

OECD releases Spain 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 22 October 2020, released the Stage 2 peer review report of Spain 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 on recommendations resulting from Spain's Stage 1 peer review report.¹

Overall, the report concludes that Spain addressed most of the shortcomings identified in its Stage 1 peer review report.

The main milestones achieved by Spain between the Stage 1 and Stage 2 peer review reports on implementation of Action 14 minimum standard are summarized as follows:

- On 7 June 2017, Spain signed the Multilateral Instrument (MLI) and is currently in the process of ratifying this instrument, which is expected to be completed in 2020.
- In addition, Spain reported that it has signed new treaties since 1 August 2017 to replace the existing treaties in force with China (People's Republic of), Japan and Romania. None of these treaties have yet been ratified by Spain or the treaty partners. All three treaties include Article 9(2) and Article 25(1-3) of the OECD Model Tax Convention as it read prior to the adoption of Action 14 final report.

- ▶ The treaty with Finland has entered into force.
- ▶ Treaty negotiations with the Netherlands are completed, following which the treaty will be in line with the requirements under the Action 14 minimum standard.
- ▶ Contacts have been established with Poland, Sweden and Switzerland to enter into negotiations to meet the requirements under the Action 14 minimum standard.
- ▶ Spain reported that the Directive (Council Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (EU)) is implemented via Royal Decree Law 03/2020, which entered into force on 6 February 2020.
- ▶ In addition, Spain reported that the International Tax Office- responsible for handling attribution/allocation cases- has put in place further specialization.

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 14.²

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.³ 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.⁴ In summary, Stage 1 consists of three steps or phases:

- ▶ 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 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 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:

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

Each part addresses a different component of the minimum standard.

Overall, Spain addressed most of the shortcomings identified in its Stage 1 peer review report.

I. Preventing disputes

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

Pursuant to this provision, jurisdictions should ensure that their tax treaties contain a provision which requires the competent authority of their jurisdiction to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaties.

Out of Spain's 91 tax treaties, 89 contain a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention requiring their competent authority to endeavor to resolve by MAP any difficulties or doubts arising as to the interpretation and application of the tax treaty. In the remaining two tax treaties,⁵ the term "interpretation" is not included.

Further, Spain signed new treaties with three treaty partners,⁶ all which concern the replacement of an existing treaty currently in force. All of the three treaties contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention, which is also the case for the treaties currently in force. None of these newly signed treaties have already entered into force.

In addition, on 7 June 2017, Spain signed the MLI and is currently in the process of ratifying this instrument, which it expects to be completed in 2020.

The MLI will, upon entry into force for the treaty concerned, modify one of the two treaties to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.⁷ The recommendation is to complete the ratification process of the MLI as quickly as possible. For the remaining treaty, since it will not be modified by the MLI, the recommendation is that the required provision be amended via bilateral negotiations.

II. Availability and access to MAP

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

Pursuant to this provision, jurisdictions should ensure that their tax treaties contain a MAP provision 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 irrespective of the remedies provided by the domestic law of those Contracting Parties, make a request for MAP assistance, and that the taxpayer cannot present the request 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.

Out of Spain's 91 tax treaties, 5 do not contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention.⁸ None of those treaties have been or are expected to be modified by the MLI to include such equivalent. With respect to these five tax treaties:

- For one, negotiations have been completed *inter alia* to include the required provision.⁹ The peer review report recommends continued negotiations to include the required provision.
- For one, contacts have been established to enter into negotiations with a view to include the required provision.¹⁰ The recommendation is to continue the process to initiate negotiations to include the required provision.
- For the remaining three, no actions have been taken nor are any actions planned to be taken. The peer review report recommends the inclusion of the required provision via bilateral negotiations.

Further, 3 out of 91 tax treaties do not contain a provision that is equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention, as the timeline to file a MAP request in these treaties is either shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty or, due to a protocol provision can be shorter than three years. Of these three treaties:

- One is expected to be modified by the MLI to include Article 25(1), second sentence, of the OECD Model Tax Convention.¹¹ For this treaty, the peer review report recommends ratifying the MLI as quickly as possible.
- Two will not be modified by that instrument to include the Article 25(1), second sentence, of the OECD Model Tax Convention.¹² For these treaties, no actions have been taken nor are any actions planned to be taken. The recommendation is that Spain should request the inclusion of the access to MAP provision via bilateral negotiations in those treaties that will not be modified via the MLI.

In addition, 1 treaty out of the 91 tax treaties does not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention and also the timeline to submit a MAP request is less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.¹³ This treaty is expected to be modified by the MLI to include the equivalent of Article 25(1), second sentence, but not as regards the first sentence of that article. The peer review report recommends that Spain complete the ratification process for the MLI to incorporate the equivalent to Article 25(1), second sentence of the OECD Model Tax Convention. As for the first sentence, without further delay, Spain should request the inclusion of an equivalent provision.

Finally, 2 of the 91 tax treaties that contain a provision that is equivalent to Article 25(1), first and second sentence, of the OECD Model Tax convention are not yet in force, while there is a treaty in force with the same jurisdiction that either does not contain a provision that is equivalent to Article 25(1), first and/or second sentence, of the OECD Model Tax Convention. The recommendation is that Spain should complete the ratification process for those two tax treaties as quickly as possible.

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

Currently, Spanish MAP guidance includes the possibility for the competent authority to deny access to MAP where there is proof that the taxpayer intended to avoid taxes, which bears the risk in cases where anti-abuse provisions are being applied, access to MAP will not be granted.

The peer review report recommends that Spanish MAP guidance should be amended so it expressly states that access to MAP should be granted in cases where anti-abuse provisions are being applied and that Spain continues granting access for these cases.

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

Pursuant to this provision, jurisdictions should 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.

Out of Spain's 91 tax treaties, 6 do not contain a provision that is equivalent to Article 25(3), second sentence of the OECD Model Tax Convention. Four of these six treaties are expected to be modified via the MLI; therefore, the recommendation is to ratify the MLI.¹⁴ For the remaining two treaties¹⁵ and for all future tax treaties to come, the recommendation is that Spain should request this provision via bilateral negotiations.

Public clear and comprehensive MAP guidance

Contact details of Spain's competent authority are not included in the MAP guidance. The peer review report considers that Spain should amend its MAP guidance and include contact details of Spain's competent authority.

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

As stated in the peer review Stage 1, Spain's MAP guidance does not include explicit information on the relation between audit settlements and MAP, therefore the peer review report recommends that Spain's MAP guidance is amended in order to clarify in its MAP guidance that audit settlements do not preclude access to MAP.

III. Resolution of MAP cases

Include Article 25(2), first sentence, of the OECD Model Tax Convention in tax treaties

By virtue of this provision, jurisdictions should ensure that their tax treaties contain a provision which requires that the competent authority who receives a MAP request from the taxpayer, shall endeavor, if the objection from the taxpayer appears to be justified and the competent authority is not itself able to arrive at a satisfactory solution, to resolve the MAP case by mutual agreement with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with the tax treaty.

As in Stage 1 of the peer review report, 1 out of 91 tax treaties does not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention.¹⁶ As Spain listed this treaty as a Covered Tax Agreement under MLI but did not modify this treaty to include the equivalent of Article 25(2), Spain should include the required provision via bilateral negotiations.

Besides, it should be noted that during this period Spain signed new treaties with three treaty partners, all of which concern the replacement of an existing treaty currently in force. All these three treaties contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention, thus fulfilling the Spanish intention to include such provision in all future tax treaties to come. None of these newly signed treaties have entered into force yet.

Provide adequate resources to the MAP function

Adequate resources, including personnel, funding and training, are necessary to properly perform the competent authority function and to ensure that MAP cases are resolved in a timely, efficient and effective manner.

In the course of the Stage 1 peer review report, the focus of attention was on the average time required to resolve MAP cases (i.e., 31.97 months, whereas the pursued average is around 24 months). While the average completion time has decreased in the period 2017-18 as compared to 2016, it is still above the 24-month average. This circumstance may indicate that the competent authority is not adequately resourced. In this respect, some peers have experienced difficulties in resolving MAP cases in a timely efficient and effective manner, which in particular concerns:

- ▶ Timely submission of position papers to treaty partners
- ▶ Timely notifications of submitted MAP requests or providing information on pending MAP cases

Furthermore, the MAP caseload has increased 35% since 1 January 2016, which regards both attribution/allocation and other MAP cases. This may also indicate that the competent authority is not adequately resourced to cope with this increase.

During this period, Spain has taken several organizational and operational steps to improve the MAP process, such as the establishment of a dedicated team for handling attribution/allocation MAP cases and the scheduling of more face-to-face meetings. Notwithstanding, further actions should be taken to ensure a timely resolution of MAP cases. In that regard, Spain should devote additional resources to its competent authority to handle these cases and also to be able to cope with the increase in the number of MAP cases, such to be able to resolve MAP cases in a timely, efficient and effective manner.

IV. Implementation of MAP agreements

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

Pursuant to this provision, jurisdictions should either: (i) provide in their tax treaties that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law; or (ii) be willing to accept alternative treaty provisions that limit the time during which a Contracting Party may make any 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 granted.

As not all of Spain's tax treaties contain the equivalent of Article 25(2), second sentence of the OECD Model Tax convention, the peer review report Stage 2 recommends that, when, after a MAP case is initiated, the domestic statute of limitations may, in the absence of the second sentence of Article 25(2) of the OECD Model Tax Convention in Spain's relevant tax treaty, prevent the implementation of a MAP agreement when the adjustment is made at the level of the treaty partner, Spain 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, Spain should for clarity and transparency purposes continue its practice to notify the treaty partner thereof without delay.

In the Stage 1 of the peer review, out of Spain's 91 tax treaties, 26 did not contain a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention nor the alternative provisions of in Article 9(1) and Article 7(2).

During this time frame, two tax treaties have been signed but not ratified which contain a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015).¹⁷ However, as they are not yet in force, the previous tax treaties apply, which do not include such provision.

Regarding these two tax treaties, Spain should as quickly as possible complete the ratification process and replace the existing treaties that neither contain a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention nor contains the alternative provisions provided for in Article 9(1) or Article 7(2).

As of the remaining 24 tax treaties, 15¹⁸ would be amended via the MLI, the recommendation is to ratify the MLI as quickly as possible. For the remaining nine tax treaties¹⁹ Spain should continue, initiate or immediately request the bilateral negotiations or be willing to accept the inclusion of both alternative provisions.

Specifically, with respect to the treaty with the former USSR that Spain continues to apply to Kyrgyzstan, Tajikistan, Turkmenistan and the Ukraine, Spain should, once it enters into negotiations with the jurisdictions for which it applies those treaties, request the inclusion of the required provision or its alternatives.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of Spain'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. See EY Global Tax Alert, [OECD releases Spain peer review report on implementation of Action 14 minimum standard](#), dated 16 March 2018.
2. See EY Global Tax Alert, [OECD releases BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
3. See EY Global Tax alert, [OECD releases schedule of Action 14 peer reviews](#), dated 1 November 2016.
4. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.
5. Australia and Vietnam.
6. China (People's Republic of), Japan and Romania.
7. Australia.
8. El Salvador, Italy, Morocco, The Netherlands, Sweden and Tunisia.
9. The Netherlands.
10. Sweden.
11. Portugal.
12. Indonesia and Philippines.
13. Italy.
14. Australia, Belgium, Chile and Mexico.
15. Ecuador and the treaty with the former USSR that Spain continues to apply to Kyrgyzstan, Tajikistan, Turkmenistan and Ukraine.
16. Morocco.
17. Japan and Romania.
18. Austria, Belgium, Bulgaria, Chile, Hungary, Indonesia, Ireland, Italy, Korea, Morocco, Poland, Portugal, Tunisia, United Kingdom and the treaty with the former Czechoslovakia that Spain continues to apply to the Czech Republic and the Slovak Republic.
19. Bolivia, Brazil, Ecuador, Mexico, Netherlands, Philippines, Switzerland, Thailand, and the treaty with the former USSR that Spain continues to apply to Kyrgyzstan, Tajikistan, Turkmenistan and Ukraine.

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