

South Africa

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. South Africa's implementation of the Action 13 minimum standard meets all applicable terms of reference.

Part A: Domestic legal and administrative framework

2. South Africa has rules (primary and secondary law) 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 South Africa. The first filing obligation for a CbC report in South Africa commences in respect of fiscal years beginning on 1 January 2016 or later. South Africa meets all the terms of reference relating to the domestic legal and administrative framework.¹

Part B: Exchange of information framework

3. South Africa 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 other signatories of this agreement which provide notifications. As of 12 January 2018, South Africa has 51 bilateral relationships activated under the CbC MCAA or exchanges under a bilateral competent authority agreement. South Africa 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 South Africa 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. There are no concerns to be reported for South Africa. South Africa 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 South Africa 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 (a) the 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. South Africa has primary law in place for implementing the BEPS Action 13 minimum standard⁵ establishing the necessary requirements, including the filing and reporting obligations. Secondary law⁶ including a ‘public notice’⁷ (issued under section 29(1)(b) of the Tax Administration Act and which also has the status of secondary law) have also been published.

(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. South Africa 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. No inconsistencies were identified with respect to South Africa’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).

9. The first filing obligation for a CbC report in South Africa commences in respect of fiscal years beginning on 1 January 2016 or later.⁹ The CbC report must be filed within 12 months of the last day of the fiscal year of the MNE Group.¹⁰

10. Article 4.2. of the CbC regulations refers, for the information to be contained in a CbC report, to the Annex III of Chapter V of the *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 Final Report* (OECD, 2015). This reference includes a definition of “Revenues – Related Party”. However, interpretative guidance issued by the OECD in April 2017, subsequent to the CbC 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 (OECD, 2015), should be interpreted as the Constituent Entities listed in Table 2 of the CbC report”. It is expected that South

Africa issue an updated interpretation or clarification of the definitions of "Revenues – Unrelated Party" and "Revenues – Related Party" within a reasonable timeframe to ensure consistency with OECD guidance, and this will be monitored.

11. No 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. South Africa has introduced local filing requirements in respect of fiscal years beginning on 1 January 2016.¹¹ No inconsistencies were identified with respect to the limitation on local filing obligation.

(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. South Africa's local filing requirements will not apply if there is surrogate filing in another jurisdiction by an MNE group.¹² 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).

14. South Africa has legal mechanisms in place to enforce compliance with the minimum standard. There are processes in place that allow for the monitoring of filing entities.¹³ There are also penalties in place in relation to the filing of a CbC report:

(i) penalties for failure to abide by reporting obligations and (ii) penalties for inaccurate information. This does not stem from provisions specific to CbC Reporting but from the comprehensive administrative penalty scheme and criminal sanctions scheme of the Tax Administration Act.¹⁴

15. In case South Africa 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, South Africa would trigger the spontaneous exchange of information procedure within the tax administration, using the latter's enforcing powers if necessary. As no exchange of CbC reports has yet occurred, this aspect will be further monitored.

Conclusion

16. In respect of paragraph 8 of the terms of reference (OECD, 2017b), South Africa 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 South Africa. South Africa meets all the terms of reference relating to the domestic legal and administrative framework.

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, 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).

18. South Africa has domestic legislation that permits the automatic exchange of CbC reports.¹⁵ 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 3 November 2011, in force on 1 March 2014 and in effect for 2016), as well as multiple double tax agreements allowing for Automatic Exchange of Information.

19. South Africa signed the CbC MCAA on 27 January 2016 and submitted a full set of notifications under section 8 of the CbC MCAA on 23 June 2017. It intends to have the CbC MCAA in effect with a large number of other Competent Authorities that provide a notification under Section 8(1)(e) of the same agreement. South Africa has signed bilateral competent authority agreements (CAA) with the United States and with Hong Kong. As of 12 January 2018, South Africa has 51 bilateral relationships activated under 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).¹⁶ Against the backdrop of the still evolving exchange of information framework, at this point in time South Africa

meets the terms of reference relating to the exchange of information framework aspects under review for this first annual peer review.

Conclusion

20. Against the backdrop of the still evolving exchange of information framework, at this point in time South Africa meets the terms of reference regarding 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: (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).

22. 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), South Africa 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.

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

Conclusion

24. In respect of paragraph 12 (a) of the terms of reference, there are no concerns to be reported for South Africa. South Africa 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 the amendment to the Tax Administration Act No. 28 of 2011.

⁶ Secondary law published on 23 December 2016 consists of “Regulations for purposes of paragraph (b) of the definition of “international tax standard” in section 1 of the Tax Administration Act, 2011, promulgated under section 257 of the Act, specifying the changes to the Country-by-Country Reporting Standard for Multinational Enterprises” (hereafter “the CbC regulations”).

⁷ Public notice published on 28 October 2016 setting out the record keeping requirements for purposes of CbC Reporting as well as transfer pricing reporting and auditing in general.

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 article 7 of the CbC regulations.

¹⁰ See article 5 of the CbC regulations. It is noted that a Public Notice 1308 (notice published in terms of section 25 of the Tax Administration Act 2011 on 8 December 2017) has extended the first filing deadline of a CbC report until 28 February 2018 for Reporting Fiscal Years commencing before 1 March 2016. This will be monitored to ensure that the filing deadline in the cases of Reporting Fiscal years commencing as from 1 January and before 1 March 2016 will not impact the ability of the South Africa to meet its obligations relating to the exchange of information under the terms of reference.

¹¹ See article 7 of the CbC regulations.

¹² See paragraph 3 of article 2 of the CbC regulations.

¹³ This is described as an administrative practice by the South African Revenue Service, which has analysed the group financial statements of groups headquartered in South Africa with a view to identifying those that meet or approach the total consolidated group revenue threshold to qualify as MNE Groups.

¹⁴ These schemes are set out in chapters 15, 16, 17 and 26 of the Tax Administration Act: the comprehensive administrative penalty scheme of Chapter 15 (public notice under section 210(2)) or 16 (understatement penalty under section 222) of the TA Act applies, as well as criminal sanctions under Chapter 17 (for example, section 234(d) or (g); (h)(i)) of the TA Act. Enforcement scheme under TA Act, in particular section 26, Chapter 3, 4 & 5, applies in addition to sanctions for non-compliance listed above. In addition, under section 46(2)(b) of the TA Act, the SARS may require relevant material held or kept by a connected person, as referred to in paragraph (d)(i) of the definition of ‘connected person’ in the Income Tax Act, 1962, in relation to the taxpayer, located outside the Republic. If a taxpayer fails to provide material referred to in subsection (2)(b) of the TA Act, the material may not be produced by the taxpayer in any subsequent proceedings, unless a competent court directs otherwise on the basis of circumstances outside the control of the taxpayer and any connected person referred to in paragraph (d)(i) of the definition of ‘connected person’ in the Income Tax Act, in relation to the taxpayer.

¹⁵ Section 108(1) of the Income Tax Act, 1962, read with section 231 of the Constitution of the Republic of South Africa. Act 108 of 1996, provide for the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and DTA’s (ratified and published in the Government Gazette), to be effective as if they had been incorporated into the Income Tax Act and therefore becomes part of South Africa’s domestic law.

¹⁶ 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.

References

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