
OECD publishes BEPS peer review documents for exchanges of tax rulings and country-by-country reports

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In brief

On 1 February 2017, the Organisation for Economic Cooperation and Development (OECD) published documents detailing the processes for review of countries' implementation of two of the OECD/G20 Base Erosion and Profit Shifting Project (BEPS) minimum standards. These relate to the compulsory spontaneous exchange of information amongst tax authorities of:

- tax rulings (the 'transparency framework'), in accordance with Action 5, and
- country-by-country reports (CbC reports), in accordance with Action 13.

These annual reviews encourage comments on a country's implementation of the respective standards from its peers in the BEPS Inclusive Framework, currently comprising around 100 countries. The peer review and monitoring process for the transparency framework will be conducted by the Forum on Harmful Tax Practices (FHTP); the process for CbC reports will be conducted by an ad hoc 'CbC Reporting Group', comprising delegates of both OECD Working Party 6 and Working Party 10 under the aegis of the Inclusive Framework.

'Terms of reference' include each of the elements that a jurisdiction needs to demonstrate it has fulfilled in order to show proper implementation of each standard. The 'methodology' contemplates collecting the data points relevant to the peer review by using standardised questionnaires sent to the reviewed jurisdiction as well as to the peers.

The OECD does not specifically seek business and civil society groups' participation in the formal evaluation processes. However, the publication of the upcoming review schedules would enable interested parties to provide information either to tax administrations or to the OECD Secretariat. The documents note that the final annual reports summarising the findings and recommendations will ultimately reflect only the views of each jurisdiction reviewed and its peers.

In detail

Annual reviews by peer groups

Each of the four BEPS minimum standards is subject to peer review. The OECD says this is in order “to ensure timely and accurate implementation and thus safeguard the level playing field”. All members of the Inclusive Framework on BEPS, currently comprising around 100 countries, commit to implementing the minimum standards, and to participating in reviews by their peers in the Inclusive Framework.

On 1 February 2017, the OECD released key documents, approved by the Inclusive Framework on BEPS. These documents relate to the minimum standards on the compulsory spontaneous exchange of information on tax rulings (the ‘transparency framework’) and country-by-country reporting. These are on the OECD website, accessible as follows:

- [the Action 5 transparency framework](#), and
- [Action 13 country-by-country reporting](#).

Action 5 covered two aspects and the peer review here includes the standard on preferential tax regimes only in a peripheral manner.

Each peer review document includes ‘terms of reference’ and the ‘methodology’ to use.

The terms of reference set out each of the elements that a jurisdiction needs to demonstrate it has fulfilled in order to show proper implementation of the respective standard. In brief:

- Transparency framework: the information-gathering process; the exchange of information; confidentiality of information received; and statistics.
- Country-by-country reporting: domestic legal and administrative framework; exchange of information framework; and confidentiality and appropriate use of CbC reports (although information will also be sought on the use of Master File and Local File documentation, which is not part of the minimum standard and is not part of the actual review).

The methodology in each case contemplates an annual review period of 1 January to 31 December from 2016 to 2019. The Inclusive Framework’s current mandate expires in 2020, so would need to be extended. The methodology includes the process for collecting the data points relevant to the peer review by using standardised questionnaires, sent to the reviewed jurisdiction as well as to the peers. It also sets out the procedural mechanics for the preparation and approval of each summary annual report, as well as the detailed outputs of the review and the follow-up process. The methodology is similar for each review.

The requirements will vary, as the BEPS recommendations stated, according to the implementation timetable envisaged. The rulings covered and the timing for delivery depend on when a country committed to the standard, and the perceived and actual difficulties in putting the relevant framework in place. In particular, the process for countries that have not yet joined the Inclusive Framework will be agreed in due course.

Regarding confidentiality and data safeguards, the reviews will rely on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes. However, countries may refer to any updates that have taken place since the last Forum review. A process for any countries not previously reviewed by the Forum is yet to be agreed.

Tax rulings exchange

The Forum on Harmful Tax Practices (FHTP) will undertake the peer review of the Action 5 minimum standard.

The peer review of the Action 5 section that relates to preferential tax regimes follows the FHTP’s existing process. Thus the focus now is mostly on the transparency framework aspect. However, since one of the categories of rulings to be exchanged relates to preferential regimes, consideration of those regimes is still relevant.

Rulings that countries should exchange

As a brief reminder, the six categories of rulings that countries should exchange are:

- rulings relating to preferential regimes
- unilateral advance pricing agreements (APAs) or other cross-border unilateral rulings in respect of transfer pricing
- cross-border rulings providing for a downward adjustment of taxable profits
- permanent establishment (PE) rulings
- related party conduit rulings, and
- any other type of ruling agreed by the FHTP that in the absence of spontaneous information exchange gives rise to BEPS concerns.

Countries should also exchange information on downward adjustments, even where there is no ruling issued (paragraph 151 of the Action 5 Report).

Periods covered

The transparency framework applies to the above categories of rulings provided they were issued within time periods identified in the Action 5 Report.

It applies to ‘future rulings’, which are defined according to when countries committed to the standard. It also applies to various ‘past rulings’.

As noted in the adjoining table, original BEPS project members face the most exacting requirements. The requirements are slightly modified and delayed for countries that made the commitment by joining the Inclusive Framework during 2016 (see below for countries joining in 2017 and later). They are further modified and delayed for those countries that face particular difficulties caused by capacity constraints, provided they:

- have informed the FHTP
- are listed on [the OECD Development Assistance Committee List of Official Development Assistance Recipients](#), as updated from time-to-time, and
- do not house relevant financial centres.

	Future rulings	Past rulings (1)	Past rulings (2)
OECD and accession countries and G20 countries	from 1 April 2016	between 1 January 2014 and 1 April 2016	between 1 January 2010 and 1 January 2014 that are still in effect on 1 April 2014
New members joining the Inclusive Framework on BEPS in 2016	from 1 April 2017	between 1 January 2015 and 1 April 2017	between 1 January 2012 and 1 January 2015 that are still in effect on 1 January 2015
Non-G20 non-financial centre developing countries where necessary	from 1 April 2018	between 1 January 2016 and 1 April 2018	between 1 January 2014 and 1 January 2016 that are still in effect on 1 January 2016

Note that the EU Directive 2015/2376 of 8 December 2015 setting out the required exchange for Member States refers to future rulings from 1 January 2017; past rulings (1) between 1 January 2014 and 1 January 2017; and those past rulings (2) from 1 January 2012 to 1 January 2014 (rather than 1 January 2010 and 1 April 2014) that are still valid on 1 January 2014.

The timeline for the review of any jurisdictions that join the Inclusive Framework on BEPS later than 2016, other than non-G20 non-financial centre developing countries, will be agreed on a case-by-case basis according to the same principles as agreed for new members in 2016.

Information that countries should gather

Countries should be identifying all jurisdictions for which a tax ruling would be relevant.

For ‘future rulings’ this requires a review and supervision mechanism, which then enables identification of the following jurisdictions:

- the residence countries of related parties with which the taxpayer enters into a transaction covered by the ruling, or which gives rise to income from related parties benefiting from a preferential treatment
- the residence country of the taxpayer’s immediate parent
- the residence country of the taxpayer’s ultimate parent
- for PE rulings, the head office country
- for conduit rulings, the residence country of the ultimate beneficial owner of the payment.

For past rulings a ‘best efforts’ approach might have been necessary.

Countries with preferential IP regimes have had to take additional steps. They should have been identifying taxpayers benefitting from the IP assets; new entrants benefitting from grandfathered IP regimes, regardless of whether a ruling is provided; and taxpayers making use of the option to treat the nexus ratio as a rebuttable presumption (those electing to increase the ratio for a particular sub-stream in exceptional circumstances where it does not reflect the true proportion of the value of the relevant qualifying IP rights that is properly attributable to expenditure in the numerator for that sub-stream). There are potential implications for compliance by a country with the nexus approach. This will be tested in the peer reviews of IP regimes.

The exchange of information that should occur

The reviewed country should have the appropriate domestic legal framework and suitable international exchange of information instruments (for the annual review year). That country should also be getting the information to its Competent Authority on a timely basis in order to effect the exchange by the required deadline.

The delivery date for future rulings is as soon as possible after the ruling has been granted, but at the latest three months from when the Competent Authority receives it (subject to any legal impediment). Note that the EU’s requirements for future rulings refer only to a six-month exchange ruling period and delivery within three months of that period’s end.

The delivery date for past rulings varies in accordance with the time period covered, as discussed above. The deadlines are in the adjoining table:

	Exchange by
OECD and accession countries and G20 countries	31 Dec 2016
New members joining the Inclusive Framework on BEPS in 2016	31 Dec 2017
Non-G20 non-financial centre developing countries where necessary	31 Dec 2018

Note that the EU requirements for past rulings require exchange by 31 December 2017.

All the required information should be exchanged in the correct format (template or XML schema).

There must also be a process for dealing with requests by countries for rulings already exchanged with other countries. The requesting country must receive a response within 90 days of receipt.

Confidentiality of information received

Peer reviewers will check to see whether the reviewed country is respecting the confidentiality requirements in the various international instruments that provide the legal capacity for exchange.

The FHTP will consider, and peers will be asked to comment on, whether the reviewed country has, and is, properly using suitable exchange mechanisms.

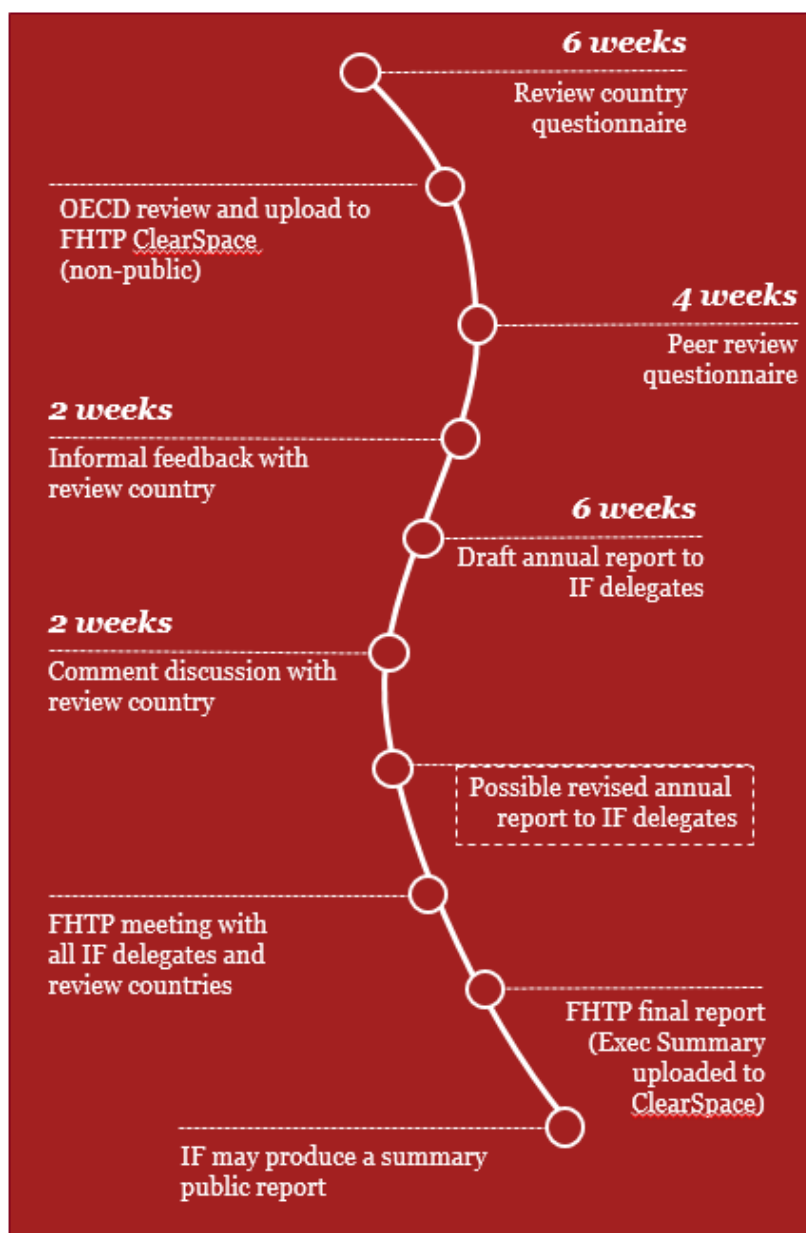
The country should also have domestic restrictions in place with appropriate penalties for breaching them.

Capture and reporting of statistics

Countries should be capturing the exchanges by category. This should cover both the number of exchanges and the jurisdictions. This differs from the EU requirement, which focuses on the number of rulings irrespective of the number of States.

Methodology

Countries should have received a questionnaire already for review of the 2016 period (the plan is to send these questionnaires within one month of each year end, up to 2020). The broad timeline is then as follows:



Any summary report published by the Inclusive Framework (IF) will not include the detailed questionnaire responses and comments.

Country-by-country reporting

The peer review is a review of the legal and administrative framework put in place by a jurisdiction to implement the CbC reporting standard. This peer review exercise is separate from the 2020 review and evaluates whether the jurisdiction should modify the CbC reporting standard.

Each country in the Inclusive Framework will be included each year, but the review will cover only an implementation progress report when reporting has not yet been feasible. Any non-member 'jurisdiction relevant to the work' or 'jurisdiction of relevance' will also undergo a yearly peer review.

Each annual review will consider the development of the process as it takes shape, i.e., in a staged manner. The first review, for 1 January to 31 December 2016, will look at the framework and confidentiality (referring to the Global Forum on Tax Transparency and Exchange of Information). The second review, for 1 January to 31 December 2017, will look at the reports being received. And the third review, for 1 January to 31 December 2018, will be able to focus on the exchange.

The peer reviewers also will seek information for purposes of monitoring the implementation of the other transfer pricing documentation set out in the Action 13 Report. These include the Master File and Local File or equivalent. This is not part of the minimum standard and will not be considered in the peer review on CbC reporting. Otherwise, the

terms of reference focus on the following three key aspects of the CbC reporting standard that a jurisdiction must meet.

The domestic legal and administrative framework

Countries will generally have the framework in place during 2016 so that MNE groups can file the first CbC reports with the relevant tax administration by 31 December 2017 (covering the 2016 calendar fiscal year).

The review will focus on whether parent entities will be required to file the relevant template information (and no more) or whether there should be local filings of the same information where advocated in Action 13, including that the jurisdiction has not adopted surrogate filing.

The peer review documents repeat many of the definitions and requirements set out in Action 13.

The exchange of information framework

The review should cover whether and to what extent jurisdictions have international exchange of information agreements that allow automatic exchange of information. It should also consider whether Qualifying Competent Authority Agreements are in effect with jurisdictions of the Inclusive Framework that have the exchange capability for that year and meet the confidentiality, consistency and appropriate use prerequisites.

In due course, exchanges will be expected to have started by 31 August 2018, i.e., within 18 months of the end of an MNE Group's fiscal year (31 March or 15 months for subsequent reporting periods).

The expectation is that the reviewed country will be exchanging the required information, or withholding it, as required by Action 13.

The confidentiality and appropriate use of CbC reports

The review will consider whether there are confidentiality obligations that apply to any exchange of information under an International Agreement, and effective penalties with a review and supervision mechanism to identify and resolve any breaches.

The standard permits the use of CbC reports for assessing high-level transfer pricing risk, for assessing other BEPS-related risks, and, where appropriate, for economic and statistical analysis. The review will cover whether this is working as intended. While there is little opportunity for taxpayers and advisers to input directly to this element of the peer review, the documents encourage feedback with tax administrations and the OECD on an ongoing basis and at the time of the review.

The peer review document reminds us that information in a CbC report on its own does not constitute conclusive evidence that transfer prices are, or are not appropriate, and should not be used by tax administrations to propose transfer pricing adjustments based on a global formulary apportionment of income. If a jurisdiction does make such an adjustment on this basis, it commits that the jurisdiction's Competent Authority will promptly concede the adjustment in any relevant Competent Authority proceeding (and it should consult with other Competent Authorities where any adjustment ultimately results from further enquiries).

Methodology

The OECD will send out self-assessment questionnaires for each reviewed country to complete annually. But a country must answer only relevant questions (and only provide updates from the previous year). It is also stipulated that countries can use supporting materials, such as legislation and other explanatory material.

Peer input questionnaires will similarly be sent to other members of the Inclusive Framework.

Each year's review process will culminate in the production of an annual report on CbC reporting implementation.

The peer review annexes document includes detailed graphical timelines for the different stages, which are the focus of review for 2016, 2017 and 2018.

The takeaway

Efficient, effective and consistent implementation of the BEPS recommendations is critical to the experience multinationals will face in future potential disputes that might arise involving different countries.

The review of the minimum standards' implementation needs to be robust and challenging. These peer review documents set out detailed processes for evaluating the automatic exchange of information of tax rulings and CbC reports. The extent of the input about any reviewed country by its peers in the Inclusive Framework will be important, but is uncertain. The challenge by the FHTP and the CbC Reporting Group as to whether a reviewed country has fully implemented the BEPS recommendations may depend on this input, but ought to be thorough in its own right.

Business and civil society groups' participation in the formal evaluation will be limited to comments made to tax administrations or to the OECD Secretariat. That is not surprising in relation to this particular part of the implementation review. However, multinationals should take the opportunity to provide feedback regularly to the OECD and to their local tax authorities about the framework and practical behaviour of any country.

We appreciate the focus on confidentiality and appropriate use of CBC reports, but the level playing field presents risks of expansion, particularly with limited opportunities for business input.

Let's talk

For a deeper discussion of how these issues might affect your business, please:

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