Executive summary

On 15 December 2017, the Organisation for Economic Co-operation and Development (OECD) released the second batch of peer review reports relating to the implementation of the Base Erosion and Profit Shifting (BEPS) Minimum Standards under Action 14 on improving tax dispute resolution mechanisms. France was among the assessed jurisdictions in the second batch.

Overall, the report concludes that France meets almost all of the elements of the Action 14 Minimum Standards. In the next stage of the peer review process, France’s efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

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 Standards 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 Standards 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 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. 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; and (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.

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 part addresses a different component of the Minimum Standards.

Overall, France meets most of the elements of the Action 14 Minimum Standards in practice. To meet the standards fully, France must amend and update a substantial number of its tax treaties to include provisions for consultation equivalent to that provided in the second sentence of Article 25(3) of the OECD Model Tax Convention (OECD MTC) and to allow MAPs notwithstanding domestic time limits. France does not fully meet the dispute resolution requirements because it does not allow Advance Pricing Agreement (APA) rollbacks. In addition, the report indicates that France may require additional resources to manage attribution/allocation cases.

Preventing disputes
France has in place 119 tax treaties, of which 64 have provisions for competent authority relief. Nearly half of French tax treaties lack consultation provisions for the elimination of double taxation, and one-third do not include a provision stating that mutual agreement will be implemented notwithstanding any time limits imposed under domestic law. However, in practice France endeavors to resolve any difficulties or doubts with treaty partners regardless of the treaty language.

France does not permit the roll-back of bilateral APAs, the French Tax Authority (FTA) views this provision as having limited practical effect on disputes given the three-year statute of limitations. (APAs typically require 18 months to two years to complete, which is nearly as long a period as the statute.) In practice, the FTA will agree to open MAPs and apply the elements of the APA in the resolution. Therefore, France does not expect any modification to its roll-back provisions.

Availability and access to MAP
Of the 119 tax treaties concluded by France, 117 contain provisions based on the first sentence of Article 25(1) of the OECD MTC, which allows taxpayers to submit a MAP request if the actions of one or both of the treaty partners result in taxation not in accordance with the provisions of the tax treaty, irrespective of the domestic remedies provided in either state. Of the 117 tax treaties with these provisions, 100 allow taxpayers to submit a MAP request within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty or do not provide for a filing period. Fifteen remaining treaties provide a period of two years and two provide a period of six months. France is modifying six of these treaties to contain a provision equivalent to Article 25(1).

Of the 119 treaties, 45 require correlative adjustment in the case of a transfer pricing adjustment initiated by another treaty partner. France has also signed the European Union (EU) Arbitration Convention which provides a MAP supplemented with an arbitration procedure. In practice, France provides access to MAP in all transfer pricing cases, having granted all such requests since 1 January 2014. Moreover, 110 of the tax treaties provide for competent authority consultation for the elimination of double taxation in cases not provided for in the treaties. France is taking steps to make the remaining nine treaties compliant with this requirement either through its signature of the Multilateral Instrument (MLI) or through the inclusion of such language in future treaties.
There is no general denial of access to MAP in cases of perceived abuse. None of the tax treaties restricts access in the case of anti-abuse, and access had not been denied in any case since 1 January 2014.

Under its administrative guidelines, France will not refuse access to MAP in the event that the taxpayer has reached a settlement with a tax authority. France has not denied access in the case of an audit settlement since 1 January 2014.

France has denied access to MAP in the event of insufficient information only in a limited number of cases (eight in 2014, three in 2015, and five in 2016). The FTA generally notifies the taxpayer of the required information, allowing 120 days for its receipt.

France is also generally compliant with requirements to provide clear rules, guidelines, and procedures for access to and use of MAP and the specific information and documents required to be submitted for the MAP process. Administrative guidelines are available on the BOFIP website.

Resolution of MAP cases
As of 31 December 2016, France had a MAP inventory of 835 cases. Over the prior year, 293 cases were started and 302 cases were closed. Sixty percent of those cases resulted in full elimination of double taxation and 13% resulted in unilateral relief only. For pre-2016 cases, an average of 39 months was required to resolve attribution/allocation cases and an average of 31 months was required to resolve other cases. However, the report found that intermediate steps in the MAP process (such as the communication of position papers) were not always achieved in the timeframes provided in the EU Code of Conduct on the implementation of the arbitration convention.

France reorganized its competent authority in 2013, more than doubling the number of caseworkers in charge of analyzing MAP cases. France monitors the performance of the competent authority annually, reviewing specifically the number of face-to-face meetings, the average time of resolution, and the evolution of the MAP inventory.

Implementation of MAP agreements
France has indicated that all MAP agreements reached since 1 January 2014 that have been accepted by taxpayers have been or will be implemented, and this conclusion was confirmed by the observations of the peers. France has not adopted a timetable for the implementation of concluded MAP agreements. The French competent authority is not responsible for the implementation of the agreements and does not monitor and verify their implementation. Peers indicated no untimely implementations since 1 January 2014.

Only 79 of France's 119 tax treaties provide for the implementation of a mutual agreement notwithstanding time limits in domestic laws. In practice, however, the FTA implements competent authority agreements notwithstanding domestic time limits.

Next steps
France is already working to address deficiencies identified in its peer review and will now move on to Stage 2 of the process, where France's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored. Under the peer review program methodology, France shall submit an update report to the Forum on Tax Administration's MAP Forum within one year of the OECD Committee on Fiscal Affairs' adoption of the Stage 1 peer review report. France is currently in negotiations with some jurisdictions to replace or amend existing tax treaties bilaterally. France also signed the MLI. France did not make any reservations related to MAP and introduced mandatory and binding arbitration provisions consistent with the MLI.

Implications
In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of France's 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.

Furthermore, the peer review for France 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 welcomed on an ongoing basis.
With stakeholder feedback in mind, businesses are encouraged to share their views with the OECD on the peer review for France 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

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EYG no. 07268-171Gbl
1508-1600216 NY
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