14 December 2018

Global Tax Alert

OECD releases second annual peer review report on Action 5 on the exchange of tax rulings

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Executive summary

On 13 December 2018, the Organisation for Economic Co-operation and Development (OECD) released the second annual peer review report (the report) relating to the compliance by members of the Inclusive Framework (IF) on Base Erosion and Profit Shifting (BEPS IF[1]) to the minimum standard on Action 5 for the compulsory spontaneous exchange on certain tax rulings (the transparency framework).

The report covers 92 of the 124 BEPS IF jurisdictions including all IF members that joined prior to 1 September 2017 and Jurisdictions of Relevance identified by the IF prior to 1 September 2017.

The report assesses the 2017 calendar-year period. This report will be followed by annual reviews performed at least until 2020, which is the end of the current agreed review period. In next year's peer review process, each assessed jurisdiction's efforts to address any shortcomings identified in the current peer review report will be monitored, and an update on exchange of information statistics will be provided.

As one of the major conclusions it was indicated that until 31 December 2017 almost 16,000 tax rulings in the scope of the transparency framework had been issued by the jurisdictions being reviewed. By 31 December 2017, around 21,000 exchanges of information had taken place, with almost 14,000 exchanges undertaken during 2017 and over 6,000 exchanges during 2016.

Building a better working world

Overall, the report concludes that all the assessed jurisdictions either have implemented, or have undertaken steps to implement, the necessary legal framework for the spontaneous exchange of information on rulings for the year in review. Also, the report highlights that the peer review process itself has proven to be very effective, with 60% of recommendations issued in the first annual report just one year ago already successfully addressed.

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 on best practices.

Minimum standards are the BEPS recommendations that all members of the BEPS IF 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 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) for Action 5 on the compulsory spontaneous exchange of certain types of tax rulings to address Harmful Tax Practices: the 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

(iv) Statistics

The Assessment Methodology sets out procedures for the undertaking of a peer review and monitoring during 2017-2020. As the current mandate for the BEPS IF ends in 2020, the carrying out of any subsequent reviews after that date will be subject to the agreement of the BEPS IF. Thus, the current Assessment Methodology applies until 2020, however the peer review process is expected to continue thereafter, possibly under a new assessment methodology). The review is conducted on whether the assessed jurisdictions comply with the minimum standard in all four key areas, based on both a jurisdiction's legal framework and on how it applies the framework in practice.

On 4 December 2017, the OECD released the first annual peer review report relating to the transparency framework, which covered the assessment of 44 jurisdictions (i.e., OECD and G20 countries and the countries that were in the OECD accession process throughout the BEPS project) for the 2016 calendar-year period.[4] The report included 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.

Annual peer review on the exchange of information on tax rulings

On 13 December 2018, the OECD released the second annual peer review report. This contains the findings of the annual peer review process of jurisdictions' compliance with the Action 5 minimum standard for the transparency framework during the 1 January 2017 – 31 December 2017 period.

While the first annual peer review covered 44 jurisdictions (i.e., OECD and G20 countries and the countries that were in the OECD accession process throughout the BEPS project), this second review covers 92 jurisdictions, including 48 BEPS IF and Jurisdictions of Relevance identified by the IF, which have undergone the peer review process for the first time.

Five jurisdictions, namely Bermuda, the British Virgin Islands, the Cayman Islands, Saint Maarten and the Turks and Caicos Islands, have not been assessed under the transparency framework. Saint Maarten was affected by a natural disaster during the year in review, and it was therefore considered appropriate that the peer review of the jurisdiction be deferred to the next annual review. Bermuda, the British Virgin Islands, the Cayman Islands and the Turks and Caicos Islands are jurisdictions which do not impose any corporate income tax, and cannot legally issue rulings within the scope of the transparency framework. BEPS IF members should not exchange information on rulings with them and these jurisdictions are considered to be outside the scope of the transparency framework.

According to the peer review documents, one of the terms of reference is related to confidentiality. However, the reviews of confidentiality in connection with the transparency framework defer to the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes in connection with the standard on Automatic Exchange of Financial Account Information for Tax Purposes.

The outcomes of that work are not published and no further references to the review of confidentiality are made in the peer review document. Thus, the reports on each reviewed jurisdiction published cover each of the aspects of the terms of reference, except for confidentiality. Each country profile included in the second chapter of the report covers the following elements, namely:

(i) The information gathering process

(ii) Exchange of information

(iii) Statistics

Moreover, jurisdictions offering intellectual property (IP) regimes include an additional element in their country profiles addressing the exchange of information on IP regimes. Jurisdictions also had the option to include a response to the report and an update on recent developments which occurred after the 2017 year in review.

The country assessments, referred to as country profiles in the report, provide whether the relevant country has met the requirements of the terms of reference (ToR) for the year in review, and thus whether a country issues tax rulings within the scope of Action 5. No recommendations have been made for more than half of the assessed jurisdictions.[5] Out of the 92 assessed jurisdictions, 68 jurisdictions can legally issue at least one type of ruling within the transparency framework. Four jurisdictions, namely Cameroon, Congo, Jamaica and Sri Lanka, did not provide a completed peer review questionnaire to the Secretariat, and therefore it is not established whether they have implemented the transparency framework. The country profiles also contain an overview of the number of past rulings and future rulings issued by a country for the assessed period. In addition, the country profiles show the number of follow-up requests that countries received for the exchange of the ruling and the average time to provide the response. The total number of follow-up requests in 2017 was 146.

Overall, almost 16,000 relevant tax rulings were identified as issued by the 92 assessed jurisdictions in the period through the end of 2017. Based on the first annual peer review report, the tax rulings issued by the 44 assessed jurisdictions in the period through the end of 2016 were 10,000. The assessed jurisdictions performed almost 21,000 exchanges of information by 31 December 2017, with almost 14,000 exchanges undertaken during 2017 and over 6,000 exchanges during 2016. In general, all jurisdictions either already had in place, or have undertaken steps to implement, the requirements of the transparency framework.

The report includes 60 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 information on past and future rulings is exchanged as soon as possible; (iii) ensuring that the information gathering process for identifying all past and future rulings and potential exchange jurisdictions, with a review and supervision mechanism, is finalized as soon as possible; and (iv) ensuring that the "best efforts approach" to identify potential exchange jurisdictions for all past rulings is applied. Also, the report provides recommendations regarding exchange information on IP regimes (new entrants, grandfathering, third category of IP assets). Of the 49 recommendations for improvement made to the 44 jurisdictions in the first annual peer review, 29 recommendations have been actioned and removed during the year in review. According to the OECD, this means that the peer review process itself has proven to be very effective, with almost 60% of recommendations issued in the first annual report just one year ago already having been successfully addressed. In a number of cases, the peer review process has assisted jurisdictions in identifying areas where improvement is required, and jurisdictions have been able to take swift action to implement changes.

Next steps

The jurisdictions assessed in the 2017 annual peer review report are already working to address deficiencies identified in their respective reports. Their progress will be reflected in peer review reports for subsequent years. The next annual peer review in 2019 will also include jurisdictions which joined the BEPS IF, and jurisdictions of relevance identified by the BEPS IF since 1 September 2017, as well as members of the BEPS IF that are developing countries and which requested an additional year to implement the transparency framework.

Implications

The annual peer review report is a significant step in the OECD's push for more transparency and information exchange. Member countries do not only have to adapt their laws to be able to implement the transparency framework, but also have to adapt their systems to be able to process and report on the information. The report further reinforces the current transparency environment, where exchanging information is the new standard. This, coupled with an ever increasing amount of other information being exchanged (tax rulings, financial account Information, and Country-by-Country reports), reinforces the need for businesses to ensure that information filed is submitted in such a way that it cannot be read out of context, thus reducing any possible confusion.

Endnotes

1. http://www.oecd.org/tax/beps/beps-about.htm#membership.
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 documesnts on BEPS Action 5 on Harmful Tax Practices and on BEPS Action 13 on Country-by-Country Reporting*, dated 6 February 2017.
4. See EY Global Tax Alert, *OECD releases first annual peer review report on Action 5*, dated 5 December 2017.
5. Australia, Belize, Benin, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Canada, Chile, Cote d'Ivoire, Croatia, Democratic Republic of the Congo, Denmark, Djibouti, Estonia, Finland, Germany, Greece, Guernsey, Haiti, Hong Kong (China), Iceland, Indonesia, Ireland, Isle of Man, Japan, Jersey, Jordan, Korea, Liberia, Liechtenstein, Lithuania, Luxembourg, Macau (China), Malta, Mauritius, Monaco, Monserrat, New Zealand, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Peru, Russian Federation, San Marino, Saudi Arabia, Seychelles, Sierra Leone, Singapore, Slovak Republic, Slovenia, South Africa, Switzerland, Trinidad and Tobago and the United States.

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EYG no. 012435-18Gbl

1508-1600216 NY
ED None

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