

Colombia

Summary of key findings

1. Consistent with the agreed methodology this first annual peer review covers: (i) the domestic legal and administrative framework, (ii) certain aspects of the exchange of information framework, as well as (iii) certain aspects of the confidentiality and appropriate use of CbC reports. Colombia's implementation of the Action 13 minimum standard meets all applicable terms of reference for the year in review, except that Colombia should take steps to ensure that the appropriate use condition is met ahead of the first exchanges of CbC reports.

Part A: Domestic legal and administrative framework

2. Colombia has rules (primary and secondary laws) that impose and enforce CbC requirements on MNE Groups whose Ultimate Parent Entity is resident for tax purposes in Colombia. The first filing obligation for a CbC report in Colombia commences in respect of fiscal years commencing on or after 1 January 2016. Colombia meets all the terms of reference relating to the domestic legal and administrative framework.¹

Part B: Exchange of information framework

3. Colombia is a signatory of the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD/Council of Europe, 2011), signed on 25 May 2012, in force on 1 July 2014 and in effect for 2016. It is also a signatory to the CbC MCAA; it has provided its notifications under Section 8 of this agreement and intends to exchange information with all other signatories of this agreement which provide notifications. As of 12 January 2018, Colombia has 48 bilateral relationships activated under the CbC MCAA and exchanges under a bilateral CAA with the United States. Colombia has taken steps to have Qualifying Competent Authority agreements in effect with jurisdictions of the Inclusive Framework that meet the confidentiality, consistency and appropriate use conditions (including legislation in place for fiscal year 2016). Against the backdrop of the still evolving exchange of information framework, at this point in time, Colombia meets the terms of reference relating to the exchange of information framework aspects under review for this first annual peer review.²

Part C: Appropriate use

4. On the appropriate use of CbC Reports, Colombia has not yet provided information on measures relating to appropriate use. It is recommended that Colombia take steps to ensure that the appropriate use condition is met ahead of the first exchanges of CbC reports.³

Part A: The domestic legal and administrative framework

5. Part A assesses the domestic legal and administrative framework of the reviewed jurisdiction by reviewing the (a) parent entity filing obligation, (b) the scope and timing of parent entity filing, (c) the limitation on local filing obligation, (d) the limitation on local filing in case of surrogate filing and (e) the effective implementation of CbC Reporting.

6. Colombia has primary⁴ and secondary⁵ law in place to implement the BEPS Action 13 minimum standard.

(a) Parent entity filing obligation

Summary of terms of reference:⁶ Introducing a CbC filing obligation which applies to Ultimate Parent Entities of MNE Groups above a certain threshold of revenue, whereby all required Constituent Entities of the MNE Group are included in the CbC report and no entity is excluded from CbC Reporting other than permitted (paragraph 8 (a) of the terms of reference).

7. Colombia has introduced a domestic legal and administrative framework which imposes CbC filing obligation on Ultimate Parent Entities of MNE Groups above a certain threshold of revenue, whereby all required Constituent Entities of the MNE Group are included in the CbC report and no entity is excluded from CbC Reporting other than permitted by the Action 13 report (OECD, 2015).

8. For the purposes of determining who is required to submit CbC Reporting, Colombia's primary and secondary legislation⁷ provide that an MNE group is required to submit CbC Reporting if it meets the following conditions: 1) the Ultimate Parent Entity of the MNE group is resident in Colombia, 2) the entity holds subsidiaries, branches or permanent establishments resident or domiciled abroad, 3) the entity is not a subsidiary of another company resident abroad, 4) the entity has the obligation to prepare, provide and disclose consolidated financial statements and 5) the consolidated group revenues in the preceding financial year is at least 81 million Tax Value Unit (UVT). The requirement that "*the entity is not a subsidiary of another company resident abroad*"⁸ differs from that under the terms of reference in particular in respect of the definition of an "Ultimate Parent Entity" (UPE).⁹ This requirement under Colombia's law may lead to cases where the entity likely to be the UPE is owned by another entity (hereafter "an upper tier" entity) which does not prepare consolidated financial statements and thus cannot be considered as a UPE. In this situation, neither the entity likely to be the UPE, nor the "upper tier entity" would be considered as a UPE for the purposes of CbC Reporting requirements.¹⁰ However, Colombia indicates that a 50% shareholding is considered as necessary to qualify as a "subsidiary" in Colombia. This means that the "upper tier" entity would thus have a requirement to prepare consolidated financial statements. There may also be instances where the "upper tier" entity would not be resident in Colombia. Colombia confirms that the provisions of article 260, paragraph 2.a.iii. of the Colombian Tax Code and article 1.2.2.2.3.3., item 1.3 of the secondary law shall be read together with the definition of UPE (in article 1.2.2.2.3.2 of the secondary law) and that it will apply these provisions in accordance with the wording of the terms of reference (OECD, 2017).¹¹ It will clarify this in FAQ to be issued. As such, no recommendation is made but this aspect will be further monitored.

9. No other inconsistencies were identified with respect to Colombia's domestic legal framework in relation with the parent entity filing obligation.

(b) Scope and timing of parent entity filing

Summary of terms of reference: Providing that the filing of a CbC report by an Ultimate Parent Entity commences for a specific fiscal year; includes all of, and only, the information required; and occurs within a certain timeframe; and the rules and guidance issued on other aspects of filing requirements are consistent with, and do not circumvent, the minimum standard (paragraph 8 (b) of the terms of reference).

10. The first filing obligation for a CbC report in Colombia commences in respect of periods commencing on or after 1 January 2016.¹² The CbC report must be filed within 12 months of the last day of the fiscal year of the MNE Group, pursuant to article 4 of the DIAN resolution No.71/2017. It is noted that the article has set the first filing deadline of a CbC report until 23 February 2018 for Reporting Fiscal Years commencing on 1 January 2016. This will be monitored to ensure that the filing deadline will not impact the ability of Colombia to meet its obligations relating to the exchange of information under the terms of reference. Colombia should also have an express deadline to file the CbC report for the upcoming years. This will be monitored.

11. No other inconsistencies were identified with respect to the scope and timing of parent entity filing.

(c) Limitation on local filing obligation

Summary of terms of reference: If local filing requirements have been introduced, that such requirements may apply only to Constituent Entities which are tax residents in the reviewed jurisdiction, whereby the content of the CbC report does not contain more than that required from an Ultimate Parent Entity, whereby the reviewed jurisdiction meets the confidentiality, consistency and appropriate use requirements, whereby local filing may only be required under certain conditions and whereby one Constituent Entity of an MNE Group in the reviewed jurisdiction is allowed to file the CbC report, satisfying the filing requirement of all other Constituent Entities in the reviewed jurisdiction (paragraph 8 (c) of the terms of reference).

12. Colombia has introduced local filing requirements¹³ as from the reporting period starting on or after 1 January 2016.¹⁴ No inconsistencies were identified with respect to the local filing obligation.¹⁵

(d) Limitation on local filing in case of surrogate filing

Summary of terms of reference: If local filing requirements have been introduced, that local filing will not be required when there is surrogate filing in another jurisdiction when certain conditions are met (paragraph 8 (d) of the terms of reference).

13. Colombia's local filing requirements will not apply if there is surrogate filing in another jurisdiction.¹⁶ No inconsistencies were identified with respect to the limitation on local filing in case of surrogate filing.

(e) Effective implementation

Summary of terms of reference: Providing for enforcement provisions and monitoring relating to CbC Reporting's effective implementation including having mechanisms to enforce compliance by Ultimate Parent Entities and Surrogate Parent Entities, applying these mechanisms effectively, and determining the number of Ultimate Parent Entities and Surrogate Parent Entities which have filed, and the number of Constituent Entities which have filed in case of local filing (paragraph 8 (e) of the terms of reference).

14. Colombia has legal mechanisms in place to enforce compliance with the minimum standard: there are notification mechanisms in place that apply to all Constituent Entities in Colombia. There are also penalties in place in relation to the filing of a CbC report for failure:¹⁷ (i) to file a CbC report, (ii) to correctly file a CbC report and (iii) to submit it on time.

15. There are no specific processes in place that would allow Colombia to take appropriate measures in case it is notified by another jurisdiction that such other jurisdiction has reason to believe that an error may have led to incorrect or incomplete information reporting by a Reporting Entity or that there is non-compliance of a Reporting Entity with respect to its obligation to file a CbC report, however Colombia indicates that penalties may be imposed under article 651 of the Colombian Tax Code. As no exchange of CbC reports has yet occurred, no recommendation is made but this aspect will be further monitored.

Conclusion

16. In respect of paragraph 8 of the terms of reference (OECD, 2017), Colombia has a domestic legal and administrative framework to impose and to enforce CbC requirements on MNE Groups whose Ultimate Parent Entity is resident for tax purposes in Colombia. Colombia meets all the terms of reference relating to the domestic legal and administrative framework for the year in review.

Part B: The exchange of information framework

17. Part B assesses the exchange of information framework of the reviewed jurisdiction. For this first annual peer review process, this includes reviewing certain aspects of the exchange of information framework as specified in paragraph 9 (a) of the terms of reference (OECD, 2017).

Summary of terms of reference: within the context of the exchange of information agreements in effect of the reviewed jurisdiction, having QCAs in effect with jurisdictions of the Inclusive Framework which meet the confidentiality, consistency and appropriate use prerequisites (paragraph 9 (a) of the terms of reference).

18. Colombia has domestic legislation that permits the automatic exchange of CbC reports. It is a Party to (i) the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD/Council of Europe, 2011) (signed on 23 May 2012, in force on 1 July 2014 and in effect for 2016) and (ii) a number of bilateral Double Tax Agreements and a Tax Information and Exchange Agreement which allow Automatic Exchange of Information.¹⁸

19. Colombia signed the CbC MCAA on 21 June 2017 and submitted a full set of notification under section 8 of the CbC MCAA on 18 December 2017. It intends to have the CbC MCAA in effect with all other Competent Authorities that provide a notification under Section 8(1)(e) of the same agreement. As of 12 January 2018, Colombia has 48 bilateral relationships activated under the CbC MCAA and exchanges under a bilateral CAA with the United States. Colombia has taken steps to have Qualifying Competent Authority agreements in effect with jurisdictions of the Inclusive Framework that meet the confidentiality, consistency and appropriate use conditions (including legislation in place for fiscal year 2016).¹⁹ Against the backdrop of the evolving exchange of information framework, at this point in time Colombia meets the terms of reference relating to the exchange of information framework for the year in review.

Conclusion

20. Against the backdrop of the evolving exchange of information framework, at this point in time Colombia meets the terms of reference relating to the exchange of information framework.

Part C: Appropriate use

21. Part C assesses the compliance of the reviewed jurisdiction with the appropriate use condition. For this first annual peer review process, this includes reviewing certain aspects of appropriate use.

Summary of terms of reference: having in place mechanisms to ensure that CbC reports which are received through exchange of information or by way of local filing can be used only to assess high level transfer pricing risks and other BEPS-related risks and for economic and statistical analysis where appropriate; and cannot be used as a substitute for a detailed transfer pricing analysis or on their own as conclusive evidence on the appropriateness of transfer prices or to make adjustments of income of any taxpayer on the basis of an allocation formula (paragraphs 12 (a) of the terms of reference.

22. Colombia has not yet provided information on measures relating to appropriate use: it was therefore not possible to perform a review at this stage. It is recommended that Colombia take steps to ensure that the appropriate use condition is met ahead of the first exchanges of CbC reports.

Conclusion

23. In respect of paragraph 12 (a) of the terms of reference (OECD, 2017), Colombia is recommended to take steps to ensure that the appropriate use condition is met ahead of the first exchanges of CbC reports.

Summary of recommendations on the implementation of Country-by-Country Reporting

Aspect of the implementation that should be improved		Recommendation for improvement
Part A	Domestic legal and administrative framework	-
Part B	Exchange of information framework	-
Part C	Appropriate use	Colombia is recommended to take steps to ensure that the appropriate use condition is met ahead of the first exchanges of CbC reports.

Notes

¹ Paragraph 8 of the terms of reference (OECD, 2017).

² Paragraph 9 (a) of the terms of reference (OECD, 2017).

³ Paragraph 12 (a) of the terms of reference (OECD, 2017).

⁴ Colombia's Primary law consists of Article 108 of the Colombian Tax Code (Law No. 1,819/2016).

⁵ Colombia's Secondary law consists of Section 3 of Decree No. 2,120/2017, published on 15 December 2017.

⁶ The « summary of terms of reference » is provided to facilitate the reading of the report. Reference should be made to the exact wording of the terms of reference published in February 2017 (OECD, 2017).

⁷ See article 260, paragraph 2.a. of the Colombian Tax Code and article 1.2.2.2.3.3. of the secondary law.

⁸ See article 260, paragraph 2.a.iii. of the Colombian Tax Code and article 1.2.2.2.3.3., item 1.3 of the secondary law.

⁹ See paragraphs 8. a) i. and 18 of the terms of reference (OECD, 2017).

¹⁰ There may also be cases where an entity likely to be a UPE would not be held through ownership by another "upper tier entity" but may however be controlled by such entity (e.g. in some cases of joint-venture where there is control without ownership). In such a situation, the "upper tier entity" would normally be the UPE if it meets all the other conditions to be a UPE (e.g. prepare Consolidated Financial Statements).

¹¹ Colombia also affirms that OECD Guidelines must be used as an interpretation tool in case of interpretation issues (as set in Constitutional Court precedent Sentence C-690/2003).

¹² See article 260-5, paragraph 2 of the Colombian Tax Code.

¹³ Local filing can be required if the following conditions are present:

"3.1) to jointly have a participation in the consolidated income of the multinational group equal to or greater than twenty percent (20%);

3.2) that the parent company has not presented in its country of residence the Country by Country Report referred to in article 1.2.2.2.3.5. of this Decree. It will be understood that these are cases in which one of the following conditions is met:

3.2.1) *There is no legal requirement for the parent or contracting entity of the Multinational Group to submit the Country by Country Report in its jurisdiction of fiscal residence; or*

3.2.2) *The jurisdiction in which the parent or contractor entity resides for tax purposes has a current "International Agreement" of which Colombia is a Party, but does not have a "Qualified Competent Authorities Agreement" of which Colombia is a Party, on the filing date of the Country by Country Report for the informed Fiscal Year; or*

3.2.3. *There is a "Systematic Failure" in the tax residence of the Parent Entity or Controlling Entity that has been notified by the Colombian Tax Administration to the Member Entity or Pertaining to the Multinational Group that is resident for tax purposes in Colombia.*

3.3) *That the multinational group has obtained consolidated revenues for accounting purposes equal to or greater than eighty-one million (81 000 000) Unit of Tax Value-UVTs in the immediately preceding taxable period."*

¹⁴ See article 260-5, paragraph 2 (c) of the Colombian Tax Code and article 1.2.2.2.3.3. of the secondary law.

¹⁵ It is noted that the condition of "jointly have a participation in the consolidated income of the multinational group equal to or greater than twenty percent (20%)" narrows the situations in which local filing is required.

¹⁶ See Section 3, article 1.2.2.2.3.3., paragraph 3.3a of the secondary law.

¹⁷ See article 651 of the Colombian Tax Code (Penalties for not filing information):

"Persons or entities obliged to provide tax information, as well as those who have been requested for information or evidence who do not provide it, who do not provide it within the deadline established for it or information is provided wrongly or does not correspond to what is requested, will incur on the following penalties:

a. Five percent (5%) of the amount that was not informed in case of not filing.

b. Four percent (4%) of the amount that was informed mistakenly.

c. Three percent (3%) of the amount that was informed extemporaneously.

d. When it is not possible to establish the basis of the penalty or the information is not quantifiable, the penalty will be equivalent to half percent (0.5%) of the net income of the person or entity obliged to provide tax information. When there is no income, the penalty will be equivalent to half percent (0.5%) of the taxpayer's gross worth, corresponding to the immediately preceding year or previous Income Tax Return.

The aforementioned penalties cannot exceed 15 000 UVT. Tax Value Unit (Unidad de Valor Tributario, in Spanish)".

¹⁸ Colombia lists bilateral tax treaties that allow for the Automatic Exchange of Information with the following jurisdictions: Canada, Chile, Czech Republic, India, Korea, Mexico, Portugal, and Spain. It also lists a Tax Information Exchange Agreement with the United States.

¹⁹ It is noted that a few of Qualifying Competent Authority agreements are not in effect with jurisdictions of the Inclusive Framework that meet the confidentiality condition and have legislation in place: this may be because the partner jurisdictions considered to not have the Convention in effect for the first reporting period, or may not have listed the reviewed jurisdiction in their notifications under Section 8 of the CbC MCAA.

References

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