

# EFAMA COMMENTS ON PUBLIC CONSULTATION DOCUMENT: REVIEW OF COUNTRY-BY-COUNTRY REPORTING (BEPS ACTION 13)

06 March 2020

## I - General comments / views on the Public Consultation Document

EFAMA<sup>1</sup> is grateful for the opportunity to comment on the OECD Public Consultation on Review of Country-by-Country Reporting (BEPS Action 13). Whereas the CbC report is still a relatively recent reporting requirement, it is premature for EFAMA to provide you with detailed and in-depth comments on all queries raised throughout the public consultation document.

Notwithstanding, after a brief assessment of the impact of the proposals within EFAMA's membership, we have received the following general comments that we would like to share with you, ahead of the meeting that will take place on 17 March 2020:

- a) The proposals under analysis will increase the burden associated with data collection and reporting, which is already quite costly for stakeholders.
- b) There is a risk that the available additional data would encourage audits or assessments that would go beyond the purposes of the CbC report.
- c) It is also likely that altering the data collected reduces its usefulness for statistical purposes due to the lack of consistency over time, thus constituting a substantial additional cost for taxpayers without a corresponding benefit for tax authorities.
- d) We can understand the purpose of this reporting obligations in the context of BEPS (to provide tax authorities with a risk assessment tool focussed on high-risk taxpayers) and we take the opportunity to ask the OECD to assess how it is being used by tax authorities for the purpose it was designed.
- e) The risks of misuse and misinterpretation of the information collected via CbC report beyond general BEPS Action 13 context should be avoided.

We also take the opportunity to raise the following points / suggestions:

- **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:** The gathering of information on these entities adds nothing to the report, while creates considerable additional work on the preparation of the CbC report as their data is not necessarily accessible through the central systems. Dormant entities should be excluded from the CbC report.

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<sup>1</sup> The European Fund and Asset Management Association, EFAMA, is the voice of the European investment management industry, representing 28 member associations, 59 corporate members and 22 associate members. At end 2018, total net assets of European investment funds reached EUR 15.2 trillion. These assets were managed by almost 62,000 investment funds, of which more than 33,000 were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining funds composed of AIFs (Alternative Investment Funds). [www.efama.org](http://www.efama.org)

- **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 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<sup>2</sup>. 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.
- **Confidential and commercially sensitive information:** The CbC reports contain commercial data that are available to the competent tax authorities and which are not in every case available to the public (depending on the public or private ownership of the constituent entities). It is important to take that into consideration and avoid an attempt to make all CbCR information public, as this entails risks related to commercially sensitive data that aren't otherwise publicly available and will lead to competitive issues in the market.

## II - EFAMA's comments on some of the questions raised throughout the PCD

<b>Section 1 - Implementation of the BEPS Action 13 minimum standard</b>
<b>1. What comments do you have regarding the general status of implementation of CbC reporting by members of the Inclusive Framework?</b>
We acknowledge that the implementation has been completed by approximately 90 out of the 137 members of the Inclusive Framework to introduce a CbC reporting requirement and a further 25 had legislation in draft form. This means that substantially all MNE groups above the revenue threshold are now subject to a requirement to file a CbC report or will be in the near future.
<b>Section 2 - The appropriate and effective use of CbC reports</b>
<b>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?</b>
<i>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.</i>
The CbC report is still a relatively recent reporting requirement. Changes should focus on known issues supported by evidence rather than perceived issues or concerns. It is therefore premature for EFAMA to make a judgement of the success of the CBCR at this stage.
<b>Section 3 - Other elements of the BEPS Action 13 report</b>

<sup>2</sup> 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.

**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 (e.g. Australia, France, Germany and Mexico) have introduced master and local file requirements that differ from the OECD guidance. The deviations from the OECD guidelines render the documentation process more onerous for both the master and local file preparation. This is a noteworthy recurring problem resulting in increased compliance costs as documentation requirements have to be monitored constantly at a jurisdictional level. Although local files are not uniform across the business as these do reflect specific local characteristics, some aspects of local businesses are common across the group 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 master file to the specificities of a group and further standardisation might lead to a loss of meaningful information.

**Section 4. 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 the PCD?**

We can see the benefits that will come from certainty/consistency of approach. Many entities are already adopting that approach and constituent entities which prudently applied the definition of cross-border transactions (or dealings considering they are conducted between the head office and the permanent establishment) were already included in the CbC reporting scope.

**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 the PCD?**

**Section 5. 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?**

**6. Are there any benefits 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 the PCD?**

**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 the PCD?**

The relevant information available regarding the ultimate beneficial ownership (and the technical feasibility to obtain the relevant information) may not create an equivalent position between the MNE groups which are present in different tax jurisdictions. *Ceteris paribus*, there would be no level playing field available for the different MNE groups based on the availability of such additional information.

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”. Widely held collective investment vehicles is not a defined term and there is no apparent reason as to why the exclusion would not be applied to other investment vehicles.

**8. From the perspective of groups, what definition of control should be used to determine whether groups are under common control that would balance the dual aims of providing useful information to tax administrations while not placing an excessive burden on groups?**

**9. From the perspective of groups, what proportion (e.g. one quarter, one third etc.) of the CbC reporting threshold could be used as a threshold, to require a CbC report to be prepared by groups under the common control of an individual or individuals acting together, that would balance the dual aims of providing useful information to tax administrations while not placing an excessive burden on smaller groups?**

**Section 6. 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 the PCD?**

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

Furthermore, considering that the current 750 million thresholds is determined through systematic study and that it already covers approximately 90% of global corporate profits, the benefits from lowering the threshold are not justifiable.

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

As the CbC report imposes an additional administrative burden on the MNE groups, the reduction of the threshold would result in significant increase in the resource burden / time cost / expenses due to the additional compliance obligations.

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 consultation document and as stressed above.

**Section 7. Should a jurisdiction with a consolidated group revenue threshold denominated in a currency other than EUR be required or permitted to rebase its threshold periodically?**

**12. Are there any benefits from each of the options for re-basing a non-EUR denominated threshold, in addition to those in the PCD?**

The re-basing options should provide a neutral treatment to MNE groups with revenue near the threshold but booked in different currency as described in the public consultancy documents.

**13. Are there any practical challenges to MNE groups from each of the options for rebasing a non-EUR denominated threshold, in addition to those in the PCD?**

**14. Option 3 and Option 4 refer to an agreed percentage movement in the value of a jurisdiction's consolidated group revenue threshold that would trigger a requirement to re-base the threshold. From the perspective of MNE groups, at what level should this percentage be agreed (e.g. 5%; 10%) in order to balance the goals of consistency and comparability?**

A study of currency fluctuation needs to be performed for selecting the percentage as such to balance the dual aims of simplicity and consistency.

**15. Are there any other options for re-basing a non-EUR denominated threshold that should be considered, in addition to those in the PCD?**

Similar to Option 3, a jurisdiction with a non-EUR threshold would be required to re-base its threshold at a set point every five years, if the re-based threshold would be more than an agreed percentage higher than the jurisdiction's current threshold. This approach can guarantee MNE groups whose revenues generally exceed but close to EUR 750 million in domestic currency to provide constant CbC reporting and avoid occasional gap years resulting from the devaluation of the domestic currency.

**16. For each of the options for applying a threshold that takes into account consolidated group revenue of more than one fiscal year described in this note, are there any benefits, in addition to those in the PCD?**

**17. For each of the options for applying a threshold that takes into account consolidated group revenue of more than one fiscal year, are there any practical challenges to MNE groups, in addition to those in the PCD?**

**Section 8. 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 the PCD?**

**Section 9. Should extraordinary income be included in consolidated group revenue?**

**19. Are there any benefits from including extraordinary income in consolidated group revenue, in addition to those in the PCD?**

20. Are there any practical challenges to MNE groups from excluding extraordinary income in consolidated group revenue, in addition to those in the PCD?

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?

Section 10. Should gains from investment activity be included in consolidated group revenue?

22. Are there any benefits from including gains from investment activity in an MNE group's consolidated financial statements, in addition to those in the PCD?

23. Are there any practical challenges to MNE groups from including gains from investment activity in an MNE group's consolidated group revenue, in addition to those in the PCD?

Considering the structure of investment funds as tax neutral investment pooling vehicles - as a matter of public policy and the fact that individual investors are subject to tax with respect to the distributions from funds – they generally do not pose BEPS risk and they are not the intended target of the BEPS actions. The inclusion of gains from investment in the revenue could cause unnecessary cost for it.

**Irrelevance of the information in the context of BEPS:** As gains on investment activity will almost invariably be 3rd party gains - intra-group transactions will be netted through the consolidation process - whilst of potential interest to tax authorities - such profits are not relevant in the context of a risk assessment tool relating to assessment and enforcement of transfer pricing rules.

**Distortion and scope volatility risks:** By their nature, these profits are generally extraordinary or exceptional. Hence their inclusion in an MNEs revenue distorts the picture, creating potential volatility in whether or not an MNE is in scope/out of scope. Further, this volatility will in part be driven by accounting standards that necessitate recognition of unrealised gains/losses as well as realised gains/losses. It is unlikely the accounting treatment at group level will map to the tax treatment at entity level, creating a further distortion.

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?

The inclusion of gains from investment would result in non-intended entities like investment funds to be covered by the CbC report.

Section 11. 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?

**25. Where the preceding fiscal year is less or more than 12 months, are there any benefits from a jurisdiction requiring an adjustment to (a) consolidated group revenue of the preceding fiscal year or (b) the consolidated group revenue threshold, in determining whether an MNE group is an excluded MNE group, in addition to those in the PCD? Otherwise, it would appear a jurisdiction could take either approach.**

Up until the end of December 2019 there was no clear guidance with regards the treatment of short accounting or long accounting period, and the various references to a “fiscal year” and an “annual accounting period” have led to some jurisdictions and MNE Groups forming a view that a CbC report cannot be required where an MNE Group prepares consolidated financial statements for a period other than 12 months or there were opposing views with regards to which jurisdiction’s remit should it fall under to request the CbC report submission. This view was not intended and led to cross sharing of certain CbC reports. This should be assessed by the latest guidance, which specifically contemplates that a CbC report can be required for a fiscal year of less than 12 months.

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

Further guidance regarding how the relevant adjustments shall be performed (with specific examples) should be provided. The adjustment solely on a pro-rata basis without considering the business cycles in the different industries may result in inconsistent annualised revenue reporting for the MNE Groups.

**Section 12. Should information in Table 1 be presented by entity rather than by tax jurisdiction?**

**27. Are there any benefits from including constituent entity information in Table 1, in addition to those in the PCD?**

The benefits from presenting Table 1 by entity rather than jurisdiction may be limited as the CbC report on its own cannot constitute a conclusive opinion on whether a transfer pricing policy adopted by MNE groups is appropriate. The additional information may have only limited contribution on the role of CbC report to indicate the BEPS risks posed by MNE groups and are not justifiable.

Moreover, disclosing CbC information at a constituent entity level may entail risks related to confidential and commercial sensitive information that, should it become publicly available, will lead to competitive issues in the market.

**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 the PCD?**

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 in 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.

Such additional requirement may constitute a substantial cost for the groups from an administrative point of view.

In addition, and as mentioned in our response to the previous question, CbC at constituent entity level entails risks relevant to confidential and commercial sensitive information that, should it become publicly available, will lead to competitive issues in the market.

**Section 13. Should consolidated data rather than aggregate data be used in Table 1?**

**29. Are there any benefits from requiring the use of consolidated data in Table 1, in addition to those in the PCD?**

**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 the PCD?**

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 mentioned above, the existing CbCR report already provides tax authorities with sufficient information to produce a high level risk assessment. Should they need to address specific questions regarding detailed flows, tax authorities can use other tools at their disposal (e.g. tax audit).

**Section 14. Should additional columns be added to Table 1?**

**31. For each of the possible new items of information considered in this section, are there any benefits from including an additional column in Table 1 of the CbC report template, in addition to those in the PCD?**

The Inclusive Framework seeks input from stakeholders on each of the following possible additional columns for Table 1:

- related party interest income
- related party royalty income
- related party service fee income
- related party interest expense
- related party royalty expense
- related party service fee expense
- total related party expenses
- research and development (R&D) expenditure
- deferred taxes.

At this stage, EFAMA understands the inclusion of additional information would be needless, a duplication and would bear extra-administrative costs. Most of the information included in table 1 is already included within the local files.

The intragroup transactions are generally well documented (either within the transfer pricing Master File or the Local file reports, as required by most of the tax jurisdictions of the Inclusive Framework members) and traced by large MNE groups.

The inclusion of the “volumes only” of these intragroup transactions alone in the CbC report (i) would be a duplication of administrative efforts, as they are generally included in the transfer pricing reports as well, (ii) would not provide sufficient details on the existence of certain transaction (i.e. residual profit split, cost sharing arrangements) without the description of the appropriate transfer pricing methodology, therefore this might result in incomplete and inappropriate conclusions in case of a high-level risk evaluation by the tax authorities.

**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 the PCD?**

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?**

As mentioned above, at this stage, EFAMA understands there is no need to include additional information in table 1. However, if the OECD decides to move forward with these proposals:

1. Clear guidance should be provided if the proposed new items should be filed in a consolidated basis as contemplated in section 13 or in aggregate basis per jurisdiction.
2. Clear guidance should be provided regarding the definition of interest. The treatment to interest accrued from interest bearing shares or other similar financial instruments should be clearly defined.
3. Clear guidance should be provided regarding the definition of royalties and service fee. For example, the "service fee" as such is not defined in OECD Model Tax Convention, therefore should service fee be construed as defined in the UN Model Tax Convention?

**Section 15. Should changes be made to how constituent entities that are not resident in any tax jurisdiction for tax purposes are categorised for CbC reporting purposes and how information on these entities is reported in Table 1?**

**34. For each of the possible approaches considered in this section, are there any benefits in addition to those in the PCD?**

**35. For each of the possible approaches considered in this section, are there any practical challenges or other concerns to MNE groups in addition to those in the PCD?**

Guidance should be provided to address the challenges on how to categorize an hybrid entity in situations where we have an overlap between category A and B, as for the Approaches 1 and 2, it is likely that a partnership that has several partners resident in several different jurisdictions.

**Section 16. Should fields required in the XML schema (e.g. tax identification number) that are not in the CbCR template in the Action 13 report be incorporated into the template?**

**36. Are there any benefits from including additional information required in the CbCR XML schema in the CbC report template, in addition to those in the PCD?**

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

It is likely that no Tax Identification Number (TIN) is assigned to certain types of constituent entities such as investment funds, partnerships in the jurisdiction in which they would otherwise be tax

resident etc. It is unclear how to file the additional information for such entities in the CbC XML schema if they are all assigned the identification i.e. "no TIN".

**Section 17. Should standardised industry codes be included in Table 2?**

**38. Are there any benefits from including standardised industry codes in the CbC report template, in addition to those in the PCD?**

The standardised industry code (for ex. NACE Rev 2.0) provides a more accurate description of the main activities of the companies in scope and facilitates the high-level risk analysis for the tax authorities.

**39. Are there any practical challenges or other concerns to MNE groups from including standardised industry codes in the CbC report template, in addition to those in the PCD?**

The incorrect representation of the constituent entities' industry code versus its actual operation may result in inconsistent and misleading CbC reporting. An additional difficulty might arise when considering the data availability at the level of the surrogate parent entities, which might have limited access to the relevant details.

**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?**

**Section 18. Should pre-determined fields be added to Table 3, in addition to free text?**

**41. Are there any benefits from including predetermined fields in Table 3 of the CbC report template, in addition to those in the PCD?**

Predetermined fields (for ex. drop down menu selection / proposed possible fields) would provide a guidance not only for MNE groups in filing the CbC report but also for tax authority in identifying the common mistakes made by MNE groups.

**42. Are there any practical challenges or other concerns to MNE groups from including predetermined fields in Table 3 of the CbC report template, in addition to those in the PCD?**

In case it is introduced, further guidance and instructions should be provided regarding the use of the predetermined fields in Table 3 (and how to interpret certain predetermined inclusions).

**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.