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Global Tax Alert

OECD releases second batch of Stage 2 peer review reports on dispute resolution

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Executive summary

On 9 April 2020, the Organisation for Economic Co-operation and Development (OECD) released the second batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden (the batch 2 jurisdictions) of the Base Erosion and Profit Shifting (BEPS) minimum standard on dispute resolution under Action 14 of the BEPS project. Stage 2 focuses on monitoring the follow-up of any recommendations that resulted from the batch 2 jurisdictions' Stage 1 peer review reports that were released on 15 December 2017.

The outcome of the Stage 1 peer review process for the batch 2 jurisdictions was that overall, the seven jurisdictions met most of the elements of the Action 14 minimum standard with respect to dispute resolution. Where deficiencies were identified, the Stage 2 monitoring showed that the jurisdictions have worked to address them. The Stage 2 reports for the batch 2 jurisdictions conclude that the assessed jurisdictions have addressed almost all or some of the identified deficiencies.

Detailed discussion

Background

In October 2015, the OECD released the final reports on all 15 Action areas of the BEPS project. The recommendations made in the reports ranged 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 countries participating in the Inclusive Framework on BEPS have committed to implement. Minimum standards were provided for under 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 specified in 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 on dispute resolution. The Terms of Reference translated the minimum standard for dispute resolution into 21 elements and the best practices into 12 items. The Assessment Methodology provided procedures for undertaking peer review and monitoring in two stages. Both stages are coordinated by the Secretariat of the OECD Forum on Tax Administration's (FTA) Forum on Mutual Agreement Procedures (MAP). In Stage 1, a review is conducted of how a jurisdiction implements the minimum standard based on its legal framework for MAP and how it applies the framework in practice.

In Stage 2, a review is conducted of the measures the jurisdiction has taken to address any shortcomings identified in Stage 1 of the peer review. An assessed jurisdiction should within one year of the adoption of its Stage 1 Peer Review report by the OECD's Committee on Fiscal Affairs submit a detailed written report to the FTA MAP Forum on: (i) the steps it has taken or is taking to address any shortcomings identified in its peer review report; and (ii) any plans or changes to its legislative or procedural framework relating to the implementation of the minimum standard.

Following the peer review documents, on 31 October 2016, the OECD released an assessment [schedule](#) covering the peer review process on dispute resolution under Action 14 where it catalogued the assessed jurisdictions into ten batches for review. On 15 December 2017, the OECD released the second batch of peer review reports covering the implementation by Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden of the BEPS minimum standard on dispute resolution.

To date, the OECD has released Stage 1 peer review reports for the first eight batches of jurisdictions¹ and Stage 2 peer review reports for the first batch of jurisdictions.²

Second batch of Stage 2 peer review reports

On 9 April 2020, the OECD released the Stage 2 peer review reports of jurisdictions included in the second batch of reviews (namely, Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden) of the BEPS minimum standard on dispute resolution. The Stage 2 reports follow the same structure as the Stage 1 reports, with four main sections: (i) preventing disputes; (ii) availability and access to MAP; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements. In addition, the Stage 2 reports also include an overview of developments in each jurisdiction since 1 April 2017 (i.e., the first of the next month following the launch of Stage 1 review for batch 2 jurisdictions on 7 March 2017), including developments relating to the tax treaty network of that jurisdiction and other developments regarding the minimum standard on dispute resolution.

In general, the progress of the batch 2 jurisdictions on addressing deficiencies identified in the Stage 1 reports has been scored as satisfactory in their respective reports, and overall, these jurisdictions meet almost all or some of the minimum standard on dispute resolution.

Germany, Luxembourg and Sweden meet the Action 14 minimum standard with respect to the prevention of disputes, and when disputes occur, they provide access to MAP in all eligible cases. France and Italy do not meet all of the requirements under the Action 14 minimum standard concerning the prevention of disputes as they do not enable taxpayers to request roll-back of bilateral advanced pricing agreements (APAs) even though they both have a bilateral APA program in place. Although Austria and Liechtenstein can provide bilateral APAs and enable taxpayers to request roll-backs of such APAs, since 1 January 2016 no requests for roll-back of APAs were received. Therefore, there was no basis to assess this requirement for these two jurisdictions.

All the batch 2 jurisdictions but Sweden have published clear and comprehensive MAP guidance on the availability of MAP and how it applies this procedure in practice. Even though Sweden has not issued specific guidance, the website of Sweden's tax administration includes basic information on, among other things, the availability of MAP and on how the MAP function in Sweden is construed and applied in practice, which was last updated in June 2019. In addition, Italy's existing MAP guidance is expected to be updated to reflect the contact details of Italy's competent authority and to make clear that access to MAP is available under the European Union Arbitration Convention when the tax authority and the taxpayer have entered into an audit settlement.

Regarding the application and time needed to resolve MAP cases, only Liechtenstein and Luxembourg met the 24-month average timeframe to close MAP cases. Austria and Germany succeeded in decreasing the amount of time needed to close MAP cases in 2017 compared to 2016. Austria reduced its average timeframe from 37.29 months to 22.78 months and Germany reduced it from 26.34 months to 22.59 months. Additionally, on the evolution of the MAP caseload over 2016 and 2017, in all batch 2 jurisdictions the caseload increased. In Luxembourg the caseload decreased as the number of cases Luxembourg closed in 2016 or 2017 is almost 30% higher than the number of all new cases started in those years.

Furthermore, in Austria, Germany, Italy, Luxembourg and Sweden additional personnel were assigned to the competent authority function or organizational changes were implemented or have been initiated with a view to handling MAP cases in a more timely, effective and efficient manner.

All the batch 2 jurisdictions' tax treaties contain a provision relating to MAP, with the exception of France, where a few of its tax treaties do not contain such provision. According to the peer review reports, the multilateral instrument (MLI) developed under BEPS Action 15 was utilized by all of these jurisdictions to bring some of their tax treaties in line with the minimum standard and bilateral negotiations were concluded (or are ongoing) in most of the jurisdictions for the treaties that are not covered by the MLI. The MLI is in force for all batch 2 jurisdictions with the exception of Germany and Italy.

Lastly, all batch 2 jurisdictions also meet the Action 14 minimum standard with respect to the implementation of MAP agreements, with the exception of Liechtenstein. Liechtenstein monitors the implementation of MAP agreements, but it has a domestic statute of limitations under which there is a risk that such agreements cannot be implemented if the applicable tax

treaty does not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. However, according to the peer review report, no problems have surfaced regarding Liechtenstein's implementation of MAP agreements throughout the peer review process.

Best practice peer review reports

In addition to the review of the minimum standard on dispute resolution, each assessed jurisdiction can provide information and request feedback from peers on how it has adopted the 12 best practices on dispute resolution.

Austria, Liechtenstein, Luxembourg and Sweden requested feedback concerning their adoption of the best practices and therefore, in addition to the peer review reports, the OECD has released accompanying best practices reports for these jurisdictions.

The best practice reports are divided into the same four parts as the peer review reports on the minimum standard. Under each of these sections, the 12 best practices on MAP are addressed and if peers provided input with respect to a particular best practice, the input is reflected in the report. However, for most of the best practices, the peers provided only limited input.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities and the number of MAP cases continues to increase, the release of the peer review reports represents the continued recognition of the importance to MNEs of certainty with respect to the tax treatment of cross-border transactions. While increased scrutiny and greater subjectivity increases the risk of double taxation, the continued focus by the OECD and participating jurisdictions on the implementation of effective dispute resolution mechanisms can be seen as a positive in helping to improve access to an effective and timely MAP process.

Furthermore, the release of this second batch of Stage 2 peer review reports provides insights to taxpayers on the progress made by these jurisdictions on the availability and efficacy of their MAP processes. As the reviews of all the assessed jurisdictions continue, the OECD welcomes taxpayer input on an ongoing basis.

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

Endnotes

1. See EY Global Tax Alerts, [OECD releases fourth batch of peer review reports on Action 14](#), dated 4 September 2018; [OECD releases fifth batch of peer review reports on BEPS Action 14](#), dated 18 February 2019; [OECD releases sixth batch of peer review reports on BEPS Action 14](#), dated 25 October 2019; [OECD releases seventh batch of peer review report on BEPS Action 14](#), dated 3 December 2019; [OECD released the eighth batch of peer review reports on Action 14](#), dated 26 February 2020.
2. See EY Global Tax Alert, [OECD releases first batch of Stage 2 peer review reports on dispute resolution](#), dated 14 August 2019.

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