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The OECD
To : **International Co-operation an Tax Administration Division**
Centre for Tax Policy an Administration

Per mail to: taxpublicconsultation@oecd.org

Berne, March 6, 2020

SwissHoldings comments on public consultation document: Country-by-Country Reporting (BEPS Action 13)

Dear Madam/Sir

The business federation SwissHoldings represents the interests of 59 Swiss-based multinational enterprises from the manufacturing and service sectors (excluding the financial sector).

SwissHoldings would like to thank the OECD for the opportunity to comment on the CbC reporting requirements and practice.

General comments from SwissHoldings

Altogether, we are impressed by the progress achieved by the OECD and the Inclusive Framework on BEPS in this project. We believe that CbC reporting supports the need for more transparency that is essential to fulfill the BEPS project's objectives.

After the first few years, MNEs have largely set up processes to implement current requirements and continue to improve these processes. Also the tax authorities are making their first experience with using CbC reporting data for risk assessment purposes. Notwithstanding, CbC reporting is still new. Some jurisdictions have just recently introduced mandatory CbCR requirements. We believe that experiences still have to be made before larger changes can be implemented. While we welcome process improvements and clarifications (some of which still need to be implemented), we consider that they should apply to the same data as required today to also ensure sufficient comparability.

Finally, it is important to notice that MNEs have often implemented costly software tools (self-developed or purchased) in order to comply with CbC reporting requirements. Any change to data required must balance admin burden/costs and benefits related to the ultimate purpose of the CbC reporting, i.e., high level risk assessment.

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1. Implementation of the BEPS Action 13 minimum standard

As mentioned above, SwissHoldings is fully supporting this successful project which is fundamental for the BEPS initiative objectives. Our members have dedicated over the last years substantial resources to design and implement tools and processes necessary to fulfill the CbC reporting obligations. MNEs are still improving their CbC reporting process just as tax authorities are still exploring their first experience with filing, receiving, exchanging and analyzing the CbC data. As a result, we believe that in general it is strongly recommended that first additional experience is obtained and collected before additional changes are made to the CbC reporting requirements.

In a few jurisdictions the CbC reporting legislation and agreements are implemented, but due to country-specific circumstances (e.g. challenges with confidentiality and data safeguards, i.e. cybersecurity), the authorities of these jurisdictions declared that they will not receive CbCRs from other countries. The CbCR standard should be clear that in such cases the jurisdiction concerned cannot require the subsidiaries of MNEs to perform a local filing or at least that penalties should not be applied if the UPE correctly filed the CbCR in its tax jurisdiction. Additionally, despite of a working OECD process, some tax authorities require local filing or sometimes local submission during tax audits. Such requests should be discouraged and stopped. Finally, some authorities require local filing and raise penalties if this is not done. Tax authorities should still consider transition rules to avoid penalty burden for taxpayers. Penalties (if at all) should only arise if the UPE did not file in its jurisdiction and a subordinated local filing is not performed after specific request.

Regarding the time from when jurisdictions are entitled to ask for a Local CbCR, we noticed some confusion between two verbs referring to two different timelines: on the one hand the verb “exchange” that is used to refer to the authority to authority exchange of CbCR (hence with deadline to be June Year+2 for first bilateral exchanges, then March Year+2), whereas the verb “file” is used to refer to the UPE’s CbCR filing deadline. This confusion resulted in several cases where Local CbC reports were required too early, i.e., months before an exchange of CbCR would be due. Since experience shows that last minute exchange activations occur between the two deadlines, further clarification in this respect is necessary.

In general, the CbCR notification process is not harmonized and adds an unnecessary burden and compliance cost to MNEs. For example, several members of IF require yearly notifications regarding the entity in the Group that files the CbCR. We believe that this is an excessive administrative burden, which also results into unnecessary cost, and see a pivotal role for the OECD to strive for further alignment. The notification filed once should remain valid until revoked or until facts and circumstances changed (e.g. the constituent entity was divested or acquired by another MNE).

Several MNEs operate through different legal entities within the same jurisdiction. We noticed that some jurisdictions require the CbC notification to be filed by each legal entity, whereby similar information needs to be submitted multiple times. One uniform submission covering several legal entities within the same jurisdiction would be less burdensome.

The content of the forms also differs, whereby some countries require a member from the Board of Directors to be mentioned as a contact person for CbC questions. It may be more useful to indicate the person which can be contacted in case there are further questions regarding the CbC filing submitted at group level, rather than referring to a director at the headquarters.

2. The appropriate and effective use of CbC reports

Experiences with the practical usage of the CbCR are still limited. It seems that many tax authorities have not yet fully set up the processing of CbCR information within the tax authorities.

It remains important to reiterate the goal of the CbCR, which is geared towards assessing the high-level transfer pricing risks. Therefore, the CbCR should be tailored to meet this principal goal, and the preliminary conclusions made on the analysis of the data provided in the CbCR should in no circumstances be used as a substitute for a detailed transfer pricing analysis on individual transactions. Differences in financial results between jurisdictions should not provide conclusive evidence that transfer prices are not appropriate.

We welcome the development of the CbC reporting Tax Risk Evaluation & Assessment Tool (TREAT), and expect this tool is also made available to MNE's to further read and interpret the CbC Reports.

In a few jurisdictions, BEPS Action 13 is implemented in a way that all or some of the information included in the CbC reports is also a mandatory element of the Local File or the Master File. This is creating an additional burden and unnecessary risks on the taxpayers since the subsidiaries often do not have access to such data and tax authorities should already have access to the information submitted in the CbC Report.

3. Other elements of the BEPS Action 13 report

We strongly support the statement in the Public consultation document that a unified and streamlined approach to the Master File should be adopted. It allows to optimize the effort for MNEs, but also provides a fair and equivalent background for the tax authorities who analyze the same transactions from a different angle.

It should be noted that MNEs often need to translate a Master File prepared in English into several other languages, despite of OECD's recommendation included in chapter 5.39 of the Transfer Pricing Guidelines, that translation of the transfer pricing documentation should only be performed upon request and when tax authorities deem that lack of translation will compromise the usefulness of the documents. This results into unnecessary costs. Typically, a Master File is prepared in English, but translation is most commonly required into Spanish, Chinese, Polish.

Some jurisdictions make use of specific Master File forms, which requires additional tailoring of the existing Master File to ensure compliance with local regulations. It would be helpful if the Master File prepared at group level could be accepted as a valid document to comply with local requirements.

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In addition, we noticed that several countries deviate from the OECD recommendations when it comes to Local File requirements. This creates an additional burden for the MNEs without direct connection to the purpose of the three-tiered documentation as described in BEPS Action 13. We strongly support that OECD re-enforces the Local File template as the adequate Local File content. Additional information and documents should only be provided upon request during an audit.

4. Should a single enterprise with one or more foreign permanent establishments be a Group for the purposes of CbC reporting?

It could be considered fair to impose the CbCR requirements on MNEs that operate through permanent establishments rather than subsidiaries. Having said that, the number of such MNEs, where one single legal entity with foreign PEs would report over 750 mEUR of revenues, is expected to be very small. The benefits of requiring such entities to disclose the respective data seems low compared to the administration efforts for all jurisdictions to adapt their laws and to potentially upgrade the IT infrastructure used to file and exchange the data.

5. Should separate CbC reports be prepared by groups that are under common control and which in aggregate have consolidated group revenue above the CbC reporting threshold?

We believe the current reference to prepare the CbC Report based on the need to prepare consolidated financial statements captures the most material businesses with 90% of corporate revenues.

Common control by an individual or several individuals does not indicate that the operational activities of both businesses are intertwined. It may be good to further reflect on the definition of control, since one needs to rely on local legislation to date to define the meaning of “control” whereby the legislation differs between jurisdictions. It is preferred to have a straightforward definition which is easy to measure and apply.

Additionally, it needs to be noted that in some cases MNEs are not aware that they are under the same ownership, especially when they are held by various members of the same family. This would make the compliance with CbC reporting requirements impossible.

6. Should the level of the consolidated group revenue threshold be reduced?

We believe that the current threshold should be maintained. With 90% of corporate revenues covered, it gives to authorities meaningful information for high level risk assessments. Additional data on smaller groups will not be comparable and would need to be used as a separated tier analysis, without warranting a return through identification of genuine tax risks. CbCR implementation costs (including advice by external consultants) may be a large burden for smaller MNEs which often outsource such special projects to

external consultants. The number of CbCRs to be processed and analyzed will increase significantly, which will also increase the need of resources for tax administrations.

Further experience should be made with the current threshold and respective data set before the scope is further expanded. We also support the statement that any changes as a result of this 2020 review should be made with the existing population of MNE groups within the scope of CbC reporting.

7. **Should a jurisdiction with a consolidated group revenue threshold denominated in a currency other than EUR be required or permitted to rebase its threshold periodically?**

It is important that the threshold for filing the CbCR is aligned worldwide to avoid cases where the UPE falls out of the obligation because its local currency value is below the threshold and the subsidiaries are still in scope. A mechanism is necessary to keep the CbCR filing thresholds close. Option 4, with a periodic review of the threshold every 5 years if the exchange rate moves outside a pre-defined corridor (i.e. 10 percent), seems reasonable.

It may also be good to specify that the threshold to comply with the CBC Reporting requirement is measured at the level of the UPE, to avoid any discussions related to differences between local thresholds specified in local currencies and the threshold applicable in the jurisdiction of the UPE.

8. **Should the threshold for Excluded MNE Groups take into account more than one year of consolidated group revenue?**

It is reasonable to define the revenue threshold based on an average over several years to account for industry cycles. 3 or 5 years are usually used in the Guidelines and transfer pricing analyses.
It is important to address the situation of newly created Groups (e.g. through spin offs). A waiver of the duty in the first 1 or 2 years of their existence could be an option to allow the new group to prepare all the required systems and data sources.

9. **Should extraordinary income be included in consolidated group revenue?**

Extraordinary income is by its very nature an exceptional item that in general is of one-off nature. As such, it should not be relevant for high level risk assessment. It should also not determine whether a given MNE qualifies for CbC reporting obligations.

10. **Should gains from investment activity be included in consolidated group revenue?**

Due to their nature, gains from investment activities should not be used to determine whether a given MNE qualifies for CbC reporting obligations.

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11. In cases where the immediately preceding fiscal year of an MNE Group is of a period other than 12 months, should the consolidated group revenue threshold (or, alternatively, consolidated group revenue in the immediately preceding fiscal year) be adjusted in determining whether the MNE Group is an Excluded MNE Group?

Whichever option is chosen, it is important that the same approach is applied by all jurisdictions to allow that the filing obligations arises in the same way for UPE and subsidiaries. A pro-rata recalculation of the revenues seems easier to implement than a pro-rata recalculation of the threshold, since it will always be company specific and will take into account the applicable facts and circumstances. The MNE should be allowed to consider actual business facts and circumstances when performing the pro-rata recalculation (for example, no simple extrapolation of revenues, but considering business cycles when revenues are not accrued evenly throughout the fiscal year).

12. Should information in Table 1 be presented by entity rather than by tax jurisdiction?

Entity by entity information is unlikely to be useful for risk assessment purposes (and countries are expected to have such data on their entities in any event). We believe that the current jurisdictional view of financial data in Table 1 is the right balance between efforts needed to collect the data and their usability and purpose. In many countries tax groupings are possible or even mandatory, making single legal entity data meaningless (and even unfeasible) for CbCR purposes. MNEs may also decide that e.g. for purely operational purposes all real estate assets or employees in a given jurisdiction are concentrated into one legal entity that leases them to the remaining companies (e.g., due to required business licenses). The entity per entity analysis of assets could then result in misleading conclusions.

In addition, group reporting is not always done at legal entity level but in many cases, it is done on another level (Reporting Unit). Reporting Units may include several legal entities, or one legal entity may include several Reporting Units. Large MNEs often have several legal entities in one jurisdiction and may operate in more than 100 jurisdictions. CbC Reporting on legal entity would require significant efforts and would result in a massive amount of additional data points and data to be reviewed and processed, whereby it is doubtful whether it enhances the quality of the analysis of the CbCR data. The goal of the CbCR is to obtain a high-level risk assessment, and that should be possible with the use of the aggregated data organized by jurisdiction.

13. Should consolidated data rather than aggregate data be used in Table 1?

In the recent years, MNEs have made significant investments in their processes and software to be able to produce aggregated jurisdictional data for Table 1, as required by BEPS action 13. Changing this requirement to consolidated data will require yet another investment. As a result, we believe that the status quo should be maintained for the time being. Any change should only be considered when more experience is collected that would demonstrate that aggregated data does not provide sufficient level of information for high level risk assessment purposes.

Besides the additional investments required, the preparation of sub-consolidations per jurisdiction causes significant additional workload on MNE, as some transactions are only recorded on group level which would then need to be pushed down to each jurisdiction. Such a push down might make a CbC reporting on statutory accounts almost impossible.

Furthermore, the use of consolidated data would likely compromise the option for an MNE to use statutory data for complying with its CbC reporting obligation. It would result in the unintended effect that MNEs would be forced to change the basis of their reporting data because of a change in another data collection definition for the CbCR. Also, this change would require considerable additional investments for those MNEs concerned.

If there is still a strong desire to use consolidated data going forward, then it would be recommended to make this optional. The MNE can indicate whether aggregated or consolidated data has been used to prepare the CbCR.

14. Should additional columns be added to Table 1?

As a general comment, we believe that current CbC data is sufficient and that further data requests will create unnecessary burden (large MNEs with decentralized IS infrastructure may be able to generate data only with costly efforts). Experience with the current CbCR reports has not been sufficiently made so it is difficult to judge if any additional data is indeed useful for the main purpose of CbC being the risk assessment. It needs to be also noted that adding new columns to Table 1 will require a reconfiguration of the XML filing mechanisms and additional validations, which can be a burden for both MNEs and tax authorities, while in some jurisdictions the filing obligation is still very new.

Specifically on the topic of adding new columns for intercompany expenses as well as intercompany revenues from specific sources (interest, royalty, services), it is clear that they will provide additional information to the authorities. It is not however granted that this information will give meaningful data for risk assessment purposes. The use of IP can be embedded in product prices, but the use thereof could also be subject to a separate royalty payment. Therefore, the application and reporting of separate royalty payments may not capture the compensation for the use of IP within a group and may lead to a series of unnecessary questions. The IP policy and remuneration is already detailed in the Master File.

Other concerns relate to for example, in industrial groups with significant technical collaboration, whereby a large amount in service fees can be a “false positive”. In addition, decentralized MNEs may also be required to work with intercompany service and license structures to globally operate (in contrast to centralized MNEs operating under a principal model and which do not need to have separate intangibles and service arrangements) which may result into a “false positive” and wrong focus for risk assessment purposes. Additionally, the service, intangibles and financing transactions are extensively described in the Master File so tax authorities do have the information about the main transactional flows and the parties involved. When it comes to details of payments made or received by the constituent entities in their jurisdiction, tax authorities can access them through the Local File.

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In addition, for services it should be considered that they are often difficult to track and eliminate because in many cases intercompany service expenses or income are not booked separately as costs or revenues. For example, intercompany services may decrease the source costs in the jurisdiction that renders the service while they are booked as external costs in the jurisdiction that receives those costs/services. So, there could be important differences while trying to offset intercompany costs vs revenues when disclosing them.

When it comes to adding into Table 1 the value of R&D expenses, it should be noted that definitions of R&D expenses can vary between GAAPs and jurisdictions. As a result, it is not granted that such information will be comparable and will provide to authorities meaningful information for risk assessment purposes. Additionally, in larger MNEs with centralized ownership of technological IP, the R&D work is often performed on contract basis. Showing only R&D expense without corresponding revenues and the respective usage of the R&D results can create false assumptions regarding ownership of IP. It should also be highlighted that the amount of R&D expenses and where those expenses occur are not relevant for value creation, as indicated in Chapter VI of the OECD Guidelines.

With respect to deferred taxes, we believe that adding the respective column in CbC reports will not meet the expected purposes. Firstly, MNEs that rely on statutory accounts (rather than IFRS or US GAAP) do not have the data for deferred taxes available since not all accounting standards include the concept of deferred taxes. Even for companies reporting in IFRS or US GAAP only the permanent differences in deferred taxes do change the effective tax rate. Additionally, it needs to be noted that:

- Most of the components for the calculation of deferred taxes are directly captured at Group level without country/entity reconciliation. MNEs will not be able to fully distribute deferred taxes per jurisdiction or per legal entity. As a result, the sum of the deferred taxes per jurisdiction cannot match the deferred taxes reported in the MNEs annual report, the biggest portion of deferred taxes being triggered at group level.
- This also means that, should deferred taxes be added in Table 1, most of the deferred taxes valuation will be allocated to the parent company (or divisional holding companies) by default, hence creating a lot of confusion at tax authorities' level.
- Larger MNEs often apply averaged tax rates estimated at group level for the calculation of deferred taxes, because deferred taxes are a risk-based valuation item that is only meant for MNEs' shareholders /investors to discount the cash flows and calculate the value of their investments in the MNE.
- Deferred taxes "movements" (as referred to in the Public Consultation report) are not limited to changes in business income or expenses. They may be triggered by changes in equity valuation, F/X rates (especially for MNEs having major business footprint in non-EUR or USD denominated countries), incoming or leaving reporting units due to acquisitions or divestments, and of course retroactive changes to tax regulations.

Finally, data on deferred taxes can fluctuate from one year, making the high-level risk analysis more difficult.

Reporting the place of effective management also depends on the local legal framework and may require additional analysis. Question remains whether this level of detail is necessary to perform a high-level risk assessment for transfer pricing purposes.

Adding additional columns to the CbCR require additional data collection, continuous monitoring of new flows and adjusting reporting systems to ensure compliance with the new reporting requirement, where the cost may become disproportionate. Note that the current CbC reporting requirement is already time consuming as well. We would therefore suggest to keep the high-level risk assessment as simple as possible.

15. Should changes be made to how constituent entities that are not resident in any tax jurisdiction for tax purposes are categorized for CbC reporting purposes and how information on these entities is reported in Table 1?

It goes without saying there are a number of non-tax reasons to operate a business in the form of a partnership. In some jurisdictions this is even a common way to organize an operation not alone for small and medium sized companies. These partnerships, due to their tax transparency, are often not a resident in the sense of the tax treaties. Notwithstanding, the partners fulfill the tax obligations in the jurisdiction where the partnership has its operations since the partnership's premises are the permanent establishment of the partner. In Table 1 the jurisdiction of the operation should be used to declare the information about these operations.

If a transparent entity's results are taxable in one or more jurisdictions, we believe the results should be allocated to these jurisdictions. Such an allocation logic already happens for branches where the branch result is allocated to the jurisdiction of the branch and is excluded from the principal entity and not double counted in the principal and the branch jurisdiction. In general, our members believe that only those transparent entities whose results do not fall under any income tax regime should be reported as "stateless" entities. This would allow to capture the arrangements that could be truly relevant for assessing the BEPS risk.

We believe that approach 4 relies on too much judgement and may lead to incomparability of reports filed by various MNEs where one can consider that (a portion) of the profits is or could be taxed while another concludes otherwise.

16. Should fields required in the XML schema (e.g. tax identification number) that are not in the CbCR template in the Action 13 report be incorporated into the template?

We believe that the obligations imposed on taxpayers should be derived from appropriate legislative documents. The XML schema is generally not a source of binding law, yet it creates in practice a legal obligation that MNEs must fulfil if they want to file the CbCR. Hence, we support the idea of aligning the CbCR template with the mandatory fields of the XML schema.

If adding TINs to the CbCR template will create significant admin burden (by changing laws etc.), they could be left out as today until a larger revision. In the meantime, MNEs are aware of the current requirement to include TINs in the XML scheme.

However, OECD should review if TINs and legal entities' addresses shall be required at all as part of the CbCR. Collecting and updating TINs can be very burdensome exercises because a company might have several tax numbers and it is not clear which one should be reported (income tax, VAT, state tax, local tax). In addition, the information may not be available on HQ level. The same comments apply to the requirement to include the address of the companies. A company may operate through various branches in the same jurisdiction with different addresses, and the workload to collect such information may be very burdensome. The CbCR already includes the name of the company and jurisdiction which should be sufficient to identify the entity.

17. Should standardised industry codes be included in Table 2?

As indicated in the Consultation document, there exist no one worldwide system of industry codes that MNEs and tax authorities could rely on. Additionally, the same legal entity can be engaged in numerous businesses which could lead to several industry codes being selected. Finally, since the data in CbCR include related party transactions, they should not be used as comparable reference. Subsequently, we believe that the additional efforts required to collect and align the industry codes will not translate into meaningful information enhancing tax authorities ability to perform high level risk assessment. Additionally, the Master Files include already an extensive description of the Industry, which can be used to supplement the activity codes included in Table 2. The reference to particular industry codes may also prove to be more complex than anticipated. Some jurisdictions require companies to spell out the industry codes in the articles of association. Should the industry codes in the CbCR then align with the articles of association, while the core business operations may be focused around one particular industry code? On top, some countries require to refer to industry codes in the articles of association, whereby the industry codes mentioned in the articles of association cover a wide array of activities. We believe that referring to industry codes may further complicate the CbCR, while the benefit thereof remains remote to make a high-level assessment for transfer pricing purposes. Note that the total result achieved by an MNE cannot be more than the result achieved through-out the entire value chain. The comparison to the result of a particular industry which is only part of the value chain has therefore only limited value.

18. Should pre-determined fields be added to Table 3, in addition to free text?

We believe that some of the additional fields could provide useful information, e.g., on the GAAP used or the source of information. We do not consider however that adding a closed choice tick the box fields is the best technical way of addressing all possible combinations of facts and circumstances to be addressed in Table 3. An enlargement of Table 3 by additional fields requires an adjustment of the XML which consequently requires additional investments by the MNEs and tax authorities. In this aspect, a change in Table 3 is no different to any other change in Table 1 or 2. Therefore, if the IF believes additional information is required in Table 3 they could define what kind of information is required, gain the experience on the basis of the current format before asking for a costly overhaul which only adds minimal additional information and which does not add any additional insight to

the risk assessment targeted by CbC reporting. Consequently, we believe that if the Inclusive Framework believes some of the information should be provided in Table 3 then it should allow MNEs to address them in the best suited way.

MNEs of over EUR 750 million revenue are restructured repeatedly. There are always material events to occur, yet CbCR is not the right place to document them. These events are properly described in the Master File (and Local File where appropriate at legal entity level).

If pre-determined fields are included to standardize and simplify some of the Table 3 content, additional free text must be allowed. Possible fields for inclusion in Table 3 could be fields numbers 1,2,4 and 8. The other fields as well as other information should be left for free text comments.

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We kindly ask you to take our comments and proposals into due consideration.

Yours sincerely,

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