

OECD releases United Kingdom Stage 2 peer review report on implementation of Action 14 minimum standard

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Executive summary

On 13 August 2019, the Organisation for Economic Co-operation and Development (OECD) released the Stage 2 peer review reports of the United Kingdom (UK) relating to the outcome of the peer monitoring of the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standard under Action 14 on improving tax dispute resolution mechanisms. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from the UK's Stage 1 peer review report.¹ The UK requested that the OECD also provide feedback concerning their adoption of the Action 14 best practices, and therefore, in addition to the peer review report, the OECD has released an [accompanying document](#) addressing the implementation of best practices.

Overall the report concludes that the UK addressed almost all of the shortcomings identified in its Stage 1 peer review report. In order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 minimum standard, the UK signed and ratified, without any reservations on the Mutual Agreement Procedure (MAP) article, of the Multilateral Instrument (the MLI). Furthermore, the UK opted for part VI of this instrument concerning the introduction of a mandatory and binding arbitration provision in tax treaties. Through this instrument a substantial number of its tax treaties have been or will be modified to meet the requirements under the Action 14 minimum standard. Where treaties have or will not be modified,

upon entry into force of the MLI for the treaties concerned, the United Kingdom reported that it has put a plan in place for their renegotiation, whereby those treaties under which its competent authority has MAP cases are prioritized.

Detailed discussion

Background

In October 2016, the OECD released the [peer review documents](#) (i.e., the Terms of Reference and Assessment Methodology) on Action 14 which form the basis of the MAP peer review and monitoring process under BEPS Action 14.²

The Terms of Reference translate the minimum standard approved into a basis for peer review, consisting of 21 elements complemented by 12 best practices. The Terms of Reference assess a Member's legal and administrative framework, including the practical implementation of this framework to determine how its MAP regime performs relative to the 21 elements in four key areas: (i) preventing disputes; (ii) availability and access to MAP; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements.

The Assessment Methodology establishes detailed procedures and guidelines for a two-stage approach to the peer review and monitoring process. Stage 1 involves the review of a Member's implementation of the minimum standard based on its legal framework for MAP and the application of this framework in practice. Stage 2 involves the review of the measures taken by the Member to address any shortcomings identified in its Stage 1 peer review. In light of the above, the OECD has also released a [schedule](#) for Stage 1 of the peer review and a questionnaire for taxpayers.³ The schedule catalogues the assessed jurisdictions into 10 batches for review.

Both of these stages are desk-based and are coordinated by the Secretariat of the Forum on Tax Administration's (FTA) MAP Forum.⁴ 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
- (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 (CFA) to adopt the report for publication.

For Stage 2, there are two steps or phases: (i) approval of Stage 2 peer monitoring report of an assessed jurisdiction and (ii) publication of Stage 2 peer review reports. More specifically, an assessed jurisdiction should within one year of the adoption of its Stage 1 peer review report by the CFA submit a detailed written report (Update Report) to the FTA MAP Forum. The Update Report should contain: (i) the steps that the assessed jurisdiction 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. Members of the FTA MAP Forum should also provide their comments on the Update Report provided by the assessed jurisdiction. Based on the Update Report submitted by the assessed jurisdiction and the input from the peers, the Secretariat will revise the Stage 1 peer review report of the assessed jurisdiction with a view to incorporate these updates in the Stage 2 peer monitoring report of the assessed jurisdiction. After adoption from the CFA, the Stage 2 peer monitoring report will be published.

Minimum standard peer review reports

The report is divided into four parts, namely:

- (i) Preventing disputes
- (ii) Availability and access to MAP
- (iii) Resolution of MAP cases
- (iv) Implementation of MAP agreements

Each part addresses a different component of the minimum standard.

Overall, the UK addressed almost all of the shortcomings identified in its Stage 1 peer review report.

Preventing disputes

The UK meets the Action 14 minimum standard concerning the prevention of disputes. It has in place a bilateral Advance Pricing Agreement (APA) program. This APA program also enables taxpayers to request rollbacks of bilateral APAs and such rollbacks are granted in practice.

There are some areas of improvement for the UK with regards to the current situation of the UK's tax treaties where 15 out of 130 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. Of these 15 treaties:

- ▶ 3 of the treaties are expected to be modified by the MLI to contain the required provision
- ▶ There are 12 treaties that will not be modified by the MLI to contain the required provision. With respect to these 12 treaties:
 - 3 are included in the list of treaties for which negotiations are envisaged, scheduled or pending
 - For the remaining 9 no actions have been taken or are planned to be taken, but are included in the plan for renegotiations

Availability and access to MAP

The UK meets the requirements regarding the availability and access to MAP under the Action 14 minimum standard. It provides access to MAP in all eligible cases, although for those tax treaties that do not contain a filing period for MAP requests, there is a risk that due to the UK's domestic time limits, access to MAP is not available even if the taxpayer filed its MAP request within three years as from the first notification of the action resulting in taxation not in accordance with the tax treaty.

Additionally, the UK has in place a documented notification and consultation process for those situations in which the UK's competent authority considers the objection raised by taxpayers in a MAP request as not justified. The UK also has comprehensive guidance on the availability of MAP and on how it applies this process in practice, both under tax treaties and the European Union Arbitration Convention. In its Stage 1 peer review it was identified that this guidance did not specify whether the UK will also grant access to MAP for cases where taxpayers and HM Revenue and Customs have entered into an audit settlement. In 2018 the UK published an update of its MAP guidance, in which several further clarifications were reflected regarding its policy and practice concerning the handling and resolution of MAP cases, including the information and documentation taxpayers need to include in their MAP request. This update also reflects that taxpayers have access to MAP in cases of audit settlements.

There are some areas of improvement as some of the tax treaties do not contain a provision that is equivalent to Article 25. Some of these treaties:

- ▶ Have been or are expected to be superseded by the MLI to contain the required provision(s); or
- ▶ Will not be modified or superseded by the MLI to include the required provision. With respect to those treaties: Some are included in the list of treaties for which negotiations are envisaged, scheduled or pending. For the remaining no actions have been taken or are planned to be taken, but they are included in the plan for renegotiations.

Resolution of MAP cases

The average time taken for resolving MAP cases for post-2015 cases follows the MAP Statistics Reporting Framework.

The number of cases the UK closed in 2016 or 2017 is around 60% of the number of all new cases started in those years. During these years, MAP cases were closed on average within a timeframe of 24 months (which is the pursued average for closing MAP cases received on or after 1 January 2016), as the average time needed was 15.95 months. This mainly concerns the resolution of other cases, for which the average is below the pursued 24-month average (9.77 months). The average time to close attribution/allocation cases is thereby considerably longer (25.31 months) and slightly above this pursued average. Although the average time to close MAP cases is below 24 months, the MAP inventory of the UK as of 31 December 2017 substantially increased to 74% as compared to the inventory on 1 January 2016, which mainly results from an increase of 159% in the number of other MAP cases. In this respect, the UK has recently attributed more resources to the competent authority function. Nevertheless, the substantial increase in the number of MAP cases indicates that even more resources may be needed to cope with this increase and to ensure that the UK continues to resolve MAP cases in a timely, effective and efficient manner.

Furthermore, the UK meets all of the other requirements under the Action 14 minimum standard in relation to the resolution of Map cases. Its competent authority operates fully independently from the audit function of the tax authorities and uses a pragmatic approach to resolve MAP cases in an effective and efficient manner. Its organization is adequate and the performance indicators used are appropriate to perform the MAP function.

Implementation of MAP agreements

The UK meets the Action 14 minimum standard as regards the implementation of MAP agreements. The UK monitors implementation and no issues have surfaced throughout the peer review process.

There are some areas of improvement where 99 out of 130 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention, nor the alternative provisions in Article 9(1) and Article 7(2). Of those 99 tax treaties:

- ▶ The MLI modifies 6 treaties to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention
- ▶ 39 are expected to be modified by the MLI to include this equivalent
- ▶ 54 will not be modified by the MLI to include this equivalent. With respect to these 54 treaties:
 - 24 are included in the list of treaties for which negotiations are envisaged, scheduled or pending
 - Negotiations have been conducted for 1 of the treaties, which did not result in the inclusion of the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention or the alternative provisions in Article 9(1) and Article 7(2)
 - For the remaining 29 no actions have been taken or are planned to be taken, but are included in the plan for renegotiations

Best practice peer review reports

Next to its assessment on the compliance with the Action 14 minimum standard, the UK also addressed the Action 14 best practices and asked for peer input on best practices.

Generally, all peers indicated having good working relationships with the UK with respect to MAP, some of them emphasized the efficiency of the UK's competent authority. Specifically, with respect to Stage 2, nearly all peers that provided input reported that the update report of the UK fully reflects the experiences these peers have had with the UK since 1 January 2017 and/or that there was no addition to previous input given.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of the United Kingdom Stage 2 peer review report represents the continued recognition and importance of the need to achieve tax certainty to cross-border transactions for MNEs. While increased scrutiny 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 to best ensure access to an effective and timely mutual agreement process.

Endnotes

1. See EY Global Tax Alert, [OECD releases the United Kingdom peer review report on implementation of Action 14 minimum standards](#), dated 26 October 2017.
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. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.

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