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BEPS 13: CBCR – Country-by-Country Reporting

BEPS 13: CBCR – raport według krajów

SUMMARY

In order to eradicate the unfair competition in the form of tax avoidance and profit shifting, the OECD and the EU advise undertaking effective measures, which have been gathered in a complex of 15 actions that should be introduced by member states to their law orders. Promoting the automatic information exchange and reporting (BEPS 13) has become one of the priorities, as it is considered a tool that guarantees the transparency of actions and the future European and international standards in tax matters. Due to the fact that groups of multinational enterprises have the possibility for applying practices of aggressive tax planning, tax organs of member states need extensive and accurate data that will enable them to react to harmful tax practices by introducing amendments to law or implementing appropriate risk assessments and tax inspections. A greater transparency towards tax organs ought to result in multinational tax organs refraining from the practices they have implemented so far, so that they would start to pay taxes in the country they generate income.

Keywords: optimisation; tax avoidance; profit shifting; base erosion; exchange of information

INTRODUCTION

BEPS[1] is a term used in an international debate concerning tax avoidance and measures towards countering the unfair underpaying of public levies, which has gained popularity due to the OECD Report, also known and referred to as the

[1] BEPS – Base Erosion Profit Shifting.

BEPS Action Plan on Base Erosion and Profit Shifting published on 19 July 2013. This term has become the synonym of measures for amending tax regulations and taxation principles. Adopted in the documents of the Organisation for Economic Co-operation and Development (OECD), the term "BEPS" refers to the tax planning strategy, the major objective of which is to make use of legal loopholes and contradictions of tax regulations for the purpose of hiding profit or transferring it to places, in which a taxpayer is active in a small extent or does not run any activity at all, yet where taxes are low when compared to the taxpayer's domicile, or where are none (so-called tax havens). Such actions of taxpayers result in them being levied either low taxation or no income tax at all. However, countries offering this sort of incentive unfairly make profit from the parts of the income, as they add funds to their budget, even though the income was generated in other countries. Therefore, with the aim of eradicating the unfair competition in the form of tax avoidance and profit shifting, the OECD and the EU advise undertaking effective measures, which have been gathered in a complex of 15 actions that should be introduced by member states. BEPS constitutes a comprehensive complex of tools that contains certain minimum standards, common solutions, guidelines and best practices in taxation, which countries can and should introduce to their law orders. Obviously, the OECD guidelines and reports are not the source of the applicable law in Poland, however, the national regulations are based on them to a considerable extent, and the Ministry of Finance strives to implement the new proposals in our law order as soon as possible. It should be highlighted that the tools offered by the OECD – in the light of the international public law – are not binding, as it is the so-called soft law. Nonetheless, it is presumed that the assumptions in the BEPS Action Plan will be adopted by the countries involved in its development. In the case of numerous countries (including Poland), the introductory works are being implemented, and in some, have been even finished.

It is worth bearing in mind that singular actions within the framework of the BEPS Action Plan concern i.a. neutralising the effects of hybrid structures making use of incoherency of tax systems, strengthening taxation principles of the controlled foreign companies (CFC), restricting the base erosion through deducting interest rates and other fees for financial services, ensuring that the transfer prices correspond to creating the value of intangible assets, as well as that they provide compliance of those prices with creating the value of the risk/capital and value of other transactions bearing a high risk, redefining the documentation of transfer prices, introducing the requirement for taxpayers to disclose the applied aggressive tax strategies, adopting a methodology of gathering and analysing the data on base erosion and profit shifting, finally, concluding a multilateral agreement introducing the BEPS Action Plan as well as modifying the already existing agreements on double taxation avoidance. Under these circumstances one can await, as to which new solutions out of those put forward by the OECD will be introduced in Poland.

LEGAL BASIS OF THE CBCR OBLIGATION

The following documents of OECD and national legislative acts form the legal basis of introducing the reporting obligation:

1. Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report, OECD, published on October 5, 2015[2] – hereinafter referred to as BEPS Project, Action 13.
2. The Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation[3].
3. The Act of 9 March 2017 on Tax Information Exchange with Other Countries[4].
4. Decree of the Minister of Development and Finance of 13 June 2017 on the specific scope of data provided for in the information on groups of entities and the form of completion thereof[5].

By adopting the Directive 2016/881 on 25 May 2016, amending the Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation[6], the European Council recognised that the increasing number of incidents of tax fraud and tax evasion forces introducing measures aimed at improving the efficiency of countering such phenomena. Therefore, expressive promoting the automatic information exchange and reporting (BEPS 13) as a tool that guarantees the transparency of actions and the future European and international standards in tax matters has become one of the priorities. Presenting the Action Plan aimed at efficiency improvement of countering tax frauds and tax evasion, an announcement was released as far back as on 6 December 2012, which highlighted that the automatic information exchange constitutes a vital tool in this matter. In turn, in conclusions from 22 May 2013, the European Council appealed to extend the automatic information exchange at both the European and the global level, with the protection of small and medium-sized enterprises (SMEs) in mind, operating exclusively on the local market, whose tax burden was higher when compared to multinational enterprises. Moreover, it was emphasised that all member states are exposed to budget income reduction, thus, there is a risk of them competing with one another, offering the groups of multinational enterprises additional tax reliefs in order to attract them. As groups of multinational enterprises operate in

[2] www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm [access: 15.10.2017].

[3] OJ L 146/8 of 3 June 2016, PL.

[4] Journal of Laws 2017, Item 648.

[5] Journal of Laws 2017, Item 1176.

[6] OJ L 146/8 of 3 June 2016, PL.

various countries, it is possible for them to apply aggressive tax planning, which are not available for domestic enterprises. Hence, tax organs of member states need extensive and accurate data concerning the structure, transfer price policies, as well as inner transactions within and outside the European Union of the groups of multinational enterprises. Such information should facilitate reacting to harmful tax practices by introducing amendments to law or implementing appropriate risk assessments and tax inspections, as well as stating whether those enterprises apply practices leading to artificial shifting of considerate income parts to more convenient tax systems. Therefore, a greater transparency towards tax organs ought to result in multinational tax organs refraining from the practices they have implemented so far, so that they would start to pay taxes in the country they generate income.

In the Council's estimation, the groups of multinational enterprises ought to report in CBCR on an annual basis – with respect to each tax jurisdiction, within the framework of which they run their business activity – the following data: earned revenue, pre-tax profit, paid and due income tax. Such a report should include information on the number of employees, basic capital, undistributed profit and tangible assets in/of each tax jurisdiction. The groups of multinational enterprises should indicate all parties belonging thereto which run business activity in a given tax jurisdiction as well as present information on the kind of business activity conducted by each of those parties. The same information is to be gathered and made accessible to tax administrations of the entire European Union in due time.

The obligatory information exchange by country should, in any event, comprise the transfer of the given basic information to those member states, in which – as can be seen from the information included in the report by country – the tax resident is at least one entity included in the multinational enterprise group, or in which at least one such an entity is levied taxation in relation to the business activity carried out by a permanent establishment of multinational enterprise groups. Member states should, in turn, adopt regulations concerning sanctions to be applied in case of any violation of national regulations adopted pursuant to this Directive, as well as guarantee to introduce these sanctions. The choice of sanctions is within the member states' competence, albeit the foreseen sanctions should be effective, proportional and deterrent.

The result of the works on the Action 13 of the BEPS Plan undertaken in the European Union are standards of information transferring by multinational enterprise groups, encompassing group and local documentation alongside the report by countries. By adopting regulations concerning the aforementioned reports, it was recognised that the OECD standards should be taken into account, and the actions of the European Union with regard to accounting by country are to include amendments introduced at the OECD level. However, by implementing the Directive, the member states should base on the final report from 2015 on tax base erosion and

profit shifting as a source of examples or interpretations, as well as to ensure the appliance in all member states.

The scope and conditions of the obligatory automatic exchange of information on report by country was referred to in Article 8aa of the adopted Directive 2016/881, which states that:

1. Each member state takes up the necessary measures to oblige the domineering ultimate parent entity of the multinational enterprise groups, which is the tax resident on its territory, or for any other entity submitting the report within the meaning of the Annex III Section II of the Directive, to present the report by country with regard to its current fiscal year within 12 months since the last of the fiscal year of a given group of multinational enterprises, in accordance with the aforementioned Annex.
2. The competent organ of the member state which has received the report by country prepared in such a way is obliged to transfer this report – within the framework of the automatic information exchange and in due time – to each member state, in which – as can be seen from the information included in the report by country – the tax resident is at least one entity of the multinational enterprise groups, to which the reporting entity belongs, or in which the business activity carried out by its permanent establishment is levied taxation.
3. The report by countries should include the following information on the multinational enterprise groups:
   - data collection concerning: earned revenue, pre-tax profit, paid and due income tax, basic capital, undistributed profit, number of employees, tangible assets other than cash or its equivalents, with respect to each jurisdiction, in which a multinational enterprise group carries out the business activity,
   - data identifying each entity that is a part of the group of multinational enterprises, including: the name of jurisdiction, in which the entity has its tax residence, the name of jurisdiction, pursuant to whose law it was established, if it is different from its tax jurisdiction, as well as the core business activity of this entity (as a part of the aforementioned group).

Article 2 of the Directive 2016/881 states that the member states ought to adopt and publish laws, regulations and administrative provisions until 4 July 2014 at the latest and that they will continue to apply them from 5 June 2017 onwards. Adopted on 9 March 2017, the Act on Tax Information Exchange with Other Countries regulates i.a. the exchange of tax information on entities that are parts of the group of entities, transferring regulations on CBCR from the Tax Act and introducing a range of amendments as to the obligation of its submitting, and above all, extending the scope of entities obliged to its transfer. So far, the obligation to transfer the information on the group of entities has arisen from Article 27 Item 6

of the Corporate Income Tax Act of 15 February 1992[7] and it referred to domestic entities considered as affiliated entities pursuant to Article 11 Item 1 Point 1 and Item 4 of the Act, which:

- are considered as parent companies and they do not fulfill the criteria classifying them as an affiliated entity, within the meaning of the Taxation Act,
- they consolidate the financial statements pursuant to the provisions of the Taxation Act,
- they have a foreign or an affiliated entity outside the territory of Poland, the latter of which was referred to in the Taxation Act,
- they have achieved consolidated revenue, pursuant to the provisions of the Taxation Act, on or outside the territory of Poland, exceeding EUR 750 million.

As it was the case so far, a parent company having its seat or management board in Poland has been obliged – in principle – to transfer the information on the group of entities, pursuant to Article 83 Item 1. It is obliged to submit the CBCR, prepared on the basis of the official template, to the Head of the National Revenue Administration within 12 months since the end of the fiscal year (for which the annual consolidated financial statements are prepared). The submission term of CBCR for 2016 was exceptionally prolonged to 18 months since the end of that year, that is up to 30 June 2018, assuming that the taxpayer's fiscal year coincides with the calendar year. As results from Article 84 Item 1, entities other than parent companies which have their management board or seat in Poland, or which carry out their business activity in Poland exclusively through a foreign enterprise, are also obliged to submit the information on the groups of entities to the Head of the National Revenue Administration, provided that:

- the parent company is not obliged to submit CBCR for a given fiscal year in the country or on the territory of the seat (management board), or
- despite concluding the Agreement on the exchange of tax information between Poland and a country or a territory of the seat (management board) of a parent company, no qualifying agreement between the competent organs was concluded within 12 months since the day of the end of the fiscal year, or
- the country or the territory of the seat (management board) of the parent company suspended the automatic information exchange or constantly did not fulfill the obligation to transfer the information to the Polish party, provided that the parent company was informed about this (through a publication in the Public Information Bulletin).

The occurrence of the aforementioned circumstances will result in imposing the obligation on such an entity to submit CBCR in Poland. However, when a parent

[7] Journal of Laws 2016, Item 1888 as amended.

company which is obliged to transfer the information on the groups of entities has not obtained the necessary data, it shall be obliged to inform about this event in CBCR, and to provide therewith only the information it has access to. In accordance with Article 84 Item 2 and 4 of the Act, the obligation to submit CBCR is not in force – despite the conditions being fulfilled – when a group has already appointed another entity from the group to meet this obligation (provided that it fulfills extra conditions included in the Act). Moreover, pursuant to Article 86 Item 1, if the consolidated revenue of a Polish entity that is a part of the group of the affiliated entities exceeds EUR 750 million, it is obliged to provide the Head of the National Revenue Administration, on the last day of the fiscal year of a given group of entities, with the following data concerning:

- the fact that it is a parent company, a reporting entity, or
- the indication of the reporting entity and the country (territory), in which CBCR is to be submitted.

EXCHANGING CBCR BETWEEN COUNTRIES

Pursuant to the adopted legal acts, countries should exchange the reports between one another. It should be noted that the representatives of Poland and of 30 other countries signed the MCAA (Multilateral Competent Authority Agreement) concerning the automatic exchange of information included in the forms of Country-by-Country Reporting. The OECD sources[8] inform that such an agreement was signed by 65 countries. Even though the list does not include the United States, yet tax organs thereof – IRS – publish such a list on their web page[9]. On 20 September 2017, the OECD declared the form in the XML format for preparing and exchanging CBCR. In accordance with the adopted regulations, the first reports will be created for 2016; capital groups are to submit the report within 12 months since the end of the year, hence, the first report exchange will take place in 2018.

1. National/domestic law – confusing and unclear terminology

It is noteworthy that according to the Polish translation of the Council Directive 2016/881, the term "CBCR" was translated into Polish as *sprawozdanie według krajów* (report by countries). Nonetheless, the Polish legislator introduced yet another term in the Act on Tax Information Exchange with Other Countries, and that

[8] Multilateral Competent Authority Agreement (MCAA), www.oecd.org/tax/beps/CbC-MCAA-Signatories.pdf [access: 06.07.2017].

[9] Country-by-Country Reporting Jurisdiction Status Table, www.irs.gov/businesses/country-by-country-reporting-jurisdiction-status-table [access: 12.10.2017].

is "information on entities being parts of the group of entities". It is all the more misleading that the already adopted Corporate Income Tax Act includes a very similar term, yet it refers to a completely different report. Pursuant to Article 9a Item 2d thereof: "Taxation documentation shall also include information on the group of affiliated entities, which include the taxpayer".

Applying such a legislative technique is completely incomprehensible for taxpayers, and in our estimation, inadmissible. The meaning of unclear terms is, therefore, presented in Table 1.

Table 1. Meaning of terms used in statutes

Terms referred to in legal acts	Meaning
Information on entities being parts of the group of entities	Report by countries or CBC Report
Information on the group of affiliated entities	Master file, element of taxation documentation

Source: own work.

2. Sanctions related to CBCR

The Act on Tax Information Exchange with Other Countries has introduced a sanction amounting up to PLN 1 million for not submitting CBCR Report or notifying about the person who is to submit this report (CBC-P Form). Pursuant to Article 90:

1) an entity being a part of the group of entities, within the meaning of Article 82 Point 5, which does not meet the obligation to transfer the information on the group of entities, referred to in Article 83 Item 1 or Article 84, or
2) to provide the notification referred to in Article 86 Item 1

– shall be liable to a pecuniary penalty. In the case described in Item 1 Point 1, only a parent company or an appointed entity being a part of the group of entities may be subject to a pecuniary penalty. Nevertheless, Article 91 Item 1 states that such a penalty is imposed by the Head of the National Revenue Administration (in form of a decision), to an amount not higher than PLN 1 million. At the same time, amendments were introduced to the Penal and Fiscal Code by adding Article 80d: "Anyone acting as a taxpayer or in a taxpayer's interest against the provisions of the Act of 9 March 2017 on the Exchange of Tax Information Between Other Countries submits the untrue information with regard to the information on entities being parts of the group of entities shall be liable to a fine amounting up to 240 of daily day-fine units".

It should be emphasised that both sanctions relate to the report. Hence, unfortunately, a tendency to impose penalties for documents and writings – and not for material results resulting therefrom, which is typical for Polish legislation – has

been maintained. However, it should be the other way round – relatively lower penalties should be imposed for documents, whereas considerably higher penalties should be imposed for "shifting" the income before taxation. The Polish regulations lack, so far, in clear provisions which would impose penalties for profit shift or removing profit before taxation. And that was the very objective of introducing the BEPS Project and its transferring to Directive 2016/881, that is, for the purpose of countering the tax base erosion and "profit shifting".

3. Material consequences of applying information included in the report by countries

Both the aforementioned BEPS Action 13 and Directive 2016/881, as well as annexes to the Project of the adopted Decree, include three tables, illustrating data that should be included in CBCR. It is noteworthy that the published Decree does not include these tables, whereas the detailed content of CBCR was stated in § 1 Point 7 and 8 of the adopted Decree, which state that this document includes the information on the core activity of the entities being parts of the group of entities classified by:

a) research and development,
b) possession or management of intangible assets,
c) purchases or orders,
d) production or manufacture,
e) sales, marketing or distribution,
f) administration, management or support services,
g) service rendition for independent entities,
h) intra-group financing,
i) regulated financial services,
j) insurance,
k) holding of stock or ownership rights in entities,
l) inactive business activity or
m) other kind of activity;

and data on the business activity carried out by entities being parts of the group of entities (Point 8) including:

a) the generated revenue, divided into the one from independent entities and the one generated by entities being parts of the group of entities, whereby payments received from other entities being parts of the group of entities, considered as dividends in the tax residence of the entity performing the payment, are not taken into account,
b) generated pre-tax profit (loss), including all extraordinary revenues and costs,
c) income tax paid and unreturned in any form during the reporting fiscal year, including tax at source paid by other entities due to payment for the benefit of the entity being parts of the group of entities,

d) due income tax for the reporting fiscal year, whereby the due income tax reflects exclusively the operations undertaken in the reporting fiscal year and does not include deferred taxes or provisions for contingent liabilities,
e) sum of the basic (share) capital,
f) undistributed profit at the end of the fiscal year,
g) number of employees in terms of full-time jobs, in accordance with the adopted calculation method,
h) sum of book values of net tangible assets (fixed and current), excluding cash contributions and their equivalents as well as intangible assets and fiscal assets

– demonstrated by country or territory, whose entities are tax residents, and in the case of a foreign enterprise by country or territory of the conducted business activity by a foreign enterprise; in the case of a foreign enterprise, the basic (share) capital is demonstrated by an entity, to which this enterprise belongs, unless capital requirements are in force in a country or on a territory of the conducted business activity by a foreign enterprise. A sample table including the required data pursuant to Point 8 § 1 of the Decree is presented in the Annex.

CONCLUSIONS

1. The reporting obligations imposed on the groups of affiliated entities are costly and time-consuming.
2. Applying this data ought to facilitate the implementation of the BEPS Project: the profit taxation should occur in the country, where it was generated.
3. The role of science is to research on the economic and legal phenomena related to this issue, as well as to prepare tips for local tax organs, which would be a basis to draw up legal acts, followed by social consultations.
4. The current Polish law – especially as regards transfer prices – is exceptionally strict when it comes to documentation obligations, whereas it provides narrow and poor basis for determining the income, on which taxation is to be imposed, according to the market conditions.

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STRESZCZENIE

W celu wyeliminowania nieuczciwej konkurencji podatkowej polegającej na unikaniu opodatkowania i przenoszeniu zysków, OECD i UE zalecają podjęcie skutecznych przedsięwzięć, które zostały zebrane w pakiet 15 działań, jakie państwa członkowskie powinny wdrożyć do swoich porządków prawnych. Jednym z priorytetów stało się promowanie automatycznej wymiany informacji i raportowania (BEPS 13) jako narzędzia zapewniającego przejrzystość działań oraz przyszłego europejskiego i międzynarodowego standardu w sprawach podatkowych. Ponieważ grupy przedsiębiorstw wielonarodowych mają możliwość przenoszenia dochodów pomiędzy podmiotami powiązanymi usytuowanymi w różnych jurysdykcjach podatkowych, organy podatkowe poszczególnych państw członkowskich potrzebują wyczerpujących i rzetelnych danych, które umożliwią im identyfikację krajów, w których powstaje dochód, oraz identyfikację krajów, w których dochód ten jest zgłaszany do opodatkowania oraz ustalenie, ile wynosi podatek zapłacony w poszczególnym kraju. Większa przejrzystość pomiędzy państwami powinna spowodować, że grupy przedsiębiorstw wielonarodowych zaprzestaną dotychczasowych praktyk i zaczną płacić podatki w kraju, w którym osiągają zyski.

Słowa kluczowe: optymalizacja; unikanie opodatkowania; przenoszenie zysków; erozja podstawy; wymiana informacji

ANNEX

To illustrate the thesis put forward in the introduction and other parts of the article that the exchange of the CBCR report can help states 1) identify places of income creation and places of taxation, and 2) indicate whether the income is taxed in the country in which it arises, the following example was developed. The format of the form was based on the original annexes to the draft regulations. The amounts have been given freely and are only meant to illustrate the scale – the more digits, the greater the amount.

1. Assumption

MNE Groups by the name of Pretty Dress owns a factory in India, which sells products to the group, global distributor having its seat in Luxembourg, which re-sells these products to its affiliated entities having their seats in individual countries,

Global Planet Pretty Dress S.A.										
2016										
Tax jurisdiction	Revenues achieved		Realized profit (loss) before tax	Indeed tax paid and not refunded in any form	Due income tax reporting year	Sum of share capital	Retained earnings from previous years	Number of employees	The sum of the book value of physical assets	Data from item 7
	From independent entities	From subsidiaries								
India	0	100	-17 290	0	0	5	0	15 000	9 000	Factory
Luxembourg	0	9 999 000 000	6 999 300 000	699 930	699 930	5	0	0	1	Global distributor
Great Britain	0	1000	500	11	3.3	5	0	220	1	Patents, B&R
Switzerland	0	1000	987	0	0	5	0	0	1	IT services
USA	0	1000	10	22	6.6	5	0	2	1	Trademarks
Poland	0	200	300 000	1.9	1.9	0.0005	0	200	2	Accounting services, IT
Cyprus	0	70 000	300 000	57 000	57 000	0.0005	0	7	0	Consultancy
Bahamas	0	70 000	1	57 000	57 000	0.0005	0	7	0	Consultancy
Hungary	80 000	0	1	0.19	0.19	0.0005	0	20	2	Sale of dresses
Russia	66 666 666 666	0	1	0.19	0.19	0.0005	0	200	3	
China	44 444 444 444	0	1	0.19	0.19	0.0005	0	200	3	
Japan	33 333 333	0	1	0.19	0.19	0.0005	0	200	2	
Germany	111 111 111	0	1	0.19	0.19	0.0005	0	200	2	
Sweden	222 222	0	1	0.19	0.19	0.0005	0	20	1	

e.g. in Russia, China, Japan, Germany, Sweden and Hungary. Simultaneously, the company in India acquires the know-how and patents from the British company, IT services from the Swiss company, from the company located in Cyprus and Bahamas – advisory services, and accounting and IT services from the Polish company. The Indian company incurs costs for trademarks to the company in the USA.

The parent company of the Group, that is, Global Planet Pretty Dress S.A., having its registered seat in Great Britain, submits the CBCR, which is automatically transmitted by the British organs to other countries.

Countries, whose consumers purchase such dresses, as perhaps the country, in which the factory is located, will be the least satisfied about the fact that almost the entire tax had been paid in Luxembourg.

The effective tax rate amounted to 0.01%.

2. Conclusions

According to the report, the main income of the capital group arises in the country of production (in India) and in countries where the goods are sold to the ultimate consumer (in Russia, China, Japan, Germany, Sweden and Hungary). On the other hand, most of the taxable income is shown in Luxembourg.

The following questions should be asked: What actions will individual countries take after receiving this report? Will the governments of individual countries apply to other countries for a refund? Will they apply to other countries for compensation for unfair tax practices?