act). The arbitration panel can be set up either as the **Advisory Commission** (§ 38 et seq. EU Tax Dispute Resolution Act, the primary form of the arbitral tribunal) or as the **Alternative Dispute Resolution Committee** (§ 49 et seq. EU Tax Dispute Resolution Act), of which the latter can also take the form of a standing committee. These two organisational units differ in terms of their composition and procedure. Whereas the procedure before the Advisory Commission is expressly regulated in the EU Tax Dispute Resolution Act, the competent authorities of the concerned EU Member States have far-reaching options with regard to the Alternative Dispute Resolution Committee.

The competent authorities of the concerned EU Member States are solely responsible for the choice regarding the type of an arbitration panel, the appointed arbitrators and the organisation of the proceedings. These issues are not determined by the affected person. However, the affected person may demand that important procedural deadlines are complied with.

The **appointments** for the arbitral tribunal take place within **120 days of the receipt** of the **request** for such appointments or from the moment when the incomplete application has been remedied (§ 39 or § 50 EU Tax Dispute Resolution Act). The chairperson of the arbitration panel immediately notifies the affected person that the arbitration panel has been set up successfully (§ 40 (7) and § 49 (6) EU Tax Dispute Resolution Act). If **the appointments do not occur in due time**, the **affected person may refer a case to the Federal Tax Court:**

- If the **independent persons** have not been appointed in a timely manner, the affected person may, **within 30 days** after **the deadline has expired**, refer a case to the Federal Tax Court for the **appointment** of the independent persons for Austria (§ 42 EU Tax Dispute Resolution Act). An ordinary or extraordinary **appeal** against the ruling of the Federal Tax Court may be lodged with the Supreme Administrative Court in accordance with Art. 133 (4) in conjunction with Art. 133 (9) Federal Constitutional Law. If the Federal Tax Court fails to adjudicate the case, a further request to set a deadline for the Federal Tax Court can be filed with the Supreme Administrative Court according to Art. 133 (1) no 2 in conjunction with Art. 133 (7) Federal Constitutional Law.

- If the **representatives of the Austrian competent authority** have not been appointed in due time, the affected person may submit a **complaint of conduct** (complaint against an unlawful conduct of an authority by application of laws in accordance with Art. 130 (2) no. 1 Federal Constitutional Law) to the Federal Tax Court (§ 40 (8) EU Tax Dispute Resolution Act). On the basis of such a complaint of the affected person the **Federal Tax Court** has to **determine** whether or not the conduct of the authority is unlawful. If **unlawfulness** is determined, the **Austrian competent authority must immediately stop the unlawful conduct**, i.e. it must immediately **appoint** its representative(s).

Within **the same period of 120 days**, the Austrian **competent authority** notifies the affected person of:

1. the signed **Rules of Functioning** of the arbitration panel,
2. the **date** by which the arbitral panel is to deliver its **opinion (decision)** on the resolution of the question in dispute, and
3. **information** on all **applicable provisions** of the domestic legislation of the concerned EU Member States and of any applicable agreements or conventions (§ 43 (3) no. 1 to no. 3 EU Tax Dispute Resolution Act).

If the affected person was not given the **Rules of Functioning in due time** and the chairperson of the arbitration panel did not remedy this (§ 45 EU Tax Dispute Resolution Act), the affected person may also **file a case to the Federal Tax Court** as a **complaint of conduct** (§ 43 (4) EU Tax Dispute Resolution Act). On the basis of the complaint of the affected person the Federal Tax Court has to determine whether or not the conduct of the authority is unlawful. If unlawfulness is determined, the Austrian competent authority must immediately stop the illegal conduct, i.e. it must immediately notify the affected person of the **Rules of Functioning**.

The **affected person** can be **summoned** by the arbitration panel (§ 53 (1) EU Tax Dispute Resolution Act) or obliged **to submit additional information to the arbitration panel** (§ 53 (2) EU Tax Dispute Resolution Act). The affected person is **obliged** to comply with these notifications.

In general, the affected person is **entitled** to submit to the arbitration panel any information, evidence or **documents** relevant for the opinion (decision) on the respective question in dispute, but **only if the competent authorities have expressed their consent** in that

regard (§ 55 EU Tax Dispute Resolution Act). The same condition applies if the affected person wishes to appear before the arbitration panel in person or to send their representative with a power of attorney (§ 55 (2) EU Tax Dispute Resolution Act).

The affected person and their representative (with a power of attorney) are subject to the tax **secrecy rules** in accordance with § 48a FFC (§ 54 EU Tax Dispute Resolution Act) with regard to any information, evidence and documents of which they become aware during the arbitration procedure. They are considered to be "third parties" within the meaning of § 48a (3) FFC. They may be required to make a relevant **declaration** to the competent authorities in this regard. In the case of a **breach** of this confidentiality obligation, **§ 252 Austrian Fiscal Penal Code** in conjunction with § 48a (3) FFC are applicable.

C.3.5. Role of the covered person during the arbitration procedure

The statements from B.4.4. apply by analogy and with deviations explained in C.3.1. – C.3.4.

C.4. Completion of arbitration procedure and implementation

C.4.1. Conclusion of arbitration procedure according to OECD Model Tax Convention (Art. 25 (5))

The arbitration procedure ends with the **arbitral award**. The competent authorities of the concerned contracting states agree mutually on the deadline for the disclosure of the arbitral award and on the arbitration method for the arbitral tribunal to apply (see Annex 3). The arbitral award has a binding effect only with respect to these questions in dispute, which were submitted to a specific procedure, and therefore does not constitute a precedent for any other procedures (Commentary on OECD Model Tax Convention, Art. 25, para. 83).

In order to become effective, the arbitral award must be implemented by a **mutual agreement of the competent authorities of the contracting states**. Some bilateral arbitration clauses enable competent authorities to reach an agreement that deviates from the arbitral award (see Commentary on OECD Tax Convention, Art. 25, para. 84; Annex 3). The **covered person** may **reject** the **arbitral award**. In such a case, the arbitral award does not become **binding** for the competent authorities and **does not have to be implemented** (see C.4.5.).

In addition to this, the **competent authorities of the concerned Contracting States may agree on a solution to the dispute at any time before the arbitral award is given**. In such a case, the arbitration procedure is discontinued immediately and the agreement reached between the competent authorities of the Contracting States is implemented as a mutual agreement (see, for example, Point 10 of the Sample Mutual Agreement on Arbitration in the Annex to the Commentary on Art. 25 of OECD Model Tax Convention). The statements from B.5. and B.6. apply by analogy.

C.4.2. Completion of arbitration procedure according to EU Arbitration Convention

Within six months from its establishment the Advisory Commission delivers an opinion, which implements the arm's length principle (Art. 4 EU Arbitration Convention) and avoids double taxation (Art. 11 EU Arbitration Convention).

After the Advisory Commission has given its opinion, **the competent authorities of the Contracting States concerned have a six-month-long period to reach an agreement**. They **may** deviate from the **opinion** of the Advisory Commission **by mutual agreement**, provided that double taxation is avoided. If they are unable to reach an agreement, they are bound by the opinion given by the Advisory Commission (Art. 12 EU Arbitration Convention). The competent authority to which the case was originally submitted notifies each of the concerned enterprises of the agreement of the competent authorities and the opinion of the Advisory Commission. For the **implementation** see C.4.5.

C.4.3. Completion of arbitration procedure according to MLI

C.4.3.1. Completion with arbitration decision

The arbitration procedure is completed with the **arbitral award**, the **withdrawal of the request for arbitration** or the agreement of the competent authorities of contracting states.

The method, upon which an arbitral tribunal may opine, depends on the reservations to MLI expressed by the contracting states (see also C.3.3.). According to **Art. 19 (10) MLI** the competent authorities of contracting states may regulate, by mutual agreement, the deadline for the arbitral award's notification and other **procedural aspects** (see Annex 3). In **principle**, the arbitral award is **binding** for the competent authorities and **must be implemented, only** if the **taxpayer** meets the requirements provided for in Art. 19 (4) MLI

(see also C.2.3.). The arbitral award is implemented by a **mutual agreement of the competent authorities of the concerned contracting states**. If, after the arbitral award has been notified, the covered person still has domestic remedies in relation to the issue under consideration during the arbitration procedure, they must waive the right to such remedies or withdraw any pending remedies **within 60 days** from the date when the mutual agreement of competent authorities of the concerned contracting states was notified. For these contracting states, which, under their domestic law, do not require the taxpayer's consent, Art. 19 (4) (b) (iii) MLI foresees that the arbitral award **is no longer binding if the taxpayer initiates** judicial proceedings. The same applies if a court declares the arbitral award invalid (Art. 19 (4) (b) (ii) MLI).

Furthermore, the **arbitral award is not binding if** both contracting states to the applicable DTT have opted in for the **possibility to agree on a different resolution** in accordance with Art. 24 MLI. In this case, the **competent** authorities can arrange for a **deviating agreement** within three calendar months after the arbitral award's notification and so in such a case they do not have to implement the arbitral award. Under this option the contracting states may also restrict that the arbitration procedure shall only be conducted in accordance with "independent opinion" procedure (Art. 24 (3) MLI). Austria has opted in for Art. 24 MLI (without restriction). The treaties, to which Art. 24 MLI applies, are listed in Annex 3.

C.4.3.2. Conclusion with agreement of competent authorities or as a result of withdrawal of request

If, before the arbitral award is given, the competent authorities of concerned contracting states agree on an **amicable solution** of the **case**, the arbitration procedure is **terminated effective immediately** (Art. 22 MLI). The same effect occurs if the **covered person withdraws their request** for the initiation of arbitration.

C.4.4. Conclusion of arbitration procedure according to EU Tax Dispute Resolution Act

According to EU Tax Dispute Resolution Act, the arbitration procedure is completed with

- **the final decision implementing the opinion of the arbitration panel** (§ 58 EU Tax Dispute Resolution Act);
- **a different agreement between the competent authorities;**
- **a discontinuation of the question in dispute** (§ 62 EU Tax Dispute Resolution Act, see C.2.4.); **or**

- **if a question in dispute ceases to exist** (§ 67 EU Tax Dispute Resolution Act).

C.4.4.1. Conclusion through final decision

The **final decision** of the competent authorities of the EU Member States may be in line or deviate from the **opinion** of the Advisory Commission or Alternative Dispute Resolution Committee. The Advisory Commission or Alternative Dispute Resolution Committee has to give its **opinion** (§ 46 or § 52 EU Tax Dispute Resolution Act) **within six months from** the date of its **set-up** (§ 47 EU Tax Dispute Resolution Act). If the Advisory Commission considers that the resolution of the question in dispute will, by its nature, take more than six months, the Advisory Commission may extend this **period by three months** (§ 47 (3) EU Tax Dispute Resolution Act). The chairperson informs the affected person about this extension.

After the Advisory Committee has delivered its opinion, the **competent authorities of the EU Member States have a six-month-long period** to agree whether they follow the **opinion** or they seek to reach an agreement that deviates from the opinion on this question in dispute (§ 58 EU Tax Dispute Resolution Act). If the competent authorities of the EU Member States have not **reached an agreement** on how to resolve the question in dispute within the period of six months, **they are bound by the opinion** of the arbitration panel, i.e. the final decision is in line with the opinion.

The Austrian competent authority notifies the affected person of the **final decision** within **thirty days** at the latest. The notification is carried out by sending the decision, which include the essential contents of the agreement (see B.6.1.). If the affected person has not been notified of the final decision, they may, provided that their place of residence is in Austria, submit a **complaint of conduct** to the Federal Tax Court (§ 58 (4) EU Tax Dispute Resolution Act). The Federal Tax Court determines whether the **conduct of the Austrian competent authority was unlawful**, and if this is the case, the **Austrian competent authority** must immediately stop such an unlawful conduct, i.e. it must **immediately notify** the affected person of the final decision.

In order for **the final decision to be implemented**, the affected person must, in accordance with § 59 EU Tax Dispute Resolution Act, **submit a request within 60 days of the notification, in which they:**

- agree on the **final decision** (no 1);

- waive the **right to appeal** against the final decision according to § 48 (2) FFC, **as well as all legal remedies** according to the law of the other **concerned** EU Member States (no 2 and no 3, see also E.3.2.); **and**
- discontinue any **appeal proceedings that are already in progress** (no 4).

If the requirements according to § 59 EU Tax Dispute Resolution Act **are not fulfilled or not fulfilled completely or not fulfilled in due time**, the final decision is not binding and shall not be implemented.

At the same time, the affected person is requested to make a **statement** (no 5) as to **whether** they consent to the **publication of the full text** of the final decision. If the affected person gives their consent and the competent authorities of the EU Member States concerned come to the agreement as well, the entire text of the final decision is published (§ 63 EU Tax Dispute Resolution Act). If one of these two conditions is not fulfilled, the Austrian competent authority creates a **summary of the final decision** in accordance with § 64 EU Tax Dispute Resolution Act and sends it to the **affected person**. The affected person is **entitled** to submit, **within 60 days** from the receipt of the summary, a request to the Austrian competent authority and the competent authority of the other **concerned** EU Member States **to remove information contained in the summary, the disclosure of which would breach any trade, business, industrial or professional secrets or trade practices**. This also applies to information that contradicts public order (§ 64 (3) EU Tax Dispute Resolution Act).

C.4.4.2. Conclusion through agreement between competent authorities

If the competent authorities agree on the solution to the question in dispute (complaint) before the arbitral decision is given, the dispute ceases to exist in accordance with § 67 EU Tax Dispute Resolution Act. For details, see C.4.4.4.

C.4.4.3. Conclusion through discontinuation of question in dispute

Pursuant to § 62 EU Tax Dispute Resolution Act, the disputed issue is deemed to have been discontinued (eliminated) if the Federal Tax Court or a court of the other concerned EU Member State has ruled on the disputed issue. This leads to the situation in which the question in dispute ceases to exist in accordance with § 67 EU Tax Dispute Resolution Act. See in detail C.2.4. and C.4.5.

C.4.4.4. Conclusion if question in dispute ceases to exist

The **question in dispute may cease to exist** (§ 67 EU Tax Dispute Resolution Act) at any stage of the procedure (the complaint phase, the mutual agreement procedure or the arbitration procedure) according to EU Tax Dispute Resolution Act. In the case of arbitration procedure, question in dispute ceases to exist if

- the dispute in question has been resolved unilaterally,
- the competent authorities of the EU Member States have reached an agreement on the resolution of the question in dispute before the arbitral award is given,
- the complaint as such was withdrawn (§ 68 EU Tax Dispute Resolution Act, see also B.1.1.3.),
- an effectively binding penalty or association fine was imposed for a tax offence within the meaning of § 69 EU Tax Dispute Resolution Act (see § 69 (4) and (5) EU Tax Dispute Resolution Act and C.2.4.), or
- circumstances occur which are qualified as other reasons, such as reasons that concern the personal sphere of the affected person.

If a dispute ceases to exist, the competent authority must immediately **determine that through a decision**. An appeal against such a decision can be lodged in accordance with § 243 et seq. FFC. Upon the issuance of such a decision, the **proceedings under** the EU Tax Dispute Resolution Act are terminated effective immediately.

If the result of the arbitration procedure is neither an agreement between the competent authorities nor a unilateral solution (e.g. if the affected person withdraws their application or their initial complaint), the competent authority is obliged to issue *ex officio* a decision according to **§ 48 (3) FFC, which determines the date** on which the **proceedings are terminated**, but only if a decision according to § 48 (1) FFC was previously issued, so that the procedure **for the suspension of tax collection** or the determination of the period for which interest payment can be made, can occur, if necessary (see in detail B.5.3. with regard to the unsuccessful conclusion of the procedure).

C.4.5. Implementation

The **agreement between the competent authorities**, which implements the **arbitral decision (opinion)** given as a result of an arbitration procedure under the applicable DTT, MLI, EU Arbitration Convention or EU Tax Dispute Resolution Act or which reflects an agreement between the competent authorities that deviate from the arbitral award, must be

determined by the competent authority in accordance with § 48 (2) FFC, **provided that an administrative court has not yet ruled on the subject matter of the proceedings.** The general remarks on the implementation from Chapters B.5. and B.6. apply by analogy.

The agreement needs to be notified to the covered person (the affected person) and the competent tax office. The requirements concerning the approval and the waiver of legal remedies must be observed, as well.

In the case of arbitration procedures under the **OECD Model Tax Convention, MLI and EU Tax Dispute Resolution Act, the taxpayer's consent is required.** If the covered person (affected person) rejects the arbitral award given as a result of arbitration procedure under the OECD Model Tax Convention, it may not be implemented (see C.4.4.1. for details). An arbitral award given in accordance with Art. 19 MLI can only **be implemented** if the **taxpayer** fulfils the requirements provided for under Art. 19 (4) MLI (see C.4.4.3. for details). An arbitral award given under EU Tax Dispute Resolution Act may only be implemented if the affected person has fulfilled the requirements of § 59 EU Tax Dispute Resolution Act.

C.5. Costs

C.5.1. Arbitration procedure according to OECD Model Tax Convention, EU Arbitration Convention and MLI

Art. 25 (5) OECD Model Tax Convention does not contain any detailed rules concerning the bearing of costs. The competent authorities therefore need to agree on costs. See Annex 3 for any agreements in that respect.

Art. 11 (3) EU Arbitration Convention stipulates that costs of the arbitration procedure are shared equally between the contracting states involved. Such costs cover the administrative costs of the Advisory Commission and the salary and expenses for the independent persons. The costs of the enterprise (e.g. tax advisor) are excluded and they are borne by the enterprise themselves.

Art. 25 MLI provides for a default rule only, which is nevertheless superseded by any agreement between the competent authorities of the concerned contracting states in accordance with Art. 19 (10) MLI. According to Art. 25 MLI, each competent authority of the

concerned contracting states has to bear their own costs. This includes the costs of the arbitrators appointed by the competent authorities. Each contracting state bears half of the costs of the chairperson and other expenses associated with the conduct of the arbitration. The covered person bears their own costs.

C.5.2. Arbitration procedure according to EU Tax Dispute Resolution Act

According to § 176 FFC, the affected person has no claim over costs. The affected person bears the costs incurred by them, which may include the costs incurred through an appearance before the arbitration panel in person or submissions of additional information, evidence or documents (§ 77 (3) EU Tax Dispute Resolution Act).

If the affected person has withdrawn the complaint during the arbitration proceedings (i.e. after the Advisory Commission had been set up for the purpose of accepting the complaint or during arbitration procedure before the Advisory Commission or the Alternative Dispute Resolution Commission), the costs of these proceedings conducted before the Advisory Commission or the Alternative Dispute Resolution Commission may be imposed on the affected person pursuant to § 77 (4) EU Tax Dispute Resolution Act, if the competent authorities of the concerned EU Member States agree on the imposition of such costs on the affected person. Costs in such a case include salary and expenses of the independent persons, including the chair (§ 77 (2) EU Tax Dispute Resolution Act).

D. Advance Pricing Arrangements (APAs)

D.1. General principles, types of APAs

An **Advance Pricing Arrangement (APA)** is an arrangement whereby, in advance of controlled transactions, an appropriate set of criteria is established (e.g. method, comparables and any appropriate adjustments thereto, critical assumptions regarding future events) between one or more **taxpayers** and one or more **tax administrations** for the determination of the **transfer pricing** for those transactions over a **fixed period of time** (see OECD Transfer Pricing Guidelines 2022, para. 4.134).

An APA is requested by a **taxpayer**, and it requires discussions between the taxpayer, one or more related taxpayer(s) and one or more tax administration(s). In accordance with the OECD Transfer Pricing Guidelines, a **unilateral** APA is an agreement concluded between one or more taxpayer(s) and one tax administration only. A **bilateral or multilateral** APA is based on an agreement between the competent authorities of two or more tax administrations under a procedure based on the applicable DTT(s).

The OECD Transfer Pricing Guidelines recommend that an APA be concluded on a bilateral or multilateral basis, wherever possible (see OECD Transfer Pricing Guidelines 2022, para. 4.173) in order to avoid any possible double taxation. This is because bilateral (or multilateral) APAs require an agreement between two or more Contracting States, which as a general rule prevents double taxation within the scope of application of such APAs.

It is within the competent authorities' discretion to accept a request to conclude an APA. Art. 25 (3) OECD Model Tax Convention, which is the legal basis for a bilateral APA, does not foresee an obligation to enter into an APA. An **ongoing tax audit**, in principle, does **not preclude** a possibility to submit a request to initiate an APA.

An APA can avoid costly and time-consuming audits and judicial appeal proceedings in transfer pricing cases for taxpayers and tax administrations alike. At the same time, APA negotiations tie up considerable resources on the part of tax administrations. However, the conclusion of a bilateral APA allows the taxpayer to enjoy a much higher degree of tax certainty and avoids the need for a mutual agreement procedure.

D.2. Legal bases

An APA may be requested to clarify the basis for pricing of those transactions that fall under **Art. 7 or Art. 9 OECD Model Tax Convention** and to clarify the question of how the generated profits are allocated to the tax jurisdictions concerned. An APA may concern transfer pricing issues of one or more taxpayer(s) or be limited to individual intra-group transactions. An APA is **concluded for future years and future business transactions**.

Bilateral and multilateral APAs are those APAs, which involve the competent authority of at least one other contracting state. They are negotiated according to the same principles as bilateral or multilateral mutual agreement procedures. **Art. 25 (3) OECD Model Tax Convention** is therefore relevant. The requirements for the applicability of the respective DTT(s) as well as the requirements for the applicability of the mutual agreement article under those respective DTT(s) (Art. 25 OECD Model Tax Convention) must therefore be fulfilled (see B.2.2.1.).

Consequently, APA procedures can only be carried out **with those countries, which are Austria's DTT partners**. There is no legal basis for conducting an APA procedure with those states, with which Austria has not concluded a DTT. APAs cannot be based on the EU Arbitration Convention since it does not contain a provision comparable to Art. 25 (3) OECD Model Tax Convention (see B.1.1.).

In addition to this, in Austria unilateral APAs can be obtained within the framework of advanced rulings pursuant to § 118 FFC. An application for an **advance ruling** (§ 118 FFC) and a request for a bilateral or multilateral **APA** are not mutually exclusive and may in principle **be filed in parallel**. It should be noted, however, that **double taxation** may result if the other concerned contracting state does not share the legal position expressed in the ruling. In such cases, the taxpayer can initiate a **mutual agreement procedure**. Pursuant to **§ 118 (9) (c) FFC**, in case an agreement is reached in the mutual agreement procedure, an advance ruling may be retroactively repealed or amended accordingly by the tax assessment decision pursuant to § 48 (2) FFC, because such an advance ruling is derived from such a tax assessment decision (see also § 295 (2a) FFC).

D.3. Pre-filing Meeting

Before formally initiating an APA, i.e. before sending the request in accordance with D.4., the competent authority may arrange an informal discussion with the taxpayer ("pre-filing meeting"). These preliminary discussions offer an opportunity to discuss the readiness to implement an APA, the suitability of an APA in the specific case, the type and range of the documents to be provided, and an approximate time line. It is at the discretion of the competent authority to decide whether the pre-filing meeting will take place.

The taxpayer should undergo such preliminary talks, if they are offered, with all concerned contracting states. More than one round of discussions may be required.

D.4. Request to conduct an APA

Bilateral APAs are initiated only at the request of the taxpayer. The request must be made in writing to the competent authority of the country of residence of the parent company or of the head office and simultaneously also to the competent authority of the other contracting state under an applicable DTT.

The contents and scope of an APA must be formulated as specifically as possible in the request, i.e. it should be indicated which companies (including permanent establishments) and which countries are concerned, the structure of the group, the scope of activities, the transaction or transactions to be covered by an APA as well as the intended period of validity of an APA and which years an APA is to cover.

According to B.1.3.1., if available, the (supporting) documentation must in any case be included in the request. The request should explain, as precisely as possible, the factual elements that are relevant to the choice of the applicable method rather than explaining the tax assessment base and taxation not in accordance with an applicable DTT. The request should also present, in a clear and detailed manner, how the chosen method is applied as well as the results of such an application. If the taxpayer (enterprise) expects double taxation as a result of a business transaction, this needs to be explained and justified. The choice of method should be justified with reference(s) to the relevant legal provisions, in particular the arm's length principle.

Furthermore, the following documents must be submitted:

- a presentation of industry and market trends for the sectors of activity of the companies to be covered by an APA;
- the financial data of the concerned companies, including their profit/loss situation and a list of the main movable and immovable assets held as business assets;
- comprehensive analyses of the functions and risks of all stakeholders;
- a comparability analysis and the relevant database studies, as well as an explanation of any comparability adjustments undertaken;
- if applicable, suggestions for validity conditions (critical assumptions) and for how to deal with changes to these conditions and/or acceptable fluctuations (see also D.9.) and
- all other significant tax consequences of the selected method (e.g. under national tax law or for indirect tax purposes).

What kind of additional documents need to be submitted will depend on the circumstances of each individual case. This can be clarified during a pre-filing meeting (see D.3.).

When the competent authority receives a request to initiate an APA, it shall send an acknowledgement of receipt to the applicant (taxpayer) and request that the application be supplemented, if necessary. If the competent authority grants an APA in relation to the request, the competent tax office will be informed so that this circumstance can be taken into account when issuing decisions regarding the relevant tax periods (see in detail D.6.).

D.5. Review of the facts and conduct of negotiations

After the submission of a (complete) request for the conclusion of an APA, the competent authority will contact the competent authority of the other concerned contracting state (under an applicable DTT).

At the same time, the competent authority will review the taxpayer's request. Additional documents may be requested or **information** may be obtained at the taxpayer's premises. If necessary, **joint enquiries** will be carried out with the competent authorities of the other concerned contracting state.

Based on the information available, the competent authorities will prepare and exchange position papers. In addition, negotiations between competent authorities of the concerned

contracting states can also be held. The **taxpayer can be asked** to take part in such meetings in a suitable form, as well.

D.6. Agreement between the competent authorities

The competent authorities shall agree, in writing, on the content of an APA during the mutual agreement procedure. The **agreement** shall take the form of a draft APA, which shall be sent to the taxpayer. The **taxpayer** is given a **period** within which they can give their **consent** to the agreement. If the taxpayer agrees on the draft APA in due time, such an APA becomes final and binding for competent authorities (and relevant tax offices). If a taxpayer has not given their consent in due time, the agreement does not become valid and is thus not binding.

If there is a final, binding APA, the competent authority will inform the local tax office about the conclusion of the APA. The APA must then be taken into account by the competent tax office when issuing tax assessment decisions for the relevant tax years. § 48 (2) FFC is not applicable to APAs. If the APA has not yet been finalised at the time the decisions relating to the relevant periods are issued, the decisions shall be issued by the tax office as provisional decisions (pursuant to § 200 FFC), and they shall be replaced accordingly by a final decision after the agreement on the APA has been reached between the competent authorities of the concerned contracting states. If final decisions have already been issued for the relevant periods, depending on the facts the agreement (APA) can be considered through a waiver of payment under § 236 FFC, an amendment to the decision under § 295a FFC (of retroactive effect, possible until the expiry of the statute of limitation), a revocation of the decision under § 299 FFC (within one year) or a reopening of the fiscal years in question under § 303 FFC (application possible until the expiry of the statute of limitations).

In terms of its content, an APA first recites the underlying facts, i.e. the business entities covered, the transaction(s) covered, the start of its validity and the duration of its validity. In principle, an APA is aimed at determining future transfer pricing issues. The binding force of an APA for the future is usually limited to a certain number of years - typically three to five years.

This is followed by the assessment of the underlying facts, i.e. the risk analysis, the comparability check, the choice of an applicable method and its application. Another part concerns the **critical assumptions**, which must be fulfilled for the APA to be valid. Critical assumptions are conditions/assumptions, which are necessary for the method adopted in the

APA to be valid. Specific critical assumptions may, for example, include consistent market conditions, the distribution of functions and risks, the capital structure, the shareholdings structure, the business model, the interest rates, the exchange rates and/or the relevant legislation. These critical assumptions may also include obligations imposed on the taxpayer, such as the reporting obligations and/or the submission of documents.

The subject matter of the APA and the critical assumptions are so interdependent that **a change in the critical assumptions** affects the agreed tax treatment included in the **APA** and can therefore also lead to the **inapplicability** of an APA (see D.9.).

In order to avoid the slightest deviations from the agreed critical assumptions resulting in the non-applicability and/or the need for a renegotiation of the APA, such critical assumptions should, firstly, not be defined too narrowly. Secondly, appropriate adjustment mechanisms, which take into account identifiable possible fluctuations of the relevant circumstances, should be agreed upon. In addition to this, to determine an acceptable level of deviations, certain parameters can be included into an APA, so that only if these parameters are exceeded, the APA would need to be renegotiated at the request of the taxpayer.

The final APA should also contain a provision imposing a reporting obligation on the taxpayer if the critical assumptions change and/or the assumed facts do not materialise accordingly. If the assumed facts are not realised or are realised with substantial changes, this circumstance generally leads to the invalidity of the APA.

It may be necessary to fulfil a reporting requirement, for example, if the business transactions change significantly. The conclusion of an APA does not affect the possibility of conducting a tax audit for the same period.

D.7. Roll-back

In addition to the conclusion of an APA, there is also a possibility to apply a "roll-back", i.e. **adopt the solution in the APA for periods prior to the starting point of the APA through a mutual agreement procedure**, provided that the facts and circumstances of the prior periods are comparable to those of the periods covered by the APA. Thus, for example, a mutual agreement procedure concerning past transfer pricing problems and an APA for the implementation of a solution for the future may be conducted simultaneously. The statements in Chapter B apply to the mutual agreement procedure.

D.8. Monitoring

The Austrian competent authority reserves the right to apply both monitoring options provided for by the OECD Transfer Pricing Guidelines. First, taxpayers may be required by the agreement(s) reached with the other concerned contracting state(s) to submit annual reports describing the actual business activity carried out by the taxpayer in the year in question, indicating whether the terms of an APA have been complied with and whether the critical assumptions of the APA are still in force. If such reports are required, they must be sent annually to the competent tax office, together with the tax return.

Secondly, in the course of a tax audit, the fulfilment of the parameters and conditions on which the APA is based can be checked, in particular whether the facts have been realised in accordance with the agreement, whether and to what extent changes in the critical assumptions have occurred and whether the transfer prices have been determined in accordance with the APA.

D.9. Subsequent cancellation, revocation or extension of APA

The circumstances, under which an APA is deemed to be terminated, are subject to an agreement between the competent authorities of the concerned contracting state(s) and shall be included in the relevant APA. The Austrian competent authority reserves the right to revoke an APA – unless otherwise agreed – if a fundamental condition of the APA has not been fulfilled by the taxpayer or is no longer fulfilled. The taxpayer and the competent authority of the other contracting state(s) will be informed in the event of a cancellation or a revocation.

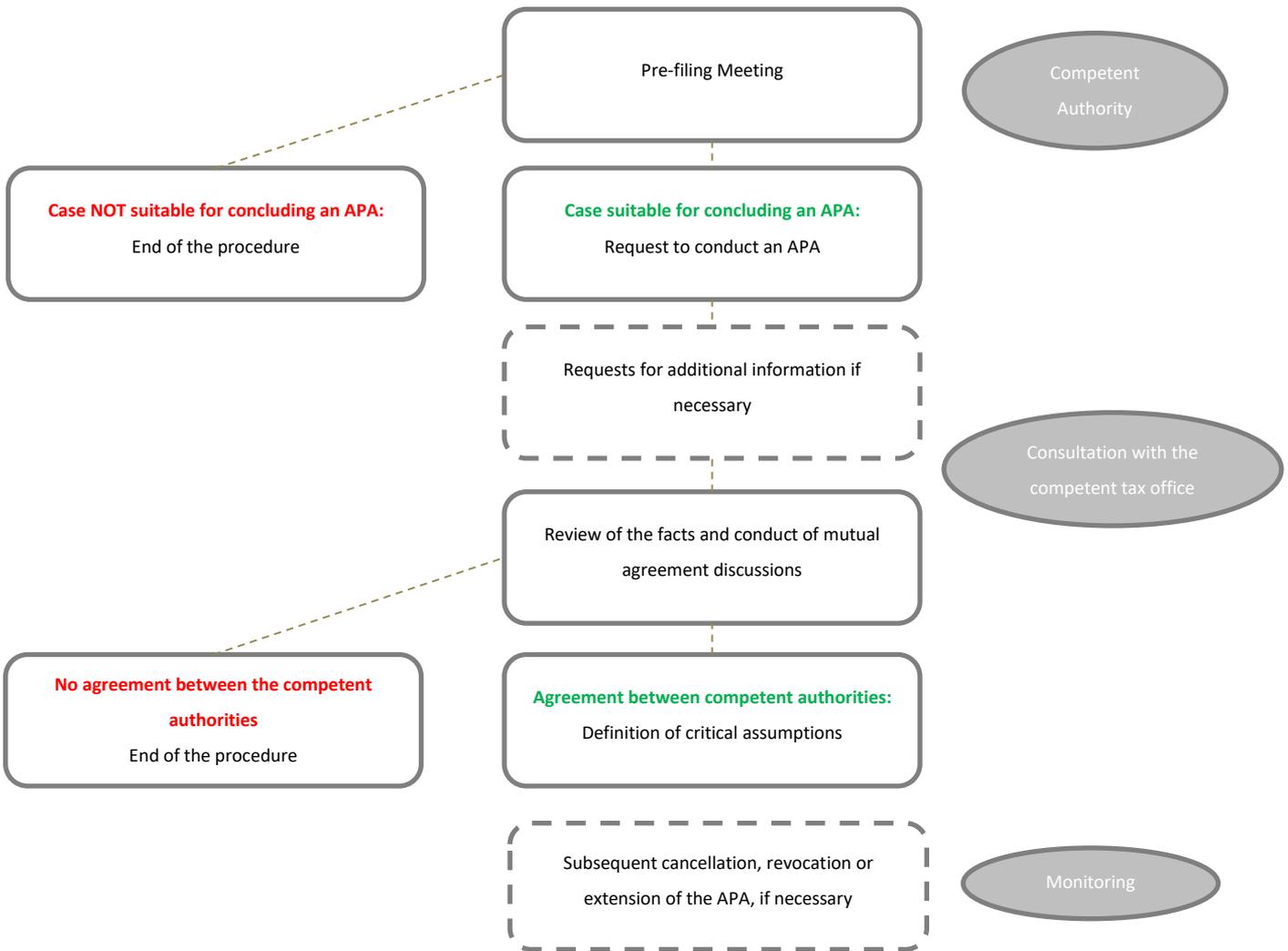
The revocation may lead to a reversal of any tax treatment undertaken on the basis of the APA. For tax purposes, the taxpayer must be treated as though the APA had never been concluded.

Alternatively, in the event of a subsequent change in the critical assumptions, an APA may be adjusted to take the new conditions into account.

As an option, an APA may also be extended at the end of its period of validity if the facts and economic conditions have not changed significantly and if the concerned tax administrations agree on such an extension. If the facts and/or critical assumptions have changed, the

conclusion of a new APA may be required instead, i.e. an adjustment of the method and of the conditions of the APA to the new facts and/or critical assumptions. The new APA will also require an agreement between the competent authorities of the concerned contracting state(s).

D.10. The APA procedure (overview)



Annex 1: Art. 25 of the OECD Model Convention (OECD minimum standard)

Article 25

Mutual Agreement Procedure

(1) Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

(4) The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

Annex 2: Special features of the Austrian DTTs in connection with mutual agreement procedure (as of 1st January 2022)²¹

*Note: the effects of MLI that have already occurred are marked with *. If a future change by the MLI is to be expected, it is marked with **.*

1. Inclusion of Art. 9 (2) OECD Model Convention

1.1. Treaties containing a provision modelled after Art. 9 (2)

Albania; Algeria; Armenia; Australia; Azerbaijan; Bahrain; Barbados; Belgium*; Belize; Bosnia and Herzegovina; Bulgaria; Chile; Germany; Denmark; Estonia; Finland; France; Georgia; Greece; Hong Kong; Ireland*; India; Iran; Iceland; Israel*; Japan; Canada*; Kazakhstan; Qatar; Kyrgyzstan; Kosovo; Croatia*; Cuba; Kuwait; Latvia; Lithuania; Luxembourg*; Morocco; Malta*; Macedonia; Republic of Moldova; Mongolia; Montenegro; Nepal; Netherlands; New Zealand; Pakistan; Poland; Portugal*; Romania; Russia; Saudi Arabia; Serbia; Singapore*; Slovakia*; Slovenia; Spain*; South Africa; Taiwan; Tajikistan; Czech Republic*; Turkey; Hungary*; Turkmenistan; Belarus; Ukraine; Uzbekistan; Venezuela; United Arab Emirates; United States of America; Vietnam; Cyprus.

1.2. Treaties in which there is no provision modelled after Art. 9 (2)

Egypt; Brazil; China**; Indonesia; Italy**; Liechtenstein; Malaysia; Mexico**; Norway, Philippines; San Marino; Sweden; Switzerland;²² South Korea; Thailand; Tunisia.

Note: The mutual agreement procedure is available in Austria for transfer pricing cases irrespective of whether or not a DTT with a particular contracting state contains a provision modelled after Art. 9 (2) OECD Model Convention (see B.1.1.1.).

²¹ Any interim changes can be found on the *Rechtsinformationssystem des Bundes* (RIS) or the Federal Ministry of Finance homepage (<https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/doppelbesteuerungsvertrag/dba-liste.html>).

²² In relation to Switzerland, due to a special feature of the Swiss law, the MLI can only be implemented through a bilateral amendment to the double taxation treaty.

2. Deadlines for initiation of mutual agreement procedures

2.1. Treaties without a deadline

Egypt; Brazil; Kuwait; Sweden; Switzerland; Tunisia; United States of America.

2.2. Treaties with a two-year-long deadline

Indonesia; San Marino.

2.3. Treaties with a three-year-long deadline

Albania; Algeria; Armenia; Azerbaijan; Australia; Bahrain; Barbados; Belgium*; Belize; Bosnia and Herzegovina; Bulgaria; Chile*; China; Denmark; Germany; Estonia; Finland; France; Georgia; Greece; United Kingdom; Hong Kong; India; Iran; Ireland*; Italy; Japan; Canada*; Kazakhstan; Qatar; Kyrgyzstan; Korea (Republic), Croatia; Cuba; Latvia; Lithuania; Luxembourg*; Malaysia; Malta; Morocco; Macedonia; Moldova; Mongolia; Montenegro; Nepal; New Zealand; Netherlands; Norway, Pakistan; Philippines; Poland; Portugal*; Romania; Russia; Saudi Arabia; Serbia; Singapore; Slovak Republic; Slovenia; Spain*; South Africa; Tajikistan; Taiwan; Thailand; Czech Republic; Turkey; Turkmenistan; Ukraine; Hungary*; Uzbekistan; Venezuela; United Arab Emirates; Vietnam; Belarus; Cyprus.

2.4. Other deadlines

Mexico**: Mutual agreement procedure can only be carried out if the other competent authority is informed about the request within four-and-a-half years from the date it was filed.

– ten years for carrying out mutual agreement procedure.

3. Implementation of agreements reached within mutual agreement procedure notwithstanding domestic statute of limitations

3.1. Treaties under which the provision is already in effect

Albania; Algeria; Armenia; Azerbaijan; Australia; Bahrain; Barbados; Belgium*; Belize; Bosnia and Herzegovina; Bulgaria; Chile*; China; Denmark; Germany; Estonia; Finland; France; Georgia; Greece; Hong Kong; India; Iran; Ireland*; Iceland; Kazakhstan; Qatar; Kyrgyzstan; Korea (Republic), Croatia; Cuba; Kuwait; Latvia; Liechtenstein (mutual consultation); Lithuania; Luxembourg*; Malta; Morocco; Macedonia; Mexico (implementation within ten

years or a longer period if the domestic law of the other contracting state permits this); Moldova; Mongolia; Montenegro; Nepal; New Zealand; Netherlands*²³; Norway, Pakistan; Poland; Portugal*; Romania; Russia; San Marino; Saudi Arabia; Sweden²⁴; Serbia; Singapore; Slovak Republic; Spain*; Slovenia; South Africa; Tajikistan; Taiwan; Czech Republic; Turkmenistan; Turkey; Hungary*; Ukraine; Uzbekistan; Venezuela; United Arab Emirates; United States of America; Vietnam; Belarus; Cyprus.

3.2. Future changes by the MLI

Italy**

Annex 3: Arbitration clauses in Austrian DTTs

1. Bilateral arbitration clauses in Austrian DTTs and related consultation agreements regarding arbitration

DTC Partner	Article	Deadline	Other particularities	Procedural arrangements?
Armenia	Art. 25 (5)	2 years	No exception for cases that have already been decided by a court; no right of veto of the taxpayer	Regulations on the composition of the arbitral tribunal, the duration of the procedure and the participation of the taxpayer in the procedure
Azerbaijan	Art. 25 (5)	No deadline	Procedure optional	No procedure set yet
Bahrain	Art. 25 (5)	2 years	No exception for cases that have already been decided by a court; no right of veto of the taxpayer	Regulations on the composition of the arbitral tribunal, the duration of the procedure and the participation of the taxpayer in the procedure
Bosnia and Herzegovina	Art. 25 (5)	2 years	No exception for cases already decided by a	Regulations on the composition of the arbitral tribunal, the duration of the procedure and

²³ See also the "Austrian-Dutch consultation agreement on the implementation of mutual agreement procedures", Administrative guidance of the Federal Ministry of Finance of 13th January 2020, 010221/0402-IV/8/2019, Official publications No. 5/2020.

²⁴ See also the "Austrian-Swedish consultation agreement on the implementation of mutual agreement procedures", Administrative guidance of the Federal Ministry of Finance of 16th October 2020, 2020-0.665.587.

			court; no right of veto of the taxpayer	the participation of the taxpayer in the procedure
Chile	Art. 25 (5)	No deadline	Procedure optional	No procedure set yet
Germany	Art. 25 (5)	3 years	Proceedings before the CJEU as an arbitral tribunal	CJEU Rules of Procedure ²⁵
United Kingdom	Art. 25 (5)	2 years	Procedure corresponds to Art. 25 (5) OECD Model Convention	No procedural regulation has yet been agreed upon
Japan	Art. 25 (5)	2 years	Procedure corresponds to Art. 25 (5) OECD Model Convention	No procedural regulation has yet been agreed upon
Kosovo	Art. 23 (5)	2 years	Procedure corresponds to Art. 25 (5) OECD Model Convention	No procedural regulation has yet been agreed upon
Macedonia	Art. 24 (5)	2 years	No exception for cases already decided by a court; no right of veto of the taxpayer	Regulations on the composition of the arbitral tribunal, the duration of the procedure and the participation of the taxpayer in the procedure
Mongolia	Art. 26 (5)	2 years	No exception for cases already decided by a court; no right of veto of the taxpayer	Regulations on the composition of the arbitral tribunal, the duration of the procedure and the participation of the taxpayer in the procedure
San Marino	Art. 25 (5) to (7)	2 years	all cases pending before national courts must have been closed; taxpayer bound by arbitral award	Regulations on the composition of the arbitral tribunal, the duration of the procedure and the participation of the taxpayer in the procedure; special rule on costs
Switzerland	Art. 25 (5)	3 years	Procedure otherwise corresponds to Art. 25 (5) OECD Model Convention	Mutual Consultation: Administrative guidance of the Federal Ministry of Finance of 12th November 2020, 2020-0.662.649, Official Publications No. 175/2020, "Mutual

²⁵ Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265 of 29.9.2012) as amended on 18 June 2013 (OJ L 173 65), 19 July 2016 (OJ L 217, 12.8.2016, p. 69), 9 April 2019 (OJ L 111, 25.04.2019, p. 73) and of 26 November 2019 (OJ L 316, 06.12.2019, p. 103), https://curia.europa.eu/jcms/jcms/Jo2_7040/de/.

				consultation on the implementation of Article 25 (5) of the Convention of 30th January 1974 between the Republic of Austria and the Swiss Confederation for the Avoidance of double taxation with respect to taxes on income and on capital, including the final protocol"
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Note: The treaty between Austria and Germany falls within the scope of the MLI. However, the arbitration clause in this treaty remains unaffected by the MLI due to Austria's reservation.

2. Treaties into which an arbitration clause will be incorporated based on MLI

DTT Partner	Last Offer	Best	Independent Opinion	Duty of confidentiality	Deviating agreement
Belgium	✓			✓	
Finland	✓				
France	✓				✓
Greece			✓		✓
Ireland	✓				✓
Italy	✓				✓
Canada	✓				
Luxembourg	✓				
Malta			✓	✓	✓
Netherlands	✓			✓	
Portugal			✓		✓
Singapore	✓				✓
Slovenia			✓		✓
Spain	✓			✓	✓

3. Austria's reservations regarding the scope of arbitration clauses under the MLI

Article 28 – Reservations

Reservation Formulated for Scope of Arbitration

Pursuant to Article 28(2)(a) of the Convention, the Republic of Austria formulates the following reservation with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI.

“The Republic of Austria reserves the right to exclude from the scope of Part VI (Arbitration) cases involving the application of its domestic general anti-avoidance rules contained in the Federal Fiscal Code (“Bundesabgabenordnung”), in particular its sections 21 and 22. Any subsequent provisions replacing, amending or updating these anti-avoidance rules would also be comprehended. The Republic of Austria shall notify the Depository of any such subsequent provisions.”

See Republic of Austria's reservations and notifications, accessible at: https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01670/imfname_640078.pdf.

Annex 4: List of abbreviations

APA	Advance Pricing Agreement
Art.	Article
BGBI.	Federal Gazette
DTT	Double taxation treaty
EU	European Union
FFC	Federal Fiscal Code
FMF	Federal Ministry of Finance
MLI	Multilateral Instrument on Implementation of Tax-related Measures to Prevent Base Erosion and Profit Shifting
OECD	Organisation for Economic Cooperation and Development
para.	paragraph