



# APA & MAP Country Guide 2019 – Germany

CONNECTING THE DOTS OF INTERNATIONAL TAX CONTROVERSY



# Germany

## APA Program

KEY FEATURES	
<b>Competent authority</b>	Bundeszentralamt für Steuern (Federal Central Tax Office, or Tax authority)
<b>Relevant provisions</b>	Ministry of Finance Ordinance of October 5, 2006 (BMF, IV B 4-S 1341-38/06)
<b>Types of APAs available</b>	Bilateral and multilateral APAs are available. Unilateral binding statements from the Tax authority can be obtained in the form of advance tax rulings which are applicable in all cases concerning the interpretation of domestic law, excluding, however, certain technical matters such as the acceptance of specific TP methods.
<b>Acceptance criteria</b>	A formal (written) request to the Tax authority signed by the Taxpayer or an authorized representative is required, in which the Taxpayer must express an interest in conducting such procedure (materiality threshold). The request has to include all relevant information, as described in more detail below and the Taxpayer must be eligible under the respective DTT (treaty protected). An ongoing audit does not preclude an APA request.
<b>Key timing requests, deadlines</b>	The APA will generally commence from the beginning of the fiscal year in which the formal request is filed. Earlier commencement dates are allowed if the APA is filed before a tax return has been submitted for an earlier fiscal year and the statutory deadline for submission has not yet expired. Earlier commencement dates may be negotiated with the consent of the other relevant foreign tax authorities.
<b>APA term limits</b>	The Tax authority suggests a three-year minimum and a five-year maximum term for an APA.

<b>Filing fee</b>	<p>APA application fee      EUR20,000 (approx. USD22,680)</p> <p>APA renewals              EUR15,000 (approx. USD17,000)</p> <p>Modification of application    EUR10,000 (approx. USD11,350)</p> <p>There is a 50 percent reduction in fees for small Taxpayers (Taxpayers with intercompany tangible goods transactions below EUR5 million (approx. USD5.7 million) and other intercompany transactions below EUR500,000 (approx. USD567,000)).</p>
<b>Rollback availability</b>	<p>Rollback is available where the foreign tax authorities involved consents, and the Taxpayer can provide proof that the circumstances brought about in the relevant preceding years match the circumstances during the years covered by the APA. If a rollback is desired, the Taxpayer must provide all information requested within the APA process for the preceding years intended to be covered.</p>
<b>Collateral issues</b>	<p>Any administrative or tax issues that are relevant to and may affect the outcome of the APA should be addressed and resolved at the pre-filing stage with the Federal Central Tax Office.</p>

**PRE-FILING REQUIREMENTS**

**Overview**

Taxpayers should request from the Tax authority a pre-filing meeting to discuss the procedure, agree on the content of the APA request and documents that are required. The relevant tax authority of the Land (State) and all relevant foreign competent authorities must be involved in this discussion. Practical experience shows that Taxpayers are required to:

- explain why an APA is suitable in the Taxpayer's circumstances;
- outline the proposed TP method;
- introduce all relevant parties of the proposed APA;
- discuss with the Tax authority the documentation required for formal filing;
- agree with the Tax authority on a filing date and timetable; and
- gauge whether any of the relevant foreign tax authorities foresee major roadblocks that could prevent the APA application from reaching successful completion.

The Taxpayer may also discuss the Tax authority's estimation of the prospects of an agreement with foreign Tax authorities being reached in the APA procedure. A joint, non-binding estimate should be made on how long it will take to conclude the APA.

**Anonymous pre-filing availability**

Pre-filing is available on an anonymous basis. Any information provided to the Taxpayer that is non-procedural will not be binding, and no preparatory work will be done by the Tax authority beforehand.

## APPLICATION REQUIREMENTS

**Content of application**

Taxpayers must file the formal APA application with the Tax authority, enclosing four copies of each document required. APA applications must include:

- details of the companies involved:
  - name, address
  - Information on potential restructurings in the past;
- years for which the APA should be applicable;
- shareholding structure between the domestic and the foreign company/companies;
- a description of the company structure and the role of the involved domestic and foreign company within the group;
- economic situation of the company/the PE in Germany:
  - expected win/loss situation prior to the APA period (5 years)
  - expected win/loss situation within the APA period (5 years)
  - tax implications of the APA (additional taxes/tax refunds, reduction/increase of loss carry forwards)
- a description of the industry in which the relevant parties operate;
- presentation of business relationships with related parties covered by the APA;
- presentation of business relationships with related parties not covered by the APA;
- short description of TP problem;
- details on the planned TP system:

	<ul style="list-style-type: none"> <li>• description of the functions, risks as well as the assets used</li> <li>• description of the TP method used prior to the envisioned APA-period</li> <li>• reasons for maintaining or changing this TP method</li> <li>• information on comparable reference values used by comparable companies or other sources of applied comparative data;</li> <li>• annexes:             <ul style="list-style-type: none"> <li>• respective contracts</li> <li>• balance sheets and profit and loss statement from the last audited period prior to the APA-period</li> <li>• any documents supporting the suggested TP-method.</li> </ul> </li> </ul> <p>The application and position of the applicant will be scrutinized, coordinating closely with local tax auditors and negotiating with the relevant foreign tax authorities. After reaching an agreement, Taxpayers are formally asked for approval. Once approved, a ruling will be granted. Until the APA is concluded with legal effect, the request may be altered at any time. However, substantial alterations will be regarded as an entirely new request.</p>
<b>Language</b>	<p>The documentation may be submitted in German or in English; however, if provided in English, translations must be made available upon request.</p>
<b>SME provisions</b>	<p>Simplified APA procedures are available on request for applicants that meet the small Taxpayer criteria as set out above. This will be provided so long as no threat is posed to the objective of the APA and the agreement with the relevant foreign tax authorities.</p>

## OTHER PROCEDURAL CONSIDERATIONS

<b>General</b>	The Tax authority follows a standard pre-filing, application and monitoring process. APAs require the explicit consent of the Taxpayer, hence a waiver of remedies against it is necessary.
<b>Monitoring &amp; compliance</b>	<p>An annual report (Compliance Report) must be submitted to the Tax authority and relevant foreign tax authorities demonstrating that the critical assumptions have been satisfied, and including any deviations or adjustments made. The Compliance Report must be delivered by the earlier of the following:</p> <ul style="list-style-type: none"><li>• the same time as delivered to the foreign tax authorities; or</li><li>• filed with the tax return for the relevant assessment period.</li></ul>
<b>Renewal procedure</b>	An APA may be renewed if there is consent from the relevant foreign tax authorities, the renewal request is duly filed, and it can be proved that the underlying facts in the future will continue to match those on which the existing APA is based. An abbreviated procedure without submission of the documents required in an initial request is possible in such circumstances.

## MAP Program

KEY FEATURES	
<b>Competent authority</b>	Bundeszentralamt für Steuern (Federal Central Tax Office, or Tax authority)
<b>Relevant provisions</b>	The Information Leaflet for competent authority and arbitration procedures, October 9, 2018, (BStBl I 2018, 1122).
<b>Acceptance criteria</b>	The Taxpayer must be eligible under one of Germany's DTTs, or the EU Arbitration Convention (90/436/EEC) to request a MAP. A formal and timely request to the Federal Central Tax Office, including a description of the facts and a legal assessment is required. Furthermore, according to some older German DTTs, access is limited to cases of actual double taxation. The request has to be submitted by the Taxpayer or an authorized representative. MAP requests are accepted in the case of a Taxpayer-initiated foreign bona fide adjustment.
<b>Key timing requests, deadlines</b>	Most of Germany's DTTs permit a Taxpayer to present their case to the Tax authority within three years from the first notification to the Taxpayer of the actions giving rise to taxation not in accordance with the DTT. However, time limits may vary, particularly in older treaties, and the relevant DTT should be consulted for the applicable time limit. The German Tax Authorities are committed to solve MAP cases under DTTs within an average time of 24 months in line with the BEPS Action 14 minimum standard. For cases under the EU Arbitration Convention, respective timeframes will be considered as well including guidance in the 2009 Revised Code of Conduct. Article 7/1 of the EU Arbitration Convention foresees a two-year period for concluding the MAP-phase. Article 4 of the EU Dispute Resolution Directive also foresees a two-year timeframe for the MAP.

## APPLICATION REQUIREMENTS

<b>Content of application</b>	<p>Taxpayers should include the following in a MAP request:</p> <ul style="list-style-type: none"><li>• name, address (registered office), tax number, and locally responsible tax office of the party covered by the agreement;</li><li>• detailed information on the facts and circumstances relevant to the case;</li><li>• details of the tax period affected by the application;</li><li>• copies of the tax advices, the investigation report or comparable documents which have led to the alleged double taxation and other significant documents;</li><li>• details of any out-of-court appeals or litigation, and any court judgments affecting the case in Germany or abroad; and</li><li>• a statement by the Taxpayer that, in its own opinion, German or foreign taxation does not comply with the agreement.</li></ul>
<b>Language</b>	<p>Generally, applications should be submitted in German. Original documents may be submitted without a translation. The tax authorities might require additional translations depending on the official language of the other state involved.</p>

**OTHER PROCEDURAL CONSIDERATIONS**

<p><b>Interaction with domestic proceedings</b></p>	<p>Taxpayers may simultaneously request a MAP and initiate domestic appeal proceedings; however, if through the MAP a solution is reached, the solution can only be implemented if appeal is withdrawn.</p> <p>Final tax assessments are not binding for the tax authorities in a MAP (Sec 175a Fiscal Code). Acceptance of cases where anti-abuse provision (domestic or treaty) have been applied is as yet not explicitly defined. Audit settlements do not preclude the later acceptance of a case for MAP. However, Taxpayers can (voluntarily) waive their right to domestic appeals and MAP. Suspension of tax collection for the time of MAP can be requested separately under domestic procedural law rules.</p>
<p><b>Arbitration</b></p>	<p>Generally, it is Germany's policy to include arbitration clauses in its DTTs; however, only a small number of German DTTs actually include an arbitration clause (those countries predominantly being European, North American or OECD member states). Additionally, as Germany is a member of the EU, Taxpayers may initiate the arbitration procedure under the Tax Dispute Resolution Directive. The Directive is applicable to matters submitted after July 1, 2019, on issues related to the tax year starting on or after January 1, 2018. The EU Arbitration Convention also imposes a binding obligation on EU member states to eliminate double taxation under DTTs including, if necessary, by reference to the opinion of an independent advisory body.</p>

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STATISTICS	
<b>APA</b>	There were 61 APA application requests in 2015 and nine completed applications. The average completion time was 37 months for bilateral and multilateral APAs. Statistics are published in line with the requirements of the EU Joint transfer Pricing Forum.
<b>MAP</b>	Germany had a total of 1,241 active MAP applications as of 31 December 2017. The average time needed to close MAP cases is 39 months for transfer pricing cases, and 41 months for other cases.

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## Double Taxation Treaty Network

The following treaties include MAP provisions which are the basis for bilateral and multilateral APA negotiations:

Albania	Cyprus	Ireland <sup>(IV)</sup>
Algeria	Czech Republic	Isle of Man
Argentina	Denmark	Israel
Armenia <sup>(I)</sup>	Ecuador	Italy
Australia <sup>(I), (IV)</sup>	Egypt	Ivory Coast
Austria <sup>(I), (VII)</sup>	Estonia	Jamaica
Azerbaijan	Finland	Japan <sup>(I), (IV)</sup>
Bangladesh	France <sup>(I)</sup>	Jersey
Belarus	Georgia <sup>(IV)</sup>	Kazakhstan
Belgium	Ghana	Kenya
Bolivia	Gibraltar	Korea (Republic of)
Bosnia-Herzegovina	Greece	Kuwait
Bulgaria	Hungary	Kyrgyzstan
Canada	Iceland	Latvia
China	India	Liberia
Costa Rica <sup>(IV)</sup>	Indonesia	Liechtenstein <sup>(I), (IV)</sup>
Croatia	Iran	Lithuania

Luxembourg <sup>(I), (IV)</sup>	Poland	Thailand
Macedonia	Portugal	Trinidad and Tobago
Malaysia	Romania	Tunisia
Malta	Russia	Turkey
Mauritius	Serbia	Turkmenistan
Mexico	Singapore	Ukraine
Moldova	Slovakia	United Arab Emirates
Mongolia	Slovenia	United Kingdom <sup>(I)</sup>
Montenegro	South Africa	United States <sup>(I)</sup>
Morocco	Spain	Uruguay
Namibia	Sri Lanka	Uzbekistan
Netherlands <sup>(I)</sup>	Sweden <sup>(VII)</sup>	Venezuela
New Zealand	Switzerland <sup>(I)</sup>	Vietnam
Norway	Syria	Zambia
Pakistan	Taipei <sup>(III), (IV)</sup>	Zimbabwe
Philippines <sup>(IV)</sup>	Tajikistan	

## NOTES

- I denotes treaties with MAP arbitration provisions.
- II denotes treaties with the USSR that remain applicable until a separate tax treaty is concluded.
- III denotes treaties between the countries' representative office in Taipei and the Taipei Economic and Cultural Office in the relevant country.
- IV denotes treaties that became effective within the last five years.
- V denotes treaties that are awaiting ratification.
- VI denotes MAP provisions identical to para 3, art 25 of the OECD Model Convention with respect to Taxes on Income and on Capital.
- VII arbitration is to be conducted under the statutes of the ECJ.
- VIII arbitration is to be conducted under the statutes of the ICJ.

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