

EBIT comments on the OECD public consultation document: Review of Country-by-Country Reporting (BEPS Action 13)

To: Tax Policy and Statistics Division, Centre for Tax Policy and Administration, OECD/CTPA

Sent via upload: taxpublicconsultation@oecd.org

Brussels, 6 March 2020

Dear Achim,

EBIT's Members¹ thank the OECD for the opportunity to provide comments on the OECD's public consultation document: Review of Country-by-Country Reporting (BEPS Action 13), which is up for comments from 6 February 2020 – 6 March 2020. Below are a number of issues and open questions that EBIT believes are important for the OECD to take into account. We will follow the sequence of the questions in the public consultation document.

I. Implementation of the BEPS Action 13 minimum standard

1. What comments do you have regarding the general status of implementation of CbC reporting by members of the Inclusive Framework?

- EBIT Members would like to see that countries commit to having multilateral exchange agreements as far as possible for effectively trying to avoid the extra burden of local filing with all types of local variations and different timelines.
- Rather than changing the parameters at this stage, EBIT encourages the OECD and individual jurisdictions to focus their efforts on reducing or eliminating differences in interpretation of what may be becoming more understood concepts. These include the range of differences still seen in relation to, for example, notifications - in terms of timing, the format (and content) and the nature of the process.
- A key element in the decision about the nature of the information that is sought in the CbC report is the massive effort that has already been put into developing appropriate systems to compile and process the data as well as the governance and sign-off that the data is sufficiently accurate. Changes that necessitate further systems development would disturb this balance and risk incurring a burden that is disproportionate to any incremental gain that might be accrued by the amended (extended) data.

II. Appropriate and effective use of CbC reports

2. What comments do you have with respect to the use of CbC reports by tax administrations? To date, what impact has this had on the number and nature of requests for additional information?

¹ EBIT Members include Airbus Group, BP, Caterpillar, C-Brands, Deutsche Lufthansa, Diageo, GSK, Huawei, International Paper, JTI, Naspers, PepsiCo, Pfizer, P&G, RELX, Schroders, SHV Group, Tupperware and UTC. For more information on EBIT see: www.ebit-businessstax.com

It may not be clear what source of information has led to a query from a tax administration, so please base your answer on changes since the first CbC reports were filed and exchanged, excluding changes that can be explained by other factors, such as other changes to domestic tax information requirements.

- The CbC report is still a relatively recent reporting requirement. We are not aware of any tax authority requests having been made based on a CbC report. It would be premature to make a judgement of the success of the CbC reporting at this stage. Changes should focus on known issues supported by evidence rather than perceived issues or concerns.
- Although we have noticed an increase in additional information requests, it is not clear whether CbC reporting has led, or how it has led, to an increase or change in the information requests. Tax authorities use different sources (internal, external, national and international, e.g. exchange of information) in their data mining system which may not be disclosed to the taxpayers concerned. It is not generally possible for a taxpayer to trace back to the source leading to the request for additional information.

III. Other elements of BEPS Action 13 Report

3. What comments do you have regarding cases where jurisdictions have implemented Master File requirements that differ from or go further than the documents listed in Annex I to Chapter V of the OECD Transfer Pricing Guidelines?

- A number of jurisdictions have introduced Master and Local File requirements that differ from the OECD guidance. This is a significant issue for companies resulting in increased compliance costs as documentation requirements have to be monitored constantly at a jurisdictional level and because the deviations from the guidelines render the documentation process more onerous for both the Master and Local File preparation. Although Local Files are not uniform across the business as these do reflect specific local characteristics, some aspects of local businesses are common to multiple entities and it is desirable for these to be presented in a consistent manner across entities. Differences in Local File requirements make it more difficult to ensure consistency in the information made available to different tax authorities.
- Further standardisation of the Master File requirements does not seem necessary and adherence to the current OECD guidance sufficient. The current OECD guidance gives some flexibility to tailor the content of the Master File to the specificities of a group and further standardisation might lead to a loss of meaningful information.
- We have noticed that countries have introduced different Master File (and Local File) requirements. Although we recognize that Master File and Local File are issues of domestic law (and not falling under the BEPS 13 standard, but are only considered a best practice), we would welcome a more streamlined approach to thresholds, formats, deadlines and processes. For example, currently, a variety of filing dates exist for Master File (and Local File): tax return date, year-end, upon request, etc. We also understand that in many (or even most) cases countries have set the Master File (and Local File) thresholds beneath the CbC reporting threshold of EUR 750m. However, we would recommend that a threshold is also set for Master File (and Local File) in order to reduce the variety of thresholds. The threshold can be set at EUR 750m.
- EBIT Members know from their day-to-day experience that Master File and Local Files can be equally burdensome. The section in the questionnaire of the present OECD public consultation document only addresses issues related to the Master File and justifies this by way of the lesser existence of an imperative for a streamlined Local File, although it also recognizes the potential for enhanced consistency and outcomes. We

would welcome, however, that when countries adopt the Local File approach format, they would also adhere to the Local File format as published in Chapter V of the OECD Transfer Pricing Guidelines.

Chapter 2. Topics concerning the scope of CbC reporting

IV. Should a single enterprise with one or more foreign permanent establishments be a Group for the purposes of CbC reporting?

4. Are there any benefits from clarifying the definition of a Group to include a single entity that conducts business through one or more permanent establishments, in other jurisdictions in addition to those described in this document?

- We believe that the issue of permanent establishments (PEs) is already covered under article 1 (2) of the Model legislation related to CbC reporting and similar articles in the competent authority agreements in the BEPS Action 13 Report. An MNE group includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a PE in another jurisdiction.

5. Are there any practical challenges to MNE groups resulting from clarifying the definition of a Group to include a single entity that conducts business through one or more permanent establishments in other jurisdictions, in addition to those described in this document?

- No practical challenges are foreseen however, we consider that the issue is already covered.

V. Should separate CbC reports be prepared by groups that are under common control and which in aggregate have consolidated group revenue above the CbC reporting threshold?

7. Are there any practical challenges to MNE groups from requiring a CbC report to be filed by groups under the common control of an individual or individuals acting together, in addition to those described in this document?

- Control would have to be tightly defined. If we move beyond a strict accounting consolidation to an objective or subjective control test, then care will have to be taken to minimise the new scope of that test. The concern that appears to be identified relates to wealthy individuals and families, and any solution needs to be narrowly targeted to that problem.
- A poorly defined control test would be of particular concern to investment funds that take a number of legal forms. If such measures are being put in place, the exception should not only apply to widely held collective investment vehicles. A 'widely held collective investment vehicle' is not a defined term and there is no apparent reason as to why the exclusion would not be applied to other investment vehicles.

VI. Should the level of the consolidated group revenue threshold be reduced?

10. Are there any benefits from reducing the consolidated group revenue threshold, in addition to those described in this document?

- As mentioned before, we believe it would be premature to make a judgement of the success of the CbC report at this stage and we therefore do not believe that the consolidated group revenue threshold should be reduced at this stage.

11. Are there any practical challenges to MNE groups resulting from reducing the consolidated group revenue threshold, in addition to those described in this document?

- Reducing the consolidated group revenue threshold would increase compliance costs significantly across the economy, impacting smaller groups. The additional compliance cost appears disproportionate compared to potential benefits, given that the groups currently above the threshold already account for about 90% of corporate revenues, as per the OECD's 2015 BEPS Action 13 Report consultation document (paragraphs 52 and 53).

VIII. Should the threshold for Excluded MNE Groups take into account more than one year of consolidated group revenue?

18. Are there any other changes to the operation of the consolidated group revenue threshold which should be considered, in addition to those in this document?

- On a more general note: the review of CbC reporting would require some changes to domestic law – upon review it is also important that consistency from a legal point of view is looked after as much as possible (although one could recognize that after this first review some changes may be needed).

IX. Should extraordinary income be included in consolidated group revenue?

21. From the perspective of MNE groups, which approach to this issue (e.g. including extraordinary income in consolidated group revenue if these items are separately presented in the consolidated group statements; excluding extraordinary income from consolidated group revenue if these items are separately presented in the consolidated group statements; or some other approach) would balance the dual aims of relative simplicity and a consistent outcome for MNE groups preparing consolidated financial statements under different accounting standards?

- EBIT Members consider that extraordinary income should not be considered under CbC reporting. Such income (or loss) is the result of transactions outside the ordinary course of the business, for example relating to one-off events such as mergers or acquisitions, and would probably distort the data required for what is intended as only a high-level risk assessment. We believe that operations giving rise to extraordinary income (or result) by their nature will only lead to additional scrutiny from the tax authorities but not add much value to the risk-assessment.

X. Should gains from investment activity be included in consolidated group revenue?

24. From the perspective of MNE groups, which approach to this issue (e.g. including gains from investment activity in consolidated group revenue if these items are separately presented in the consolidated group statements; excluding gains from investment activity from consolidated group revenue if these items are separately presented in the consolidated group statements; or some other approach) would balance the dual aims of relative simplicity and a consistent treatment of MNE groups preparing consolidated financial statements under different accounting standards?

- If investment is an important part of the core activity of the group (say > 25 %, then yes; if below the threshold, then no as it may inappropriately distort the high-level analysis.

XI. In cases where the immediately preceding fiscal year of an MNE Group is of a period other than 12 months, should the consolidated group revenue threshold (or, alternatively, consolidated group revenue in the immediately preceding

fiscal year) be adjusted in determining whether the MNE Group is an Excluded MNE Group?

26. Are there any practical challenges to MNE groups in applying the consolidated group threshold as described in this document, in cases where the preceding fiscal year is less or more than 12 months, in addition to those in this document?

- In practice, for the time being, several approaches co-exist, leading to complexity:
 - use the actual total consolidated group revenue for the short accounting period and the threshold applicable to a 12-month fiscal year;
 - adjust the total consolidated group revenue for the short accounting period to reflect the consolidated group revenue that would correspond to a 12-month accounting period;
 - calculate the pro-rata share of the EUR 750m threshold that would correspond to the short accounting period; and
 - other approaches.
- It would seem that adjusting the threshold of EUR 750m (or its equivalent) to reflect the longer or shorter accounting period would be the easier way out.

Chapter 3. Topics concerning the content of a CbC report

XII. Should information in Table 1 be presented by entity rather than by tax jurisdiction?

28. Are there any practical challenges or other concerns to MNE groups from including constituent entity information in Table 1, in addition to those in this document?

- The CbC report is meant to be used for high level risk assessment and detailed entity level data does not fit within this scope. Entity level data is already been made available to local tax authorities through statutory accounts and tax returns. Depending on how the CbC report data is collected, this does not necessarily tie back to statutory accounts (e.g., using a top down approach based on head office GAAP could create differences with local GAAP, on which statutory accounts are based). Presenting the data at jurisdictional level would likely create tax authority requests for data reconciliation, which is not part of the CbC reporting requirement. This would then lead to a bias in the application of the top down vs bottom up approach.
- When only one constituent entity (including a PE) is present in a country, the information given is already at entity level. The information is therefore only relevant where more than one entity of the same MNE is present in a certain jurisdiction. The effect of having an entity-related CbC report could therefore only be useful in those jurisdictions where more than one entity is situated. As mentioned in the document, however, domestic issues may distort the aim of the CbC report: a high-level risk assessment and not an entity level risk assessment. A related issue is whether separate rules should be constructed in case a country's domestic legislation provides for a fiscal unity in a certain jurisdiction?
- In reviewing CbC reporting, one should consider that the MNEs concerned have put in place procedures to deliver the CbC report on time. The investment and efforts of those MNEs should not be disregarded by adapting the standard after 5 years of application.
- Statutory accounts, which are readily accessible to tax authorities, already give information at the entity level.

- CbC report data should not have to be reconciled back to statutory accounts.

XIII. Should consolidated data rather than aggregate data be used in Table 1?

30. Are there any practical challenges or other concerns to MNE groups from requiring the use of consolidated data in Table 1, in addition to those in this document?

- Data consolidated at the jurisdiction level is not readily available as there is no current commercial or regulatory basis for producing information in this format. It would be extremely onerous, and a significant investment into systems to be able to produce data consolidated at the jurisdiction level. As above, the existing CbC report provides tax authorities with sufficient information to produce a high-level risk assessment. If they have specific questions regarding detailed flows they can use other tools at their disposal (e.g. tax audit).
- This would be particularly hard in a divisionalised business, where there may be multiple entities in a particular jurisdiction, but they are not necessarily in the same ownership chain, meaning that such businesses would never have cause to perform a sub-consolidation at country level. It would be a huge systems challenge to be able to produce such numbers, not least as existing accounting systems are not configured to distinguish in-country intercompany transactions from out-of-country intercompany transactions.

XIV. Should additional columns be added to Table 1?

32. For each of the possible new items of information considered in this section, are there any practical challenges or other concerns to MNE groups from including an additional column in Table 1 of the CbC report template, in addition to those in this document?

- It is not clear how the additional items proposed would aid the high-level risk assessment purpose of the CbC report. The possible additions are not necessarily readily available data items and would require significant additional work to collect, as well as a change to systems put in place for the preparation of CbC reports, leading to additional compliance costs.

33. If any of the possible new items considered in this section were added to Table 1 of the CbC report template, what additional instructions or guidance would be helpful to MNE groups?

- From the questionnaire, we derive that the discussion on inserting additional information in table 1 of CbC report is limited to:
 - Interest income and expenses
 - Royalty income and expenses
 - Service fee income and expenses
 - Total related party expenses
 - R&D expenditure
 - Deferred Tax
- It would seem to us that several of these items can be misused for a direct application of CFC rules (passive income) – which would be contrary to the high-level risk analysis that the CbC report is supposed to be.
- Further detailed information about these topics is documented in the Master File and Local File so Tax Authorities have access to the more granular data already via that

route; hence the information would not be helpful at the level of the CbC report. For example, the additional information is documented in:

- Interest expense and income: MNEs intercompany financial activities (MF) and pricing of the transaction on an Arm's Length basis (Local File);
 - Royalty income and expenses: MNE's intangibles (Master File) and pricing the transaction on an Arm's Length basis (Local File);
 - Total related party expenses: pricing of a transaction on an Arm's Length basis (Local File);
 - R&D expenditure: MNE's intangibles (Master File) and pricing the transaction on an Arm's Length basis (Local File);
 - Deferred Tax: MNE's financial and tax positions (Master File) and statutory accounts
- EBIT Members, for the time being, do not see a reason to supplement the data already in table 1 by inserting columns on the items mentioned, requiring systems development for the CbC reporting process and additional data checks etc. at the time of filing.

XVI. Should fields required in the XML schema (e.g. tax identification number) that are not in the CbC report template in the Action 13 report be incorporated into the template?

37. Are there any practical challenges or other concerns to MNE groups from including additional information required in the CbC reporting XML schema in the CbC report template, in addition to those in this document?

- From an administrative perspective, and certainly from a legal perspective, CbC reporting rules are documentation requirements transposed in domestic law, the content of the CbC report template and the inputs of the XML file should be aligned. This will, however, lead to changes in the official forms to be used (and subsequent administrative or legalistic (for example secondary law) procedures to be followed.

XVII. Should standardised industry codes be included in Table 2?

40. From the perspective of MNE groups which of the existing industry code standards is most likely to be the least burdensome and most useful in providing information on the activities of constituent entities?

- The use of standardised industry codes encourages the idea that data for a large number of specific companies can be directly compared. EBIT does not think that is helpful in the objective of using CbC reporting as a high-level risk assessment tool. In much the same way that the figures should not be used in any process which is formulary in nature, EBIT does not think the nature of the business being carried out should be restricted to automated comparison of what are in most countries and for most purposes fairly non-standard criteria.
- Many multinationals operate different businesses which makes it very difficult and arbitrary to pick the right standardized industry code.

XVIII. Should pre-determined fields be added to Table 3, in addition to free text?

43. From the perspective of MNE groups, what predetermined fields could be included in Table 3 that would provide useful information to a tax administration in interpreting a CbC report, while not being burdensome for an MNE group?

- Having to add additional pre-determined text to Table 3 for each entity is not easy or quick and would result in a considerable amount of additional compliance work. The

usefulness of these proposed fields for high level risk assessment are not apparent and given the short time the CbC reporting requirements have been in place it is unclear what further information would be useful for tax administrations. It therefore feels premature to add additional data requirements at this stage.

Additional points

Notification requirements:

- The notification requirements are a significant administrative burden and the usefulness of these appears to be limited. After an initial notification for an entity no further notifications should be required unless there is a change to the information provided (e.g. change of the group entity filing the CbC report or accounting year end, which informs the deadline for filing).

Dormant entities:

- Dormant entities should be excluded from the CbC report. These add nothing to the report but do create considerable work as their data is not necessarily accessible through the central systems.

Description of source data:

- Guidance on the implementation of the CbC report has been updated in December 2019, and on p.25 contains a section on sources of data. This guidance specifies that the description of the source of each item of information in the CbC report has to be disclosed where this deviates from the main source of information. There are many reasons as to why data points are not available from the main data source or have to be amended. Having to add a description of every single instance where an amendment has been made would result in a considerable amount of additional work and not improve the usefulness of the CbC report. A description of the main data sources used without reference to individual items should be sufficient in terms of disclosure.
- Examples of the reasons for deviation include: local and headquarter GAAP differences resulting in booking differences which don't agree with the specific CbC report definition of the item; hyper-inflation and other necessary manual adjustments made outside the system; data not available in the main system for e.g. dormant entities or partially owned entities.

EBIT Members are not in favour of including any more mandatory information, whether in the way of predetermined fields or otherwise, because this would involve yet more systems development, which is very burdensome. Importantly, that burden is unlikely to be warranted by the benefit to the taxpayer or the tax administration. The examples shown in the consultation document nearly all rely on further free text information and don't specifically ease the burden that often already exists in constructing meaningful descriptions at this stage of the assessment. The extent of additional explanation in some areas is likely to be driven by the nature and reasons for questions from the tax administration and businesses are more likely to consider it justifiable if there is a clear cause.

Yours sincerely,

European Business Initiative on Taxation – March 2020

For further information on EBIT, please contact EBIT's Secretariat via Bob van der Made, Telephone: + 31 6 130 96 296; Email: bob.vandermade@pwc.com).

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