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BUSINESS AT OECD FEEDBACK ON LOCAL COUNTRY DIVERGENCES FROM FINAL ACTION 13 REPORT

Dear Achim and Mark,

Business at OECD (BIAC) thanks the OECD for the opportunity to provide comments on our experience with local country implementation of the transfer pricing (TP) documentation guidelines outlined in the final Base Erosion and Profit Shifting (BEPS) Action 13 Report, including global Country-by-Country Report (CbCR) requirements. While it may be too early to assess the usefulness and accuracy of the CbCR as a high level risk assessment tool, our member feedback attached focuses on the implementation challenges – notably diverse requirements, deadlines, and formats. We have focused on issues observed to enable further discussion.

We have not focused in this letter (although we did write earlier this year) on the many positive aspects of implementation or general consistency in execution to date, and for which the OECD continues to deserve much credit for its detailed and helpful guidance.

As the CbCR 2020 review is launched, we welcome our engagement as an important stakeholder in this process to provide for effective use of Tax Authority and business resources to ensure the objectives of the Action 13 report are achieved.

Sincerely,



Will Morris

Chair BIAC Tax Committee Chair BIAC Tax Committee

Business at OECD Comments

General

1. In general, even if there are local differences, the information exchange mechanics apply such that the ultimate parent entity (UPE) filing takes precedence over any local requirements. This fact highlights the importance of countries signing the Multilateral Competent Authority Agreement on the Exchange of CbCR (MCAA) and is discussed in more detail for those who have not signed up for the MCAA. As explained below, common differences fall into two main categories: notification requirements and divergences in definitions, timing and details.

Notification Requirements

2. The CbCR notification requirement is something that was recommended in the OECD's Model Legislation (see Annex IV to Chapter V of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD Guidelines")) and serves as a notification to the Tax Authority in a given jurisdiction as to which legal entity will be filing the CbCR for the multinational entity ("MNE") and the reporting period it will cover. At this time, approximately 50 jurisdictions have notification requirements in place or will in the next year. For many of our members, this means potentially hundreds of notification requirements (considering the number of legal entities and countries operated in). While the OECD Guidelines offered a three-table CbCR format that has been adopted by most jurisdictions as presented, the model legislation did not provide similar guidance for the notification process.
3. Consequently, our members face a myriad of formats and languages in which this information must be filed as well as deadlines that vary by jurisdiction. As such, what should be a routine administrative process is unnecessarily complicated by each jurisdiction's unique way of implementing the notification process.
4. Per comprehensive member feedback, here is a short summary of these divergences:
 - The form of notification submission varies by jurisdiction:
 - Notification is submitted as part of the corporate tax return (e.g., France, Italy, Romania, Germany, Brazil);
 - Notification must be completed in a letter format as there is currently no portal or form (e.g., Croatia, South Africa).
 - Notification is submitted through a form to be completed and sent to the tax authority via email or postal service (e.g., Kazakhstan, Croatia, Lithuania, South Africa, U.K., Colombia).
 - Notification is filed through an internet portal that requires a special token or identification of the tax preparer or another certified person (e.g., Finland, Luxembourg).
 - Notification is required through a separate tax form (e.g., Colombia, Australia, China).

- Most countries require separate notifications for each entity. However some countries do allow a group notification, which is administratively much easier and less costly (e.g., Denmark, Argentina, Spain, U.K., Russia, South Africa, Argentina, Peru). Note in some cases the due date for the notification is too early and the taxpayer may not have sufficient information to properly comply (e.g., in the U.K. the due date for the notification is the end of the year which is to be reported on and hence the taxpayer may not know at this time which entities will ultimately be included in the group).
 - Some countries require a two-stage notification (e.g., Argentina, U.K.);
 - Some countries require no notification at all (e.g., New Zealand) or notifications only if the entity is an UPE or surrogate parent entity (e.g., Switzerland);
 - Others require submission by specific legal representatives listed on tax authority websites (e.g., Peru) while others provide the ability to nominate someone within tax to complete the notification (e.g., Cayman Islands).
 - Some notification due dates are based on the fiscal year end of the legal entity rather than that of the UPE, which results in multiple deadlines within jurisdictions where there are legal entities with different fiscal year ends (e.g., Republic of Korea, Taiwan).
 - Notifications have also been delayed due to the form or portal not being ready by the initial due date (e.g., Portugal, Turkey).
 - Notifications are often only published in the original language, which means taxpayers may need to rely on a third party to provide a translation or to file the form. This further aggravates the ability to centralise these functions, as quite often some kind of electronic registration or local legal rights to submit are required.
 - Most jurisdictions require the notification to be submitted annually; even though the information is likely to stay the same year over year. Alternatively, we appreciate the approach of the Czech Republic and Slovakia, which request a subsequent notification to be filed only in the case of a change in the UPE or reporting period.
 - Many jurisdictions had a special year one due date, which required each company to reassess the requirements from scratch again the following year.
 - Some countries are applying penalties for failing to meet the notification deadline, which is effectively an administrative filing versus a substantive tax filing.
5. These diverse notification processes result in a considerable administrative burden for corporate tax teams of MNEs, both in terms of monitoring jurisdictional requirements and the sheer number of separate forms required to be prepared and filed. As this requirement is meant to provide the same information to all Tax Authorities, this process could be improved in the following ways:
- The notification could be made part of the corporate income tax return. Under this approach, the notification process would be integrated into the return preparation, the deadline is established, and the Tax Authority can then get this information directly from the tax return.



- We also recommend the creation of a single form that an MNE can file with its UPE filing and simultaneously with the relevant tax jurisdictions of in scope subsidiaries, if needed. This is routine information, so using a common reporting form should be straightforward and will save taxpayers time and resources that are currently spent in monitoring and complying with these requirements.
- Also, the current notification process is annual but the information provided often changes little year over year. We question the need for an annual process and alternatively suggest consideration of wider adoption of the Czech Republic / Slovakia approach.
- In the meantime and until a more consistent and practical approach is agreed, we would appreciate a dedicated summary of the requirements to be placed on the OECD website (by jurisdiction) to reduce MNEs efforts searching by jurisdiction.
- Further, the acknowledgement by countries that taxpayers may rely on such list would also be greatly appreciated for not only reduction in resources spent, but also tax certainty in the approach taken and avoidance of potential penalties as noted above.

Timing and Filing Issues

6. While most jurisdictions allow 12 months following the fiscal year of the UPE for filing the CbCR, some jurisdictions have earlier filing requirements. Bosnia and Herzegovina's deadline is March 31 regardless of the fiscal year end, and Indonesia and Vietnam's deadlines are three and four months following the fiscal year end, respectively, which is a significant challenge for taxpayers to comply with (especially when this may be a shorter period than is required to prepare consolidated financial statements).
7. There is also no clear guidance on alignment of fiscal years where a constituent entity's fiscal year differs from that of the UPE (assuming the UPE is not-calendar year). As a consequence, some taxpayers are taking the position that the effective date in any tax jurisdiction is relative to the UPE's fiscal year. However, this analysis required significant exchanges around the issue with local advisors in several jurisdictions with 1 January 2016 effective dates and calendar year constituent entities. This is also problematic with respect to the MF and LF, as the MF would lag the LF by the difference in the fiscal year end to 12/31.
8. Several countries have not adopted OECD standard XML for filing resulting in multiple conversions required to allow compliant local filing – e.g., U.S., India, Peru, Bulgaria, Russia. Also local language requirements plus additional information requests cause issues.
9. Many countries are late adopters of CbC rules, and the resulting guidance is not always clear and timely – an example is Gabon, which has issued rules, but has still not confirmed if local filing is required
10. In some cases, diverging jurisdiction CbCR definitions may limit the usefulness of cross-border sharing and surrogate approaches, potentially increase administration for MNEs, and

provide the risk of more than one version of CbCR existing for the same MNE and period. Some examples of such divergence examples include:

- Employee definitions (e.g., Canada includes contractors, Spain requires average employee numbers, etc.);
 - Table 1 additional measures (e.g., Russia requires a more granular breakdown of the employee and capital data);
 - Stateless definition differences across markets;
 - Most jurisdictions require a format in line with the OECD, and accept the UPE's GAAP and functional currency. However, though the content is exactly the same, the OECD format (10 or so page for most taxpayers) differs significantly from the US format 8975 (requiring 2 pages of initial information as well as a separate 2 page schedule for each tax jurisdiction the taxpayer has a constituent entity in);
 - Most require translation of the report submitted to the parent jurisdiction into local language;
 - Mechanics vary, mostly through local systems – some via a pdf copy (e.g., Romania), others via notarised copy (e.g. Kazakhstan), others via re-entering each data point into a local XML system (e.g. Bulgaria).
11. To reduce MNE burden, and to maintain one CbCR version globally, clarity would be welcomed by suggesting that where direct secondary filing is required, countries should accept the UPE home country format.
12. India has implemented several MF requirements that divert from the final Action 13 Report. Please review our [prior comments](#) submitted for a detailed summary of such divergences.
13. In addition, across other jurisdictions, there are variations for MF deadlines between three months and twelve months following year end. Indonesia, for example, requires the MF to be translated to local language within four months following the fiscal year end. In order to develop a consistent MF for all countries, this, in practice, requires country MFs be completed at approximately 3 months. This is a challenge due to availability of data/information in such a short window.
14. In addition to the MF, there are several variations of local country LF requirements when compared with OECD LF guidance. Members have reported that there are 23 countries with local file requirements that differ from OECD local file guidance, including unique additional disclosures in countries such as China and India. Some of such differences are noted below:
- There is inconsistent application of LF rules (in the absence of an exchange arrangement) – e.g., most do require an active filing, some do not require it (e.g., New Zealand, Malaysia), or some require it on demand (e.g., Kazakhstan, China)
 - Many jurisdictions have different requirements regarding comparables (e.g., number of years (1 vs 3 vs 5); local vs regional; varying definitions of independence; varying acceptability of working capital adjustments, etc.), all of which adds additional complexity.

- The Belgian LF requires significantly more information on the local entity, containing general information regarding the activities in Belgium and detailed information of cross border transactions per business unit of the Belgian entity that are not required in other countries: transactions on goods, assets, services, royalties, fees, R&D, financial transactions, interests, loans, borrowings, cash pool, other controlled cross-border transactions, intra-group trade receivables and trade payables, TP methodology and studies, profit allocation to PE, cost contribution arrangements and APAs.
 - Denmark, Finland and Norway all require annual filing of a significant amount of information regarding the intercompany transactions as a part of the tax return. The information is mainly related to the local figures. In Finland the intercompany transactions tax form has been updated for FY18 and the authorities requires even more detailed information about the intercompany transactions.
 - South Africa has an obligation on certain South African subsidiaries to submit the MF and LF to SARS even though CbC MCAA has been activated between South Africa and certain respective countries.
 - Australia requires that the LF set out all international related party dealings that the AU entities enter into. This results in a quite onerous reporting process and is required to be lodged in XML Schema format
 - The Peruvian rules require 2 files that include additional information not required as part of the OECD standard (e.g., currency of accounts, consolidated group income, tax identification number of each group entity etc.).
15. Some countries are making additional “CbC-like” data requests in local file requirements or as additional requests – e.g., China, where extensive “CbC-like” data requests have been made. These requests are duplicative to the MF/LF & CbCR. They have been requested in excel in order to feed into the tax authority database, which raised complexity and issues of its own. Alternatively, we would prefer the ability to point tax authorities to such information where already disclosed and reported.
16. The general effort required for the LF is quite substantial. For larger MNEs operating in hundreds of jurisdictions, this requires over 100 LF reports to be filed, most averaging hundreds of pages each. Considering the significant burden on taxpayers, we encourage the OECD and member countries to review what data is most relevant and important (in line with the Action 13 objectives), while eliminating data that is not helpful, yet very burdensome for taxpayers.

Non-MCAA Jurisdictions (e.g., the U.S.)

17. Many countries have yet to sign up to the MCAA. As a result, MNEs with parent companies in these jurisdictions are currently in a difficult situation. For example, the U.S. International Revenue Service (“IRS”) adopted the CbCR but did not agree to participate in the MCAA framework. Instead, the IRS is enacting bilateral agreements to exchange CbCRs with each tax jurisdiction, which is a time consuming process. At this point, the IRS has only signed



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agreements with 42 jurisdictions and is in negotiations with 7 others, leaving several jurisdictions with no exchange agreements with the U.S. This lack of exchange agreements could result in multiple local filings in addition to the U.S. filing.

18. In reality, up to this point, many of our members have not had to file locally since jurisdictions with approaching deadlines have put extensions or other measures in place that delayed the CbCR requirement until an agreement with the IRS has been reached (e.g., India, Indonesia, Japan). However, this is not a sustainable long term solution.
19. In cases where the local competent authority does not have a bilateral agreement to exchange CbCRs with jurisdictions that have CbCR requirements, there is some uncertainty around local filing obligations. The secondary mechanism as described in Article 2.2 of the Model Legislation states that local filing should be required only when (a) the UPE of the MNE group is not required to file a CbCR in its tax jurisdiction; (ii) the UPE's jurisdiction has a current International agreement (tax treaty or tax information exchange agreement) but no qualifying competent authority agreement to exchange CbCRs; or (iii) there has been a systemic failure of the UPE's tax jurisdiction. Therefore, if a foreign tax jurisdiction does have a secondary mechanism in place, but the Country A competent authority has no International Agreement, based on the Model Legislation guidance, a Country A MNE should not be obligated to file locally even if the foreign tax jurisdiction has adopted CbCR requirements.
20. Tax advisers in several jurisdictions without International Agreements have advised our members that they legally do not have a local filing obligation since there is no bilateral CbCR exchange agreement in place. However, this analysis has consumed our members' corporate tax teams with hours of correspondence with tax advisors to get clarity around true local obligations.
21. Our general view is that it was not the intent of the OECD to require a taxpayer to file in multiple jurisdictions as a matter of principle. However, there is still uncertainty around implementation under the OECD approach.