

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

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### Executive summary

On 22 October 2020, the Organisation for Economic Co-operation and Development (OECD) [released](#) the third batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by the Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain (the batch 3 jurisdictions) of the Base Erosion and Profit Shifting (BEPS) minimum standard on dispute resolution under Action 14 of the BEPS project. These Stage 2 reports focus on evaluating the progress made by batch 3 jurisdictions in addressing any of the recommendations that resulted from the Stage 1 peer review reports that were released on 12 March 2018.<sup>1</sup> Denmark, Poland and Singapore had also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and the OECD therefore also released three accompanying best practices reports.

The outcome of the Stage 1 peer review process for the batch 3 jurisdictions was that overall, the eight 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 reflects that most of the assessed jurisdictions have worked to address them. The Stage 2 reports for the batch 3 jurisdictions conclude that the assessed jurisdictions have addressed some or almost all of the deficiencies identified in Stage 1, with the exception of the Czech Republic and Spain.

## 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 grouped the assessed jurisdictions into 10 batches for review. Also, the peer reviews for a number of jurisdictions were deferred until 2020.<sup>2</sup> On 12 March 2018, the OECD released the peer review reports covering the implementation by the batch 3 jurisdictions of the BEPS minimum standard on dispute resolution.

Prior to this release, the OECD has released Stage 1 peer review reports for the first nine batches of jurisdictions<sup>3</sup> and Stage 2 peer review reports for the first two batches of jurisdictions.<sup>4</sup>

### Third batch of Stage 2 peer review reports

On 22 October 2020, the OECD released the Stage 2 peer review reports of the batch 3 jurisdictions 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 relevant developments from each jurisdiction between 1 August 2017 (i.e., from the month following the release of the Stage 1 review for batch 3 jurisdictions) and 28 February 2019, including developments relating to the tax treaty network of that jurisdiction and other developments regarding the minimum standard on dispute resolution. Further, the MAP statistics included in the reports are based on years 2016, 2017 and 2018.

In general, the progress of the batch 3 jurisdictions on addressing deficiencies identified in the Stage 1 reports has been scored as satisfactory in their respective reports, although not all show the same level of progress according to the OECD press release. Denmark, Finland, Korea, Norway and Singapore solved some or almost all of the deficiencies identified in the Stage 1 review. Poland solved one of the identified deficiencies and Spain has not yet solved any of the identified deficiencies. The Czech Republic has not taken any further actions to address the deficiencies identified, nor is it in the process of taking such actions.

Denmark, Finland, Korea, Norway, Singapore and Spain 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. The Czech Republic and Poland do not meet 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.

All the batch 3 jurisdictions except for the Czech Republic have published clear and comprehensive MAP guidance on the availability of MAP and how it applies in practice. Even though Spain has issued guidance, the report on Spain highlights that the guidance does not include the contact details of the competent authority and it includes the possibility for the competent authority to deny access to MAP where there is evidence that the taxpayer intended to evade taxes. This possibility bears the risk that in cases where anti-abuse provisions are being applied, access to MAP will not be granted, which is considered not in line with the Action 14 minimum standard. In addition, Spain does not address in its MAP guidance the relationship between audit settlements and MAP.

Regarding the application and time needed to resolve MAP cases, none of the batch 3 jurisdictions met the 24-month average timeframe to close MAP cases. However, Denmark, Finland, Korea, Norway, Singapore and Spain succeeded in decreasing the amount of time needed to close MAP cases. Additionally, on the evolution of the MAP caseload over 2016, 2017 and 2018, the caseload increased in all batch 3 jurisdictions except for Korea, where there was a reduction of 8% of its MAP inventory, as of 31 December 2018, in comparison to 1 January 2016.

Furthermore, all the batch 3 jurisdictions have added more personnel to the competent authority function and/or made organizational improvements with a view to handling MAP cases in a more timely, effective and efficient manner.

All the batch 3 jurisdictions' tax treaties contain a provision relating to MAP, with the exception of Norway, where one of its tax treaties does not contain such provision. According to the peer review reports, the multilateral instrument (MLI) developed under BEPS Action 15<sup>5</sup> 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 3 jurisdictions with the exception of Spain.

Lastly, all batch 3 jurisdictions also meet the Action 14 minimum standard with respect to the implementation of MAP agreements except for the Czech Republic and Denmark that almost meet this standard. Both the Czech Republic and Denmark do not monitor the implementation of MAP agreements and they have a domestic statute of limitations, for which there is a risk that such agreements cannot be implemented where the applicable tax treaty does not include Article 25(2), second sentence, of the OECD Model Tax Convention. However, according to the peer review reports, no problems have surfaced regarding the implementation of MAP agreements in the Czech Republic and Denmark 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.

Denmark, Poland and Singapore 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 reflects 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 third 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. Also, the OECD FTA MAP Forum started discussions on a possible strengthening of the minimum standard on Action 14 and the continuation of the deferrals of certain jurisdictions' peer reviews. The OECD has indicated that it expects to hold a public consultation at the end of 2020.

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## Endnotes

1. See EY Global Tax Alert, [OECD releases third batch of peer review reports on BEPS Action 14](#), dated 14 March 2018.
2. Angola, Armenia, Belize, Benin, Bosnia and Herzegovina, Botswana, Burkina Faso, Cabo Verde, Cameroon, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Dominica, Dominican Republic, Egypt, Gabon, Georgia, Grenada, Haiti, Jamaica, Kenya, Liberia, Malaysia, Maldives, Mauritius, Mongolia, Montserrat, Republic of North Macedonia, Nigeria, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Seychelles, Sierra Leone, Sri Lanka, Ukraine, Uruguay and Zambia
3. See EY Global Tax Alerts, [OECD releases first batch of peer review reports on Action 14](#), dated 28 September 2017; [OECD releases second batch of peer review reports on Action 14](#), dated 15 December 2017; [OECD releases third batch of peer review reports on Action 14](#), dated 14 March 2018; [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; [OECD released the ninth batch of peer review reports on Action 14](#), dated 31 July 2020.
4. See EY Global Tax Alert, [OECD releases first batch of Stage 2 peer review reports on dispute resolution](#), dated 14 August 2019 and EY Global Tax Alert, [OECD releases second batch of Stage 2 peer review reports on dispute resolution](#), dated 14 April 2020.
5. See EY Global Tax Alert, [OECD releases multilateral instrument to implement treaty related BEPS measures on hybrid mismatch arrangements, treaty abuse, permanent establishment status and dispute resolution](#), dated 2 December 2016.

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