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Denmark issues final statutory order on country-by-country reporting

Denmark on August 31 published the final version of the statutory order on country-by-country (CbC) reporting.

The statutory order (Statutory Order no. 1133 of August 27, 2016) applies as of September 1, 2016, and contains technical details regarding how to formally notify the Danish Tax Authority (SKAT), as well as details on the contents and submission of the CbC report. With the statutory order, Denmark has taken the last step in the implementation of BEPS Action 13.

Notification procedure

According to the statutory order, the formal notification procedure pursuant to the Danish Tax Control Act, section 3B subsection 14, is fulfilled when the following information is provided:

- Full entity name;
- Address;
- Tax jurisdiction; and
- Company number (cvr-nr.) or business registration number (SE-nr.).

In addition to the above information, additional details may be required depending on the structure of the group. We have included a description of the information required under three relevant scenarios.

Denmark-based ultimate parent: Denmark-based ultimate parent companies subject to the Danish CbC requirements (Danish Tax Control Act section 3B subsection 10) are required to notify SKAT and include the aforementioned information.

Foreign-based ultimate parent: Denmark-based entities with a foreign ultimate parent that do not fall within the scope of the exemption in Danish Tax Control Act section 3B subsection 11, and therefore are obligated to file a CbC report, are required to notify SKAT. The notification must include the above information in addition to information on which Danish entity will submit the CbC report (if the group has multiple Danish entities).

Foreign-based ultimate parent with appointed surrogate entity: Denmark-based entities with a foreign ultimate parent that has appointed a surrogate entity to submit the CbC report (Danish Tax Control Act section 3B subsection 12) are required to notify SKAT. The above information for the surrogate entity must be included in the notification, in addition to information on which tax jurisdiction the surrogate entity is a tax resident of. If the surrogate entity has a tax identification number (TIN-nr.) this should be included as well.

Deadline for notification: The deadline for the notification to SKAT is the end of the income year that the CbC report covers. The notification must be communicated electronically to SKAT and follow the instructions provided by SKAT. Specific details from SKAT on the instructions are still outstanding, but are expected to be published during 2016. Until further guidance is provided, we expect that notifications through e-mail will be sufficient. SKAT accepts notifications written in Danish, English, Swedish, or Norwegian.

Going forward, entities previously subject to the Danish CbC reporting requirements are required to notify SKAT if in a later income year they fall outside the scope of the rules. The same deadlines would apply for this notification.

Formal content of the CbC report

The formal content requirements of the CbC report itself are aligned with BEPS Action 13 and should be interpreted in line with this report, as the Statutory Order directly refers to Annex III of the OECD's Guidance on Transfer Pricing Documentation and CbC Reporting.

Limitation of accessibility of information for reporting purposes

Compared to the draft statutory order, which was sent into consultation in April 2016, one very important amendment has been included in the statutory order.

According to section 4 subsection 5, Danish entities that do not fall within the scope of the exemption in Danish Tax Control Act section 3B subsection 11, and therefore are obligated to file a CbC report, are obligated to request all necessary information from their ultimate parent in order for the Danish entity to comply with the Danish CbC rules. However, if the ultimate parent fails to provide or make available the required information, the Danish entity is required to submit a CbC report that contains all the information the Danish entity is in possession of, and must notify SKAT that the ultimate parent has failed to provide or make available the required information.

From a practical point of view, this amendment is important, as Danish entities of foreign groups may have restricted access to group information. With this amendment, Denmark aligns its rules with those of several other countries.

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France publishes decree on country-by-country reporting

The French government on October 1 published an administrative decree defining the filing procedures for and the contents of the country-by-country (CbC) report. The decree is aligned with the recommendations of the OECD's final report on BEPS Action 13.

The CbC reporting requirement applies to companies with annual consolidated group revenue equal to or in excess of EUR 750 million, and must include the following information:

- Revenue resulting from intragroup transactions;
- Revenue resulting from transactions with independent companies;
- Total revenue;
- Before-tax profits;
- Income tax paid;
- Income tax accrued;
- Stated capital;
- Accumulated earnings;
- Number of employees; and
- Tangible assets other than cash and cash equivalents.

The annual CbC report must be submitted to the French tax authorities within 12 months of the fiscal year-end. It must be filed by the French ultimate parent entity of the group or by a French entity of a foreign group, if the CbC report has not already been filed with a tax authority that would share it automatically with the French tax authorities. All data must be in euros or in the currency used for group consolidation. For each tax jurisdiction, the report must contain the identity of all entities located in the tax jurisdiction, including branches. The nature of the main activities must be chosen from a list provided in the decree. Finally, the reporting company may use data from consolidated financial statements, corporate accounts of each entities, or internal management accounts.

Public CbC reporting

Although the law has not been enacted yet, the French National Assembly on September 29 voted during a second hearing on the draft provisions on public CbC reporting (article 45 bis of the draft bill "Sapin II").

The French public CbC report remains aligned, for the most part, with the proposal submitted at the EU level to amend the 2013/34/EU Directive, the Accounting Directive. The report would include:

- Brief description of the company's activities;
- Number of employees;
- Net turnover;
- Before-tax profits;

- Income tax paid, with explanations for possible inconsistencies with the amount of income tax accrued; and
- Accumulated earnings.

Information would have to be provided on a country-by-country basis for:

- Countries that are members of the European Union;
- Countries that are listed by the European Union for their lack of transparency; and
- Countries outside of the European Union if the multinational group has a minimum number of entities in these countries. This minimum number will be determined in a future decree.

Contrary to the proposed changes to the 2013/34/EU Directive, the French public CbC report may require that information be disclosed on a country-by-country basis – rather than an aggregated basis – for non-EU countries.

For the first two years after enactment, the public CbC report would apply to groups with consolidated sales of EUR 750 million or higher. The threshold would then be lowered to EUR 500 million for another two years, and finally to EUR 250 million.

The public CbC information would have to be freely available online using an open data model. Details on data publication will be provided in a decree.

The date of entry into force would be the day after implementation of the European directive that provides for changes to the 2013/34/EU Directive, but would be, at the latest, January 1, 2018.

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Slovakia plans to introduce country-by-country reporting

In the course of the base erosion and profit shifting (BEPS) project, the OECD introduced extensive changes to existing transfer pricing documentation processes and created an additional documentation element, the country-by-country (CbC) report. Slovakia will follow the OECD guidance and implement the requirement to prepare a CbC report.

As part of the implementation process, the legislative bodies of Slovakia issued a bill amending Act No. 442/2012 Coll. on international assistance and cooperation in tax administration, which introduces the CbC reporting obligation in Slovakia. The draft legislation closely follows the recommendations of the OECD BEPS project.

The CbC reports, exchanged among tax authorities on the basis of the model competent authority agreement, will provide tax administrations with relevant and reliable information to perform an efficient and robust transfer pricing risk assessment analysis. Slovakia is one of the countries that has signed a multilateral competent authority agreement for the automatic exchange of CbC reports.

Reporting requirements

CbC report: Under the draft legislation, a Slovakian resident ultimate parent company of a multinational group will be required to submit a CbC report to the tax authorities if, in the preceding fiscal year, its consolidated group revenue was at least EUR 750 million. If the ultimate parent company is not resident in Slovakia and the foreign jurisdiction fails to provide information to the Slovak tax authorities, because (1) the country in which the ultimate parent is resident does not require the submission of CbC reports; (2) there is no agreement to exchange CbC reports with the country of residence of the ultimate parent company; or (3) there is a systematic failure of the ultimate parent or its state of residence to provide CbC reports, as a secondary mechanism, a Slovakian group company may be required to file the CbC report. The content requirements for the CbC report are consistent with the recommendations under BEPS action 13.

The draft legislation provides for penalties for failure to file a CbC report or for late filing, or when information is missing or incorrect. The tax authorities may levy penalties of up to EUR 10,000 for breach of the above-mentioned obligations.

Notification obligation: Slovakian residents who are members of multinational groups subject to CbC reporting will have to report to the tax authorities whether they are ultimate parent companies or surrogate parent companies of the multinational group. When the Slovakian entity of a multinational group is not the ultimate parent entity or the surrogate parent entity, it shall notify the tax authorities of the identity and country of tax residence of the reporting entity. It should be noted that a penalty of up to EUR 3,000 may be imposed for failure to fulfill this reporting obligation.

Entry into force and deadlines

Once the draft legislation is formally introduced, the CbC reporting requirement will be effective for fiscal years starting on or after January 1, 2016. Slovakian ultimate parent companies must file the CbC report electronically within 12 months after the last day of the relevant fiscal year. In cases when a Slovakian entity assumes the filing responsibility for its foreign ultimate parent company, the CbC report must be submitted only for fiscal years starting on or after January 1, 2017.

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Costa Rica issues guidance on transfer pricing report

Costa Rica's tax authorities published guidance on September 13 (Resolution DGT-R-44-2016) that clarifies the requirement for certain taxpayers to prepare a transfer pricing information return. The resolution, which applies from the date of issuance, provides as follows.

Large Costa Rican taxpayers and entities operating under the Free Zone Regime are required to file a transfer pricing information return. The return will provide information regarding intercompany transactions, and details regarding the transfer pricing methods used.

The annual return must be filed electronically by the last business day of June. The first transfer pricing return – for 2015 – and the transfer pricing return for 2016 periods will both be due in June 2017. The information in the return will be based on information from the transfer pricing study that is prepared annually.

Penalties will be imposed for failure to file the return.

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Taiwan set to commence transfer pricing audits

Taiwan's National Taxation Bureau has announced that it would commence the 2015 transfer pricing audits on October 1, 2016, and that it plans to expand the scope and depth of these audits.

According to a press release issued by the National Taxation Bureau, a Taiwan company would be a potential target for transfer pricing audit under the following circumstances:

- The company's reported gross profit margin, operating profit margin, and net profit margin are lower than those of other companies in the same industry;
- The multinational group's consolidated profit is positive but the Taiwan entity's profit is negative, or the reported profits of the Taiwan entity are significantly lower than those of other affiliates within the group;
- The company's reported net income/loss significantly fluctuates over three consecutive years, including the current year and the two preceding years;
- The taxpayer fails to disclose related-party transactions;
- The taxpayer fails to analyze whether its related-party transactions are in compliance with the arm's length principle, and fails to prepare a transfer pricing report in accordance with Taiwan's transfer pricing guidelines;
- The taxpayer avoids or evades tax liability through other non-arm's-length arrangements;
- The taxpayer enters into large and frequent transactions with its related parties located in tax-free or low-tax countries/regions;
- The taxpayer enters into large and frequent transactions with its related parties that enjoy tax incentives; or
- The taxpayer has other arrangements to avoid or evade tax liability.

The National Taxation Bureau of the Central Area emphasized that it would focus on a company if the following circumstances are present:

- Transfers of tangible assets: the purchase or sales prices of controlled transactions significantly deviate from those of uncontrolled transactions, or profits are kept outside of Taiwan, resulting in non-arm's length transactions.
- Use of intangibles: the taxpayer' foreign related parties are licensed to use technology, patents, and trademarks developed in Taiwan but it does not charge a reasonable license fee.
- The provision of services: the taxpayer has its employees provide technical or management services to foreign subsidiaries but it does not charge a reasonable service fee.
- Financing activities: arrears or advance payment terms between related parties significantly deviate from those between unrelated parties, which results in non-arm's-length transactions, or the taxpayer provides guarantees or endorsements for loans and undertakes risks without receiving a reasonable remuneration.
- Inappropriate comparables: the taxpayer does not conduct an appropriate analysis of the functions and risks of the related-party transactions, or does not adjust for the significant differences identified, which results in choosing inappropriate comparable companies.
- Incorrect transfer pricing method: the taxpayer does not use the profit-split method as the most appropriate method to analyze its related-party transactions in situations in which the transactions are highly integrated and it is difficult to evaluate individual transactions, or the related parties involved made valuable or special contributions to the controlled transactions.

Taxpayers should check their related-party transactions and operations to verify whether the aforementioned circumstances are present, and prepare transfer pricing documentation.

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Luxembourg issues draft law on country-by-country reporting

Luxembourg's Parliament on August 2 issued a draft tax law introducing country-by-country (CbC) reporting obligations based on the recommendations in the OECD's final reports on the base erosion and profit shifting (BEPS) initiative and transposing Council Directive (EU) 2016/881 regarding the mandatory automatic exchange of information in the field of taxation.

The draft law intends to implement Council Directive (EU) 2016/881 and BEPS Action 13 based on the Multilateral Competent Authority Agreement signed by Luxembourg. The proposed CbC rules would require Luxembourgish ultimate parent entities of multinational companies with a consolidated group turnover of EUR 750 million or more to file a CbC report with the Luxembourg competent tax authority.

CbC Report

According to the draft tax law, and in line with the OECD guidance, the CbC report consists of three parts:

- An overview of the aggregate allocation of income, taxes, and business activities (including capital, assets, and employees) to each tax jurisdiction;
- A list of all "constituent entities" of the multinational group included in the aggregation for each tax jurisdiction; and
- Additional information that is necessary to understand the information provided for the first two parts.

The draft law also envisions, subject to conditions, a secondary filing mechanism whereby a "surrogate parent entity" or any "constituent entity" that is not the ultimate parent company may be designated as a "reporting entity."

The draft law also includes rules for the determination of a "surrogate parent entity" and a "constituent entity" resident in Luxembourg as a "reporting entity" for purposes of the CbC reporting rules. The "reporting entity" is obligated to communicate to the competent tax authority.

In addition, a Luxembourg-resident "constituent entity" that is neither an ultimate parent entity, a surrogate parent entity, nor a reporting entity is under the obligation to notify the competent tax authority of the identity of the reporting entity.

Submission deadline

The CbC report must be filed for fiscal years starting on or after January 1, 2016. The deadline for the submission of CbC reports is 12 months after the last day of the relevant fiscal year. For the first year, the deadline has been extended to 18 months. Thus, *the first reporting period* includes fiscal years starting on or after January 1, 2016, and *the first reporting deadline* is 18 months following the end of the first fiscal year. For example, a Luxembourg-resident reporting entity will have to submit the first CbC report by the end of June 2018, at the latest, provided its fiscal year is the calendar year.

Exceptions

As expected, the threshold for filing a CbC report has been implemented in the amount of EUR 750 million (or an equivalent amount in local currency as of January 2015) of consolidated group revenue. If the threshold is not exceeded in the preceding fiscal year, the multinational group does not have to prepare a CbC report.

Penalties

The draft law provides for penalties of up to EUR 250,000 when:

- The CbC report is not filed within the prescribed period, or if the data submitted is incomplete or incorrect;
- The conditions subject to which a reporting entity is designated have not been observed; and
- The relevant notifications to the competent tax authority have not been submitted.

The comments on the draft law make it clear that the reporting entity's motives for failing to comply with the reporting requirement should be taken into account in the determination of the penalty amount. The amount of the potential penalties is in line with penalties for similar noncompliance with FATCA reporting obligations.

Automatic exchange of CbC reports

The draft law introduces a mechanism for the automatic exchange of CbC reports between the competent tax authorities in Luxembourg and the jurisdictions in which a reporting obligation arises ("jurisdiction soumise à déclaration").

As a result, the automatic exchange of CbC reports will be initiated with EU member states as well as with other jurisdictions, signatories to the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports previewed by BEPS Action 13.

A list of all jurisdictions with which automatic exchange is to be initiated is expected to be included in a separate decree.

With respect to deadlines, the Luxembourg competent tax authorities are obligated to exchange CbC reports within three months of their submission. The period for exchanging CbC reports covering the first covered fiscal year starting on or after January 1, 2016, is extended to six months.

Next Steps

Luxembourg's parliament must now review, discuss and, if necessary, modify the draft law before it can be approved.

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Austria's Transfer Pricing Documentation Act officially published

The Austrian Transfer Pricing Documentation Act was announced in the Federal Law Gazette on August 1, 2016. The act is based on the three-tiered standardized approach to transfer pricing documentation under action 13 of the OECD's BEPS project, and requires the submission of a country-by-country (CbC) report, as well as the preparation of a master file and a local file if certain requirements are fulfilled. This means that for the first time, standardized transfer pricing documentation becomes mandatory for the majority of Austrian enterprises that are part of a multinational group.

Reporting requirements

CbC report: Under the Transfer Pricing Documentation Act, and in line with the OECD recommendations, an Austrian resident ultimate parent company of a multinational group will be required to submit a CbC report to the tax authorities if, in the preceding fiscal year, the consolidated group revenue was at least EUR 750 million. Even if the ultimate parent company is not resident in Austria, an Austrian group company may be required to file the CbC report in exceptional cases, for instance, when (1) the country in which the ultimate parent is resident does not require the submission of CbC reports; (2) there is no agreement to exchange CbC reports with the country of residence of the ultimate parent company; or (3) there is a systematic failure of the ultimate parent or its state of residence to provide CbC reports. The content requirements for the CbC report are consistent with the recommendations under BEPS action 13.

Master file / local file: Some Austrian entities of multinational groups will have to submit a master file to the Austrian tax authorities that provides high-level information about the enterprise's global business operations and transfer pricing policies. A local file also must be submitted that provides more detailed information on related-party transactions and amounts involved.

An Austrian member of a multinational group is subject to the master file and local file requirements if its turnover exceeds EUR 50 million for two consecutive fiscal years; conversely, if revenue falls short of the threshold for two years in a row, the documentation obligation ceases. Regardless of whether the threshold is met, the competent authorities could request the master file when the ultimate parent company is required to prepare master file documentation under its local legislation. Smaller companies that are not covered by this rule continue to be subject to the general documentation requirements under Austria's domestic law, and could be required to provide documentation to the tax authorities upon request.

The content for the master file and the local file will be set forth in a decree; a draft decree has been published that follows the requirements proposed in the relevant OECD reports.

All documentation must be prepared in German or English.

Penalties will be imposed for failure to file a CbC report or for late filing, or when information is missing or incorrect. While the maximum fine for intentional violations of the requirements will be EUR 50,000, grossly negligent violations could lead to penalties of up to EUR 25,000. It should be noted that the penalty can be imposed per perpetrator; thus, the total amount of the penalties in an individual case may be substantially higher than EUR 50,000. A merely negligent submission of incorrect data is not subject to penalties.

Entry into force and deadlines

In general, all documentation requirements are effective for fiscal years starting on or after January 1, 2016. In cases when an Austrian entity assumes the filing responsibility for its foreign ultimate parent company, the CbC report must be submitted only for fiscal years starting on or after January 1, 2017. Austrian ultimate parent companies must file the CbC report electronically via "FinanzOnline" within 12 months after the last day of the relevant fiscal year. The master file and local file must be submitted only upon request from the tax authorities after the corporate income tax return is filed. The taxpayer will need to submit documentation in response to such a request within 30 days.

Comments

The Transfer Pricing Documentation Act is closely based on the recommendations of the OECD BEPS project and effectively provides for documentation requirements for all Austrian companies that conduct cross-border intragroup transactions. Because the first half of the 2016 reporting year has already passed, preparations for documentation and the coordination within MNE groups should commence without delay.

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Recent Changes to Turkey's Transfer Pricing Landscape

A number of significant changes to Article 13 of the Turkish Corporate Tax Law governing "disguised profit distributions through transfer pricing" entered into effect on August 9, 2016. The multifaceted changes will have important consequences for the Turkish transfer pricing landscape. The most important aspects of the changes introduced are summarized below.

Related-party threshold

According to the changes introduced, for a related-party relationship to arise through direct or indirect ownership, there must be at least 10 percent ownership, voting rights, or dividend rights for a consideration of disguised income distribution. The Council of Ministers is authorized to modify this requirement and set the threshold at any point from 1 percent to 25 percent, or to completely remove this condition in the future.

Explicit recognition of transactional profit methods

Transactional profit methods (transactional net margin method and profits split) were already in use in Turkish transfer pricing practice per guidance provided by General Communiqué No:1 on transfer pricing. With the most recent changes introduced, the use of such methods, in addition to transactional methods, is explicitly added to Article 13 of the Corporate Tax Law governing "disguised profit distribution through transfer pricing."

Advance pricing agreements (APAs)

The transfer pricing method determined under the original APA may be applied to prior open fiscal years, or roll backed, provided the regret filing clauses of the tax procedural law are applicable to the case, and that the conditions under which the APA was signed are also applicable to the prior years. In addition, the Council of Ministers is authorized to modify the term limit for APAs from three years to five years in the future. The current term limit is three years under existing regulations.

(Partial) penalty protection

Provided that transfer pricing documentation requirements are met in full and on time, the penalty on underpaid or late paid tax due to disguised profit distributions will be subject to a 50 percent reduction, except in cases when the underpayment arises from acts described in Article 359 of the tax procedural law (pertaining to tax evasion provisions).

Procedures for mutual exchange of Information

With the recent changes in effect from August 9, the authority of the Council of Ministers has been expanded. Accordingly, the Council of Ministers has been authorized to include the obligation to provide information about the operations of cross-border related parties outside Turkey within the scope of transfer pricing documentation obligations, and determine the procedures for mutual exchange of such information with the tax administrations of other countries in accordance with international agreements.

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Mexico amends APA rules

Mexico's Tax Administration Service (SAT) on July 14 published two important transfer pricing rules in the Third Resolution on Amendments to the Omnibus Tax Bill for 2016 (*Tercera Resolucion de Modificaciones a la Resolucion Miscelanea Fiscal*).

The first rule (Rule No. 2.12.8) relates to the resolution process for advance pricing agreements (APAs) under the provisions of article 34-A of the Federal Tax Code (CFF) and establishes that taxpayers that request a unilateral or bilateral APA shall do so under the data-processing guidelines No. 102/(CFF).

With regard to these guidelines, when the tax authorities determine that the information submitted by the taxpayer in an APA is insufficient, inconsistent, or contains irregularities regarding the description of functions, assets, and risks, collaboratively and cooperatively with the taxpayer, they may perform a functional analysis as part is added process of study and evaluation of information, data, and documentation submitted, to identify and define the functions performed, assets, used and risks assumed in transactions subject to consultation.

The functional analysis will be conducted at the taxpayer's legal address and may also include visits to other facilities (if necessary), always with the presence of the taxpayer's legal representative and other relevant personnel involved in the inquiry.

At the end of these visits, the tax authorities will prepare a report that will include the conclusions of the functional analysis. The taxpayer should read the conclusion of the functional analysis with its legal representative, so that the parties may ratify its content.

It is important to note that, according to this new rule, at no time the visit will not be deemed a tax examination procedure, when the tax authorities carry out the functional analysis in the taxpayer's official address under the terms of this rule.

Although there is no specific exception in the regulation of the application of rule 2.12.18 to APA requests filed by Mexican maquiladoras, in unofficial statements the SAT has mentioned that this rule is not intended to be applicable in those cases.

We consider of vital importance that companies that have submitted an APA before the Mexican tax authorities or are considering doing so, carefully review these modifications that could complicate the process.

The second rule (Rule No. 3.9.5) represents an amendment to the exception for taxpayers that allows them not to obtain or maintain transfer pricing supporting documentation if the taxpayer's taxable revenues in the previous fiscal year are equal to or below MXN 13 million or MXN 3 million in the case of individuals providing independent professional services. The amendment specifies that this exception does not apply to companies or contractors referred to in the Mexican Hydrocarbon Income Law.

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