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. The United Kingdom (UK) was among the assessed jurisdictions in the first batch.

The UK had also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and therefore, the OECD has also released an accompanying best practices report.

Overall the reports conclude that the UK meets most of the elements of the Action 14 minimum standard. In the next stage of the peer review process, the UK’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 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 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 a nutshell, 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; 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 of these parts addresses a different component of the minimum standard.

Twenty-two peers provided input to the UK’s peer review report, consisting of countries that represent approximately 90% of post-2015 MAP cases in the United Kingdom’s inventory on 31 December 2016. Input was also received from taxpayers.

Overall, the report concludes that the UK meets most of the elements of the Action 14 minimum standard.

Preventing disputes

The UK meets the Action 14 minimum standard concerning the prevention of disputes. It has run an Advance Pricing Agreement (APA) program since 1999, and this APA program also enables taxpayers to request roll-backs of bilateral APAs. This ability to roll back APAs is outlined in the UK’s published APA guidance. Although the UK does not currently monitor the number of requests concerning the roll-back of an APA, peers have noted positive working experiences with the UK in agreeing to roll-backs of bilateral APAs.

Availability and access to MAP

The UK provides access to MAP in all eligible cases, and meets the Action 14 minimum standard.

The report notes that the UK needs to supplement its MAP guidance last updated in 2011 in respect of access to MAP where Her Majesty’s Revenue & Customs (HMRC) have entered into an audit settlement with the taxpayer. However, in practice access to MAP is always granted.

The UK is currently in the process of updating its 2011 MAP guidance and will include information on the elements of the Action 14 minimum standard and best practices in the forthcoming update. It is anticipated that this update will be published before the end of 2017.

The UK has 15 tax treaties (out of a total of 129) with no MAP article, and has a further 74 treaties in which the filing period deviates from the Article 25(1) standard of the OECD Model Tax Convention allowing taxpayers to submit a MAP request within a period of three years from the first notification of the action resulting in taxation not in accordance with the provisions of the treaty. To address this, the UK envisages not making any reservations in its commitment under the Multilateral Instrument (MLI) concerning the MAP, so all existing tax treaties are expected to be aligned to the minimum standard as the UK indicated that it will sign and ratify the MLI as soon as practicable.

The UK indicated that it will always provide access to MAP for transfer pricing (TP) cases, and since 1 January 2015, it has not denied access to MAP on the basis that the case concerned transfer pricing. It has indicated that this information will be included in its forthcoming updated guidance on MAP. EY’s experience in this regard has been that the position of accepting TP claims into MAP has never been an issue even where the wording of the Associated Enterprise Article has not confirmed the requirement; the UK has always seen the MAP Article itself as sufficient.

While the UK does provide guidance on information taxpayers should include in a MAP request, it anticipates updating this guidance as part of its current rewrite and the report suggests greater alignment with the guidance produced by the FTA MAP Forum. However, taxpayers
and one peer did note that they consider the UK’s current guidance to be clear and informative. It is however understood that the revised guidance will set out in greater detail the information required in relation to the claim. EY’s experience and following discussions with the UK Competent Authority (CA) team regarding best practice is that the earlier a claim is made and the more information that can be provided the easier the process becomes.

Resolution of MAP cases
The UK met the OECD MAP resolution timeframe of 24 months from start to finish for a case. The average time to resolve all types of cases was 20.51 months, but for the 38 profit allocation or attribution cases in the reporting period, the average time was 25.42 months. Peers noted that cases were generally resolved within a reasonable period but the nature of some cases could mean they would take longer, for example oil and gas sector cases. The report suggests that the UK may need to dedicate additional resources to accelerate the resolution of some cases. In this regard, it was noted that the UK’s closing inventory of MAP cases of 322 at the end of 2016 was above the opening inventory of 262. The OECD will continue to monitor progress on MAP inventory following the Stage 2 review.

Peers also reported that contacting the UK CA was easy and that it was solution-oriented. Peers generally reported that the UK has an adequately-resourced CA function, although one peer noted a meeting had been postponed and there appeared to be a frequent movement of personnel which could cause delays.

The UK was noted as being timely, effective and principled in its handling of MAP cases by many of its peers, with the MAP function being independent of the audit teams. This is also EY’s experience with UK CAs taking principled positions based on the proper application of treaty provisions rather than simply seeking to protect the UK tax base where this is conflict.

As many of the UK’s 129 treaties have been in effect for a number of years, only 21 include an arbitration clause. However the inclusion of MAP arbitration is part of the UK’s tax treaty policy and it has reported that it will opt and indeed has since opted for mandatory and binding arbitration under the MLI.

Implementation of MAP agreements
The UK meets the Action 14 minimum standard for the implementation of MAP agreements. The UK monitors implementation and no issues were reported by peers or taxpayers. UK law waives domestic time limits if a case is dealt with under MAP, and similarly allows for agreements reached under the European Union Arbitration Convention to be implemented.

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 requested that the OECD provide feedback concerning their adoption of the best practices contained in the Action 14 final report, including the UK. However, for most of the best practices, the peers provided only limited input.

The comments provided by the peers confirm that they have a good working relationship with the UK, with one peer noting that the UK’s public guidance on its APA program is clear and provides useful information. Another peer complimented the UK for its willingness to grant multilateral APAs, especially in the financial services sector.

Peers noted that the UK is a committed participant in the OECD fora, pursuing issues of mutual concern such as joint audits. One peer also noted that the UK is amenable to considering multilateral MAPs on a case-by-case basis.

Next steps
The UK is already working to address deficiencies identified in its peer review and will now move on to Stage 2 of the process, where the UK’s efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored. Under the peer review program methodology, the UK 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.
Implications

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

Furthermore, the peer review for the UK 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 are encouraged to share their views with the OECD on the peer review for the UK 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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