

OECD releases third peer review report on Action 5 on the exchange of tax rulings

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Executive summary

The Organisation for Economic Co-operation and Development (OECD) has released the [third annual peer review report](#)¹ (the report) relating to the compliance by members of the Inclusive Framework (IF) on Base Erosion and Profit Shifting (BEPS IF²) with the minimum standard on Action 5 for the compulsory spontaneous exchange of certain tax rulings (the transparency framework).

The report covers 112 of the 137 current BEPS IF jurisdictions, including all IF members that joined prior to 30 June 2018 and Jurisdictions of Relevance identified by the IF prior to 30 June 2018. The report assesses the 2018 calendar-year period and contains 52 jurisdiction-specific recommendations. Further, the report indicates that by 31 December 2018 more than 18,000 tax rulings in scope of the transparency framework had been issued by the jurisdictions under review, and around 30,000 exchanges of information had taken place.

The report will be followed by a fourth annual review, to be performed in 2020, which is the end of the current agreed review period. In next year's peer review process, each assessed jurisdiction's efforts to address any shortcomings identified in the current peer review report will be monitored, and an update on exchange of information statistics will be provided. The carrying out of reviews after 2020 will be subject to the agreement of the BEPS IF. First discussions on the rulings standard and the future peer review process will also take place in 2020.

Detailed discussion

Background

In October 2015, the OECD released the final reports on all 15 focus areas of the BEPS Action Plan.³ The recommendations made in the reports range from new minimum standards to reinforced international standards, common approaches to facilitate the convergence of national practices, and guidance on best practices.

Minimum standards are the BEPS recommendations that all members of the BEPS IF have committed to implement, and refer to some of the elements of:

- ▶ Action 5 on harmful tax practices
- ▶ Action 6 on treaty abuse
- ▶ Action 13 on transfer pricing documentation and Country-by-Country reporting
- ▶ Action 14 on dispute resolution

The minimum standards are all subject to peer review processes. The mechanics of the peer review process were not included as part of the final reports on these Actions. Instead, the OECD indicated at the time of the release of the BEPS reports that it would, at a later stage, issue peer review documents on these Actions providing the terms of reference and the methodology by which the peer reviews would be conducted.

In February 2017, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) for Action 5 on the compulsory spontaneous exchange of certain types of tax rulings to address Harmful Tax Practices: the Transparency Framework.⁴ The Terms of Reference translated the Action 5 minimum standard for the transparency framework into four key areas of review:

- (i) The information gathering process
- (ii) The exchange of information
- (iii) Confidentiality of the information received
- (iv) Statistics

The Assessment Methodology sets out procedures for the undertaking of a peer review and monitoring during 2017-2020. As the current mandate for the BEPS IF ends in 2020, the carrying out of any reviews after that date will be subject to the agreement of the BEPS IF. Thus, the current Assessment Methodology applies until 2020, but the peer review process is expected to continue thereafter,

possibly under a new assessment methodology, on which discussions will also take place in 2020. Each peer review is conducted on whether the assessed jurisdictions comply with the minimum standard in all four key areas, based on both a jurisdiction's legal framework and on how it applies the framework in practice.

On 4 December 2017, the OECD released the first annual peer review report relating to the transparency framework, which covered the assessment of 44 jurisdictions (i.e., OECD and G20 countries and countries that were in the OECD accession process throughout the BEPS project) for the 2016 calendar-year period. The report included 49 country-specific recommendations for improvement.⁵ On 13 December 2018, the OECD released the second annual peer review report relating to the transparency framework, which covered the assessment of 92 jurisdictions for the 2017 calendar-year period. The report included 60 country-specific recommendations for improvement.⁶

Annual peer review on the exchange of information on tax rulings

On 23 December 2019, the OECD released the third annual peer review report relating to the compliance by members of the BEPS IF to the minimum standard on the transparency framework during the 1 January 2018 - 31 December 2018 period.

While the first and second annual peer review covered 44 and 92 jurisdictions, respectively, this third review covers 112 jurisdictions, including all IF members that joined prior to 30 June 2018 and Jurisdictions of Relevance (i.e., jurisdictions outside the BEPS IF, but also deemed to be of interest for the purposes of transparency in tax) identified by the IF prior to 30 June 2018. Eight members of the IF have not been assessed under the transparency framework (namely Anguilla, the Bahamas, Bahrain, Bermuda, the British Virgin Islands, the Cayman Islands, the Turks and Caicos Islands and the United Arab Emirates) as these jurisdictions do not impose any corporate income tax and cannot legally issue rulings within the scope of the transparency framework. In addition, St. Maarten was affected by a natural disaster and therefore its peer review was deferred to the next annual review.

According to the peer review documents, one of the terms of reference is related to confidentiality. However, the reviews of confidentiality in connection with the transparency framework defer to the work of the Global Forum on Transparency and

Exchange of Information for Tax Purposes in connection with the standard on Automatic Exchange of Financial Account Information for Tax Purposes.

The outcomes of that work are not published and no further references to the review of confidentiality are made in the peer review document. Therefore, each country profile included in the second chapter of the report covers the following elements, namely:

- (i) The information gathering process
- (ii) Exchange of information
- (iii) Statistics

The country assessments, referred to as country profiles in the report, provide whether the relevant country has met the requirements set out in the terms of reference for the year in review, and thus whether the country issues tax rulings within the scope of Action 5. As per the OECD's press release, 68 jurisdictions have now successfully implemented the transparency framework and did not receive any recommendations for improvement, while the report contains 52 jurisdiction-specific recommendations on issues such as improving the timeliness of the exchange of information and ensuring that exchanges of information are made with respect to preferential tax regimes that apply to income from intellectual property (IP). However, the report notes that there are 14 recommendations made to OECD and G20 countries, particularly with regard to the transparency obligations that apply to grandfathered IP regimes, where action has not yet been taken and thus these recommendations are being issued for the third time.

The most common recommendations appear to be on issues such as: (i) improving the timeliness of the exchange of information; (ii) ensuring that all information on past and future rulings is exchanged as soon as possible; (iii) ensuring that the information gathering process for identifying all past and future rulings and potential exchange jurisdictions, with a review and supervision mechanism, is finalized as soon as possible; and (iv) ensuring that the "best efforts approach" to identify potential exchange jurisdictions for all past rulings is applied.

The country profiles also contain an overview of the number of past rulings and future rulings issued by a country for the assessed period as well as the number of follow-up requests that countries received for the exchange of the ruling and the average time to provide the response.

Overall, more than 18,000 tax rulings in the scope of the transparency framework have been issued by the jurisdictions being reviewed. By 31 December 2018, around 30,000 exchanges of information had taken place, with almost 14,000 exchanges undertaken during 2017 and over 6,000 exchanges during 2016.

Next steps

The jurisdictions assessed in the 2018 annual peer review report are already working to address deficiencies identified in their respective reports. Their progress will be reflected in peer review reports for subsequent years. The next annual peer review, in 2020, will also include jurisdictions which joined the BEPS IF since 1 July 2018, and St. Maarten, whose peer review was deferred due to natural disasters.

Implications

The annual peer review report is a significant step in the OECD's efforts for more transparency and information exchange in the area of tax. Member countries not only have to adapt their laws to be able to implement the transparency framework, but also have to adapt their tax administration systems to be able to process and report on information exchange. The report further reinforces the current transparency environment, where exchanging information automatically is the new standard. This, coupled with an ever increasing amount of other information being exchanged (tax rulings, financial account information, and Country-by-Country reports), reinforces the need for businesses to ensure that information filed is submitted in such a way that it cannot be read out of context, thus reducing any possible confusion.

Endnotes

1. The report was released on 23 December 2019.
2. <http://www.oecd.org/tax/beps/beps-about.htm#membership>.
3. See EY Global Tax Alert, [OECD releases final reports on BEPS Action Plan](#), dated 6 October 2015.
4. See EY Global Tax Alert, [OECD releases peer review documents on BEPS Action 5 on Harmful Tax Practices and on BEPS Action 13 on Country-by-Country Reporting](#), dated 6 February 2017.
5. See EY Global Tax Alert, [OECD releases first annual peer review report on Action 5](#), dated 5 December 2017.
6. See EY Global Tax Alert, [OECD releases second annual peer review report on Action 5 on the exchange of tax rulings](#), dated 14 December 2017.

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