

Briefing December 2016

Federal Council Adopts Dispatch on Exchange of Country-by-Country Reports

On 23 November 2016, the Swiss Federal Council adopted the dispatch on the Multilateral Agreement on the exchange of Country-by-Country Reports (CbCRs) and draft federal implementing legislation. The proposal is aimed at implementing the minimum standard of the G20 countries and the OECD to combat base erosion and profit shifting (BEPS), in particular with regard to BEPS Action 13 concerning the review of transfer pricing documentation of multinational enterprises (MNEs) and the country-specific reporting. The proposed entry into force date is end of 2017, with automatic exchange of CbCRs starting in 2020.

The Swiss government actively participated in the BEPS project and the development of the minimum standard. The OECD's report on BEPS Action 13 provides that MNEs shall supply three sets of documentation: a CbCR, a master file and a local file.

3. the Federal Act on the International Automatic Exchange of CbCRs of MNEs (ALBA Act), likewise submitted to the Federal Parliament for approval.

Required Legal Basis

In order to implement the automatic exchange of CbCRs in Switzerland, the following legal foundations must be established:

1. the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (MAC Convention), which was adopted by the Parliament on 18 December 2015, will enter into force on 1 January 2017. The application in Switzerland will begin as of 1 January 2018;
2. the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (MCAA-CbCR), signed by the Swiss Government on 27 January 2016 and now submitted to the Federal Parliament for ratification;

Time Frame

The dispatch of the Federal Council followed a public consultation which was carried out between 13 April and 13 July 2016. If approved by the Parliament and provided that no referendum will be requested, the MCAA-CbCR and the ALBA Act might enter into force at the end of 2017, implying that qualifying MNEs operating in Switzerland would start having to prepare CbCRs from the fiscal year 2018 onwards. Switzerland would implement the automatic exchange of such CbCRs with its partner jurisdictions on an annual basis as from 2020. Once the ALBA Act will enter into force, the Federal Council will determine the list of jurisdictions with which to automatically exchange such CbCRs. Provided that entry into force will occur as scheduled, MNEs may voluntarily choose to submit CbCRs even for earlier

tax years than 2018, which would be exchanged by the Swiss Federal Tax Administration (SFTA) with competent tax authorities of the partner jurisdictions as from 2018.

Companies Affected by Automatic Annual Exchange of CbCRs

CbCRs are meant to show how the turnover generated and the taxes paid by a MNE group are distributed globally. They are also to provide information on the key economic activities performed by an MNE in each single jurisdiction. In scope are MNE groups with an annual consolidated turnover exceeding the equivalent of EUR 750 million as of 1 January 2015. Annual CbCRs would be submitted to the authorities of all partner jurisdictions in which the MNE group maintains business units ('constituent entities'), for as long a bilateral legal basis exists with each of those jurisdictions. As a prerequisite, the MAC Convention, the MCAA-CbCR and the ALBA Act must be in legal force; in addition, Switzerland must have bilaterally activated the automatic exchange of the country-specific reports with the partner jurisdiction in question.

The CbCR will generally be provided by the top company of the MNE. It will be collected by the competent tax authority of the jurisdiction in which such top entity is resident. The Report will be automatically exchanged on an annual basis with the competent tax authorities of all participating tax jurisdictions in which the MNE has one or more constituent entities (subsidiaries, permanent establishments), provided that a bilateral agreement enabling the exchange with the receiving jurisdiction is in place. Under certain conditions (for example, when the top entity is not resident in a participation jurisdiction), a substituting reporting entity may be determined in lieu of the top entity of the MNE, which will assume the reporting obligations of the top entity.

The minimum standard only concerns the CbCRs and their automatic annual exchange. Preparation of the master file and of the local files are not covered. The master file supplements the CbCR with more detailed information. The local file only includes information on specific group-internal transactions

of the local constituent entity and is only filed with the relevant local tax authority. All three reporting elements are exclusively prepared for the tax authorities and won't be made public.

Features of the Minimum Standard

The report on BEPS Action 13 defines the minimum standard, which includes the definition of MNEs concerned by the duty to file a country-specific report, the content of such report, the implementation time frame and the instruments needed by the tax authorities for the collection of the information. These instruments include a sample for the country-specific report, sample national legislation covering such reports, the MCAA-CbCR, and sample competent authority agreements on the mutual exchange of country-specific reports, either based on a double tax treaty (DTT) or based on a tax information exchange agreement (TIEA). Affected taxpayers include MNE groups comprising at least two constituent entities tax resident in different jurisdictions, as well as businesses that were set up in one jurisdiction for tax purposes, which are however subject to tax in another jurisdiction for having a permanent establishment in such other jurisdiction.

The sample country-specific report form is made up of three tables. The first table sets out aggregated information (such as the total number of FTEs in each jurisdiction) for each participating jurisdiction in which one of the constituent entities is resident. The second table lists all single constituent entities of the MNE per jurisdiction, including their state of incorporation if that differs from the state of residence, and their respective key activities. The third table is reserved for additional information.

Implications for Swiss based MNE Groups

Given the minimum consolidated turnover threshold of the equivalent of EUR 750 million as of 1 January 2015, an estimated 200 Swiss MNE groups will be affected. The Swiss National Bank is not considered to be in scope.

The Swiss country-specific report will have to be prepared in either German, French, Italian or English. Financial information must be stated in one single currency, either Swiss francs or the foreign functional currency adopted by the MNE.

Only under exceptional circumstances may the Swiss authorities require a Swiss resident constituent entity that is not the top consolidating entity of the MNE group to provide the country-specific report. Such will be the case either (a) where the

jurisdiction in which the consolidating top entity of the MNE group is resident is not a 'partner jurisdiction' of Switzerland, i.e. has not activated the bilateral automatic exchange of such reports, or (b) where a bilateral agreement on the mutual exchange of country-specific reports has been activated but the Swiss constituent entity has been informed by the SFTA of a systemic failure on the side of the partner jurisdiction and no substituting reporting entity has been determined.

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