

OECD releases first batch of peer review reports on Action 14

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Executive summary

On 26 September 2017, the Organisation for Economic Co-operation and Development (OECD) released the first batch of peer review reports¹ relating to the implementation by Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States of the Base Erosion and Profit Shifting (BEPS) minimum standards on Action 14 on improving tax dispute resolution mechanisms. These jurisdictions had also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and therefore, the OECD has also released six accompanying best practices reports.

Overall the reports conclude that these jurisdictions meet most of the elements of the Action 14 Minimum Standard. In the next stage of the peer review process, each jurisdiction's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

Detailed discussion

Background

In October 2015, the OECD released the final reports on all 15 focus areas of the BEPS Action Plan.² 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 BEPS³ (BEPS members) have committed to implement, and refer to 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 (CbC) 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 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 October 2016, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) on Action 14 on Making Dispute Resolution Mechanisms More Effective.⁴ The Terms of Reference translated the Action 14 minimum standard into 21 elements and the best practices into 12 items. The Assessment Methodology provided procedures for undertaking a peer review and monitoring in two stages. In Stage 1, a review is conducted of how a BEPS member implements the minimum standard based on its legal framework for Mutual Agreement Procedures (MAPs) and how it applies the framework in practice. In Stage 2, a review is conducted of the measures the BEPS member takes to address any shortcomings identified in Stage 1 of the peer review.

Both of these stages are desk-based and are coordinated by the Secretariat of the Forum on Tax Administration's (FTA) MAP Forum. In a nutshell, Stage 1 consists of three steps or phases: (i) obtaining inputs for the Stage 1 Peer Review; (ii) drafting and approval of a Stage 1 Peer Review Report; and (iii) 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' to adopt the report for publication.

Following the peer review documents, the OECD released a schedule covering Stage 1 of the peer review process on Action 14 where it catalogued the assessed jurisdictions

into eight batches for review⁵ and invited taxpayers to fill in a questionnaire and submit their input related to their experiences in the noted six jurisdictions included in the first batch. On 26 September 2017, the OECD released the first batch of peer review reports together with the optional reports on the adoption of best practices.

Minimum standards peer review reports

The first six peer review reports relate to Action 14 minimum standards implementation by Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States. The reports are divided into four parts, namely (i) preventing disputes; (ii) availability and access to MAP; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements. Each of these parts addresses a different component of the minimum standard.

The six reports include over 110 recommendations relating to the minimum standard. In general, the performance of the relevant countries with regards to MAP has proven to be satisfactory in their respective reports.

Overall, Belgium meets almost all of the elements of the Action 14 Minimum Standard and the other five jurisdictions meet most of the items of the Action 14 Minimum Standard.

All of the countries under assessment have mechanisms to prevent disputes from arising, and when disputes occur, they have the MAP available and accessible in the situations required by the minimum standard. Also, regarding application and time, the function of the competent authorities, in the view of the peer review, is adequate and pragmatic, and MAP agreements reached so far have been implemented on time. Main areas identified as requiring improvement concern the observance of the average period of 24 months for the resolution of MAP cases, the accessibility, and understanding of the MAP guidance, as well as the alignment of the tax treaties' MAP provisions with the Action 14 minimum standard.

Best practice peer review reports

Each assessed jurisdiction can provide information and request feedback from peers on how it has adopted the 12 best practices contained in Action 14 final report.

All of the jurisdictions in the first batch of the peer review requested that the OECD provide feedback concerning their adoption of the best practices contained in Action 14 final report.

The best practice reports are divided into the same four parts as the peer review reports, namely (i) preventing disputes; (ii) availability and access to MAP; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements. Under each of these sections, the 12 best practices on MAP are addressed and if peers provided input with respect to a best practice, the input is reflected in the report. However, for most of the best practices, the peers provided only limited input.

Next steps

The six jurisdictions assessed in the first batch of the peer review are already working to address deficiencies identified in their respective reports and are moving to Stage 2. In Stage 2 of the peer review process, a jurisdiction's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored. Assessed jurisdictions shall submit an update report to the FTA MAP Forum within one year of the OECD Committee on Fiscal Affairs' adoption of the Stage 1 Peer Review report.

The OECD is currently working on the peer reviews reports for the second batch (Austria, France, Germany, Italy, Liechtenstein, Luxemburg and Sweden)⁶ and third batch (Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain)⁷ of jurisdictions, and will continue to publish Stage 1 peer review reports in accordance with the Action 14 peer review assessment schedule.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of the peer review reports represents the continued recognition and importance of the need to achieve tax certainty to 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 direction to ensure access to an effective and timely mutual agreement process.

Furthermore, the peer review reports provide insights to taxpayers on the availability and efficacy of MAP in the countries under review. With additional countries continuing to be reviewed, the OECD has made it known that taxpayer input continues to be welcome on an ongoing basis.

With stakeholder feedback in mind, we encourage businesses to share their views with the OECD on the recent Peer Review and to perhaps comment on whether the next iteration of the OECD's assessment of tax administration's MAP performance warrants greater feedback from taxpayers as the primary source. Feedback from the international tax community is the logical next step after Peer Review, which may help to further validate the current favorable result.

EY Global Tax Alerts on each of the peer review reports are forthcoming.

Endnotes

1. <http://www.oecd.org/tax/oecd-releases-first-peer-reviews-on-implementation-of-beps-minimum-standards-on-improving-tax-dispute-resolution-mechanisms.htm>.
2. See EY Global Tax Alert, [OECD releases final reports on BEPS Action Plan](#), dated 6 October 2015.
3. <http://www.oecd.org/tax/beps/beps-about.htm>.
4. See EY Global Tax Alert, [OECD releases BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
5. See EY Global Tax Alert, [OECD releases schedule of Action 14 peer reviews](#), dated 1 November 2016.
6. See EY Global Tax Alerts, [OECD invites taxpayer input on peer reviews of Dispute Resolution under BEPS Action 14](#), dated 1 February 2017.
7. See EY Global Tax Alert, [OECD seeks taxpayer input on BEPS Action 14 peer reviews](#), dated 14 June 2017.

For additional information with respect to this Alert, please contact the following:

Ernst & Young LLP (United Kingdom), London

▶ Rob Thomas +44 20 7760 5538 rthomas5@uk.ey.com

Ernst & Young Belastingadviseurs LLP, Rotterdam

▶ Ronald van den Brekel +31 88 407 9016 ronald.van.den.brekel@nl.ey.com
▶ Marlies de Ruiter +31 88 407 7887 marlies.de.ruiter@nl.ey.com

Ernst & Young LLP, Global Tax Desk Network, New York

▶ Jose Bustos +1 212 773 9584 joseantonio.bustos@ey.com
▶ David Corredor-Velásquez +1 212 773 6259 david.corredorvelasquez@ey.com

Ernst & Young LLP, International Tax Services, Washington, DC

▶ David Canale +1 202 327 7653 david.canale@ey.com
▶ Richard J McAlonan +1 202 327 7209 richard.mcalonan@ey.com

Ernst & Young LLP (Canada), International Tax Services, Ottawa

▶ Paul Mulvihill +1 613 598 4339 paul.f.mulvihill@ca.ey.com

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