

Transfer Pricing Alert

OECD/G20 Base Erosion and Profit Shifting Project. Action 13: Guidance on the Implementation of the Transfer Pricing Documentation and Country-by-Country Reporting

Following the report published by the Organization for Economic Cooperation and Development (“OECD”) in September 2014 regarding three-tier approach on the transfer pricing documentation, more precisely the master file, the local file and the Country-by-Country reporting (CbC), OECD offers additional assistance through Action 13 regarding the implementation of the documentation and of the CbC reporting in order to ensure a consistent approach.

The main aspects presented in this note refer to the implementation of the CbC reporting and, more specifically, focus on:

- the timing of preparation and filing of the CbC Report;
- which multinational enterprises (MNE) groups should be required to file the CbC Report;
- the necessary conditions underpinning the obtaining and the use of the CbC Report by jurisdictions;
- the framework for government-to-government mechanisms to exchange CbC Reports together with the work plan for developing an implementation package.

As an additional recommendation, this note specifies that the master file and local file elements of the new transfer pricing documentation standard be implemented through local country legislation or administrative procedures and that the master file and local file be filed directly with the tax administrations in each relevant jurisdiction as required by those administrations.

Moreover, there will be developed mechanisms to monitor jurisdictions' compliance with their commitments and also to monitor the effectiveness of the filing and disseminations of the mechanisms set forth in this note.



Below are presented in more detail each action recommended by OECD through this note regarding the implementation of the CbC reporting:

a) Timing: when should the CbC Reporting requirement start?

The recommendation regarding the timing of the CbC report is that it should be filed for MNE fiscal years beginning on or after 1st of January 2016.

One important aspect that needs to be stressed is the fact that jurisdictions may need time to follow their own domestic legislative process in order to make necessary adjustments to the law. In order to support countries in their process of preparing timely legislation, the key elements of statutory provisions will be developed for ultimate parent entities of MNE groups to file the CbC Report in their jurisdiction of residence. Moreover, jurisdictions will be able to adapt these elements to their own legal systems. The September Report recommends that MNEs be allowed one year from the close of the fiscal year to which the CbC Report relates to prepare and file the CbC Report, thus the first CbC Reports would be filed by 31 December 2017. For MNEs with a fiscal year ending on a date other than 31 December, the first CbC Report would be required to be filed later in 2018, 12 months after the close of the relevant MNE fiscal year, and would report on the MNE group's first fiscal year beginning after 1 January 2016.

b) Which MNE groups should be required to file the CbC Report?

The recommendation is that all MNE groups be required to file the CbC Report each year. However, an exception from this rule are Groups with annual consolidated group revenue in the immediately preceding fiscal year of less than € 750 million or a near equivalent amount in domestic currency.

Although the threshold of € 750 million will exclude approximately 85% – 90% of MNE groups from the requirement to file the CbC Report, the CbC Report will be filed by MNE groups controlling approximately 90% of corporate revenues.

However, the countries participating in the OECD/G20 BEPS Project intend to reconsider the appropriateness of the applicable revenue threshold (i.e. € 750 million) in connection with their 2020 review of implementation of the new standard. For the groups with income derived from international transportation or transportation in inland waterways that is covered by treaty provisions that are specific to such income and under which the taxing rights on such income are allocated exclusively to one jurisdiction, should include the information required by the CbC template with respect to such income only against the name of the jurisdiction to which the relevant treaty provisions allocate these taxing rights.

c) Necessary conditions underpinning the obtaining and the use of the CbC Report

The obtaining and use of the CbC Report are based on the following conditions:

- **Confidentiality** - Jurisdictions should have in place and enforce legal protections of the confidentiality of the reported information, such as: limitation of the use of information, rules on the persons to whom the information may be disclosed, etc.
- **Consistency** - Jurisdictions should use their best efforts to adopt a legal requirement that MNE groups' ultimate parent entities resident in their jurisdiction prepare and file the CbC Report.
- **Appropriate use** - Jurisdictions should use appropriately the information in the CbC Report template. The CbC Report can be used for assessing high-level transfer pricing risk or for assessing other BEPS-related risks.

d) The framework for government-to-government mechanisms to exchange CbC Reports and implementation package

Framework

Jurisdictions should require in a timely manner CbC reporting from ultimate parent entities of MNE groups and exchange this information on an automatic basis with the jurisdictions in which the MNE group operates and which fulfil the conditions underpinning the obtaining and the use of the CbC Report.

In case a jurisdiction fails to provide information to a jurisdiction fulfilling the conditions listed in section c) because:

- it has not required CbC reporting from the ultimate parent entity of such MNE groups;
- no competent authority agreement has been agreed in a timely manner under the current international agreements of the jurisdiction for the exchange of the CbC Reports;
- it has been established that there is a failure to exchange the information in practice with a jurisdiction after agreeing with that jurisdiction to do so, a secondary mechanism would be accepted as appropriate, through local filing or by moving the obligation for requiring the filing of the CbC Reports and automatically exchanging these reports to the next tier parent country.

Implementation package

Countries participating in the OECD/G20 BEPS Project have agreed to develop an implementation package for government-to-government exchange of CbC consisting of:

- the development of the key elements of domestic legislation requiring the ultimate parent entity of an MNE group to file the CbC Report in its jurisdiction of residence;
- the development of secondary mechanisms;
- the development of implementation arrangements for the automatic exchange of the CbC Reports under international agreements. The work related to such implementing arrangements will include the development of competent authority agreements ("CAAs", both bilateral and multilateral) based on existing international agreements;
- the development of a comprehensive package containing the different elements indicated above by April 2015.

Finally, it may be possible that the need for more effective dispute resolution may increase as a result of the enhanced risk assessment capability following the adoption and implementation of a CbC reporting requirement.

The impact of the changes in Romania

Although Romania is not an OECD member, the Romanian legislation generally follows the Transfer Pricing Guidelines issued by the OECD.

Thus, taking into consideration the fact that the CbC Report represents an important risk measurement tool, if such legislative provisions will be implemented in Romania, the local fiscal authorities will have access to specific information from the CbC Report. Such a measure would allow a more accurate transfer pricing and other BEPS related risk assessment of the Romanian companies members of MNE groups which may trigger an intensification of the transfer pricing and tax audits.



Deloitte Transfer Pricing Contacts in Romania



Dan Bădin

Tax & Legal Partner-in-Charge

Phone: + 40 21 207 53 92

E-mail: dbadin@deloittece.com



Ciprian Gavrilu

Director, Tax

Phone: + 40 21 2075 348

E-mail: cgavrilu@deloittece.com



Alexandra Bunea-Oprişescu

Manager, Tax

Phone: + 40 21 207 56 96

E-mail: aoprisescu@deloittece.com



Bogdan Barbu

Manager, Tax

Phone: + 40 21 207 56 51

E-mail: bbarbu@deloittece.com

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