

OECD releases fourth peer review report on BEPS Action 5 on the Exchange of Information of Tax Rulings

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Executive summary

On 15 December 2020, the Organisation for Economic Co-operation and Development (OECD) released the [fourth annual peer review report](#) (the report) relating to compliance by members of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) with the minimum standard on BEPS Action 5 for the compulsory spontaneous exchange of certain tax rulings (the transparency framework).

The report covers 124 of the 137 current Inclusive Framework jurisdictions, including all jurisdictions that joined prior to 30 June 2019 and Jurisdictions of Relevance (i.e., jurisdictions that are outside the Inclusive Framework but are deemed to be of interest for the purposes of transparency in tax) identified prior to 30 June 2019. The report assesses the 2019 calendar-year period and contains recommendations for 43 jurisdictions to improve their legal or operational framework to identify and exchange tax rulings. Further, the report indicates that by 31 December 2019 almost 20,000 tax rulings within the scope of the transparency framework had been issued by the jurisdictions under review and over 36,000 exchanges of information had taken place.

This report is the final report for the peer review process on BEPS Action 5, as agreed in the current review methodology. The Inclusive Framework is now working to ensure that the progress made on ensuring transparency with respect to tax rulings is maintained in the future, both through a review of the overall effectiveness of Action 5 and the development of a peer review process for the years 2021 through 2025.

Detailed discussion

Background

In October 2015, the OECD released the final reports on all 15 focus areas of the BEPS Action Plan.¹ 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 on best practices.

Minimum standards are the BEPS recommendations that all members of the Inclusive Framework have committed to implement, covering 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
- ▶ 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, the OECD indicated at the time of the release of the BEPS 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 February 2017, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) for BEPS Action 5 on the compulsory spontaneous exchange of certain types of tax rulings to address the transparency framework related to harmful tax practices.² The Terms of Reference translated the Action 5 minimum standard for the transparency framework into four key areas of review:

- (i) The information gathering process
- (ii) The exchange of information
- (iii) Confidentiality of the information received
- (iv) Statistics

The Assessment Methodology set out procedures for peer review and monitoring during 2017 through 2020. The conduct of any reviews after 2020 will be subject to the agreement of the Inclusive Framework. Thus, the current Assessment Methodology applies through 2020, but the peer review process is expected to continue thereafter, possibly under a new assessment methodology. Each peer review is focused on whether the assessed jurisdictions comply with the minimum standard in all four key areas, based on each jurisdiction's legal framework and on how it applies the framework in practice.

The OECD has released four annual peer review reports relating to the transparency framework:

- ▶ On 4 December 2017, the OECD released the first annual peer review report, which covered the assessment of 44 jurisdictions (i.e., OECD and G20 countries and countries that were in the OECD accession process during the BEPS project) for the 2016 calendar-year period. The report included 49 country-specific recommendations for improvement.³
- ▶ On 13 December 2018, the OECD released the second annual peer review report, which covered the assessment of 92 jurisdictions for the 2017 calendar-year period. The report included 60 country-specific recommendations for improvement.⁴
- ▶ On 23 December 2019, the OECD released the third annual peer review report, which covered the assessment of 112 jurisdictions for the 2018 calendar-year period. The report included 52 country-specific recommendations for improvement.⁵
- ▶ On 15 December 2020, the OECD released the fourth annual peer review report, which covered the assessment of 124 jurisdictions for the 2019 calendar-year period. The report includes 58 country-specific recommendations for improvement.

Annual peer review on the exchange of information on tax rulings

BEPS Action 5 on the compulsory spontaneous exchange of information on tax rulings is intended to provide tax administrations with timely information on rulings that have been granted to a foreign related party of their resident taxpayer or a permanent establishment, which can be used in conducting risk assessments and which, in the absence of exchange, could give rise to BEPS concerns.

The exchange of information on tax rulings covers five categories:

- (i) Rulings related to certain preferential regimes
- (ii) Unilateral advance pricing arrangements (APAs) or other cross-border unilateral rulings in respect of transfer pricing
- (iii) Rulings providing for a downward adjustment of taxable profits
- (iv) Permanent establishment (PE) rulings
- (v) Related party conduit rulings

The fourth annual peer review covers 124 jurisdictions, including all Inclusive Framework that joined prior to 30 June 2019 and Jurisdictions of Relevance identified by the Inclusive Framework prior to 30 June 2019. Of these 124 jurisdictions, there were 30 jurisdictions⁶ that are not able to legally, or in practice, issue rulings in the scope of the transparency framework; no separate peer review reports are included for these jurisdictions. Eight other members⁷ of the Inclusive Framework have not been assessed under the transparency framework as these jurisdictions do not impose any corporate income tax and cannot legally issue rulings within the scope of the transparency framework.

According to the peer review documents, one of the terms of reference is related to confidentiality. The reviews of confidentiality in connection with the transparency framework defer to the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes in connection with the standard on Automatic Exchange of Financial Account Information for Tax Purposes. The outcomes of that work are not published and no further references to the review of confidentiality are made in the peer review document. Therefore, each country assessment included in the second chapter of the report covers the following elements, namely:

- (i) The information gathering process
- (ii) Exchange of information
- (iii) Statistics
- (iv) Exchange of information on intellectual property regimes

The country assessments, referred to as country profiles in the report, indicate whether the relevant country has met the requirements set out in the terms of reference for the year in review and thus whether the country issues tax rulings within the scope of BEPS Action 5. As noted in the [OECD's press release](#), 81 jurisdictions are now fully in line with Action 5, with the remaining 43 jurisdictions receiving one or more recommendations to improve their legal or operational framework to identify and exchange tax rulings.

The most common recommendations are on issues such as: (i) improving the timeliness of the exchange of information; (ii) ensuring that all information on past and future rulings is exchanged as soon as possible; (iii) ensuring that the information gathering process for identifying all past and future rulings and potential exchange jurisdictions, including a review and supervision mechanism, is finalized as soon as possible; and (iv) ensuring that the "best efforts approach" to identifying potential exchange jurisdictions for all past rulings is applied.

The country profiles also contain an overview of the number of past rulings and future rulings issued by a country for the assessed period as well as the number of follow-up requests that countries received for the exchange of the ruling and the average time to provide the response.

Overall, almost 20,000 tax rulings within the scope of the transparency framework have been issued by the jurisdictions being reviewed. By 31 December 2019, over 36,000 exchanges of information had taken place, with approximately 7,000 exchanges during 2019, 9,000 during 2018, 14,000 during 2017 and 6,000 during 2016.

Next steps

The jurisdictions assessed in the 2019 annual peer review report are already working to address deficiencies identified in their respective reports. This is the fourth and final report for the peer review process on BEPS Action 5, as agreed in the current review methodology. The Inclusive Framework is now working to ensure that the progress made on ensuring transparency with respect to tax rulings is maintained in the future, both through a review of the overall effectiveness of Action 5 and the development of a renewed peer review process for the years 2021 through 2025.

Implications

The annual peer review report is a significant step in the OECD's efforts for more transparency and information exchange in the area of tax. Member countries not only have to adapt their laws to be able to implement the transparency framework, but also have to adapt their tax administration systems to be able to process and report on information exchange. The report further reinforces the current

transparency environment, where exchanging information automatically is the new standard. This, coupled with an ever increasing amount of other information being exchanged (tax rulings, financial account information, and country-by-country reports), reinforces the importance of businesses ensuring that information filed is submitted in such a way that it cannot be read out of context so as to reduce any possible confusion.

Endnotes

1. See EY Global Tax Alert, [OECD releases final reports on BEPS Action Plan](#), dated 6 October 2015.
2. See EY Global Tax Alert, [OECD releases peer review documents on BEPS Action 5 on Harmful Tax Practices and on BEPS Action 13 on Country-by-Country Reporting](#), dated 6 February 2017.
3. See EY Global Tax Alert, [OECD releases first annual peer review report on Action 5](#), dated 5 December 2017.
4. See EY Global Tax Alert, [OECD releases second annual peer review report on Action 5 on the exchange of tax rulings](#), dated 14 December 2018.
5. See EY Global Tax Alert, [OECD releases third peer review report on Action 5 on the exchange of tax rulings](#), dated 13 January 2020.
6. Belize, Bulgaria, Burkina Faso, Cameroon, Cook Islands, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Dominica, Greenland, Haiti, Liberia, Macau, Maldives, Monaco, Mongolia, Montserrat, Nigeria, North Macedonia, Oman, Pakistan, Papua New Guinea, Paraguay, Saint Vincent and the Grenadines, Saudi Arabia, Serbia, Sierra Leone, Tunisia, Trinidad & Tobago and Zambia.
7. Anguilla, Bahamas, Bahrain, Bermuda, British Virgin Islands, Cayman Islands, Turks and Caicos Islands and the United Arab Emirates.

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