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B: Practical approaches to international tax dispute prevention and resolution

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Summary and conclusions

Tax dispute prevention and resolution becomes increasingly important as the degree of globalization and digitalization is steadily rising, leading to a more complex and legally uncertain environment for taxpayers. It is therefore of utmost importance to provide a legal framework that allows for several different mechanisms for dispute prevention and resolution to increase tax certainty for those that conduct cross-border business activities. The Austrian legal framework allows for many such mechanisms. These are available to taxpayers on a domestic and unilateral level as well as on a bi- and multilateral cross-border level. Purely **unilateral dispute prevention mechanisms** include the Austrian **advance ruling regime**, which is available for future cases relating to matters of international tax law. While access to the mechanism is restricted to the types of issues set out in the law and it requires a certain amount of preparation and expertise on the part of the taxpayer who has to draft and file the case, cases are handled swiftly and by tax officers highly experienced in international tax law. Upon valid application of the taxpayer, which is subject to an administrative fee ranging from **EUR 1,500 to EUR 20,000**, the competent tax authority is obliged to issue a legally binding, non-public advance ruling – to the extent possible – within two months after submission of the application. Under the Austrian **cooperative compliance programme** called "accompanying control" (*begleitende Kontrolle*), which is a voluntary alternative to the traditional retroactive tax audit system, participating taxpayers are subject to increased transparency and disclosure obligations and in turn benefit from a faster tax procedure, increased legal certainty and a reduced risk of litigation. As a main precondition for participation in the programme, which is available only for enterprises with an annual turnover exceeding EUR 40 Mio, a tax control framework (TCF, *Steuerkontrollsystem*) has to be implemented. The TCF shall ensure the timely and correct payment of taxes. Without any specific requirements, the taxpayer may request (non-public) **information from the competent tax authority**. Unlike an advance ruling, such information is not legally binding but may have legal consequences in favour of the taxpayer based on the principle of good faith. Although neither legally binding nor "binding" under the principle of good faith, the **express reply service** (*Express-Antwort-Service, EAS*) of the Federal Ministry of Finance has high practical relevance in Austria, as it is easily accessible, free of charge and swift: Based on an informal request, the Austrian Ministry of Finance provides its legal opinion on an abstract and anonymous basis within a few weeks. Such

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an opinion is regularly followed by the competent tax offices. At the **bi- and multilateral dispute prevention** level, Austria makes use of several different mechanisms, such as **APAs**, simultaneous and **joint audits** and **multilateral risk assessment**. However, as the latter mentioned mechanisms have only been incorporated into domestic law recently on the basis of international initiatives, taxpayers as well as tax authorities are still in the process of gaining more practical experience in their conduct. Taxpayers may therefore be more reluctant to apply for these dispute prevention mechanisms. The APA statistics indicate that while APAs are regularly sought out by taxpayers, they are not (yet) a very popular mechanism.

On the bi- and multilateral dispute resolution side, Austria has significant experience in the conduct of **MAP** cases and has even conducted **arbitration** proceedings. Austria has concluded more than 90 tax treaties and has well-functioning administrative processes for the handling of bi- and multilateral disputes. In this respect, Austria grants **MAP** access in all eligible cases and endeavours to resolve these in a timely manner with other contracting states. This official policy is borne out in the MAP statistics, where Austria is consistently close to the top ten jurisdictions and which showcase the fact that Austrian MAP cases are generally resolved by the removal of double taxation, albeit in a longer period of time than that recommended by the OECD. Due to legislative changes enacted in concert with the implementation of the EU-Dispute Resolution Directive (EU-DRD), the Austrian tax authorities are generally also able to implement MAP agreements irrespective of domestic time limits. All of the aforementioned secures a legal framework that provides tax certainty for taxpayers conducting business at a cross-border level in most cases. As competent authorities, however, are not obliged to reach an agreement during the MAP, Austria strives to include an arbitration provision in its tax treaties and also participates in all international initiatives that foster arbitration. Given the slowness of treaty negotiations and the reluctance of most jurisdictions to embrace **arbitration**, Austria has so far only managed to implement 13 bilateral arbitration clauses. Of these, the most recent ones follow the OECD Model Convention, but the older versions were negotiated long before and follow a slightly different design, which incorporates procedural elements into the ambit of the clauses. The ratification of the **MLI** has more than doubled Austria`s arbitration network: 14 arbitration clauses are already in force and two more will soon follow. Austria exercised great restraint in its MLI position in order to ensure a broad application and scope for the clauses. With the EU Arbitration Convention and the EU Arbitration Directive, arbitration within the EU is well secured. Moreover, Austria has already had one **arbitration case with Germany**, decided by the **CJEU** according to its usual procedural rules but acting in the capacity of an arbitral tribunal as a result of the unique arbitration clause in the tax treaty with Germany. Thus, Austria proves willing not only to negotiate arbitration but also to apply it in practice in the few cases where the MAP itself as employed by the Austrian tax administration proves insufficient to resolve the dispute.

In sum, as showcased in this report, Austria has a mature dispute prevention and resolution system, with a great variety of mechanisms, some of which (EAS, MAP) are heavily employed and thus part of the day-to-day business of the tax administration. The Austrian tax administration seems to be aware of the great importance of tax certainty for business and to endeavour to ensure it to the greatest possible extent. The mechanisms have different areas of application and (dis-)advantages (cost, duration etc.), but overall taxpayers` needs are well covered.

Part One: Main features corporate compliance system

1.1. General legal framework

The material provisions for the taxation of individuals and corporations in Austria are found in the Income Tax Act (Einkommensteuergesetz 1988 (EStG), "ITA")[4] and the Corporate Income Tax Act (Körperschaftsteuergesetz 1988 (KStG), "CITA"),[5] respectively. The corresponding procedural rules, which include dispute prevention and resolution mechanisms, are found in the Austrian Federal Fiscal Code (Bundesabgabenordnung (BAO), "FFC")[6]. The EU Dispute Resolution Directive was implemented into domestic law in the EU Tax Dispute Resolution Act (EU Besteuerungsstreitbeilegungsgesetz (EU-BStbG), "EU-TDRA").[7]

From the Austrian perspective, international agreements such as Double Tax Conventions ("DTCs") and the EU Arbitration Convention[8] ("EU-AC") are *directly applicable* as part of domestic law and thus override the otherwise applicable domestic tax rules.

1.2. Organization of Tax Administration

The Austrian Tax Administration consists of several functional units. The ones which are most relevant for this report will be described very briefly in the following:[9] The Tax Authority for Large Traders (*Finanzamt für Großbetriebe*) is a tax authority with nationwide responsibility over large traders, financial service providers, groups of companies, foundations and funds, as well as non-profit building associations (*gemeinnützige Bauvereinigungen*). The Tax Authority Austria (*Finanzamt Österreich*) has comprehensive and nationwide responsibility for all tasks that are not assigned to another tax authority. The Central Services (*Zentrale Services*) are a nationwide institution of the Federal Finance Administration with a support function. Finally, Central Management (*Zentralleitung*) has the general oversight functions and is primarily tasked with the drafting and interpretation of the relevant laws.

4 Bundesgesetz vom 7 Juli 1988 über die Besteuerung des Einkommens natürlicher Personen (Einkommensteuergesetz 1988 – EStG 1988), Austrian Federal Law Gazette Nr. 400/1988, last amended by Austrian Federal Law Gazette I Nr. 111/2023.

5 Bundesgesetz vom 7 Juli 1988 über die Besteuerung des Einkommens von Körperschaften (Körperschaftsteuergesetz 1988 – KStG 1988), Austrian Federal Law Gazette Nr. 401/1988, last amended by Austrian Federal Law Gazette I Nr. 110/2023.

6 Bundesgesetz über allgemeine Bestimmungen und das Verfahren für die von den Abgabenbehörden des Bundes, der Länder und Gemeinden verwalteten Abgaben (Bundesabgabenordnung – BAO), Austrian Federal Law Gazette Nr. 194/1961, last amended by Austrian Federal Law Gazette I Nr. 110/2023.

7 Bundesgesetz über Verfahren zur Beilegung von Besteuerungsstreitigkeiten in der Europäischen Union (EU-Bes teuerungsstreitbeilegungsgesetz – EU-BStbG), Austrian Federal Law Gazette I Nr. 62/2019, last amended by Austrian Federal Law Gazette I Nr. 108/2022.

8 CONVENTION on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC), L 225/10 20 August 1990.

9 The internal organization of the Austrian Tax Administration can be accessed via the webpage of the Austrian Federal Ministry of Finance ("FMoF"): https://www.bmf.gv.at/en/the-ministry/internal-organisation.html (accessed on 28 December 2023).

1.3. Extent (number of treaty partners) of tax treaty network

Austria has an extensive network of more than 90 concluded tax treaties ("DTCs") in place.[10]

1.4. Filing and assessment procedures

The deadline to submit a tax declaration for individual or corporate income tax is, in general, the end of April of the subsequent calendar year. If the tax declaration is submitted electronically via FinanzOnline,[11] such declaration may be submitted until the end of June (section 134 (1) FFC). The extension of these deadlines is – at the discretion of the tax authority –however, possible (section 134 (1) FFC). The assessment procedure of tax declarations is set out in sections 161 to 165 FFC. The tax authorities are obliged to examine submitted tax declarations (section 161 (1) FFC). It may – if it is of the opinion that certain documents or information are missing – submit a request for the submission of further documents or information to the taxpayer (section 161 (1) and (2) FFC). If a taxpayer claims a tax deduction, the tax authorities are allowed to request the names of the creditors or recipients of such amounts upon which the deductibility is claimed (section 162 (1) FFC). If the taxpayer fails to provide the necessary information, the tax authority has to deny a tax deduction (section 162 (2) FFC).

1.5. Audit process, including selection and opportunities for engagement

The tax authority mainly carries out audits on a sampling basis (see section 4.1.1 on risk assessment). It is in the discretion of the tax authority to decide on the intervals at which it conducts an audit (section 147 (1) FFC). The taxpayer has to be notified of the prospective conduct of an audit a week in advance (section 148 (5) FFC).

The audit starts with the presentation of the audit mandate to the taxpayer (section 148 (1) FFC). The audit mandate has to include the subject of the audit including the specific types of income (taxes) and taxable years (section 148 (2) FFC). During the audit, the tax authority is allowed to request further information from the taxpayer. The audit ends with a final discussion of the outcome of the audit in the presence of the auditor and/or the legal representative (*Schlussbesprechung*, section 149 FFC).

The tax authority is obliged to put the outcome of the tax audit into writing and submit a copy of the audit report to the taxpayer (section 150 FFC). The audit report is not subject to legal remedies, it might, however, be the basis for issuing an amended tax notice.

1.6. Administrative/pre-litigation remedies

Not applicable.

[10] A complete list of DTCs can be accessed under the following link: https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/doppelbesteuerungsabkommen/dba-liste.html (accessed on 28 December 2023).

[11] See for more information: https://www.oesterreich.gv.at/lexicon/F/311984.html (accessed on 28 December 2023).

1.7. Court system

See section 3.1.2.

Part Two: Pre-dispute phase

2.1. Purely domestic dispute prevention mechanisms

2.1.1. Advance rulings and/or Advance Transfer Pricing Agreements

Under the Austrian advance ruling regime (section 118 FFC), which has been in place since 1 January 2011, taxpayers and tax transparent bodies of persons (e.g. partnerships) may apply for a binding ruling at the competent tax authority on certain future tax cases.[12]

Access to the advance ruling procedure is restricted in several ways: In temporal terms, it is available only for situations not yet realized when the application is filed. Eligibility might be questionable in situations where agreements, which have already been entered into in the past (e.g. conclusion of loan agreement with an associated enterprise), are having tax effects also in future years (e.g. monthly payments of arm's length interest over the credit period), which might differ from tax effects in the past years due to changing circumstances and conditions.[13]

With respect to the substantive scope,[14] advance rulings are available only for legal questions in connection with reorganizations within the meaning of the Austrian Reorganization Tax Act *(Umgründungssteuergesetz)*,[15] the Austrian group taxation regime (section 9 CITA),[16] matters of international tax law, VAT and the question as to whether the domestic GAAR (section 22 FFC) is applicable.[17] It is contentious whether the term "international tax law" is restricted to supranational law (i.e. essentially DTC law)[18] or can be interpreted in a broad sense (also covering e.g. the existence of a permanent establishment

[12] See *J. Herdin-Winter, F. Koppensteiner & S. Schmidjell-Dommes*, Austria, in Dispute Resolution Procedures in International Tax Matters, at 109 et seq. (IFA Cahiers vol. 101A, 2016), Books IBFD.

[13] In such a constellation it can be argued that the changing market conditions constitute new facts and circumstances for which a unilateral ruling can be applied for; c.f. *G. Steiner & D.Schedlbauer*, *Wer fragt, gewinnt! Auskunftsbescheide bei sich ändernden Rahmenbedingungen*, TPI 2/2023, at70 et seq. with further references.

[14] S. 118 (2) FFC.

[15] Apart from purely domestic reorganizations, the Austrian Reorganization Tax Act also covers certain international reorganizations with a specific nexus to Austria, e.g. cross-border mergers.

[16] Under the Austrian group taxation regime, it is possible to include foreign subsidiaries in the tax group and, thereby, utilize their losses in Austria.

[17] Initially, the advance ruling regime only covered legal questions in connection with reorganizations, the Austrian group taxation regime and transfer pricing. In 2018, the scope was extended to international tax law cases (in force as of 1 January 2019), VAT law (in force as of 1 January 2020) and the question of whether the domestic GAAR (s. 22 BAO) is applicable (in force as of 1 January 2019).

[18] Legislative materials and the position taken by the Austrian FMoF, see ErlRV 190 BlgNR XXVI. GP, 46; *F. Fiala & B.Hörtenhuber*, SWI Conference: Advance Ruling on Foreign Currency Differences, SWI 10/2019, at492.

under domestic law; application of interest deduction limitations or unilateral relief based on section 48 (5) FFC).[19] Transfer pricing questions are covered in any case.[20]

Furthermore, the law requires a "particular interest" *(besonderes Interesse)* of the applicant with respect to "significant tax implications" *(erhebliche abgabenrechtliche Auswirkungen*) of the future case. According to Austrian administrative practice, these requirements are interpreted generously and generally considered to be fulfilled in connection with applications relating to legal questions covered by the substantive scope.[21]

The application for the advance ruling has to be made in writing (filing per fax or electronically via FinanzOnline permitted, but not per e-mail) and has to contain the following:[22]

- a comprehensive description of the facts of the future tax case;
- arguments as to why the applicant has a particular interest in the advance tax ruling;
- a description of the legal problem;
- specific legal questions;
- an own legal opinion of the applicant on the legal questions raised with a detailed reasoning;
- information required for the calculation of administrative fees.

Having regard to the substantive scope of the advance ruling, the legal questions are typically of a rather complex nature, thus requiring a certain level of expertise on both the applicants' and tax administrations' sides. This is why taxpayers often involve legal representatives like tax advisors for drafting and filing the application.

The application will be rejected by the competent tax authority if the applicant is not entitled to apply for a ruling, if the application comprises only legal questions not covered by the substantive scope or if the facts of the case have already been realized at the time of application. Should the application suffer any other minor shortcomings (e.g. formal deficiencies, missing signature, application formally not complete), the competent tax authority has to issue a request for improvement of the application *(Mängelbehebungsauftrag)* to the applicant. If the application is valid, the competent tax authority has to process an advance ruling in the form of a formal administrative notice – to the extent possible *(tunlichst)* – within two months after receipt of the application.[23] However, this time limit may be exceeded if, e.g. the request is of particular complexity.[24] If no advance ruling notice is issued within six months after receipt of the application, the applicant may file an appeal claiming a breach of the obligation to reach a (timely) decision *(Säumnisbeschwerde)* at the Federal Fiscal Court *(Bundesfinanzgericht)* based on general procedural provisions.[25]

19 C.f. *C. Ritz & B. Koran*, Bundesabgabenordnung, 7th edition (2021) s. 118 MN 2a with further references.

20 *Bundesministerium für Finanzen (BMF)*, Verrechnungspreisrichtlinien 2021 (VPR 2021), 2021-0.586.616 from 7 October 2021 (Austrian Transfer Pricing Guidelines) MN 526; *Bundesministerium für Finanzen (BMF)*, *Richtlinien zu Advance Ruling (Auskunftsbescheid gemäß s. 118 BAO)*, BMF-010103/0035-VI/2011 from 2 March 2011, s. 1.

21 C.f. *BMF*, *Richtlinien zu Advance Ruling*, s. 3: no de minimis exception, questions dealt with in a Decree or information of the FMoF are allowed.

22 S. 118 (4) FFC.

23 S. 118 (5a) FFC applicable as of 1 July 2019.

24 ErlRV 190 BlgNR XXVI. GP, 46.

25 See *Ritz & Koran*, *supra* n. 19, s. 118 MN 10.

The advance ruling, which is not publicly available but subject to automatic exchange of information based on the provisions implementing Council Directive (EU) 2015/2376 and OECD BEPS Action 5,[26] has to contain the following points:[27]

- a description of the facts of the case for which the ruling is rendered;
- the binding legal opinion of the tax authorities (which can also deviate from the legal opinion of the applicant);
- the applicable provisions of the Austrian tax law;
- the taxes and the period of time for which the ruling applies;
- reporting obligations, i.e. specifications about whether and when the taxpayer has to report to the tax authorities, especially when the facts of the ruling have been fulfilled or when circumstances have changed.

Based on the advance ruling notice, which is binding not only for the competent tax authority but also for e.g. the Federal Fiscal Court and the Supreme Administrative Court *(Verwaltungsgerichtshof)*, the applicant is legally entitled to the tax treatment as provided in the ruling. The binding effect, however, is subject to the condition that the facts actually realized do not or only to a minor extent deviate from the description of facts provided in the ruling.[28] Furthermore, the ruling is binding only insofar as (i) the tax treatment granted in the ruling does not prove to be incorrect to the detriment of the applicant and (ii) the tax provisions decisive for the ruling are not abolished or changed. Deviating opinions published by tax authorities or deviating court decisions, however, do not have an influence on the binding effect of the ruling.[29]

The applicant may appeal against the advance ruling notice. A decision on the merits is effective ex tunc. Furthermore, a ruling, which proves to be incorrect, can be repealed or changed ex officio or upon application of the taxpayer. Such actions generally have *ex nunc* effect.[30]

For an advance ruling under section 118 FFC, an administrative fee, which ranges from EUR 1,500 to EUR 20,000 depending on the applicant's sales revenue, has to be paid. An amount of only EUR 500 is due when the application is rejected or withdrawn before the ruling is issued.

According to the most recent EU JTPF APA Statistics available, there were 15 unilateral Advance Pricing Agreements (APAs) in force at the end of 2021, 24 APA requests had been received and 15 APAs had been granted in 2021.[31]

2.1.2. Collaborative compliance systems

Since 1 January 2019, Austria has a legal framework for a cooperative compliance programme called "accompanying control" (*begleitende Kontrolle*).[32] Under the programme, which is a

[26] Ritz & Koran, supra n. 19, § 118 MN 22.

[27] Ex tunc effect only under the preconditions in § 118 (9) FFC.

[28] See in detail *I. Kerschner, Der Auskunftsbescheid – Grenzen der Bindungswirkung*, LexisNexis 2016, at 97 et seq.

[29] *Ritz & Koran*, *supra* n. 19, s. 118 MN 22.

[30] *Ex tunc* effect only under the preconditions in s. 118 (9) FFC.

[31] https://taxation-customs.ec.europa.eu/system/files/2023-08/20230816_APA_consolidated_2021 template.pdf; accessed on 22 December 2023.

[32] S. 148 (3a) FFC and ss. 153a to 153g FFC.

voluntary alternative to the traditional retroactive tax audit system,[33] participating taxpayers are subject to increased transparency and disclosure obligations and in turn benefit from a faster tax procedure, increased legal certainty and a reduced risk of litigation.[34]

Access to the programme is granted upon written application via FinanzOnline filed either by the taxpayer or its legal representative and subject to the following main conditions:

- Eligible are bookkeeping enterprises (*buchführende Unternehmer*) or groups of companies with a specific nexus (place of management, seat, permanent establishment or domicile) in Austria.
- The enterprise's turnover has to exceed EUR 40 Mio in the last two financial years prior to the application (with certain exceptions for banks and insurance companies). The main reason for excluding smaller taxpayers, who also might have the need for legal and planning certainty granted by the programme, is likely to limit the scope of potential applicants to a number which is manageable for tax authorities.[35] In case of a group of companies (*Kontrollverbund*), only one group member has to exceed the turnover threshold, which allows also smaller group members to participate in the programme in such scenario.[36]
- In the past five years prior to the application, the applicant must not have been convicted for an intentional or grossly negligent financial offence committed in the past seven years prior to the application. Additionally, all unaudited years within a period of five years prior to the application are subject to a tax audit. After this audit is finished, the competent tax authority assesses whether the applicant proves to be "tax reliable" (*steuerlich zuverlässig*). For the assessment of tax reliability, a non-exhaustive list of criteria is decisive, which, amongst others, includes the applicant's conduct in the tax audit and the findings in the tax audit, as well as the applicant's general "fiscal conduct" (*steuerliches Verhalten*) in the five preceding years. Finally, the applicant has to commit to "tax honesty" (*Steuerehrlichkeit*), which essentially means (i) legally compliant conduct with regard to tax obligations and duties, (ii) tax reliability, and (iii) refraining from potentially abusive arrangements within the meaning of the domestic GAAR (section 22 FFC) as well as refraining from tax evasion within the meaning of fiscal criminal law.[37] In particular, the required commitment to tax honesty is subject to criticism, as the taxpayer, also in the absence of such commitment, has to comply with the law anyway. Whereas not committing to tax honesty would result in the rejection of the application, the commitment is likely not more than a "gesture of goodwill" at the end of the day.[38]
- A TCF has to be implemented, which, according to the legal definition, comprises all measures taken by the taxpayer that ensure the timely and correct payment of taxes.[39] The TCF has to be based on a comprehensive risk assessment and constantly has to be adapted to changing conditions. The risk assessment, the resulting management

33 See above ss1.5.

34 *F. Fiala & L. Ramharter*, Cooperative Compliance in Austria, European Taxation 2019, at 385.

35 Id., at 389.

36 In case of a tax group within the meaning of the group taxation regime in s. 9 CITA, the group parent and all group members have to be included.

37 S. 4 (1) of the Regulation of the Austrian Federal Minister of Finance on the Audit of the Tax Control Framework (*SKS-Prüfungsverordnung*).

38 See in more detail *Fiala & Ramharter*, *supra* n. 34, at 389 et seq.

39 S. 153b (6) FFC.

processes, as well as all necessary control measures have to be documented on a regular basis.[40] Already upon application, the TCF has to be audited and its effectiveness certified by a public auditor or tax advisor in the form of a written expert opinion.[41] This expert opinion must be renewed every three years at the latest or even earlier, if the TCF significantly changes.

If all requirements are fulfilled, the competent tax authority, which is the Tax Authority for Large Traders, has to issue a formal notice, which is not publicly available, with the effect that the applicant is subject to accompanying control as of the following assessment period (or the following calendar year in case of taxes which are not levied by way of an assessment procedure). This, in turn, has the consequence that the taxpayer is in principle no longer subject to traditional *ex post* tax audits, but enters into an enhanced relationship with the tax administration. Such relationship is characterized by the following main features:[42]

- an increased disclosure obligation, under which the taxpayer even before filing the respective tax return has to disclose facts that pose a serious risk of being assessed differently by the competent authority (CA), if such facts might not only have insignificant effects on the tax result;
- a permanent contact between the taxpayer and the representatives of the competent tax authority in the form of at least four meetings per calendar year for discussion of potential tax issues or drafts of tax returns; and
- an obligation of the tax authority to provide information on tax implications of past and future cases for the taxpayer. With respect to future cases, the information is not binding, but the principle of good faith applies.[43]

Accordingly, legal certainty as main benefit for the taxpayer essentially results from the prompt assessment and omission of subsequent audits. The accompanying control covers all taxes which fall under the competence of the Tax Authority for Large Traders.[44] Representatives of the Tax Authority for Large Traders are highly trained and experienced. Against the background that only larger enterprises or groups of companies are eligible for the program and that the application *inter alia* requires the implementation of an effective TCF certified by a public auditor or tax advisor, the level of tax expertise is typically also high at taxpayers' side.

There are no fees for participating in the programme, but costs will be triggered especially in connection with the implementation and certification of the TCF. There is no specific time limitation, but participation in the programme essentially ends upon

40 S. 153b (6) FFC.

41 The audit procedure and the minimum content of the expert's opinion are further specified in the Regulation of the Austrian Federal Minister of Finance on the Audit of the Tax Control Framework (*SKS-Prüfungsverordnung*).

42 S. 153a FFC; under the accompanying control program, traditional tax audits are restricted to the cases explicitly mentioned in s. 148 (3a) FFC (e.g. taxes not covered by the accompanying control program; in case of corresponding adjustments of transfer prices).

43 See *G. Furherr & M. Vock*, *Umfasste Abgaben, Prüfungsmöglichkeiten während der begleitenden Kontrolle und Rechtsschutzsaspekte* at 126, in R. Brandl et al. (eds), *SWK-Spezial Begleitende Kontrolle*, Linde 2019.

44 This essentially means that all federal taxes with the exception of customs, excise duties (*Verbrauchsteuern*), stamp duties (*Gebühren*) and transfer taxes (*Verkehrsteuern*) are covered. Taxes which are subject to wage tax inspection are explicitly excluded from the scope of accompanying control. The taxpayer does not have the option of subjecting only certain taxes to the accompanying control.

request of the taxpayer, if the requirements for participation are not fulfilled any longer, if the taxpayer breaches its increased disclosure obligation or if the expert opinion with respect to the effectiveness of the TCF is no longer plausible.

2.1.3. Alternative or Supplementary dispute prevention mechanisms

The Austrian FMoF has a tax ombudsman service (*Steuerombudsdienst*), which does not have an explicit function for international tax dispute prevention and resolution, but may assist taxpayers with dispute prevention by ensuring proper filing in Austria and contacting the foreign tax administrations to clear up any questions in doubt.

2.1.4. Other

Advice from the tax authority

The taxpayer can – orally, in writing or by telephone – request information on tax issues at the competent tax authority.[45] The request is not subject to qualified conditions or specific formal requirements. For reasons of evidence, however, a written application is preferred in practice.[46] The tax authority is obliged to provide information only in certain cases, for example if the request is based on section 1 Duty to Grant Information Act (*Auskunftspflichtgesetz*) or section 90 ITA.[47] In other cases, the taxpayer has no legal right to obtain any information, but the tax authority can voluntarily provide an opinion.[48]

Information provided by the tax authorities is not legally binding. However, there can be legal consequences in favour of the taxpayer based on the principle of good faith (*Treu und Glauben*) if the following conditions are fulfilled:[49]

- The opinion has to be provided by the competent tax authority (in other words: the tax authority in charge). Accordingly, information provided by the FMoF is generally not binding under the principle of good faith, since the FMoF is – although highest ranked within the hierarchy of the Austrian tax administration – the competent tax authority only in very exceptional cases.[50]
- The opinion is not evidently incorrect (i.e. not clearly in conflict with unambiguous legal rules or contrary to supreme court case law), irrespective of whether the taxpayer is aware of such evident incorrectness or not.

45 C.f. for example s. 2 Auskunftspflichtgesetz.

46 C.f. guidelines to the principle of good faith, Official Gazette of the Austrian Tax Administration 2006/126, 3.1. Transcripts (s. 87 FFC) or proper notes (section 89 FFC) could be considered as evidence for oral information.

47 In addition, there is also an obligation to provide information based on s. 153a FFC, s. 118b (7) FFC or a ministerial decree concerning withholding tax; cf. for further details *M. Vock & A. Ullman*, Good faith in domestic an international tax law, IFA cashiers de droit fiscal international Volume 107, at 116.

48 Cf. guidelines to the principle of good faith, Official Gazette of the Austrian Tax Administration 2006/126, 3.1.

49 Cf. guidelines to the principle of good faith, Official Gazette of the Austrian Tax Administration 2006/126, 3.1. Additionally, it should be mentioned that the taxpayer can only rely on the principle of good faith if the actual facts substantially differ from the facts presented to the tax authority.

50 Cf. *N. Zorn, Schutz des Abgabepflichtigen durch den Grundsatz von Treu und Glauben*, in M. Lang, J. Schuch & C.Staringer (eds) *Soft Law in der Praxis* (2005) at 94.

- The incorrectness of the opinion was not apparent to the taxpayer.
- Relying on the correctness of the opinion provided beforehand, the taxpayer has made dispositions that otherwise would not have been made or made differently.[51]
- The taxpayer would suffer a (financial) loss – determined by the difference between the tax that was expected to be paid based on the tax authority's opinion and the actual tax owed – if the taxation was carried out contrary to the information provided by the competent tax authority.

The legal consequences differ depending on whether the legal tax provision in question grants the competent tax authority discretionary powers or not. If there is no discretionary power, the constitutional principle of the rule of law (*Legalitätsprinzip*) precedes the principle of good faith. As a result, the information provided does not protect the taxpayer from the application of the relevant legal provision and a later deviating opinion of the tax authority.[52] However, the taxpayer may be granted a renouncement of tax claims (*Nachsicht*)[53] in the amount of the financial loss.[54] When a legal provision grants discretionary powers, the tax authority needs to consider the principle of good faith.[55]

There are no administrative fees for such an information request.[56] The answer provided by the CA is not publicly available.

"Express reply service" ("Express-Antwort-Service – EAS") of FMoF

In 1991, the so-called "express reply service" (*Express-Antwort-Service, EAS*) was established in the FMoF to provide answers in connection with legal questions about international tax law within a short period of time. It is an "alternative" to unilateral advance rulings which had already been implemented in other countries at this time.[57] The express reply service is available for legal questions in connection with treaty law as well as "domestic" international tax law (e.g. domestic provisions on withholding taxes).[58]

The main advantages of the express reply service, which neither has a concrete legal basis nor binding procedural rules, are that it is easily accessible, free of charge and swift: Based on an informal written request, which typically includes a short summary of relevant facts on an anonymous basis together with the legal question(s), the FMoF provides its high-quality legal opinion on an abstract and anonymous basis usually within two or three weeks (in German or English depending on the request). The express reply service is used by taxpayers and their legal representatives (e.g. tax advisors), but also by members of the tax administration itself. The answers are published online at FINDOK,[59] and in journals. Since

51 C.f. for example VwGH 26 June 2004, 2000/14/0090.

52 C.f. for example VwGH 7 June 2001, 98/15/0065.

53 Based on s. 236 FFC and s. 3 (2) lit a of the ministerial decree concerning the renouncement of tax claims, Federal Law Gazette II 2005/435.

54 C.f. also *Vock & Ullman*, *supra* n. 47, at 117 et seq; Guidelines to the principle of good faith, Official Gazette of the Austrian Tax Administration 2006/126, 3.3. and 6.

55 Cf. Vock & Ullman, *supra* n. 47, at 118.

56 C.f. Guidelines on advance rulings, Official Gazette of the Austrian Tax Administration 2011/102, 10.

57 *H. Loukota*, 1000 replies delivered under the ministerial Express Reply Service, SWI 3/1997, at 94.

58 For the Austrian advance ruling regime, see above s. 2.1.1.

59 Standardsuche – Findok Internet (bmf.gv.at).

the answers are provided on an abstract and anonymous basis, the taxpayer who made the application cannot be traced back.

The main disadvantage of the express reply service is that the answers have no legally binding effect. In addition, also the principle of good faith does not apply in relation to them.[60] Nevertheless, the express reply service has a high practical relevance as the legal positions taken by the FMoF will be considered and followed by the competent tax offices. In practice, the answers are an important source for both taxpayers and tax administration when dealing with international tax cases.

2.2. International dispute prevention mechanisms

2.2.1. *Interpretative clarifications under article 25(3) of the OECD/UN Model Tax Conventions[61] which may avoid multiplication of the same disputes*

DTC provisions based on article 25 (3) of the OECD-MC and UN-MC establish the possibility of conducting general consultation procedures between competent authorities. These procedures typically concern questions of general importance and are initiated *ex officio*, i.e. by the CA itself. Austria concludes consultation agreements on a regular basis. These publicly available agreements include questions on difficulties or doubts arising as to the interpretation or application of certain DTC provisions.[62] The FMoF views consultation agreements as subsequent agreements in the sense of article 31 (3) lit a VCLT and applies these as means of interpretation of DTC provisions on the basis of a dynamic approach of DTC interpretation. The interpretative declarations forming part of consultation agreements include – amongst others – the beneficial-ownership requirement,[63] entitlement to DTC benefits of public bodies and tax-free corporations,[64] tax consequences of COVID-19,[65] certificates of residence[66], or taxation of frontier workers.[67]

2.2.2. *Bilateral or multilateral Advance Pricing Agreements*

APAs are instruments of dispute prevention requested by a taxpayer. The acceptance of an APA request is at the discretion of the competent authorities addressed by the request, as DTC provisions based on article 25 (3) OECD-MC and UN-MC – as legal basis for APAs – do not foresee an obligation to enter into negotiations of an APA as well as no obligation to come to a final conclusion after negotiations.

The Austrian MAP- and APA guidance foresees that an APA request of a taxpayer has

60 *M. Lang*, The significance of EAS legal information from the Ministry of Finance, SWI 10/1998, at 460.

61 "OECD-MC"/ "UN-MC".

62 https://findok.bmf.gv.at and https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/doppelbesteuerungsabkommen/dba-liste.html (at the respective DTC).

63 See, e.g. BMF, 010221/0433-VI/8/2014, no. 118/2014 (1 August 2018).

64 See, e.g. BMF, 04 0101/62-IV/4/92, no. 04 0101/62-IV/4/92 (7 July 1992).

65 See, e.g. BMF, 2022-0.232.980, no. 41/2022 (30 March 2022).

66 See, e.g. BMF, 2023-0.451.130, no. 75/2023 (21 June 2023).

67 See, e.g. BMF, 010221/0113-IV/8/2019, no 68/2019 (30 April 2019).

to be addressed to the Tax Authority for Large Traders in written form.[68] No fees are due for these requests. APA requests are regularly filed by representatives of the legal profession (e.g. tax consultants) as they require high expertise in the field of transfer pricing. Before the submission of an APA request, however, the Austrian tax authority may organize a joint pre-filing meeting with the taxpayer. The organization of such meeting is at the discretion of the competent tax authority. Most often, however, the Austrian tax authority will organize a pre-filing meeting as it offers the opportunity to discuss the suitability of an APA in a specific situation, the readiness to implement such APA, the types and range of documents to be provided by the taxpayer, as well as an approximate timeline.[69]

After receipt of a complete APA request, the Austrian tax authority will contact the competent authority or authorities of the other contracting state(s) on the basis of the applicable DTC provisions. The bi- or multilateral exchange of information between the competent authorities also includes the exchange of position papers prepared based on the information available to the authorities. Such written exchange of positions may be supplemented by virtual and physical meetings between the competent authorities. In this respect, the taxpayer may also be asked to participate in these meetings – when suitable – as well.[70]

If negotiations between the CAs lead to the conclusion of an APA, the Tax Authority for Large Traders will inform the competent national tax office of such. The competent tax office will then have to take into account the outcome of the APA as part of the issuance of tax assessments for the relevant years. In this respect, the FFC foresees the possible use of various different instruments to implement the APA outcome, depending on whether final tax assessments have already been issued and whether the APA had been finalised at that time. In the latter mentioned case, provisional decisions as defined in section200 FFC will be replaced by final decisions after the final conclusion of an APA. If, however, final decisions have already been issued before conclusion of an APA, the following instruments may be considered on a case-by-case basis by the competent tax authorities: waiver of payment (section 236 FFC); amendment of the decision of retroactive effect, unless the statute of limitations has expired (section 295a FFC); revocation of the decision within one year (section 299 FFC) or a reopening of the relevant fiscal years until the expiry of the statute of limitations (section 303 FFC).

A full picture of the Austrian APA practice (which also includes multilateral APA cases) can only be gleaned by examining the EU JTPF APA Statistics. The most recent (2022) statistics showcase that Austria is not among the main APA jurisdictions: it had only 28 APAs in force at the end of that year as compared to, say, Spain's 110.[71] Furthermore, most of these

[68] See https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/verstaendigungsverfahren.html (accessed on 2 December 2023).

[69] See BMF, Verständigungs- und Schiedsverfahren nach Doppelbesteuerungsabkommen, dem EU Schiedsübereinkommen und dem EU-Besteuerungsstreitbeilegungsgesetz, 2022-0.300.851, 56: https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=86584be8-e4a4-4572-91cd-a772a524a4ee (accessed on 2 December 2023).

[70] See BMF, Verständigungs- und Schiedsverfahren nach Doppelbesteuerungsabkommen, dem EU Schiedsübereinkommen und dem EU-Besteuerungsstreitbeilegungsgesetz, 2022-0.300.851, 58: https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=86584be8-e4a4-4572-91cd-a772a524a4ee (accessed on 2 December 2023).

[71] Statistics on APA's in the EU at the End of 2022, APAs_2022_FINAL.pdf (europa.eu) (accessed on 28 December 2023).

(22) were unilateral. However, 24 of the 28 APAs were based on requests submitted and granted in the same year, which showcases both the taxpayer interest in this mechanism as well as the responsiveness of the tax administration. On average, it took the Austrian tax administration 20 months to negotiate bilateral APAs, which is fairly swift compared to, e.g. Ireland's 46 months or Sweden's 112,87 months.

Austria also has experience with multilateral APA cases, which were mainly positive. However, the experience of Austria has shown that there is room for improvement. The following suggestions might improve the negotiation process:

- One jurisdiction needs to take the lead and be a point of contact for the other jurisdictions as well as for the taxpayers to effectively communicate with each other;
- One common communication platform that would be used by all jurisdictions, should be established;
- One person per jurisdiction should be nominated as the point of contact for communication and as a result the nominated persons would be responsible for the communication process;
- One point of contact that acts and communicates on behalf of the taxpayer(s) should be nominated;
- Commitment by all jurisdictions is required;
- Establishing a clear understanding of the procedural rules (of all participating jurisdictions) that relate to the implementation of a final multilateral APA is necessary;
- The participating jurisdictions should agree in writing to notify each other of an ongoing audit that could result in TP adjustments.

2.2.3. *Any other bilateral or multilateral tax mechanism used to avoid disputes arising*

The Austrian legislator included provisions on the possibility of multilateral risk assessment which are globally as well as on an EU-wide level also known as "ICAP"[72] or "ETACA",[73] as part of the Tax Amendment Act 2022 on 7 July 2022.[74] The mentioned act also included changes to domestic provisions as provided by the sixth change of the Directive on Administrative Cooperation (DAC 7),[75] such as the inclusion of provisions on joint audits. The latter-mentioned provisions supplement already existing provisions in the European Union Administrative Cooperation Act (*EU-Amtshilfegesetz*)[76] on simultaneous audits.

Provisions on the multilateral risk assessment are found in section 118b FFC. According to section 118b (1) FFC, a so-called "leading" entity[77] seated in Austria is eligible to file for

[72] See https://www.oecd.org/tax/administration/international-compliance-assurance-programme.htm (accessed on 1 December 2023).

[73] See https://taxation-customs.ec.europa.eu/eu-cooperative-compliance-programme/european-trust-and-cooperation-approach-etaca-pilot-project-mnes_en (accessed on 1 December 2023).

[74] See Abgabenänderungsgesetz 2022 – AbgÄG 2022 (1534 d.B.), BGBl I 108/2022.

[75] See Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, L 104/1 (25 March 2021).

[76] See Bundesgesetz zur Umsetzung der Richtlinie 2011/16/EU über die Zusammenarbeit der Verwaltungsbehörden im Bereich der Besteuerung und zur Aufhebung der Richtlinie 77/799/EWG (EU-Amtshilfegesetz – EU-AHG), BGBl I 112/2012 in its current version and with respect to joint audits ss. 12a and 12b of aforementioned act.

[77] The Austrian legislator aims – in conformity with the ICAP and ETACA programs – to include such entities in the scope of the provision that are subject to the obligations of exchange of CbC-reports: ErläutRV 1534 BlgNR 27. GP 33.

the initiation of a multilateral risk assessment at the Tax Authority for Large Traders. The initiation of such process, however, is not warranted by law. It is far more at the discretion of the tax authority to initiate a multilateral risk assessment with the tax authorities of other participating states. As the aforementioned risk assessment includes an assessment of transfer prices, withholding taxes, hybrid structures and similar issues, a high level of expertise in (international) taxation is required from both, participating jurisdictions as well as filing taxpayers.

The possibility to file for multilateral risk assessment is not contingent upon the payment of a certain monetary amount. Section 118b (3) FFC, however, requires that the filing entity was not subject to any penalty based upon a financial criminal offence conducted with wilful default or gross negligence.

The multilateral risk assessment procedure is expected to be finalised within a timeframe of 28 to 36 weeks.[78] The outcome of the procedure will be manifested in a risk assessment report. If, in this respect, risks referring to the business conduct of an entity are ascribed to be low, it is assumed that a tax authority doesn't aim to put further resources into further risk assessment of covered periods. However, such a low risk assessment doesn't protect the taxpayer from a potential audit as well as the issuance of a deviating tax notice by the Austrian tax authority, as the risk assessment report has no legal value in itself.[79]

The instrument of multilateral risk assessment has to be differentiated from joint audits as provided by sections 12a and 12b EU-AHG. Joint audits may – in contrast to multilateral risk assessments – only be initiated by the tax authorities themselves. It may either be the case that a foreign competent tax authority requests the Austrian Central Liaison Office (CLO) to conduct a joint audit, or vice versa. If the first-mentioned situation is the case, the CLO– according to section 12a (1) EU-AHG – has to respond to such request within 60 days of receipt. In case a joint audit is conducted in Austria, foreign auditors are bound by the domestic rules of conduct of auditing in relation to the taxpayer. These rules are enshrined in sections 148 to 151 FFC.

The outcome of a joint audit is manifested in a final report. Such a report reflects the findings on the facts of the case agreed by the competent tax authorities concerned but may also include such facts upon which these authorities did not agree. The Austrian tax authorities are generally not bound by the outcome of the joint audit within tax procedures based on the FFC, however, the outcomes of the joint audit shall still be reflected in the assessment of the case when e.g. issuing a tax notice on certain taxable periods.[80]

2.2.4. Other

Not applicable.

[78] See ErläutRV 1534 BlgNR 27. GP 31.
[79] See ErläutRV 1534 BlgNR 27. GP 34.
[80] See ErläutRV 1534 BlgNR 27. GP 57.

2.2.5. *Any other dispute prevention procedure as may be applied under international investment agreements*

Not applicable.[81]

Part Three: Dispute phase

3.1. Purely domestic dispute resolution mechanisms

3.1.1. Administrative review

Not applicable.

3.1.2. Judicial review

An overview of the basic functioning of the appeals / judicial review process is already provided in *Herdin-Winter/Koppensteiner/Schmidjell-Dommes*, Austria in IFA Cahiers 2016 – Volume 101A: Dispute resolution procedures in international tax matters.

3.1.3. Alternative or Supplementary dispute resolution mechanisms

See section 2.1.3. for a description of the function of the tax ombudsman. However, the tasks performed by the tax ombudsman are primarily relevant to the dispute prevention phase.

3.1.4. Other

Not applicable.

3.2. International dispute resolution mechanisms

3.2.1. Mutual Agreement Procedure under DTCs

Austria has a fairly large DTC network of more than 90 signed DTCs.[82] All Austrian DTCs contain a MAP provision patterned after article 25 of the OECD-MC.[83]

[81] Investment treaties do not contain dispute prevention clauses. *See Lang et al (eds)* The Impact of Bilateral Investment Treaties on Taxation.

[82] A current list can be found on the official website of the FMoF at https://www.bmf.gv.at/en/topics/taxation/double-taxation-agreements/the-austrian-tax-treaty-network.html (accessed on 28 December 2023).

[83] The provision generally follows the OECD-MC at the time of conclusion of the respective DTC, which leads to some – relatively small – deviations from the current OECD-MC in older treaties. OECD, *MAP Peer Review Report – Austria (Stage 1)*, *supra* n. 13, at 9 and 57 et seq.

The conduct of a MAP is generally possible for transfer pricing as well as other cases. Transfer pricing cases may – from an Austrian perspective – also be subject to MAP without the existence of a DTC provision corresponding to article 9 (2) OECD-MC.[84]

In Austria, access to MAP is contingent upon the unsuccessful application of refund of withholding taxes. A request for MAP, however, does not preclude the possibility to file an appeal to a tax notice or other legal remedies. This also holds true for pending appeals. Nevertheless, it needs to be mentioned that the Austrian CA for MAP cases, i.e. the Tax Authority for Large Traders, is bound by rulings of national courts on the basis of sections 278 (3), 279 (3) FFC as well as section 63 Austrian Supreme Administrative Court Act (*Verwaltungsgerichtshofgesetz*). Therefore, if a court ruling has been issued before a MAP has been finalized, the competent Austrian tax authority may only be able to conclude a MAP either in line with the judgement, or – if the other contracting state doesn't agree with such outcome – with an agreement to disagree, i.e. without the avoidance of taxation not in accordance with the legal instrument. Although the failure to agree within a MAP may – under certain circumstances – lead to an arbitration procedure,[85] the existence of a court ruling generally precludes this possibility.[86]

The affected person also has the possibility to apply for the suspension of the appeal procedure during the MAP. This possibility is enshrined in section 271 FFC and a decision on the suspension may already be taken by the competent Austrian tax authority if the decision is still pending before the tax authority as such.

Although certain states, such as Italy,[87] may prevent access to MAP in case of an agreement made between the tax authority and the taxpayer (audit settlement), Austria grants – in conformity with the BEPS Minimum Standard[88] – access to MAP in the existence of an audit settlement. In addition, Austria also grants access to MAP, even if a domestic anti-abuse rule may be applicable in a certain case. This is also manifested in Austria's MAP guidance.[89] In general, it can be concluded that Austria very generously grants access to MAP. According to the annually reported MAP statistics, only 2 out of 110 MAP cases closed in 2022 resulted in the outcome "access denied".[90]

Taxpayers may submit a MAP request in writing, by e-mail or electronically via FinanzOnline.[91] The lattermentioned option, however, is only available for cases falling in the scope of the EU Tax Dispute Resolution Act (EU-TDRA; *EU-Besteuerungsstreitbeilegungsgesetz*), i.e. the implementation act of the EU Dispute Resolution Directive. MAP applications

84 BMF, Verständigungs- und Schiedsverfahren nach Doppelbesteuerungsabkommen, dem EU Schiedsübereinkommen und dem EU-Besteuerungsstreitbeilegungsgesetz, 2022-0.300.851, 64: https://findok.bmf.gv.at/findok?execution=e1000001s1&segmentId=86584be8-e4a4-4572-91cd-a772a524a4ee (accessed on 2 December 2023).

85 See s. 3.2.2.

86 See, however, art. 25 (5) DTC Austria-Germany (2002): This provision does not preclude access to the arbitration procedure before the ECJ, even in the existence of a court ruling.

87 See OECD, Making Dispute Resolution More Effective – MAP Peer Review Report, Italy (Stage 2): Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project (2020) 49.

88 See also Commentary on Article 25 OECD Model 2017, art. 25, para. 45.1.

89 See BMF, Verständigungs- und Schiedsverfahren nach Doppelbesteuerungsabkommen, dem EU Schiedsübereinkommen und dem EU-Besteuerungsstreitbeilegungsgesetz, 2022-0.300.851, 21: https://findok.bmf.gv.at/findok?execution=e1000001s1&segmentId=86584be8-e4a4-4572-91cd-a772a524a4ee (accessed on 2 December 2023).

90 See https://www.oecd.org/tax/dispute/map-statistics-austria.pdf (accessed on 1 December 2023).

91 See https://finanzonline.bmf.gv.at/fon/ (accessed on 1 December 2023).

may be submitted by either the affected person or its representative. In this respect, MAP applications for "other cases" are generally submitted by the affected person him- or herself and for transfer pricing cases by a legal representative.

As already mentioned, the Austrian Tax Authority for Large Traders is the CA for the negotiation of MAP cases. This is due to a delegation of powers by the Minister of Finance, who in substance is the CA for the conduct of MAP cases. The negotiation of MAP cases by the Tax Authority for Large Traders falls under the supervision of the International Tax Law Division (Division IV/8) of the FMoF. The aforementioned division is responsible for the negotiation, application and interpretation of DTCs. It might therefore be reasonably assumed that the professional conduct of MAP cases is sufficiently guaranteed.

The MAP might be divided into two stages: The unilateral and the bilateral stage. While the formerly mentioned stage refers to the conduct between the Austrian CA and the affected person, the latter-mentioned stage is a purely bilateral (or occasionally multilateral) one between competent authorities of contracting states. Based on such classification, the right to participate in the process as regards the affected person, differs substantially. Within the unilateral stage, an affected person is ascribed the status of a party as provided by section 78 FFC. Therefore, the affected person is entitled to certain rights enshrined in the FFC, such as access to files (section 90 FFC).[92] The affected person, however, also needs to fulfil the obligations set out by the FFC. These include – amongst others – the duty to disclose facts and circumstances (section 119 and section 139 FFC), a duty to cooperate (section 115 FFC) as well as notification duties (sections 120 et seq. FFC). The affected person may therefore be asked by the competent Austrian authority to provide certain information upon request if, e.g. the information as set out in the Austrian MAP-guidance[93] or – in cases of application based on the EU-TDRA – information as referred to in section 9 EU-TDRA is not sufficiently provided.

In contrast to the unilateral stage of a MAP, an affected person does not have the status of a party in the sense of section 78 FFC and is therefore also not able to claim the rights connected to such status in the bilateral stage of a MAP. This approach taken by Austria is in line with the Commentary on article 25 OECD-MC.[94] The affected person may nevertheless be granted the opportunity to present his or her position to the Austrian CA orally and provide the necessary documents thereto.[95] After a MAP is concluded between Austria and another contracting state, the competent Austrian tax authority is obliged to implement its outcome. This may – if a MAP resulted in an agreement on the elimination of taxation not in accordance with a treaty – be done by way of issuing a tax notice according to section 48 (2) FFC. Such tax notice is the basis for further decisions taken by the competent tax authorities, such as the annulment or

92 Such access, however, does not include access to communication conducted between the competent authorities, such as position papers. Such communication relates to the second stage of the MAP and remains confidential.

93 See BMF, Verständigungs- und Schiedsverfahren nach Doppelbesteuerungsabkommen, dem EU Schiedsübereinkommen und dem EU-Besteuerungsstreitbeilegungsgesetz, 2022-0.300.851, s. B.1.3.1.: https://findok.bmf.gv.at/findok?execution=e1000001s1&segmentId=86584be8-e4a4-4572-91cd-a772a524a4ee (accessed on 2 December 2023).

94 See Commentary on OECD-MC 2017, art. 25, paras. 36 et seq.

95 See BMF, Verständigungs- und Schiedsverfahren nach Doppelbesteuerungsabkommen, dem EU Schiedsübereinkommen und dem EU-Besteuerungsstreitbeilegungsgesetz, 2022-0.300.851, 33: https://findok.bmf.gv.at/findok?execution=e1000001s1&segmentId=86584be8-e4a4-4572-91cd-a772a524a4ee (accessed on 2 December 2023).

modification of tax notices based on section 118 (9) lit c FFC.[96] The implementation of a MAP agreement in Austria by way of a tax notice in the sense of section 48 (2) FFC is not contingent upon the existence of a provision in the legal instrument along the lines of article 25 (2) second sentence OECD-MC. A MAP agreement may therefore in any case be implemented in Austria notwithstanding the absolute domestic statute of limitations of 10 years.[97]

As regards the implementation of MAP agreements, however, one needs to keep in mind the specifics of the EU-TDRA. According to section 27 EU-TDRA, the affected person is – in contrast to MAPs filed under the EU-AC and DTCs – obliged to provide a waiver on potential legal remedies taken on the tax notice based on section 48 (2) FFC and withdrawal of any legal remedies concerning the dispute in question as well as its consent to the agreement made between the contracting states. If proof of these issues is not provided by the affected person within 60 days of receipt of the information on the MAP agreement, such agreement will not be implemented. Note, however, that the competent Austrian tax authority may still request such waiver with respect to MAP agreements reached on the basis of the respective provisions of a DTC or the EU-AC.[98] Nevertheless, with respect to these instruments, a waiver is voluntary. It does not constitute any legal precondition to implement the MAP agreement but may – in accordance with section 245 FFC – only be implemented after the expiration of the one-month period to appeal the tax notice of section 48 (2) FFC. Regardless of the legal basis upon which the MAP is based, an individual result of a MAP is not published by the Austrian tax authorities.[99]

The affected person has – according to section 212a (2a) FFC icw section 48 (1) FFC – the possibility to file for the suspension of tax collection for the duration of a MAP. The tax so suspended will be collected *ex officio* by the competent Austrian tax authority when the competent authorities of the MAP fail to reach an agreement on the avoidance of taxation not in accordance with the treaty. In such a case, the competent Austrian tax authority will issue a tax notice in accordance with section 48 (3) FFC to manifest the last date of suspension of tax collection. Unilateral relief on the basis of section 48 (5) FFC is not possible for the duration of a MAP. It may, however, be applicable under strict circumstances and at the discretion of the FMoF, if the MAP fails and all other possible legal remedies, such as court proceedings are exhausted. This approach applies to all MAPs irrespective of their legal basis, i.e. DTCs, EU-AC or EU-TDRA.

Affected persons are not charged any costs in relation to a MAP by the Austrian tax authorities. However, any costs incurred by the affected person with respect to a MAP, such as for the provision of documents requested by the Austrian tax authority in accordance with its MAP guidance, will not be reimbursed. Similarly, each contracting state bears its own costs arising from the MAP.[100]

Austria has been submitting statistical information concerning MAP disputes to the EU

96 See with respect to notes on s. 118 FFC: Ch. 2.1.1.; see also s. 295 (2a) FFC with respect to changes on already issued tax notices that require modifications based on the issuance of a tax notice according to s. 48 (2) FFC.

97 See also s. 295 (2a) FFC.

98 BMF, Verständigungs- und Schiedsverfahren nach Doppelbesteuerungsabkommen, dem EU Schiedsübereinkommen und dem EU-Besteuerungsstreitbeilegungsgesetz, 2022-0.300.851, 36: https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=86584be8-e4a4-4572-91cd-a772a524a4ee (accessed on 2 December 2023).

99 See, however, s. 3.2.2. with respect to the final decision of the arbitration procedure.

100 BMF, Verständigungs- und Schiedsverfahren nach Doppelbesteuerungsabkommen, dem EU Schiedsübereinkommen und dem EU-Besteuerungsstreitbeilegungsgesetz, 2022-0.300.851, 37: https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=86584be8-e4a4-4572-91cd-a772a524a4ee (accessed on 2 December 2023).

and OECD since the inception of their collection. Based on the statistics, it can be concluded that the MAP is a generally effective, although not always efficient, instrument in Austria, meaning that while MAP cases are generally resolved through the removal of double taxation, they may take a long time to conclude.[101]

3.2.2. Arbitration in DTCs

The inclusion of arbitration clauses in Austrian DTCs has been part of Austria's general treaty policy for a long time.[102] Its unofficial Model Convention has included an arbitration clause since 1998. With respect to EU Member States, the Austrian Model 2008 proposed the selection of the EU Court of Justice (ECJ) as an arbitrator.[103]

Austria was also the first jurisdiction to ratify the MLI and to opt in to Part VI of the MLI, which modifies DTCs by the application of an arbitration clause.[104] More recently, Austria updated its list of notifications to include most of its treaty network in the scope of the MLI.[105] The arbitration clause in Part VI is already in force with respect to 14 Austrian DTCs.[106] As a result of the revised notifications, Part VI will in future also become applicable with respect to Austria's treaties with Barbados and Denmark, bringing the total up to 16. Furthermore, Part VI will not apply to certain DTCs because Austria reserved against this possibility in accordance with article 26 (4) of the MLI.[107] With respect to the MLI arbitration clauses, which have a standardized design, the analysis will focus on the Austrian position as expressed in the notifications made.

While Part VI of the MLI has become the main source of arbitration clauses in Austria's DTCs, Austria has also concluded 13 such clauses in the course of bilateral negotiations.[108] The Austrian arbitration clauses outside of the MLI can be subdivided into three separate

101 See for a more in-depth analysis, *Turcan*, Best practices for competent authorities to ensure effective and efficient arbitration in *Haslehner et al (eds)* Alternative Dispute Resolution and tax disputes.

102 Jirousek, *supra* n. 17; H. Jirousek, *Anmerkungen zur DBA-Politik Österreichs: eine Replik*, SWI 4, at 157 (2012).

103 M. Lehner, *Art 25*, para. 268, in *Doppelbesteuerungsabkommen* (*DBA*), 6th edition (K. Vogel & M. Lehner eds, Beck 2015); H. Loukota, W. Seitz & G. Toifl, *Austria's Tax Treaty Policy*, 58 Bull. Intl. Taxn. 8/9, at 364, 371 (2004), Journals IBFD; M. Lang, *Überlegungen zur österreichischen DBA-Politik*, SWI 3, at 108, 112 (2012), *citing* Art. 25(5) of the Austrian Model as printed in W. *Gassner, H. Hemetsberger, M. Lang, J. Sasseville & K. Vogel*, *Zukunft*, at 129 (Linde 1999); M. Sedlacek, Art 24 und Art 25 OECD-MA, in M. Lang, J. Schuch & C. Staringer eds, Die *österreichische DBA-Politik*, at 360.

104 See Austria's position at the time of ratification on the 22nd September 2017, https://www.oecd.org/tax/treaties/beps-mli-position-austria-instrument-deposit.pdf (accessed 31.12.2023).

105 See the notification on 28th August 2023, https://www.oecd.org/tax/treaties/beps-mli-position-austria-consolidated.pdf (accessed 31 December 2023).

106 Belgium, Canada, Finland, France, Greece, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Singapore, Slovenia, Spain and Hungary. The MLI is not yet in force with respect to the treaty with Italy because Italy hasn't ratified it yet. An overview of the procedural specifics of these clauses can be found in Annex 4 of Austria's MAP guidance, p. 67 et seq., https://findok.bmf.gv.at/findok/resources/pdf/c439ca20-25ef-4d9b-b6c3-d8e1fbdc6347/81116.1.1.pdf (accessed 31 December2023).

107 Armenia, Bosnia and Herzegovina, Germany, Mongolia, North Macedonia, San Marino and Switzerland, see supra n. 105, p. 33.

108 Armenia, Azerbaidjan, Bahrain, Bosnia and Herzegovina, Chile, Germany, Great Britain, Japan, Kosovo, Macedonia, Mongolia, San Marino and Switzerland. These clauses are listed and briefly analysed in Austria's MAP guidance, see the Annex ("Anlage") 3, p. 65-67, https://findok.bmf.gv.at/findok/resources/pdf/c439ca20-25ef-4d9b-b6c3-d8e1fbdc6347/81116.1.1.pdf (accessed 31 December 2023).

categories: the "old" clauses, the "new" clauses and the provision in the DTC with Germany. In the newer DTCs,[109] the clauses are patterned after article 25 (5) of the OECD-MC. The older treaties, which were negotiated before the OECD-MC contained an arbitration clause, follow a different pattern but are very similar to each other. They are similar to the OECD-MC in that they introduce a 2-year deadline and are binding,[110] but contain additional procedural specifications and omit the veto right.[111] The next sub-sections provide more details on the design of these clauses.

The only arbitration clause to have thus far been applied according to publicly available information is the special clause in the treaty with Germany, which designates the CJEU as an arbitrator.[112] This choice has significant impacts on the design and functioning of the resulting arbitration process, which will be briefly examined in the following sub-sections.[113] The CJEU case dealt with the question of whether Germany was allowed to levy a withholding tax on cross-border interest payments under article 11 (2) of the DTC, which deviates from the OECD-MC, as it concerns "[i]ncome from rights or debt-claims with participation in profits, […] or income from profit-participating loans and profit-sharing bonds". Under the treaty, the residence state of the recipient of the interest generally has the exclusive right to tax, but article 11 (2) introduces an exception. Germany as the source state applied article 11 (2) due to its domestic Supreme Court jurisprudence.[114] Austria, as the residence of the beneficial owner, disputed the application of article 11 (2) and claimed an exclusive taxing right. The interest in question arose from profit participation rights (Genusscheine). Payments to investors were a fixed percentage of invested capital. However, they were only due when the issuer had sufficient profits to satisfy the claim. Unpaid coupons would be carried forward if this was the case. The Court found in favour of Austria, by concluding that article 11 (2) must be interpreted according to the methods of international law by its ordinary meaning, object and purpose.[115]

Austria has made use of the opportunity offered by article 28 (2) of the MLI to make a free-form reservation with respect to the material scope of Part VI. Austria's reservation is comparatively limited in scope, as it covers only cases involving the application of its domestic anti-abuse rules (sections 21 and 22 FFC).[116] Austria also extended the default duration of the MAP to 3 years for all clauses under Part VI.[117] Given that the Austrian CA

[109] Great Britain, Japan, Kosovo and Switzerland.

[110] With the exception of the treaties with Azerbaijan and Chile.

[111] For an in-depth analysis of the clauses, see *Kubik/Turcan*, ch. 3: Austria, in *Lang et al (eds)*, Tax Treaty Arbitration, p. 82 et seq.

[112] AT/DE: ECJ, Case C-648/15, 12 Sept. 2017, *Austria v. Germany*, ECLI:EU:C:2017:664.

[113] For an in-depth analysis of the clauses, see *Kubik/Turcan, supra* n. 111, pp. 85-87 and the sources cited there.

[114] BFH (German Supreme Fiscal Court), 26 August 2010, I R 53/09.

[115] For a more in-depth analysis of the case, *see* I. Kerschner, F. Koppensteiner & C. Seydl, *Österreich erhebt aufgrund einer DBA-Streitigkeit erstmals Klage beim EuGH*, SWI, at 134 (2016); H. Jirousek, *Schiedsverfahren nach Art 15 Abs 5 DBA Deutschland vor dem EuGH*, SWI, at 36 (2017); H. Jirousek, *Schiedsverfahren nach Art 25 Abs 5 DBA Deutschland – Schlussanträge des Generalanwalts*, SWI, at 300 (2017); H. Jirousek, *EuGH entscheidet im Schiedsverfahren zugunsten Österreichs*, *Steuer- und WirtschaftsKartei* (SWK) 28, at 1186 (2017); M. Lang, *DBA-Interpretation durch den EuGH*, SWI, at 507 (2017); C. Staringer, *Austria: CJEU Pending Case from Austria: Austria / Germany (C-648/15)*, in *CJEU: Recent Developments in Direct Taxation 2016* (Linde Verlag 2016); B. Michel, Austria v. Germany *(Case C-648/15): The ECJ and Its New Tax Treaty Arbitration Hat*, 58 Eur. Taxn. 1, at 1 (2008), Journals IBFD.

[116] *See supra* n. 105, at 33. For an overview of other reservations, *see* H.M. Pit, *Arbitration under the OECD Multilateral Instrument: Reservations, Options and Choices*, 71 Bull. Intl. Taxn. 10, s. 5.1.3. (2017), Journals IBFD.

[117] Art. 19 (11) MLI.

cannot deviate from the decisions of Austrian courts,[118] Austria's reservation under article 19 (12) MLI ensures that an arbitration procedure cannot take place once such a decision has been rendered. Furthermore, due to Austria's reservation, cases for which the MAP request was submitted before the entry into force of the MLI for a given tax treaty are only accepted into arbitration if both competent authorities agree.[119]

The arbitration clause with Germany also applies the 3-year time limit for the MAP. However, cases previously decided by domestic courts are not excluded from the scope of arbitration due to the hierarchy of legal sources: EU law and bodies prevail over Austrian domestic law (and bodies) and thus the Austrian CA would not be prevented from implementing the ECJ decision even if a differing final decision were to have been issued in the matter by a domestic court.[120] In practice, the CJEU decision in the Austria-Germany case was implemented despite the decision of the German Supreme Court.[121]

The arbitration clauses with Azerbaijan[122] and Chile[123] are voluntary clauses and leave all other details to "*be established between the Contracting States by notes to be exchanged through diplomatic channels*". As opposed to the OECD-MC, which only allows the submission of MAP cases resulting from a taxpayer request to arbitration, the other older Austrian clauses are applicable to any unresolved "difficulties or doubts", meaning that interpretive MAPs are also covered if some of the taxpayers affected by these issues make a request.

The arbitration clauses in the DTCs with Japan and Switzerland generally follow the OECD-MC and therefore do not include any scope restrictions. The time limit in the clause with Switzerland is 3 instead of 2 years. However, Austria concluded a competent authority agreement ("CAA") with Switzerland, which provides for further procedural details, including details on the calculation of the above-mentioned deadline.[124]

With respect to the Austrian competent authority staff handling cases, see 3.2.1. on the depth of expertise. Article 20 (2a) of the MLI requires "*expertise or experience in international tax matters*".[125]

In the case of the arbitration clause with Germany, the cases are handled by the ECJ and its judges. The pros and cons of the ECJ as an arbitrator have been discussed in detail by *Staringer*.[126]

The older arbitration clauses contain significant deviations with respect to the set-up and composition of the arbitral panel. Firstly, just like the EU-AC, they require representatives of the competent authorities.[127] Secondly, the chairman must "*possess the qualifications required for the appointment to the highest judicial offices in his country or be a jurisconsult of recognized*

118 Ss. 278 (3) and 279 (3) FFC, as well as s. 63 Law of the Supreme Administrative Court (*Verwaltungsgerichtsgesetz*, VwGG). *See also C. Marchgraber*, Die Bindungswirkung verwaltungsgerichtlicher Entscheidungen im Abgabenverfahren, UFS Journal 7/8, at 281 (2013).

119 Art. 36 (2) MLI.

120 *See also* Staringer, *supra* n. 115, at 10.

121 BFH (German Supreme Fiscal Court), 26 August 2010, I R 53/09.

122 Art. 25 (5) of the DTC.

123 Art. 25 (5) of the DTC.

124 BMF-AV Nr. 96/2020, 2020-0.394.761, https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=7f205aed-c406-4202-8fc9-528172409db8 (last accessed 2 December2023).

125 The CAs can overrule it via a bilateral CAA, but so far, no CAAs have been concluded by Austria.

126 C. Staringer, *Austria: CJEU Pending Case from Austria: Austria / Germany (C-648/15)*, in *CJEU: Recent Developments in Direct Taxation 2016* (Linde Verlag 2016), at 8 et seq.

127 With the exception of the San Marino DTC.

competence".[128] The San Marino DTC requires the "*president*" to be selected "*from among independent personalities belonging to the Contracting States or to a third OECD member State*". The other independent persons are to be chosen from the previously established list of 5 persons. No details are provided on the expected qualifications.

The OECD-MC contains no specific requirements on the expertise of arbitrators. This is left to the bilateral CAAs. Austria has thus far only concluded one CAA, with Switzerland, which requires the panel members to have "*expertise and experience in the field of international tax law*".[129]

Since arbitration is an inter-governmental process, domestic procedural rules will not apply to that part of the process. They will, however, still govern the relationship between the taxpayer and its national CA.[130] The FFC foresees a right to be heard for the taxpayer, which includes the right to submit documents.[131]

The taxpayer's rights under Part VI of the MLI are generally not subject to options or reservations exercised by the jurisdictions. The only exception would be the possibility to implement a confidentiality requirement under article 23 (5), but Austria did not make use of it. Thus, no further analysis of the MLI will be provided in this section. With respect to transparency, the MLI follows the general OECD approach (see below).

In the case of the German DTC, the taxpayer is not allowed the usual veto to the arbitration decision. Given that ECJ interpretations are binding on all parties involved (thus, also taxpayers), it would be pointless to foresee it.[132] Nevertheless, the judgment does not have direct legal consequences for the parties in the arbitration case. Instead, it acts as an expert opinion, which the contracting states must then implement by means of a mutual agreement.[133] Furthermore, the ECJ procedural rules foresee the full publication of decisions regardless of the consent of the parties.[134]

The older Austrian arbitration clauses also do not foresee the taxpayer right to veto the arbitration decision. On the other hand, the taxpayer has the strongest procedural rights of any arbitration instrument, as he "*shall be heard before the arbitration court at his request*". The clause with San Marino provides for some deviations. It requires "*the prior discontinuance – without reservations or conditions – of any actions pending in national courts*". With respect to publicity, the older DTCs also follow the general OECD-MC approach.

Aside from the right to initiate the proceedings and the veto right, the OECD-MC (and thus the DTCs with Japan and Switzerland) do not foresee taxpayer rights, but competent authorities can deviate in their CAAs. However, the CAA between Austria and Switzerland does not include additional rights. Arbitral awards are not public under the OECD-MC in general or under Austrian DTCs.

128 Armenia (art. 25 (5)), Bahrain (art. 24 (5)), Bosnia and Herzegovina (art. 25 (5)), Macedonia (art. 24 (5)), Mongolia (art. 26 (5)) and San Marino (art. 25 (5)-(7)).

129 "Fachkenntnis und Erfahrung auf dem Gebiet des internationalen Steuerrechts" (authors translation), *see* para 10 of the CAA.

130 See BMF, Verständigungs- und Schiedsverfahren nach Doppelbesteuerungsabkommen, dem EU-Schiedsübereinkommen und dem EU-Besteuerungsstreitbeilegungsgesetz, 2022-0.300.851, 56: https://findok.bmf.gv.at/findok?execution=e1s1&segmentId=86584be8-e4a4-4572-91cd-a772a524a4ee (accessed on 2 December 2023), B.4.4. (p. 32 et seq.).

131 S. 15 (2) & 78 FFC.

132 Art. 91 Rules of Procedure of the Court of Justice, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf (consolidated version as of 25 September 2012). *See also* Kerschner, Koppensteiner & Seydl, *supra* n. 114, at 135; Staringer, *supra* n. 114, at 10.

133 *See Kubik/Turcan*, *supra*. n. 111, pp. 87 et seq.

134 Rules of Procedure of the Court of Justice, *supra* n. 120, art. 92.

The outcome of any arbitration procedure, the arbitral opinion, has no separate legal status under Austrian domestic law. It is only given legal effect once the mutual agreement implementing it is transformed into domestic law.[135]

As is the case for the MAP, taxpayers are not charged for filing a request for arbitration under any of the arbitration clauses in the Austrian DTC network. Within the Austrian DTC network, only the arbitration clause in the San Marino DTC addresses costs: it requires an equal split between the contracting states. Article 25 MLI foresees the same as a default rule, as it does under the CAA with Switzerland.[136]

For the relationship between the arbitral award on one hand and domestic time limits, suspension of collection and interest on the other hand, see 3.2.1., as these aspects result from the implementation of the MAP instituting the arbitral award.

3.2.3. *Alternative or Supplementary dispute resolution mechanisms applied under DTCs*

The possibility to use a mediator is provided for in m.no 86 of the Commentary on article 25 of the OECD-MC, which manifests that "*it is clear that supplementary dispute resolution mechanisms other than arbitration can be implemented on an ad hoc basis as part of the mutual agreement procedure. Where there is disagreement about the relative merits of the positions of the two competent authorities, the case may be helped if the issues are clarified by a mediator.*". As the EU-AC directly reflects several provisions from the OECD-MC,[137] the respective provisions of the EU-AC that are based on the OECD-MC may be interpreted in line with the commentary to the OECD-MC, therefore also allowing for the use of a mediator for MAPs that are within the scope of the EU-AC.[138]

According to publicly available information, Austria does not have practical experience in the conduct of instruments of alternative or supplementary dispute resolution mechanisms yet.

3.2.4. *Dispute resolution under EU tax law*

According to the publicly available MAP statistics of the European Commission, Austria had 39 MAP open MAP cases initiated on the basis of the EU-AC in its MAP inventory on 31 December 2021, which is also the starting inventory of 1 January 2022.[139] In this respect, 22 cases were solved in 2021 within an average of 40 months. Concerning cases submitted on the basis of the national implementing acts of the EU-DRD, the closing MAP inventory on 31 December

135 *See* chapter C.4. of the Austrian MAP guidance.

136 See part IX, para 37 of the CAA.

137 Such as art. 6 reflecting art. 25 (1) and (2) OECD-MC).

138 The Code of Conduct of the EU-AC also regularly refers to the relevant provisions of the OECD-MC. See, e.g. Point 4 subparagraph 2 of the Revised Code of Conduct: *Council of the European Union*, Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 2009/C 322/01 (30 December 2009).

139 See https://taxation-customs.ec.europa.eu/system/files/2023-08/20230816_AC%20MAP_2021_FINAL.pdf (accessed on 2 December 2023).

2021 was 5 cases. This counts for more than one-fifth of the closing MAP inventory of the whole EU.[140]

From Austria's experience, the EU-AC does not seem to be an appropriate legal basis for the conduct of MAPs. This is due to the fact that certain tax authorities within Europe try to circumvent the application of the provisions on the establishment of an advisory commission after the expiration of the 2-year time limit of article 7 (1) EU-AC by suddenly taking the stance that the minimum information as provided in the Code of Conduct has not been submitted by the taxpayer, therefore the 2-year period not even being started yet. This may even occur after bilateral discussions as required by article 6 (2) of the EU-AC were initiated and agreed upon by both contracting states, i.e. the case already being in the bilateral phase of a MAP. In the opinion of the authors, by looking at the MAP statistics of the EU-AC of the last years, it seems obvious that other EU Member States may have (similar) issues in starting the arbitration process. In 2019, 42 cases with a 2-year time limit expiration were to be sent to arbitration, however, only 1 case was in arbitration. In 2020, 46 cases were meant to be sent to arbitration, but no case was in arbitration at all and in 2021, 54 cases were eligible for arbitration with only 3 cases being in arbitration. In this respect, one might hope that the EU-DRD will provide more legal certainty for taxpayers and tax authorities due to binding and enforceable rules to start an arbitration procedure in eligible cases.

3.2.5. *Any other dispute resolution procedure as may be applied under international investment agreements*

Not applicable.[141]

Part Four: Other mechanisms and features which may trigger disputes

4.1. Mechanisms used by Tax Authorities

4.1.1. Risk assessment

The regulations for the external audit can be found in sections 143 et seq. FFC. However, the law does not specify how risk assessment takes place. According to the Austrian Chamber of Commerce, there are several approaches to case selection for audits, which are used in combination:

– group selection (computer-generated mathematical selection);
– time selection (selection of the enterprises with the longest past unaudited periods); and
– individual selection (on the basis of separate orders, notifications, event-related audits

[140] See https://taxation-customs.ec.europa.eu/system/files/2023-08/20230816_DRM_2021_FINAL.pdf (accessed on 2 December 2023).

[141] *See Gläser/ Reinisch*, Austria, in *Lang et al. (eds)*, The Impact of Bilateral Investment Treaties on Taxation, *supra* n. 81.

due to observations by tax authorities such as inconsistencies in tax returns or changes in legal relationships).[142]

The audited periods are usually the last three years for which tax returns have already been submitted and/or assessments issued.[143]

The Austrian tax administration has a centralized risk assessment unit, the PACC (*Predictive Analytics Competence Center*),[144] which uses supervised machine learning to predict the taxpayers and aspects of the tax system most prone to tax avoidance and fraud. This allows an optimal deployment of scarce audit personnel and resources (centralised audit case selection). In addition, the PACC assists with establishment and expansion of automated examinations in the context of tax audits and provides data management services. The data used by the PACC in its analysis stems from the information reported by taxpayers and exchanged between tax authorities.[145]

The publicly available information is insufficient to perform an evaluation of Austria's risk assessment system according to the OECD Enterprise Risk Management Maturity Model.[146] However, some conclusions can be drawn from the 29 self-evaluations performed for purposes of the report.[147] Firstly, all 29 tax administrations are at the same level (2) on the scale for all aspects being ranked. Secondly, while the assessment is anonymous, it's highly likely that Austria, as an OECD member, has either participated in it or would achieve similar results if it did participate.

4.1.2. *Audit manuals and other compliance training*

Austrian audit manuals are not public and can therefore not be referenced. As a member of the OECD and the FTA, Austria is committed to following its strategic plan, which includes the commitment to make all auditors aware of:

(1) "*the potential for creating double taxation,*
(2) *the impact of proposed adjustments on the tax base of one or more other jurisdictions, and*
(3) *the processes and principles by which competing jurisdictional claims are reconciled by competent authorities*".[148]

142 Austrian Chamber of Commerce, Außenprüfung (vormals Betriebsprüfung) – FAQ (as of 01 January 2023), https://www.wko.at/steuern/aussenpruefung-vormals-betriebspruefung-faq (last accessed 31 December2023).

143 Idem.

144 Predictive Analytics Competence Centre, *see* https://www.bmf.gv.at/en/topics/combating-fraud/anti-fraud-units/pacc.html (accessed 31 December .2023).

145 The international sources of information are listed in detail on the homepage of the Austrian FMoF, https://www.bmf.gv.at/en/topics/combating-fraud/Automatic-and-International-Information-Exchange.html (accessed 31 December 2023). *See* also 4.2.2.

146 OECD-FTA, OECD Tax Administration Maturity Model Series Enterprise Risk Management Maturity Model, https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/enterprise-risk-management-maturity-model.pdf (accessed 31 December 2023).

147 Enterprise Risk Management Maturity Model, 11.

148 *OECD-FTA*, multilateral strategic plan on mutual agreement procedures: a vision for continuous MAP improvement, https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/map-strategic-plan.pdf (accessed 31 December 2023). This will in all likelihood be achieved by using the "*Global Awareness Training Module*" that may be used for that purpose. The document is not public and can therefore not be evaluated.

All officials of Austria's tax administration have to complete a basic training (*Grundausbildung*) that encompasses all areas of tax law, commercial law and accounting. They must also pass exams related to this material. Tax officials with a special function, such as auditors, further have to complete special training (*Funktionsausbildung*) that prepares them for performing their specific tasks. In this respect, training for auditors comprises both practical and theoretical training, which intensifies and complements the knowledge obtained within this basic training.[149]

4.1.3. Cross-functional consultations and progress reporting

The FMoF has established a Central Services Division with a Central Specialized Unit for Legal Affairs that, among others, is tasked with:
- "*Ensuring uniform interpretation of the law throughout the country;*
- *Ensuring the inter-agency exchange of experience and information;*
- *Contributing to practical enforcement*
- *[establishing the] Link between the offices of the Federal Finance Administration and the FMoF*".[150]

This Unit can be consulted in the course of difficult audits, e.g. to assist with settling questions of interpretation.

4.1.4. Other

Not applicable.

4.2. Mechanisms used by taxpayers

4.2.1. Risk mitigation structures

An important instrument for risk mitigation is the implementation of a (voluntary) tax control framework.

4.2.2. Public reporting requirements

The Action 13 Minimum Standard was implemented in the Austrian VPDG,[151] which is fully in line with the OECD requirements.[152] Reporting has been a legal requirement since 2016, with

[149] See Bundesfinanzakademie (bmf.gv.at).

[150] *See* https://www.bmf.gv.at/en/the-ministry/internal-organisation/Central-Services-.html#100 (accessed 31 December2023).

[151] Bundesgesetz über die standardisierte Verrechnungspreisdokumentation (Verrechnungspreisdokumentationsgesetz – VPDG), BGBl. (Austrian Law Gazette) I Nr. 117/2016 as modified by BGBl. I Nr. 104/2019.

[152] Austria has no recommendations, *see OECD/G20*, Country-by-Country Reporting – Compilation of 2022 Peer Review Reports, p. 27, 5ea2ba65-en.pdf (oecd-ilibrary.org) (accessed 31 December 2023).

the first exchanges taking place 2018. However, there is likely still little practical experience with the use of CbC-R in domestic audits, since audits usually take place ex-post for a period of multiple years (often five years) and, given Austria's size, the most relevant information is likely to come from foreign CbC-R.

4.2.3. Other

Not applicable.

4.3. Features which may trigger disputes

Not applicable.

International Fiscal Association

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