

11 April 2014

Organisation for Economic Co-operation and Development
OECD 2, rue André Pascal
F-75775 Paris Cedex 16
France

By email: TransferPricing@oecd.org

Dear Sir/Madam

Comments on the Transfer Pricing Comparability Data and Developing Countries

This submission is made in response to your invitation for comments on the Consultation Paper on “Transfer Pricing Comparability Data and Developing Countries” (Consultation Paper) issued by the OECD on 11 March 2014. This response represents the views of the Standard Chartered Bank Group (hereinafter ‘SCB’). SCB is a UK headquartered international banking group with an extensive network of over 1,700 branches in more than 68 countries with a focus on Asia, Africa and the Middle East.

We confirm that we have no objection to the posting of our letter on the OECD website.

Our comments for your consideration are set out below. These are based on our experience of operating with significant presence in emerging markets across Asia, Africa and the Middle East:

SCB welcomes the OECD’s recognition that the ability of tax administrations to compare relevant price information across jurisdictions is essential for the effective operation of transfer pricing rules, and a lack of data on comparable transactions is a significant issue for effective tax collection, particularly in developing countries. These limitations of poor quality and quantity of data similarly pose a significant challenge to taxpayers who endeavour to be compliant in applying transfer pricing consistently across a broad geography where there are both OECD and non-OECD countries.

In this respect, we support the OECD in taking into account both the OECD transfer pricing guideline and the UN Practical Transfer Pricing Manual for Developing Countries in responding to the call in the G8 Lough Erne Communiqué of 18 June 2013 to “find ways to address the concerns expressed by developing countries on the quality and availability of the information on comparable transactions that is needed to administer transfer pricing effectively”. As a number of developing countries have begun articulating different interpretations in their application of the arm’s length principle in the UN Manual, it is particularly important that multi-national corporations such as SCB are able to refer to and implement a set of commonly agreed transfer pricing principles globally, instead of having to deal with divergences between OECD and non-OECD countries.

We note that addressing comparability limitations is an essential corollary to the BEPS Country-by-Country reporting and the Master/ Local file initiative. Being able to access data of sufficient quality and quantity and being able to make appropriate comparability adjustments to take into account regional/local differences will assist in the appropriate presentation, explanation and interpretation of variations in documentation across regions. It will also discourage the formulaic use of data disclosed through Country-by-Country reporting and Master-local files by developing countries without applying the comparability analysis as articulated in Chapter III of the OECD Transfer Pricing Guidelines for Multilateral Enterprises and Tax Administrations and more generally the arm’s length principle.

We do observe, however, that Paragraph 17 of the Consultation Paper suggests that the OECD is prepared to approve the use of secret comparables by drawing a distinction between its “use for risk evaluation purposes (i.e. identifying a taxpayer for possible audit) and for making a transfer

pricing adjustment". Although the paragraph goes on to "note that it would be inequitable to make use of secret comparables to make an adjustment unless the data can be disclosed to the affected taxpayers", it is our submission that the OECD should continue to uphold the recommendation against the use of secret comparables by tax authorities, whether for risk assessment or otherwise. The use of secret comparables is not only inequitable to taxpayers, it also gives rise to the selective use of data by developing countries to support adjustments that are not based on a full functional analysis or application of the arm's length principle.

In the same vein, we recommend that the OECD should encourage greater transparency by tax authorities in disclosing not only secret comparables, but also more broadly, the data and databases they use. This is in line with the overall OECD move to encourage greater transparency. It will also help in-house transfer pricing directors and advisors gauge how well their own or their clients' global or pan-regional searches will hold up in a particular region or country. This saves time and resources in selecting the most appropriate benchmarks for a particular country or region. Greater transparency will also encourage healthy competition amongst database providers to provide access at affordable cost (for instance, competing to becoming the preferred search database for a region) and increase their incorporation of local comparables into their existing databases.

Where no direct comparables are available, we appreciate the need as discussed in Paragraphs 24 and 25 for consideration of alternative approaches to evaluating transactions that do not rely directly on comparables. Nevertheless, we recommend that the OECD articulate the need for tax authorities to first have recourse to, and try to apply, the mainstream OECD methods before resorting to alternative or other methods. Further, that a safe-harbour may be considered where such alternative approaches are necessitated by the lack of comparables so long as the outcome of that alternative approach is in line with that produced by the initial method used.

Finally, we recommend the OECD co-ordinates its efforts with the UN in this area of comparability and more generally on ensuring the consistency of the OECD and UN transfer pricing guidance and look forward to an opportunity to provide feedback on any draft that is the outcome of such a joint effort.

Thank you once again for the opportunity to contribute to the development of this important OECD initiative.

Yours sincerely

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