

## Kenya

### 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. Kenya does not have a legal and administrative framework in place to implement CbC Reporting. It is recommended that Kenya finalise its domestic legal and administrative framework in relation to CbC requirements as soon as possible (taking into account its particular domestic legislative process) and put in place an exchange of information framework as well as measures to ensure appropriate use.

#### ***Part A: Domestic legal and administrative framework***

2. Kenya does not have a legal and administrative framework in place to implement CbC Reporting and thus does not implement CbC Reporting requirements for the 2016 fiscal year. It is recommended that Kenya take steps to implement a domestic legal and administrative framework to impose and enforce CbC requirements as soon as possible, taking into account its particular domestic legislative process.<sup>1</sup>

#### ***Part B: Exchange of information framework***

3. Kenya is a Party to the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD/Council of Europe, 2011) (signed on 8 February 2016, not yet in effect). With respect to the terms of reference relating to the exchange of information framework aspects under review for this first annual peer review process,<sup>2</sup> it is recommended that Kenya take steps to bring the Convention into force as soon as possible, sign the CbC MCAA and have QCAAs in effect with jurisdictions of the Inclusive Framework which meet the confidentiality, consistency and appropriate use prerequisites. It is however noted that Kenya will not be exchanging CbC reports in 2018.

#### ***Part C: Appropriate use***

4. With respect to terms of reference under review for this first annual peer review,<sup>3</sup> Kenya does not yet have measures in place relating to appropriate use. It is recommended that Kenya take steps to ensure that the appropriate use condition is met ahead of the first exchanges of information. It is however noted that Kenya will not be exchanging CbC reports in 2018.

## 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. Kenya does not yet have legislation in place to implement the BEPS Action 13 minimum standard.

### *(a) Parent entity filing obligation*

Summary of terms of reference:<sup>4</sup> 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).

### *(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).

### *(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).

*(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).

*(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).

7. Kenya does not yet have its legal and administrative framework in place to implement CbC Reporting and thus does not implement CbC Reporting requirements for the 2016 fiscal year.

8. Kenya notes that draft legislation is currently under discussion and close to finalising. As Kenya got a new Parliament in August 2017, it is envisaged that Parliament will consider this new Income Tax Bill in the first quarter of 2018 and hence new legislation will come into effect in 2019.

9. The steps for implementing new legislation in Kenya are (1) drafting of the legislation, (2) release draft for public comments, (3) review and incorporation of comments, (4) publication of bill, (5) forwarding to Parliament for parliamentary process (including further public participation and deliberation by relevant committee) and approval, (6) presidential assent and (7) coming into effect.

*Conclusion*

10. In respect of paragraph 8 of the terms of reference (OECD, 2017), Kenya does not yet have a complete domestic legal and administrative framework to impose and enforce CbC requirements on the Ultimate Parent Entity of an MNE Group that is resident for tax purposes in Kenya. It is recommended that Kenya take steps to implement a domestic legal and administrative framework to impose and enforce CbC requirements as soon as possible, taking into account its particular domestic legislative process.

**Part B: The exchange of information framework**

11. 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 QCAAs 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).

12. Kenya does not yet have domestic legislation that permits the automatic exchange CbC reports. It is a Party to the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD/Council of Europe, 2011) (“the Convention”), signed on 8 February 2016. The instruments of ratification have not yet been deposited, therefore the Convention may not be in effect at the start of the commencement of CbC Reporting requirements. This means that Kenya may not be able to exchange (either send or receive) CbC reports under the Convention.

13. Kenya has not signed the CbC MCAA and does not have Qualifying Competent Authority Agreements (QCAAs) in effect.

14. As of 12 January 2018, Kenya does not yet have bilateral relationships activated under the CbC MCAA. It is recommended that Kenya take steps to enable exchanges of CbC reports relating to the fiscal year 2017, in particular:

- bringing the Convention into force as soon as possible (notably depositing its instrument of ratification, carrying on any internal process so that the Convention is brought into effect and lodging a Unilateral Declaration in order to align the effective date of the Convention with first intended exchanges of CbC reports under the CbC MCAA, as permitted under paragraph 6 of Article 28 of the Convention),
- signing the CbC MCAA,
- have QCAAs in effect.

### **Conclusion**

15. It is recommended that Kenya take steps to have the Convention in force as soon as possible, sign the CbC MCAA and have QCAAs in effect with jurisdictions of the Inclusive Framework which meet the confidentiality, consistency and appropriate use prerequisites. It is however noted that Kenya will not be exchanging CbC reports in 2018.

## **Part C: Appropriate use**

16. 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: (a) having in place mechanisms (such as legal or administrative measures) to ensure CbC reports which are received through exchange of information or by way of local filing are only used to assess high-level transfer pricing risks and other BEPS-related risks, and, where appropriate, for economic and statistical analysis; and cannot be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis; and are not used on their own as conclusive evidence that transfer

prices are or are not appropriate; and are not used to make adjustments of income of any taxpayer on the basis of an allocation formula (paragraphs 12 (a) of the terms of reference).

17. Kenya does not yet have measures in place relating to appropriate use. It is recommended that Kenya take steps to ensure that the appropriate use condition is met ahead of the first exchanges of information. It is however noted that Kenya will not be exchanging CbC reports in 2018.

### ***Conclusion***

18. It is recommended that Kenya take steps to ensure that the appropriate use condition is met ahead of the first exchanges of information. It is however noted that Kenya will not be exchanging CbC reports in 2018.

## 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	It is recommended that Kenya take steps to implement a domestic legal and administrative framework to impose and enforce CbC requirements as soon as possible, taking into account its particular domestic legislative process.
Part B	Exchange of information framework	It is recommended that Kenya take steps to have the Convention in force as soon as possible, sign the CbC MCAA and have QCAAs in effect with jurisdictions of the Inclusive Framework which meet the confidentiality, consistency and appropriate use prerequisites.
Part C	Appropriate use	It is recommended that Kenya take steps to ensure that the appropriate use condition is met ahead of the first exchanges of CbC reports.

### Notes

<sup>1</sup> Paragraph 8 of the terms of reference (OECD, 2017).

<sup>2</sup> Paragraph 9 (a) of the terms of reference (OECD, 2017).

<sup>3</sup> Paragraph 12 (a) of the terms of reference (OECD, 2017).

<sup>4</sup> 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).

### References

- OECD (2017), “Terms of reference for the conduct of peer reviews of the Action 13 minimum standard on Country-By-Country Reporting” in *BEPS Action 13 on Country-by-Country Reporting – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris.  
[www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf).
- OECD/Council of Europe (2011), *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol*, OECD Publishing, Paris,  
<http://dx.doi.org/10.1787/9789264115606-en>.



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