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Guidelines for the implementation of  
the  
EU Council Directive 2016/881/EU of  
25 May 2016 amending Directive  
2011/16/EU as regards mandatory  
automatic exchange of information in  
the field of taxation (DAC4)  
in Malta  
and the  
2015 Final Report on Action 13 of the  
OECD/G20 Base Erosion and Profit  
Shifting Project

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## Abbreviations

Base Erosion and Profit Shifting	<b>BEPS</b>
Commissioner for Revenue	<b>CfR</b>
Country-by-Country	<b>CbC</b>
Country-by-Country Reporting	<b>CbCR</b>
Competent Authority Agreement	<b>CAA</b>
EU Council Directive 2016/881/EU	<b>DAC IV</b>
European Central Bank	<b>ECB</b>
European Union	<b>EU</b>
Multilateral Competent Authority Agreement	<b>MCAA</b>
Multinational Enterprise	<b>MNE</b>
Organisation for Economic Development and Cooperation	<b>OECD</b>
Small and Medium-Sized Enterprise	<b>SME</b>
Ultimate Parent Entity	<b>UPE</b>

# 1 Introduction

In recent years, the challenge posed by tax fraud and tax evasion has increased considerably and has become a major focus of concern within the European Union (hereinafter referred to as 'EU') and at global level. The automatic exchange of information constitutes an important tool in this regard and is seen as the future European and international standard for transparency and exchange of information in tax matters.

As multinational enterprise groups (hereinafter referred to as 'MNE Groups') are active in different countries, they have the possibility of engaging in aggressive tax-planning practices that are not available for domestic companies. Purely domestic companies, normally small and medium-sized enterprises (hereinafter referred to as 'SMEs'), may thus be particularly affected, as their tax burden is higher than that of MNE Groups. Tax authorities need comprehensive and relevant information on MNE Groups regarding their structure, transfer-pricing policy and internal transactions. Such information will enable tax authorities to react to harmful tax practices by making changes in legislation or by undertaking adequate risk assessments and tax audits, and to identify whether companies have engaged in practices that have the effect of artificially shifting substantial amounts of income into tax-advantaged environments. Increased transparency could have the effect of giving MNE Groups an incentive to abandon certain practices and pay their fair share of tax in the country where profits are made. Enhancing transparency for MNE Groups is therefore an essential part of tackling base erosion and profit shifting (hereinafter referred to as 'BEPs').

## 1.1 Outline of EU Council Directive 2016/881/EU ('DAC4')

Exchange of information between Member States is already available through Council Directive 2011/16/EU. DAC4 has extended the cooperation between EU tax authorities to automatic exchange of country-by-country reports (hereinafter referred to as 'CbC Reports'). The mandatory automatic exchange of CbC reports between Member States should in each case include the communication of a defined set of basic information that would be accessible to those Member States in which, on the basis of the information in the country-by-country report, one or more entities of the MNE Group are either resident for tax purposes or subject to tax with respect to the business carried out through a permanent establishment (hereinafter referred to as 'PE') of an MNE Group.

In order to minimise costs and administrative burdens both for tax administrations and for MNE Groups, rules for the automatic exchange of information as per DAC4 are in line with international developments. On 19<sup>th</sup> July 2013, the Organisation for Economic Development and Cooperation (hereinafter referred to as 'OECD') published its Action Plan on Base Erosion and Profit Shifting ('hereinafter referred to as 'BEPS'), which was a major initiative to modify existing international tax rules, with the final reports being presented on 5<sup>th</sup> October 2015. The work on Action 13 of the BEPS Action Plan resulted in a set of standards for providing information for MNE Groups, including the master file, the local file and the CbC report.

It was therefore felt appropriate that OECD standards were taken account of when establishing rules on the CbC report. EU action in the area of CbC reporting will continue to take account of future developments at OECD level and in implementing DAC4, Member States are required to use the 2015 Final Report on Action 13 of the OECD/G20 Base Erosion and Profit Shifting Project (hereinafter referred to as 'CbCR Final Report'), developed by the OECD, as a source of illustration or interpretation, as well as to ensure consistency of application across all Member States. It is thus pertinent to note that both DAC4 and ultimately, Maltese legislation, closely mirrors the OECD's CbCR Final Report and relies on it for interoperation and implementation of CbC Reporting.

## 1.2 Outline of the OECD/G20 2015 Final Report on Action 13 ('DAC4')

CbC Reporting is part of Action 13 of the Action Plan on BEPS, which recognised that enhancing transparency for tax administrations is essential to tackle the BEPS problem. To this effect, it was identified that this can be done by providing tax administrations with adequate information to conduct transfer pricing risk assessments. The Action 13 report proposes a three-tiered standardised approach to transfer pricing documentation:

1. **The Master File** - requirement for MNEs to provide tax administrations with high-level information regarding their global business operations and transfer pricing policies, available to all relevant tax administrations;
2. **The Local File** – requirement for MNEs to provide detailed transactional transfer pricing documentation, specific to each country, identifying material related party transactions, the amounts involved in those transactions, and the company's analysis of the transfer pricing determinations they have made with regard to those transactions;
3. **The Country-by-Country Report** – requirement for MNEs with annual consolidated group revenue of € 750 million to provide annually and for each tax jurisdiction in which they do business the amount of revenue, profit before income tax, taxes and other indicators of economic activities.

Taken collectively, the above three documents will make it easier for tax administrations to identify whether companies have engaged in transfer pricing and other practices that have the effect of artificially shifting profits into tax-advantaged environments. With specific reference to the CbC report, this will give a global overview of the operations of MNE Groups, as well as an overview of all Constituent Entities for which financial information is reported, including the main business activities carried out by each entity. It will be helpful for high-level transfer pricing risk assessment purposes and can also be used in evaluating other BEPS related risks or for economic and statistical analysis. It is imperative to note however, that the CbC Report should not 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, as the information contained therein does not constitute conclusive evidence that transfer prices are or are not appropriate. On the other hand, tax administrations should not be prevented from using the CbC Report data as a basis for making further enquiries into the MNE's transfer pricing arrangements or into other tax matters in the course of a tax enquiry.

In order to ensure consistent and swift implementation of CbC Reporting developed under Action 13 of the BEPS Action Plan, a CbC Reporting Implementation Package has been agreed by countries participating in the OECD/G20 BEPS Project. Moreover, as the implementation of automatic exchange of information by means of a Multilateral Competent Authority Agreement in the context of the Common Reporting Standard proved to be time and resource efficient, the same approach was adopted in relation to CbC Reporting. Malta is a party to the instrument and has signed the CbC MCAA on the 26<sup>th</sup> January 2017.

### 1.3 Implementation of DAC4 and CRS into Maltese legislation

DAC4 has been implemented into Maltese legislation by virtue of LN 400 of 2016 entitled the Cooperation with Other Jurisdictions on Tax Matters (Amendment) Regulations, 2016 (hereinafter referred to as ‘Cooperation Regulations’) which regulations amend the Cooperation with Other Jurisdiction on Tax Matters Regulations with effect from 1<sup>st</sup> January 2017. The Cooperation Regulations will be amended over the course of 2017, to extend cooperation to Non-EU jurisdictions and exchange CbC Reports with other signatories of the OECD CbC MCAA.

### 1.4 Purpose of these Guidelines

These guidelines are issued in terms of Article 96(2) of the Income Tax Act (Chapter 123 of the Laws of Malta) and are to be read in conjunction with LN 400 of 2016.

These guidelines will be regularly reviewed and if necessary, updated to reflect any changes or other clarifications that the Commissioner deems necessary for the purposes of a more correct application of the DAC4 and/or CbC Reporting as developed under Action 13 of the BEPS Action Plan. In the case of any changes, the revised version of the guidelines will be published on the Commissioner for Revenue website.

The Version 1.1 of the Guidelines was published on 22<sup>nd</sup> June, 2018 and includes changes to the following Sections:

- In Section 7 – Section 7.1 and 7.2
- In Section 8 – List of Jurisdictions that are not EU Member States

The Version 1.2 of the Guidelines was published on 23<sup>rd</sup> November, 2018 and includes changes to the following Sections:

- In Section 5 – Section 5.4 and 5.5 and Notes 8 and 11
- In Section 8 – List of Jurisdictions that are not EU Member States

The Version 1.3 of the Guidelines was published on 11<sup>th</sup> March, 2019 and includes changes to the following Sections:

- In Section 7 – Section 7.2
- In Section 8 – List of Jurisdictions that are not EU Member States

The Version 1.5 of the Guidelines was published on 3 February, 2021 and includes changes to Section 8 – List of Jurisdictions that are not EU Member States.

## 1.5 Competent Authority

In the case of Malta, this term is to be interpreted in line with the provisions of Regulation 8 of the Cooperation with Other Jurisdictions on Tax Matters Regulations (LN 295 of 2011 as amended).

## 2 High Level Overview of CbC Reporting

Generally, the ultimate parent entity (hereinafter referred to as 'UPE') of an MNE group should prepare a CbC Report for each fiscal year of the group commencing **on or after 1<sup>st</sup> January 2016** and file the report within 12 months of the end of the fiscal year with the tax authority in the jurisdiction where it is tax resident, in this case, with the Commissioner for Revenue. An exception from this general rule applies where the MNE group had total consolidated revenues of less than EUR 750, 000, 000 in the immediately preceding fiscal period (or the near equivalent in a jurisdiction's domestic currency as of January 2015).

The CbC Report filed by an MNE group includes three tables which contain information on the global activities and financial characteristics of the group, and is divided as follows:

- **Table 1** sets out the global allocation by tax jurisdiction of an MNE group's third party revenues, related party revenues, profit before tax, tax paid, tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets;
- **Table 2** lists all constituent entities of the MNE group by tax jurisdiction, together with their main business activities;
- **Table 3** allows for the provision of additional information by the MNE group in the form of free text to facilitate the understanding of the information contained in Tables 1 and 2.

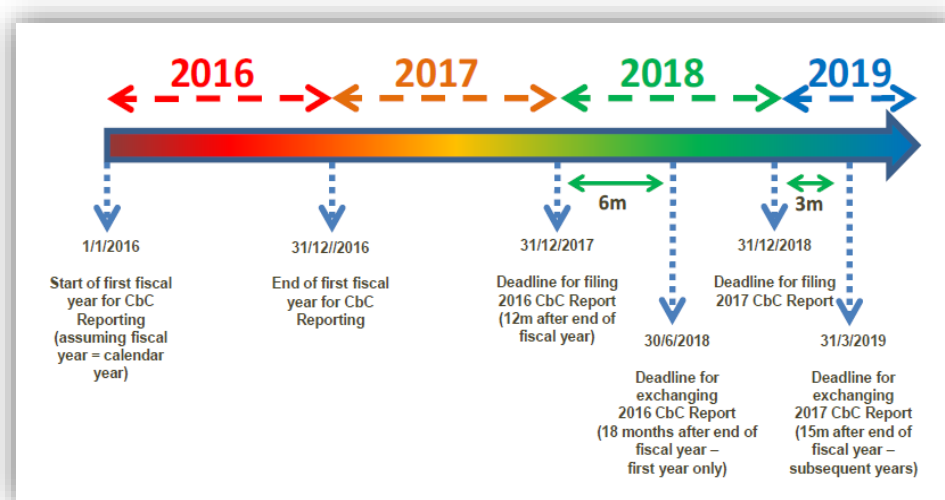
A model template of the CbC Report can be found under Section III of Annex III to the Cooperation Regulations, which also includes general instructions concerning the definition of key terms used in the template, the period covered by the template, the sources of data used for completing the



template, and specific instructions for the completion of Tables 1 and 2. The CbC Report template and instructions should also be read in light of subsequent interpretive guidance provided by the OECD.

A CbC Report filed by the UPE of an MNE group with the Commissioner must be exchanged with the tax authorities in other jurisdictions where a member of the MNE group is either a resident for tax purposes or is subject to tax with respect to a business carried on through a PE, subject to conditions governing the confidentiality and the appropriate use of the information contained in the CbC Report. The exchange of CbC Reports is carried out under the terms of an international agreement which permits automatic exchange of information and a competent authority agreement (hereinafter referred to as 'CAA') which sets out the operational details of the exchange in the case of Non-EU jurisdictions, and in terms of DAC4 in the case of exchange with EU Member States. In the first year of CbC Reporting, the exchange should take place within 18 months of the end of the group's reporting fiscal year. In subsequent years, the deadline is shortened to 15 months after the end of a group's reporting fiscal year. This is shown in the diagram below, which assumes CbC Reporting commences for reporting fiscal years beginning on 1<sup>st</sup> January 2016, and having an MNE group with a calendar fiscal year.

Figure 1 - Reporting & Exchange of CbC Report



It is intended that an MNE group should only be required to file a CbC Report once for each reporting fiscal year, in the jurisdiction of its UPE. However, there may be cases where a constituent entity (i.e. an entity within the MNE group) that is not the UPE may be required to file the CbC Report directly with its local tax authority (also known as 'local filing') but only if one or more of the following conditions have been met:

- there is no obligation on the UPE to file a CbC Report in its residence jurisdiction;
- there is an international agreement allowing automatic exchange of information between the jurisdictions of the UPE and the constituent entity but there is no competent authority

agreement in effect providing for the automatic exchange of CbC Reports (i.e. the exchange relationship has not yet been activated);

- there has been a systemic failure by the residence jurisdiction of the UPE to exchange CbC Reports that has been notified to the constituent entity by the local tax authority.

To avoid local filing and ensure that an MNE group is able to file a CbC Report in **just one** jurisdiction, Malta allows for surrogate entity filing. In this case, a constituent entity in the group that is not the UPE and which has been specifically appointed by the group (known as the surrogate parent entity) will file the CbC Report with Commissioner, and the Competent Authority of Malta shall then exchange the CbC Report with other jurisdictions where a constituent entity of the MNE group is a tax resident or is subject to tax in the other jurisdiction with respect to a business carried on through a PE. This is subject to the conditions as laid down in Point 2 of Section II of Annex III to the Cooperation Regulations.

As explained earlier, the Action 13 minimum standard as well as DAC4 permit the use of the information contained in CbC Reports for high-level transfer pricing risk assessment, the assessment of other BEPS-related risks and, where appropriate, for economic and statistical analysis. As such, CbC Reports will provide tax authorities with a powerful tool that can be used alongside the master file, local file, and other information, such as internal and external data, and the audit history of an MNE group, to identify taxpayers and arrangements that pose a potential tax risk. In this respect, CbC Reports provide tax authorities with an opportunity to better understand how local entities fit within their MNE group and to direct resources towards the higher risk taxpayers.

## 3 Filing and Use of CbC Reports

In order to ensure effective implementation of DAC4 and the Action 13 minimum standard, Malta has in place a legislative and administrative framework that includes the following elements relevant to the filing and use of CbC Reports:

- the definition of an MNE group, and groups subject to CbC Reporting;
- the definition of a reporting entity;
- the definition of a reporting fiscal year;
- the determination of the first reporting fiscal year;
- the format and content of a CbC Report;
- the timing for filing;
- the appropriate use of CbC Reports; and
- the confidentiality of CbC Reports.

### 3.1 Definition of an MNE group and Subject Persons

CbC Reporting applies to entities in certain MNE groups. For this purpose, a group means a collection of enterprises related through ownership or control, that it is either required to prepare consolidated financial statements under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange. An MNE group is any group which includes two or more enterprises resident in different jurisdictions, or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to a business carried out through a PE in another jurisdiction.

As a general point to note, the deemed listing provision in the definition of the term "Group" in Point 1, Section I of Annex III to the Cooperation Regulations is only relevant where an enterprise would otherwise be the UPE, but it is not required to prepare Consolidated Financial Statements in the jurisdiction where it is a resident for tax purposes. 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. In applying the deemed listing provision, it is irrelevant 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. For instance, some jurisdictions differentiate between public entities and non-public entities (or private entities) in determining whether Consolidated Financial Statements are required to be prepared (e.g. the United States and Canada). In this case, the deemed listing provision would be relevant in determining the constituent entities in an MNE Group where the UPE is a non-public entity. The term "public entities" refers to entities which have instruments listed on a public securities exchange and the expression "non-public entities" refers to entities which have no instruments traded on a public securities exchange. The term "public entity" does not refer to an entity held by public sector bodies. The deemed listing provision should not be interpreted as giving rise to an exemption from the obligation to file the Country-by-Country report.

In the case where the “deemed listing provision” is relevant and the parent entity of an MNE Group is tax resident in a jurisdiction that does not have a securities exchange, inconsistencies have arisen as to how to apply this test. In these cases, an entity will be the Ultimate Parent Entity of an MNE group if it would be required to prepare consolidated financial statements if its equity instruments were traded on a securities exchange upon which equity instruments of entities tax resident in the same jurisdiction are commonly traded. To provide greater certainty for MNEs and for other jurisdictions, jurisdictions that do not have a securities exchange are encouraged to specify one or more jurisdictions with a securities exchange that would be considered acceptable for these purposes.

An MNE Group which is not required to prepare Consolidated Financial Statements in its residence jurisdiction, for example because it does not have its equity interests traded on a public securities exchange, may still prepare Consolidated Financial Statements. These may be, for example, for use by investors and lenders. In some cases, these may be prepared using generally accepted accounting principles other than those that must be used for the purposes of determining the existence and membership of a group as per the definition in the Cooperation Regulations. In these cases, the MNE Group is still required to calculate total consolidated group revenue for the purposes of the term “Excluded MNE” in Point 3, Section I of Annex III to the Cooperation Regulations based on the accounting standards to be used for identifying a group under Point 1 of the same section.

CbC Reporting requirements are directed at the largest MNE groups which control approximately 90% of corporate revenues and which pose the greatest potential BEPS risk. To limit the reporting burden to the largest MNE groups, MNE groups with total consolidated group revenue in the immediately preceding fiscal year of less than EUR 750 million (or near equivalent in the jurisdiction’s domestic currency as of January 2015) are excluded from the reporting requirement. The exemption is expected to exclude approximately 85% to 90% of MNE groups from the reporting requirements.

**NOTE 1: If Country A is using a domestic currency equivalent of EUR 750 million for its filing threshold, Country B is using EUR 750 million for its filing threshold, and as a result of currency fluctuations Country A's threshold is in excess of EUR 750 million, can Country B impose its local filing requirement on a Constituent Entity of an MNE Group headquartered in Country A which is not filing a CbC report in Country A because its revenues, while in excess of EUR 750 million, are below the threshold in Country A?**

As set out in the Cooperation Regulations, the agreed threshold is EUR 750 million or a near equivalent amount in domestic currency as of January 2015. Provided that the jurisdiction of the Ultimate Parent Entity has implemented a reporting threshold that is a near equivalent of EUR 750 million in domestic currency as it was at January 2015, an MNE Group that complies with this local threshold should not be exposed to local filing in any other jurisdiction that is using a threshold denominated in a different currency. There is no requirement for a jurisdiction using a threshold denominated other than in Euros to periodically revise this in order to reflect currency fluctuations.

When the preceding fiscal year of an UPE is shorter than 12 months, for the purposes of applying the 750 million Euro threshold, one must calculate the pro-rata share of the 750 million Euro threshold that would correspond to the short accounting period. The filing deadline for the CbC Report in such cases remains the same i.e. 12 months after the last day of the accounting period.

As a general note, references to a fiscal year and an annual accounting period have led to some jurisdictions and MNE Groups forming a view that a CbC report cannot be required where an MNE Group prepares consolidated financial statements for a period other than 12 months. This view is not intended and is inconsistent with existing guidance, which specifically contemplates that a CbC report can be required for a fiscal year of less than 12 months. To this end, the fiscal year should be the period with respect to which the Ultimate Parent Entity of the MNE Group prepares its financial statements, even when this is shorter or longer than 12 months.

Where a Maltese UPE's reporting currency for financial statement purposes is a non-Euro currency, for the purposes of applying the 750 million Euro threshold, the UPE should use the ECB's average exchange rate for January 2015 to convert the threshold and determine whether the group would fall to be classified as an MNE group.

**NOTE 2: For the purpose of determining whether an MNE Group is an Excluded MNE Group, are extraordinary income and gains from investment activities included in total consolidated group revenue?**

In determining whether the total consolidated group revenue of an MNE Group is less than EUR 750 million (or near equivalent amount in local currency as of January 2015), all of the revenue that is (or would be) reflected in the consolidated financial statements should be used. Inclusion of extraordinary income and gains from investment activities in total consolidated group revenue is required if those items are presented in the consolidated financial statements under applicable accounting rules.

For financial entities, which may not record gross amounts from transactions in their financial statements with respect to certain items, the item(s) considered similar to revenue under the applicable accounting rules should be used in the context of financial activities. Those items could be labelled as 'net banking product', 'net revenues' or others depending on accounting rules. For example, if the income or gain from a financial transaction, such as an interest rate swap, is appropriately reported on a net basis under applicable accounting rules, the term 'revenue' means the net amount from the transaction.

An MNE Group that complies with the rules of the jurisdiction of the UPE or the SPE on the calculation of consolidated group revenue for purposes of determining its CbC filing obligations, should not be exposed to local filing in any other jurisdiction provided the rules of the jurisdiction where the UPE/SPE is resident for tax purposes are consistent with DAC4 and the Action 13 minimum standard, as supplemented by the implementation guidance.

## 3.2 Definition of a Reporting Entity

The reporting entity for an MNE group is the entity within the group that is required to file the CbC Report on behalf of the group. By default, a CbC Report should be filed by the UPE of the MNE group in its jurisdiction of tax residence. This will generally be the entity at the top of the ownership chain which is required to prepare consolidated financial statements in its jurisdiction of residence, or would be so required, if its equity interests were traded on a public securities exchange in that jurisdiction.

The Cooperation Regulations also provide that other entities in a group may be permitted or would be required to file CbC Reports in specific circumstances instead of the UPE. Surrogate entity filing and local filing of CbC Reporting are considered further on.

### **NOTE 3: How should the CbC reporting rules be applied to investment funds?**

There is no general exemption for investment funds and therefore, the governing principle to determine an MNE Group is to follow the accounting consolidation rules. For example, if the accounting rules instruct investment entities to not consolidate with investee companies (e.g. because the consolidated accounts for the investment entity should instead report fair value of the investment through profit and loss), then the investee companies should not form part of a Group or MNE Group (as defined in the Regulations) or be considered as Constituent Entities of an MNE Group. This principle applies even where the investment entity has a controlling interest in the investee company.

On the other hand, if the accounting rules require an investment entity to consolidate with a subsidiary, such as where that subsidiary provides services that relate to the investment entity's investment activities, then the subsidiary should be part of a Group and should be considered as a Constituent Entity of the MNE Group (if one exists). It is still possible for a company, which is owned by an investment fund, to control other entities such that, in combination with these other entities, it forms an MNE Group. In this case, and if the MNE Group exceeds the revenue threshold, it would need to comply with the requirement to file a CbC report.

**NOTE 4: How should a partnership which is tax transparent and thus has no tax residency anywhere be included in the CbC report? How should a reverse hybrid partnership, which is tax transparent in its jurisdiction of organisation but considered by a partner's jurisdiction to be tax resident in its jurisdiction of organisation, be treated?**

The governing principle to determine an MNE Group is **to follow the accounting consolidation rules**. If the accounting consolidation rules apply to a partnership, then that partnership may be a Constituent Entity of an MNE group subject to CbCR. For the purpose of completing the CbC report, if a partnership is not tax resident in any jurisdiction then the partnership's items, to the extent not attributable to a permanent establishment, should be included in the line in Table 1 of the CbC report for stateless entities. Any partners that are also Constituent Entities within the MNE Group should include their share of the partnership's items in Table 1 in their jurisdiction of tax residence. Table 2 of the CbC report should include a row for stateless entities and a sub-row for each stateless entity including partnerships that do not have a tax residence - that is, the reporting for stateless entities should parallel the reporting for Constituent Entities that have a tax residence. For a partnership included in the stateless entity category, the field in table 2 for "tax jurisdiction of organisation or incorporation if different from tax jurisdiction of residence" should indicate the jurisdiction under whose laws the partnership is formed / organised.

It may be advisable for the MNE to provide an explanation in the notes section of the report on the partnership structure and on the stateless entities. For instance, a note in the Additional Information section may indicate that a partnership's "stateless income" is includable and taxable in the partner jurisdiction.

Where a partnership is the UPE, for the purpose of determining where it is required to file the CbC report in its capacity as the UPE, the jurisdiction under whose laws the partnership is formed / organised will govern, if there is no jurisdiction of tax residence. A PE of a partnership would be included in the CbC report in the same manner as any other permanent establishment.

**NOTE 5: To determine the existence of a “Group” and the membership of the Group under Regulations:**

a) If the equity interests of the relevant enterprise\* are traded on a public securities exchange, should the applicable accounting standards be the accounting standards that currently apply to that enterprise for consolidated financial statement purposes?

b) If the equity interests of the relevant enterprise\* are not traded on a public securities exchange, can the applicable accounting standards be chosen provided that the choice is either (i) local GAAP in the jurisdiction of the enterprise assumed to be listed or (ii) International Financial Reporting Standards (IFRS), and provided the method chosen is used consistently?

*\*Relevant enterprise would be the UPE as defined in the Regulations.*

The Regulations do not specify that any particular accounting standard's consolidation rules be used. It is expected that:

a) If the equity interests of the relevant enterprise, which would be a UPE under the Regulations, are traded on a public securities exchange, jurisdictions will require the Group to use the consolidation rules in the accounting standards already used by the Group.

b) If the equity interests of the relevant enterprise, which would be an Ultimate Parent Entity under Article 1.6 of the model legislation, are not traded on a public securities exchange, jurisdictions may allow the Group to choose to use either local GAAP of the jurisdiction of the UPE (which includes US GAAP if it is permitted under the local rules and regulations of the jurisdiction of the UPE) or IFRS as its governing accounting standard, as long as the Group applies this choice consistently across years and for other aspects of the CbC report requiring reference to an accounting standard. However, if the jurisdiction of residence of the enterprise that would be the UPE mandates the use of a particular accounting standard (or standards) for enterprises the equity of which is traded on a public securities exchange, this mandatory standard (or one of these mandatory standards) must be used. Exceptionally, if a jurisdiction's consolidation rules generally require investment entities to be consolidated with investee companies, the jurisdiction may mandate the use of IFRS consolidation rules for the purpose of determining the membership of a Group. Any such deviation from the accounting standards generally followed for the CbC report of a particular MNE Group should be noted in Table 3 of the CbC report for the MNE Group.



### 3.3 Definition of Reporting Fiscal Year and Determination of the First Reporting Fiscal Year

The reporting entity for an MNE group should prepare its CbC Report based on its fiscal year, which is the annual accounting period with respect to which the UPE of the group prepares its financial statements. When filling in the CbC Report, Part B.3. of Section III of Annex III to the Cooperation Regulations contemplates instances where the constituent entities of the group have a different fiscal year to that of the reporting entity. In such a case, it is at the reporting entity's discretion to fill in the CbC Report using **either** of the following two options:

- (a) providing information for the fiscal year of the relevant Constituent Entities ending on the same date as the fiscal year of the Reporting MNE, or ending within the 12-month period preceding such date; or
- (b) information for all the relevant Constituent Entities reported for the fiscal year of the Reporting MNE.

With respect to the first reporting fiscal year, CbC Reporting in Malta should apply with respect to all fiscal years beginning on or after 1<sup>st</sup> January 2016.

**NOTE 6: Is transitional relief available for MNE Groups with a short accounting period that starts on or after 1 January 2016 and that ends before 31 December 2016?**

As a transitional measure, the Reporting Entity of an MNE Group with a short accounting period beginning on or after 1 January 2016 and ending before 31 December 2016 may file the required CbC report in accordance with the same timelines as for MNE Groups with a fiscal year ending on 31 December 2016. The date by which the CbC report is to be exchanged would be similarly extended. This transitional relief would not frustrate the policy intention of the Regulations, as contemplated in DAC4 and the Action 13 minimum standard.

### 3.4 The Format, Content and Timing of Filing of a CbC Report

CbC Reports of all MNE groups should be prepared in a consistent format, applying the definitions and instructions contained in the CbC Template in Section III of Annex III to the Cooperation Regulations. The CbC Report should contain the following information:

- aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE group operates; and

- an identification of each constituent entity of the MNE group setting out the jurisdiction of tax residence of such constituent entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such constituent entity is organised, and the nature of the main business activity or activities of such constituent entity.

In accordance with the CbC Reporting XML Schema: User Guide for Tax Administrations and Taxpayers published by the OECD<sup>1</sup>, the CbC Report must also contain the following information:

- (i) country of issuer of the TIN for each constituent entity; and
- (ii) the address of each constituent entity.

The XML Schema explains in more detail the specific information to be included on the CbC Report relating to addresses.

In order to ensure that financial data required for the completion of an MNE group's CbC Report is available, the deadline for filing a CbC Report with the Commissioner for Revenue is 12 months after the last day of the group's reporting fiscal year.

### 3.5 The appropriate use and Confidentiality of CbC Reports

Both DAC4 and the Action 13 minimum standard provides that the information contained in a CbC Report can be used **only** for high-level transfer pricing risk assessment, the assessment of other BEPS-related risks, and, where appropriate, for economic and statistical analysis. This encapsulates the meaning of 'appropriate use' of CbC Reports. The information cannot be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and full comparability analysis. Furthermore, such information cannot be used on its own, as conclusive evidence that transfer prices are or are not, appropriate, or be used to make adjustments to the income of any taxpayer on the basis of an allocation formula. In observing the appropriate use condition when assessing CbC Reports, it is essential that assessment teams refer to the *Guidance on the appropriate use of information contained in Country-by-Country reports* as issued by the OECD.<sup>2</sup>

The standard also imposes an obligation on a jurisdiction that makes an adjustment to the income of any taxpayer in contravention of these conditions to promptly concede such adjustment in any competent authority proceedings. This does not imply, however, that jurisdictions would be prevented from using a CbC Report as a basis for making further inquiries into the transfer pricing arrangements within an MNE group or into other tax matters in the course of a tax audit. Malta is also committed to immediately inform the OECD Coordinating Body Secretariat of any cases of non-

<sup>1</sup> <http://www.oecd.org/tax/country-by-country-reporting-xml-schema-user-guide-for-tax-administrations-and-taxpayers.htm>

<sup>2</sup> <http://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-appropriate-use-of-information-in-CbC-reports.pdf>

compliance with the above, including any remedial actions, as well as any measures taken in respect of such non-compliance. Non-compliance with the appropriate use condition will be considered **significant non-compliance** which may lead to temporary suspensions of exchange of CbC Reports with jurisdictions which have committed such non-compliance.

As per Regulation 18(1)(a), both the CbC Reports as well as their exchange are covered by the obligation of official secrecy. The content of the reports is confidential and Malta has been assessed on its level of confidentiality and data safeguards for automatic exchange of information and found to be fully compliant with the internationally agreed standard for automatic exchange of information<sup>3</sup>.

## 4. Optional Elements for the Filing of CbC Reports

The obligation to file CbC reports is a requirement which is applicable to the following entities as from 1<sup>st</sup> January 2016:

1. The UPE of an MNE Group which is not an excluded MNE Group and which is resident for tax purposes in Malta;
2. A surrogate parent entity which has been specifically appointed to undertake reporting obligations of the CbC Report, in line with Point 1 of Section II of Annex III to the Cooperation Regulations;
3. A constituent entity of the group which is not the UPE nor the Surrogate Parent Entity and which is required to file the CbC Report under the secondary reporting mechanism.

### 4.1 Surrogate Parent Entity Reporting

One of the aims of the Regulations is to ensure that an MNE group is able to file a CbC Report with the tax authority in one jurisdiction. This tax authority then exchanges the CbC Report with tax authorities in other jurisdictions where the group has constituent entities, subject to conditions. In most cases, it is expected that an MNE group will file its CbC Report in the jurisdiction of its UPE. However, there are limited scenarios where local filing [which is considered to be a secondary reporting mechanism] is required by a constituent entity of the group that is not the UPE.

To minimise local filing and protect the ability of an MNE group to file a CbC Report in just one jurisdiction, Malta permits the filing of the CbC Report by a surrogate entity on behalf of the group. The appointment of the Surrogate Parent Entity is on the premise that certain conditions are met;

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<sup>3</sup> <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>

this however depends on whether the entity is resident in an EU Member State or in a non-EU Member State.

Where a constituent entity is resident for tax purposes in any other EU Member State other than Malta, Point 1 of Section II of Annex III to the Cooperation Regulations [Fourth Paragraph] provides that it can be appointed as a Surrogate Parent Entity to file the CbC Report instead of the UPE where one or more of the following circumstances apply:

- (1) the UPE of the MNE Group is not obligated to file a country-by-country report in its jurisdiction of tax residence;
- (2) the jurisdiction in which the UPE is resident for tax purposes has a current International Agreement to which Malta is a party but does not have a Qualifying Competent Authority Agreement yet with Malta by the time specified in regulation 13(4)(a) for filing the CbC report for the Reporting Fiscal Year;
- (3) there has been a Systemic Failure of the jurisdiction of tax residence of the UPE, that has been notified by Malta.

Where a Constituent Entity is resident for tax purposes in a Non-EU jurisdiction, then it can be appointed as a Surrogate Parent Entity if all of the following conditions are satisfied:

- (1) One or more of the circumstances stated in Point 1(b) of Section II of Annex III to the Cooperation Regulations [and listed in the previous paragraph above] apply;
- (2) the jurisdiction of tax residence of the Surrogate Parent Entity requires filing of CbC reports conforming to the requirements of regulation 13(4)(c);
- (3) the jurisdiction of tax residence of the Surrogate Parent Entity has a Qualifying Competent Authority Agreement in effect with Malta by the filing deadline of the CbC report for the Reporting Fiscal Year;
- (4) the jurisdiction of tax residence of the Surrogate Parent Entity has **not** notified the competent authority of Malta of a Systemic Failure;
- (5) the jurisdiction of tax residence of the Surrogate Parent Entity has been notified no later than the last day of the Reporting Fiscal Year of such MNE Group by the Constituent Entity resident for tax purposes in its jurisdiction that it is the Surrogate Parent Entity;
- (6) a notification has been provided to the Commissioner in accordance with Point 4 of Section II of Annex III to the Cooperation Regulations.

If the above applies, and a Surrogate Parent Entity has been appointed, then no further obligations for reporting are placed on the other Constituent Entities of the MNE Group. Subsequently, the tax authority with which the surrogate entity files the CbC Report will exchange this report with the tax

authorities in other jurisdictions where a member of the MNE group is either a resident for tax purposes or is subject to tax with respect to a business carried out through a PE and where there is an international agreement that permits the automatic exchange of information and a CAA in effect.

If the appointed Surrogate Parent Entity is a Maltese Constituent Entity, then the Cooperation Regulations apply as if that entity were a UPE, with all ensuing obligations. Thus, the required elements outlined in the Regulations (e.g. the content of CbC Reports and the timing of filing) should be applied to those reports in the same way as to CbC Reports filed by UPEs resident in Malta. In particular, the Regulations provide that a Maltese tax resident Constituent Entity which has been appointed as a Surrogate Parent Entity must submit a CbC Report to the Commissioner on behalf of the entire MNE Group.

There should be no distinction between CbC Reports received through exchange with another jurisdiction based on whether those reports were filed in the other jurisdiction by the UPE or by a surrogate entity. For example, local filing cannot be required under the minimum standard and DAC4 where the CbC Report for the MNE group is available from the jurisdiction in which the surrogate entity filed the report. Therefore, filing of the CbC Report should occur in only one jurisdiction.

## 4.2 The Secondary Reporting Mechanism – Local Filing

The secondary reporting mechanism [ or local filing] applies to local Constituent Entities of an MNE Group where no Surrogate Parent Entity has been appointed and one or more of the following circumstances apply:

- the UPE of an MNE Group is not required to provide a CbC Report in its jurisdiction of tax residence;
- the jurisdiction in which the UPE is resident for tax purposes does not have a qualifying competent authority agreement in effect with Malta (by the due date for filing the CbC Report) that provides for the exchange of CbC Reports; or
- there has been a systemic failure by the jurisdiction of tax residence of the UPE to provide the CbC Reports in its possession and the Commissioner has notified the Maltese Constituent Entity that such a failure has occurred.

Where the above conditions apply and thus local filing is required, the Maltese Constituent Entity is obliged to request its UPE to provide it with all the information required to enable it to prepare a CbC Report with information on the whole MNE Group. Where the UPE complies with this request, the domestic Constituent Entity must provide a full CbC Report to the Commissioner for the MNE Group. However, where the UPE refuses to comply with the request, the Maltese Constituent Entity will not be able to provide a CbC report containing all the requested information under the Regulations. To this effect, the entity would need to fill and submit a CbC Report containing all information that is within its possession and other information in respect of which it has an

enforceable legal right to obtain or acquire from other group entities (with the exception of legally privileged information)<sup>4</sup>. Furthermore, it must:

- (a) notify the Commissioner of this refusal, and
- (b) provide an equivalent CbC Report to the Commissioner.

The above shall be without prejudice to the right of the Commissioner to apply penalties provided for in the Cooperation Regulations and upon being notified of the refusal referred to in (a) above, the Commissioner will inform other EU Member States of the refusal.

Additionally, under local filing, an MNE Group has the option to designate any Constituent Entity to file the report on behalf of **all the EU constituent entities of a non-EU parented MNE Group**. A Maltese Constituent Entity which has not been designated as such would not be required to file a CbC Report under the secondary reporting mechanism but must notify the Revenue Commissioner the identity and related details of the designated reporting entity for the MNE.

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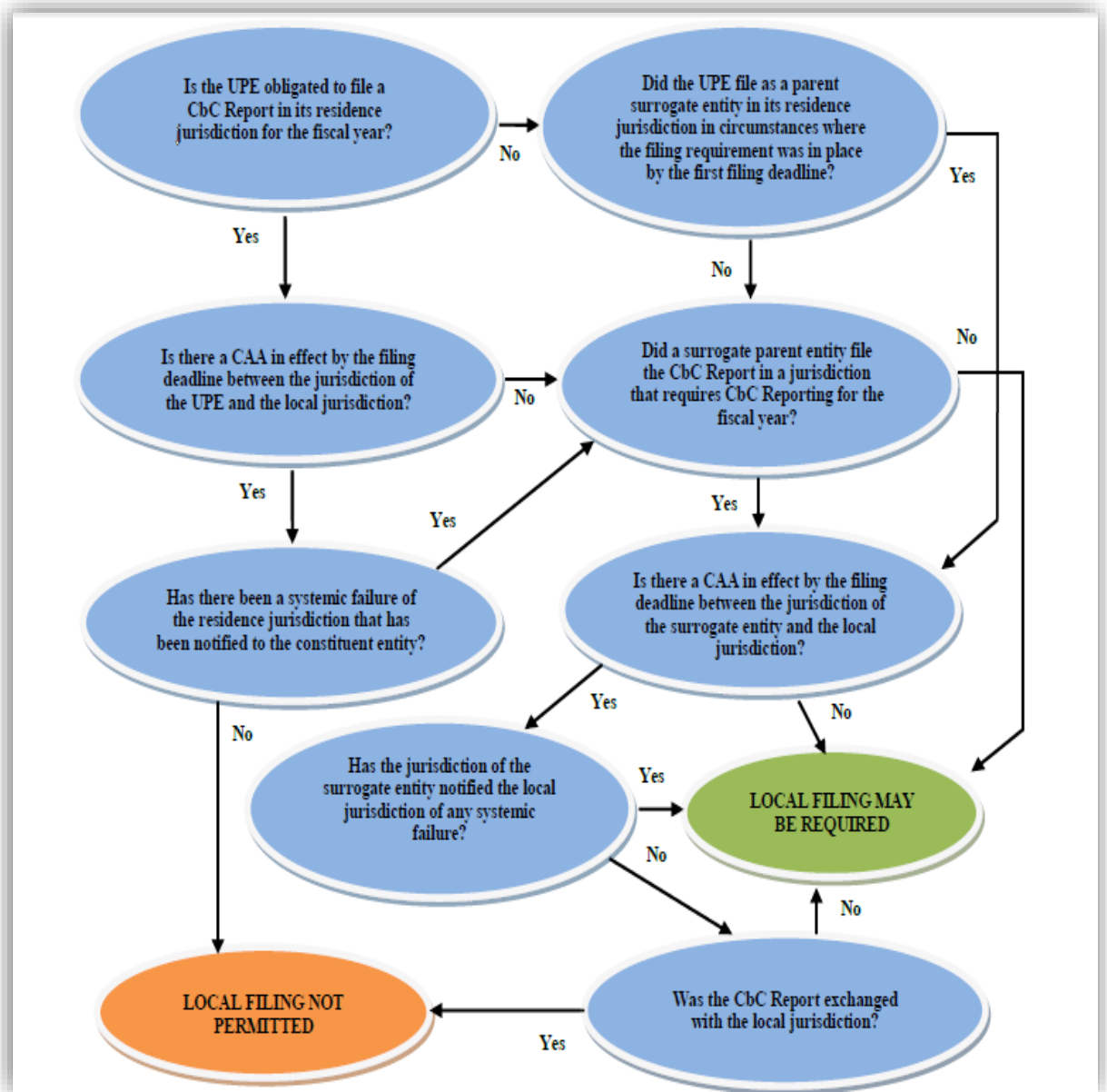
<sup>4</sup> A Constituent Entity submitting such a report may use Table 3 in the CbC Report ('Additional Information') to outline the approach taken as well as to provide an explanation for the data which it could not obtain.

**NOTE 7: Can MNE Groups with an Ultimate Parent Entity resident in a jurisdiction whose CbC reporting legal framework is in effect for Reporting Periods later than 1 January 2016 voluntarily file the CbC report for fiscal periods commencing on or from 1 January 2016 in Malta? What is the impact of such filing on local filing obligations in other jurisdictions?**

All OECD and G20 countries, as well as others, have committed to implementing the minimum standard of CbC reporting agreed in the Action 13 Report. The Action 13 Report recommended that countries implement a legal requirement for CbC reporting with respect to MNEs' fiscal periods commencing on or from 1 January 2016. At the same time, the Action 13 Report recognises that "some jurisdictions may need time to follow their particular domestic legislative process in order to make necessary adjustments to the law." Where jurisdictions are implementing CbC Reporting but will not be able to implement with respect to the fiscal period commencing from 1 January 2016, this therefore gives rise to a transitional issue. Thus, the Commissioner accepts that where a UPE of an MNE Group files a CbC Report for its 2016 fiscal year on a voluntary basis in its country of residence (also known as parent surrogate filing), and provided a number of conditions are met, constituent entities tax resident in Malta will not be required to file a CbC Report under the secondary reporting mechanism for that year. All the conditions that must be satisfied are:

1. the UPE has made available a CbC report conforming to the requirements of the Action 13 Report to the tax authority of its jurisdiction of tax residence, by the filing deadline (i.e. 12 months after the last day of the Reporting Fiscal Year of the MNE Group);
2. by the first filing deadline of the CbC report, the jurisdiction of tax residence of the UPE must have its laws in place to require CbC reporting (even if filing of a CbC report for the Reporting Fiscal Year in question is not required under those laws);
3. by the first filing deadline of the CbC report, a Qualifying Competent Authority Agreement must be in effect between the jurisdiction of tax residence of the UPE and Malta;
4. the jurisdiction of tax residence of the UPE has not notified Malta of a Systemic Failure; and
5. the following notifications have been provided:
  - the jurisdiction of tax residence of the UPE has been notified by the UPE, no later than the last day of the Reporting Fiscal Year of such MNE Group; and
  - the Commissioner for Revenue has been notified by a Constituent Entity of the MNE Group that is resident for tax purposes in Malta that it is not the UPE nor the Surrogate Parent Entity, stating the identity and tax residence of the Reporting Entity, no later than the last day of the Reporting Fiscal Year of such MNE Group.

Figure 2 - Circumstances under which there is a Local Filing Requirement





## 5 The Country-by-Country Report

As a general point of note, the CbC Report is intended to apply to a number of entities across a broad range of industries. Whilst generic in nature, detailed instructions and guidance on how to complete CbC Reports can be found in Section III of Annex III to the Cooperation Regulations, such guidance being based on that found in the BEPS Action 13 Final Report as well as DAC4. This should be reviewed prior to completing a CbC Report, having regard to the specific facts and circumstances of the MNE Group and the industry in which it operates. In addition, updated guidance on certain aspects of the report, as issued by the OECD from time to time should also be taken into account.

The reporting entity should adopt a reasonable, practical and consistent approach to the completion of the report. The onus is on the reporting entity to ensure that the CbC Report is complete and accurate and presented in a timely manner.

**NOTE 8: Where there are minority interests held by unrelated parties in a Constituent Entity, should the previous year's consolidated group revenue include 100% of the Constituent Entity's revenue for the purpose of applying the 750 million Euro threshold (or near equivalent amount in local currency as of January 2015) to identify an Excluded MNE Group, or should the revenue be pro-rated? Further, should the entity's financial data that is included in the CbC report represent the full 100% or should it be pro-rated?**

Under the condition that accounting rules in the jurisdiction of the UPE require a Constituent Entity, the minority interests of which are held by unrelated parties, to be **fully consolidated**, 100 % of the entity's revenue should be included for the purpose of applying the 750 million Euro threshold (or near equivalent amount in local currency as of January 2015). In such a case, the entity's financial data that is included in the CbC report should represent the full 100% amount and should not be pro-rated. In contrast, if the accounting rules require proportionate consolidation in the presence of minority interests, then the entity's revenue may be pro-rated for the purpose of applying the 750 million Euro threshold and its financial data included in the CbC report may also be pro-rated.

Where the financial data of a Constituent Entity is reported on a pro-rata basis, the number of employees of the Constituent Entity should also be reported on a pro-rata basis. Where this is the case, the taxpayer should insert the following statement in Table 3 of the CbC Report: "The number of employees of the Constituent Entity A (specified) in Jurisdiction X (specified) is reported on a pro-rata basis in accordance with the pro-rata reporting of the financial data of A".

**NOTE 9: Where an entity owned and/or operated by more than one unrelated MNE Groups (e.g. a joint venture entity) is consolidated in the consolidated financial statements of one or more of these MNE Groups, including under a pro-rata consolidation rule, is such an entity considered a Constituent Entity of those unrelated MNE Groups (i.e. should it be included in Table 2)? If so, where a pro-rata consolidation rule is applied to the entity under the applicable accounting rules, should Table 1 include the pro-rata data of the entity, and should the entity's revenue be included pro-rata for the purpose of applying the 750 million Euro threshold?**

The treatment of an entity for CbC reporting purposes should follow the accounting treatment. In the case of an entity which is owned and/or operated by more than one unrelated MNE Groups, the treatment of the entity for CbC reporting purposes should be determined under the accounting rules applicable to each of the unrelated MNE Groups separately. If the applicable accounting rules require an entity to be consolidated into the consolidated financial statements of an MNE Group, the entity would be considered as a Constituent Entity of that group under Point 5 of Section I of Annex III to the Cooperation Regulations. Accordingly, the financial data of such an entity should be reported in the CbC report of the MNE Group. This applies to entities included in the MNE Group's consolidated financial statements using either full consolidation or pro-rata consolidation. If an entity is not required to be consolidated under applicable accounting rules, the entity would not be considered a Constituent Entity and, accordingly, the financial data of such an entity would not be reported in the CbC Report.

Therefore an entity included in the MNE Group's consolidated financial statements under equity accounting rules would not be a constituent entity. Where pro-rata consolidation is applied to an entity in an MNE Group in preparing the group's consolidated financial statements, jurisdictions may allow a pro-rata share of the entity's total revenue to be taken into account for the purpose of applying the 750 million Euro threshold, instead of the full amount of the entity's total revenue. An MNE group may include a pro-rata share of the entity's financial data in its CbC report, in line with the information included in the MNE Group's consolidated financial statements, instead of the full amount of this financial data.

## 5.1 Items to be included in the *Revenues* column in Table 1 of the CbC Report

The term *Revenues* should include income from sales of inventory and properties, services, royalties, interest, premiums and any other amounts. Payments received from other constituent entities that are treated as dividends in the payor's tax jurisdiction should be excluded. This term shall be interpreted in the broadest possible sense to include all income (both revenue and capital in nature, but excluding payments that are treated as dividends in the payor's tax jurisdiction). Extraordinary income and gains from investment activities are **to be included** in *Revenues*.

The reporting entity of an MNE Group is best placed to interpret the definition of *Revenues*, taking into account the guidance provided as well as having regard to the specific facts and circumstances of the MNE Group and the industry in which it operates, ensuring a reasonable and consistent approach is taken.

**NOTE 10: When financial statements are used as the source of the data to complete the CbC template, which items shown in the financial statements should be reported as *Revenues* in Table 1?**

All revenue, gains, income, or other inflows shown in the financial statement prepared in accordance with the applicable accounting rules relating to profit and loss, such as the income statement or profit and loss statement, should be reported as *Revenues* in Table 1. For example, if the income statement prepared in accordance with the applicable accounting rules shows sales revenue, net capital gains from sales of assets, unrealized gains, interest received, and extraordinary income, the amount of those items reported in the income statement should be aggregated and reported as *Revenues* in Table 1. Comprehensive income/earnings, revaluations, and/or unrealized gains reflected in net assets and the equity section of the balance sheet should not be reported as *Revenues* in Table 1. The amount of any income items shown on the income statement need not be adjusted from a net amount.

When financial statements that were prepared using fair value accounting are used as the source of data, then the amount of revenues and profits determined in accordance with fair value accounting and reported in financial statements may be reported in the CbC report without further adjustment.

## 5.2 Definition of Related Parties

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 and DAC4, should be interpreted as the Constituent Entities listed in Table 2 of the CbC report.

### 5.3 Aggregated/Consolidated Data to be reported per Jurisdiction

The Cooperation Regulations contemplate that reporting will occur on an aggregate basis at a jurisdictional level. Accordingly, data should be reported on an aggregated basis, regardless of whether the transactions occurred cross-border or within the jurisdiction, or between related parties or unrelated parties. This will be particularly relevant for the columns on related party revenues and thus, total revenues and financial results of all intercompany dealings within the same country must be aggregated and not consolidated. An MNE Group may use the notes section in Table 3 to explain the data, if it wishes to do so, highlighting intercompany dealings within the same country.

Where the jurisdiction of the UPE has a system of taxation for corporate groups which includes consolidated reporting for tax purposes, and the consolidation eliminates intra-group transactions at the level of individual line items, that jurisdiction may allow taxpayers an option to complete the CbC report using consolidated data at the jurisdictional level, as long as consolidated data are reported for each jurisdiction in Table 1 of the CbC report and consolidation is used **consistently** across the years. Taxpayers choosing this option should use the following wording in Table 3 that: "*This report uses consolidated data at the jurisdictional level for reporting the data in Table 1*", and should specify the columns in Table 1 in which the consolidated data is different than if aggregated data were reported.

### 5.4 Profit (Loss) before Income Tax

Consistent with Revenue, Profit (Loss) before Income Tax excludes payments received from other Constituent Entities that are treated as dividends in the payer's tax jurisdiction. Where applicable accounting rules require or permit a Constituent Entity to include in profit before tax for financial reporting purposes an amount representing all or part of the profit of another Constituent Entity, this amount should be treated in the same way as dividends from other Constituent Entities and excluded from Revenue and Profit (Loss) before Income Tax.

### 5.5 Amount of Income Tax Accrued and Paid

***Income Tax Accrued-Current Year*** is the amount of accrued current tax expense recorded on taxable profits or losses for the Reporting Fiscal Year of all Constituent Entities resident for tax purposes in the relevant tax jurisdiction, **irrespective of whether or not the tax has been paid** (e.g. based on a preliminary tax assessment). ***Income Tax Paid (on Cash Basis)*** is the amount of the taxes **actually paid** during the Reporting Fiscal Year, which should thus include not only advanced payments fulfilling the relevant fiscal year's tax obligation but also payments fulfilling the previous year(s)' tax obligation (e.g. payment of the unpaid balance of corporate income tax accrued in relation to the previous year(s), including payments related to reassessments of previous years), regardless of whether those taxes have been paid under protest. The amount of ***Income Tax Accrued-Current Year*** and ***Income Tax Paid (on Cash Basis)*** should be reported independently.

In the case of tax which has been paid and subsequently refunded, in general, a refund of income tax should be reported in ***Income Tax Paid (on Cash Basis)*** in the reporting fiscal year in which the refund

is received. An exception to this may be permitted where the refund is treated as revenue of the MNE group under the applicable accounting standard or in the source of data used to complete Table 1. Where this is the case, taxpayers should provide the following statement in Table 3: "*Tax refunds are reported in Revenues and not in Income Tax Paid (on Cash Basis)*".

Any income tax accrued or income tax paid on dividends from other Constituent Entities which are not included in "Profit (loss) before Income Tax" column as per Section 5.4 above should likewise not be included in the relevant column(s).

## 5.6 Accumulated Earnings

Where there are two or more constituent entities in the same jurisdiction, the negative figures for accumulated earnings, if there are any, should be netted with the positive figures for accumulated earnings. Where this is the case, taxpayers should provide the following statement in Table 3: "*Accumulated earnings include negative figures for jurisdiction [--]*".

## 5.7 Employees of Constituent Entities

Independent contractors participating in the ordinary operating activities of the constituent entity may be reported as employees. It is ideal that the reporting entity is best placed to decide whether contractors participate in the ordinary operating activities of the business and therefore should be included as employees on the CbC Report.

Similarly, with regard to employees that have been seconded within an MNE Group, from one group entity to another group entity, the reporting entity would be best placed to decide in which entity's headcount seconded employees should be included for the purposes of the CbC Report, adopting a reasonable, practical and consistent approach to completion of CbC Reports. Furthermore, the reporting entity should complete CbC Reports to the best of its ability, taking into account the guidance provided, having regard to the individual facts and circumstances of the MNE Group and the industry in which it operates. The onus remains on the reporting entity to ensure that the CbC Report is complete and accurate.

## 5.8 PE Data

Permanent establishment data should be reported by reference to the tax jurisdiction in which the PE is situated and not by reference to the tax jurisdiction of residence of the business unit of which the PE is a part. Residence tax jurisdiction reporting for the business unit of which the PE is a part should **exclude** financial data related to the PE. The Cooperation Regulations set out specific rules with regard to the balance sheet items on Table 1, that is, Stated Capital, Accumulated Earnings and Tangible Assets other than Cash and Cash Equivalents. The specific rules with regard to permanent establishments are as follows:

- **Stated Capital:** The stated capital of the PE should be reported by the legal entity of which it is a permanent establishment unless there is a defined capital requirement in the PE's tax jurisdiction for regulatory purposes.
- **Accumulated Earnings:** Accumulated earnings of the PE should be reported by the legal entity of which it is a PE.
- **Tangible Assets other than Cash and Cash Equivalents:** Assets of the PE should be reported by reference to the tax jurisdiction in which the PE is situated.

**NOTE 11: The use of shortened or rounded amounts in preparing Table 1**

The Action 13 report and published guidance\* do not provide for any shortening of the amounts to be included in Table 1. Amounts in Table 1 should be reported in full whole units (i.e. an amount of 123 456 789 should be reported as 123 456 789 and should not be shortened, for example, to 123 457).

With respect to rounding, likewise, the Action 13 report does not provide any guidance concerning the rounding of amounts in Table 1, other than with respect to the number of employees (where reasonable rounding or approximation is permissible, providing this does not materially distort the relative distribution of employees across tax jurisdictions). A reasonable level of rounding is acceptable but cannot include any rounding that could materially distort the data contained in Table 1 and should only be used if such rounding has been replicated in the consolidated financial statements and these are used as the basis for CbC reporting. A reasonable level of rounding would of financial data would be to the nearest EUR 1, 000. In all cases, amounts should be reported in full numbers, including all zeroes with no shortening.

\* *Country-by-Country Reporting: XML Schema User Guide for Tax Administrations*, at page 16.

## 5.9 Information with respect to the sources of data in Table 3

The general instructions for completion of the CbC report template provide, in Part B(4) of Section III of Annex III to the Cooperation Regulations, that a reporting MNE should consistently use the same sources of data from year to year in completing the CbC report template. The reporting MNE may choose to use data from its consolidation reporting packages, from separate entity financial statements, regulatory financial statements, or internal management accounts. The reporting MNE should also provide a brief description of the sources of data used in preparing the template in Table 3. If a change is made to the source of data used from year to year, the reporting MNE should explain the reasons for the change and its consequences. However, from CbC reports filed to date, it appears that not all MNEs are providing this information, or the information being provided is insufficient for a tax administration to understand the different data sources used in completing the CbC report.

MNEs are required to provide a description of the sources of data used and, while this may be brief, it should be sufficient to enable an understanding of the source of each item of information in the CbC report. Where a general principle applies, this should be described together with any exceptions that exist. Where information relevant to a particular jurisdiction is taken from different sources of data, or where the sources of data used change over time, this must be explained.

As an illustrative example, Table 3 could include a statement that information has been obtained from the MNE Group's consolidation package with the exception of the following:

- [Specified items for jurisdictions A, B and C] were obtained from entity financial statements prepared in accordance with local GAAP.
- [Specified items for jurisdictions D, E and F] were obtained from regulatory financial statements prepared in accordance with local law.
- [Specified items for jurisdictions B, D and F] were obtained from internal management accounts.
- Since the CbC report for [previous reporting fiscal year], the source of data used for [specified items for jurisdiction D] has changed from [previous source] to [current source]. [Description of the reasons and consequences of this change].

## 5.10 Common errors made by MNE groups in preparing CbC reports

CbC reports contain valuable information on the global allocation of the income, taxes paid and the location of economic activity among tax jurisdictions in which an MNE group operates, for use in a high level transfer pricing risk assessment, assessment of other BEPS-related risks, and economic and statistical analysis, if appropriate. However, this information can only be used effectively for these purposes if the data contained in CbC reports prepared by MNEs is robust and accurate. Tax administrations have encountered a number of concerns with the data in CbC reports filed to date, and the most common of these are described on the OECD website at <https://www.oecd.org/tax/beps/common-errorsmnes-cbc-reports.pdf>. MNEs within the scope of CbC reporting should review these descriptions and ensure that these errors are not repeated in CbC reports they are preparing. Where errors have been identified in filed CbC reports (including but not limited to those described on the OECD website) such errors should be corrected by the Reporting MNE.

## 6 Issues relating to Mergers/Acquisitions/Demergers

### 6.1 Treatment in case of Mergers/Acquisitions/Demergers

When in a given year there are changes in ownership due to mergers, acquisitions and demergers, this will affect the CbC filing obligation for that given year as well as the information to be reported in the CbC report. For the year in which a merger/acquisition/demerger occurs, the determination of whether the Group is or is not an Excluded MNE Group shall be based on the **Group's total consolidated group revenue** during the Fiscal Year immediately preceding the Reporting Fiscal Year, as reflected in its Consolidated Financial Statements for such preceding Fiscal Year. There is no need to adjust the consolidated group revenue for the preceding Fiscal Year due to a merger/acquisition/demerger occurring during the following year.

As to the information to be reported in the CbC report for the year in which the merger/acquisition/demerger occurs, the accounting principles/standards (as determined in accordance with the guidance to identify the accounting principles/standards for determining the existence and membership of a group) will govern the determination as to the period for which the financial data of the merged/acquired/demerged constituent entities should be included in CbC reports of the relevant MNE Groups (e.g. a pro-rata share or full year). In accordance with the flexibility given on the source of data for purposes of completing Table 1, the information reported in Table 1 may be taken from a source using different accounting principles/standards from those applied in the Consolidated Financial Statements.

There may be cases where a group (Acquired Group) is acquired by another group (Succeeding Group) on a date other than the Acquired Group's regular fiscal year end. For example, Acquired Group could prepare its regular financial statements on a calendar year basis, but be acquired by Succeeding Group on 30 June Y1. Assuming the Acquired Group had total consolidated group revenues in Y0 which were not less than 750 million EUR, whether the Acquired Group will be obligated to submit a CbC report for the period from 1 January Y1 to 30 June Y1 will depend upon whether it is required to prepare Consolidated Financial Statements for this period in the jurisdiction where its UPE is tax resident (or if the deemed listing provision applies). If there is no such requirement, then the Acquired Group will not be obligated to submit a CbC report for this period. In such a case, the Succeeding Group should in Table 3 of its CbC Report for Y1:

- a) indicate that the Succeeding Group acquired the Acquired Group and the date of acquisition; and,
- b) include the following statement: "The Acquired Group did not file a CbC report in any jurisdiction for the period 1 January Y1 to 30 June Y1".

Entities are to provide the above information in Table 3 as soon as possible, taking into account the specific domestic circumstances. The following examples illustrate the application of this guidance.



**Example 1 - In Y1, Group S sells a sub-group of its own entities. The sub-group of entities subsequently becomes an independent Group, Group E.**

In order to determine whether both Groups are an Excluded MNE Group in their own right under the Regulations, there is no need to adjust the consolidated group revenue for the preceding Fiscal Year due to a merger/acquisition/demerger occurring during the following year. Group S should be required to file a CbC report for Y1 if the total consolidated group revenue of Group S for Y0 was equal to or greater than 750 million euros (or near equivalent amount in local currency as of January 2015). In the case of Group E, since the sub-group of entities (which upon sale become an independent Group E) already existed from an economic point of view before the sale, as part of Group S, it should therefore be required to file the CbC report for Y1 if the total consolidated revenues for the sub-group of entities in Y0 is equal to or greater than 750 million Euro. Where Group E complies with the approach adopted by the jurisdiction of its UPE on this specific aspect, the constituent entities of Group E should not be exposed to local filing in any other jurisdiction.

In case where Group S is not an Excluded MNE in Y1 based on its total consolidated group revenue for Y0, the determination as to the period for which the financial data of the sub-group should be included in the CbC reports of Group S (e.g. pro-rata share or full year) should be governed by the accounting principles/standards applicable to Group S (as determined in accordance with the guidance to identify the accounting principles/standards for determining the existence and membership of a group). Thus, if the accounting principles/standards applicable to Group S require its Consolidated Financial Statements to incorporate a pro-rata share of the financial data of the sub-group (i.e. Group E subsequently), Group S's CbC report should also include a pro-rata share of the financial data of the sub-group (Group E).

**Example 2 - In Y1, Group B acquires 100% of Group E. Both Group B and Group E qualify as an Excluded MNE Group for purposes of Y1 as the total consolidated group revenue of each during the preceding Fiscal Year (Y0) is less than 750 million Euros.**

If the combined total consolidated group revenues of Group B and Group E during Y0 are equal to or greater than 750 million Euros, this will not change the position of Group B as an Excluded MNE Group for purposes of its CbC report filing obligation for Y1. Thus, Group B will continue to be an Excluded MNE Group for Y1 purposes. For the year in which a merger/acquisition/demerger occurs, i.e. Y1, the determination of whether the Group is or not an Excluded MNE Group shall be based on the Group's total consolidated group revenue during the Fiscal Year immediately preceding (i.e. Y0) the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year. There is no need to adjust the consolidated group revenue for the preceding Fiscal Year due to a merger/acquisition/demerger occurring during the following year.

**Example 3 - On 30 June of Y1, Group B acquires 100% of Group E. Neither Group B nor Group E qualify as an Excluded MNE Group for purposes of Y1, as the total consolidated group revenue of each during the preceding Fiscal Year (Y0) is equal to or greater than 750 million Euros.**

The determination as to whether Group E should file a CbC report for the period from 1 January Y1 to 30 June Y1 will depend on whether Group E is required to prepare Consolidated Financial Statements. If Group E is obligated to prepare Consolidated Financial Statements for the period from 1 January Y1 to 30 June Y1 (or if the deemed listing provision applies) under the financial reporting rules in the jurisdiction of the UPE's residence, Group E should also prepare and file a CbC report for the short fiscal period before the acquisition.<sup>5</sup>

However, where the UPE of Group E is not obligated to prepare the Consolidated Financial Statements for the period from 1 January Y1 to 30 June Y1 under financial reporting rules in the jurisdiction where the UPE is a tax resident, Group E is not obligated to prepare and file a CbC report for the short fiscal period either. In these circumstances, Group B should in Table 3 of its CbC Report:

- a) indicate that Group B acquired Group E; and,
- b) include the following statement: "Group E did not file a CbC report with any jurisdictions for the short accounting period before the acquisition."

Entities are to provide the above information in Table 3 as soon as possible, taking into account the specific domestic circumstances.

Additionally, the determination as to the period for which the financial data of Group E should be included in the CbC report of Group B (e.g. pro-rata share or full year) should be governed by the accounting principles/standards (as determined in accordance with the guidance to identify the accounting principles/standards for determining the existence and membership of a group) applied to Group B. Thus, if the accounting principles/standards applicable to Group B require Group B's Consolidated Financial Statements to incorporate a pro-rata share of the financial data of Group E, the CbC report of Group B should also include a pro-rata share of the financial data of the Group E.

**Example 4 - In Y1, Group S sells a sub-group of its entities to Group B. The total consolidated group revenue of Group B for Y0 is less than EUR 750 million i.e. Group B is an Excluded MNE Group.**

In such a case, the amount of total consolidated group revenue of the Fiscal Year immediately preceding the Reporting Fiscal Year (i.e. Y0) should not be adjusted to take into account the sale that occurred in Y1. If total consolidated group revenue in Y0 of Group S is equal to or greater than 750 million Euros, Group S would not qualify as an Excluded MNE Group for Y1. Alternatively, if total consolidated group revenue in Y0 is less than 750 million Euros, Group S remains an Excluded MNE Group for Y1.

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<sup>5</sup> In case where the UPE of Group E does not exist after the acquisition, the entity or person (e.g. a lawyer or agent) responsible under the applicable rules (e.g. accounting, regulatory, or any other relevant legal provisions) to file the Consolidated Financial Statements for the short fiscal period is **also expected to file the CbC report** for Group E.

Moreover, the amount of total consolidated group revenue of the Fiscal Year immediately preceding the Reporting Fiscal Year (i.e. Y0) should not be adjusted to take into account the acquisition that occurred in Y1. Group B should continue to qualify as an Excluded MNE Group based on the total consolidated group revenue of the Group for the preceding year.

**Example 5 - In Y1, Group S sells a sub-group of entities to Group B. The total consolidated group revenue of each of Group B and Group S for Y0 is not less than EUR 750 million i.e. for Y1 purposes they are both considered to be MNE Groups for CbCR purposes in their own right.**

In order to determine whether any financial data of the sub-group of entities sold to Group B in Y1 should be included in the CbC report of Group S for Y1, this should be governed by the accounting principles/standards (as determined in accordance with the guidance to identify the accounting principles/standards for determining the existence and membership of a group) applicable to Group S. Thus, if the governing accounting principles/standards applied to Group S require Group S's Consolidated Financial Statements to incorporate a pro-rata share of the financial data of the sub-group of entities sold to Group B, the CbC report of Group S should also include a pro rata share of the financial data of the sub-group.

Furthermore, the determination as to the period for which financial data of the sub-group should be included in the CbC report of Group B (e.g. a pro-rata share or full year) should be governed by the accounting principles/standards (as determined in accordance with the guidance to identify the accounting principles/standards for determining the existence and membership of a group) applicable to Group B. Thus, if the governing accounting principles/standards applied to Group B require Group B's Consolidated Financial Statements to incorporate a pro-rata share of the financial data of the sub-group, the CbC report of Group B should also include a pro-rata share of the financial data of the sub-group.

## 6.2 Changes with respect to the UPE of an MNE Group during a fiscal year

It should be noted that the UPE of an MNE Group may change from one fiscal year to the next or part way through a fiscal year as a result of for instance a takeover. An MNE Group should be cognisant of the impact changing UPEs may have on CbC Reporting obligations, in particular, where the jurisdiction of tax residence of the UPE changes. Where a change in the UPE of an MNE Group occurs, the MNE Group should carefully review its obligations with regard to making notifications and filing the CbC Report. In particular, where a UPE of an MNE Group changes part way through a fiscal year the following applies:

- a) The parent entity of the acquired MNE Group should file a CbC Report including data for that MNE Group **up to the date of takeover**.
- b) The parent entity of the acquirer MNE Group should file a CbC Report as normal for its fiscal year. That CbC Report will **include** data for the constituent entities of the acquired MNE Group from the date of acquisition until the end of the fiscal year.

### 6.3 Table summarising the interpretation on Mergers/Demerger/Acquisitions

Events and Consequences in Examples 1- 5 of Mergers/Acquisitions/Demerger

	Event In		Consequence (Y)	
	Reference Year (Y0)	Reporting Year (Y1)	Threshold	Table 1
<b>Example 1 - Demerger</b>	The total consolidated group revenue of Group S is equal to or greater than 750 million Euros.	Group S sells a sub-group of its own entities. The sub-group of entities subsequently becomes an independent Group, Group E.	Group S remains a non-Excluded MNE Group. Whether Group E qualifies as an Excluded MNE Group or not depends on the legislation of each jurisdiction. However, where Group E follows the rule of the jurisdiction of its UPE, local filing should not be applied to the CEs of Group E in any other jurisdiction.	The period for which the financial data of the sub-group should be reported in CbC reports of Group S should follow the rule applied to the Consolidated Financial Statements of Group S.
<b>Example 2 - Merger</b>	The total consolidated group revenue of Group B and Group E is respectively less than 750 million Euros.	Both Group B and Group E qualify as an Excluded MNE Group. Group B acquires 100% of Group E. It turns out that combined total consolidated group revenues of Group B and Group E for Y0 was equal or greater than 750 million Euros.	Group B qualifies as an Excluded MNE Group.	N/A
<b>Example 3 - Merger</b>	The total consolidated group revenue of Group B and Group E is respectively equal to or greater than 750 million Euros.	Neither Group B nor Group E qualifies as an Excluded MNE Group. On 30 June, Group B acquires 100% of Group E.	Whether Group E is obliged to file the last CbC reports before the merger depends on the financial reporting rules in the jurisdiction of Group E. Group B remains a non-Excluded MNE Group.	The period for which the financial data should be reported in CbC reports should follow the rule applied to the Consolidated Financial Statements of Group B (and E, if it is the case).
<b>Example 4 - Selling/Buying subgroup</b>	The total consolidated group revenue of Group B is less than 750 million Euros.	Group S sells a sub-group of its entities to Group B. Group B is an Excluded MNE Group.	Group B qualifies as an Excluded MNE Group. Whether Group S qualifies as an Excluded MNE Group or not follows its total consolidated group revenue in Y0.	N/A
<b>Example 5 - Selling/Buying subgroup</b>	The total consolidated group revenue of Group B and Group S is respectively equal to or greater than 750 million Euros.	Group S sells a sub-group of entities to Group B. Both Group B and Group S are non-Excluded MNE Groups.	Both Group B and Group S remain non-Excluded MNE Groups.	The period for which the financial data of the sub-group should be reported in CbC reports of Group S/B should follow the rule applied to the Consolidated Financial Statements of Group S/B.

## 7 Notifications and Submissions in relation to CbCR

### 7.1 Notifications

In line with the requirements outlined under Points 3 and 4 in Section II of Annex III of the Cooperation Regulations, local Constituent Entities are required to submit notifications to the Commissioner in the following cases:

- a. If the Constituent Entity in Malta is the UPE or the SPE or the Constituent entity referred to in Point 1 of Section II of Annex III to the Regulations and will thus be submitting the CbC Report in Malta;
- b. If the Constituent Entity in Malta is not the entity outlined in (a) above and will thus not be submitting the CbC Report in Malta. In this case, the notification should contain details of the identity and tax residence of the Reporting Entity, stating the specific jurisdiction where the report will be submitted on behalf of the MNE.

At present, notifications are to be sent annually to the Commissioner for Revenue, at the International Tax Unit, by means of a letter, signed in original by the director of the Constituent Entity in question, outlining the main points specified in (a) and (b) above, as well as the Reporting Fiscal Year to which such notification refers. The intention is that this process will be automated and submission of electronic notifications will be possible through the AEOI portal on the CfR website during 2018.

### 7.2 Format and Submission of CbC Report

If a Maltese Entity is the UPE and is required to submit the CbC Report to the CfR [and has duly notified as per Section 7.1 (a) above], then the appropriate format for the CbC report will be as per the template outlined in Section III of Annex III of the Cooperation Regulations, in XML schema as developed by the OECD.<sup>6</sup>

If an XML file contains one or more of these characters, these should be replaced by the following predefined entity references to conform to XML schema best practices:

Character	Description	Entity Reference
&	Ampersand	&amp;
<	Less than	&lt;
>	More than	&gt;
'	Apostrophe	&apos;
“	Quotes	&quot;

<sup>6</sup> <http://www.oecd.org/tax/beps/country-by-country-reporting-xml-schema-user-guide-for-tax-administrations.htm>

The below characters are not allowed:

Character	Description	Entity Reference
--	Double hyphen	N/A
/*	Forward slash and asterisk	N/A
&#	Ampersand and hash	N/A

For the first reporting period, the report is to be submitted to the CfR via an SFTP server [in the same manner as outlined for Trustee-documented Trusts Consolidated Reporting in Section 9.4.2. of the CRS Guidelines]. Submission of the XML CbC Report will thus be through the IRD Secure File Transfer Protocol (SFTP) server. If a Constituent Entity so wishes to use this service, it is requested to apply by sending an e-mail on [itu.mfin@gov.mt](mailto:itu.mfin@gov.mt) with the necessary details [including name of the contact person] in order to be provided with the required information to access the SFTP server and upload the file. The intention is that this process will be automated and submission of CbC Reports will be possible through the AEOI portal on the CfR website for the following reporting period.

In order to ensure that a message and a record can be identified and corrected, the MessageRefID and DocRefID must be unique in space and time (i.e. there must be no other message or record in existence that has the same reference identifier).

The MessageRefID identifier can contain whatever information the sender uses to allow identification of the particular record but should start with the country code of the sending jurisdiction, followed by the year to which the data relates and then a dash before a unique identifier. The sending Reporting Entity should ensure that a unique identifier is created in line with the above explanations, which could be complemented by a Reporting Entity identification number, provided by the Competent Authority of the Tax Jurisdiction of the Reporting Entity.

e.g. MT2016-123456789

The unique identifier in the DocRefID is used by the sending Competent Authority [or the Reporting Entity] to identify a unique record and is composed of the country code of the sending jurisdiction, followed by the year to which the data relates and then a dash before a unique identifier.

e.g. MT2016-286abc123xyz

## 8 List of Jurisdictions that are not EU Member States

In terms of Regulation 49 of the Cooperation with Other Jurisdiction on Tax Matters Regulations, the following is the list of jurisdictions which are not EU Member States and with which Malta has an arrangement in place to automatically exchange CbC Reports:

Jurisdiction		Reportable Period
1	Andorra	Effective for taxable periods starting on or after 1/1/2018
2	Argentina	Effective for taxable periods starting on or after 1/1/2016
3	Australia	Effective for taxable periods starting on or after 1/1/2016
4	Brazil	Effective for taxable periods starting on or after 1/1/2016
5	Canada	Effective for taxable periods starting on or after 1/1/2016
6	Chile	Effective for taxable periods starting on or after 1/1/2016
7	China	Effective for taxable periods starting on or after 1/1/2017
8	Colombia	Effective for taxable periods starting on or after 1/1/2017
9	Gibraltar	Effective for taxable periods starting on or after 1/1/2017
10	Guernsey	Effective for taxable periods starting on or after 1/1/2016
11	Hong Kong (China)	Effective for taxable periods starting on or after 1/1/2019
12	Iceland	Effective for taxable periods starting on or after 1/1/2016
13	India	Effective for taxable periods starting on or after 1/1/2016
14	Indonesia	Effective for taxable periods starting on or after 1/1/2016
15	Isle of Man	Effective for taxable periods starting on or after 1/1/2016
16	Japan	Effective for taxable periods starting on or after 1/1/2016
17	Jersey	Effective for taxable periods starting on or after 1/1/2016
18	Korea	Effective for taxable periods starting on or after 1/1/2016
19	Liechtenstein	Effective for taxable periods starting on or after 1/1/2016
20	Malaysia	Effective for taxable periods starting on or after 1/1/2016
21	Mauritius	Effective for taxable periods starting on or after 1/1/2016
22	Mexico	Effective for taxable periods starting on or after 1/1/2016
23	Monaco	Effective for taxable periods starting on or after 1/1/2018
24	New Zealand	Effective for taxable periods starting on or after 1/1/2016
25	Norway	Effective for taxable periods starting on or after 1/1/2016
26	Pakistan	Effective for taxable periods starting on or after 1/1/2018
27	Peru	Effective for taxable periods starting on or after 1/1/2020
28	Russian Federation	Effective for taxable periods starting on or after 1/1/2016
29	San Marino	Effective for taxable periods starting on or after 1/1/2016
30	Seychelles	Effective for taxable periods starting on or after 1/1/2018
31	Singapore	Effective for taxable periods starting on or after 1/1/2018
32	South Africa	Effective for taxable periods starting on or after 1/1/2016
33	Switzerland	Effective for taxable periods starting on or after 1/1/2016
34	United Kingdom	Effective for taxable periods starting on or after 1/1/2016
35	Uruguay	Effective for taxable periods starting on or after 1/1/2018
36	USA	Effective for taxable periods starting on or after 1/1/2016

