

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

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Executive summary

On 30 July 2019, the Organisation for Economic Co-operation and Development (OECD) released the Stage 2 peer review report of Switzerland 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 Switzerland's Stage 1 peer review report.¹ Switzerland 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 Switzerland addressed almost all the shortcomings identified in its Stage 1 peer review report.

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 Mutual Agreement Procedure (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 consist 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 the Stage 2 peer monitoring report of an assessed jurisdiction; and (ii) publication of the 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 by the CFA, the Stage 2 peer monitoring report will be published.

Minimum standard peer review report

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, Switzerland addressed almost all the shortcomings identified in its Stage 1 peer review report. Where deficiencies were identified, Switzerland worked to address them, which has been monitored in Stage 2 of the process. In this respect, Switzerland has solved most of the identified deficiencies. All of Switzerland's tax treaties include a provision relating to MAP, which generally follows paragraphs 1 through 3 of Article 25 of the OECD Model Tax Convention (OECD, 2017). Its treaty network is largely consistent with the requirements of the Action 14 minimum standard.

Preventing disputes

Switzerland meets the Action 14 minimum standard concerning the prevention of disputes.

- Switzerland reported that it is authorized to enter bilateral and multilateral Advance Pricing Agreements (APAs) on the basis of the MAP provision in the applicable tax treaty. The authority competent to handle APA requests is the State Secretariat for International Finance (SIF) within the Federal Department of Finance, which is the same

entity that acts as the competent authority for handling MAP cases. In addition, Switzerland allows for roll-back of bilateral APAs, provided that the roll-back period is within Switzerland's domestic time limit of 10 years. Thus far, Switzerland has never had a case where they refused or limited the roll-back period.

- Switzerland reported that since 1 January 2017 its competent authority tracks in its inventory the fiscal years that are in the scope of an APA, and the date on which the APA was submitted. Based on this information, Switzerland reported it can also identify the number of APAs that include a roll-back. Consequentially, Switzerland also started publishing statistics on APAs, beginning with the fiscal year 2016. These statistics include: (i) the number of APA requests received, closed and pending; (ii) completion times; and (iii) the number of APAs per region.

There are some areas of improvement where 2 out of 95 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention.

Switzerland reported that where a tax treaty does not contain a provision that is based on or is the full equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, there are under its domestic legislation and/or administrative practice no constraints to endeavor to reach an agreement on the general interpretation of a tax treaty. In practice, the lack of the full equivalent in the two treaties mentioned above has not caused any issues.

Availability and access to MAP

Switzerland meets the requirements regarding the availability and access to MAP under the Action 14 minimum standard.

- In May 2018, Switzerland published an update of its MAP guidance, including availability and the use of the MAP and how its competent authority conducts the process in practice. Several clarifications were reflected regarding its policy and practice concerning access to MAP in transfer pricing cases, in cases where an anti-abuse provision applies and where multiple states are involved, the relationship between domestic remedies and access to MAP, details on the availability of arbitration under tax treaties, the applicable process when access to MAP is denied, and the rights of taxpayers when a MAP agreement is reached. Furthermore, Switzerland has created for both attribution/allocation cases and other cases a specific form that taxpayers should use when filing a MAP request.

This updated MAP guidance was published in German, French, Italian and English and is available at: <https://www.sif.admin.ch/sif/en/home/bilateral/verstaendigungsverf.html>.

- In addition, Switzerland updated its MAP profile in August 2018 to reflect changes to the contact details of Switzerland's competent authority, links to guidance on APAs and the MAP guidance (as well as statistics on APAs and MAP cases), a clarification that audit settlements are not available in Switzerland, and a specification that there is an internal document that details the MAP process (including timeframes to be applied during the process).

There are some areas of improvement where:

- Out of Switzerland's 95 tax treaties, 3 do not contain a provision that is equivalent to Article 25(1), first sentence, of the 2015 OECD Model Tax Convention. None of these treaties is expected to be modified by the Multilateral Instrument to include such equivalent.

Negotiations have been initiated with one treaty partner, while for the remaining two treaties no actions have been taken or are planned to be taken, but one is included in the plan for renegotiation.

- Out of the 95 tax treaties, 5 do not contain a provision that is equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention, as the timeline to file a MAP request is in these treaties shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.

Of these five treaties, two are expected to be modified by the Multilateral Instrument to include the required provision and three will not be modified by that instrument to include the required provision. With respect to one of these three treaties, negotiations have been initiated with one treaty partner, while for the other two no actions have been taken or are planned to be taken but are included in the plan for renegotiations.

- Out of the 95 tax treaties, 5 do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention.

Of these five treaties, one is expected to be modified by the Multilateral Instrument to contain the required provision, one is expected to be modified by the Multilateral Instrument when an update is made to the list of notifications under that instrument and three will not be modified by that

instrument to contain the required provision. With respect to these three treaties, two are included in the list of treaties for which negotiations are envisaged, scheduled or pending.

Resolution of MAP cases

Switzerland has committed to provide for mandatory and binding MAP arbitration in its bilateral tax treaties as a mechanism to provide that treaty-related disputes will be resolved within a specified timeframe. In addition, Switzerland continues to monitor whether it has adequate resources in place to ensure that future MAP cases are resolved in a timely, efficient and effective manner, particularly to cope with the significant increase in the number of other MAP cases.

Switzerland reported that it has taken a few steps to resolve the remaining 90% of its post-2015 MAP cases that were pending on 31 December 2016 (128 cases), such within a timeframe that results in an average timeframe of 24 months for all post-2015 cases. In view of these steps, Switzerland reported that these have contributed to a decrease in its MAP inventory. The average completion time has also slightly decreased in 2017 as compared to 2016.

There are some areas of improvement where out of the 95 tax treaties, 1 does not contain a provision equivalent to Article 25(2), first sentence of the OECD Model Tax Convention. Switzerland reported it will seek to include Article 25(2), first sentence, of the OECD Model Tax Convention in all future treaties.

Implementation of MAP agreements

Switzerland meets the Action 14 minimum standard with respect to the implementation of MAP agreements.

Switzerland reported that it has updated its MAP guidance to now include information on the role of the taxpayer in the implementation process and the time period to give consent to a MAP agreement. It also changed the approval process for the taxpayer, which is that the taxpayer now explicitly has to accept the MAP agreement for it to become valid.

There are some areas of improvement where 85 out of 95 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

both Article 9(1) and Article 7(2). None of these treaties will be modified by the Multilateral Instrument to include this equivalent. Nevertheless, Switzerland reported it is willing to seek to include the alternatives provisions for Article 9(1) and 7(2) in all its future tax treaties. Switzerland has a domestic statute of limitations for amending the taxpayer's tax position, which would apply in respect of most of Switzerland's tax treaties, as only a few tax treaties contain second sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2017) stipulating that any MAP agreement shall be implemented notwithstanding domestic time limits.

Best practice peer review reports

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

Generally, all peers indicated having good working relationships with Switzerland with respect to MAP and some of them emphasized the following areas:

- ▶ Considering multilateral APAs in appropriate cases
- ▶ Raising awareness of the principles of the Global Awareness Training Module within its examination and competent authority functions
- ▶ Providing access to MAP in double taxation cases resulting from bona fide taxpayer initiated foreign adjustments covered within the scope of MAP
- ▶ Considering 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 Switzerland's Stage 2 peer review 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 mutual agreement process.

Endnotes

1. See EY Global Tax Alert, [*OECD releases Switzerland's peer review report on implementation of Action 14 minimum standards*](#), dated 19 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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