

## OECD releases fifth batch of peer review reports on BEPS Action 14

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### Executive summary

On 14 February 2019, the Organisation for Economic Co-operation and Development (OECD) released the fifth batch of peer review reports relating to the implementation by Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia, and Turkey of the Base Erosion and Profit Shifting (BEPS) minimum standard on Action 14 (*Making Dispute Resolution Mechanisms More Effective*).

Overall, the reports conclude that the majority of these jurisdictions meet most or almost all of the elements of the Action 14 minimum standard. Iceland meets more than half of the elements of the Action 14 minimum standard, and Romania meets less than 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. The Stage 2 peer review of the fifth batch is scheduled to commence in October 2019.

### Detailed discussion

#### Background

In October 2015, the OECD released final reports on all 15 action points of the BEPS Action Plan.<sup>1</sup> 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 BEPS members now number 128 jurisdictions.

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.<sup>2</sup> 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 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 an assessment [schedule](#) covering the peer review process on Action 14 where it catalogued the assessed jurisdictions into ten batches for review.<sup>3</sup> To date, the OECD has released the following Stage 1 peer review reports:

- ▶ The first batch (Belgium, Canada, the Netherlands, Switzerland, the United Kingdom, and the United States) was released on 26 September 2017<sup>4</sup>
- ▶ The second batch (Austria, France, Germany, Italy, Liechtenstein, Luxembourg, and Sweden) was released on 15 December 2017<sup>5</sup>
- ▶ The third batch (Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore, and Spain) was released on 12 March 2018<sup>6</sup>
- ▶ The fourth batch (Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand, and Portugal) was released on 30 August 2018<sup>7</sup>
- ▶ The fifth batch (Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia, and Turkey) was released on 14 February 2019

The OECD has also invited taxpayers to complete a questionnaire and submit their input related to their experiences in the jurisdictions included in the sixth batch (Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania and South Africa) and the seventh batch (Brazil, Bulgaria, China, Hong Kong, Indonesia, Papua New Guinea, Russian Federation and Saudi Arabia), so the peer reviews of these batches are underway and the reports should be published in the coming months.

### Fifth batch of peer review reports

The reports are divided into four parts or areas, 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 from the fifth batch include over 200 recommendations relating to the minimum standard. In general, the performance of the assessed jurisdictions with regards to MAP has been found as satisfactory in their respective reports. Overall, the majority of the assessed jurisdictions meet most or almost all of the elements of the Action 14 minimum standard. Iceland meets more than half of the elements of the Action 14 minimum standard,

and Romania meets less than half of these elements. The majority of the assessed jurisdictions have mechanisms to prevent disputes from arising, and when disputes occur, they have an established MAP program. Further, regarding application and time of MAP, the average time taken for resolving MAP cases is in general satisfactory, and MAP agreements reached so far have been implemented on time. The main areas that require improvement concern the accessibility to MAP, including MAP guidance, and the alignment of the tax treaties' MAP provisions with the Action 14 minimum standard.

Regarding the prevention of disputes, all assessed jurisdictions except Greece and Romania meet this area of the minimum standard. Further, Greece and Romania have in place bilateral Advance Pricing Agreement (APA) programs which do not allow for rollbacks. Also, Iceland has no bilateral APA program in place, and therefore there were no other elements to assess regarding the prevention of disputes for this jurisdiction.

Most of the assessed jurisdictions generally meet the requirements regarding the availability and access to MAP under the Action 14 minimum standard. Romania has not introduced its guidance on the availability of MAP and how it applies this procedure in practice, and Iceland is currently in the process of drafting such guidance. From the assessed jurisdictions, only Slovenia has in place a documented bilateral consultation and notification process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not justified.

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 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.<sup>8</sup> 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.

## Next steps

The eight jurisdictions assessed in the fifth 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 Stage 1 peer review reports for the sixth and seventh batch of jurisdictions and the Stage 2 peer review reports for the first batch. The OECD will continue to publish Stage 1 peer review reports in accordance with the Action 14 peer review assessment schedule, and will issue the first Stage 2 peer review reports in the coming months.

## Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities and the number of MAP cases being closed continues to contract, 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 may 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, and taxpayers are accordingly recommended to take advantage of that opportunity.

## 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 released fourth batch of peer review reports on Action 14](#), dated 4 September 2018.
8. See EY Global Tax Alerts, [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 [Mandatory Binding Treaty Arbitration under OECD's Multilateral Instrument](#), dated 2 December 2016.

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