

## OECD releases sixth batch of peer review reports on Action 14

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### Executive summary

On 24 October 2019, the Organisation for Economic Co-operation and Development (OECD) released the sixth batch of peer review reports relating to the implementation by Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania and South Africa of the Base Erosion and Profit Shifting (BEPS) minimum standard on Action 14 (*Making Dispute Resolution Mechanisms More Effective*). Colombia, Latvia and Lithuania had also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and the OECD also therefore released three accompanying best practices reports.

Overall, the reports conclude that five of the eight assessed jurisdictions meet the majority or most of the elements of the Action 14 minimum standard. Latvia meets slightly more than half of the elements of the Action 14 minimum standard, and India meets half of the elements. Colombia meets fewer than half of the elements of the Action 14 minimum standard. 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.

## Detailed discussion

### Background

In October 2015, the OECD released the 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 IF) 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 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 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 IF 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 IF member takes to address any shortcomings identified in Stage 1 of the peer review.

Both of these 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
- (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 10 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, 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.<sup>8</sup>
- ▶ The sixth batch (Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania and South Africa) was released on 24 October 2019.

Also, in August 2019, the OECD released for the first time Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by Belgium, Canada, Netherlands, Switzerland, United Kingdom and the United States (the batch one jurisdictions) of the BEPS minimum standard on dispute resolution under Action 14.<sup>9</sup>

### Sixth 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

(iv) Implementation of MAP agreements

Each of these parts addresses a different component of the minimum standard.

According to the OECD [press release](#), the eight reports from the sixth batch include over 230 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, five of the eight assessed jurisdictions meet the majority, or most, of the elements of the Action 14 minimum standard. Latvia meets slightly more than half of the elements of the Action 14 minimum standard, and India meets half of these elements. Colombia meets fewer than half of the elements of the Action 14 minimum standard. The main areas requiring improvement concern accessibility of MAP, including MAP guidance, and the alignment of the tax treaties' MAP provisions with the Action 14 minimum standard.

Regarding the prevention of disputes, India meets this area of the minimum standard. Latvia also meets this area but only in principle, as its APA program in theory enables taxpayers to request roll-back of bilateral APAs, but no such roll-backs were requested during the period of review. Lithuania, Croatia, Colombia and Chile have in place bilateral Advance Pricing Agreement (APA) programs which do not allow for roll-backs and thus do not meet the standard in this area. Further, Argentina and South Africa have no bilateral APA program in place, and therefore there were no specific elements to assess regarding this point under the prevention of disputes area.

Most of the assessed jurisdictions generally meet the requirements regarding the availability and access to MAP under the Action 14 minimum standard. More than half of the assessed jurisdictions (Argentina, Chile, Colombia, India and Latvia) have not introduced guidance on the availability of MAP and how it applies this procedure in practice. From the assessed jurisdictions, only Argentina and Lithuania have 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.

Further, regarding application and the time taken to settle MAP cases, the average time taken to resolve MAP cases is in general satisfactory in the view of the peer reviewers, and MAP agreements reached so far have been implemented on

time in the majority of the assessed jurisdictions. In Croatia and India, MAP cases were not closed within a timeframe of 24 months. Colombia had one attribution/allocation case in its MAP inventory on 1 January 2016, which was still pending on 31 December 2017. It will therefore be monitored on whether this case, and future MAP cases, are resolved in a timely, efficient and effective manner.

All assessed jurisdictions except for Latvia meet the requirements under the Action 14 minimum standard in relation to the resolution of MAP cases. However, for Argentina, Chile, Colombia and Croatia, it was not yet possible to assess whether they meet this area of the minimum standard as there were no MAP agreements reached during the period of review. The peer reviewers concluded that the competent authorities operate fully independently from the audit function of the tax authorities and adopt a pragmatic approach to resolve MAP cases in an effective and efficient manner.

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 certain 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>10</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.

### Best practice peer review reports

Each assessed jurisdiction may provide information and request feedback from peers on how it has adopted the 12 best practices contained in the Action 14 final report.

Colombia, Latvia and Lithuania requested that the OECD provide feedback concerning their adoption of the best practices.

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

## Next steps

The eight jurisdictions assessed in the sixth batch of the MAP peer review process 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 be similarly 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 seventh batch of jurisdictions (Brazil, Bulgaria, China, Hong Kong, Indonesia, Russia and Saudi Arabia) and the Stage 2 peer review reports for the second batch of jurisdictions (Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden). The OECD will continue to publish Stage 1 and 2 peer review reports in accordance with the Action 14 peer review assessment schedule.

## Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressure and scrutiny from tax authorities and the number of MAP cases continues to accelerate, 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 increase significantly the risk of double taxation, the fact that tax authorities may be subject to review by their peers should be viewed by MNEs as a positive step that will 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.

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## 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 Alert, [OECD releases fifth batch of peer review reports on BEPS Action 14](#), dated 18 February 2019.
9. See EY Global Tax Alert, [OECD releases first batch of Stage 2 peer review reports on dispute resolution](#), dated 14 August 2019.
10. See EY Global Tax Alert, [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 EY Global Tax Alert, [Mandatory Binding Treaty Arbitration under OECD's Multilateral Instrument](#), dated 2 December 2016.

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