31 July 2020

Global Tax Alert

OECD releases ninth batch of peer review reports on BEPS Action 14 related to improving dispute resolution

Executive summary

On 27 July 2020, the Organisation for Economic Co-operation and Development (OECD) released the ninth batch of peer review reports relating to the implementation by Andorra, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Faroe Islands, Macau (China), Morocco and Tunisia of the Base Erosion and Profit Shifting (BEPS) minimum standard on Action 14 (Making Dispute Resolution Mechanisms More Effective).

Overall, the reports conclude that most of the assessed jurisdictions meet almost all or the majority of the elements of the Action 14 minimum standard. Tunisia meets more than half and Morocco less than half 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. 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, at the time of the release of the BEPS final reports, the OECD indicated that it would issue peer review documents on these Actions at a later stage, 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. 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 Inclusive Framework member takes to address any shortcomings identified in Stage 1 of its 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:

- Obtaining inputs for the Stage 1 peer review
- Drafting and approval of a Stage 1 peer review report
- 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 on the assessed jurisdiction and sends the draft report to the assessed jurisdiction for its written comments. 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, which 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 separated the assessed jurisdictions into 10 batches for review. 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.
- The second batch (Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden) was released on 15 December 2017.
- The third batch (Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain) was released on 12 March 2018.
- The fourth batch (Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal) was released on 30 August 2018.
- The fifth batch (Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia and Turkey) was released on 14 February 2019.
- The sixth batch (Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania and South Africa) was released on 24 October 2019.
- The seventh batch (Brazil, Bulgaria, China, Hong Kong, Indonesia, Russia and Saudi Arabia) was released on 28 November 2019.
- The eighth batch (Brunei Darussalam, Curaçao, Guernsey, Isle of Man, Jersey, Monaco, San Marino and Serbia) was released on 24 February 2020.

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). In April 2020, the OECD released the second Stage 2 peer reviews relating to Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden (the second batch of jurisdictions).

Ninth batch of peer review reports

On 27 July 2020, the OECD released the ninth batch of peer review reports relating to the implementation by Andorra, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Faroe Islands, Macau (China), Morocco and Tunisia. The reports are divided into four parts, namely:

- Preventing disputes
- Availability and access to MAP
- Resolution of MAP cases
- Implementation of MAP agreements

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

According to the OECD press release, the nine reports on the ninth batch of jurisdictions include approximately 185 targeted recommendations that will be followed up on in Stage 2 of the peer review process. Overall, the reports conclude that most of the assessed jurisdictions meet almost all or the majority of the elements of the Action 14 minimum standard. Tunisia meets more than half and Morocco less than half of the elements of the Action 14 minimum standard.

All the assessed jurisdictions other than Morocco and Tunisia have no bilateral Advance Pricing Agreement (APA) program in place at present, and thus there were no specific APA elements to assess for those jurisdictions. Morocco and Tunisia each have in place a bilateral APA program that does not allow roll-backs of bilateral APAs and thus both jurisdictions do not meet the Action 14 minimum standard concerning the prevention of disputes.

Regarding availability and access to MAP, Macau (China) and Tunisia meet almost all of the requirements and the rest of the assessed jurisdictions meet some of the requirements under the Action 14 minimum standard. The majority of the assessed jurisdictions (namely, Andorra, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Faroe Islands and Morocco) have not introduced guidance on the availability of MAP and how they apply this procedure in practice. Morocco reports that the guidance has been drafted and will be approved and published in French on the website of the General Directorate of Taxation as soon as possible. Macau (China) and Tunisia have published clear and comprehensive guidance on the availability of MAP and how they apply this procedure in practice. However, in the case of Tunisia, the guidance does not contain information on the relationship between MAP and audit settlements.

In regard to the resolution of MAP cases, most of the assessed jurisdictions except Faroe Islands, Morocco and Tunisia have not received any MAP requests during the period 2016-18 but they meet in principle all the requirements under the Action 14 minimum standard. Morocco and Tunisia have pending MAP cases, but they did not close any of them during their respective review periods. Only the Faroe Islands closed MAP cases on average within a 24-month timeframe during the period 2016-18, as required by the minimum standard.

Further, for all the assessed jurisdictions, except Faroe Islands and Tunisia, it was not yet possible to assess whether they meet the Action 14 minimum standard on the implementation of MAP agreements as there was no MAP agreement reached that required implementation in 2016, 2017 or 2018. According to the report on it, the Faroe Islands meets almost all of the Action 14 minimum standard as regards the implementation of MAP agreements. The report notes however that Tunisia does not meet all the requirements because taxpayers are required to ask for the implementation of MAP agreements in person (or through a proxy, which creates the risk that some MAP agreements either are not implemented or are not in a timely manner).

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 except Andorra and the Bahamas received recommendations to amend and update some of their tax treaties. Morocco and Tunisia 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. 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. The British Virgin Islands, the Faroe Islands and Macau (China) reported that they will update their treaties bilaterally and that they have already started negotiations with their treaty partners. Bermuda and Cayman Islands indicated that they intend to sign the MLI.

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. The best practice reports are divided into sections that cover the best practices on MAP. If peers provide input with respect to a best practice, the input is reflected in the report.

None of the assessed jurisdictions included in the ninth batch requested that the OECD provide feedback concerning their adoption of the best practices so no best practice reports were prepared.

Next steps

The nine jurisdictions assessed in the ninth 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 monitored and the jurisdictions are expected 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 tenth batch of jurisdictions (Aruba, Bahrain, Barbados, Gibraltar, Greenland, Kazakhstan, Oman, Qatar, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, United Arab Emirates and Vietnam) and the Stage 2 peer review reports for the third batch of jurisdictions (Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain).

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 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 can be viewed by MNEs as a positive factor that should 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 being reviewed, the OECD has made clear that taxpayer input is welcome on an ongoing basis.

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