Country-by-Country Reporting (CbCR) – Clarification of the Term "Group"

August 2019

The scheduled amendment to the CbC Act (CbCG)[1] stipulates that the term "Group" in particular should be adjusted to the definition of the OECD.

Background of the legislative review

A measure under the OECD/G20 Base Erosion and Profit Shifting (BEPS) project concerns the automatic exchange of country-by-country reports by multinational groups of companies (Country-by-Country Reporting, CbC Reporting, CbCR). Its implementation in Liechtenstein took effect on 1 January 2017.[2] To simplify the national implementation of Country-by-Country Reporting, a model legislative framework has been developed by the OECD/G20. The states were not bound to exactly adopt the wording of the model provision, but could "adapt this model provision to their own legal systems, where changes to current legislation were required".[3]

Liechtenstein did not adopt the definition of the term "Group" from the model provision in the creation of its CbC Act, but provided for a specific wording with reference to the Persons and Companies Act (PGR).

Since the entry into force of the CbCG, the OECD has continuously amended its Guidance on the Implementation of Country-by-Country Reporting[4] on the basis of interpretative issues. In addition, the effective implementation of the CbCR standard has been included as a new criterion for the EU list of non-cooperative jurisdictions for tax purposes. For members of the so-called Inclusive Framework of the OECD, including Liechtenstein, it is expected that they implement the CbC Reporting in full compliance with the minimum standard by the end of 2019.[5] As a result, the term "group" in the Liechtenstein CbCG is to be adapted to the wording of the OECD model provision.

The term "Group"

In accordance with the OECD model provision, the term "Group" in Art. 2 (1) (a) CbCG shall be defined as a collection of enterprises related through ownership or control so that the group is

- either required to prepare consolidated financial statements for financial reporting purposes under applicable accounting principles OR
- would be so required if equity investments in any of the enterprises were traded on a public securities exchange.

Accounting principles

Liechtenstein-based companies (parent companies) in the legal form of a company limited by shares *(Aktiengesellschaft)*, a limited partnership *(Kommanditaktiengesellschaft)*, and a limited liability company *(Gesellschaft mit beschränkter Haftung)* are required to prepare consolidated financial statements if they have controlling interests or otherwise exercise controlling influence over the subsidiaries (Article 1097 PGR in conjunction with Art. 1063 PGR).

For parent companies in the legal form of the foundation, the establishment or the trust reg. there is no requirement to deliver consolidated financial statements under Liechtenstein law. In such cases, the assessment of whether there is a group of companies should be based on the deemed listing provision.

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[1] Government Consultation Report (VNB) amending the Law on the International Automatic Exchange of Country-by-Country Reports of Multilateral Groups of Companies (CbC Act).

[2] For the implementation of CbC Reporting in Liechtenstein see CONFIDA-Info: "Country-by-Country Reporting (CbCR). Implementation in Liechtenstein".

[3] OECD, Transfer Pricing Documentation and Country-by-Country Reporting, Action 13: 2015 Final Report, Nr. 61, p. 23.

[4] OECD, Guidance on the Implementation of Country-by-Country Reporting, BEPS Action 13, updated September 2018 (cited: OECD Guidance).

[5] Council of the European Union, doc. 14363/18, FISC 480, ECOFIN 1058, 20.11.2018, p. 2, Nr. 11 in conjunction with Council of the European Union, doc. 14364/18, FISC 481, ECOFIN 1059, 20.11.2018, p. 14 and ANNEX 3 as well as Council of the European Union, doc. 10823/18, DCL 1, FISC 293, 02.04.2019, p. 4ff.

Deemed listing provision

The deemed listing provision is used, according to the OECD definition, when there is a group of companies and the ultimate parent entity is not required to prepare consolidated financial statements. "In this case, the Group includes all entities that would be included in the Consolidated Financial Statements that the relevant enterprise would be required to prepare if it was listed on a public securities exchange."[6] Furthermore, it results from the OECD Guidance that it is irrelevant to the deemed listing provision "whether or not a particular type of entity is in fact able to be listed, taking into account, among other things, the jurisdiction's company law and/or regulations governing the relevant public securities exchange".

The OECD Guidelines indicate that neither the deemed listing provision nor the OECD Guidance should be interpreted as constituting any exemption from the requirement to file the Country-by-Country report other than the exemption by sales volume, i.e. multinational groups with a consolidated turnover of less than CHF 900 million.

Legal data protection adjustments

In the context of the amendment to the CbCG, pending adjustments in connection with the revised Data Protection Act are still to be made. Since the data protection related corrections are more formal in nature, they will not be discussed any further here.

Coming into Effect

The draft bill is currently being circulated to stakeholders for comments to be submitted by 9 August 2019. Subject to a possible referendum, the amendments to the CbCG shall enter into force on 1 January 2020.

Consequences

It is anticipated that the proposed amendments to the CbCG will come into effect on January 1, 2020. Considering the current time limits, this, in our opinion, should mean the following:

- registration: Liechtenstein companies that become subject to reporting as a result of the new definition of the term "Group" are required to register with the Liechtenstein tax administration without being asked to do so by the end of the reporting period, i.e. 31 December 2020;
- reporting: the first reporting would then be made within 12 months after the end of the reporting period, i.e. by December 31, 2021.

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[6] OECD Guidance, p. 20.