

Malta

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. Malta's implementation of the Action 13 minimum standard meets all applicable terms of reference. The report, therefore, contains no recommendations.

Part A: Domestic legal and administrative framework

2. Malta has rules (primary and secondary laws) that impose and enforce CbC Reporting requirements on the Ultimate Parent Entity of a multinational enterprise group ("MNE" Group) that is resident for tax purposes in Malta. The first filing obligation for a CbC report in Malta commences in respect of fiscal years beginning on 1 January 2016 or later. Malta meets all the terms of reference relating to the domestic legal and administrative framework.¹

Part B: Exchange of information framework

3. Malta is a signatory to the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD/Council of Europe, 2011), which is in effect for 2016, and 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 a large number of signatories of this agreement which provide notifications under the same agreement. Malta also signed a bilateral Competent Authority Agreement (CAA) with the United States. As of 12 January 2018, Malta has 54 bilateral relationships activated under the CbC MCAA or exchanges under the EU Council Directive (2016/881/EU) and under the bilateral CAA. Malta 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, Malta meets the terms of reference relating to the exchange of information framework aspects under review for this first annual peer review process.²

Part C: Appropriate use

4. There are no concerns to be reported for Malta. Malta 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). It has provided details in relation to these measures, enabling it to answer "yes" to the additional questions on appropriate use.³ Malta meets the terms of

reference relating to the appropriate use aspects under review for this first annual peer review.⁴

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. Malta has primary law in place to implement the BEPS Action 13 minimum standard which enables the Minister responsible for finance to make rules in relation to the exchange of information,⁵ and secondary law (hereafter referred to as the “principal regulations”) establishing the necessary requirements, including the filing and reporting obligations.⁶ Guidance was not published.⁷

(a) Parent entity filing obligation

Summary of terms of reference:⁸ 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. Malta has introduced a domestic legal and administrative framework which imposes a CbC filing obligation on Ultimate Parent Entities of MNE Groups which have a consolidated group revenue above a certain threshold, 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. With respect to the definition of an “Excluded MNE Group”, the principal regulations state that this refers to a group having total consolidated group revenue of less than EUR 750 000 000 “or an amount in local currency approximately equivalent to EUR 750 000 000 as of January 2015” during the Fiscal Year immediately preceding the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year.⁹ While this provision would not create an issue for MNE Groups whose Ultimate Parent Entity is a tax resident in Malta, it may however be incompatible with the guidance on currency fluctuations for MNE Groups whose Ultimate Parent Entity is located in another jurisdiction, if local filing requirements were applied in respect of a Constituent Entity (which is a Malta tax resident) of an MNE Group which does not reach the threshold as determined in the jurisdiction of the Ultimate Parent Entity of such Group.¹⁰ Malta has indicated that the threshold calculation rule would apply in a manner consistent with the OECD guidance on currency fluctuations, in respect of an MNE Group whose Ultimate Parent Entity is located in a jurisdiction other than Malta. As such, no recommendation is made but this issue will be monitored.

9. No other inconsistencies were identified with respect to Malta’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 Malta commences in respect of fiscal years beginning on 1 January 2016 or later.¹¹ The CbC report must be filed within 12 months of the last day of the fiscal year of the MNE Group.¹²

11. The principal regulations of Malta include a description of the items to be included in a CbC Report (in Section III of Annex III). This explains that this should include notably “*the sum of revenues of all the Constituent Entities of the MNE group in the relevant tax jurisdiction generated from transactions with associated enterprises*”. However, interpretative guidance issued by the OECD¹³ subsequent to the issuance of the principal regulations explains that “*for the third column of Table 1 of the CbC report, the related parties, which are defined as “associated enterprises” in the Action 13 report, should be interpreted as the Constituent Entities listed in Table 2 of the CbC report*”. It is expected that Malta issue an updated interpretation or clarification of the definition of “associated enterprises” within a reasonable timeframe to ensure consistency with OECD guidance, and this will be monitored.

12. 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).

13. Malta has introduced local filing requirements in respect of fiscal years beginning on 1 January 2017¹⁴ or thereafter. No inconsistencies were identified with respect to the limitation on 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).

14. Malta's local filing requirements will not apply if there is surrogate filing in another jurisdiction by an MNE group.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: 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).

15. Malta has legal mechanisms in place to enforce compliance with the minimum standard. There are notification mechanisms in place that apply to the Ultimate Parent Entity and the Surrogate Parent Entity.¹⁷ There are also penalties in place in relation to the filing of a CbC report: (i) penalties for failure to file a CbC report¹⁸ and (ii) penalties for failure to file a CbC report in a complete and accurate manner.¹⁹ In addition, Malta states that the Commissioner may use any information gathering power under the Income Tax Acts to obtain any information required in a CbC report.²⁰

16. There are no specific processes in place that would allow to take appropriate measures in case Malta 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. Malta indicates that the processes are currently being developed. As no exchange of CbC reports has yet occurred, no recommendation is made but this aspect will be monitored.

Conclusion

17. In respect of paragraph 8 of the terms of reference (OECD, 2017b), Malta has a 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 Malta. Malta meets all the terms of reference relating to the domestic legal and administrative framework.

Part B: The exchange of information framework

18. 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).

19. Malta has domestic legislation that permits the automatic exchange of CbC reports.²¹ Malta 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 26 October 2012, in force on 1 September 2013 and in effect for 2016) and (ii) multiple bilateral Double Tax Agreements and Tax Information and Exchange Agreements.²² Malta has also implemented EU Council Directive 2016/881/2016 amending Directive 2011/16/EU as regards mandatory Automatic Exchange of Information in the field of taxation.

20. Malta signed the CbC MCAA on 26 January 2017 and submitted a full set of notifications under section 8 of the CbC MCAA on 8 March 2017. It intends to have the CbC MCAA in effect with a large number of signatories of this agreement which provide notifications under Section 8(1)(e) of the same agreement. Malta also signed a bilateral CAA with the United States. As of 12 January 2018, Malta has 54 bilateral relationships activated under the CbC MCAA²³ or exchanges under the EU Council Directive (2016/881/EU) and under the bilateral CAA. Malta 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 Malta meets the terms of reference relating to the exchange of information framework aspects under review for this first annual peer review.

Conclusion

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

Part C: Appropriate use

22. 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).

23. 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), Malta 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). It has provided details in relation to these measures, enabling it to answer “yes” to the additional questions on appropriate use. It has also provided a copy of its draft guidelines in relation to appropriate use.

24. There are no concerns to be reported for Malta in respect of the aspects of appropriate use covered by this annual peer review process.

Conclusion

25. In respect of paragraph 12 (a) of the terms of reference (OECD, 2017b), there are no concerns to be reported for the Malta. Malta thus meets these terms of reference.

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	-	

Notes

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

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

³ These questions were circulated to all members of the Inclusive Framework following the release of the Guidance on the appropriate use of information in CbC reports on 6 September 2017, further to the approval of the Inclusive Framework.

⁴ Paragraph 12 (a) of the terms of reference (OECD, 2017b).

⁵ Primary law consists of Articles 76 and 96 of the Income Tax Act: www.justiceservices.gov.mt (accessed 20 April 2018) and Article 10A of the Income Tax Management Act: www.justiceservices.gov.mt (accessed 20 April 2018).

⁶ Secondary law consists of the “Cooperation With Other jurisdiction on Tax Matters Regulations” (the “principal regulations”): <http://justiceservices.gov.mt> (accessed 20 April 2018) as amended by means of Legal Notice 400 of 2016 entitled “Cooperation with Other Jurisdiction on Tax Matters (Amendment) Regulations, 2016”: www.justiceservices.gov.mt (accessed 20 April 2018).

⁷ Malta indicates that guidance is currently being finalised and will be published in the coming weeks.

⁸ 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).

⁹ See annex III, Section 1, point 4 of the principal regulations.

¹⁰ See question IV. 1. “Impact of currency fluctuations on the agreed EUR 750 million threshold (June 2016) of the “Guidance on the Implementation of Country-by-Country Reporting” (OECD, 2018).

¹¹ See Regulation 13(7)(d) of the principal regulations.

¹² See Regulation 13(6) of the principal regulations which has been amended to extend the time frame for filing the CbC report from 9 months to 12 months.

¹³ See www.oecd.org/tax/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf (OECD, 2018).

¹⁴ See Article 1 of Section II “General Reporting Requirements” of Annex III of the principal regulations.

¹⁵ It is noted that Malta’s rules provide, in accordance with the provisions of European Union (EU) Council Directive 2016/881/EU (Annex III, Section II), that the Constituent Entity resident in Malta shall request its Ultimate Parent Entity to provide it with all information required to enable it to meet its obligations to file a country-by-country report, in accordance with regulation 13(4)(c). If despite that, that Constituent Entity has not obtained or acquired all the required information to report for the MNE Group, this Constituent Entity shall file a country-by-country report containing all information in its possession, obtained or acquired, and notify the

Commissioner that the Ultimate Parent Entity has refused to make the necessary information available. This shall be without prejudice to the right of the Commissioner to apply penalties provided for in national legislation and the competent authority of Malta shall inform all EU Member States of this refusal. It is also provided that where there are more than one Constituent Entities of the same MNE Group that are resident for tax purposes in the EU, the MNE Group may designate one of such Constituent Entities to file the country-by-country report conforming to the requirements that would satisfy the filing requirement of all the Constituent Entities of such MNE Group that are resident for tax purposes in the EU. Where a Constituent Entity cannot obtain or acquire all the information required to file a country-by-country report, then such Constituent Entity shall not be eligible to be designated to be the Reporting Entity for the MNE Group.

¹⁶ See Article 2 of Section II “General Reporting Requirements” of Annex III of the principal regulations.

¹⁷ See Article 3 and 4 of Section II “General Reporting Requirements” of Annex III of the principal regulations. This also applies to any other Constituent Entity resident in Malta.

¹⁸ See Regulation 48(1)(b): penalty of (i) EUR 200; and (ii) EUR 50 for every day during which the default existed; but not exceeding EUR 20 000.

¹⁹ See Regulation 48(2): penalty of (i) in the case of minor errors - (aa) EUR 200 and (bb) EUR 50 for every day during which the default existed; but not exceeding EUR 5 000; and (ii) in the case of significant non-compliance, a penalty of EUR 50 000.

²⁰ Malta mentions that Regulation 47 states that: “The Commissioner may use any information gathering power under the Income Tax Acts, including those under the provisions of article 10A and article 20 of the Income Tax Management Act, to obtain any information specified in Section III of Annex III to these regulations, notwithstanding that the said information may not be required for the purposes of the Income Tax Acts. The provisions of this regulation shall be interpreted widely in the same manner as the interpretation found in regulation 5”.

²¹ See amended Regulations 13 (4) and 49 of the principal regulations which extend CbC Reporting with all relevant jurisdictions including non-EU Member States.

²² Malta indicates that all of its 72 double taxation agreements permit Automatic Exchange of Information and that none of its TIEAs currently in force allow for Automatic Exchange of Information but these are being modified and upgraded to allow Automatic Exchange of Information, due to the negotiation of bilateral Competent Authority Agreements for the Automatic Exchange of Financial Account Information, under the Common Reporting Standard.

²³ It is noted that a few 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 do 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.

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