Consultation
Chief Minister's Department

States of Jersey

Base Erosion and Profit Shifting:

Response to Public Consultation on Introduction of Country-by-Country Reporting

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Introduction

This paper summarises responses to the public consultation entitled "Base Erosion and Profit Shifting (BEPS): introduction of country-by-country reporting." The consultation was open from January to April 2016. Responses were received and collated by the Chief Minister's Department of the Government of Jersey, and by Jersey Finance Ltd.

This consultation on proposed Regulations was undertaken to inform the next stage in Jersey's commitment to support the actions proposed by the OECD under the BEPS programme. Since then, on 16 June 2016, Jersey became a BEPS Associate and a member of the BEPS Inclusive Framework. All BEPS Associates are committed to consistent implementation of the BEPS package, including its four minimum standards. As a BEPS Associate, Jersey is also able to contribute to the overall development of the BEPS project through policy dialogue and exchange of information – participating on an equal footing with OECD, G20 and many other countries and jurisdictions.

The BEPS project has identified "Action 13 – Transfer Pricing Documentation and Country-By-Country Reporting (CBCR)" as one of the four minimum standards. In October 2015, the UK published draft Regulations[1] to implement the UK's regime for country-by-country reporting under the BEPS project. Accordingly, the purpose of this consultation was to seek industry views on aspects of the UK's draft Regulations, which it was envisaged would be included in Jersey's Regulations. Providing that no major issues were identified in the consultation, it was agreed that draft Regulations

[1] "Taxes (Base Erosion and Profit Shifting) (Country-By-Country Reporting) Regulations 2015"

would be presented to Ministers for consideration prior to being presented to the States for approval.

In total, there were seven responses received to the consultation. The respondents included major accounting firms, a large international bank, and one international service provider to the oil and gas industry. Jersey's financial services trade body, Jersey Finance Ltd, also canvassed its members and provided a summary response.

A number of the responses to government were marked as private and confidential. Given the relatively small size of the sample, it has therefore been decided to anonymise all responses and to report instead on the general themes that emerged from the consultation.

Overview and Key Findings

A clear majority (over 70%) of the responses were supportive of the proposals referred to in the consultation document. There were no respondents who disagreed with the Government of Jersey's position that Jersey should support the actions being undertaken under the BEPS project, and that Jersey's regulations should closely follow the OECD (and UK) model legislation.

Several responses highlighted the importance of securing alignment of CBCR regulations across the Crown Dependencies. One respondent described this as essential so as to reduce the potential for additional complexity and operational costs to comply with requirements. The Government of Jersey recognises the importance of achieving consistency of CBCR implementation for businesses that operate across the Crown Dependencies. Officials will continue to coordinate with counterparts in Guernsey and the Isle of Man so as to achieve, to the fullest extent possible, a common approach to CBCR implementation.

Another major theme to emerge from the consultation was the question of whether to make country reports public. Public reporting was not part of the original BEPS recommendations. However, since the time of the release of the Jersey consultation, the European Commission has proposed legislation requiring public CBCR from EU

enterprises, including with respect to activity in third countries. This proposal has been supported by a number of EU Member States, including the UK and France.

A clear majority of respondents highlighted concerns about the potential impacts of public CBCR. While supportive of transparency and the fight against illicit finance and tax evasion, a number of responses argued that Jersey should follow the OECD BEPS minimum standard, which provides for exchange of CBCR information between tax authorities. One respondent noted that some jurisdictions, such as the US, have indicated that they will not share information that will be made public. Switching to public CBCR, it was argued, might therefore inhibit Jersey's ability to share information under its TIEAs, DTAs and IGAs.

Several respondents highlighted a potential connection to the creation of an EU blacklist of non-cooperative tax jurisdictions. The EU blacklist – which is due to be agreed by Member States by the end of 2017 – will include BEPS-related criteria. The detail of the BEPS criteria has yet to be defined. However, it is possible that it will include public CBCR. A majority of respondents favoured an approach of implementing the OECD minimum standard of non-public CBCR, while continuing to monitor developments in Europe closely. This is in line with Jersey's longstanding position in support of a level-playing field and compliance with global standards, including those set by the OECD.

A final thematic issue was the importance of effective taxpayer engagement to the overall success of CBCR implementation. One respondent recommended that the Jersey Tax Office provide direct assistance to taxpayers in preparing CBCR, including through the publication of accompanying guidance on the completion of the CBCR templates, and on interpretation of associated definitions.

Ministerial response to the Consultation

The Chief Minister would like to thank all those organisations who responded to the consultation paper. The responses received were generally informative and well considered. The information contained in the responses to the consultation will be used to inform a policy proposal, which will be put to Ministers this summer.

Summary of responses

A summary to the response to each of the questions is included below:

Question 1 – threshold for filing obligation

There was universal support for Jersey's regulations to be as consistent as possible with the UK's Final Regulations (issued February 2016) in respect of the proposed threshold. The Final Regulations differ from the Draft UK Regulations (issued October 2015) in that the reporting threshold has been changed to €750 million. Respondents indicated a strong preference for Jersey to follow and replicate proposals under Action 13 of the OECD's BEPS proposals (and now mirrored by the UK): "there would be an exemption from the general filing requirement for MNE groups with annual consolidated group revenue in the immediately preceding fiscal year of less than €750 million or a near equivalent amount in domestic currency."

Questions 2 and 3 – difficulties in implementation and issues with voluntary filing by a Constituent Entity

One respondent highlighted a significant potential difficulty facing Constituent Entities based in Jersey. The respondent argued that Constituent Entities may not have readily available the full complement of information on their MNE group that would be required by the Regulations. Accordingly, the respondent supported the voluntary nature of filing by Surrogate Parent Entities, as this would provide an appropriate level of flexibility in these situations.

This view was shared by other respondents, who argued in favour of retaining greater flexibility by ensuring that the Jersey Regulations closely follow the OECD Final Report (October 2015). It was noted that the Final UK Regulations removed the voluntary nature of reporting by constituent entities where the ultimate parent entity was based outside of the UK, making it a requirement instead. The consensus among respondents – recognising Jersey's position as a highly transparent, substance-led jurisdiction that is home to many global businesses, many of which may be headquartered elsewhere – was that the Government of Jersey should instead follow the OECD Final Report rather than the (revised) UK approach. This means retaining the ability to appoint a Surrogate Parent Entity when the ultimate parent entity jurisdiction meets at least one of the criteria outlined in the Final Report.

In June 2016, the OECD produced guidance on implementation of this issue, as follows:

"…Where surrogate filing (including parent surrogate filing) is available, it will mean that there are no local filing obligations for the particular MNE in any jurisdiction which otherwise would require local filing in which the MNE has a Constituent Entity (herein referred to as the Local Jurisdiction). This is subject to the following conditions:

1. the Ultimate Parent Entity 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); and

2. by the first filing deadline of the CbC report, the jurisdiction of tax residence of the Ultimate Parent Entity 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); and

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 Ultimate Parent Entity and the Local Jurisdiction;1 and

4. the jurisdiction of tax residence of the Ultimate Parent Entity has not notified the Local Jurisdiction's tax administration of a Systemic Failure; and

5. the following notifications have been provided:

 the jurisdiction of tax residence of the Ultimate Parent Entity has been notified by the Ultimate Parent Entity, no later than [the last day of the Reporting Fiscal Year of such MNE Group]; and

 the Local Jurisdiction's tax administration has been notified by a Constituent Entity of the MNE Group that is resident for tax purposes in the Local Jurisdiction that it is not the Ultimate Parent Entity 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].

One respondent noted that the effectiveness of using Jersey as a filing location by a Surrogate Parent Entity on behalf of a MNE group would depend on the Double Taxation Agreements (DTAs) and Tax Information Exchange Agreements (TIEAs) that Jersey has in place with other jurisdictions where a business has operations and therefore may be required to file a CbC report. It is noted, however, that the

Multilateral Competent Authority Agreement on CBCR provides a mechanism for exchange of CBCR information without recourse to bilateral agreements.

Question 4 – use of proposed template

All respondents agreed that there were no issues with the use of the proposed template for CBCR as it is aligned with the OECD recommendations and with the draft and final regulations announced in many countries worldwide.

Questions 5 and 6 – timing of implementation

There were mixed views on the timing of the introduction of CBCR regulations in Jersey. One respondent argued strongly in favour of bringing in an obligation on the same timescale as the UK tax authorities – which begins on or after 1 January 2016.

Another respondent thought that the Government of Jersey's proposal for applying the rules in Jersey to accounting periods which begin on or after 1 January 2017 would not be inconsistent with the global trend. The same respondent also noted, however, that staggered implementation could also increase the risk of creating a filing gap for Jersey-headquartered businesses with operations that require filing for earlier accounting periods (e.g. the US, the UK, and Europe). And it was acknowledged that variance in implementation timeframes is already causing concern among taxpaying companies about administering and effectively complying with local regulations.

Question 7 – sharing of CBCR with relevant countries

Comments in respect of public CBCR have been addressed at the start of this report. One respondent noted the importance of putting in place appropriate safeguards to ensure confidentiality of taxpayer information. The same respondent also suggested that the Government of Jersey issue a recommendation alongside the CBCR regulations that businesses prepare and maintain robust documentation that supports and explains the information containing in the CBCR filing.

Question 8 – provision of supporting information to determine accuracy of CbC report

One respondent highlighted concern among some taxpayers about what information could be reasonably provided to the tax authorities within the proposed 14-day period, particularly where all the relevant information is not held locally. It

recommended that the CBCR regulations contain clarity on what information is likely to be requested so that taxpayers can prepare in advance of any potential request. The same respondent noted a particular concern about requests for reconciliations between CBCR data and other reports, which are included in the UK legislation but are omitted from Annex III.B. of the OECD Final Report. It argued that preparing reconciliations involves a significant administrative burden and should only be made when the matter is material, and where other more readily available information cannot be used to resolve the matter.

Another respondent strongly criticised the proposed approach as "extremely onerous" with the 14-day period "unnecessarily short" but did not offer an alternative, preferred time period for the provision of information to the tax authorities.

Questions 9 and 10 – Penalty regime and appeals procedure

There were fewer comments in response to questions 9 and 10. One respondent thought that "these procedures are over the top" and that the definitions included in the UK guidance ere "subjective and judgemental." A majority of respondents supported the proposed approach, on the basis that it is consistent with what is already in place and understood by Jersey businesses e.g. the procedure adopted for the Common Reporting Standard (CRS) regulations. One respondent highlighted the need to clarify how "accurate" would be interpreted in the regulations.