



OECD issues guidance on Action 14 peer reviews

Global Transfer Pricing Alert 2016-036

The G20/OECD and other countries participating in the 'Inclusive Framework' on base erosion and profit shifting (BEPS) published key documents on October 20, 2016, setting out the infrastructure for peer review and monitoring of mutual agreement procedures (MAP) under Action 14 ("Making Dispute Resolution Mechanisms More Effective") of the BEPS Action Plan.

Action 14 calls for effective dispute resolution mechanisms to resolve tax treaty-related disputes, and the October 2015 final report outlined the minimum standard and best practices for resolving treaty-related disputes under MAP. More than 100 countries that are members of the Inclusive Framework on BEPS have committed to the implementation of the Action 14 minimum standard and to have their implementation reviewed by their peers.

Peer review and monitoring package

The package released consists of four component documents:

- Terms of Reference to Monitor and Review the Implementing of the BEPS Action 14 Minimum Standard to Make Dispute Resolution Mechanisms More Effective;
- Assessment Methodology for the Monitoring and Review of the Implementation of the BEPS Action 14 Minimum Standard to make Dispute Resolution Mechanisms More Effective;
- MAP Statistics Reporting Framework;
- Guidance on Specific Information and Documentation Required to be Submitted with a Request for MAP Assistance.

Terms of reference

The terms of reference assess a country's legal and administrative framework for dealing with treaty-related disputes under MAP. They translate the agreed minimum standard for dispute resolution into 21 elements under the four key areas of an effective dispute resolution mechanism:

- Preventing disputes
- Availability and access to MAP
- Resolution of MAP cases
- Implementation of MAP agreements

As set out in the October 2015 final report on Action 14, the minimum standard is complemented by 12 best practices that do not form part of the minimum standard. The extent to which countries implement these will not form part of their peer review or assessment.

The terms of reference do not alter the minimum standard set out in the October 2015 final report. To the extent there is any perceived inconsistency between the two documents, the final report takes precedence.

Assessment methodology

Peer reviews will be performed by members of the Forum on Tax Administration MAP Forum (FTA MAP Forum) (a subsidiary body of the OECD's Committee on Fiscal Affairs (CFA)). Reviews will be undertaken in batches. The first reviews are due to take place in December 2016, and the intent to publish the first reports in the second half of 2017.

The assessment methodology sets out the two-stage process for the review. Stage 1 involves the review of the assessed country's implementation of the minimum standard based on its legal framework for MAP and its application in practice. Stage 2 involves the review of the measures taken by the country to address any shortcomings identified at Stage 1.

Stage 1 reviews will commence with a series of questionnaires based on the 21 minimum standard elements of the terms of reference. One questionnaire will be sent to the assessed jurisdiction, another to its treaty partners, and a separate questionnaire will be available to businesses and other taxpayers on the OECD website, covering MAP matters upon which taxpayers are best placed to comment (such as availability and ease of access to MAP).

Stage 2 will commence a year after a Stage 1 report has been approved. Each assessed jurisdiction must provide an update report setting out steps taken to address any shortcomings identified during the Stage 1 review and any plans for legislative changes to implement the minimum standard.

Statistics reporting framework

The minimum standard requires competent authorities to attempt to resolve disputes through MAP within an average of 24 months. The extent to which this requirement is being met will be reviewed by the FTA MAP Forum through information provided by countries in accordance with the agreed reporting framework. The reporting framework includes agreed milestones for the initiation and conclusion of a case under MAP, as well as other relevant stages in the process.

Guidance on specific information and documentation required

An element of the minimum standard is the requirement that access to MAP is not denied on the basis that taxpayers have provided insufficient information. To provide certainty and clarity to taxpayers applying for MAP, countries are required to publish clear rules and guidelines on access to and use of MAP. This requirement includes the requirement to include details of the specific information and documentation that should be included with any application for MAP assistance, together with the form in which such information should be provided. This document includes details of what information countries should provide, as well as information that could be of benefit to taxpayers.

European Union: Proposed Council Directive on Double Taxation Dispute Resolution Mechanisms in the EU

On October 25, 2016, the European Commission proposed a new directive on double taxation dispute resolution. The proposed directive would improve the efficiency of the existing dispute resolution process (the EU Arbitration Convention) and extend its scope to matters beyond transfer pricing and attribution of profits to permanent establishments. In particular, the directive would apply to all instances of double taxation of business income, explicitly requires elimination of double taxation, and would require mandatory resolution of double taxation disputes through a binding arbitration or binding alternative dispute resolution process. In addition, the timelines for settlement (a major weakness of the existing Arbitration Convention) would be enforced. The proposal will be put forward for consideration by the European Council.

Next steps

Peer reviews of countries' implementation of MAP will begin in 2016, with the objective of finishing the first reports in the second half of 2017. Stage 1 reviews are to have been begun by the end of 2018. Stage 2 reviews are to be completed in 2020. As a practical matter, reviews of some developing countries will be deferred by request. The conditions for deferral are that the country must not be a member of the G20 or OECD, must have received a limited number of requests for MAP, and there must have been no feedback from other countries indicating shortcomings in the developing country's MAP process.

Comments

The ability to resolve disputes and effectively eliminate double taxation is a key component of a modern international tax

system that promotes cross-border trade and economic growth.

The introduction of the peer review process and reports demonstrates the commitment of the G20/OECD and other participating countries to make changes to improve MAP processes, in practice as well as in policy, and to hold competent authorities and countries to account for their performance against the minimum standard and obligations under double tax treaties.

Key to this process will be for countries to find the necessary resources, particularly qualified people to act as competent authorities within the tax administration, to meet their MAP obligations.

The number of cross-border disputes requiring resolution under MAP has been increasing, and is expected to rise further in the short-to-medium term as some of the other changes under BEPS are implemented and interpreted by businesses and tax authorities. The G20/OECD work on dispute resolution under the BEPS Action Plan is a welcome and necessary development for businesses. At the same time, mandatory binding arbitration (which is not part of the minimum standard requirements but is being taken forward by 20 OECD countries including the UK, the United States, and 14 other European countries) remains the only guarantee for ensuring elimination of double taxation. Within the European Union, if it is agreed to, this will be supported by the proposed EU directive on dispute resolution, which complements the OECD's work. The G20/OECD work on dispute resolution under the BEPS Action Plan is a welcome and necessary development for businesses.

The recent publication of the "MAP Profiles" of OECD and G20 countries, including contact details for each country's competent authority, domestic guidelines for MAP, and other useful information for both tax authorities and businesses is a useful starting point. The profiles of non-G20/OECD member countries are expected to be made public in 2017, further facilitating the process for businesses.

The framework for peer review offers businesses, as the main users of MAP, the opportunity to provide input on their experience with a country's MAP process, which will assist with ensuring the reviews capture the full practical consequences.

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