

OECD releases eighth batch of peer review reports on BEPS Action 14

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Executive summary

On 24 February 2020, the Organisation for Economic Co-operation and Development (OECD) released the eighth batch of peer review reports relating to the implementation by Brunei Darussalam, Curaçao, Guernsey, Isle of Man, Jersey, Monaco, San Marino and Serbia of the Base Erosion and Profit Shifting (BEPS) minimum standard on Action 14 (*Making Dispute Resolution Mechanisms More Effective*).¹ Guernsey and the Isle of Man had also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and the OECD therefore also released two accompanying best practices reports.

Overall, the reports conclude that all eight assessed jurisdictions meet almost all or most of the elements of the Action 14 minimum standard. In the next stage of the peer review process, each jurisdiction's efforts to address any shortcomings identified in this Stage 1 peer review report will be monitored.

Detailed discussion

Background

In October 2015, the OECD released the final reports on all 15 action points of the BEPS Action Plan.² 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 drawing on best practices.

Minimum standards are the BEPS recommendations that all members of the [Inclusive Framework on BEPS](#) 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 and 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 final 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 October 2016, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) on Action 14.³ The Terms of Reference translated the Action 14 minimum standard into 21 elements and the best practices into 12 items. The Assessment Methodology provided procedures for undertaking a peer review and monitoring in two stages. In Stage 1, a review is conducted of how a BEPS Inclusive Framework member implements the minimum standard based on its legal framework for Mutual Agreement Procedures (MAP) and how it applies the framework in practice. In Stage 2, a review is conducted of the measures the BEPS minimum Framework member takes to address any shortcomings identified in Stage 1 of the peer review.

Both stages are desk-based and are coordinated by the Secretariat of the OECD's Forum on Tax Administration's (FTA) MAP Forum. In summary, Stage 1 consists of three steps or phases:

- (i) Obtaining inputs for the Stage 1 peer review
- (ii) Drafting and approval of a Stage 1 peer review report
- (iii) Publication of Stage 1 peer review reports

Input is provided through questionnaires completed by the assessed jurisdiction, peers (i.e., other members of the FTA MAP forum) and taxpayers. Once the input has been gathered, the Secretariat prepares a draft Stage 1 peer review report of the assessed jurisdiction and sends it to the assessed jurisdiction, asking for its written comments on the draft report. When a peer review report is finalized, it is sent for approval of the FTA MAP forum and later to the OECD Committee on Fiscal Affairs, who then adopts the report for publication.

Following the peer review documents, the OECD released an assessment [schedule](#) covering the peer review process on Action 14 where it catalogued the assessed jurisdictions into 10 batches for review.⁴ To date, the OECD has released the following Stage 1 peer review reports:

- ▶ The first batch (Belgium, Canada, Netherlands, Switzerland, United Kingdom, and the United States) was released on 26 September 2017.⁵
- ▶ The second batch (Austria, France, Germany, Italy, Liechtenstein, Luxembourg, and Sweden) was released on 15 December 2017.⁶
- ▶ The third batch (Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore, and Spain) was released on 12 March 2018.⁷
- ▶ The fourth batch (Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand, and Portugal) was released on 30 August 2018.⁸
- ▶ The fifth batch (Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia, and Turkey) was released on 14 February 2019.⁹
- ▶ The sixth batch (Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania, and South Africa) was released on 24 October 2019.¹⁰
- ▶ The seventh batch (Brazil, Bulgaria, China, Hong Kong, Indonesia, Russia, and Saudi Arabia) was released on 28 November 2019.¹¹

Also, in August 2019, the OECD released the first Stage 2 peer review reports, relating to the outcome of the peer monitoring with respect to Belgium, Canada, Netherlands, Switzerland, United Kingdom, and the United States (the first batch of jurisdictions).¹²

Eighth batch of peer review reports

On 24 February 2020, the OECD released the eighth batch of peer review reports relating to the implementation by Brunei Darussalam, Curaçao, Guernsey, Isle of Man, Jersey, Monaco, San Marino and Serbia. The reports are divided into four parts, namely:

- (i) Preventing disputes
- (ii) Availability and access to MAP
- (iii) Resolution of MAP cases
- (iv) Implementation of MAP agreements

Each of these parts address a different component of the minimum standard.

According to the OECD [press release](#), the eight reports from the eighth batch include approximately 135 targeted recommendations that will be followed up on in Stage 2 of the peer review process. Overall, the reports conclude that all eight of the assessed jurisdictions meet almost all or most of the elements of the Action 14 minimum standard.

All the assessed jurisdictions with the exception of Curaçao have no bilateral Advance Pricing Agreement (APA) program in place at present, and thus for them there were no specific APA elements to assess regarding the prevention of disputes. Curaçao has in place a bilateral APA program that allows for roll-backs, which is one of the elements of the minimum standard. However, it was not possible to evaluate the effective implementation of this element in practice because Curaçao did not receive any requests for roll-back of bilateral APAs during the review period.

Regarding availability and access to MAP, Monaco meets all the requirements and the rest of the assessed jurisdictions meet almost all or some of the requirements under the Action 14 minimum standard. Most of the assessed jurisdictions (namely, Brunei Darussalam, Guernsey, Curaçao, Isle of Man, Jersey, Monaco, and Serbia) have introduced guidance on the availability of MAP and how they apply this procedure in practice. However, in the case of Curaçao, the guidance is limited and the report indicated that further clarity should be provided. Further, Guernsey, Jersey, and Monaco have in place a documented bilateral consultation and notification process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not justified.

In regard to the resolution of MAP cases, all the assessed jurisdictions meet in principle all the requirements under the Action 14 minimum standard. Only Curaçao closed MAP cases on average within a 24-month timeframe during the period 2016-18, as required by the minimum standard. Brunei Darussalam, Monaco and San Marino were not involved in any MAP cases during the review period. Guernsey and Jersey were only involved in one MAP case, and the Isle of Man and Serbia did not close any MAP cases during the review period.

Further, for all the assessed jurisdictions except for Curaçao it was not yet possible to assess whether they meet the Action 14 minimum standard on the implementation of MAP agreements. The reports noted however that Jersey and Serbia have a domestic statute of limitations for implementation of MAP agreements, as a result of which there is a risk that such agreements cannot be implemented where the applicable tax treaty does not contain the

equivalent of Article 25(2), second sentence (i.e., any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States) of the OECD Model Tax Convention. Curaçao meets the Action 14 minimum standard on the implementation of MAP agreements. Although Curaçao does not monitor the implementation of MAP agreements, no issues were identified in the peer review process.

Finally, in order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 minimum standard, all the assessed jurisdictions received recommendations to amend and update some of their tax treaties. All the assessed jurisdictions, with the exception of Brunei Darussalam, have signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (the MLI), through which some of their tax treaties will potentially be modified to fulfill the requirements under the Action 14 minimum standard.¹³ Where treaties will not be modified upon entry into force of the MLI, the assessed jurisdictions reported that in general they intend to update some or all of their tax treaties to be compliant with the requirements under the Action 14 minimum standard through bilateral negotiations. Brunei Darussalam indicated that it is currently reviewing the possibility of signing the MLI. It also reported that it intends to amend its tax treaties bilaterally with all its treaty partners, but it has not yet put in place a specific plan.

Best practice peer review reports

Each assessed jurisdiction may provide information and request feedback from peers on how it has adopted the 12 best practices contained in the Action 14 final report.

Guernsey and the Isle of Man requested that the OECD provide feedback concerning their adoption of the best practices.

The best practice reports are divided into sections that cover the 12 best practices on MAP, and if peers provided input with respect to a best practice, the input is reflected in the report. However, for most of the best practices, the peers provided only limited input.

Next steps

The eight jurisdictions assessed in the eighth batch of the MAP peer review process are already working to address deficiencies identified in their respective reports and are moving to Stage 2. In Stage 2 of the peer review process, a jurisdiction's efforts to address any shortcomings identified

in its Stage 1 peer review report will be similarly monitored and the jurisdictions are to submit an update report to the FTA MAP Forum within one year of the OECD Committee on Fiscal Affairs' adoption of the respective Stage 1 peer review report.

The OECD is currently working on the Stage 1 peer review reports for the ninth batch of jurisdictions (Andorra, Anguilla, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Faroe Islands, Macau (China), Morocco, Tunisia, and Turks and Caicos Islands) and the Stage 2 peer review reports for the third batch of jurisdictions (Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore, and Spain). The Stage 2 peer review reports for the second batch of jurisdictions (Austria, France, Germany, Italy, Liechtenstein, Luxembourg, and Sweden) are expected to be released on 12 March 2020.

The OECD will continue to publish Stage 1 and 2 peer review reports in accordance with the Action 14 peer review assessment schedule.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face significant pressure and scrutiny from tax authorities and the number of MAP cases continues to increase, the release of the peer review reports reflects the continued recognition of the importance to MNEs of tax certainty with respect to their cross-border transactions. The fact that tax authorities are subject to this type of review by their peers should be viewed by MNEs as a positive step that will increase the likelihood of access to an effective and timely MAP process.

Furthermore, the peer review reports provide insights to taxpayers on the availability and effectiveness of MAP in the countries under review. As additional countries are continuing to be reviewed, the OECD has made clear that taxpayer input is welcomed on an ongoing basis.

Endnotes

1. <https://www.oecd.org/tax/beps/oecd-releases-stage-1-peer-review-reports-on-dispute-resolution-for-brunei-darussalam-curacao-quernsey-isle-of-man-jersey-monaco-san-marino-serbia.htm>.
2. See EY Global Tax Alert, [OECD releases final reports on BEPS Action Plan](#), dated 6 October 2015.
3. See EY Global Tax Alert, [OECD releases BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
4. See EY Global Tax Alert, [OECD releases schedule of Action 14 peer reviews](#), dated 1 November 2016.
5. See EY Global Tax Alert, [OECD releases first batch of peer review reports on Action 14](#), dated 27 September 2017.
6. See EY Global Tax Alert, [OECD releases second batch of peer review reports on Action 14](#), dated 15 December 2017.
7. See EY Global Tax Alert, [OECD releases third batch of peer review reports on Action 14](#), dated 14 March 2018.
8. See EY Global Tax Alert, [OECD released fourth batch of peer review reports on Action 14](#), dated 4 September 2018.
9. See EY Global Tax Alert, [OECD releases fifth batch of peer review reports on BEPS Action 14](#), dated 18 February 2019.
10. See EY Global Tax Alert, [OECD releases sixth batch of peer review reports on BEPS Action 14](#), dated 25 October 2019.
11. See EY Global Tax Alert, [OECD releases seventh batch of peer review reports on BEPS Action 14](#), dated 3 December 2019.
12. See EY Global Tax Alert, [OECD releases first batch of Stage 2 peer review reports on dispute resolution](#), dated 14 August 2019.
13. See EY Global Tax Alert, [OECD releases multilateral instrument to implement treaty related BEPS measures on hybrid mismatch arrangements, treaty abuse, permanent establishment status and dispute resolution](#), dated 2 December 2016 and EY Global Tax Alert, [Mandatory Binding Treaty Arbitration under OECD's Multilateral Instrument](#), dated 2 December 2016.

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