Executive summary

On 26 September 2017, the Organisation for Economic Co-operation and Development (OECD) released the first batch of peer review reports relating to the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standards on Action 14 on improving tax dispute resolution mechanisms.1 Belgium was among the assessed jurisdictions in the first batch.2 Belgium also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and therefore, the OECD has released an accompanying best practices report.3 In the next stage of the peer review process, the Belgian efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

Overall, the report concludes that Belgium meets most of the elements of the Action 14 minimum standard. Therefore, as many practitioners and taxpayers can confirm, it can be concluded that Belgium makes the Mutual Agreement Procedures (MAPs) accessible to taxpayers and that it is also efficient in the actual MAP process, which is to be welcomed by taxpayers.
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 on Making Dispute Resolution Mechanisms More Effective. 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 member implements the minimum standard based on its legal framework for MAPs and how it applies the framework in practice. In Stage 2, a review is conducted of the measures the BEPS 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 Forum on Tax Administration’s (FTA) MAP Forum. 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; and (iii) publication of the Stage 1 peer review report. Input is provided through questionnaires completed by the assessed jurisdiction, their 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.

Minimum standards 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; and (iv) implementation of MAP agreements. Each of these parts addresses a different component of the minimum standard.

The report includes a number of recommendations relating to the minimum standard. In general, the performance of Belgium with regard to MAP has proven to be satisfactory in their respective reports. Overall, Belgium meets almost all of the elements of the Action 14 minimum standard.

Preventing disputes

The two main elements identified by Action 14 minimum standards to prevent disputes are: (i) the inclusion of a provision in existing tax treaties requiring tax authorities to resolve by mutual agreement any difficulties or doubts as to the interpretation or the application of the tax treaty; and (ii) the provision of a “roll-back” of bilateral or multilateral APA that could be relevant in determining the treatment of comparable controlled transactions in previously filed years.

Seventy-nine (out of 96) tax treaties entered into by Belgium contain provisions equivalent to (i) above. The remaining 17 treaties only slightly differ (from the others) to the extent they do not make reference to the “interpretation” of the 2015 OECD Model Tax Convention (OECD MTC). Such deviation may limit competent authorities’ ability to prevent disputes (and should hence be addressed) although Belgium indicated that this does not prevent the competent authorities from entering into interpretative MAP agreements.

Belgium has indicated that in order to include a provision equivalent to Article 23, first sentence of the OECD MTC, in existing and future tax treaties, it is signing the Multilateral Instrument (MLI), without making any reservations on the modifications made by Article 16 of the MLI concerning the MAP for all of its existing tax treaties to be covered by that instrument, or to enter into bilateral negotiations to modify or replace its existing tax treaties where necessary.

Roll-backs of bilateral APAs have been available to taxpayers in Belgium since June 2016 but thus far, only one request was submitted to the Belgian competent authorities. In that respect the main recommendations relate to increasing the awareness of their treaty partners on the availability of that process and keeping a tracking system of the roll-back requests that were (or not) granted.

Availability and access to MAP

The report also considers the availability and access to MAP. These elements are assessed on the basis of the following actions:

- Whether a provision is included in tax treaties allowing taxpayers to submit a MAP request, as well as a provision enabling the competent authorities to consult together for the elimination of double taxation in cases not provided for by these treaties.
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Whether the submission of MAP requests is allowed to the competent authority of either treaty partner, or, alternatively, whether a bilateral consultation or notification process has been introduced

Whether in TP related cases MAP is accessible in relation to the application of anti-abuse provisions, and of audit settlement

Whether clear and comprehensive MAP guidance is published and easily accessible as well as whether a MAP profile is published

Whether MAP guidance clarifies that audit settlements do not preclude access to MAP

Belgium meets the requirements regarding the availability and access to MAP under the Action 14 minimum standards but it needs to issue more comprehensive MAP guidance. Belgium is considered as providing access to MAP in all eligible cases. A notification process for these situations in which Belgium’s competent authority considers the objection raised by taxpayers in a MAP request as not justified was introduced in 2016. In addition, Belgium published a document addressing frequently asked questions relating to MAPs and APAs, which already provides practical information on MAP.

Resolution of MAP cases

With respect to resolution, Belgium's 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 deemed by peers to be adequate and the performance indicators used as appropriate to perform the MAP function.

In 2016, the competent authority had an opening inventory of 764 cases (almost 90% relating to individuals), in addition to which 425 cases started during the year and 438 were closed by the end of the year and 50% of them resulted in the full elimination of double taxation, with an ending inventory of 751 cases.

The average time to resolve cases was 13.2 months. However, the average time necessary to resolve allocation/attribution cases is significantly longer (39.67 months). This indicates that additional resources specifically dedicated to handling MAP cases on attribution/allocation may be necessary to accelerate the resolution of these cases, for which more frequent scheduling of face-to-face meetings may also be helpful.

Implementation of MAP agreements

Belgium reported that all MAP agreements reached since 1 January 2014, once accepted by taxpayers, have been (or will be) implemented. Furthermore, it has implemented a mechanism to keep track of whether all MAP agreements reached are actually implemented. Belgium does not have in place a timeframe for the implementation of mutual agreements reached but in average, the implementation takes two months upon receipt of the order (to implement a MAP agreement). Peers have not indicated experiencing any problems with Belgium regarding the implementation of MAP agreements that were reached on or after 1 January 2014.

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 of the jurisdictions in the first batch of the peer review reports, including Belgium, requested that the OECD provide feedback concerning their adoption of the best practices contained in the Action 14 final report. However, for most of the best practices, the peers provided only limited, but positive input, especially with respect to implementation of APA programs, developing global awareness of the audit/examination functions, providing access to MAP for bona fide taxpayers-initiated foreign adjustments, and providing guidance on multilateral MAPs.

Next steps

Belgium is already working to address deficiencies identified in its peer review and will now move on to Stage 2 of the process, where Belgium’s efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored. Under the peer review program methodology, Belgium shall submit an update report to the Forum on Tax Administration’s AP Forum within one year of the OECD Committee on Fiscal Affairs’ adoption of the Stage 1 Peer Review report.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of the Belgium 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 direction to ensure access to an effective and timely mutual agreement process.

Furthermore, the peer review for Belgium provides insights to taxpayers on the availability and efficacy of MAP. With additional countries continuing to be reviewed, the OECD has made it known that taxpayer input continues to be welcome on an ongoing basis.

With stakeholder feedback in mind, businesses should share their views with the OECD on the peer review for Belgium and any other jurisdictions, and to perhaps comment on whether the next iteration of the OECD’s assessment of tax administration’s MAP performance warrants greater feedback from taxpayers as the primary source. Feedback from the international tax community is the logical next step after peer review, which may help to further validate the current favorable result.

Endnotes

5. Similar to Article 25(3), first sentence, of the 2015 OECD Model Tax Convention in tax treaties.
6. An advance pricing arrangement (APA) is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time.
7. When they consider that the actions of one or both of the treaty partners result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty.
9. Figure C.3, Making Dispute Resolution More Effective - MAP Peer Review Report, Belgium (Stage 1), OECD/G20 Base Erosion and Profit Shifting Project, 41.
For additional information with respect to this Alert, please contact the following:

**Ernst & Young Tax Consultants SCCRL/BCVBA, Brussels**
- Kurt Van der Voorde  
  kurt.van.der.voorde@be.ey.com

**Ernst & Young Tax Consultants SCCRL/BCVBA, Diegem**
- Jan Bode  
  jan.bode@be.ey.com
- Pierre Legros  
  pierre.legros@be.ey.com

**Ernst & Young LLP, Belgium-Netherlands Tax Desk, New York**
- Max Van den Bergh  
  max.vandenbergh@ey.com

**Ernst & Young LLP, Global Tax Desk Network, New York**
- Jose Bustos  
  joseantonio.bustos@ey.com
- David Corredor-Velásquez  
  david.corredorvelasquez@ey.com
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