

OECD releases fourth batch of peer review reports on Action 14

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Executive summary

On 30 August 2018, the Organisation for Economic Co-operation and Development (OECD) released the fourth batch of peer review reports relating to the implementation by Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal of the Base Erosion and Profit Shifting (BEPS) minimum standard on Action 14 (*Making Dispute Resolution Mechanisms More Effective*). Australia, Japan, Malta and New Zealand had also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and the OECD therefore also released four accompanying best practices reports.

Overall, the reports conclude that the majority of these jurisdictions meet almost all or most of the elements of the Action 14 minimum standard. Australia meets part of the elements of the Action 14 minimum standard, while Mexico meets half of these elements. 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 action points 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 14.² 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 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 ten batches for review.³ The peer review reports of the first batch (Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States) were released on 26 September 2017,⁴ the peer review reports of the second batch (Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden) were released on 15 December 2017⁵ while the peer review reports of the third batch (Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain) were released on 12 March 2018.⁶ Taxpayers were also invited to complete a questionnaire and submit their input related to their experiences in the jurisdictions included in the fifth batch (Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia and Turkey) and the sixth batch (Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania and South Africa) by 9 April 2018 and 24 August 2018 respectively.⁷ On 30 August 2018, the OECD released the fourth batch of peer review reports together with the optional reports on the adoption of best practices.

Minimum standard peer review reports

The fourth batch of peer review reports relates to Action 14 minimum standard implementation by the eight jurisdictions listed in the executive summary. 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 eight reports include over 130 recommendations relating to the minimum standard. In general, the performance of the relevant countries with regards to MAP has been scored as satisfactory in their respective reports. Overall, the majority of the assessed jurisdictions meet almost all or most of the elements of the Action 14 minimum standard. Australia meets part of the elements of the Action 14 minimum standards broadly because its treaty network is partly consistent with the requirements of the Action 14 minimum standard (e.g., approximately 70%

of its tax treaties do not contain the equivalent of Article 25(3), second sentence of the OECD Model Tax Convention (2017) stating that the competent authorities may consult together for the elimination of double taxation for cases not provided for in the tax treaty.); and Mexico meets half of these elements broadly because its treaty network is partly consistent with the requirements of the Action 14 minimum standard (e.g., except for one, all of its tax treaties neither contain a provision stating that mutual agreements shall be implemented notwithstanding any time limits in domestic law (which is required under Article 25(2), second sentence of the OECD Model Tax Convention (2017), nor the alternative provisions for Article 9(1) and Article 7(2) of the OECD Model Tax Convention (2017) to set a time limit for making transfer pricing adjustments.). The majority of the countries assessed have mechanisms to prevent disputes from arising, and when disputes occur, they have an established MAP program. Also, regarding application and time, the average time taken for resolving MAP cases is in general satisfactory, and MAP agreements reached so far have been implemented on time. Main areas that require 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.

Regarding the prevention of disputes, all assessed countries, but Portugal, meet this key area of the minimum standard. Although Portugal has in place a bilateral Advance Pricing Agreement (APA) program, it does not allow rollbacks of bilateral APAs. Malta and Israel provide bilateral APAs and enable taxpayers to request roll-backs of bilateral APAs in theory, but during the reviewed period no requests for roll-back of APAs were received, and it was therefore not possible to assess this element of the Action 14 minimum standard in practice. In Mexico, the taxpayers' requests for roll-backs of bilateral APAs that have been submitted since 1 January 2016 are still under consideration by Mexico's competent authority.

Most of the assessed jurisdictions generally meet the requirements regarding the availability and access to MAP under the Action 14 minimum standard. However, the reports recommend that Australia update its MAP guidance to include up-to-date contact information of its competent authority and complete its MAP guidance regarding audit settlements and the access to MAP. Also, the reports recommend that Israel include information on contact details of the competent

authority in its MAP guidance and that Mexico improve the level of clarity of its MAP guidance, especially with respect to the use of MAP.

Finally, in order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 minimum standard, all assessed jurisdictions, are recommended to amend and update a certain number of their tax treaties. In this respect, all assessed jurisdictions have signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (the MLI), through which a number of their tax treaties will potentially be modified to fulfill the requirements under the Action 14 minimum standard.⁸ Where treaties will not be modified, upon entry into force of the MLI, the assessed jurisdictions reported that in general they intend to update some or all of their tax treaties to be compliant with the requirements under the Action 14 minimum standard via bilateral negotiations.

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 the Action 14 final report.

Australia, Japan, Malta and New Zealand requested that the OECD provide feedback concerning their adoption of the best practices.

The best practice reports are divided into the same four parts as the peer review reports. 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 eight jurisdictions assessed in the fourth 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 similarly be monitored, and 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 fifth and sixth batch of jurisdictions. 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.

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 releases first batch of peer review reports on Action 14](#), dated 27 September 2017.
5. See EY Global Tax Alert, [OECD releases second batch of peer review reports on Action 14](#), dated 15 December 2017.
6. See EY Global Tax Alert, [OECD releases third batch of peer review reports on Action 14](#), dated 14 March 2018.
7. See EY Global Tax Alert, [OECD invites taxpayer input on sixth batch of peer reviews of dispute resolution processes under BEPS Action 14](#), dated 26 July 2018.
8. See EY Global Tax Alert, [OECD releases multilateral instrument to implement treaty related BEPS measures on hybrid mismatch arrangements, treaty abuse, permanent establishment status and dispute resolution](#), dated 2 December 2016 and EY Global Tax Alert, [Mandatory Binding Treaty Arbitration under OECD's Multilateral Instrument](#), dated 2 December 2016. For further details, visit ey.com/mli.

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

Ernst & Young LLP (United Kingdom), London

- ▶ Chris Sanger csanger@uk.ey.com

Ernst & Young Belastingadviseurs LLP, Rotterdam

- ▶ Ronald van den Brekel ronald.van.den.brekel@nl.ey.com
- ▶ Marlies de Ruiter marlies.de.ruiter@nl.ey.com

Ernst & Young Belastingadviseurs LLP, Amsterdam

- ▶ Konstantina Tsilimigka konstantina.tsilimigka@nl.ey.com

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

- ▶ Jose A. (Jano) Bustos joseantonio.bustos@ey.com
- ▶ David Corredor-Velásquez david.corredorvelasquez@ey.com

Ernst & Young LLP, Washington, DC

- ▶ Rob Thomas rob.l.thomas1@ey.com

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