Action 13: Country-by-Country Reporting; Are You Ready?

On October 5, 2015, the Organisation for Economic Co-operation and Development (OECD) released a final package of 15 action items (the Actions) as part of its years' long work on the Base Erosion and Profit Shifting (BEPS) Project for the "comprehensive, coherent and coordinated reform of the international tax rules." In November 2015, the G-20 endorsed the 15 Actions and now, where applicable, the Actions are awaiting implementation within the legislative and regulatory bodies of each participating country.

Nestled amongst the 15 Actions is Action 13: one of the Actions intended to be implemented most quickly. Action 13 calls for a "three-tiered standardised approach" to transfer pricing documentation. Specifically, Action 13, when implemented, requires all multinational enterprises (MNEs) to prepare both a master file providing a high-level overview of their global operations and a local file of transfer pricing documentation specific to each country relevant to its tax return. In addition, companies with consolidated group revenue equal to or exceeding €750 million will need to prepare a country-by-country report to summarize by jurisdiction revenue, pre-tax income, income tax paid and accrued, employees, stated capital, retained earnings, and tangible assets. Action 13 recommends that countries require country-by-country reporting (CbyCR) beginning for the 2016 tax year, with those initial reports being filed in 2017.

The report for Action 13 includes draft legislation, which countries may use to implement these new requirements, and also a model template detailing the information that the OECD recommends be reported. Several countries have taken steps to begin implementation of CbyCR over the past few months and we expect this trend to continue and accelerate. In addition, the European Commission (EC) has indicated it believes an EC version of CbyCR is appropriate in addition to the CbyCR regimes its member states will enact as part of BEPS. Indeed, on January 28, 2016, the EU released a proposal that a prior directive be expanded to require "mandatory automatic exchange of country-by-country reports between Member states,"[1] which contemplates some level of public disclosure of CbyCR information. It should be noted, however, that any such directive by the EC will require unanimous approval by all EU member countries in order to become effective and, of course, it would be limited to MNEs that operate within the EU.

In this Alert, we provide a country-by-country overview of CbyCR implementation progress to date in the following jurisdictions: The United States, Australia, China, France, Germany, Ireland, Netherlands, Poland, Spain, and the United Kingdom.[2]

1 The proposal is available at: http://eur-lex.europa.eu/resource.html?uri=cellar:89937d6d-c5a8-11e5-a4b5-01aa75ed71a1.0014.02/DOC_1&format=PDF.

2 In addition to contributions from authors at Squire Patton Boggs, we acknowledge the kind contributions of Mark O'Sullivan at Matheson Ormsby Prentice for his insights into CbyCR implementation in Ireland and of Cees-Frans Greeven at Buren Legal for his insights into CbyCR implementation in the Netherlands.

United States

On December 18, 2015, the United States Treasury (Treasury) issued proposed regulations to require CbyCR for "US persons that are the ultimate parent entity of a multinational enterprise group." The first thing to note is that Treasury obviously believes it already has statutory authority to implement CbyCR via regulations. The key provisions of these proposed regulations are as follows:

1. The US will use the model template issued by the OECD in the final BEPS reports.[3]
2. The US may exchange CbyCR information with countries where the US person operates, provided the US has reciprocity provisions in place with that jurisdiction.
3. CbyCR only applies to US persons who have US$850 million or more in group revenues, which isn't quite the same, but is generally aligned with the OECD's threshold of €750 million.
4. The regulations will become effective for tax years beginning after the date on which the regulations are finalized. Therefore, at least for calendar year enterprises, US CbyCR will be effective no sooner than for tax years beginning on or after January 1, 2017, with filing to be completed sometime in 2018.

Strikingly, by effectively proposing filings to be completed in 2018 (for tax years beginning on or after January 1, 2017), Treasury might have made it possible that US-based MNEs that are not required to comply with US CbyCR requirements with respect to tax year 2016 will face requests for their 2016 CbyCR information from other countries. According to high-ranking officials at Treasury, Treasury recognizes the potential difficulties this would bring and are working assiduously with various countries in the hopes of coming to a collaborative solution that in effect serves as a patch for US-based MNEs. This might be done in the context of the individual agreements with each Competent Authority as described in the preamble to the proposed regulations. Bob Stack, US Deputy Assistant Treasury Secretary for International Tax Affairs, recently emphasized that the US intends to enter into such bilateral agreements "with appropriate countries that have also adopted country-by-country reporting provisions, have appropriate safeguards and infrastructure in place, and with respect to which the US has an income tax treaty or tax information exchange agreement in effect." That means a very large number of bilateral agreements must be entered into in a relatively short period of time – even with the delayed US effective date of 2017.

3 The model template is available at: http://www.oecd-ilibrary.org/docserver/download/2314301e.pdf?expires=1454049473&id=id&accname=guest&checksum=E2DB462468C01B9B84A4334364EB30F5.

Meanwhile and not surprisingly on Capitol Hill, even prior to the release of the regulations, lawmakers questioned Treasury's authority to implement CbyCR under existing US tax law and raised concerns about implementation – especially regarding privacy. In fact, on December 18, 2015, House Ways and Means Committee Member Charles Boustany (R-LA) introduced the BEPS Act (H.R. 4297) to "impose certain requirements on the Secretary of the Treasury relating to transmittals of country-by-country reports for purposes of the Base Erosion and Profit Shifting Action Plan." Specifically, the proposed legislation would: (1) prevent Treasury from collecting or transmitting CbyCR information from any US person for taxable years beginning before January 1, 2017; (2) suspend transmittal of CbyCR information to any jurisdiction that has been found to be abusing the master file document requirements or failing to safeguard the confidentiality of the CbyCR information, and (3) in some ways limit the information that can be requested in a CbyCR.

The interplay between current and forthcoming legislative efforts on CbyCR and Treasury's preferred path forward is far from certain, especially considering that the Senate has yet to offer companion legislation to Mr. Boustany's proposal. For these and other reasons (e.g., the upcoming 2016 election season), we believe Treasury will be well-positioned to timely implement the CbyCR rules in the US.

Australia

Australia has agreed to adopt CbyCR for MNEs with group revenues over AU$1 billion, which happens to be significantly below €750 million at present. This requirement will apply to the reporting entity's tax years beginning on or after January 1, 2016, with reports due within 12 months of the end of the taxable year.

So far, Australia has not determined what its CbyCR format will look like, although in December 2015 the Australian Taxation Office noted that "[t]he approved form for the statements corresponding to the CbC report and master file will include the information outlined in Annexures III and I of the OECD guidance. In the case of the CbC report, the approved form will be the OECD specified CbC XML schema. The CbC report will require information about the multinational group's income, taxes and business activities sorted by tax jurisdiction."

The Australian Taxation Office (ATO) recently signed a multilateral agreement in Paris agreeing to share tax information of MNEs with other jurisdictions that are parties to the multilateral agreement. As a result, information obtained by the ATO through CbyCR will be available to be shared through this process.

China

On September 17, 2015, the China State Administration of Taxation (SAT) released a discussion draft of Implementation Measures of Special Tax Adjustments (Draft Circular) for public review and comment. This Draft Circular incorporates several transfer pricing and anti-avoidance rules proposed under BEPS Actions, including CbyCR. The Draft Circular does not include any sample CbyCR form, nor is it known when a formal tax regulation will be issued making the CbyCR requirement effective. As such, it is unclear how the new regulation will address MNEs located in countries with different effective dates.

According to the Draft Circular, two types of companies will be required to submit CbyCR in China: (1) a company registered in China as the ultimate holding company of an MNE with a consolidated revenue for the latest fiscal year exceeding RMB 5 billion (which is currently lower than, but close to, €750 million); or (2) a Chinese company with its ultimate parent company not registered within China, but which has been appointed by the MNE to comply with CbyCR filing requirements.

Furthermore, an audited Chinese company may be required to submit CbyCR if its overseas ultimate parent company is subject to CbyCR in its home country, but the Chinese tax authority is unable to obtain a copy of such report because either the parent company failed to submit the report or the information exchange regime does not require the production of the report.

If a company is required to comply with CbyCR, the report should be filed with related party transaction disclosures, which are part of the company's annual corporate income tax filings.

France

France has adopted CbyCR for accounting periods beginning on or after January 1, 2016, and filing of the report must occur within 12 months of the close of the company's annual accounting period.

The French CbyCR regime requires certain companies to declare, country-by-country, the distribution of "the profits of the group and the economic, accounting and fiscal aggregates, as well as information on the locality and the activity of the group companies." These rules apply to companies: (1) belonging to groups with a turnover of over €750 million, which are required to produce consolidated financial statements; and (2) held by entities located in a country that will not participate in CbyCR. A failure to comply or a delay in providing the CbyCR would be penalized by a fine of up to €100,000. It is not yet clear how delays in other countries' effective dates for CbyCR will be handled.

France expects to sign a multi-lateral agreement in 2018 that will require CbyCR to be delivered upon request by another country. The participating countries to the agreement will make a commitment to provide, in every jurisdiction in which the company group has a resident entity, the information required by the CbyCR.

Germany

To date, the German government has only announced that they intend to incorporate CbyCR into German tax law. While no new amendments to the German Tax Code have yet been released, it is expected they will be published in the next few months. If these regulations pass the German parliament this year, the new regulations should come into effect for the 2016 tax year, with reports due within 12 months of the end of the taxable year. Currently, it is expected that the new regulations will follow the OECD's recommendations, including the €750 million threshold for filing.

Ireland

Ireland published CbyCR regulations in January 2016 that will require companies to report for fiscal years beginning on or after January 1, 2016. Companies will have to file the report within 12 months of the end of the relevant fiscal year.

In general, the reporting will follow the recommendations of the OECD, including the €750 million threshold for filing. The regulations require that an Irish entity will be required to comply with Irish CbyCR if: (1) the ultimate parent company is not required to comply with CbyCR in its home country; (2) the home country of the ultimate parent company does not require an exchange of CbyCR information; or (3) there is otherwise an unwillingness of the home country to exchange information. In addition, Ireland expects to begin exchanging CbyCR reports by June 30, 2018.

Netherlands

The Netherlands has published rules to implement CbyCR for fiscal years beginning on or after January 1, 2016. Companies will have to file the report within 12 months of the end of the relevant fiscal year.

In general, the reporting will follow the recommendations of the OECD, including the €750 million threshold for filing. If the Netherlands does not obtain a CbyCR report for Dutch taxpayers from another country upon request, they can request the Dutch taxpayer to file the report instead.

Poland

CbyCR rules have been implemented in Poland and will be effective for tax years beginning on or after January 1, 2016, through amendment of the Corporate Income Tax Act. In general, the reporting will follow the recommendations of the OECD, including the €750 million threshold for filing. The ultimate parent company will be required to prepare the CbyCR report.

Additionally, an exemption from transfer pricing documentation was introduced for taxpayers whose neither costs, nor income exceed €2 million. At the same time, benchmarking analyses will be mandatory for entities with revenues or costs above €10 million.

Spain

New Spanish corporate income tax regulations have introduced CbyCR for fiscal years beginning on or after January 1, 2016. The rules will apply to those groups with revenues of at least €750 million in the 12 months preceding the beginning of the tax year. CbyCR should be submitted by the Spanish tax resident parent company of an MNE or by the Spanish subsidiary when the parent company is not a tax resident in Spain if: (1) the parent company appoints the Spanish subsidiary to prepare the CbyCR report; (2) there is no CbyCR obligation in the country where the parent company is a tax resident; or (3) there is no automatic information exchange agreement between the country where the parent company is a tax resident and Spain, or there is an automatic information exchange agreement, but it is repeatedly breached.

The CbyCR report must be submitted within 12 months following the end of the reporting year. The expectation is that the first report would be filed in 2017 for companies with a calendar year end. Although the reporting form has not yet been finalized, Spain will likely utilize the OECD's model template.

United Kingdom

One of the first countries to implement CbyCR was the UK, which passed legislation to require CbyCR as part of the annual Finance Act in March 2015. Draft regulations to implement CbyCR were then published in October 2015 to coincide with publication of the OECD BEPS Reports. There was a short period allowed for consultation and the regulations are now subject to confirmation by Parliament.

MNE groups headed by a UK company will be required to file an electronic report with HM Revenue and Customs (HMRC) using the OECD template (the exact format will be confirmed at a later date). The report will then be shared with other tax authorities. A UK member of an MNE group headed by a non-UK company will be able to make a voluntary filing. HMRC suggests this may be appropriate if the parent company is located in a jurisdiction that has not yet required CbyCR.

Groups with consolidated group revenues of £586 million will be subject to CbyCR. This amount is currently higher than the €750 million threshold proposed by the OECD and it is not clear how (if at all) exchange rate fluctuations will be addressed. The reporting obligation will apply to accounting periods beginning on or after January 1, 2016. This means that for groups with a December 31 year end, the first report will need to be submitted in 2017 in respect of the group's activities during 2016.

It is worth noting that HMRC believes they already have the authority to require submission of the CbyCR information from UK companies under existing powers. The new regulations will remove the need for HMRC to prompt or request production of the report and ensure it is submitted in a consistent format.

Conclusion

There is a clear consensus among tax authorities around the world that BEPS Action 13 and CbyCR is important and will be implemented within the next few years by all the countries participating in BEPS. There are some differences in reporting thresholds outside the Eurozone and some differences in the due dates of initial reports, which might cause some vexation in the early years. But CbyCR is here and we can expect more countries' laws, rules, and forms to be coming at us "fast and furious" over the next period – stay tuned!

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