

OECD releases Liechtenstein 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), on 9 April 2020, released the [Stage 2 peer review report of Liechtenstein](#) 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 Liechtenstein's Stage 1 peer review report. Liechtenstein 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.¹

Overall, the report concludes that Liechtenstein addressed most 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.

The Terms of Reference translate the approved minimum standard 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. 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.² 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 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 Stage 2 peer monitoring report of an assessed jurisdiction; and (ii) publication of 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, Liechtenstein addressed almost all the shortcomings identified in its Stage 1 peer review report.

Preventing disputes

Include Article 25(3), first sentence, of the OECD Model Tax Convention in tax treaties

All of Liechtenstein's 20 tax treaties contain a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (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.

Provide roll-back of bilateral APAs in appropriate cases

Liechtenstein reported that it does not have a bilateral Advance Pricing Agreement (APA) program, but considers that on the basis of Article 25(3), first sentence, of the OECD MTC its competent authority can enter into such APAs with its treaty partners. Although Liechtenstein does not yet have a bilateral APA program in place, it reported that its competent authority could consider granting a roll-back of bilateral APAs when a bilateral APA is entered into, such to the extent the past years are not yet finally assessed.

Availability and access to MAP

Include Article 25(1) of the OECD MTC in tax treaties

The report states that out of Liechtenstein's 20 tax treaties, 5 contain a provision equivalent to Article 25(1), first sentence, of the OECD MTC as amended by the Action 14 final report allowing taxpayers to submit a MAP request to the competent authority of either contracting state. All remaining 15 treaties contain a provision that is equivalent to Article 25(1), first sentence, of the OECD MTC as it read prior to the adoption of that report.

Additionally, all of Liechtenstein's 20 tax treaties contain a provision equivalent to Article 25(1), second sentence, of the OECD MTC allowing taxpayers to submit a MAP request within a period of three years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty.

Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process

As noted under the element include Article 25(1) of the OECD MTC in tax treaties, out of Liechtenstein's 20 tax treaties, 5 currently contain a provision equivalent to Article 25(1), first sentence, of the OECD MTC. In addition, 10 treaties will be modified by the Multilateral Instrument to allow taxpayers to submit a MAP request to the competent authority of either treaty partner.

Liechtenstein reported it introduced a notification/consultation Process in 2017.

Provide access to MAP in transfer pricing cases

Out of Liechtenstein's 20 tax treaties, 19 contain a provision equivalent to Article 9(2) of the OECD MTC requiring their state to make a corresponding adjustment if a transfer pricing adjustment is made by the other treaty partner. Nevertheless, Liechtenstein indicated that it will always provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments regardless of whether the equivalent of Article 9(2) is contained in its tax treaties.

Provide access to MAP in relation to the application of anti-abuse provisions

None of Liechtenstein's 20 tax treaties nor the domestic law and/or administrative processes of Liechtenstein allow competent authorities to restrict access to MAP for cases when a treaty anti-abuse provision could be applied.

Provide access to MAP in cases of audit settlements

Liechtenstein reported that under its domestic law, it is possible for taxpayers and the tax authorities to enter into a settlement during the course of or after an audit has been completed. Additionally, it has no administrative or statutory dispute settlement/resolution process in place that allows Liechtenstein to deny access to MAP for issues resolved through that process.

Provide access to MAP if required information is submitted

Liechtenstein reported that its competent authority has to verify the validity of the MAP request and the necessary documents within two weeks. Where taxpayers have not provided all the required information and documentation, they will be requested to provide this information for which they generally have two weeks, but which can be extended in justified circumstances.

Include Article 25(3), second sentence, of the OECD MTC in tax treaties

All of Liechtenstein's 20 tax treaties contain a provision that is equivalent to Article 25(3), second sentence, of the OECD MTC, allowing their competent authority to consult together for the elimination of double taxation in cases not provided for in their tax treaties.

Publish clear and comprehensive MAP guidance

Liechtenstein issued rules, guidelines and procedures relating to the MAP function, including a list on what information and documentation should be included in a MAP request (MAP Guidance). This MAP guidance is available at:

<https://www.llv.li/files/stv/int-mb-mutualagreementprocedure-en.pdf>.

Make MAP guidance available and easily accessible and publish MAP profile

See above section.

Clarify in MAP guidance that audit settlements do not preclude access to MAP

Peers raised no issues with respect to the availability of audit settlements and the inclusion of information in Liechtenstein's MAP guidance.

Resolution of MAP cases

Include Article 25(2), first sentence, of the OECD MTC in tax treaties

All of Liechtenstein's 20 tax treaties contain a provision equivalent to Article 25(2), first sentence, of the OECD MTC requiring its competent authority to endeavor to resolve the MAP case by mutual agreement with the other treaty partner with a view to the avoidance of taxation which is not in accordance with the tax treaty.

Seek to resolve MAP cases within a 24-month average timeframe

According to the report, Liechtenstein has resolved its MAP cases during the Statistics Reporting Period within the pursued 24-month average, as the average is 22.76 months. However, a variance exists between the average time taken to solve attribution/allocation cases and other cases - in 2017 the average completion time for attribution/allocation cases was significantly above 24 months.

Provide adequate resources to the MAP function

The report states that there may be a risk that post-2015 MAP cases are not resolved within the average of 24 months. The MAP caseload relating to attribution/allocation cases has doubled since 2016, which indicates that the competent authority may not be adequately resourced to cope with this increase. Therefore, the report suggests that Liechtenstein should closely monitor whether it has adequate resources in place to ensure that pending and future MAP cases are resolved in a timely, efficient and effective manner. Especially with respect to attribution/allocation cases, Liechtenstein is advised to devote additional resources to cope with the increase of the number of cases.

Ensure staff in charge of MAP has the authority to resolve cases in accordance with the applicable tax treaty

With respect to policy considerations, in Liechtenstein, the same persons are in charge of treaty negotiations and of handling MAP cases. Liechtenstein further reported that its policy to include a mandatory and binding arbitration clause in all its tax treaties helps to prevent bias during the resolution of MAP cases by such staff.

Use appropriate performance indicators for the MAP function

The report notes that Liechtenstein meets the Action 14 minimum standard concerning the use of appropriate performance indicators for the MAP function.

Provide transparency with respect to the position on MAP arbitration

Liechtenstein's MAP guidance clearly explains that in those cases in which the competent authorities cannot reach an agreement but the underlying double taxation convention contains an arbitration clause, the settlement of the tax conflict is guaranteed by way of arbitration proceedings.

Implementation of MAP agreements

Implement all MAP agreements

Most of Liechtenstein's tax treaties include the equivalent of Article 25(2), second sentence, of the OECD MTC or the alternatives provided in Article 9(1) and 7(2), except the tax treaty with Switzerland. Therefore, there is a risk that for this tax treaty not all MAP agreements will be implemented, due to the 10-year time limit in its domestic law. The report consequently recommends that Liechtenstein should put appropriate procedures in place to ensure that such an agreement is implemented. In addition, where during the MAP process the domestic statute of limitations may expire and may then affect the possibility to implement a MAP agreement, Liechtenstein should for clarity and transparency purposes notify the treaty partner thereof without delay.

Implement all MAP agreements on a timely basis

There are no recent developments with respect to this element.

Include Article 25(2), second sentence, of the OECD MTC in tax treaties or alternative provisions in Article 9(1) and Article 7(2)

As mentioned before, only the tax treaty with Switzerland contains neither a provision that is equivalent to Article 25(2) second sentence, of the OECD MTC, OECD (2015), nor the alternative provisions in Article 9(1) and Article 7(2). This treaty will not be modified by the Multilateral Instrument to include this equivalent. Therefore, the report recommends

that Liechtenstein should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(2), second sentence, of the OECD MTC or be willing to accept the alternative provisions in Article 9(1) and Article 7(2) in the treaty with Switzerland. Respective negotiations between Liechtenstein and Switzerland are currently ongoing.

Best practice peer review reports

Peers did not provide any input relating to any of the best practices.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of Liechtenstein'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.

Endnotes

1. <https://www.oecd.org/tax/beps/beps-action-14-peer-review-best-practices-liechtenstein-2020.pdf>.
2. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.

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EYG no. 003176-20Gbl

1508-1600216 NY
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