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# Global Tax Alert

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

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### Executive summary

The Organisation for Economic Co-operation and Development (OECD) released, on 9 April 2020, the Stage 2 peer review report of Austria 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 Austria's Stage 1 peer review report. Austria requested that the OECD also provide feedback concerning their 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.

Overall the report concludes that Austria addressed almost all of 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>1</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>2</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>3</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 report

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.

Overall, Austria addressed almost all of the shortcomings identified in its Stage 1 peer review report.

### Preventing disputes

The two main elements identified by Action 14 minimum standard to prevent disputes are:

- (i) The inclusion of a provision similar to Article 25(3), first sentence, of the OECD Model Tax Convention (MTC), requiring tax authorities to endeavor to resolve by mutual agreement any difficulties or doubts as to the interpretation or the application of the tax treaty.
- (ii) The provision of a "roll-back" of bilateral or multilateral advance pricing arrangements (APA).

According to the peer report, Austria's treaty network is largely consistent with the requirements of the Action 14 minimum standard. Out of Austria's 90 tax treaties, 86 contain a provision equivalent to Article 25(3), first sentence, of the OECD MTC requiring their competent authority to endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of their tax treaties. Austria reported that where a treaty does not contain the full equivalent of Article 25(3),

first sentence, of the OECD MTC, it would still consider the MAP provision to be applicable to all types of cases that would fall under the scope of application of Article 25(3), first sentence.

With a view to update the tax treaties slightly differing from Article 25(3), first sentence, Austria signed the Multilateral Instrument (MLI) and deposited its instrument of ratification on 22 September 2017. The MLI entered into force for Austria on 1 July 2018. Two of the tax treaties that were considered not to contain the equivalent of Article 25(3), first sentence, of the OECD MTC, have been modified by the MLI. For the two treaties (i.e., those with Australia and Egypt) that have not been or will not be amended by the MLI to include the equivalent of Article 25(3), first sentence, of the OECD MTC, negotiations are pending. Further, according to the peer report, Austria will seek to include Article 25(3), first sentence, of the OECD MTC in all of its future tax treaties.

Austria reported that under its APA program, it is allowed to grant roll-back of bilateral APAs. Generally, APAs are applied to future fiscal years, whereby roll-backs are not part of the APA but dealt with in the course of MAP. Taxpayers should file a request for roll-back of a bilateral APA before the process of obtaining an APA is finalized, but there are no additional requirements to be met in order to grant such roll-backs. Roll-backs will generally be granted, except where there are important obstacles, which, for example, is the case where there are pending court proceedings without the granting of a suspension of collection or penal proceedings.

### Availability and access to MAP

Austria meets most of the requirements regarding the availability of and access to MAP under the Action 14 minimum standard. It provides access to MAP in all eligible cases, although for those tax treaties that do not contain a filing period for MAP requests, there is a risk that due to Austria's domestic time limits, access to MAP is not available even if the taxpayer filed its MAP request within three years as from the first notification of the action resulting in taxation not in accordance with the tax treaty. Furthermore, Austria has in place a documented consultation process for those situations in which Austria's competent authority considers the objection raised by taxpayers in a MAP request as not justified. Austria also published detailed and comprehensive guidance on the availability of MAP and how it applies this process in practice, both under tax treaties and the European

Union Arbitration Convention. In its Stage 1 peer review report it was identified that this guidance did not specify whether Austria will also grant access to MAP for cases where taxpayers and the tax administration have entered into an audit settlement. This MAP guidance and other domestic guidance also include a discretion for the competent authority to deny access to MAP in *inter alia* abusive cases, by which access to MAP may be denied. In July 2019, Austria updated this guidance to address these issues, which was after ending of the peer review process. It is published in German on the website of Austria's Ministry of Finance.<sup>4</sup> According to this guidance, an audit settlement reached between the affected person and a tax administration will not prevent the initiation of a MAP (see OECD MTC 2017, Article 25, m.no. 45.1). Similarly, access to the MAP will not be denied if an anti-abuse rule under domestic law (such as sec. 22 Federal Fiscal Code) or in the double tax treaty might be applicable in the case at hand (see OECD MTC 2017, Article 25, m.no. 26).

### Resolution of MAP cases

While Austria's competent authority for the years 2016 and 2017 did not close MAP cases on average within a timeframe of 24 months (which is the pursued average for resolving MAP cases received on or after 1 January 2016), as the average was 27.93 months, it managed to significantly reduce this average in 2017 as compared to 2016: from 37.29 months to 22.78 months. In that regards, although Austria has made several organizational changes that have led to this reduction, the fact that the overall average for both years remains to be above 24 months and the fact that its MAP inventory as of 31 December 2017 increased about 30% (from 195 to 255 cases) as compared to its inventory as of 1 January 2016, indicates that more resources may be necessary to cope with this increase and to ensure that Austria resolves all MAP cases in a timely, effective and efficient manner.

In addition, according to the report, Austria meets all of the other requirements under the Action 14 minimum standard in relation to the resolution of MAP cases. Austria's competent authority uses a pragmatic approach to resolve MAP cases in an effective and efficient manner and operates fully independently from the audit function of the tax authorities. Its organization is adequate and the performance indicators used are appropriate to perform the MAP function.

## Implementation of MAP agreements

Lastly, according to the report, Austria also meets the Action 14 minimum standard regarding the implementation of MAP agreements. While in the Stage 1 peer review report it was identified that where treaties do not include a provision on the implementation of MAP agreements, Austria's domestic time limits may prevent the implementation of such agreements, it has amended its domestic legislation to ensure that all MAP agreements can be implemented notwithstanding any time limits in its domestic law. The update to the MAP guidance published in July 2019 also includes a description of the implementation process of MAP agreements in Austria.

## Best practice peer review reports

Austria has provided information and requested updated feedback by peers on how it has adopted the Action 14 best practices during both stages. However, for most of the best practices, the peers did not provide any input.

## Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of Austria'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 BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
2. See EY Global Tax alert, [OECD releases schedule of Action 14 peer reviews](#), dated 1 November 2016.
3. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.
4. <https://www.bmf.gv.at/themen/steuern/internationales-steuerrecht/verstaendigungsverfahren.html>.

For additional information with respect to this Alert, please contact the following:

**Ernst & Young Steuerberatungsgesellschaft m.b.H., International Tax and Transaction Services - Transfer Pricing**

- ▶ Gerhard Steiner, *Linz*            gerhard.steiner@at.ey.com
- ▶ Christina Fuchs, *Vienna*        christina.fuchs@at.ey.com

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