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BMF – International Tax Law Division IV/8 (IV/8)

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Mutual Agreement and Arbitration Procedures under Double Taxation Treaties and the EU Arbitration Convention

This guidance deals with mutual agreement and arbitration procedures under double taxation treaties which are initiated upon request of a covered person under the DTT or ex officio*. It provides an overview of the formal and substantive premises for this procedure in Austria and is intended to covered persons under DTTs with a guide on the process and functioning of the mutual agreement procedure and on requests for such a procedure.*

This guidance replaces the Federal Ministry of Finance (FMF) guidance of 31.03.2015, BMF-010221/0172-VI/8/2015, as well as m.nos. 351-368 of the Austrian Transfer Pricing Guidelines (österreichische Verrechnungspreisrichtlinien, öVPR) 2010. These are deemed repealed. The present guidance does not deal with procedures under the EU Tax Dispute Resolution Act [German acronym: EU-BStbG] or the revised Federal Fiscal Code (FFC).

Version of 1 July 2019

A. General remarks on international mutual agreement and arbitration procedures

A.1. Scope and objectives

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 to achieve this objective. In order to resolve these intergovernmental disputes that lead to double taxation and double non-taxation, the DTTs, the MLI and the EU Arbitration Convention contain rules permitting contracting states to communicate with one another in the form of international mutual agreement and arbitration procedures.

Disputes can arise, for example, from the fact that contracting states apply different allocation rules to the same factual situation, due to differing views on the facts of the case and subsequently arrive at a different allocation of taxing rights, or they may have different legal opinions on how those allocation rules should be interpreted. The aim of mutual agreement procedures is to assist covered persons under a DTT in pursuing their right to be taxed in accordance with the DTT. All the DTTs entered into by Austria contain a rule on mutual agreement procedures. The rules are based on and very closely follow Article 25 of the OECD Model Convention, hence the following explanations refer to the OECD Model Convention 2017 (hereinafter the "OECD Model Convention") unless explicitly stated otherwise.

The OECD/G20 have developed the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter "the MLI")[1] in order to implement the proposals developed as part of the BEPS Action Plan into existing DTTs. The MLI was ratified by Austria and already entered into effect for the first Austrian treaties in

[1] BGBl. III No. 93/2018, see: https://www.bmf.gv.at/steuern/int-steuerrecht/Massnahmen-Verkuerzung.html.

2019.[2] The MLI also contains measures on improving the dispute resolution mechanisms of bilateral DTTs.

Within the EU, tax disputes may also be avoided or resolved by the EU Arbitration Convention.[3] The aim of the EU Arbitration Convention is to avoid double taxation in cases of adjustments of profits by tax authorities concerning associated enterprises and permanent establishments within the European Union (hereinafter: EU).

In addition, beginning on 1st September 2019, tax disputes may also be treated under the EU BStbG.[4] Procedures under the EU-BStbG are not yet dealt with in the present information brochure and will be included in a revised version.

A.2.Types of procedures and legal bases

A.2.1. Mutual agreement procedures under DTTs

The legal bases for mutual agreement procedures are the mutual agreement provisions of the individual DTTs, in their most current versions (*see* Art. 25 OECD Model Convention, which they are based on). An overview of the Austrian DTT network as well as the associated texts of the DTTs can be found under the following link: https://www.bmf.gv.at/steuern/int-steuerrecht/DBA-Liste.html.

38 of the DTTs concluded by Austria are scheduled to be modified by the MLI.[5] Part V (Art. 16 and 17) of the MLI, "Improving Dispute Resolution", aligns the existing mutual agreement clauses with Art. 25 OECD Model Convention. Part VI (Art. 18 to 26), "Arbitration", of the MLI introduces an arbitration clause in individual DTTs.[6]

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[2] The DTTs in question are shown separately in the DTT list and the impacts of the MLI are shown clearly by means of so-called "synthesised versions", see: https://www.bmf.gv.at/steuern/int-steuerrecht/DBA-Liste.html, such as that for the Slovenia DTT.
[3] 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].
[4] BGBl I 62/2019.
[5] The list of the covered DTTs is included in the notification of the Republic of Austria, *see* https://www.bmf.gv.at/steuern/int-steuerrecht/MLI_Notifikation_DE.pdf?6hebc9.
[6] See Annex 3.

A.2.2. EU Arbitration Convention

The provisions of Art. 6 *et seq.* of the EU Arbitration Convention govern procedures in cases in which profits of one enterprise are subject to taxation in two (or more) contracting states on the basis of the arm's length principle (Art. 4 EU Arbitration Convention). The procedure under the EU Arbitration Convention consists of two phases: a mutual agreement procedure similar to that under the OECD Model Convention, and, if applicable, a subsequent arbitration procedure.

A.3. Competent authorities

The competent authorities are, as a rule, the central offices of the respective tax administrations (*see* Art. 3 OECD Model Convention and the DTT provisions modelled on it, and Art. 3 EU Arbitration Convention). In Austria, the Federal Ministry of Finance (FMF) (Directorate IV/8, International Tax Law) is the competent authority for the MAP function. .

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A.4. OECD guidance

In handling mutual agreement procedures, Austria follows the OECD's recommendations in this regard.

In 2007, the OECD published a Manual on Effective Mutual Agreement Procedures (MEMAP).[7] That publication consists of a compilation of 24 "best practices" for improving mutual agreement procedures. The objective of the MEMAP is to promote the efficiency of such

[7] The MEMAP can be accessed at http://www.oecd.org/ctp/dispute/manualoneffectivemutualagreementprocedures-index.htm.

procedures, because there is a concern that an increase in international tax disputes may represent an obstacle to international business activities.

The BEPS project of the OECD/G20 provides a "comprehensive package of measures" which is intended to, *inter alia,* improve dispute resolution. BEPS Action 14 is aimed at "Improving the Effectiveness of Dispute Resolution Mechanisms" in order to ensure effective and rapid resolution of disputes in the mutual agreement procedure.[8]

B. Mutual agreement procedure under DTTs

B.1. Types of DTT mutual agreement procedures

The mutual agreement clauses under DTTs represent an opportunity for the competent authorities of the contracting states to contact one another directly. It is not necessary go through the customary diplomatic channels used for communications between sovereign nations.

This direct communication is possible in the following three cases:

- to resolve taxation not in accordance with the treaty in individual cases (**individual mutual agreement procedures or mutual agreement procedures on request**), e.g. where contracting states are operating on the basis of differing fact patterns; this is the main area of request for mutual agreement procedures.
- to achieve a uniform interpretation of the DTT or to reach agreement on questions of implementation (**general consultation procedures**), e.g. in order to reach agreement on the uniform interpretation of certain terms used in the DTT or to reach agreement between contracting states on the use of certain intergovernmental forms. As a general rule, general consultation procedures are initiated *ex officio*; and
- to avoid double taxation outside of the scope of request of the DTT (**supplemental consultation procedures**), e.g. mutual agreement procedures in respect of transfer

[8] See: https://read.oecd-ilibrary.org/taxation/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report_9789264241633-en#page1. Many of the recommendations of the OECD in this report are modelled on the "best practices" from MEMAP.

pricing adjustments between two permanent establishments of a single parent company domiciled in a third country, OECD Model Commentary Art. 25, m.no. 37.

B.2. Initiation of the mutual agreement procedure

Art. 25 paras. 1 and 2 of the OECD Model Convention envisage mutual agreement procedures on request for individual cases, whereas (general and supplemental) consultation procedures are initiated *ex officio* (Art. 25 para. 3).

B.2.1. Mutual agreement procedures on request

B.2.1.1. Submission of request, deadlines and contracting state of submission

The request to initiate a mutual agreement procedure constitutes a proposition. The request is submitted in writing to the FMF. A request can only be filed when a person has suffered taxation not in accordance with the DTT or it is likely that such taxation will occur.

The request must be submitted by the person concerned or by an authorised representative. For the request to be submitted in Austria, it is necessary that the person concerned is a resident of Austria within the meaning of the DTT (Art. 4) or, in cases of discrimination on the grounds of nationality, is an Austrian citizen (*see* Art. 25 para. 1 OECD Model Convention 2014).[9] In cases concerning associated enterprises, a mutual agreement procedure must generally be applied for in the residence state of the parent enterprise if it was involved in the transaction at stake.

Example 1:

In the course of an external audit of a domestic company which is a part of an MNE group, the tax authorities request clarification under sec. 138 FFC (Federal Fiscal Code) regarding the compensation for the transfer of self-created patents to a foreign associated enterprise whose business consists of exploiting such patents. If the foreign entity is the parent company of the Austrian company, then the proceedings would,

[9] In respect of the contracting state in which the request must be submitted, Austria continues to follow Art. 25 (1), 1st sentence, OECD Model Convention 2014, and thus does not permit requests to be submitted in either contracting state, as envisaged by OECD Model Convention 2017.

as a rule, have to be initiated in the residence state of the parent. 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.

Example 2:

A German GmbH (limited liability co) has a 100% share in an Austrian KG (limited partnership) with an active business and has thereby established a permanent establishment in Austria. The limited partnership has set up distribution permanent establishments in eastern European countries and the profits allocated to these permanent establishments were subject to an upward adjustment as a result of local audits. If a corresponding adjustment cannot be carried out in Austria because the Austrian tax authorities consider the findings of the eastern European tax authorities to be unjustified (taking into account the relevant OECD transfer pricing guidelines), then the German GmbH can request the initiation of mutual agreement proceedings with those eastern European states by filing the request in Austria. The legal basis for Austria to consult with the eastern European states would be Art. 25 para. 3 final sentence of the treaties with those states. The above-mentioned provision also permits mutual agreement proceedings in cases "not dealt with in the DTT" (EAS 2796).

Example 3:

A mutual agreement procedure concerning a transfer pricing adjustment for a transaction between two permanent establishments (situated in different states) of a company domiciled in a third state (see Example 2) would nevertheless first have to be initiated in the parent state. Notwithstanding the fact that the company domiciled in the third state is not relying on the DTT between the two states in which the establishments are situated, consultations can nevertheless be conducted between those two countries in which the establishments are located.

Under the OECD Model Convention, a case must be submitted within three years from the initial notification of the action resulting in taxation not in accordance with the DTT. This is also in line with the BEPS Action 14 minimum standard, which is implemented by Art. 16 para. 1 MLI. When determining whether the deadline has been met, the relevant timeframe is

determined based on the date when the request was received by the competent authority. The filing period for the MAP request will only begin to run from the date the relevant official notice is received by the taxpayer; however a mutual agreement procedure may also be applied for before such an official notice is issued. If a request for the initiation of a mutual agreement procedure is filed before a tax assessment notice is issued, the tax assessment may be issued on a preliminary basis, if it is uncertain whether the prerequisites for the assessment of the tax have indeed been met (sec. 200 FFC).

Example 4:

In the course of an external audit of a domestic company which is part of an MNE group, the tax authorities request clarification under sec. 138 FFC regarding the sale price for the transfer of self-created patents to an associated enterprise which exploits such patents (see Example 1) and the amount of licence fees received by the foreign group company after acquisition of the licence rights. The domestic company is of the opinion that the sale price, as calculated based on forecasts, is arm's-length. Nevertheless, an upward adjustment of the sales price (via an estimate) is to be expected because the MNE group refuses to disclose the data required by the tax authorities. The mutual agreement procedure can therefore already be requested at this point in time.

The mutual agreement provisions of several Austrian DTTs which are not covered by the MLI contain filing periods differing from the OECD Model Convention (see Annex 2). These periods will likewise only begin to run from the date of the initial notification of the action resulting in taxation not in accordance with the DTT. In any event, affected persons ought to file a request as promptly after the first notification of the action giving rise to taxation not in accordance with the DTT.

Where a DTT does not contain a filing period and the MLI does not apply in relation to the contracting state in question, then the initiation of a mutual agreement procedure is possible within the procedural time limits applicable under domestic law.

From the perspective of Austrian law, a request for the initiation of a mutual agreement procedure is not precluded by the fact that an appeal is pending or that the appeal can still be lodged.

It is not possible for a covered person to request a mutual agreement procedure in lieu of applying for a refund of foreign withholding tax. 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.

If the fact pattern giving rise to taxation not in accordance with the treaty spans multiple tax years for which tax returns have already been filed, then all of those tax years may be covered by a single request for a mutual agreement procedure. If it becomes apparent in the course of the procedure that the question in disputed concerns multiple tax years, then the request may be expanded retrospectively to encompass those years. This must be done within the relevant filing period for the tax year in question as defined in the DTT.

B.2.1.2. Content of the request

The request for the initiation of a mutual agreement procedure must refer to the relevant articles of the applicable DTT. The request shall contain the following information:

- Name and, if applicable, date of birth of the person concerned;
- Address/registered office;
- Tax identification number;
- Local tax office;
- Contact person on the part of the affected taxpayer for questions of the FMF (if necessary including telephone number and e-mail address);
- If applicable, contact details of the tax representative and a copy of the power of attorney;
- Precise description of the facts including, if applicable, information on the relationships between the affected persons (e.g. participation structure and relationships);
- Taxable period(s) concerned;
- Taxable amount which, in the opinion of the affected person, is not taxed in accordance with the DTT;
- Explanation of the extent to which, in the opinion of the affected taxpayer, the taxation is not in accordance with the DTT;
- Information on pending or planned legal remedies, as well as legally binding judgements already issued with respect to the question in dispute in Austria or abroad, as well as any

other requests for mutual agreement proceedings submitted in other states (including related documents).

- Appropriate documentation (e.g. assessment notices, tax audit reports, any rulings issued on the question in dispute, APAs, etc.) both from Austria and from abroad which may be of relevance to the mutual agreement procedure (e.g. as evidence of double taxation). This also includes information facilitating a review of the timely filing of the request;
- Confirmation that the documents submitted are correct and complete and that the affected taxpayer will assist the competent authorities in concluding the mutual agreement procedure in a reasonable time.

As a general rule, the request must be filed in German although in all cases in which mutual agreement procedures are conducted in other languages, it will be advisable to submit translated documents.

If the FMF receives a request for the initiation of a mutual agreement procedure, it will confirm receipt and will, if appropriate, request additional information or documentation. The FMF will set an appropriate deadline for the submission of this documentation/information, taking into account the complexity of the information requested. In addition, the competent authority of the other contracting state and the local tax office will be informed of the request at the earliest opportunity.

If the request submitted by the affected person is incomplete or if additional information is necessary, then a request for additional information or for complementation will be issued. A deadline will be set in light of the complexity of the information requested. As a rule of thumb, a period of six weeks will often be appropriate. Upon request of the affected person, this period may also be extended once. An application for an extension of the period may be submitted in writing or by e-mail. If the additional documents/information submitted still do not meet the requirements for a request for a mutual agreement procedure, the competent authority may issue a second request for supplementation or reject the request as unfounded. The decision as to the best approach is a discretionary decision on the part of the tax authority. In exercising its discretion, the tax authority will also take into account the complexity of the information requested and whether an extension of the deadline was granted.

B.2.1.3. Initial assessment of the request

As soon as a complete request for initiation of a mutual agreement procedure has been received, it will be examined whether the request of the affected person can be effectively addressed by domestic measures or whether the initiation of a mutual agreement procedure is necessary. The following prerequisites must be met, among others, for the initiation of a mutual agreement procedure:

- Applicability of DTT;
- Impending or realized taxation not in accordance with the DTT;
- Compliance with filing limits;
- Justification of the request;
- Complete request.

If the competent authority deems the request to be well-founded and the objection to be justified, it will initiate the mutual agreement procedure. Whether the prerequisites for initiation are met will also be reviewed where a request is submitted abroad. The proceedings requested by the other competent authority will only be initiated if the prerequisites are met.

An audit settlement reached between the affected person and a tax administration will not prevent the initiation of a mutual agreement procedure (*see* OECD Model Convention 2017, Art. 25, m.no. 45.1). Similarly, access to the mutual agreement procedure will not be denied if an anti-abuse rule under domestic law (such as sec. 22 FFC) or in the DTT might be applicable in the case at hand (*see* OECD Model Convention 2017, Art. 25, m.no. 26).

Part VI of the MLI is primarily concerned with arbitration but it also contains several special rules for mutual agreement procedures. For DTTs modified by Part VI (see Annex 3), these rules should thus be taken into account for the mutual agreement procedure. Pursuant to Art. 19 paras. 5 and 6 MLI, the competent authority which receives the request for a mutual agreement procedure must confirm receipt within two calendar months and must inform the other DTT state regarding the request. In addition, the two contracting states must either request additional information or confirm that all necessary information has been provided within three calendar months from the date of receipt of the request for initiation of a mutual agreement procedure /of its confirmation.

B.2.1.4. Suspension of collection

In addition to the possibility of submitting an request for a deferral (sec. 212 FFC) or for suspension of collection measures (sec. 212a FFC) where the respective prerequisites are met, the taxpayer may submit a special request for suspension of collection/relief from taxation based on sec. 48 FFC to the FMF.

A measure under sec. 48 FFC must be necessary to balance domestic and foreign taxation. Temporary relief from double taxation under sec. 48 FFC cannot be granted if a suspension of tax collection was granted or if a request for such would be possible. Because the duty to investigate *ex officio* is of secondary importance in proceedings which are aimed at obtaining reliefs or benefits, the request must be justified and well-founded (calculation of amounts in question, proof of foreign taxation, etc.).

The issuance of tax relief notices under sec. 48 FFC is at the discretion of the FMF. As a rule, a notice under sec. 48 FFC will be issued for the duration of the mutual agreement procedure or for up to two years and will foresee the application of the credit method for granting relief. Follow-up requests are permitted. If a sec. 48 FFC notice lapses or expires, interest on the tax claim can accrue.

Temporary relief cannot be granted if there is a risk that the tax cannot be recovered. Temporary relief with respect to *de minimis* amounts or the mere risk of double taxation is not to be considered expedient in the interests of procedural economy. Such relief will therefore not be granted. Mere double taxation does not constitute an unduly harsh treatment. Any unduly harsh treatment (e.g. liquidity issues) should be invoked in the request.

B.2.2. Mutual agreement procedures *ex officio*

The general consultation procedure (Art. 25 para. 3, 1st sentence OECD Model Convention) is meant to resolve interpretation or application issues of general importance by agreement of the contracting states. Its aims are, on the one hand, to ensure a uniform interpretation of DTTs (contextual significance of the provisions of the DTT) and, on the other hand, to facilitate agreement on the implementation of DTTs (e.g. on the forms to be used, on the procedure for refunds, on the granting of residence certificates, etc.). The results of general consultation procedures are generally published by the FMF as decrees or ordinances.

Consultation procedures supplementing DTTs (Art. 25 para. 3, 2nd sentence OECD Model Convention) allow the competent authorities to communicate directly even in cases where the occurring double taxation lies outside the scope of the DTT. The purpose of this procedure is to allow the utilization of instruments of domestic law to solve double taxation problems in a reciprocally beneficial way.

B.2.3. Foreign-initiated mutual agreement procedures

Firstly, the FMF determines whether the formal prerequisites have been met. If they are met, the procedure is considered to be initiated and subsequently, the local tax office is notified of the foreign-initiated procedure and, if necessary, it is asked to submit its position.

B.3. Course of the mutual agreement procedure

During the mutual agreement procedure the FMF interacts directly with the competent authority of the other contracting state. The local tax office responsible and the affected person (i.e., the covered person under the DTT) are kept up-to-date with respect to the progress of the procedure. Where necessary, the competent local tax office is requested to conduct (supplemental) investigations regarding the facts of the case.

In the course of the mutual agreement procedure, the tax administrations will exchange position papers with each other; in certain cases, face-to-face meetings may also be held.

All of the information and documents furnished to the FMF in the course of the mutual agreement procedure are subject to the strict confidentiality requirements of Austrian domestic tax law pursuant to sec. 48a FFC. The provisions on data protection in secs. 48d *et seq.* FFC are also applicable. Confidentiality requirements which are codified in the applicable DTTs (such as in Art. 26 OECD Model Convention) remain unaffected by these domestic provisions.

B.4. Role of the affected person in the mutual agreement procedure

The mutual agreement procedure has two different phases, generally speaking. The FFC is applicable only to the first, purely domestic phase of the mutual agreement procedure, i.e. the communications between the FMF and the affected person.

During this first phase, the affected person has the status of a party to the legal proceedings within the meaning of sec. 78 FFC relative to the FMF, as well as all of the rights and obligations associated with this status. However, the affected person does not have that status in the subsequent procedure between the competent authorities of the tax administrations (second phase). Where the other prerequisites under sec. 90 FFC are met, the FMF must grant the taxpayer the right to inspect the case file, but this does not extend to the documents created or forwarded by the foreign tax authorities (e.g. position papers), because these do not constitute a part of the taxpayer's case file according to sec. 90 FFC.

The affected taxpayer is also subject to all duties under the FFC relative to the FMF, such as the duty of disclosure within the meaning of secs. 119 and 139 FFC, the duty of heightened cooperation within the meaning of sec. 115 FFC, the reporting obligation within the meaning of secs. 120 *et seq.* FFC etc. Thus, affected taxpayers have a duty to assist in the conduct of the mutual agreement procedure by providing descriptions of their financial affairs and, potentially, by submitting evidence.

The second, intergovernmental phase, of the mutual agreement procedure, i.e. the communications and negotiations with the foreign competent authority/authorities, takes place outside the scope of the FFC. Consequently, in this phase of the procedure, the taxpayer has neither the status of a party nor any of the rights associated with this status. This is in line with the principles espoused by the OECD, which does not grant the affected person the status of a party during this phase of the procedure (see OECD Model Convention 2017, Art. 25 margin nos. 36 *et seq.*).

B.5. Conclusion of the mutual agreement procedure

As a general rule, the mutual agreement procedure is concluded when the contracting states finalize a written agreement (e.g. final exchange of letters by both contracting states).

Where the contracting states are unable to reach any agreement, the mutual agreement procedure will fail. The affected taxpayer does not have any legal entitlement to an agreement by the contracting states. Legal certainty with respect to the resolution of the taxation not in accordance with the treaty (generally, double taxation) can therefore only be achieved in cases in which the applicable treaty contains an arbitration clause (see Chapter C and Annex 3).

B.6. Implementation of the mutual agreement

B.6.1. Notification of the competent local tax authority and implementation of the solution reached

The competent local tax office is notified of the results of the mutual agreement procedure. That office is also responsible for any acts of implementation required.

B.6.2. Notification of the affected taxpayer and implementation of the solution reached

The agreement reached must be communicated to the affected taxpayer. The consent of the affected taxpayer is not required by the Austrian competent authority for the validity of the solution reached and its implementation.

B.6.3. Relationship between the mutual agreement procedure and domestic legal remedies

From an Austrian perspective, the fact that legal remedies are pending or have not yet been exhausted in Austria does not constitute an obstacle to the initiation of a mutual agreement procedure. A taxpayer may apply for a suspension of the appellate proceedings under sec. 271 FFC. The competent tax office may suspend the appellate decision until conclusion of the mutual agreement procedure where the necessary prerequisites under sec. 271 para. 1 FFC are present.

It should be noted that the FMF is unable to depart from the decision of a court in a mutual agreement procedure. In respect of decisions of the Federal Fiscal Court (FFCt), this follows from sec. 278 para. 3 FFC and sec. 279 para. 3 FFC. In cases decided by the Supreme Administrative Court (SACt), one should note sec 63 of the Supreme Administrative Court Act

[VwGG]. This also applies to other states.[10] Thus, where applicable, the affected taxpayer should check to see which of the procedures it wishes to pursue.

If the mutual agreement procedure fails, then the affected taxpayer will be at liberty to continue any appellate remedies which may have been suspended.

Within the scope of Part VI of the MLI (see B.2.1.3 and Annex 3), Art. 19 para. 2 clarifies the relationship between mutual agreement procedures and appellate procedures. A competent authority may suspend a mutual agreement procedure until a court decision is issued. Such procedural suspensions are also possible for other reasons, such as where an agreement is reached between the competent authority and the affected taxpayer.

B.6.4. Procedural aspects of implementation

The agreement reached in the mutual agreement procedure should be implemented notwithstanding any time limits in the domestic law of the contracting states, particularly rules on *res judicata* and limitations periods (Art. 25 para. 2, final sentence, OECD Model Convention). Thus, even the ten-year absolute limitations period will not be an obstacle to the implementation of the adjustments agreed on in the mutual agreement procedure.

Depending on the facts of the case, the agreement reached may be implemented by way of a forbearance under sec. 236 FFC, an amendment to an assessment notice pursuant to sec. 295a FFC (retrospective event up to expiry of the limitations period), the setting aside of an assessment notice under sec. 299 FFC (within one year's time) or a readmission procedure under sec. 303 FFC (request can be made up to the expiry of the limitations period). Finally, the mechanism of unilateral relief under sec. 48 FFC, on the basis of which an assessment notice may be retroactively adapted under sec. 295 para. 3 FFC, is also available. In this case, it is no longer the sole responsibility of the competent tax office to implement the result of a mutual agreement procedure; the participation of the FMF is also required. In addition, interest on claims under sec. 205 FFC (interest on additional tax or interest on tax credits due) may be claimed by the fiscal authority / paid to the taxpayer.

[10] Information on competent authorities and procedural rules of foreign states can be found in the OECD database "Country Profiles on Mutual Agreement Procedures", which can be accessed at: http://www.oecd.org/tax/dispute/country-map-profiles.htm.

B.7. Costs

Each contracting state bears its costs arising from the mutual agreement procedure. The costs incurred by affected persons are not reimbursed.

B.8. Mutual agreement procedures and transfer pricing

If the contracting states have different views on the transfer prices to be applied between associated enterprises within the meaning of Art. 9 OECD Model Convention or on the allocation of profits between a permanent establishment and the head office located in another state within the meaning of Art. 7 OECD Model Convention or Art. 4 EU Arbitration Convention, then economic double taxation may arise. The mutual agreement procedure is available in order to avoid this *de facto* double taxation.

The Austrian Transfer Pricing Guidelines[11] and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations,[12] in their respective most recent versions, will be applicable for the purpose of resolving the special questions that arise in the context of transfer pricing.

The mutual agreement procedure is available in Austria for transfer pricing cases irrespective of whether or not the DTT with the contracting state contains a provision modelled on Art. 9 para. 2 OECD Model Convention. Even in the absence of such a provision, Austria must grant a counter-adjustment if the primary adjustment complies with the arm's-length principle (see Annex 2.1).

Subsequent adjustments to transfer prices from previous years made by the (foreign) taxpayer (taxpayer-initiated adjustments) may also be the subject of a mutual agreement procedure.

[11] As of July 2019, the current version of the Austrian TPG is the 2010 version from 28.10.2010, BMF-010221/2522-IV/4/2010, https://findok.bmf.gv.at/findok?execution=e100000s1&dokumentId=2416ddaa-05dd-457d-a3cf-26c113f9e197.

[12] As of July 2019, the current version of the OECD TPG is the 2017 version, https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en.

C. Arbitration under DTT rules

C.1. General principles of arbitration under the OECD Model Convention

C.1.1. General remarks

In order to avoid interminable mutual agreement procedures, and to increase the effectiveness of such procedures, since 2008, a new paragraph 5, containing a proposal for a binding arbitration clause, was added to Art. 25 of the OECD Model Convention. Arbitration is not an alternative to a mutual agreement procedure, but rather it forms a part of it (OECD Model Commentary, Art. 25 m.nos. 5 and 64). As a basic principle, all tax disputes that can give rise to a mutual agreement procedure on request may be subject to arbitration (OECD Model Commentary Art. 25 m.no. 68).

Several Austrian DTTs contain articles on mutual agreement procedures envisaging international arbitration in the event that a tax dispute cannot be resolved within a given time period by means of the regular mutual agreement procedure. These clauses – termed "arbitration clauses" – are worded differently in the individual conventions (see Annex 3). In addition, the MLI introduces new arbitration clauses (see Annex 3).

C.1.2. Art. 25 para. 5 of the OECD Model Convention

Where, within 2 years from the presentation of the case to the competent authority of the other contracting state, no agreement is reached in the mutual agreement procedure, a request for arbitration may be submitted (OECD Model Commentary, m.nos. 63, 70 and 75). In general, the taxation which is in conflict with the DTT must have already arisen, i.e. the tax must have already been assessed or must have been communicated in some other manner to the affected taxpayer. The 2-year period until the request for arbitration is possible does not begin to run as long as there is a mere threat of double taxation not in accordance with the convention and thus arbitration cannot yet be requested (OECD Model Commentary, m.no. 72).

The arbitral award will only have binding effect with respect to the questions in dispute which were submitted in the specific procedure, and will thus not have prejudicial effect with respect

to other procedures (OECD Model Commentary, m.no. 83). If the affected person does not object to the outcome of the arbitration, then the arbitral award will be binding on both contracting states. In some cases the DTT allows competent authorities to depart from the arbitral award (by way of analogy with Article 12 of the EU Arbitration Convention), but only by agreement and with the consent of the affected person. This constitutes a departure from the standard text of the Model Convention (OECD Model Commentary, m.no. 84).

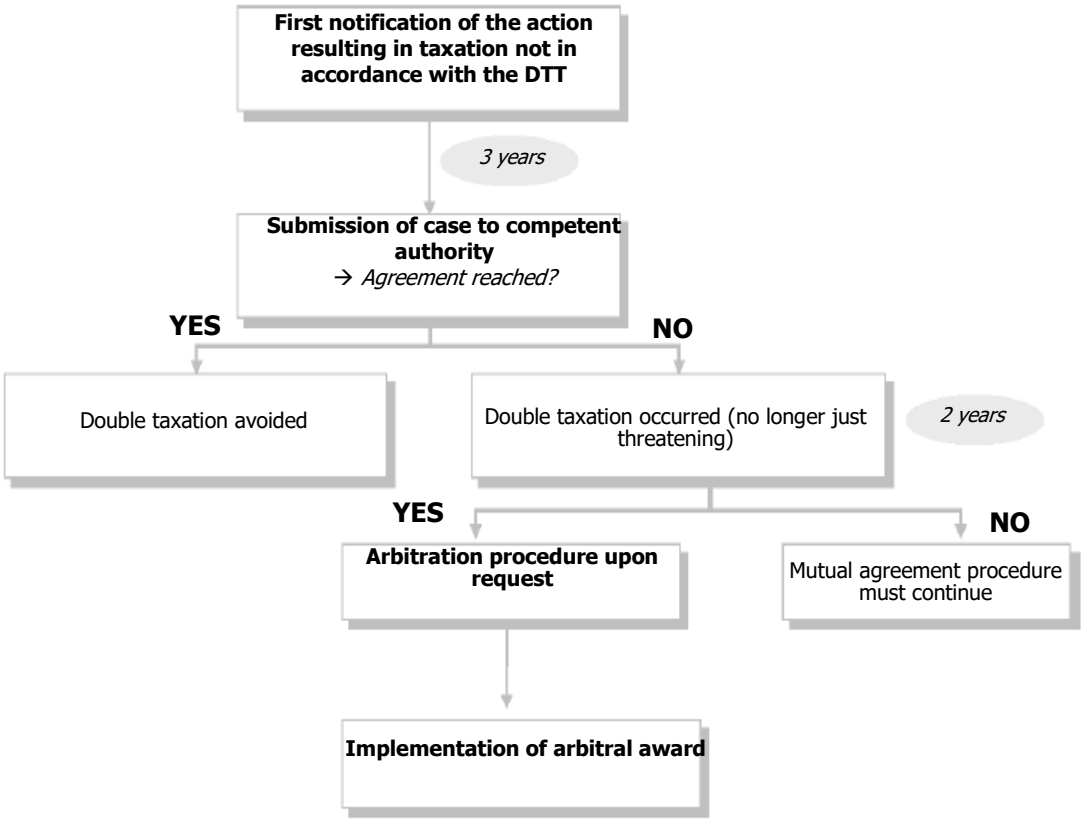
DTT with Germany: If a mutual agreement procedure with Germany has not been concluded within three years from the time it was initiated, then under Art. 25 para. 5 DTT with Germany the affected person will have the right to demand that the dispute be submitted to the European Court of Justice (CJEU) which is required to carry out an arbitration proceeding under Art. 239 of the Treaty on the Functioning of the EU (Art. 273 TFEU).

C.1.3. Relationship between arbitration and domestic legal remedies

It is not possible to initiate an arbitration procedure under Art. 25 para. 5 if a decision of a court or administrative tribunal has already been issued in the case in one of the contracting states (OECD Model Commentary, m.no. 76). Thus, the request to conduct arbitration should include a written declaration by the person involved that, to-date, there no court decision has been issued on the questions submitted in these procedures in either of the two contracting states (see sub-sec. 1 of the Sample Agreement in the Annex to the OECD Model Commentary).

If appellate procedures have been initiated but are suspended, then there are no compelling reasons not to initiate arbitration procedures. Upon conclusion of the arbitration procedures, the affected taxpayer still has the option of accepting the arbitral award or continuing to pursue the legal remedies (OECD Model Commentary, m.no. 77).

C.1.4. OECD MAP and arbitration



C.2. Arbitration proceedings under the MLI

Arts. 18 to 26 of the MLI (Part VI) offer the option of introducing an arbitration clause in a DTT. However, the arbitration clause can only be inserted into a tax treaty if both contracting states:

- apply the MLI to that tax treaty,
- have opted to apply Part VI of the MLI to that tax treaty and
- the options and reservations exercised by the contracting states do not prevent this.

Annex 3 lists the tax treaties to which Part VI applies (in all likelihood).

In addition, Austria has limited the material scope of the arbitration clause in Part VI by means of a free reservation under Art. 28 para 2 MLI such that cases covered by the domestic anti-abuse rule are excluded from its scope (see Annex 3). However, when applying the arbitration

clause under the MLI, the respective reservations made by Austria's partner states will also be relevant.[13]

Due to the reservation exercised by Austria under Art. 36 para. 2 MLI, requests for the initiation of an arbitration proceeding regarding those mutual agreement procedures which were referred prior to the entry into force of the MLI will only be accepted with the consent of the competent authorities of both contracting states.

Under Art. 19 para. 11 MLI, Austria has made a reservation that leads to a divergence from Art. 25 para. 5 OECD Model Convention: arbitration can only be initiated after three years have elapsed. In addition, the MLI features different rules for the calculation of the relevant period than those in the bilateral Austrian arbitration clauses (see Art. 19 paras. 8 and 9 MLI).

The implementation of the arbitral award follows the same general principles as the implementation of mutual agreements (see B.6.). Under Art. 24 MLI, the contracting states can deviate from the arbitral award by mutual agrement. However, this provision will likely only be applicable to a few Austrian tax treaties (see Annex 3). In the event of an arbitration under the MLI, the consent of the affected taxpayer will be required in order to implement the arbitral award (see Art. 19 para. 4 MLI).

With respect to the relationship between the arbitration proceedings under the MLI and domestic court proceedings, the following rules apply: as a general principle, both types of proceedings may be conducted in parallel, but:

- if a court decision is issued before an arbitration proceeding is requested, then access to the arbitration proceeding is blocked;
- if a court decision is issued prior to an arbitral award, the arbitration proceeding will be deemed automatically terminated;

- if a court decision is issued after the arbitral award, then that arbitral award will no longer be binding and is not required to be implemented (see Art. 19 paras. 4 and 12 MLI).

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

Art. 23 MLI specifies the type of arbitration proceeding. Pursuant to Art. 23 para. 1 MLI, as a rule, the "final offer" procedure (also known as the "last-best offer procedure" or "baseball arbitration") should be applied. In that type of procedure, the decision of the arbitrators will consist of selecting one of the proposed resolutions submitted by the competent authorities. However, contracting states may also reserve the right to apply the independent opinion procedure, under which the arbitrators will decide the case themselves based on the information provided to them.Both types of procedures will be used in Austrian treaties (see Annex 3).

Many of the rules of the MLI are only default rules and thus will only apply in the absence of any agreement to the contrary by the competent authorities of the contracting states, which may be reached in the form of a consultation agreement under Art. 19 para. 10 MLI. Austria envisages concluding an agreement on the conduct of arbitration proceedings with all contracting states with which an arbitration clause under the MLI applies.

D. Mutual agreement and arbitration procedures under the EU Arbitration Convention

D.1. Scope of application of the EU Arbitration Convention

The Arbitration Convention concluded between the EU Member States applies only to transfer pricing disputes. The starting point must therefore be an adjustment to the transfer prices under the arm's length principle of Art. 4 of the EU Arbitration Convention. Art. 4 covers transfer pricing adjustments between associated enterprises (para. 1) and between the head office and a permanent establishment (para. 2). The Convention is only applicable to enterprises domiciled within the EU and to permanent establishments of enterprises domiciled within the EU.

In order to ensure the effective application of the EU Arbitration Convention, the Council of the European Union, in cooperation with the Member States, has developed a Code of Conduct (Code of Conduct for the effective implementation of the Arbitration Convention [90/436/EEC of 23.7.1990]).

D.2. Mutual agreement procedure under the EU Arbitration Convention

D.2.1. Preliminary procedures under Art. 5 of the Arbitration Convention

Where the fiscal authority intends to adjust the profits of an enterprise under Art. 4 of the Arbitration Convention, it informs the enterprise in due time of the intended measure and gives it the opportunity to inform any affected associated enterprise in another Member State. The other associated enterprise(s) will then likewise have the opportunity to contact the competent authority in their Member State to obtain a corresponding adjustment. Where the competent authorities involved and the enterprises all agree to both the initial adjustment and the corresponding adjustment, no mutual agereement and arbitration procedures need to be carried out.

D.2.2. Request – content and time limits

See also B.2.1.1. and B.2.1.2. The present section only addresses differences from the mutual agreement under the DTT.

Under Art. 6 para. 1 of the Arbitration Convention, in contrast to the mutual agreement procedure under DTT, the request may also be submitted in the Member State in which the permanent establishment or the associated enterprise are located. However, in the interest of expediency, the request should nevertheless be filed in the Member State in which the parent company or the head office are located.

Where a request for initiation of a mutual agreement procedure does not contain any reference to the EU Arbitration Convention, then it will be deemed to constitute an request for a mutual agreement procedure under the DTT.

The request must contain the documents and information (minimum contents) referred to in B.2.1.2. In addition, the following must be enclosed with the request:

- An explanation by the enterprise indicating how the arm's-length principle under Art. 4 EU Arbitration Convention was violated with and
- all specific additional information requested by the competent authority within two months from the receipt of the request.

Pursuant to the Code of Conduct, a case is deemed to have been received only once the following information has been received (item 2 of the Code of Conduct):

- name, address, tax ID number of the enterprise filing the request and of the other enterprises involved;
- details regarding the relevant facts and circumstances of the case;
- relevant taxation period;
- copies of tax assessment notices, tax audit reports, etc. giving rise to double taxation;
- documents relating to any extrajudicial or judicial procedures or any court decisions which may already have been issued regarding the parties involved ;
- an explanation by the enterprise stating how the arm's length principle of Art. 4 of the Arbitration Convention was violated;
- a declaration of commitment by the enterprise stating that it shall respond to all reasonable and appropriate inquiries by competent authorities as quickly and comprehensively as possible and shall furnish any required documents in respect thereof; and
- any specific additional information requested by the competent authorities within two months from its receipt of the request.

The two-year time period after which the arbitration can be initiated only begins to run when the requisite information has been submitted and when a final assessment notice has been received (see also D.3.1.).

D.2.3. Preliminary procedure and initiation of mutual agreement procedures

See also B.2.1.3. – B.2.3. If all of the prerequisites have been met, the FMF will inform the enterprise filing the request of the initiation of a mutual agreement procedure and the day on which the two-year period under Art. 7 para. 1 EU Arbitration Convention has begun to run.

D.2.4. Course of mutual agreement procedure

See also B.3.

Cases should be resolved through the use of all of the materials and means suitable to bring about rapid agreement, but in any event no later than two years from the date on which the case was submitted for the first time to the FMF or to another competent authority.

Under Art. 8 para. 2 EU Arbitration Convention, a mutual agreement procedure or an arbitration proceeding may be suspended if:

- a court or administrative procedure is pending in respect of one of the affected enterprises and
- the enterprise is alleged to have committed a violation of tax law which is subject to severe penalties (in particular: intentional or negligent underpayment of tax which is punishable under the Fiscal Offences Act) and
- the violation is connected to the transactions adjusted under Art. 4 EU Arbitration Convention.

If such a violation is found to have been committed, then, under Art. 8 para. 1 EU Arbitration Convention, the competent authorities are not obliged to initiate the mutual agreement procedure or the arbitration procedure.

D.2.5. Implementation of the mutual agreement

See B.6.

D.3. Arbitration procedure under the EU Arbitration Convention

D.3.1. General remarks

Where, within two years from the date on which a complete and comprehensive request was submitted to one of the competent authorities, the mutual agreement procedure has not resulted in an agreement, the competent authorities of the contracting states involved are required to appoint an advisory commission and obtain its recommendations. The competent authorities may extend this two-year period by agreement with the enterprises involved.

In addition, the two-year period will only begin to run when all of the requisite minimum information has been submitted to the competent authority. This will also include a clear

reference to the legal basis. The commencement of the period will also require the final tax assessment notice. A preliminary tax assessment notice will not satisfy this prerequisite.

D.3.2. Relationship between the arbitration procedure and domestic legal remedies

For details see C.1.3.

In cases in which an appeal is pending, the two-year period for the initiation of an arbitration procedure under Art. 7 para. 3 EU Arbitration Convention will only begin once a final decision has been issued by the court or administrative body.

D.3.3. Appointment of advisory commission

If no agreement has been reached in the course of the mutual agreement procedure, an advisory commission is appointed which issues a recommendation on how the double taxation should be remedied.

D.3.4. Advisory commission procedure

On the one hand, the advisory commission may demand that the competent authorities of the contracting states involved in the case appear before it. On the other hand, the affected enterprises also have a right to be heard or represented before the advisory commission. They may submit their position on the facts of the case and the relevant legal provisions to the advisory commission and attach such evidence and documents as they deem necessary. Upon demand of the advisory commission, the affected enterprises are obliged to provide information or to submit evidence or documents and to appear before the advisory commission or to engage counsel to represent them there. Any submissions and documents which an affected enterprise submits must be translated by that enterprise into the language of the procedures. While preparing its recommendation, the advisory commission may also hear witnesses or experts.

D.3.5. Recommendation and implementation

The advisory commission issues its recommendation within six months. It is bound to adhere to the arm's length principle of Art. 4 of the EU Arbitration Convention in the recommendation.

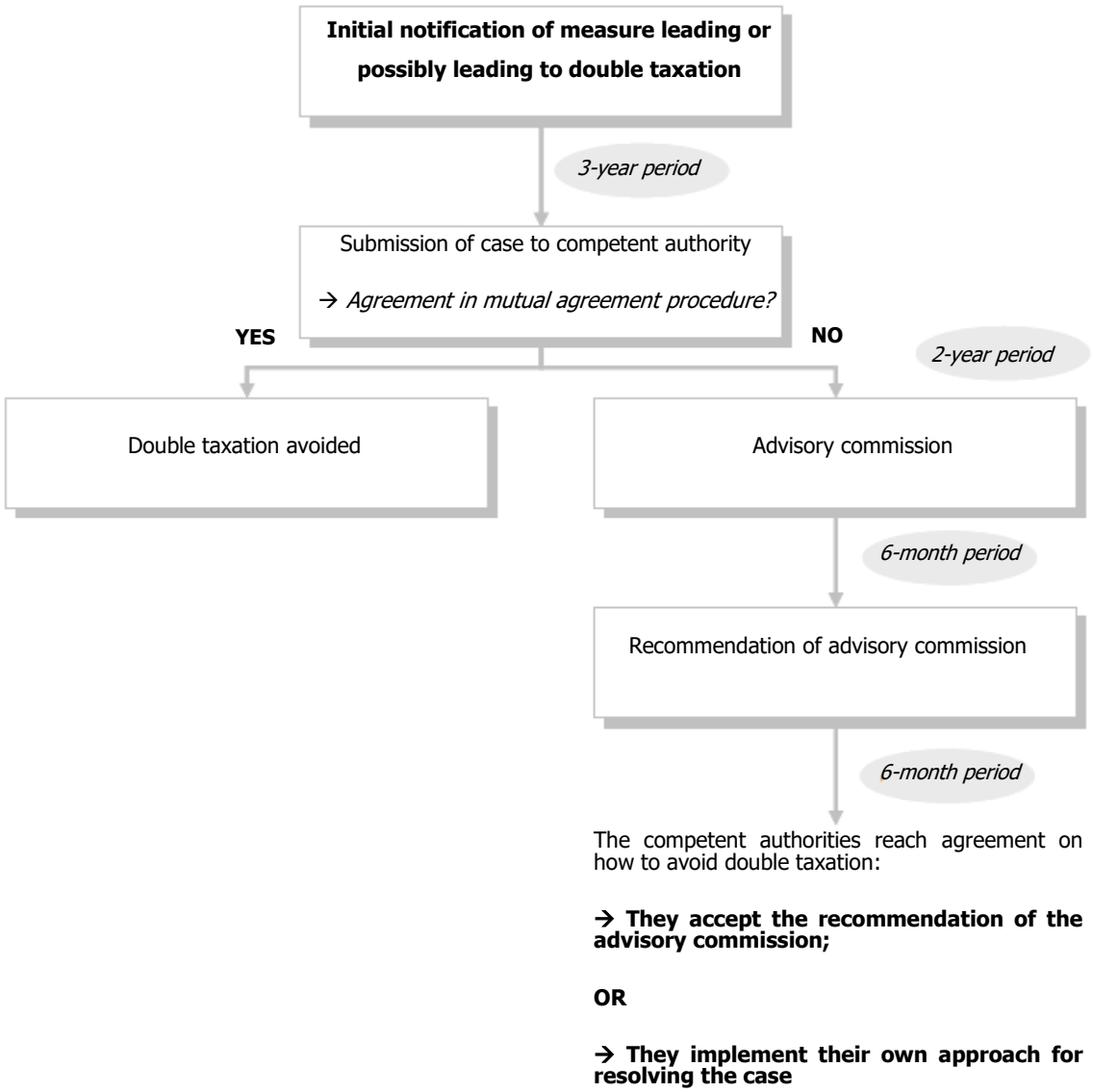
The competent authorities have a further six months after the advisory commission has issued its recommendation to reach agreement. They may depart from the recommendation of the advisory commission if in doing so they still avoid any double taxation. If they are unable to reach agreement, they will be bound by the recommendation of the advisory commission *qua* arbitral award.

The competent authority to which the case was submitted forwards the decision of the competent authorities and the recommendation of the advisory commission to each of the enterprises involved. The decision or recommendation is applied in the same manner as any mutual agreement.

D.3.6. Costs

With respect to the costs of the mutual agreement procedures, see B 7. The procedural costs of the advisory commission are borne by the contracting states in question in equal shares (Art. 11 para. 3 of the EU EU Arbitration Convention). These include the administrative costs of the advisory commission and the fees and cost disbursements for the independent persons.

D.3.7. Mutual agreement and arbitration procedures under the EU Arbitration Convention



E. Advance Pricing Arrangements (APAs)

E.1. General principles, types of APA

An Advance Pricing Arrangement (APA) is an agreement that determines an appropriate set of criteria (e.g. method, comparables and any appropriate adjustments, critical assumptions as to future events) between one or more taxpayers and one or more tax administrations in advance of certain intra-group business transactions taking place, in order to determine the transfer pricing for those business transactions over a fixed period of time (see OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, m.no. 4.134).

An APA is applied for by a taxpayer and requires discussions between the taxpayers, one or more associated enterprises and one or more tax administrations. In accordance with the OECD Guidelines, a unilateral APA is an agreement concluded between one or more taxpayers and one tax administration only. A bilateral or multilateral APA is one which is based on an agreement between the competent authorities of two or more tax administrations under a procedure based on the applicable DTTs.

The OECD Guidelines recommend that wherever possible an APA be concluded on a bilateral or multilateral basis (see OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, m.no. 4.173) in order to avoid any possible double taxation. This is because bilateral (or multilateral) APAs require agreement between two or more contracting states, which as a general rule prevents double taxation within the scope of request of an APA.

A request to enter into an APA is granted at the discretion of the competent authorities. Art. 25 para. 3 of the OECD Model Convention, which forms the basis for a bilateral APA, does not foresee an obligation to enter into an APA.

An ongoing tax audit is not, in principle, an obstacle to requesting the initiation of 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, the negotiations tie up considerable resources on the part of the tax administration. However, the conclusion

of a bilateral APA provides increased tax certainty and prevents a mutual agreement procedure.

E.2. Legal Bases

An APA can be applied for to clarify the bases for pricing transactions falling under Art. 7 or 9 of the OECD Model Convention and the question of how the resulting profits are distributed among the tax jurisdictions concerned. An APA may relate to transfer pricing issues of one or more taxpayers, or it may be restricted to individual intra-group business transactions. An APA is concluded for future years and business transactions.

Bilateral and multilateral APAs are those involving the competent authority of at least another contracting state. They are negotiated according to the same principles as bilateral or multilateral mutual agreement procedures. Art. 25 para. 3 of the OECD Model Convention applies. The request must therefore be covered under the respective DTT(s) and, additionally, under the scope of the mutual agreement article (Art. 25 of the OECD Model Convention) (see B.1. to B.8.).

Consequently, APA procedures may only be initiated with Austria's DTT partners.

There is no legal basis for conducting proceedings with countries with which no DTT has been concluded. APAs may not be based on the Arbitration Convention, as this does not contain a provision equivalent to Art. 25 para. 3 of the OECD Model Convention.

There is no requirement to reach an agreement in the course of the APA procedure. If the competent authorities involved do not agree on a solution, the APA is deemed to have failed.

In addition, unilateral APAs can be entered into in Austria within the framework of sec. 118 FFC, which allows taxpayers to request and administrative determination on a question of law ("*Auskunftsbescheid*"). The Advance Ruling (sec. 118 FFC) and bilateral or multilateral APAs are not mutually exclusive and may in principle be applied for in parallel. However, it should be noted that this may result in double taxation, if the other country does not share the legal opinion expressed in the ruling. A mutual agreement procedure is also possible in the event of an administrative decision in response to a request for information. Sec 118 para. 9 FFC must be taken into account in this context.

E.3. APA request

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 in which the parent company or the head office is resident and at the same time to the competent authority of the DTT contracting state.

The request must set out as clearly as possible the content and scope of the APA, i.e. the enterprises and contracting states concerned (including any permanent establishments), the group structure, the area of activity, the transaction(s) the APA should cover, the desired duration of the APA and the years to be covered by the APA. If changes to the underlying facts of the APA are anticipated in the future, they must also be communicated to the tax administration.

The request should include the documents referred to in B.2.1.2, if available. Rather than explaining the tax base and the taxation which is not in conformity with the Agreement, the request should describe as precisely as possible the factual elements that were relevant to the selection of the method and present clearly and comprehensively the application of the method and the results thereof. The selection of the method should be legally justified with reference to the relevant legal provisions, in particular the arm's length principle.

In addition, the following documents must be submitted:

- A description of the industry and market trends for the areas of activity of the enterprises to be covered by the APA;
- the financial data of the enterprises involved, including their profit and loss situation and a list of real and moveable property assets held as business assets;
- the expected development of the financial situation of the enterprises covered for the duration of the APA, details of the assumptions on the basis of which the forecasts were made and proposals for dealing with any discrepancies between the forecasts and the actual results;
- a comprehensive functional and risk analysis of all participants;
- a comparability analysis and the relevant database studies. Any comparability adjustments must be explained;

- if applicable, proposals for critical assumptions as well as proposals for dealing with changes to those assumptions and/or acceptable fluctuations (see also E.5.) and
- all other significant fiscal consequences of the selected method (e.g. under national tax law or for indirect tax purposes).

Which additional documents need to be submitted will depend on the circumstances of each individual case. This may be clarified in the course of a pre-filing meeting (see E.4.).

When the FMF receives a request for the initiation of an APA procedure, it sends the applicant an acknowledgement of receipt and requests additional information to support the request, if necessary.

E.4. Facts and critical assumptions

Critical assumptions are conditions/assumptions which are necessary in order 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, shareholdings, the business model, interest rates, exchange rates or the relevant legislation.

The subject matter of the APA and the agreed critical assumptions are interdependent, such that a change in the critical assumptions will affect the agreement the APA is based on and thus may also cause the APA to become inapplicable (see E.5. and E.8.).

E.5. Pre-filing meeting

Before an APA is formally initiated, i.e. before the request is sent, the preparedness of the competent authorities and enterprises involved to carry out an APA can be clarified in the course of an informal discussion ("pre-filing meeting") with the competent authority.

These preliminary discussions provide the possibility to discuss the suitability of a specific case for an APA, the nature and scope of the documents to be provided and a rough timetable. It is up to the taxpayer to initiate such a discussion. It is recommended that the taxpayer hold preliminary discussions with all countries involved, should such preliminary discussions be required. More than one round of discussions may be required.

In principle, it is also possible to submit the request prior to the pre-filing meeting, and subsequently to make only additions or minor changes to the request after consultation with the tax administration.

E.6. Review of the request and APA negotiations

Following the submission of a (complete) request to determine the suitability of a case for an APA and the initiation of the APA, the competent authority will contact the other contracting state(s) involved.

In parallel, the competent authority will review the taxpayer's request. Additional documents may be requested, or information may be obtained at the taxpayer's premises. The additional information received will be communicated to the other competent authorities concerned. Where necessary, joint fact-finding meetings will be held with the other competent authorities.

Based on the information available, the competent authorities will prepare and exchange position papers. On the basis of the position papers (revised, if necessary), negotiations will be held. If necessary, the taxpayer may be asked to give a presentation of the relevant information to both competent authorities.

E.7. Agreement between the competent authorities

The competent authorities agree in writing on the content of the APA in the mutual agreement procedure. The agreement takes the form of a draft of the APA, which is sent to the taxpayer and will only become final and binding if the taxpayer grants his consent by the deadline. If no consent is given, the agreement is not valid and cannot be implemented.

In terms of content, an APA first recites the underlying facts, i.e. the business entities covered by the APA, the transaction(s) covered, the start of validity and the term. In principle, an APA is aimed at determining future transfer pricing issues. The term will be limited to a certain number of years - usually three to five years - depending on the specific circumstances of the case and will be influenced by numerous factors.

Next comes the legal assessment of the underlying facts, i.e. the risk analysis, the comparability test, the selection of the method and its application. Another aspect concerns the essential critical assumptions which must be met in order for the APA to be valid. These

critical assumptions may also include obligations imposed on the taxpayer, such as reporting obligations and the submission of documents. In addition, it may be stipulated in the critical assumptions that none of the taxpayers involved may resort to legal remedies to contest the decisions issued on the basis of the APA.

In order to prevent the slightest deviations from the agreed critical assumptions leading to non-applicability and/or renegotiation of the APA, they should, firstly, not be defined too narrowly. Secondly, appropriate adjustment mechanisms should be agreed that take into account identifiable possible fluctuations of the relevant circumstances. In addition, certain parameters can be included to determine an acceptable degree of variance, so that the APA will only have to be renegotiated, at the taxpayer's request, if these values are exceeded.

The APA concluded should also contain a provision imposing a reporting obligation on the taxpayer in the event that the critical assumptions change, or the assumed facts do not materialise accordingly. If, for example, the assumed facts do not materialise, then this results, in principle, in the invalidity of the APA.

A reporting obligation may be triggered, for example, if the business transactions change significantly or if economic conditions that cannot be influenced (e.g. significant changes in exchange rates) have such a decisive influence on the reliability of the methodology that independent enterprises also consider them to be significant for their pricing. Depending on the particular circumstances, a revision of the APA, or its termination, may be envisaged.

Concluding an APA does not affect the possibility of conducting a tax audit for the same period.

E.8. Roll-back

In addition to concluding a final binding APA, there is also the option of a "roll-back", i.e. adoption of the solution arrived at in the APA for years preceding the APA, if comparable facts and circumstances arise in the preceding periods. Thus, for example, mutual agreement procedures associated with transfer pricing problems in the past and an APA for the implementation of a solution for the future may be conducted concurrently.

E.9. Implementation of the APA

The only parties to a bilateral or multilateral APA are the competent authorities of the two Contracting States. However, a final APA requires the consent of the taxpayer, which indicates that the APA is to have binding effect (see E.6.).

The competent authority informs the relevant tax office of the conclusion of the APA.

The relevant tax office must then implement the APA in accordance with domestic legislation. For the rules governing implementation, see B.6.4.

If the critical assumptions on the basis of which the APA was concluded change significantly, the APA may lose its validity.

E.10. Monitoring

The Austrian competent authority reserves the right to exercise both monitoring options provided for in the OECD Transfer Pricing Guidelines. Taxpayers may initially be required, in accordance with the agreements reached with the other contracting state(s), to submit annual reports describing the actual business activities of the taxpayer for the year in question, whether the conditions of the APA have been complied with and whether the critical assumptions continue to apply. If reports are required, they must be sent annually to the relevant tax office, together with the tax return.

The allocation of taxing rights between the countries concerned, as established in an APA, can no longer be subject to a tax audit. However, compliance with the underlying parameters and conditions in the APA may be examined in the context of a tax audit; in particular, whether the facts have materialised in accordance with the agreement, whether and to what extent changes in the critical assumptions have occurred and whether the transfer pricing was carried out in accordance with the APA.

E.11. Subsequent cancellation, revocation or extension of the APA

The conditions for termination of an APA must be set out in the APA. Unless otherwise agreed, the Austrian competent authority may revoke an APA in the event that:

- Negligence, neglect or breach of duty by the taxpayer leads to an error or false assertion, particularly if this has a material influence on the representation of the facts or the critical assumptions, or
- a basic condition of the APA was not met by the taxpayer or no longer exists.

The revocation leads to a reversal of any tax measures taken on the basis of the APA. For tax purposes, the taxpayer must be treated as though the APA had never been concluded.

Unless otherwise agreed, the Austrian competent authority may cancel an APA, i.e. declare it invalid for the future from the tax year in question in the event that:

- an omission or an error has occurred which cannot be attributed to the sphere of the taxpayer, or
- a basic condition of the APA was not met by the taxpayer or no longer exists, or
- one or more or critical assumptions have not materialised, or
- a subsequent change in a tax provision (domestic or international) relevant to the APA has occurred.

In each case, the taxpayer and the other competent authority must be informed in the event of revocation or cancellation.

As an alternative, in the event of a subsequent change of the critical assumptions, an APA may also be modified unilaterally or in agreement with the other competent authority, depending on the type of APA, in order to take account of the new assumptions.

As an option, an APA may also be extended at the end of its term if the facts and economic conditions have not changed significantly and if the tax administrations involved reach agreement on an extension. If the facts and/or the critical assumptions have changed, a new arrangement is required instead, i.e. the method and the conditions of the APA must be adapted to the new facts and/or the new critical assumptions. A new arrangement will also require agreement between the competent authorities.

E.12. The APA procedure

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 the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. 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 request 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 presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. 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 request of this paragraph.

Annex 2: Particularities of Austrian DTTs in connection with mutual agreement procedures

*Note: the actual and anticipated impacts of the MLI (as of: 30.06.2019) are marked with an *.*

1. Inclusion of Art. 9 para. 2 OECD Model Convention

1.1. Conventions containing a provision modelled on Art. 9 para. 2

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

1.2. Conventions in which there is no provision modelled on Art. 9 para. 2

Brazil; Egypt; Indonesia; Liechtenstein; Malaysia, Norway, Philippines; San Marino; Sweden; South Korea; Thailand; Tunisia.

Note: The mutual agreement procedure is available in Austria for transfer price cases irrespective of whether or not the DTT with the contracting state contains a provision modelled after Art. 9 para. 2 OECD Model Convention (see B.8.).

2. Time limits for initiating mutual agreement procedures

2.1. Conventions containing no stated time limit

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

2.2. Conventions containing a 2-year period

Indonesia; San Marino.

2.3. Conventions containing a 3-year period

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; Kuwait; Latvia; Lithuania; Luxembourg*; Malaysia; Malta; Morocco; Macedonia; Mexico*; Moldova; Mongolia; Montenegro; Nepal; New Zealand; Netherlands*; Norway; Pakistan; Philippines; Poland; Portugal*; Romania; Russia; Saudi Arabia; Switzerland*; 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 time limits

Mexico: Mutual agreement procedure can only be carried out if the other authority is informed of the request within 4.5 years from the date it was filed.

- – 10 years for carrying out mutual agreement procedure

3. Implementation of outcome reached in mutual agreement procedures notwithstanding time limits under domestic law

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*; Italy; Kazakhstan; Qatar; Kyrgyzstan; Korea (Republic), Croatia; Cuba; Kuwait; Latvia; Liechtenstein (mutual agreement); Luxembourg*; Malaysia; Malta; Morocco; Macedonia; Mexico (implementation within 10 years or a longer period if the domestic law of the other contracting state permits this); Moldova; Mongolia; Montenegro; Nepal; New Zealand; Netherlands*; Norway; Pakistan; Poland; Portugal*; Romania; Russia; San Marino; Saudi Arabia; Serbia; Singapore; Slovak Republic; Spain*; Slovenia; South Africa; Tajikistan; Taiwan; Czech Republic; Turkey; Turkmenistan;

Ukraine; Uzbekistan; Venezuela; United Arab Emirates; United States of America; Vietnam; Belarus; Cyprus.

Annex 3: Arbitration clauses in Austrian DTTs

1. Bilateral arbitration clauses in Austrian DTTs

Specific procedural rules (regarding the initiation of procedures, the composition of the arbitral tribunal, the right of parties to be heard, deadlines for the arbitral tribunal's issuance of its decision, binding effect of arbitral award) have been agreed with the following contracting states:

- **Armenia** (Art. 25 (5): mandatory where no agreement is reached within a period of 2 years from the date procedures were initiated)
- **Bahrain** (Art. 25 (5): mandatory where no agreement is reached within a period of 2 years from the date procedures were initiated)
- **Bosnia and Herzegovina** (Art. 25 (5): mandatory where no agreement is reached within a period of 2 years from the date procedures were initiated)
- **Germany** (Art. 25 (5): mandatory where no agreement is reached within a period of 3 years from the date procedures were initiated; special aspect: arbitral procedures conducted before CJEU)
- **Macedonia** (Art. 25 (5): mandatory where no agreement is reached within a period of 2 years from the date procedures were initiated)
- **Mongolia** (Art. 25 (5): mandatory where no agreement is reached within a period of 2 years from the date procedures were initiated)
- **San Marino** (Art. 25 (5) to (7): mandatory where no agreement is reached within a period of 2 years from the date the case was first submitted to one of the competent authorities, subject to the condition that all procedures pending before national courts have ceased; special rule on costs)

Further conventions providing for an option of carrying out arbitral procedures in the event that mutual agreement procedures fail, under which the contracting states first have to reach agreement on the procedural rules, are the following:

- **Azerbaijan** (Art. 25 (5))

- **Chile** (Art. 25 (5))
- **United Kingdom** (Art. 25 (5)): mandatory where no agreement is reached within a period of 2 years from the date procedures were initiated)
- **Japan** (Art. 25 (5)): mandatory where no agreement is reached within a period of 2 years from the date procedures were initiated)
- **Kosovo** (Art. 23 (5)): mandatory where no agreement is reached within a period of 2 years from the date procedures were initiated, subject to the condition that no decision by court or administrative court of one of the two contracting states has been issued)
- **Switzerland** (Art. 23 (5)): mandatory where no agreement is reached within a period of 3 years from the date procedures were initiated, subject to the condition that no decision by court or administrative court of one of the two contracting states has been issued)

Note: Austria's conventions with Germany and Switzerland fall within the scope of the MLI. However, the arbitration clauses in those DTTs remain unaffected by the MLI, due to Austria's reservation.

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

Belgium, Finland, France, Greece, Ireland, Italy, Canada, Luxembourg, Malta, Netherlands, Portugal, Singapore, Slovenia, Spain.

2.1. Of these, conventions for which the last-best offer procedure or baseball arbitration is used (Art. 23 para. 1 MLI).

Belgium, Finland, France, Greece, Ireland, Italy, Canada, Luxembourg, Netherlands, Singapore, Spain.

2.2. Of these, conventions for which the independent opinion method is applied (Art. 23 para. 2 MLI).

Greece, Malta, Portugal, Slovenia.

2.3. Of these, conventions regarding which a duty of confidentiality applies to the taxpayer and its representatives under Art. 23 para. 5 MLI.

Belgium, Netherlands, Spain, Malta.

2.4. Of these, conventions for which the contracting states may agree on a different resolution under Art. 24 MLI.

France, Greece, Ireland, Italy, Malta, Portugal, Singapore, Slovenia, Spain.

3. Austria's reservation 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 request 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 Depositary 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
FFC	Federal Fiscal Code
BGBl.	Federal Gazette
BFH	Federal Tax Court
FMF	Federal Ministry of Finance
DTT	Double taxation treaty
EU	European Union
MLI	Multi-lateral instrument on implementation of tax-related measures to prevent base erosion and profit shifting
OECD	Organisation for Economic Cooperation and Development
OECD MA	OECD Model Convention
OECD MC	OECD Model Commentary
OECD TPG	OECD Transfer Price Guidelines
öVPR	Austrian Transfer Price Guidelines

Federal Ministry of Finance, 24 July 2019