



GUIDELINES FOR THE APPROPRIATE USE OF INFORMATION CONTAINED IN CBC REPORTS AND CONSULTATIONS BETWEEN COMPETENT AUTHORITIES

These Guidelines are issued to provide guidance to the staff of the Inspectorate of Taxes, Multinational Enterprises (hereafter: MNEs) operating in Curaçao, all taxpayers, taxpayers' representatives or advisers and the general public on the appropriate use of information contained in the Country-by-Country (hereafter: CbC) reports.

Part I Preliminary

1. Legal background

These Guidelines are given to supplement the CbC legislation that came into force on January 1, 2018 pursuant to paragraph 2 of Section 5 and Section 6 of the Multilateral Competent Authority Agreement on Country-by-Country Reporting (hereafter: CbC MCAA). The Guidelines will give effect to Curaçao's commitment under the Inclusive Framework on Base Erosion and Profit Shifting (hereafter: BEPS), as well as other Exchange of Information Instruments.

Part II Appropriate Use

2. Conditions for obtaining and using CbC reports

The ability of Curaçao to obtain and use CbC reports is conditional upon using it appropriately. This condition is described in paragraphs 25 and 59 of the Action 13 Report and given effect through article 45 of the National Ordinance of Profit tax 1940 and paragraph 2 of Section 5 of the CbC MCAA. Accordingly, every officer of the Inspectorate of Taxes that accesses information from CbC reports must use it appropriately in line with these Guidelines, the CbC legislation, the CbC MCAA and other legal instruments relating to the Exchange of Information.

3. What constitutes "Appropriate Use"

For the purposes of the CbC reports, appropriate use is restricted to:

- a) the assessment of high level transfer pricing risk assessment;
- b) the assessment of other base erosion and profit shifting related risks; and
- c) economic and statistical analysis, where appropriate.



4. Instances of inappropriate use

In accordance with Paragraphs 25 and 29 of BEPS Action 13 Report and Section 5 of the MCAA, the use of Country-by-Country reports is inappropriate if the information is used:

- a) 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;
- b) as a conclusive evidence that transfer prices are or are not appropriate;
- c) to propose transfer pricing adjustments based on a global formulary apportionment of income; and
- d) to propose adjustments to the income of any taxpayer on the basis of an income allocation formula based on the data obtained therefrom.

However, the usage of the Country-by-Country reports 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 audit will not be considered as inappropriate.

Similarly, nothing in this guideline shall prevent the Inspectorate of Taxes from using intelligence obtained from CbC reports for the purposes of planning tax audits or other compliance actions, or as a basis for making further enquiries to taxpayers or to other tax authorities. Further enquiries directed to another tax authority, however, must meet the foreseeable relevance standard.

5. The use of CbC reports in planning a tax audit

The Inspectorate of Taxes may use CbC reports in planning a tax audit or as the basis for making further enquiries into the group's transfer pricing arrangements or other tax matters in the course of an audit. The Inspectorate of Taxes makes no commitment that these enquiries must relate specifically to potential risks identified through the use of CbC reports. For example, CbC reports (such as the details of constituent entities in Table 2 of the report) may be used as the basis for making enquiries into tax matters identified using other data sources or arising during the course of a tax audit.

Tax Inspectors will be notified whether a CbC report has been filed regarding taxpayers for which they are responsible. The tax risk assessment is carried out by the Tax Inspectors through a manual review based on the CbC reports in combination with other sources of data such as their own expertise and data available to the Inspectorate of Taxes. When reviewing the reports the Tax Inspectors will focus on:

- Income;
- Expenses;
- Other BEPS risks (e.g. data inconsistency, hybrid PE's, etc.);



- Cross check data already available of the taxpayer.

The findings based on the manual review will be discussed with the other Tax Inspectors if a transfer price risk has been identified before deciding on the best way forward. On all cases a so called “Four-Eyes-Principle” will be applied, which means consensus of at least two Tax Inspectors will always be needed to ensure consistency. One next step could be to discuss the findings with the taxpayer. During these discussions, the Tax Inspector can ask for the master file and local file according to article 46 of the National Ordinance on Profit tax 1940 and/or other relevant (transfer pricing) documentation.

The OECD Forum on Tax Administration’s handbook on making effective use of CbC reports for the purposes of tax risk assessment is hereby incorporated for further clarity on the use of the information for tax risk assessment.

6. The use of CbC reports for economic and statistical analysis
CbC reports may be used for economic and statistical analysis where appropriate. However, it may not be used as stated above where the relevant exchange of information agreement forbids this.

Part III BEPS-related risk

7. The meaning of BEPS-related risk

Though the phrase BEPS-related risk is not expressly defined in the BEPS Action Plans, the introduction to the February 2013 Report *Addressing Base Erosion and Profit Shifting* (the BEPS Report, OECD 2013) refers to this as “*planning aimed at shifting profits in ways that erode the taxable base to locations where they are subject to a more favorable tax treatment*”. The report further states that: *While the specific goals will vary among MNEs, in particular with respect to companies headquartered in different jurisdictions, broadly speaking, BEPS focuses on moving profits to where they are taxed at lower rates and expenses to where they are relieved at higher rates. Specific strategies may also be put in place to make use of existing “tax attributes” such as tax credits, loss-carry forwards, etc. These generic goals are often achieved in a way that aligns with the overall management of the treasury operations of the group, e.g. in terms of cash management, management of foreign exchange risks and efficient repatriation strategies.*

8. How BEPS-related risk can arise

The BEPS Report gives a number of examples of how tax rules in place at the time could be used to achieve low or no taxation, based around existing rules on jurisdiction to tax, transfer



pricing, and the tax treatment of debt and anti-avoidance rules. These include the use of a low-taxed branch of a foreign company, hybrid entities, hybrid financial instruments, conduit companies, the use of derivatives to avoid withholding taxes, and profit shifting using the contractual allocation of risk and the pricing of intangibles.

9. The Meaning of “Assessment of other BEPS-related risks”

Consistent with the BEPS Report, the term “assessment of other BEPS-related risks”, should be understood to refer to the high-level assessment of tax risks that may result in the erosion of a country’s tax base. In practice, while CbC reports may be used to identify indicators of possible tax risk, it will usually only be possible to understand the arrangements giving rise to that risk once further enquiries have been conducted. It remains key that CbC reports should be limited to use in risk assessment and as a basis for making further enquiries in the course of a tax audit (and economic and statistical analysis, where appropriate). In the same way that CbC reports on their own do not constitute conclusive evidence that transfer prices are not appropriate, it also does not constitute conclusive evidence that a group is engaged in other forms of BEPS.

Part IV Consequences of Non-Compliance with the Appropriate Use Condition

10. Consequences of breach of Appropriate Use under Action 13 Report and the MCAA

CbC reports must be used in a manner consistent with appropriate use conditions, always bearing in mind that Curaçao’s failure to do so would trigger the Action 13 Report’s consequences for non-compliance with the appropriate use condition.

For that purpose, Curaçao has the following commitments under the CbC MCAA:

- a) that appropriate use is a condition for receiving and using CbC reports;
- b) to disclose breaches of appropriate use to the Coordinating Body Secretariat (for exchanges pursuant to the MCAA), including any remedial actions as well as any measures taken;
- c) to promptly concede inappropriate adjustments in competent authority proceedings.

In addition to the above, there is a serious risk that inappropriate use of CbC reports could result in entities being issued incorrect tax assessments.

Part V General and Miscellaneous provisions

11. Policies on Appropriate Use

These Guidelines communicate the policy of the Inspectorate of Taxes on the appropriate use of CbC reports. The Guidelines will be communicated to all officers of the Inspectorate of Taxes that are likely to have access to CbC reports in the course of their work and will be published on the internal portal and website of the Inspectorate of Taxes and of the Ministry of Finance.



12. Training on Appropriate Use

The Inspectorate of Taxes shall regularly train staff whose job is or may become relevant to transfer pricing and BEPS related risk assessment on appropriate use of CBC reports. Such training will clearly set out the obligations and commitments as set out in paragraph 10 of these guidelines.

Where necessary the team of the competent authority of Curaçao will give presentations on CbC to tax inspectors to educate and train on CbC and explain expectations and requirements.

13. Measures to monitor, control and restrict access to CbC reports

The Inspectorate of Taxes commits to restrict access to CbC reports and put in place adequate measures to ensure effective control and monitoring of the use of CbC reports to ensure appropriate use. To this end:

- i. only staff handling the exchange of CbC reports and members of a compliance team involved in tax risk assessment shall have access to the reports;
- ii. password protected computers should be used to access electronic data relating to CbC reports;
- iii. physical copies of CbC reports should be stored in locked rooms or locked filing cabinets with access for authorized persons only;
- iv. CbC reports (including extracts from CbC reports or analyses based on CbC reports) may be provided to staff in the compliance function, to the extent that this is covered by the appropriate use conditions;
- v. the Inspectorate of Taxes will put in place, mechanisms that may be used to monitor or record which staff access CbC reports;
- vi. the tax risk assessment team shall maintain a record of what information was shared, the reason for sharing it, and the staff with whom it was shared;
- vii. the Inspectorate of Taxes should ensure that appropriate use is adequately evidenced;
- viii. the Inspectorate of Taxes shall incorporate the appropriate use condition into their existing review mechanisms; and
- ix. the Inspectorate of Taxes shall continually review and monitor the measures put in place to ensure appropriate use of CbC reports, and where necessary, introduce control, or expand existing controls, to ensure that CbC reports are available to staff involved in activities covered by the appropriate use conditions, but restrict access to other staff.

Part VI Consultations between competent authorities

14. Consultations between competent authorities

Pursuant to Section 6 the competent authority of Curaçao will provide for consultations with the competent authorities of other jurisdictions in the following situations:

- where difficulties arise in the implementation or interpretation of the CbC MCAA.



- prior to making a determination that there is a systemic failure to exchange CbC Reports according to article 42, letter l, of the National Ordinance on Profit Tax 1940 or significant non-compliance with the CbC MCAA.
- where a tax adjustment has led to undesirable economic outcomes.

Please note that only the competent authority of Curaçao is competent to communicate with other competent authorities.

15. Implementation or interpretation

In case of questions relating to the implementation or interpretation of CbC MCAA the competent authority of Curaçao will engage directly with the other competent authority in writing with a view to identifying the issue and facilitating an exchange of views with the purpose of resolving these questions.

Follow-up discussions and/or meetings will be scheduled, as necessary. In the event that a resolution is reached, this will be memorialized in an exchange of letters. Furthermore, if the consultation was requested by the competent authority of Curaçao, the competent authority will notify the Coordinating Body Secretariat of any conclusions that were reached and measures that were developed, including the absence of any conclusions or measures.

16. Systemic failure

Consequently, the competent authority of Curaçao will consult with another competent authority before the competent authority determines that there is a systemic failure to exchange CbC reports by the other competent authority. If, after consultations, the competent authority of Curaçao makes a determination of systemic failure, it will notify the Coordinating Body Secretariat.

The above could for example apply when based on notifications Curaçao would expect CbC reports but subsequently none were received. The Inspectorate of Taxes will then first reconcile all notifications with the CbC reports received. If there are discrepancies they will inform the competent authority of Curaçao. Together they will discuss the issue and will decide on appropriate action.

17. Significant non-compliance

The competent authority of Curaçao will consult with another competent authority before making a determination of significant non-compliance by the other competent authority. This



consultation is critical since significant non-compliance is a basis for suspending the exchange of CbC reports. Significant non-compliance means non-compliance with the conditions requiring confidentiality or appropriate use of the information contained in CbC reports or, as applicable, failure to consult with the aim of resolving undesirable economic outcomes from an adjustment following enquiries based on the data in a CbC report or failure to endeavor to resolve a case of taxation not in accordance with the provisions of a double tax agreement (hereafter: DTA), as well as a failure to provide timely or adequate information.

If the competent authority of Curaçao is considering making a determination of significant non-compliance it will clearly identify the basis for its belief, which could be based on information received from Multinationals, the Inspectorate of Taxes or any other medium, and invite the other competent authority to address its concerns on an expedited basis. If such non-compliance has occurred, the other competent authority would be expected to explain what remedial action, if any, has been or will be taken.

18. Undesirable economic outcomes

Where enquiries, based on the data in the CbC report, result in an adjustment to the taxable income of an entity in an MNE group that, in turn, leads to “undesirable economic outcomes”, after being informed about this by the Inspectorate of Taxes, the competent authority of Curaçao will consult with the other competent authority with the aim of resolving the case. If there is a DTA in place which includes a provision for mutual agreement procedure based on Article 25 of the Model Tax Convention, a taxpayer may submit a request under this provision to the competent authority specified in the DTA.

19. Suspension of exchange of CbC reports

The suspension of the exchange of CbC reports would only occur in exceptional circumstances. The competent authority of Curaçao will give notice in writing if it determines that there is or has been significant non-compliance by another jurisdiction. This determination may, for example, be based upon the outcomes of a jurisdiction's peer review evaluation. A suspension will have immediate effect and will continue until both jurisdictions are satisfied that there had been no significant non-compliance, or relevant measures have been adopted by the other jurisdiction to address the non-compliance.

20. Review of the Guidelines

The Fiscal Affairs office at the Ministry of Finance in conjunction with the Inspectorate of Taxes will review these Guidelines, and the procedures put in place to ensure appropriate use of CbC reports, on an ongoing basis, and make changes that are considered desirable as appropriate.

