

## OECD releases the Netherlands 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 Netherlands 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 Report](#)). Stage 2 focuses on monitoring the follow-up of any recommendations resulting from the Netherlands' Stage 1 peer review report (Stage 1 Report).<sup>1</sup> The Netherlands requested that the OECD also provide feedback concerning its 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 Netherlands' implementation of best practices ([Best Practices Report](#)).

The outcome of the Stage 1 peer review was that overall the Netherlands has met most of the elements of the Action 14 minimum standard. The Stage 2 Report concludes that the Netherlands has addressed most of the shortcomings identified in its Stage 1 peer review report.

The Netherlands signed the Multilateral Instrument without any reservations on the mutual agreement procedure (MAP) article, and it intends to replace or amend existing tax treaties that will not be modified by the Multilateral Instrument to be compliant with the requirements under the Action 14 minimum

standard. Furthermore, the Netherlands has introduced a bilateral consultation and notification process towards the other competent authority as well as an objection and appeals process at the level of domestic courts for those situations where its competent authority considers the objections raised by the taxpayer in its MAP request not to be justified.

The Netherlands has indicated that it will update its current MAP guidance.<sup>2</sup> The Stage 2 Report mentions that the update to the MAP guidance would be published at the latest in July 2019. The update has not been published yet, and therefore is expected shortly.

The average time necessary for closing MAP cases during 2016 and 2017 is below the pursued average of 24 months. The MAP inventory as of 31 December 2017 increased with 34% as compared to 1 January 2016. The Netherlands has recently attributed more resources to the competent authority function and acted to increase the number of closed cases. The Stage 2 Report recommends the Netherlands to closely monitor whether it has adequate resources in place to continue to resolve MAP cases in a timely, effective and efficient manner, particularly given the increased number of cases.

From the Best Practices Report it follows that the Netherlands applies or has adopted most of the Action 14 best practices. The peer review input on these matters was rather limited.

## 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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.

### In general

The Netherlands has a large tax treaty network with over 90 tax treaties and has signed and ratified the European Union (EU)'s Arbitration Convention. The Netherlands has an established MAP program and long-standing and large experience with resolving MAP cases. It has a large MAP inventory with a very large number of new cases submitted each year, with 350 cases pending on 31 December 2017. Of these cases, 34% concern attribution/allocation cases, i.e., transfer pricing related.

The peers that provided input for the Stage 2 Report represent approximately 88% of the MAP cases in the Netherlands' inventory that started in 2016 or 2017.

### Preventing disputes

The Stage 1 Report concluded that the Netherlands meets the Action 14 minimum standard concerning the prevention of disputes. Currently, 2 out of its 93 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention, which requires their competent authority to endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty. This paragraph is relevant for cases that may arise concerning the interpretation or the application of tax treaties that do not necessarily relate to individual cases but are more of a general nature. One treaty will be amended on this matter through the Multilateral Instrument and for the other, treaty negotiations are being initiated to (inter alia) include the required provision.

Furthermore, the Netherlands has an advance pricing agreement (APA) program that allows taxpayers to enter into unilateral, bilateral and multilateral APAs. There are no specific timelines for the filing of an APA request and the Netherlands does not charge any fees to taxpayers for a

bilateral APA request. The program also allows for the roll-back of APAs, in relation to which the Netherlands received a few requests during 2017, including a multilateral APA.

### Availability and access to MAP

The conclusion reached in the Stage 1 Report was that the Netherlands meets most of the requirements regarding the availability and access to MAP under the Action 14 minimum standard.

Twelve of the Netherlands' tax treaties effectively do not include a provision equivalent to Article 25(1), first sentence, OECD Model Tax Convention (MTC), which is the basis of the MAP procedure. Out of these 12, 5 tax treaties will be modified via the Multilateral Instrument. Six tax treaties contain a filing period for MAP requests of less than three years, which is not aligned with the Action 14 minimum standard. The Multilateral Instrument will change three of these six treaties upon entry into force. In line with the recommendations of the Stage 1 Report, the Netherlands reported in its Update Report that it will seek to include the minimum standard of Article 25(1) of the OECD MTC in all its future treaties.

The Netherlands provides access to MAP in all eligible cases included in the minimum standard. Since the release of the Stage 1 Report, it has also introduced a bilateral consultation or notification process for those situations in which the Netherlands' competent authority considers the objection raised by taxpayers in a MAP request not justified. It further introduced an objection and appeals process at the level of its domestic courts, which can be initiated by taxpayers in cases where the objection raised by them is considered not justified.

The Netherlands has clear and comprehensive guidance on the availability of MAP<sup>6</sup> and how it applies this procedure in practice both under tax treaties and the EU Arbitration Convention. In its Stage 1 Report it was identified that the MAP guidance of the Netherlands, however, does not include information on whether a taxpayer can request MAP for cases for which it entered into an audit settlement with the tax authorities. Although the Netherlands indicated during Stage 1 that it will publish an updated version of its MAP guidance that inter alia clarifies that audit settlements do not preclude access to MAP, such updated version has been delayed due to the adoption of the new [EU Directive on Tax Dispute Resolution Mechanisms](#).

The new guidance will: (i) clarify the relationship between domestic available remedies and MAP, and between audit settlements and MAP; (ii) clarify that access to MAP would be granted in the case of double taxation resulting from bona fide taxpayer-initiated foreign adjustments; and (iii) include information on multilateral MAP guidance. The Stage 2 Report mentions that the update to the MAP guidance would be published at the latest in July 2019. The update has not been published yet, and therefore is expected shortly.

### Resolution of MAP cases

The Stage 1 Report mentioned that the Netherlands' competent authority was found to use a pragmatic approach to resolve MAP cases in an effective and efficient manner. The average time to close MAP cases is below the targeted 24 months. The MAP inventory of the Netherlands as of 31 December 2017 increased with 34% as compared to the inventory on 1 January 2016, resulting from an increase by 50% in the number of other MAP cases. In this respect, the Netherlands has recently attributed more resources to the competent authority function and acted to increase the number of closed cases. Nevertheless, the significant 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 Netherlands continues to resolve MAP cases in a timely, effective and efficient manner.

From the peer input for the Stage 1 Report, it was noted that audit personnel of the Dutch tax administration (often) attend competent authority meetings and participate in discussions to resolve MAP cases. Although this may not per se cause the Netherlands' competent authority to enter into MAP agreements dependent on the approval or direction of personnel of the Dutch tax administration directly involved in the adjustment, the report indicates that there is a risk that this personnel is or becomes involved in the decision-making process or that it could be perceived by treaty partners that the Netherlands' competent authority is dependent on approval or direction of this personnel. Further, it is noted that the authority for handling MAP cases related to disputes on resident status of corporate taxpayers is delegated to the Director of Large Enterprises which bears the risk that personnel directly involved in the adjustments at issue may influence the process of resolving these cases.

As a response to this peer input, country-coordinators for auditors/members were introduced by the end of 2016 as part of the Coordination Group on Transfer Pricing of the Dutch tax administration (CGTP). These coordinators are

tasked to oversee all attribution/allocation MAP cases with a specific treaty partner, act as a liaison between the auditors at the local tax offices and the Ministry of Finance (the competent authority) and guard the quality and consistency in handling MAP cases with each treaty partner. Their role is also to objectively and independently review the case under review and render an adviser to the Ministry of Finance. Also, specific measures have been put in place to avoid that the country-coordinator becomes involved in the MAP discussions if members of the CGTP were directly involved in the adjustment at issue.

### Implementation of MAP agreements

The Stage 1 Report concluded that the Netherlands meets the Action 14 minimum standard with respect to the implementation of MAP agreements. Although the Netherlands does not monitor the implementation of such agreements, no issues have surfaced regarding implementation throughout the peer review process. The Netherlands implements all MAP agreements and the implementation itself takes place on a timely basis.

To provide full certainty to taxpayers, it is essential that implementation of MAP agreements is not obstructed by any time limits in the domestic law of the jurisdictions concerned. This is governed by including Article 25(2), second sentence, of the OECD MTC in tax treaties, or the alternative provisions provided for in Article 9(1) and 7(2) of the OECD MTC. Out of the Netherlands' 93 tax treaties, 71 contain one of these provisions. Out of the remaining 22 tax treaties, 13 will be amended through the Multilateral Instrument. The Stage 2 Report generally recommends the Netherlands to proceed with the negotiations with the treaty partners of the other tax treaties not modified by the Multilateral Instrument.

### 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. All jurisdictions in the first batch of the peer review requested that the OECD provide feedback concerning their adoption of the best practices contained in the Action 14 final report, including the Netherlands. However, for most of the best practices, the peers provided no to limited input.

One peer provided input and noted that the Netherlands' competent authority is a committed partner within the FTA MAP Forum and FTA Large Business Program to raise awareness of the principles of the Global Awareness Training

Module within its examination and competent authority functions. Two peers provided input in relation to the best practice to implement appropriate administrative measures to facilitate recourse to MAP. Both peers indicated that they are aware that although the formal initiation of the MAP in the Netherlands, with certain exceptions, is dependent on the finalization of domestic judicial/administrative proceedings, the Netherlands in practice initiates the MAP simultaneously with pending domestic remedies. One peer also noted that the Netherlands' competent authority is allowed to deviate from decisions of its domestic courts. It was noted by one peer that the Netherlands' competent authority has been amenable to considering cases involving bona fide taxpayer-initiated foreign adjustments in MAP on a case-by-case basis. Similarly, the competent authority is open to consider multilateral MAPs on a case-by-case basis.

## Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of the Netherlands' Stage 2 Report represents the continued recognition and importance of the need to achieve tax certainty for 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 MAP.

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## Endnotes

1. See EY Global Tax Alert, [OECD releases the Netherlands peer review report on the implementation of BEPS Action 14 minimum standards](#), dated 29 September 2017.
2. Decree of the Netherlands' State Secretary of Finance of 29 September 2008 (IFZ2008/248M). This guidance is available (in Dutch) at: <https://zoek.officielebekendmakingen.nl/stcrt-2008-188-p2-SC87664.html>.
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. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.
6. See endnote ii.



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