

OECD releases first annual peer review report on Action 5

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Executive summary

On 4 December 2017, the Organisation for Economic Co-operation and Development (OECD) released the first annual peer review report¹ relating to the compliance by members of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) of the minimum standards on Action 5 for compulsory spontaneous exchange on certain tax rulings (the transparency framework). The report covers the jurisdictions which participated in the BEPS project prior to the creation of the Inclusive Framework, and it assesses the 2016 calendar-year period. This report will be followed by annual reviews performed at least through 2020 (the end of the current agreed review period). With respect to jurisdictions that joined the BEPS inclusive framework in 2016, the next annual peer review process will be their first review.

Overall, the report concludes that all the assessed jurisdictions either had, or have undertaken steps to implement, the necessary legal framework for the spontaneous exchange of information on rulings for the year in review.

In next year's peer review process, each assessed jurisdiction's efforts to address any shortcomings identified in the 2016 peer review report will be monitored, and more jurisdictions will be included into the assessment.

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 BEPS 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 February 2017, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) on Action 5 on Harmful Tax Practices: Transparency Framework.³ 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; and (iv) statistics. The Assessment Methodology provided procedures for undertaking a peer review and monitoring during 2017-2020. As the current mandate for the Inclusive Framework on BEPS ends in 2020, the carrying out of any subsequent reviews after 2020 will be subject to the agreement of the Inclusive Framework on BEPS. Thus, the current Assessment Methodology applies until 2020, but the peer review process is expected to continue thereafter (to that end, a new assessment methodology needs to be agreed). The review is conducted on how the assessed jurisdictions comply with the minimum standard in all four key areas based on its legal framework and on how it applies the framework in practice.

Methodology

The review is desk-based and is coordinated by the Secretariat of the Forum on Harmful Tax Practices (FHTP). In summary, the review consists of three steps or phases: (i) obtaining inputs for the annual peer review report; (ii) drafting and approval of the annual peer review report; and (iii) publication of the annual peer review report. Input is provided through questionnaires completed by the assessed jurisdiction and peers (i.e., other FHTP delegates representing BEPS members). Once the input has been gathered, the Secretariat prepares a draft section of report on each assessed jurisdiction and sends it to the assessed jurisdiction for its written comments. When peer review reports of all assessed jurisdictions are finalized, the compilation of reports is sent for approval of the Inclusive Framework on BEPS to adopt the report for publication.

The review covers six categories of taxpayer-specific tax rulings⁴ which the issuing jurisdiction must exchange with other jurisdictions at its own initiative (as opposed to the exchange on request) in order to comply with the transparency framework requirements. The Inclusive Framework considers that, in the absence of compulsory information exchange, such rulings may give rise to BEPS concerns, i.e., to mismatches in tax treatment or double non-taxation. The transparency framework applies both to future rulings and retrospectively to rulings issued on or after 1 January 2010 provided they were still in effect as from 1 January 2014 (referred to as "future rulings" and "part rulings," respectively).

Moreover, where a member of the Inclusive Framework does not issue tax rulings within the scope of the transparency framework, they will be asked to certify this and will not be required to complete the rest of the review process.

Annual peer review report on the Exchange of Information on Tax Rulings

On 4 December 2017, the OECD released the first annual peer review report (the Report). The first annual peer review report contains the findings of the annual peer review process of jurisdictions' compliance with Action 5 minimum standards for the transparency framework. The 2016 annual peer review report covers a total of 44 jurisdictions,⁵ which were the countries participating in the BEPS project from the outset, i.e., comprising all OECD member countries, OECD accession countries and G20 countries.

The second chapter of the Report contains the country profiles of the assessed jurisdictions. Each country profile covers four elements, namely: (i) the information gathering process; (ii) exchange of information; (iii) confidentiality of information received; and (iv) statistics. Moreover, jurisdictions offering intellectual property (IP) regimes, have an additional element in their country profiles addressing the exchange of information on IP regimes.

The country profiles provide whether the relevant country has met the aspects of the terms of reference (ToR) for the year in review and whether a country issues tax rulings within the scope of Action 5. About half of the countries have met all the aspects of the ToR and no recommendations have been made.⁶ For countries not meeting one or more aspects, the country profile includes recommendations. Moreover, 43 out of the 44 assessed jurisdictions have the mechanism within their tax system to issue rulings that would be within the scope of Action 5. Saudi Arabia is the only jurisdiction which does not issue any type of rulings within the scope of the transparency framework in practice, although theoretically there is no impediment for Saudi Arabia to issue tax rulings.

The country profiles also contain an overview of the number of past rulings and future rulings issued by a country for the assessed period. For example, New Zealand issued 69 past rulings and 14 future rulings; the United States issued 114 past rulings and 21 future rulings; Norway issued one past ruling and did not issue any new (future) rulings; and in the case of the Netherlands it is estimated that the Netherlands issued approximately 2,000 past rulings within the scope of the transparency framework and more than 180 future rulings.

Overall, more than 10,000 relevant tax rulings were identified as issued by the assessed jurisdictions in the period up to the end of 2016. This includes both certain past rulings (issued during the 1 January 2010 - 31 March 2016 period) and future rulings (issued during the 1 April - 31 December 2016 period). The assessed jurisdictions performed almost 6,500 exchanges of information in the reviewed period. In general, all jurisdictions either already had in place, or have undertaken steps to implement, the requirements of the transparency framework.

The report includes 49 country-specific recommendations for improvement relating to the minimum standard to be taken into account by the assessed jurisdictions by the next peer review cycle. The most common recommendations appear to be on issues such as (i) improving the timeliness of the exchange of information, (ii) ensuring that all relevant information on the taxpayer's related parties is captured for exchange purposes, and (iii) ensuring that exchanges of information are made with respect to preferential tax regimes that apply to income from IP.

Next steps

The jurisdictions assessed in the 2016 annual peer review report are already working to address deficiencies identified in their respective reports. Their progress will be reflected in the peer review reports for subsequent years. Jurisdictions that became BEPS members in 2016 will be reviewed for the first time in 2018 for the 2017 calendar-year period. For some countries that notified the FHTP in 2017 that they require additional time to implement the transparency framework, the 2019 review will be their first review and will cover the 2018 calendar-year period.

Implications

The annual peer review report is a significant step in the OECD's push for more transparency and information exchange. Member countries will not only have to adapt their laws to be able to implement the transparency framework, but also will have to adapt their systems to be able to process the information. The report further reinforces the current environment, where exchanging information is the new standard. This, coupled with an ever increasing amount of information is being exchanged (tax rulings, financial account information, and soon CbC reports), reinforces the need for businesses to ensure that information filed is written in a way that avoids confusion when read out of context.

The report on the outcomes of the peer reviews will be provided to the members of the Inclusive Framework on BEPS each year. This may lead to additional technical guidance or further changes to be implemented by jurisdictions, and thus it will be important for taxpayers to stay abreast of any additional changes.

Endnotes

1. <http://www.oecd.org/tax/beps/harmful-tax-practices-peer-review-reports-on-the-exchange-of-information-on-tax-rulings-9789264285675-en.htm>.
2. See EY Global Tax Alert, [OECD releases final reports on BEPS Action Plan](#), dated 6 October 2015.
3. 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.
4. These categories are: (i) rulings relating to preferential regimes, (ii) unilateral advance pricing agreements or other cross-border unilateral rulings in respect of transfer pricing, (iii) cross-border rulings providing for a downward adjustment of taxable profits, (iv) permanent establishment rulings, (v) related party conduit rulings, and (vi) any other type of ruling agreed by the FHTP that in the absence of spontaneous information exchange gives rise to BEPS concerns. For now, the list is exhaustive and comprises items (i) - (v). The language of the sixth category is intended to give the FHTP flexibility in the future to broaden the obligation to spontaneously exchange to additional categories of rulings. This would only therefore apply where the FHTP subsequently agrees that other rulings give rise to similar concerns as the rulings already included within the framework and should therefore be added.
5. Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China (People's Republic of), Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxemburg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Russian Federation, Saudi Arabia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States.
6. Namely, Argentina, Australia, Belgium, Brazil, Canada, Chile, Denmark, Germany, Indonesia, Ireland, Japan, Mexico, New Zealand, Norway, Saudi Arabia, Slovak Republic, Slovenia, South Africa, Switzerland and the United States.

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