

OECD releases peer review documents on BEPS Action 5 on Harmful Tax Practices and on BEPS Action 13 on Country-by-Country Reporting

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Executive summary

On 1 February 2017, the Organisation for Economic Co-operation and Development (OECD) released the peer review documents on Base Erosion and Profit Shifting (BEPS) Action 5 on Harmful Tax Practices and Action 13 on Country-by-Country (CbC) Reporting. The purpose of the peer reviews is to ensure the consistent and effective implementation of BEPS actions that have been agreed as a minimum standard. The peer review documents include the agreed terms of reference containing the evaluation criteria regarding the minimum standards and the assessment methodology for the peer review process.

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 drawing on best practices.

Minimum standards are the BEPS recommendations that all members of the Inclusive Framework on BEPS (i.e., BEPS members) are committed to implement, and refer to some of the recommendations included in Action 5 on harmful tax practices, Action 6 on treaty abuse, Action 13 on transfer pricing documentation and CbC reporting and Action 14 on dispute resolution.

The minimum standards are subject to a peer review process. 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 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 to conduct the peer reviews at a later date

In October 2016 the OECD released the peer review documents on Action 14 on *Making Dispute Resolution Mechanisms More Effective*² and shortly thereafter, a schedule for reviewing this Action Point was released.³

The OECD has now issued the peer review documents on Action 5, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance*, and Action 13 *Transfer Pricing Documentation and Country-by-Country Reporting*. It is expected that the peer review documents on Action 6 will be released at a later date.

The peer review documents on Action 5 and Action 13 reflect the agreed approach to review compliance with the minimum standards, and contain two sections: (i) the terms of reference; and (ii) the methodology. The information used to conduct the peer review includes information gathered from a self-assessment questionnaire provided by the jurisdiction under review, and information from other BEPS members.

Action 5 peer review documents

The terms of reference included in the Action 5 peer review documents contain four areas of review:

- ▶ **Information gathering process:** On the transparency pillar of the Action 5 harmful tax practices report, jurisdictions are required to identify the tax rulings that are covered by the transparency framework of Action 5 and identify all jurisdictions for which the receipt of such tax rulings would be relevant (for example, rulings related to a preferential regime, cross-border advance pricing agreements, etc.). With respect to the Action 5 harmful tax practices report relating to intellectual property (IP) regimes, jurisdictions are required to identify taxpayers taking advantage of the third category of IP assets (other IP assets that are

nonobvious, useful, and novel with income limitation) and, besides that, to identify new entrants benefitting from grandfathered IP regimes, irrespective of whether a ruling has been issued.

- ▶ **The exchange of information:** This would include among others, putting in place the domestic legal framework to allow the spontaneous exchange of tax rulings, adhering to the timelines for such exchange and ensuring that the mandatory information in the template (contained in Annex C of the final report on Action 5) is present.
- ▶ **Confidentiality of the information received:** Jurisdictions should ensure that the information received through exchange of information is kept confidential, e.g., jurisdictions should have the necessary confidentiality framework in place to impose penalties on unauthorized disclosure of confidential information.
- ▶ **Statistics:** This requires reporting on the number of rulings exchanged spontaneously and providing a list of the jurisdictions with whom the information was exchanged.

The methodology sets out the procedural manner in which the peer reviews will be conducted. This includes a process for collecting the relevant data (by making use of standardized questionnaires), preparation and approval of the reports, output included in the report and the process for follow up. The OECD's Forum on Harmful Tax Practices will conduct the peer review and monitoring processes regarding all jurisdictions associated with the BEPS project.

The first review will take place in 2017 covering the period from 1 January 2016 to 31 December 2016 and will relate to OECD countries, OECD accession countries and G20 countries. This will be followed by yearly reviews performed in 2018 to 2020. With respect to jurisdictions that joined the BEPS inclusive framework in 2016, their first annual review will be in 2018. The outcome of the review will be provided in an annual report (starting at the end of 2017), containing recommendations for each reviewed jurisdiction.

Action 13 peer review documents

The terms of reference in the Action 13 peer review documents focus on three key aspects of CbC reporting.

- ▶ **The domestic legal and administrative framework:** Under this heading, jurisdictions are required to put in place the framework to ensure CbC reporting, including, for example, introducing a parent entity filing obligation (also known as primary filing) and specifying the scope and timing of filing a CbC report. Although introduction of a

local filing obligation is not required in order to meet the minimum standard, if introduced, local filing obligations should apply in the way prescribed in the peer review documents. Moreover, the review will also consider the effective implementation of CbC reporting, i.e., providing for enforcement provisions and monitoring its effective implementation.

- ▶ **The exchange of information framework:** Under this heading, an assessment will be made to determine whether and to what extent jurisdictions have international tax agreements allowing the automatic exchange of information. Among the items considered under this key element will be the assessment of whether the exchange of information processes by a jurisdiction comply with the OECD XML schema and whether the information is provided in accordance with the XML schema user guide.⁴
- ▶ **The confidentiality and appropriate use of CbC reports:** This inter alia requires jurisdictions to put in place the necessary domestic rules and procedures to maintain confidentiality, and to impose penalties for unauthorized disclosures or unauthorized use of confidential information.

Although the Transfer Pricing documentation requirements relating to the Master file and Local file are not minimum standards, information on the implementation of these other transfer pricing documentation contained in Action 13 will be gathered for monitoring purposes.

The methodology sets out the procedural manner in which the peer reviews will be conducted. Since the above three key aspects may be implemented at different times, the peer review will follow a staged approach. This will allow the early detection of inconsistencies with the minimum standard as well as provide the opportunity to take action to address inconsistencies.

The peer reviews will consist of three phases structured into annual reviews, starting respectively in 2017, 2018 and 2019. Each year's review process will culminate in the production of an annual consolidated report on the outcomes of the peer reviews.

Implications

Consolidated reports on the outcomes of the peer reviews will be provided to the BEPS members each year. The purpose of the peer reviews is to ensure the effective implementation of the agreed standards on Actions 5 and 13.

The peer review document related to CbC reporting notes that the peer review process is a separate exercise to the review scheduled for 2020, which will evaluate whether modifications to the CbC reporting standard should be made. Nevertheless, the outcome of the Action 13 peer reviews will inform the discussions in 2020 of the effectiveness of the design of the CbC reporting standard. The outcome of the peer reviews may lead to additional technical guidance or further changes to be implemented by jurisdictions. It will be important for taxpayers to stay abreast of any additional changes.

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 BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
3. See EY Global Tax Alerts, [OECD releases schedule of Action 14 peer reviews](#), dated 1 November 2016 and, [OECD invites taxpayer input on peer reviews of Dispute Resolution under BEPS Action 14](#), dated 1 November 2016.
4. See EY Global Tax Alert, [OECD releases Country-by-Country reporting XML Schema and related User Guide](#), dated 25 March 2016.

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