

OECD releases second batch of peer review reports on Action 14

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Executive summary

On 15 December 2017, the Organisation for Economic Co-operation and Development (OECD) released the [second batch of peer review reports](#) relating to the implementation by Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden of the Base Erosion and Profit Shifting (BEPS) Minimum Standards on Action 14 on *Making Dispute Resolution Mechanisms More Effective*. Austria, Liechtenstein, Luxembourg and Sweden had also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and therefore, the OECD has also released four accompanying best practices reports.

Overall the reports conclude that these jurisdictions meet most of the elements of the Action 14 Minimum Standards. 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.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](#) (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 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 *Making Dispute Resolution Mechanisms More Effective*.² The Terms of Reference translated the Action 14 Minimum Standards 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 member of the Inclusive Framework on BEPS 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 OECD Forum on Tax Administration's (FTA) MAP Forum. In summary, 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 nine batches for review.³ The peer review reports of the first six jurisdictions were released on 26 September 2017. Taxpayers were invited to complete a questionnaire and submit their input related to their experiences in the noted seven jurisdictions included in the second batch on 30 January 2017. On 15 December 2017, the OECD released the second batch of peer review reports together with the optional reports on the adoption of best practices.

Minimum Standards peer review reports

The second batch of peer review reports relate to Action 14 Minimum Standards implementation by Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden. 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 Standards.

The seven reports include over 170 recommendations relating to the Minimum Standards. In general, the performance of the relevant countries with regards to MAP has been scored as satisfactory in their respective reports. Overall, the assessed jurisdictions meet most of the elements of the Action 14 Minimum Standards. The majority of the countries assessed have mechanisms to prevent disputes from arising, and when disputes occur, they have MAP available and accessible in the situations required by the Minimum Standards. 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 Standards.

Regarding the prevention of disputes, Germany and Sweden meet this Minimum Standards, while France and Italy do not fully meet it as they do not enable taxpayers to request roll-backs of bilateral APAs, and such roll-backs are also not granted in practice. Regarding Austria, Liechtenstein, and Luxembourg, although they can provide bilateral APAs and

enable taxpayers to request roll-backs of bilateral APAs in theory, during the review period no requests for roll-back of APAs were received, and it was therefore not possible to assess the implementation of this element of the Action 14 Minimum Standards in practice.

Most of the assessed jurisdictions generally meet the requirements regarding the availability and access to MAP under the Action 14 Minimum Standards. However, the reports recommend that Austria should complete its MAP guidance regarding audit settlements and the access to MAP, Sweden should improve the level of clarity of its MAP guidance, and Luxembourg should issue more comprehensive MAP guidance.

Finally, in order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standards, all assessed jurisdictions, except Liechtenstein, are recommended to amend and update a certain number of their tax treaties.

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.

Austria, Liechtenstein, Luxembourg and Sweden 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 seven jurisdictions assessed in the second 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 third batch of jurisdictions (Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain)⁴ and it is gathering input for the fourth batch of jurisdictions (Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal).⁵ The OECD 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 and the number of MAP cases continues to accelerate, the release of the peer review reports represents the continued recognition and importance of the need for MNEs to be able to achieve higher levels of tax certainty in relation to cross-border transactions. While increased scrutiny and subjectivity 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 step that will increase the likelihood of access to an effective and timely MAP 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 welcomed on an ongoing basis.

With stakeholder feedback in mind, businesses should share their views with the OECD on the recent peer review and possibly comment on whether the next iteration of the OECD's assessment of tax administrations' 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 the individual peer review reports are forthcoming.

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 Alert, [OECD releases schedule of Action 14 peer reviews](#), dated 1 November 2016.
- 4 See EY Global Tax Alert, [OECD seeks taxpayer input on BEPS Action 14 peer reviews](#), dated 14 June 2017.
- 5 See EY Global Tax Alert, [OECD invites taxpayer input on fourth batch of peer reviews of Dispute Resolution under BEPS Action 14](#), dated 11 December 2017.

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