

OECD releases Consultation Document on 2020 review of BEPS Action 14

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Executive summary

On 18 November 2020, the Organisation for Economic Co-operation and Development (OECD) released a public consultation document on the review of the minimum standard on dispute resolution under Action 14 of the Base Erosion and Profit Shifting (BEPS) project (the [Consultation Document](#)). The [assessment methodology](#) for the peer review process of the Action 14 minimum standard included a planned evaluation of this process in 2020 in light of the experience in conducting peer monitoring.

Based on this experience, the 2020 review also presents an opportunity to re-examine what is viewed to be working well in the mutual agreement procedure (MAP) process and what issues could be further improved. The Consultation Document therefore seeks stakeholder input on proposals for the 2020 review of the Action 14 minimum standard regarding the following items:

- ▶ Experiences with, and views on, the status of dispute resolution and suggestions for improvement, including experiences with MAP in those jurisdictions that obtained a deferral within the peer review process
- ▶ Additional measures that may strengthen the Action 14 minimum standard
- ▶ Additional measures that may strengthen the MAP Statistics Reporting Framework

The proposals included in the Consultation Document do not represent the consensus views of the OECD's Committee on Fiscal Affairs, the Inclusive Framework or its subsidiary bodies, but are intended to provide stakeholders with substantive proposals for analysis and comment. The [press release](#) highlights that while many jurisdictions expressed support for most of the proposals, several jurisdictions also raised strong concerns with some of them.

Interested parties are invited to submit their comments on the questions raised in the Consultation Document by 18 December 2020. A [public consultation meeting](#) on the 2020 review of BEPS Action 14 will be held in early 2021.

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.

Each minimum standard is subject to a peer review process. 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 (the MAP forum). 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.

The assessment methodology also included a planned evaluation of the peer review process in 2020, including a decision on the continuation of the peer review deferrals for the jurisdictions that are subject to deferral.¹

Following the release of 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 in which it grouped the assessed jurisdictions into 10 batches for review.

The OECD has released Stage 1 peer review reports for the first nine batches of jurisdictions² and Stage 2 peer review reports for the first three batches of jurisdictions.³ The finalization of the Stage 2 process for all 10 batches is expected in 2021.

On 18 November 2020, the OECD released a public Consultation Document on areas where the Inclusive Framework members seek input from stakeholders regarding how this 2020 review should be conducted and what issues should be of central focus.

Consultation document

The Consultation Document is organized in three sections:

- ▶ Section 1: Introduction
- ▶ Section 2: Proposals to strengthen the Action 14 minimum standard, focusing on what could be improved with respect to the MAP process based on the experience with the peer review process so far
- ▶ Section 3: Proposals to collect additional data under the MAP Statistics Reporting Framework with respect to the MAP process and practices that affect MAP

It also includes an annex with guidance on information and documentation that is typically required to be submitted when making a request for MAP to be invoked.

Each section contains proposals and questions for stakeholders, with a total of 27 specific questions across the three sections. Although the Consultation Document does not contain a section on the Assessment Methodology, the OECD is discussing suggestions for making it more risk focused and any comments on the Assessment Methodology are also welcome.

Proposals to strengthen the minimum standard include the following, with each proposal accompanied by one or more specific questions to which the OECD invites responses:

1. **Increase the use of bilateral advance pricing arrangements (APAs):** The Inclusive Framework seeks comments on the proposal for the introduction of an obligation for jurisdictions to establish a bilateral APA program (except for jurisdictions with a low volume of transfer pricing MAP cases).
2. **Expand access to training on international tax issues for auditors and examination personnel:** The Inclusive Framework seeks comments on the introduction of an obligation for jurisdictions to deploy the Global Awareness Training Module, a training module developed by the FTA, or a similar training program. Mandatory training for audit/examination personnel would result in fewer adjustments, preventing disputes.
3. **Define criteria to ensure that access to MAP is granted in eligible cases and introduce standardized documentation requirements for MAP requests:** The Inclusive Framework seeks comments on the proposal to require jurisdictions to reflect in their MAP guidance the following items: (i) criteria for determining whether access to MAP should be granted; and (ii) details on what information taxpayers (as a minimum) should include in their MAP requests.
4. **Suspend tax collection for the duration of the MAP process under the same conditions as are available under domestic rules:** The Inclusive Framework seeks comments on the proposal to introduce the obligation for jurisdictions to suspend tax collection during the period in which a MAP case is pending, under the same conditions as are available to taxpayers under domestic rules.
5. **Align interest charges/penalties in proportion to the outcome of the MAP process:** The Inclusive Framework seeks comments on the proposal to introduce the obligation for jurisdictions to ensure that penalties and/or interest charges are aligned in proportion to the outcome of the MAP process.
6. **Introduce a proper legal framework to ensure the implementation of all MAP agreements:** The Inclusive Framework seeks comments on the proposal to introduce the obligation for jurisdictions to ensure that all MAP agreements can be implemented notwithstanding the expiration of domestic time limits.
7. **Allow multi-year resolution through MAP of recurring issues with respect to filed tax years:** The Inclusive Framework seeks comments on the proposal to introduce the obligation for jurisdictions to implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayers within the time period provided for in an applicable tax treaty for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same as initially started, and subject to the verification of such facts and circumstances upon audit.
8. **Implement MAP arbitration or other dispute resolution mechanisms as a way to guarantee the timely and effective resolution of cases through MAP:** The Inclusive Framework seeks comments on the proposal for the introduction of MAP arbitration, as well as views or other suggestions regarding any other alternative approaches to dispute resolution. The Consultation Document notes that a number of jurisdictions have expressed strong support for the adoption of MAP arbitration as a means to improve the efficiency and effectiveness of the MAP. It further notes that other jurisdictions have clearly indicated that MAP arbitration raises constitutional and sovereignty concerns and also practical issues, including cost, capacity and resource constraints, which is why these jurisdictions have not supported its inclusion in the minimum standard and consider it very difficult to change this position.

Proposals to strengthen the MAP Statistics Reporting Framework include the following, and each proposal is again accompanied by one or more questions to responders:

1. **Reporting of additional data relating to pending or closed MAP cases:** The Inclusive Framework seeks comments on the proposal to support a more meaningful assessment of the progress toward meeting the 24-month target timeframe to resolve MAP cases by requiring jurisdictions to report data on: (i) identification of the jurisdiction(s) that made the adjustment or took the action at issue; (ii) breakdown of the time taken to close MAP cases per type of outcome; and (iii) identification of the year when initiated for MAP cases pending at year end.
2. **Providing relevant information on other practices that impact MAP, including APA statistics:** The Inclusive Framework seeks input on the proposal to publish statistics on APAs. The data categories (which the OECD notes are non-exhaustive) being considered for publication include:

Inventory overview	▶ Inventory at the start of the year
	▶ Filed APA requests
	▶ Case closures (including withdrawals)
	▶ Inventory at year end
Type of APA cases for newly received requests	▶ Unilateral or bilateral
	▶ New APA request or renewal of an existing APA
	▶ Roll-back request

Next steps

Interested parties are invited to submit their comments by email on the questions raised in the Consultation Document by 18 December 2020. Comments and questions relate to the MAP process, but also to experiences with inappropriate audit adjustments. All comments submitted will be made available to the public, via the OECD website, in advance of the public consultation meeting, which will be held in early 2021.

Implications

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 is as a positive step in helping to improve access to an effective and timely MAP process.

It is important for taxpayers to follow these developments closely as they develop in the coming months. As taxpayers are the main users of MAP, their perspectives on these proposals are important. Companies should consider participating in the consultation and providing feedback based on their experiences.

Endnotes

1. According to the assessment methodology, the MAP Forum should defer the review of any such member that is a developing country and is not an OECD or G20 country if that member has not yet encountered meaningful levels of MAP requests and there is no feedback from other members of the FTA MAP Forum indicating that the jurisdiction's MAP regime requires improvement.
2. 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; and [OECD released the ninth batch of peer review reports on Action 14](#), dated 31 July 2020.
3. See EY Global Tax Alerts, [OECD releases first batch of Stage 2 peer review reports on dispute resolution](#), dated 14 August 2019; [OECD releases second batch of Stage 2 peer review reports on dispute resolution](#), dated 14 April 2020; and [OECD releases third batch of Stage 2 peer review reports on dispute resolution](#), dated 26 October 2020.

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EYG no. 008030-20GbI

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