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Global Tax Alert

OECD releases first annual peer review report (Phase 1) on Action 13

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Executive summary

On 23 May 2018, the Organisation for Economic Co-operation and Development (OECD) released the first annual peer review report (the Report) relating to the compliance by members of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) of the minimum standard on Action 13 (*Transfer Pricing Documentation and Country-by-Country Reporting*) with a focus on the domestic legal and administrative framework. The Report also comments on certain aspects relating to the exchange of information framework as well as the confidentiality and appropriate use of Country-by-Country (CbC) reports.

The Report contains the review of 95 jurisdictions which provided legislation or information pertaining to the implementation of CbC reporting (Country-by-Country reporting or CbCR), with individual sections for each jurisdiction. This report will be followed by two additional annual reports on peer reviews performed in 2018 and in 2019, which will focus on different aspects of the key areas under review, i.e., the exchange of information framework, and the confidentiality and appropriate use of CbC reports respectively.

Overall, the Report provides the following main conclusions:

- ▶ The Report covers 95 jurisdictions which are part of the Inclusive Framework on BEPS.
- ▶ As of 12 January 2018, 60 jurisdictions have introduced legislation to impose a CbCR filing obligation for relevant multinational enterprises (MNEs), thereby covering the majority of MNEs expected to be in scope.
- ▶ For some jurisdictions, final legislation is awaiting official publication, whereas other jurisdictions have primary law in place which needs to be completed with secondary law or guidance.
- ▶ In total, 28 jurisdictions received one or more recommendations for improvement on specific areas of their framework, such as the definition of Ultimate Parent Entity and of an MNE Group, clarification and amending the group revenue threshold and limiting requirements for local filing of reports.
- ▶ For 33 jurisdictions, a general recommendation to put in place or finalize their domestic legal and administrative framework has been issued.
- ▶ The vast majority of jurisdictions do not have CbCR requirements for fiscal year 2016, but rather for later fiscal years.
- ▶ Out of the 95 jurisdictions that were assessed, 58 jurisdictions have multilateral or bilateral competent authority agreements in place, effective for taxable periods starting on or after 1 January 2016, or on or after 1 January 2017.
- ▶ Also, 39 jurisdictions provided sufficient detailed information relating to the assurance that measures are in place to ensure the appropriate use of CbC reports.

Detailed discussion

Background

In October 2015, the OECD released the final reports on all 15 focus areas of the BEPS Action Plan.¹ The recommendations made in the reports range from new minimum standards to reinforced international standards, common approaches to facilitate the convergence of national practices, and guidance drawing on best practices.

Minimum standards are the BEPS recommendations that all members of the Inclusive Framework on BEPS (i.e., BEPS members) are committed to implement, and refer to some

of the recommendations included in Action 5 on harmful tax practices, Action 6 on treaty abuse, Action 13 on CbC reporting and Action 14 on dispute resolution.

The minimum standards are subject to a peer review process. The mechanics of the peer review process were not included as part of the final reports on these Actions. Instead, the OECD indicated at the time of release of the BEPS reports that it would, at a later stage, issue peer review documents on these Actions providing the terms of reference and the methodology to conduct the peer reviews at a later date.

On 1 February 2017, the OECD released terms of reference for the peer review on BEPS Action 13 on CbC reporting (Peer Review Document).² The terms of reference in the Peer Review Document focus on three key aspects of CbC reporting: (A) the domestic legal and administrative framework, (B) the exchange of information framework, and (C) the confidentiality and appropriate use of CbC reports. Since the above three key aspects may be implemented at different times, the peer review followed a staged approach. This allows the early detection of inconsistencies with the minimum standard as well as provides the opportunity to take action to address inconsistencies. Thus, the peer review of the Action 13 minimum standard is proceeding in stages with three annual reviews in 2017, 2018 and 2019 on different aspects of the three key areas under review. The second annual peer review was launched in April 2018.

Annual peer review report on CbC reporting (Phase 1) - Compilation

On 23 May 2018, the OECD released the first annual peer review report which contains the findings of the annual peer review process of jurisdictions' compliance with the Action 13 minimum standard with a focus on the domestic legal and administrative framework. The peer review has been undertaken by an Ad Hoc Joint Working Party 6 - Working Party 10 sub-group (CbCR Group). The Report covers a total of 95 jurisdictions which provided legislation or information pertaining to the implementation of CbC reporting. A few jurisdictions that were recent joiners of the Inclusive Framework, impacted by natural disasters, or that faced capacity constraints, were not yet included in the process, but will be reviewed as soon as possible.³

Consistent with the agreed methodology, this first annual peer review covers: (i) the domestic legal and administrative framework (Part A); (ii) certain aspects of the exchange of information framework (Part B); and (iii) certain

aspects of the confidentiality and appropriate use of CbC reports (Part C). The Report also includes a summary of recommendations on the implementation of CbC reporting, a description of the aspects of the implementation that should be improved and the recommendation for improvement, and a Q&A on appropriate use (Annex A).

Part A: Domestic legal and administrative framework

The first part of each annual report analyzes whether the jurisdiction has put in place a domestic legal and administrative to ensure CbC reporting by the relevant taxpayers to the tax administration. Matters that are included in this assessment are: (a) the parent entity filing obligation; (b) the scope and timing of the parent entity filing; (c) the limitation on the local filing obligation; (d) the limitation on local filing in the case of surrogate filing; and (e) the effective implementation.

As of 12 January 2018, 60 jurisdictions have introduced legislation to impose a CbCR filing obligation for relevant MNEs, thereby covering the majority of MNEs expected to be in scope.⁴ For some jurisdictions, final legislation is awaiting official publication, for example because legislation is still subject to final approval by parliament. Out of the jurisdictions that provided draft or final legislation, 28 jurisdictions received one or more recommendations for improvement on specific areas of their framework.⁵ This includes amending definitions in the legislation in line with the minimum standard, such as the definition of Ultimate Parent Entity and of an MNE Group, clarification and amending the group revenue threshold and limiting requirements for local filing of reports.

For 34 jurisdictions, a general recommendation to put in place or finalize their domestic legal and administrative framework has been issued.⁶ This includes jurisdictions that have primary law in place which needs to be completed with secondary law or guidance. The Report notes that the vast majority of jurisdictions do not have CbCR requirements for fiscal year 2016, but rather for later fiscal years.

Part B: Exchange of information framework

The Report also considers whether and to what extent jurisdictions have international exchange of information agreements in place that allow for the automatic exchange of the CbC reports. For this first annual peer review process, this includes reviewing certain aspects of the exchange of information framework as specified in paragraph 9 (a) of the terms of reference (having Qualified Competent Authority

Agreements in effect with jurisdictions of the Inclusive Framework which meet the confidentiality, consistency and appropriate use prerequisites).

Out of the 95 jurisdictions that were assessed, 58 jurisdictions have multilateral or bilateral competent authority agreements in place, effective for taxable periods starting on or after 1 January 2016, or on or after 1 January 2017.⁷ The Report encourages jurisdictions that do not have effective agreements in place yet to take further steps to sign the multilateral competent authority agreement on the exchange of CbC reports (CbC MCAA) and/or activate the bilateral relationships under the CbC MCAA. Another option suggested in the Report for countries such as the United States that have not signed the CbC MCAA is to continue to work actively towards signing bilateral competent authority agreements with jurisdictions of the Inclusive Framework that meet the confidentiality, consistency, and appropriate use conditions.

Part C: Appropriate use.

The third and final part of each annual report assesses whether the reviewed jurisdiction has measures in place to ensure the confidentiality and appropriate use of the CbC reports in areas identified by the OECD in its Peer Review Document: (a) having international exchange of information mechanisms with confidentiality protections, (b) having domestic rules or procedures to give effect to the restrictions in international instruments, (c) having in place and enforcing legal protections of the confidentiality of CbC reports received through local filing, (d) having effective penalties for unauthorized disclosures or use, and (e) having in place mechanisms to ensure that CbC reports which are received can be used only to assess high level transfer pricing risks and other BEPS-related risks and for economic and statistical analysis where appropriate; and cannot be used as a substitute for a detailed transfer pricing analysis or on their own as conclusive evidence on the appropriateness of transfer prices or to make adjustments of income of any taxpayer on the basis of an allocation formula.

The OECD received detailed information relating to the appropriate use of the CbC reports from 39 jurisdictions, enabling the CbCR Group to reach sufficient assurance that measures are in place to ensure the appropriate use of CbC reports in these jurisdictions.⁸ Other jurisdictions either did not have measures in place yet relating to the appropriate use, indicated that they are taking steps to have measures in

place to ensure the appropriate use of information, or did not yet provide information on this point. Bermuda, British Virgin Islands and Cayman Islands are considered non-reciprocal jurisdictions and will not receive CbC reports submitted to tax authorities in other jurisdictions and will not apply local filing. As such, for these three jurisdictions, their compliance to Part C was not further assessed.

Next steps

The jurisdictions assessed in the Report are already working to address deficiencies identified in their respective reports. The OECD will continue to publish annual peer review reports in the next two years with a focus on the other aspects of the key areas under review, i.e., the exchange of information framework, and the confidentiality and appropriate use of CbC reports.

Implications

The purpose of the peer reviews is to ensure the effective implementation of the agreed minimum standard on Action 13. The peer review process is a separate exercise to the review scheduled for 2020, which will evaluate whether modifications to the CbCR standard should be made. Nevertheless, the outcome of the Action 13 peer reviews will inform the discussions in 2020 of the effectiveness of the design of the CbCR standard.

Furthermore, the peer review reports provide insights to MNEs on the availability and efficacy of the CbC rules in the countries under review. Furthermore, it is expected that some jurisdictions will amend their legal framework as a result of the review. It will be important for MNEs to stay abreast of any additional developments in the countries they are doing business in in this regard.

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