

## OECD releases Sweden Stage 2 peer review report on implementation of Action 14 minimum standard

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### Executive summary

On 9 April 2020, the Organisation for Economic Co-operation and Development (OECD) released the Stage 2 peer review report of Sweden relating to the outcome of the peer monitoring of the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standard under Action 14 on improving tax dispute resolution mechanisms. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from Sweden's Stage 1 peer review report.<sup>1</sup> Sweden requested the OECD to also provide feedback concerning the adoption of the Action 14 best practices, and therefore, in addition to the peer review report, the OECD has released an accompanying document addressing the implementation of best practices.<sup>2</sup>

Overall, the report concludes that Sweden has addressed almost all the shortcomings identified in its Stage 1 peer review report.

### Detailed discussion

#### Background

In October 2016, the OECD released the [peer review documents](#) (i.e., the Terms of Reference and Assessment Methodology) on Action 14 which form the basis of the Mutual Agreement Procedure (MAP) peer review and monitoring process under BEPS Action 14.<sup>3</sup>

The Terms of Reference translate the minimum standard approved into a basis for peer review, consisting of 21 elements complemented by 12 best practices. The Terms of Reference assess a Member's legal and administrative framework, including the practical implementation of this framework to determine how its MAP regime performs relative to the 21 elements in four key areas: (i) preventing disputes; (ii) availability and access to MAP; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements.

The Assessment Methodology establishes detailed procedures and guidelines for a two-stage approach to the peer review and monitoring process. Stage 1 involves the review of a Member's implementation of the minimum standard based on its legal framework for MAP and the application of this framework in practice. Stage 2 involves the review of the measures taken by the Member to address any shortcomings identified in its Stage 1 peer review. In light of the above, the OECD has also released a [schedule](#) for Stage 1 of the peer review and a questionnaire for taxpayers.<sup>4</sup> The schedule catalogues the assessed jurisdictions into 10 batches for review.

Both of these stages are desk-based and are coordinated by the Secretariat of the Forum on Tax Administration's (FTA) MAP Forum.<sup>5</sup> In summary, Stage 1 consist 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 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 (CFA) to adopt the report for publication.

For Stage 2, there are two steps or phases: (i) approval of the Stage 2 peer monitoring report of an assessed jurisdiction; and (ii) publication of the Stage 2 peer review reports. More specifically, an assessed jurisdiction should within one year of the adoption of its Stage 1 peer review report by the CFA submit a detailed written report (Update Report) to the FTA MAP Forum. The Update Report should contain: (i) the steps that the assessed jurisdiction 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. Members of the FTA MAP Forum should also provide their comments on the Update Report provided by the assessed jurisdiction. Based on the Update Report submitted by the assessed jurisdiction and the input from the peers, the Secretariat will revise the Stage 1 peer review report of the assessed jurisdiction with a view to incorporate these updates in the Stage 2 peer monitoring report of the assessed jurisdiction. After adoption from the CFA, the Stage 2 peer monitoring report will be published.

### Minimum standard peer review reports

The report is 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 part addresses a different component of the minimum standard.

### Preventing disputes

Out of Sweden's 84 tax treaties, 79 contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention requiring the competent authority to endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty. For the remaining five treaties which do not contain an equivalent of Article 25(3), first sentence, two have been modified by the Multilateral Instrument (MLI) to include the required provision, whereas the remaining three will not be modified by the MLI. For one, Sweden has reached out to the relevant treaty partner to initiate negotiations.

For the two treaties which have not been or will not be amended by the MLI, the peer review report recommends that Sweden should without further delay request or, when possible, initiate bilateral negotiations regarding the inclusion of the required provision.

Notably, no area for improvement is identified with respect to the requirement of the minimum standard to provide for the roll-back of an advance pricing arrangement (APA) in appropriate cases. Such roll-backs are subject to the normal statute of limitations and to verification of the relevant facts and circumstances being the same as for the period covered by the APA.

## Availability and access to MAP

### Inclusion of Article 25(1), first sentence of the OECD Model Tax Convention

Nine out of 84 tax treaties do not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention, which provides that when the taxpayer considers that the actions of one or both of the contracting parties result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty, the taxpayer may make a request for MAP assistance *irrespective of the remedies provided by the domestic law* of those contracting parties.

Five of the nine treaties include non-discrimination provisions that apply both to nationals that are resident of one of the contracting states and to nationals that are not, while not clarifying that those who are not residents of a contracting state may still apply for MAP assistance. Further, three treaties require taxpayers to show proof of taxation not in accordance with the provisions of the treaty, do not allow the submission of a MAP request irrespective of domestic available remedies, or limit access to MAP to cases of double taxation as opposed to “taxation not in accordance with the provisions of the convention.” Finally, one treaty explicitly provides that recourse must be had to domestic remedies before applying for MAP assistance.

Eight of the nine treaties will not be modified by the MLI to include the equivalent of Article 25(1), first sentence. For three of the eight treaties, negotiations are envisaged, scheduled or pending, while this is not the case for five treaties. The peer review report recommends that Sweden should without further delay request the inclusion of the equivalent of Article 25(1), first sentence, or continue negotiations which have been initiated.

While the recommendation of the peer review report is to negotiate changes to the treaties, the report recognizes that Sweden reported that access to MAP is available from a Swedish perspective regardless of whether taxpayers have sought to resolve the dispute via domestic remedies. Sweden also reported that its competent authority is under domestic law not legally bound by decisions from its domestic courts and that the competent authority may deviate from a court decision in a MAP agreement.

### Inclusion of Article 25(1), second sentence of the OECD Model Tax Convention

The second sentence of Article 25(1) provides that the taxpayer can present the request for MAP assistance within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.

Two out of Sweden's 84 tax treaties do not contain a provision equivalent to this provision, as the timeline to file a MAP request in these treaties is either shorter than three years or refers to the domestic law of one of the treaty partners, which bears the risk that such a three-year period is not available. Out of these two treaties, one is expected to be superseded by the MLI whereas for the other treaty no action has been taken or is planned to be taken.

In this respect, for the treaty where no action has been taken or is planned to be taken, the recommendation contained in the peer review report is that Sweden should without further delay request, via bilateral negotiations, the inclusion of the required provision.

It may be noted that in addition to the 2 treaties discussed above, 14 treaties do not contain a filing period for MAP requests. With respect to these treaties, Sweden reported that there is no domestic statute of limitations for filing of MAP requests. However, the official guidance from the Swedish Tax Agency indicates that taxpayers should be mindful that statutes of limitations may apply under domestic law of the treaty partners.

The minimum standard requires jurisdictions to ensure that their tax treaties contain a provision under which competent authorities may consult together for the elimination of double taxation in cases not provided for in their tax treaties.

However, 17 out of 84 of Sweden's tax treaties do not contain an equivalent provision. Eight of these are tax treaties with a limited scope of application. Out of the remaining nine comprehensive tax treaties, six have been or are expected to be modified by the MLI. With respect to the remaining three comprehensive treaties, the recommendation included in the peer review report is that Sweden should either continue negotiations where such negotiations are envisaged, scheduled or pending or, alternatively, without further delay request via bilateral negotiations the inclusion of the required provision for the remaining two treaties.

## Allow submission of MAP requests to either treaty partner or introduce a bilateral consultation or notification process

The minimum standard requires that: (i) tax treaties shall contain provisions which provide that the taxpayer can request MAP assistance to the competent authority of either contracting party; or (ii) where this is not permitted under the treaty and the competent authority who received the MAP request does not consider the taxpayer's objection to be justified, the competent authority should implement a bilateral consultation or notification process which allows the other competent authority to provide its views on the case.

In this regard, Sweden reported that any cases where access is denied or where the objection raised is considered not to be justified are viewed as exceptional and that Sweden will always discuss such decisions with the other competent authority. The peer review report does not identify any area for improvement or recommendation regarding this matter.

## Other topics for which no areas for improvement were identified

In addition to the above areas, the peer review report discussed the following aspects of the minimum standard in relation to which no areas for improvement were identified:

- (i) Access to MAP in transfer pricing cases: Sweden reported that it will always provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments regardless of the exact wording of the tax treaty in question.
- (ii) Access to MAP in relation to the application of anti-abuse provisions: Sweden reported that it considers such issues to be within the scope of MAP.
- (iii) Access to MAP in cases of audit settlements and clarification in MAP guidance that audit settlements do not preclude access to MAP: Sweden reported that no process is available allowing settlements during the course of or after a tax audit, and for this reason access to MAP would not be denied because of any such settlements.
- (iv) Access to MAP should not be limited based on the argument that insufficient information was provided if the taxpayer has provided the required information based on the rules, guidelines and procedures made available to taxpayers.

- (v) Publish clear and comprehensive MAP guidance; make MAP guidance available and easily accessible and publish MAP profile: Sweden has recently made certain improvements to the MAP guidance available through the website of the Swedish Tax Agency.

## Resolution of MAP cases

Article 25(2), first sentence, of the OECD Model Tax Convention, provides that the competent authority shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other contracting state, with a view to the avoidance of taxation which is not in accordance with the tax treaty.

Five out of Sweden's 84 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence. Out of these five treaties, two will not be modified by the MLI and for one of these no negotiations are envisaged, scheduled or pending. In this regard, the peer review report recommends that Sweden should without further delay request via bilateral negotiations the inclusion of the required provision in the treaty in question.

## Implementation of MAP agreements

The minimum standard requires that jurisdictions shall either: (i) in their tax treaties provide that any agreement reached through MAP shall be implemented notwithstanding any time limits in domestic law; or (ii) be willing to accept alternative treaty provisions that limit the time during which a contracting party may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

Twenty out of 84 of Sweden's tax treaties do not contain provision which meet this standard. Of these treaties, some have been modified by the MLI to include an equivalent of Article 25(2), second sentence whereas some are expected to be so modified. However, 10 treaties will not be modified, and no action has been taken or is planned to be taken with respect to six of these treaties.

The recommendation included in the peer review report is that Sweden should initiate or continue bilateral negotiations.

## Best practice peer review reports

Each assessed jurisdiction can provide information and request feedback from peers on how it has adopted the 12 best practices contained in the Action 14 final report. Sweden has provided information and requested feedback on how it has adopted best practices. In that regard, the FTA MAP Forum agreed on an optional best practices feedback form that peers have used to provide feedback on Sweden's adoption of the best practices.

Several peers provided input on Sweden's bilateral APA program, although most input relates to the granting of roll-backs of bilateral APAs by Sweden. Peers noted for example a cooperative and productive APA relationship with Sweden and positive experiences with Sweden's competent authority in pursuing a multilateral APA.

One peer provided input in relation to development of global awareness of the audit /examination functions. This peer indicated that it would welcome discussing with Sweden's competent authority issues of joint concern both at the level of the audit/examination and the competent authority function.

One peer noted that it had a MAP case with Sweden where the taxpayer also opted to have the case reviewed by domestic courts in Sweden. It appreciated the fact that Sweden's competent authority proposed to proceed with the domestic remedy first, as this allowed them to go further back in time to refund Swedish withholding taxes, which benefitted the taxpayer. Another peer noted that Sweden puts the discussions in MAP on hold where there is a domestic court case pending in Sweden concerning the same matter.

One peer mentioned that according to its experience, Sweden's competent authority is amenable to consider cases involving bona fide taxpayer-initiated foreign adjustments on a case-by-case basis.

One peer provided input on the best practice of providing guidance on multilateral MAPs and mentioned that "Sweden's competent authority is willing to discuss multilateral MAPs on a case-by-case basis and that it welcomes the cooperation in this respect."

In relation to the best practice of permitting taxpayers to request multi-year resolution of recurring issues through the MAP, one peer provided input to this particular best practice and stated that it is aware that Sweden allows for the multi-year resolution of MAP cases.

Peers did not provide any feedback on the remaining best practices.

## Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of Sweden's Stage 2 peer review report represents the continued recognition and importance of the need to achieve tax certainty for cross-border transactions for MNEs. While increased scrutiny is expected to significantly increase the risk of double taxation, the fact that tax authorities may be subject to review by their peers should be seen by MNEs as a positive step to best ensure access to an effective and timely mutual agreement process.

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## Endnotes

1. See EY Global Tax Alert, [OECD releases second batch of peer review reports on Action 14](#), dated 15 December 2017.
2. <http://www.oecd.org/tax/beps/beps-action-14-peer-review-best-practices-sweden-2020.pdf>.
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. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.

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