

Malaysia

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. Malaysia's implementation of the Action 13 minimum standard meets all applicable terms of reference, except that it raises one timing issue and one substantive issue in relation to its domestic legal and administrative framework. The report, therefore, contains two recommendations to address these issues. In addition, Malaysia should take steps to ensure that the appropriate use condition is met ahead of the first exchanges of CbC reports. It is however noted that Malaysia will not be exchanging CbC reports in 2018 (except for the CbC reports relating to the fiscal year 2016 that Malaysia would receive under the voluntary parent surrogate mechanism and which it would send to other jurisdictions).

Part A: Domestic legal and administrative framework

2. Malaysia has legislation in place that imposes and enforces CbC requirements on MNE Groups whose UPE is resident for tax purposes in Malaysia.¹ The filing obligation for a CbC report in Malaysia commences in respect of fiscal years commencing on or after 1 January 2017. Malaysia meets all the terms of reference relating to the domestic legal and administrative framework, with the exception of:

- the guidelines containing detailed instructions on the filing of CbC reports, including the content of a CbC report, which are yet to be published,²
- the absence of administrative mechanisms in place to enforce compliance by Ultimate Parent Entities with their filing obligations³

Part B: Exchange of information framework

3. Malaysia is a signatory of the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD/Council of Europe, 2011), which is not in force for 2017 (entry into force since 1 May 2017). Malaysia has however submitted a Unilateral Declaration in order to align the effective date of the Convention with the first intended exchanges of CbC reports under the CbC MCAA. Malaysia is also a signatory of the CbC MCAA. It has provided its notifications under Section 8(e)(i) of this agreement and intends to exchange information under the Multilateral Convention with a large number of other signatories of this instrument. As of 12 January 2018, Malaysia has 46 bilateral relationships activated under the CbC MCAA. With respect to the terms of reference relating to the exchange of information framework aspects under review for this first annual peer review process,⁴ Malaysia 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. It is noted that a number of Qualifying Competent Authority agreements are not in effect for the 2017 fiscal year with jurisdictions of the Inclusive Framework that meet the confidentiality condition and have legislation in place, in particular because the partner jurisdictions did not submit a Unilateral Declaration (with regard to the fact that Malaysia does not have the Convention in effect for its first reporting period). Since Malaysia has taken a number steps including by lodging a Unilateral Declaration, no recommendation is made. Against the backdrop of the still evolving exchange of information framework, at this point in time Malaysia meets the terms of reference relating to the exchange of information framework for the year in review.

Part C: Appropriate use

4. With respect to the terms of reference relating to the appropriate use aspects under review for this first annual peer review,⁵ Malaysia indicates that it does not yet have measures in place to ensure the appropriate use of information in all six areas identified in the *OECD Guidance on the appropriate use of information contained in Country-by-Country report* (OECD, 2017a).⁶ It is recommended that Malaysia ensures that the appropriate use condition is met ahead of the first exchanges of information. It is however noted that Malaysia will not be exchanging CbC reports in 2018 (except for the CbC reports relating to the fiscal year 2016 that Malaysia would receive under the voluntary parent surrogate mechanism and which it would send to other jurisdictions).

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.

6. Malaysia has primary and secondary legislation in place⁷ which implements the BEPS Action 13 minimum standard for reporting fiscal years beginning on or after 1 January 2017. No guidance has been published.⁸

(a) Parent entity filing obligation

Summary of terms of reference:⁹ 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. Malaysia has introduced a domestic legal and administrative framework which imposes a 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. The definition of an Ultimate Parent Entity ("ultimate holding entity")¹⁰ in Article 3 of Malaysia's CbC Reporting Rules refers to a constituent entity that owns directly or indirectly a sufficient interest in one or more other constituent entities in the MNE group.

There is one important difference between this definition and the definition of an Ultimate Parent Entity in the terms of reference: The definition in Malaysia's rules does not include a condition that the ultimate holding company is required to prepare Consolidated Financial Statements or would be so required if its equity interests were traded on a public securities exchange in Malaysia ("deemed listing provision"). Malaysia however confirms that listed companies and non-listed companies, as well as any other type of entity (notably partnerships), are subject to a requirement to prepare Consolidation Financial Statements (CFS) when they meet certain conditions of shareholding and / or control. Such requirement to prepare CFS may arise under Section 26D of the Financial Reporting Act 1997 [Act 558] which sets out the requirement that financial statements are to be prepared in compliance with "approved accounting standards" which is the financial standard approved by the Malaysian Accounting Standards Board. In relation to the preparation of CFS, Malaysia has adopted the international financial reporting standard through the Malaysian Financial Reporting Standard 10 which provides that an entity which controls one or more other entities (parent entity) is required to prepare the CFS. Further, Section 244 of Malaysia's Companies Act 2016 [Act 777] also requires a company which is a holding company, be it a public or private company, to prepare CFS in accordance with the approved accounting standard.¹¹

9. It is also noted that the definition in Malaysia's rules does not make it clear that the ultimate holding entity is a Constituent Entity that owns directly or indirectly a sufficient interest in one or more other Constituent Entities of the MNE Group "*such that it is required to prepare Consolidated Financial Statements under accounting principles generally applied in its jurisdiction of tax residence, or would be so required if its equity interests were traded on a public securities exchange in its jurisdiction of tax residence*".¹²

10. Malaysia confirms that the definitions in its legislation should be interpreted in light of the Action 13 minimum standard. The operation of these rules will be monitored to make sure that they apply consistently with the terms of reference.

11. No other inconsistencies were identified with respect to the parent entity filing obligation.¹³

(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).

12. The first filing obligation for a CbC report in Malaysia applies in respect of reporting fiscal years commencing from 2017. The CbC report must be filed no later than 12 months after the last day of the reporting fiscal year.¹⁴

13. Article 4 of Malaysia's CbC Reporting Rules lists the information that must be contained in an MNE group's CbC report. However, these rules do not contain detailed arrangements for the submission of a CbC report or a template for completing a CbC report. Malaysia indicates that the "Country-By-Country Reporting Guidelines 2017" are

being prepared at the time the peer review, but these have not yet been released. Malaysia indicates that the “Country-by-Country Report 2017” which contains instructions for the filing of CbC report has been prepared and is now under approval process before it is posted on the website.

14. It is therefore recommended that Malaysia publish detailed guidelines arrangements as soon as possible, prescribing all of, and only, the information as contained in the template in the Action 13 Report (OECD 2015 - Annex III to Chapter V - Transfer Pricing Documentation – Country-by-Country Report) with regard to each jurisdiction in which the MNE Group operates, as well as detailed arrangements for the submission of a CbC report.

15. 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).

16. Malaysia does not apply or plan to introduce local filing.

(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).

17. Malaysia's legislation requires a “surrogate holding company” to file in Malaysia when such surrogate company has been appointed by the MNE Group to do so. Surrogate filing shall occur only when certain conditions are met.¹⁵

(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).

18. Malaysia's legislation specifies that failure to file a CbC report is an offence and, on conviction, a fine of between MYR 20 000 (Malaysian ringgit) and MYR 100 000 and/or up to six months imprisonment may be imposed. In addition, where a person has been convicted, the court may make an order to comply with the CbC Reporting requirement within 30 days or such other period as the court deems fit. There are currently no administrative provisions for penalties or other enforcement mechanisms in cases of non-compliance. Malaysia indicates that it is currently in the midst of extracting information with regards to Malaysia's MNC (Multinational Corporation) that meets the threshold. The administrative mechanisms are also being prepared to ensure the smooth running of the compliance enforcement exercise.

19. There are no specific processes in place that would allow to take appropriate measures in case Malaysia is notified by another jurisdiction that such other jurisdiction has reason to believe that an error may have led to incorrect or incomplete information reported by a Reporting Entity or that a Reporting Entity is failing to comply with respect to CbC Reporting obligations. As no exchange of CbC reports has yet occurred, no recommendation is made but this aspect will be further monitored.¹⁶

20. It is recommended that Malaysia introduce administrative mechanisms to enforce compliance by Ultimate Parent Entities in Malaysia, which do not rely on a person first being convicted of an offence. No other inconsistencies were identified with the effective implementation of CbC Reporting.¹⁷

Conclusion

21. In respect of paragraph 8 of the terms of reference (OECD, 2017b), Malaysia has a domestic framework to impose CbC requirements on MNE Groups whose UPE is resident for tax purposes in Malaysia. Malaysia meets all the terms of reference relating to the domestic legal and administrative framework, with the exception of (i) the guidance on detailed filing requirements (paragraph 8 (b) iv. of the terms of reference (OECD, 2017b)); and (ii) the enforcement mechanisms (paragraph 8 (e) i. of the terms of reference (OECD, 2017b)).

Part B: The exchange of information framework

22. 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, 2017b).

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).

23. Malaysia has domestic legislation that permits the automatic exchange of 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) (signed on 25 August 2016, in force on 1 May 2017) (the "Convention").¹⁸ The Convention will therefore not be in effect at the start of the commencement of CbC Reporting in Malaysia on 1 January 2017. This means that Malaysia will not be able to exchange (either send or

receive) CbC reports with respect to 2017 fiscal year and will not send or receive CbC reports under the Convention and CbC MCAA on the exchange date in 2019. Malaysia has however lodged a Unilateral Declaration which enables exchanges of CbC reports relating to the fiscal year 2017 (by aligning 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)¹⁹ with other jurisdictions that have provided the same Unilateral Declarations.

24. Malaysia signed the CbC MCAA on 27 January 2016 and submitted a full set of notifications under section 8 of the CbC MCAA on 28 April 2017. It intends to have the CbC MCAA in effect with a large number of Competent Authorities which are signatories to the CbC MCAA and provide a notification under Section 8(1)(e) of the same agreement. As of 12 January 2018, Malaysia has 46 bilateral relationships activated under the CbC MCAA. Malaysia 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. It is noted that a number of Qualifying Competent Authority agreements are not yet in effect for the fiscal year 2017 with jurisdictions of the Inclusive Framework that meet the confidentiality condition and have legislation in place: this is because the partner jurisdictions did not submit a Unilateral Declaration (in regard of the fact that Malaysia does not have the Convention in effect for the first reporting period), or the partner jurisdictions considered do not have the Convention in effect for the first fiscal period, or may not have listed the reviewed jurisdiction in their notifications under Section 8 of the CbC MCAA. Since Malaysia has taken a number steps including by lodging a Unilateral Declaration, no recommendation is made. Against the backdrop of the still evolving exchange of information framework, at this point in time Malaysia meets the terms of reference relating to the exchange of information framework for the year in review.

Conclusion

25. Against the backdrop of the still evolving exchange of information framework, at this point in time Malaysia meets the terms of reference regarding the exchange of information framework.

Part C: Appropriate use

26. 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).

27. In order to ensure that a CbC report received through exchange of information or local filing can be used only to assess high-level transfer pricing risks and other

BEPS-related risks, and, where appropriate, for economic and statistical analysis, and in order to ensure that the information in a CbC report 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; or is not used on its own as conclusive evidence that transfer prices are or are not appropriate; or is not used to make adjustments of income of any taxpayer on the basis of an allocation formula (including a global formulary apportionment of income), Malaysia indicates that measures are in place to ensure the appropriate use of information in all six areas identified in the OECD *Guidance on the appropriate use of information contained in Country-by-Country reports* (OECD, 2017a). However, Malaysia has not provided any details in relation to these questions and it was therefore not possible to perform a review at this stage. It is recommended that Malaysia take steps to ensure that the appropriate use condition is met ahead of the first exchanges of information. It is however noted that Malaysia will not be exchanging CbC reports in 2018 (except for the CbC reports relating to the fiscal year 2016 that Malaysia would receive under the voluntary parent surrogate mechanism and which it would send to other jurisdictions).

Conclusion

28. In respect of paragraph 12 (a) of the terms of reference (OECD, 2017b), it is recommended that Malaysia take steps to ensure that the appropriate use condition is met ahead of the first exchanges of CbC reports. It is however noted that Malaysia will not be exchanging CbC reports in 2018 (except for the CbC reports relating to the fiscal year 2016 that Malaysia would receive under the voluntary parent surrogate mechanism and which it would send to other jurisdictions).

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 - Scope and timing of parent entity filing content of CbC report	It is recommended that Malaysia publish the detailed Guidelines as soon as possible containing instructions for the filing of CbC reports, prescribing all of, and only, the information as contained in the template in the Action 13 Report (Annex III to Chapter V of Transfer Pricing Documentation Country-by-Country Report) with regard to each jurisdiction in which the MNE Group operates.
Part A	Domestic legal and administrative framework - Effective implementation	It is recommended that Malaysia introduce administrative mechanisms to enforce compliance by Ultimate Parent Entities with their filing obligations in the absence of a conviction for an offence.
Part B	Exchange of information framework	-
Part C	Appropriate use	It is recommended that Malaysia 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, 2017b).

² Paragraph 8 (b) iv. of the terms of reference (OECD, 2017b).

³ Paragraph 8 (e) i. of the terms of reference (OECD, 2017b).

⁴ Paragraph 9 (a) of the terms of reference (OECD, 2017b).

⁵ Paragraphs 12 (a) of the terms of reference (OECD, 2017b).

⁶ These questions were circulated to all members of the Inclusive Framework following the release of the *Guidance on the appropriate use of information contained in Country-by-Country reports* (OECD, 2017) on 6 September 2017, further to the approval of the Inclusive Framework.

⁷ Primary law consists of Malaysia Income Tax Act 1967 and the following amendments (Laws of Malaysia, Act 785, Finance Act 2017): www.hasil.gov.my (accessed 20 April 2018).

The principal Act is amended by inserting after section 112 the following section: Section 112A – Failure to furnish country –by country report. The principal Act is amended by inserting after section 113 the following section: Section 113A – Incorrect returns, information returns or reports. The principal Act is amended by inserting after section 119A the following section: Section 119B – Failure to comply with rules made under paragraph 154(1)(c) on mutual administrative assistance.

Malaysia indicates that the Malaysia Income Tax Act (ITA)1967 is currently being updated to incorporate the 2017 amendment.

Secondary law consists of Income Tax (Country-By-Country Reporting) Rules 2016 (the “CbC Reporting Rules”): www.federalgazette.agc.gov.my (accessed 20 April 2018).

⁸ Malaysia indicates that work is in progress for the “CbCR Guidelines 2017”.

⁹ 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, 2017b).

¹⁰ Malaysia recently introduced amended rules in its CbC Reporting (Amendment) Rules 2017: the terms “ultimate holding company” have notably been changed to “ultimate holding entity”.

¹¹ Malaysia also notes that the requirement to prepare CFS is tied to the definition of “MNE Group”. As such, as long as any one of the Constituent Entities in a Group is required to prepare CFS or would be so required (deeming listing provision), the entire Group will be an MNE Group for the purpose of the CbC rules.

¹² Malaysia also notes that the requirement to prepare CFS is tied to the definition of “MNE Group”. As such, as long as any one of the Constituent Entities in a Group is required or would be required to prepare CFS, the entire Group will be an MNE Group for the purpose of the CbC rules.

¹³ In Malaysia’s previous CbC Reporting Rules 2016 (Article 2), a potential limitation of CbC Reporting had been identified as the Rules would apply to cases where, with respect to an MNE group: (a) *any of its constituent entities have cross-border transactions with other constituent entities*; (b) *the total consolidated group revenue in the financial year preceding the reporting financial year is at least three billion ringgit*; (c) *its ultimate holding company is incorporated under the Companies Action 1965 [Act 125] or under any written law and resident in Malaysia*; and (d) *its constituent entities are incorporated or registered under the Companies Act 1965 or under any written law or under the laws of a territory outside Malaysia and resident in Malaysia*.

It was not clear whether this Article, and in particular clauses a) and d) imposed limits that were inconsistent with the terms of reference. In addition, the definition of a “Multinational corporation group” under Article 3 of the CbC Reporting Rules 2016 referred to a “collection of corporations” and it was unclear whether entities other than corporations would be part of an MNE Group. Malaysia has amended these provisions in the CbC Reporting (Amendment) Rules 2017 by deleting sub-provisions (a) and (d) mentioned above; by referring to “entities” instead of “corporations”; and by referring to Constituent Entities which may be “deemed to be incorporated, registered or established under the Companies Act 2016 or under any written law or under the laws of a territory outside Malaysia and resident in Malaysia. Malaysia confirms that this intends to cover the case of entities which are not companies (e.g. partnerships).

¹⁴ See Article 1 (2) and 7 of the CbC Reporting Rules.

¹⁵ which reflect the conditions set in paragraphs 8 c) iv. a) b) and c) of the terms of reference (OECD, 2017b) for local filing requirements.

¹⁶ Malaysia indicates that a process will be design and constructed soon.

¹⁷ Malaysia indicates that a mechanism will be constructed and design for the purpose of validating whether all Ultimate Parent Entities and Surrogate Parent Entities (SPEs) that were to file in Malaysia did file a CbC report. In addition, penalties for failure to notify the reporting entity, to furnish the report and Incorrect returns will be imposed as stated in the Malaysia Income Tax Act 1967. Finally, the CbCR Guidelines 2017 has yet to be finalised.

¹⁸ Malaysia does not report any list of bilateral exchange of information agreements that are in force and that permit Automatic Exchange of Information.

¹⁹ Paragraph 6 of Article 28 of the Convention reads as follows: “[...] Any two or more Parties may mutually agree that the Convention [...] shall have effect for administrative assistance related to earlier taxable periods or charges to tax.”

References

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