

OECD releases first batch of Stage 2 peer review reports on dispute resolution

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Executive summary

On 13 August 2019, the Organisation for Economic Co-operation and Development (OECD) released the first batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by Belgium, Canada, Netherlands, Switzerland, United Kingdom and United States (the batch 1 jurisdictions) of the Base Erosion and Profit Shifting (BEPS) minimum standard on dispute resolution under Action 14 of the BEPS project. This is the first of multiple batches of Stage 2 reviews covering all of the jurisdictions that are being assessed. Stage 2 focuses on monitoring the follow-up of any recommendations that resulted from the batch 1 jurisdiction's Stage 1 peer review reports that were released on 26 September 2017.

The outcome of the Stage 1 peer review process for the batch 1 jurisdictions was that overall the six jurisdictions met almost all or most of the elements of the Action 14 minimum standard with respect to dispute resolution.¹ Where deficiencies were identified, the Stage 2 monitoring showed that the jurisdictions have worked to address them. The Stage 2 reports for the batch 1 jurisdictions conclude that the majority of these jurisdictions have addressed almost all or most of the identified deficiencies.

Detailed discussion

Background

In October 2015, the OECD released the final reports on all 15 action areas of the BEPS project.² The recommendations made in the reports ranged 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 countries participating in the Inclusive Framework on BEPS have committed to implement. Minimum standards were provided for under 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 specified in 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 dispute resolution.³ The Terms of Reference translated the minimum standard for dispute resolution into 21 elements and the best practices into 12 items. The Assessment Methodology provided procedures for undertaking peer review and monitoring in two stages. Both stages are coordinated by the Secretariat of the OECD Forum on Tax Administration's (FTA) Forum on Mutual Agreement Procedures (MAP). In Stage 1, a review is conducted of how a jurisdiction implements the minimum standard based on its legal framework for MAP and how it applies the framework in practice.

In Stage 2, a review is conducted of the measures the BEPS jurisdiction has taken to address any shortcomings identified in Stage 1 of the peer review. An assessed jurisdiction should within one year of the adoption of its Stage 1 Peer Review report by the OECD's Committee on Fiscal Affairs submit a detailed written report to the FTA MAP Forum on: (i) the steps it has taken or is taking to address any shortcomings identified in its peer review report; and (ii) any plans or changes to its legislative or procedural framework relating to the implementation of the minimum standard.

Following the peer review documents, the OECD released an assessment schedule covering the peer review process on dispute resolution under Action 14 where it catalogued the assessed jurisdictions into ten batches for review.⁴ To date, the OECD has released Stage 1 peer review reports for the first five batches.⁵

On 26 September 2017, the OECD released the first batch of peer review reports⁶ covering the implementation by Belgium,⁷ Canada,⁸ the Netherlands,⁹ Switzerland,¹⁰ the United Kingdom¹¹ and the United States¹² of the BEPS minimum standard on dispute resolution.

First batch of Stage 2 peer review reports

On 13 August 2019, the OECD released the Stage 2 peer review reports of countries included in the first batch of reviews (namely, Belgium, Canada, Netherlands, Switzerland, United Kingdom and United States) of the BEPS minimum standard on dispute resolution. The Stage 2 reports follow the same structure as the Stage 1 reports, with four main sections: (i) preventing disputes; (ii) availability and access to MAP; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements. In addition, the Stage 2 reports also include an overview of developments in each jurisdiction since 1 January 2017, including developments relating to the tax treaty network of that jurisdiction, other developments regarding the minimum standard on dispute resolution, and, in certain cases, the actions taken by the jurisdiction to address the recommendations made in its Stage 1 peer review report.

In general, the progress of the batch 1 jurisdictions on addressing deficiencies identified in the Stage 1 reports has been scored as satisfactory in their respective reports, and overall, these jurisdictions meet almost all or most of the elements of the minimum standard on dispute resolution.

All the batch 1 jurisdictions meet the Action 14 minimum standard with respect to the prevention of disputes, and when disputes occur, they provide access to MAP in all eligible cases. Belgium, Switzerland and the United Kingdom have updated or clarified issues in their MAP guidance. Regarding the application and time of MAP, each of the six jurisdictions decreased or maintained the amount of time needed to close MAP cases and all of these jurisdictions except one (the United States) met the 24-month average timeframe to close MAP cases. Additionally, on the evolution of the MAP caseload over 2016 and 2017, in four out of the six jurisdictions, the caseload increased (ranging from

a 1% increase in the United States to 74% in the United Kingdom). In Belgium and Canada, the MAP caseload decreased 6% and 33% respectively.

Furthermore, in some of the jurisdictions (i.e., Belgium, Netherlands and the United Kingdom), additional personnel were provided to the competent authority function and organizational changes were implemented or have been initiated with a view to handling MAP cases in a more timely, effective and efficient manner.

All of the batch 1 jurisdictions' tax treaties contain a provision relating to MAP with the exception of the United Kingdom, where almost all of its tax treaties contain such provision. According to the peer review reports, the multilateral instrument developed under BEPS Action 15 was utilized by almost all of these jurisdictions to bring some of their tax treaties in line with the standard and bilateral negotiations were concluded (or are ongoing) in most of the jurisdictions.

Lastly, all batch 1 jurisdictions also meet the Action 14 minimum standard with respect to the implementation of MAP agreements.

Best practice peer review reports

In addition to the review of the minimum standard on dispute resolution, each assessed jurisdiction can provide information and request feedback from peers on how it has adopted the 12 best practices on dispute resolution.

All the batch 1 jurisdictions requested feedback concerning their adoption of the best practices and therefore, in addition to the peer review reports, the OECD has released accompanying best practices reports.

The best practice reports are divided into the same four parts as the peer review reports on the minimum standard. Under each of these sections, the 12 best practices on MAP are addressed and if peers provided input with respect to a particular best practice, the input is reflected in the report.

However, for most of the best practices, the peers provided only limited input. Most significantly, there was peer input on the best practice of implementing bilateral Advance Pricing Agreement, which reflected an overall positive view of the batch 1 jurisdictions performance in this area.

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 increase, the release of the peer review reports represents the continued recognition of the importance to MNEs of certainty with respect to the tax treatment of cross-border transactions. While increased scrutiny and greater subjectivity increases the risk of double taxation, the continued focus by the OECD and participating jurisdictions on the implementation of effective dispute resolution mechanisms can be seen as a positive in helping to improve access to an effective and timely MAP process.

Furthermore, the release of this first batch of Stage 2 peer review reports provides insights to taxpayers on the progress made by these jurisdictions on the availability and efficacy of their MAP processes. As the reviews of all the assessed jurisdictions continue, the OECD welcomes taxpayer input on an ongoing basis.

The OECD will continue to publish Stage 1 and Stage 2 peer review reports in accordance with the Action 14 peer review assessment schedule. The publication of the sixth batch of Stage 1 peer reviews related to Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania and South Africa is forthcoming on 20 September 2019, and the second batch of Stage 2 peer reviews related to Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden is expected to be released later this year.

Endnotes

1. See EY Global Tax Alert, [OECD releases first batch of peer review reports on Action 14](#), dated 27 September 2017.
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 BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
4. See EY Global Tax Alert, [OECD releases schedule of Action 14 peer reviews](#), dated 1 November 2016.
5. See EY Global Tax Alerts, [OECD releases first batch of peer review reports on Action 14](#), dated 27 September 2017; [OECD releases second batch of peer review reports on Action 14](#), dated 15 December 2017; [OECD releases third batch of peer review reports on Action 14](#), dated 14 March 2018; [OECD releases fourth batch of peer review reports on Action 14](#), dated 4 September 2018; [OECD releases fifth batch of peer review reports on BEPS Action 14](#), dated 18 February 2019.
6. See EY Global Tax Alert, [OECD releases first batch of peer review reports on Action 14](#), dated 27 September 2017.
7. See EY Global Tax Alert, [OECD releases Belgium peer review report on implementation of BEPS Action 14 minimum standards](#), dated 20 October 2017.
8. See EY Global Tax Alert, [OECD releases Canada peer review report on implementation of BEPS Action 14 minimum standards](#), dated 2 October 2017.
9. See EY Global Tax Alert, [OECD releases the Netherlands peer review report on implementation of BEPS Action 14 minimum standards](#), dated 29 September 2017.
10. See EY Global Tax Alert, [OECD releases Switzerland's peer review report on implementation of BEPS Action 14 minimum standards](#), dated 19 October 2017.
11. See EY Global Tax Alert, [OECD releases the United Kingdom peer review report on implementation of Action 14 minimum standards](#), dated 26 October 2017.
12. See EY Global Tax Alert, [OECD releases the United States peer review report on implementation of BEPS Action 14 minimum standards](#), dated 2 October 2017.

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