In 35 countries, Dalkia is a global player in energy services: cogeneration, facilities management, heating and cooling systems. Given this status, we are strongly concerned by the TP documentation and country by country reporting, currently discussed at the level of the OECD.

We have summarized below the key points of interest as a multinational enterprise:

We can understand that tax administrations need risk assessment tools to improve their knowledge of the amounts of all the different taxes declared and paid by the enterprises.

However we do insist on the businesses constraints:

- Gathering all the detailed information suggested in the draft report would definitely require a huge internal work and therefore costs (i.e. internal or external costs, since external law firms would more likely be mandatory to engage in most cases);

- Business sectors and organizations put in place to face the market are all different from one to another;

- Most of the datas contemplated in the draft report are sensitive and strategic especially in energy services: the competitiveness of the enterprise is at stake.

Consequently, we strongly believe that both the country by country reporting (“CbCR”) and the Transfer Price Documentation (“TPD”: Master file and Local file) should be designed in a flexible way, focused on key relevant data and not subject to penalty. In addition, their content should refer to:

- Data already available and reliable: e.g. refer to official documents reviewed by an administration, such as the annual results guide;

- Concepts already defined by well-known standards or institutions: e.g. IFRS, or the EU TP documentation which already provides a standardized framework.
February 23, 2014

Mr. Pascal Saint-Amans
Director, Centre for Tax Policy and Administration
OECD
2, rue Andre Pascal
75775 Paris
FRANCE

Re: Comments on *Discussion Draft on Transfer Pricing Documentation and CbC Reporting*

Dear Mr. Saint-Amans:

We are pleased to submit comments on behalf of the Global Transfer Pricing professionals of the Deloitte Touche Tohmatsu Ltd. member firms regarding the *Discussion Draft on Transfer Pricing Documentation and CbC Reporting*. We appreciate this opportunity to share our views on this issue and hope you find our comments valuable to the discussion.

We look forward to continued collaboration with the OECD on this and other transfer pricing initiatives.

Very truly yours,

DELOITTE TAX LLP

By: Todd Wolosoff
Global and U.S. Transfer Pricing Leader

Enclosure
DELOITTE COMMENTS ON OECD'S DISCUSSION DRAFT ON TRANSFER PRICING DOCUMENTATION AND CbC REPORTING

In response to Action 13 of the BEPS Action Plan, which directs the OECD to “develop rules regarding transfer pricing documentation to enhance transparency for tax administrations, taking into account the compliance costs for business,” the OECD on January 30, 2014, issued a “Discussion Draft on Transfer Pricing Documentation and CbC Reporting.” We commend the OECD’s efforts to develop guidance in the area of documentation, and appreciate the opportunity to comment on the discussion draft. Such guidance would facilitate the presentation of more standardized information for tax authorities and should assist with tax authority reviews. Our comments are based on discussions with U.S. multi-national businesses, and our experience with the U.S. and foreign tax authorities regarding transfer pricing documentation.

The discussion draft identifies three objectives for transfer pricing documentation rules:

- To provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment;
- To ensure that multinational enterprises (MNEs) give appropriate consideration to transfer pricing requirements in establishing prices for transactions between associated enterprises and reporting the income derived from those transactions in their tax returns; and
- To provide tax administrations with the information they need to conduct an appropriately thorough examination of MNEs’ transfer pricing practices.

We also commend the OECD for acknowledging that the new reporting requirements should be consistent with maintaining the arm’s length standard, facilitate efficient assessment of tax, and not create an environment in which examination time is extended, or result in double taxation that must be resolved through an already overburdened competent authority process. Significantly, the discussion draft cites as an “overarching consideration” the need to balance the usefulness of the data to be collected for tax administrations with any increased compliance burdens placed on MNEs. Thus, in reviewing the proposed guidelines, we should keep in mind the OECD’s stated goals and guiding principles as the touchstone for our assessment.

The thrust of our comments is twofold. First, one of the stated objectives -- to provide tax administrations with the information they require to conduct an appropriately thorough examination of MNEs’ transfer pricing practices -- is a significant expansion of the historic purpose of transfer pricing documentation. Satisfying this objective is inconsistent with the overarching consideration of balancing MNEs’ compliance burdens with the usefulness of the data being collected. Second, we are concerned that the proposed documentation rules request a significant amount of confidential, nonpublic business information, but do not provide sufficient procedures to ensure that such information remains confidential.

1 CbC = country-by-country.

2 During a February 13, 2014, Deloitte webcast attended by participants from over 2500 business enterprises, 91 percent of participants expressed their belief that the OECD’s revised documentation guidance, including the CbC reporting template, would increase their transfer pricing compliance burdens. And 47 percent of the participants expected their compliance burden to increase by at least 40 percent.
Our specific recommendations, in response to your request for comments on various topics, are as follows.

**Balancing compliance costs and the need for information**

As stated above, Action 13 calls on the OECD to perform a balancing act in developing documentation rules between tax administrations’ need for transparency and MNEs’ compliance burden. The OECD addresses this issue, stating in Paragraph 12 of the discussion draft that “[i]t is therefore important for countries to keep documentation compliance requirements reasonable and focused on material transactions . . . .” However, the proposed detailed requirements are inconsistent with the balance required by mandating the reporting of information that MNEs do not currently collect. The proposed rules, if adopted, would necessitate that MNEs put in place costly information tracking and collection systems (as well as a significant number of personnel to implement and operate them), dramatically increasing their transfer pricing compliance costs.

Most importantly, the stated objective that documentation should provide tax administrations with the information they need to conduct an appropriately thorough examination is a sharp departure from documentation’s long-established role as a tool for risk assessment and as evidence that the MNE made a reasonable effort to evaluate and accurately report its transfer pricing. Once a tax administration makes a decision to pursue a comprehensive transfer pricing examination, the tax administration should have timely access to all information necessary to conduct that examination. It is therefore incumbent on MNEs to work closely with tax administrations to identify and provide that information. However, a clear distinction should be made between the information deemed necessary and helpful for tax administrations to make an informed *transfer pricing risk assessment* and information that a tax administration may subsequently seek in *conducting a thorough examination*.

The inclusion of the goal that documentation provide “information that they [tax administrators] require in order to conduct an appropriately thorough examination” permits an interpretation that the documentation must include most if not all of the information that might reasonably be expected to be requested during a transfer pricing examination. This standard is inconsistent with the typical existing process for performing an examination of transfer pricing issues in which tax authorities perform a risk assessment, identify selected transactions for review, and then request detailed financial records and analysis related to the selected transactions. The proposed documentation standard is a significant expansion from the current standard of providing evidence that the taxpayer has acted reasonably in evaluating and reporting its income in accordance with the arm’s length standard. This expanded documentation requirement would impose an unfair burden on MNEs that would be subject to penalties for failure to provide the required documentation with their tax return, rather than in the context of a tax examination. Such an expanded requirement is unnecessary. If during a tax examination an examiner determines that additional information is needed, the normal avenues of information-gathering are available to the tax authorities.

We recognize that in some countries specifying that the documentation includes “information that they [tax administrators] require in order to conduct an appropriately thorough examination” might be deemed necessary to obtain the required information to conduct a transfer pricing examination. However, we suggest that a better alternative would be to provide guidance to those countries regarding examination procedures utilized by other countries to obtain the required information from MNEs. Those tools might include conditioning penalty relief on whether an MNE provides relevant information in its possession and in the possession of its affiliates during the tax examination. Any such tools must recognize that in practice the information relied on by the MNE in preparing its transfer pricing analysis and documentation may be only part of the information the tax administrator believes is necessary to conduct a thorough transfer pricing examination. Any tools established to
assist examiners in gathering the necessary information must take into account that the requested information may not be readily at hand. Furthermore, requirements or expectations that all potentially relevant information be readily available ignore the reality that reasonable people may differ as to what constitutes potentially relevant information. A balance must be struck between the burden of obtaining and maintaining detailed financial information and the likelihood of it being requested.

Consequently, for the reasons stated above, we propose that the third objective be revised to read as follows: “To provide tax administrations with sufficient information to initiate an examination during which it can request the additional information necessary to conduct an appropriately thorough examination of MNEs’ transfer pricing practices.”

Master file considerations

The discussion draft’s concept of a two-tiered approach to transfer pricing documentation, bifurcated into a master file that would contain standardized information relevant to all MNE group members, and a local file that would refer specifically to the local MNE’s material transactions, is at the core of the OECD’s proposed guidelines. While there is nothing inherently wrong with this approach, pinning down the appropriate contents of each file, and determining whether and how this information should be shared – both with multiple tax authorities and within the MNE – is crucial.

We believe the local file would contain the primary information a tax authority would need to commence an examination of a company’s transfer prices, and would contain most of the information necessary to analyze a company’s transfer pricing position. Tax authorities also need a “reasonably complete picture” of the taxpayer’s relevant business activities to have the proper context to review a company’s transfer prices. The proposed master file (including the CbC reporting template) is intended to provide these additional insights.

We suggest, however, that the information requested in these two documents goes substantially beyond the information governments would need in the majority of transfer pricing examinations to obtain that reasonably complete picture. Simply put, obtaining a “reasonably complete picture” does not require all the information the OECD suggests that tax administrations may request.

Proposed Annex I in the discussion draft lists the information that should be included in the master file. This long list includes numerous examples of information that would rarely be necessary to obtain a “reasonably complete picture,” such as:

- the title and country of the principal office of each of the top 25 employees;
- a list of the MNE’s APAs and other rulings;
- a list of pending and resolved MAP cases;
- a description of the main geographic markets for material products and services;
- a list of restructurings and intangibles transfers during the year (which presumably do not include the local country, which would be included in the local country report if the local company was a counterparty); and
- intercompany transactions between countries other than the local company.
Requiring information not necessary to form a reasonably complete picture of the relevant business activities would increase compliance costs for businesses, and increase the time commitment of tax examiners, who presumably would be required to read and understand the information provided, even though it would have little, if any, effect on their review of a local company’s transfer prices. There is also the risk that the large amount of information currently required to be included in the master file may allow aggressive tax authorities to expand their reach into MNEs’ profits at the expense of less aggressive tax authorities (or to use formulary apportionment rather than the arm’s length standard to determine the amount of their proposed adjustment). This may result in escalating tensions between tax authorities as jurisdictions become more and more aggressive. Therefore, we request that the OECD substantially reduce the amount of information proposed to be included in the master file and the CbC reporting template. Specifically, we recommend limiting the CbC reporting template to revenue, earnings before income taxes (EBIT), income tax, number of employees, and activity code.

Much of the information listed in the proposed Annex I for inclusion in the master file adds little to tax administrations’ ability to obtain a “reasonably complete picture,” and may therefore be more appropriate for inclusion in the local file. For example, to the extent a member of an MNE uses intellectual property of the MNE, the local file requirements found in Annex II would require a thorough discussion of both the local company’s functions and risks with respect to its use of the intellectual property, as well as those of all counterparties of that local company involved with the intellectual property. That information, coupled with the information from the CbC reporting template, would provide the tax administration with the relevant information necessary to obtain a “reasonably complete picture.” It would also provide a solid foundation for conducting a thorough transfer pricing examination involving the local company’s use of the MNE’s intellectual property.

The same line of reasoning applies to the requirement found in proposed Annex I calling for lists of material intangibles or groups of intangibles, and lists of important related-party agreements. These items fall into the category of information that would be included in the relevant local country files if relevant; therefore, requiring its inclusion in the master file is duplicative and unnecessarily burdensome to MNEs, and unhelpful to tax administrations.

At a minimum, the OECD should consider whether some of the information that is proposed for inclusion in the master file would be more appropriate for inclusion in the local file (instead of the master file) to the extent it is relevant to that jurisdiction (such as pending MAP requests) and to the extent it has some relevance to the local entity’s business activities.

The OECD should recommend stronger steps to protect MNEs’ confidential information

We welcome the OECD’s acknowledgement of the importance of tax administrations protecting the confidentiality of sensitive MNE information. The integrity of all tax systems depends on confidence that tax administrations will protect from public disclosure all information provided to them. This basic tenet applies regardless of whether the tax administration obtains the information from the MNE by means of transfer pricing documentation, through other examination procedures, a tax treaty or a tax information exchange agreement, or from any other nonpublic source.³

³Approximately 86 percent of the participants attending Deloitte’s February 13, 2014, webcast expressed concern over the potential disclosure of confidential information, given the scope and potentially broad distribution of the master file and CbC reporting template.
The master file, CbC report, and local file will contain confidential MNE information, as well as commercially sensitive information that will require appropriate protection from public disclosure. Great care should be taken to protect such sensitive information. Such protections might include:

- Provisions requiring that the master file (including the CbC report) be filed with the home country and made available only through request (alternatively, provisions indicating that the information need not be filed, but only that it be available for inspection (but not copying) at the MNE’s affiliate’s principal place of business);
- Provisions authorizing countries to whom a request to provide MNE information is made to limit the information provided to information relevant to transactions involving the jurisdiction of the requesting country;
- Procedures whereby the MNE would be permitted to suggest reasonable redactions of potentially sensitive commercial information not relevant to the transactions that involve the jurisdiction of the requesting country;
- Procedures whereby arrangements are made for a requesting country to review confidential and potentially sensitive commercial information relevant to the transactions that involve it at the local country premises of the MNE;
- Providing notice to MNEs when a request for information is made and received; and
- Providing for penalties (both civil and criminal) for violating such confidentiality protection provisions.

We are particularly concerned about the confidential information contained in the master file and CbC report. Paragraph 45 of the discussion draft recommends that the master file portion of the proposed documentation, including the CbC reporting template, be completed by the MNE’s parent company, and then shared with the group affiliates. The discussion draft then proposes that the tax administrations in the local affiliates’ countries could obtain the master file directly from the local affiliates. However, we believe that to protect MNEs’ confidential information, the master file should be filed only with the parent company’s home country, and shared with local tax authorities through the mechanism provided by tax exchange of information agreements.

The OECD should establish specific materiality thresholds that vary for different jurisdictions

The discussion draft suggests that only “material transactions” should be subject to the new disclosure requirements, but requests comments with respect to how to define “material.” We recommend, first, that the OECD provide precise guidance on this definition that is capable of determination without any ambiguity. Otherwise, there would likely be a significant amount of confusion both on the part of MNEs and tax authorities as to what constitutes “materiality,” which would undoubtedly lead to more disputes both between MNEs and tax authorities and between different tax authorities, putting greater stress on competent authorities’ limited resources for dispute resolution. Specific guidance on this issue is also needed in order to ensure that MNEs’ compliance costs do not become unreasonably high. Such guidance could take the form of an absolute dollar threshold for transactional value, or some other specific objective measure, but it should be precise enough that it leaves no doubt as to whether the transaction must be disclosed or not.

Second, we recommend that this precise threshold should take into account the fact that different jurisdictions would have different thresholds of materiality for different transactions. For example, a $1 million transaction might be relevant to a country with a small gross domestic product (GDP), but might not be relevant to a larger
jurisdiction with a correspondingly larger GDP. Accordingly, the materiality threshold could be different for the different purposes of the local file and the master file.

Third, we recommend that the OECD consider defining materiality with reference to the MNE’s business. For example, the OECD could define a transaction as material by reference to whether the transaction was more or less than a certain percentage of the company’s gross sales in a given year, or gross assets in the case of loans and IP transfers. Additionally, we recommend that the OECD consider excluding transactions that are not part of the MNE’s core business operations, thus acknowledging that such lower-risk ancillary transactions would not be material. This would allow tax authorities to focus their risk assessment on MNEs’ core business transactions and alleviate some of the compliance burden that these rules will place on MNEs.

**Considerations with respect to “top-down” or “bottom-up” approach in the CbC reporting template**

The discussion draft suggests a bottom-up approach to reporting financials on the CbC reporting template, but acknowledges that many questions remain, and requests comments as to whether a top-down approach should be required or permitted.

Given that MNEs differ in terms of operational organization, business structures, and accounting systems, the type of information readily available differs from company to company. MNEs need the flexibility to be able to adopt either the bottom-up or the top-down approach, because companies have different ways of compiling financial data, and the information that would be readily available would vary significantly from one MNE to another. It is not uncommon for MNEs to have multiple accounting systems, and not unheard of for large MNEs to have as many as 20 different accounting systems in place around the globe, as a result of decentralized information technology system decision-making, merger and acquisition activity, or regulatory requirements. The prospect of reconciling these systems for purposes of the CbC reporting template would be daunting and potentially expensive for these MNEs. Thus, MNEs should be given the opportunity to pick the least burdensome and the least expensive approach.

The purpose of the CbC reporting template is to facilitate comparisons across a single MNE, not among different MNEs. Therefore, as long as an MNE follows a consistent approach, either option – bottom up or top down -- should be adequate for risk assessment purposes.4

In considering the top-down approach, the discussion draft states that the tentative view of the OECD’s Working Party Group 6 is that to be useful, “top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country.”

Top-down reporting (without the above-stated adjustments) has some natural advantages over the bottom-up approach. Because the financials would be in a uniform currency, using a common time period, and a consistent accounting standard, it would be easier for tax authorities to use these figures for a global view and comparisons across entities with similar functions. Before adjustments,5 companies gather this data as part of preparing their consolidating financial statements, which may lighten the burden on the MNE. However, the

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4 Approximately 60 percent of the participants attending Deloitte’s February 13, 2014, webinar said that multinationals should be given the option of choosing between the bottom-up and the top-down approaches, because each multinational’s industry, corporate structure, and geographical business locations are different.

5 Many companies make “top side” adjustments that could complicate the use of consolidated financial statements and the ability to reconcile those financial statements to local accounts.
adjustments that Working Party Group 6 suggests would significantly increase the time spent compiling and checking top-down results. Furthermore, MNEs are concerned that if the OECD were to adopt top-down results, each tax authority would require a reconciliation between the top-down results and the statutory results, thereby entirely removing any time savings generated by the top-down approach.

However, in assessing the top-down approach, the requirement to reflect cross-border transactions without intracountry transactions can be onerous. We question whether such eliminations are truly necessary to make the CbC reporting template useful to tax authorities. If tax authorities wish to use the CbC reporting template to obtain a global view of the MNE and to compare their local entity to similar global entities, then in what way does eliminating intracountry transactions improve the comparison? Are the intracountry transactions somehow invalid? Is this a concern only for countries that allow consolidated reporting? Many countries do not allow consolidated tax filings of affiliates within the same country, requiring companies to accurately reflect any intracompany transactions. For these countries, would intracountry eliminations not be necessary? Moreover, the local tax authority will already have local entity financials with intracountry transactions eliminated through the local file. Therefore, this could be compared to the CbC reporting results to identify any major impacts of intracountry transactions, allowing local tax authorities to make their own adjustments in comparison.

Unless the requirement for these adjustments to the top-down approach is removed, the approach would likely be of little use to many MNEs. However, if the OECD removed or lightened this requirement, then giving MNEs a choice between the bottom-up and the top-down approach would be appreciated by MNEs, and could give tax authorities an opportunity to review more consistent data.

**Considerations on CbC reporting of income taxes**

The discussion draft requires that the following items be reported in the CbC reporting template:

- **Earnings Before Income Tax**: In the sixth column of the template, enter the total amount of earnings before income tax for the Constituent Entity. This number should be taken from the same financial statement as the revenue numbers, and should generally be reflected in the functional currency of the Constituent Entity.

- **Income Tax Paid (on Cash Basis)**: (a) To Country of organization: In the seventh column of the template, enter the amount of income tax actually paid to the country of organization by each Constituent Entity during the relevant year. (b) To All Other Countries: In the eighth column of the template, enter the amount of income tax paid by the Constituent Entity to all countries other than the country of its organization for the relevant fiscal year. With respect to both, cash payments of tax and not tax accruals should be reported. Tax payments should be reported in the same currency used to report earnings before income tax in column 6.

In addition to the cash income taxes amount required by the discussion draft, it is possible that MNEs may be able to access two other aspects of income tax reporting in their books and records — income taxes reflected on their income statement, and income taxes reflected on their income tax returns. We acknowledge that there is no perfect measure of income taxes and that there are several advantages in reporting cash income taxes:

- It is an absolute;
- It is likely more meaningful in that it reflects tax actually paid by a group; and
• It is consistent with the other business activities that are also reported on a cash basis in the CbC reporting template (royalties, interest, and service fees and the related withholding taxes).

However, there are also disadvantages in reporting cash income taxes paid:

• The amount may not be easily identifiable in books and records;
• It may be difficult to discern the impact of income tax refunds (including tax credits and/or grants that may be nonrecurring) received during the reporting year;
• It is incongruent with the reporting of book earnings before income taxes as required by the CbC reporting template; cash income taxes usually do not correlate to current year’s profits because there is usually a lag between cash taxes paid and earnings subject to tax, inclusive of overlapping periods when making estimated tax payments and/or payments upon finalization and filing of income tax returns from previous periods (this would be especially problematic when cash taxes are paid on behalf of a group of entities and allocated to the relevant constituent entities on the basis of their share of profits as required by the discussion draft); and
• Tax planning strategies that allow companies to defer payments to future periods and/or are pending approval or input from tax authorities (for example, authorization for tax treatment of an acquisition or pending MAP cases) would result in the timing of cash taxes in a period different than the reporting period.

An alternative way to report this kind of information would be to report book income taxes reflected on the income statement (i.e., reporting of accrued taxes). The advantages of this approach include:

• It aligns better with accrual-based financial statement income;
• It is congruent with the reporting of book revenues as required by the CbC reporting template; and
• It is easy to identify and extract from books and records (because it is reflected on the income statement as a discrete item).

But there are also disadvantages in reporting book income taxes:

• Distortions related to deferred tax accounting (for example, related to uncertain tax positions; the recording and reversal of valuation allowances; decisions regarding timing of options provided under tax law with respect to, for example, depreciation; changes in the classification of permanently reinvested earnings; and return to provision adjustments);
• Cash payments from tax authority examinations may impact the amount of the tax provision, but these payments may not be individually recorded in the provision; and
• Income taxes that might be taken directly to equity in some countries (for example, tax on stock options).

A third option would be to report income taxes as reflected on income tax returns. The disadvantages listed above for reporting book income taxes are conversely advantages in reporting income taxes as reflected on income tax returns. The disadvantages of this approach, though, include the following:
• It is incongruent with the reporting of book earnings before income taxes as required by the CbC reporting template, because cash income taxes usually do not correlate to current year’s profits;

• It could be distorted by net operating loss carryforwards and tax credits;

• Payments pursuant to tax authority examinations might not be individually recorded in the provision; and

• Unavailability of information, because in some countries the tax return is due more than a year after the end of the fiscal year.

As explained above, all three approaches have advantages and disadvantages, and none is perfect. More importantly, the availability and reliability of information varies by industry, corporate structure, and geographical business locations. Accordingly, the practical solution is to allow MNEs to choose one of the three options and apply it over an extended period of time. The application of the same approach over a multiple-year period should not only produce the intended useful information that tax authorities are looking for, but also provide, to a high materiality threshold, information that MNEs could collect without undue burden.

The discussion draft also provides that where tax is paid by one entity on behalf of a combined group of associated enterprises operating in a country, tax should be allocated among members of the relevant combined group in proportion to their shares of the earnings before income tax of the combined group. This is quite an issue for MNEs for a number of reasons. For example, some organizations that have a combined filing group make ease of administration decisions about costs; for example, they may incur all payroll costs out of one company and not allocate to other entities in the group. In such a situation, if the allocation is based on earnings before interest and taxes, it will be distorted. It is important to note that usually a tax sharing agreement is in place among the members of a combined filing group that deals with strategic decisions, such as utilization of historical losses or other tax benefits. If there is a tax sharing agreement, we recommend that it be respected.

We are also concerned that the CbC reporting template does not address reporting difficulties that could arise for MNEs due to differences in taxation year-ends and differing documentation due dates within multinational groups. We recommend that the OECD provide rules that allow for flexibility regarding these issues.

We are also concerned that the amount of information required to be provided in the CbC reporting template would allow tax authorities to either: (1) compile databases of non-public comparable profit levels that could be used as benchmarks to adjust an MNE’s income tax return without the MNE having similar access to the non-public data set; or (2) make income tax adjustments based on a formulary apportionment methodology rather than the arm’s length standard. What mechanisms will be put in place to prevent these unfair and undesirable events?

The OECD should recommend that countries adopt a uniform time at which MNEs are no longer required to update the information contained in the documentation

As a practical matter, business and economic information, including information on comparable companies and comparable transactions, is not static. To reasonably comply with documentation requirements, MNEs need a specific date after which they are no longer required to update their documentation with potential new information so that they can prepare documentation in an orderly fashion. We recommend that the OECD adopt
a provision that requires MNEs to include in their documentation only information that existed at the end of the relevant tax year.

The OECD should recommend that countries adopt uniform rules that permit taxpayer-initiated post-year-end compensating adjustments

Documentation would be an exercise in futility if MNEs were not allowed to report on timely filed tax returns the arm’s length prices carefully analyzed and supported in their documentation. Today, many countries permit MNEs to increase the taxable income reported on their tax returns as a result of post-year-end transfer pricing analysis, but only a few countries permit MNEs to reduce their taxable income. To state the obvious, for every increase in one jurisdiction, there must be an offsetting reduction in another jurisdiction. The current Paragraph 3.71 of the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations recognizes this difficulty, but provides little guidance other than to state that the competent authorities are encouraged to use their best efforts to resolve the resulting double taxation.

We believe that if the OECD adopts new documentation guidance, it must address the asymmetry that currently exists with respect to post-year-end or compensating adjustments. The EU Joint Transfer Pricing Forum issued a paper on November 5, 2013, calling for similar action. To protect the integrity of documentation, we recommend that the OECD, as part of the revisions to Chapter V, permit MNEs to make post-year-end tax return adjustments, at least up until the time the tax return is due.

Tax authorities should communicate the results of the risk analysis to MNEs

We commend the OECD for acknowledging that “sharing risk assessment results with taxpayers can help improve compliance and enhance the effectiveness and the quality of an audit.” We propose that the OECD include in Chapter V a recommendation that tax authorities must share their risk assessments with MNEs. Doing so would provide MNEs with an opportunity not only to double-check the information provided, but also to prepare relevant evidence or analysis in response to the tax authority’s position that the tax authority may have overlooked, or concerning which the tax authority may not have had any information. The U.S. Internal Revenue Service, for example, just recently promulgated internal rules for its transfer pricing examiners that require them to provide the taxpayer under examination with the initial risk analysis (including examination plan and timeline) by the seventh month of the examination,6 and the midcycle risk analysis (as well as the draft notice of proposed adjustment, if any, including a draft economist report) by the 18th month of the examination cycle.7

Conclusion

Today, business faces a multitude of sometimes conflicting documentation requirements around the world, as many countries have adopted their own documentation requirements. Keeping track of and complying with these separate documentation requirements has significantly increased business’ documentation compliance costs. A uniform documentation standard is essential to reducing those compliance costs. We agree with the tenor of Paragraphs 44 and 45 of the discussion draft.8 However, we believe those paragraphs are not strong enough to address the need for uniform rules where MNEs can report on compensating adjustments on their tax returns.

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7 Id. at pp. 21, 23.

8 Paragraph 44. Transfer pricing documentation requirements are and should continue to be features of local law. The implementation of the two-tiered transfer pricing documentation consisting of a master file and a local file, therefore, requires that local countries
enough. We believe it is essential that the OECD produces a consensus document, and that all OECD and G-20 members adopt consistent and uniform rules based on that consensus that do not add additional requirements to those contained in Chapter V. Failure to adopt consistent and uniform rules is contrary to Action 13, and would unfairly increase the compliance burden on business.

Paragraph 45. In this respect, consistent and uniform formats are essential. To ensure that the master file information is consistent from country to country, local transfer pricing documentation requirements should include master file information conforming to Annexes I and III. It is recommended that the master file portion of the proposed documentation (including the country by country reporting template) be completed under the direction of the parent company of the MNE group and be shared with each country in which the MNE has an affiliate subject to tax. The master file could then be obtained by local taxing authorities directly from local affiliates. Absent prompt compliance at the local country level, such information could be obtained by tax administrations under treaty exchange of information mechanisms.
Transfer Pricing Unit
Organisation for Economic Co-operation and Development

By email: TransferPricing@oecd.org

23 February 2014
Our ref: WJID/AL/LS

Dear Sirs

Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting

Thank you for the opportunity to comment on the non-consensus Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (the ‘Discussion Draft’). We hope that the involvement of business stakeholders at this early stage will provide valuable input to allow for the OECD and G20 to reach consensus on these matters and provide for a workable and useful approach.

Our comments are based on our discussions with businesses in the UK, and our experience of the approach taken by the UK tax authorities and others in relation to transfer pricing documentation.

Promotion of enhanced transparency and compliance

We take as the starting point for our consideration of the draft the communiqué from the G8 Summit in Lough Erne in June 2013 and the directive to ‘develop a common template for country-by-country reporting to tax authorities’ to address the widely-perceived need to provide ‘big picture’ information to allow tax authorities to understand the wider context of a taxpayer’s transactions. The OECD’s Base Erosion and Profit Shifting (‘BEPS’) Action Plan focusses on this objective. Action 13 sets out to ‘develop rules on transfer pricing documentation to enhance transparency for tax administrations, taking into consideration the compliance costs for business.’ In addition, the OECD has been clear in its statements on the BEPS project, including in the Action Plan, that the arm’s length principle remains the standard for determining the pricing of transactions between associated enterprises, and indirectly, between a head office and its permanent establishments.

We consider that the country-by-country information to be provided in the common template should be separate from a group’s transfer pricing documentation. The country-by-country information should give the global ‘big picture’ that local statutory accounts, local tax returns and local transfer pricing documentation does not. It is a tool for risk assessment in relation to the wider backdrop of the BEPS Action Plan, and cannot be a replacement for tax return information or transfer pricing documentation relevant to a company’s liability. Tax paid in a country may be affected by a wide number of variables, including commercial factors as well as financing, regulatory and tax considerations.
The OECD’s objective to assist tax authorities with maximising the efficient use of their resources when reviewing the transfer pricing of multinational organisations is important, as are objectives to ensure transparency for tax authorities and the provision of useful, relevant and complete information to enable i) an assessment of risk and ii) an assessment of the position under audit.

There is also an opportunity for businesses in that providing better and more relevant information in a standardised format to tax authorities can reduce time and associated compliance costs where there is little likelihood of a transfer pricing adjustment that is sustainable under a double tax treaty. The proposals in the Discussion Draft do not necessarily address these opportunities.

The provision of information should assist a tax authority’s ability to assess the risk of base erosion and profit shifting, or lack of risk, in relation to a multinational’s global activities. In our view the information to be provided should be clearly targeted and manageable in terms of volume and above all relevant, so that tax authorities can focus resources on items that matter. It is also essential that the common template achieves consensus so that it is seen as the global standard template for this ‘big picture’ information to ensure that tax authorities have access to the same information, whilst keeping the compliance burden on businesses proportionate to tax authorities’ objectives. The OECD should encourage tax authorities to follow its guidance in this area in order to realise the potential benefits to tax authorities and tax payers of a common approach.

During a recent webcast, we polled 930 clients (mainly US multinationals) on their estimate of the effect on compliance costs of the proposals. 55% said that they expected compliance costs to increase by at least 40% (22% thought the increase would be at least 70%) and a further 37% thought that compliance costs would increase by 10% to 40%. These are significant estimated costs for multinationals. It is essential that the OECD and G20 countries consider each element of data requested on an annual basis in light of the benefit it will be to tax authorities relative to the cost of obtaining it.

Additional information requirements beyond this increase the burden for business and may result in tax authorities failing to identify key issues where there is insufficient resource to thoroughly review all the information provided. Some of the information requested in the proposed country-by-country common template and master file adds to the volume of information without being relevant. In our view there are too many data points and we question, for example, what value is gained by the listing of all payments within the group. What a tax authority needs for risk assessment is knowledge of whether there are group finance companies or intangibles management companies for example.

Centralised vs decentralised businesses and the master file approach

Any master file approach to transfer pricing documentation is only appropriate for businesses that have homogenous operations in different countries/regions. For decentralised businesses, a master file approach will not be appropriate, as a great volume of information related only to some disparate business units or geographies will need to be assembled in one file and provided to tax authorities, regardless of whether it is relevant or useful to tax authorities in relation to the assessment of local liabilities.

The cost of providing information in this manner (which will be substantial for all multinationals) is also increased for decentralised businesses, as there will need to be additional explanations of which elements of the master file are relevant to each business unit, region or entity as appropriate.

We consider that sufficient flexibility should be available to ensure that documentation is prepared taking the ‘most appropriate approach’ for that business, similar to selection of the most appropriate method for
assessing arm’s length pricing of transactions, and the master file approach (excluding the separate common template for country by country information) should be an option for businesses, either on a global, regional or business unit basis. Such flexibility should not be seen as a limitation on tax authorities’ ability to obtain information that is relevant to the liabilities of local entities, as discussed further below.

A successful approach should not limit the meaningful assessment by companies of their transfer pricing position that documentation is intended to encourage, but should free businesses to invest time in appropriate assessment rather than complying with administrative requirements which do not enhance the tax authority’s understanding of the business or its associated risks.

**Country-by-country information - systems and data**

For many businesses, the processes and time taken to access data for the country-by-country common template will be determined by the accounting and other systems that the business uses. For some businesses, this may be one sophisticated global accounting (‘ERP’) system, and perhaps also one human resources system for employee information. To get data in the format required for the common template may, for these businesses, be a case of producing a new report or re-working existing reports into the template format. From our discussions with businesses, it seems that it is only a limited number of multinationals, particularly based in the US, who have invested in systems of this nature.

For many other multinational businesses, systems used are not so sophisticated or integrated. This is particularly true of those businesses that have grown via acquisition or those where different business lines or geographies have different requirements, which may have multiple accounting systems. Human Resources (‘HR’) systems are even less likely to be integrated or global, and it is not uncommon for businesses to outsource HR in new or small markets.

Some large businesses in the UK use ‘consolidation’ systems to pull information from their often multiple ERP and accounting systems to enable the preparation of group statutory accounts. For these businesses, a ‘top down’ approach would allow the data pulled through the consolidation system to be used as the basis for preparing information. Even then, some of the data requested, such as intercompany payments and receipts by entity, tax paid split by home country and other and separate results for permanent establishments will not be available through the consolidation system. Other, typically smaller, businesses consolidate data for group statutory accounts using multiple Excel files, which means gathering the data requested would require additional manual data collection.

Most local statutory accounts are produced in Word and Excel using data from local general ledger systems and other local sources. This means manual adjustments are required via spreadsheets to produce statutory accounting information at the local or consolidated level. For these businesses the production of the common template information will also require manual input via spreadsheets.

The variety among businesses is significant and there is no ‘one size fits all’ approach that will manage the compliance costs for business. For this reason, the only workable solution is to offer businesses a choice of ‘top down’ or ‘bottom up’ approach, with a safeguard that businesses can only change their approach when there is a good reason, such as the implementation of new systems. It is important to stress that the global information provided in the common template is designed to show the global position of profits and taxes paid within a multinational group, rather than provide a comparison between different multinational groups. For this reason, we think that providing flexibility for businesses here would provide a practical and workable policy.
We should also observe that a ‘top-down’ approach offers benefits in the form of results presented under common accounting principles and in the same currency.

**Sharing mechanism**

A significant concern for businesses is ensuring that commercially sensitive and tax information remains confidential. This concern is two-fold: firstly, that the information is not published by tax authorities in those countries where tax information is routinely made public under domestic legislation; and, secondly that commercially sensitive data or business knowledge (e.g. in relation to valuable intellectual property) is not shared widely within the multinational group, increasing the risk of it being shared with competitors. For this reason, a sharing mechanism that includes confidentiality protection and uses the double tax treaty or information exchange agreement network of the parent company jurisdiction is the most appropriate solution. We recognise there may need to be a fall-back option for groups where the parent company jurisdiction is not a signatory to information exchange agreements, such that in these circumstances the multinational would have to, for example, submit their information to a subsidiary company tax authority for sharing under an information exchange or treaty network. This approach may also have a wider benefit of encouraging more countries to enter into tax information agreements (so that they can obtain global information in relation to companies operating in their jurisdictions) and enhancing global transparency.

Providing greater levels of information could also increase the risk that tax authorities misunderstand what is supplied and potentially seek tax in situations which lead to double taxation. We think it is vital that the OECD set out clearly the purposes for which the information should be used – and those for which it should not be used. It also suggests that there will be an increase in Mutual Agreement Procedures (‘MAP’) and thus the importance of Action 14 is highlighted. Double taxation reduces economic growth. Tax authorities may face resource challenges in managing MAP and improving the protocols to manage the process better would add significant value to tax authorities and businesses alike.

**Timing of implementation**

Once the common template for country-by-country information and new requirements for transfer pricing documentation are finalised, businesses will need some time to implement changes to their systems and processes, which may be substantial for many. In our view, reporting the additional information and data for 2015 in 2016 would need earlier notice than September 2014 of the final template.

We have included three appendices to this letter:

- Appendix 1 sets out responses to the questions raised in the Discussion Draft
- Appendix 2 sets out specific comments on the common template for country-by-country reporting
- Appendix 3 sets out other comments in relation to transfer pricing documentation and the proposed master file and local file
If you wish to discuss any of the points raised in this letter, please do not hesitate to contact either me (bdodwell@deloitte.co.uk), or Alison Lobb (alobb@deloitte.co.uk).

Yours faithfully

W J I Dodwell
Deloitte LLP
Appendix 1 - Responses to questions raised in the Discussion Draft

Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

We see little or no benefit in there being additional questionnaires or surveys. The inclusion of routine additional information requirements will result in increased paperwork for tax authorities and an increased administrative burden for taxpayers. In addition, transfer pricing is a facts and circumstances question, and questionnaires and standard forms are difficult to draft so that they produce value. To the extent that tax authorities require further information this should be obtained through discussions with taxpayers under a co-operative compliance approach, as recommended by the OECD1, or under audit.

The UK tax authorities' approach has been to involve taxpayers in and share the results of risk assessments, and our experience has been that engagement with taxpayers has led to increased understanding of each business by tax authorities and more accurate risk assessment.

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

To the extent that information and documents are relevant to determining the tax liability of an entity within a jurisdiction, the relevant tax authority must have rights of access under either domestic legislation or treaty sharing mechanisms agreed between governments. Taxpayers have an obligation to provide all relevant information to tax authorities to enable the verification of local taxable income on audit and the location of these documents within the taxpayer's organisational structure should not preclude this. Guidance from the OECD on the obligations to make relevant transfer pricing information available to local tax authorities for auditing would be welcomed.

To the extent that the legislative frameworks of countries do not give adequate information powers to obtain the information requested, exchange of information under double tax treaties or tax information exchange agreements should be used. In particular, this will encourage countries to participate in international best practices in relation to sharing of information whilst maintaining confidentiality of taxpayer information. The continuing expansion of the convention on mutual administrative assistance network is also helpful here.

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

In order to provide the most meaningful and relevant information to tax authorities, taxpayers should have the flexibility to choose whether to prepare a master file on a line of business, regional or entity wide basis, or to prepare local files only, selecting the 'most appropriate approach'.

1 http://www.oecd.org/ctp/administration/co-operative-compliance.htm
Each line of business or region should be treated as distinct. A tax authority would therefore only have information relevant to a line of business undertaken in its territory or to its region. This approach has several benefits; including that commercially sensitive information will be restricted to subsidiaries and tax authorities for whom it is relevant. In addition, tax authorities will only see information that is relevant to the transactions undertaken locally, and some of the extraneous detail in a global approach will be removed.

To address any concerns of completeness, we suggest that the tax authority of the parent company be entitled to see all master files, so that it may determine whether a multinational is satisfying the condition of ‘most appropriate approach’ to transfer pricing documentation.

A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

Should the country-by-country report be part of the master file or should it be a completely separate document?

The country-by-country report should be entirely separate from transfer pricing documentation and the master file. It has a different, broader purpose, and its focus on numerical ‘big picture’ information does not readily fit with facts and circumstances analyses required in relation to transfer pricing. It is a tool in relation to the wider context of the OECD/G20 Action Plan on BEPS, and will assist tax authorities with risk assessment of other areas of tax, such as financing arrangements, as well as transfer pricing.

Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

Flexibility for businesses is needed and taxpayers should have the option of preparing information on either a ‘bottom up’ or ‘top down’ approach based on the most readily available information from their accounting systems. The variety among businesses and their accounting systems is significant and there is no ‘one size fits all’ approach that will assist with the compliance costs. Some of the largest businesses may be able to produce a new report from their accounting systems, others may wish to use their consolidation systems to assist with accessing the data, and smaller businesses are likely to need to make manual adjustments using data from their general ledgers and spreadsheets. The information provided in the common template is designed to show the global position of profits and taxes paid within a multinational group, rather than provide a comparison between different multinational groups, and therefore there is no need for all businesses to adopt the same approach.

A ‘top down’ approach of information by country would result in information being provided for each territory in the same currency and under consistent accounting standards. There are also challenges with information prepared on an entity-by-entity basis, such as difficulties in the allocation of tax paid under a fiscal consolidation or group relief arrangement.

Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting
top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

The country-by-country template should be prepared on the basis of aggregated (but not consolidated) information by country, in line with the mandate from the G8. Consolidation for the purposes of group accounts is designed to ensure that group shareholders are not presented with results that include sales, cost of sales and profit that are unrealised outside the group. However, for tax purposes the starting point remains profits of an individual entity including intra-group sales. Aggregation will mean that revenues will be increased by intra-country sales, but profit before tax will be less affected due to the corresponding effect on costs (except in respect of unrealised profits, the margin on intra-country sales). Aggregation is not inconsistent with the objectives of the common template, as tax paid will be calculated by entity without exclusion of related party sales. Tax paid, number of employees and salary costs will not be affected by a decision to aggregate rather than consolidate. Given the ‘big picture’ objective of the country-by-country information, we think aggregation will make little difference to the usefulness of the information to tax authorities, but will be of great benefit to minimising the compliance burden on businesses. Aggregation by country is also straightforward where a ‘bottom up’ approach is taken, entity results can be simply added up to achieve information by country.

Reporting on an entity by entity basis will result in a very large volume of data which may be difficult for tax authorities to analyse. An aggregated basis by country will assist with this.

Questions of source and characterisation of income should be addressed in local tax returns and local transfer pricing documentation. Whether a payment is subject to withholding tax is relevant only to the paying and receiving countries, and disclosure on a global basis will not provide any insight for third country tax authorities.

Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

All information should be aggregated by country, as set out above.

We agree that the template should include an aggregate number for corporate income tax paid on a per country basis even if other information is included on an individual entity basis. Including an aggregate tax paid number eliminates the distortions created by tax consolidations and group relief arrangements.

On balance, the UK businesses we have been talking to consider that tax paid should be reported on a cash basis, including cash tax payments made in the year. This will create some distortions in that the tax paid figure will not correlate to profits before tax for the period due to payments made in the year for previous or future periods. Over a number of years, however, tax authorities will see the full picture. Current tax due also has a number of distortions which means it will not easily correlate to profit before tax. These may include timing differences such as book/tax differences on depreciation, losses utilised or not recognised and permanent differences such as non-allowable expenses. Tax paid is an absolute.
The template should not require the reporting of withholding tax paid. Withholding tax is borne by the recipient of the payment, who may be able to offset the withholding tax paid under a credit system in the territory of the recipient. Withholding tax reporting will already be included in local tax returns or a specific withholding tax report in many territories. The purpose of the country-by-country template is to increase transparency on a global level, and withholding tax is solely an allocation of taxing rights between source and residence country on a bilateral basis. The cost of including this information will be significant for many businesses, where amounts are insignificant.

Some businesses would like an option for taxpayers to include withholding taxes, and we see this as a practical solution. These are businesses that suffer significant amounts of withholding tax through their sources of income or the countries in which they operate, such that withholding tax is not credited in the residence country. This could be achieved by including in the definition of tax paid the option to include (consistently for all countries and years) withholding tax suffered but not subject to credit relief.

**Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?**

The reporting of aggregate cross-border payments between associated enterprises should not be required. This information should be included in the local tax returns and/or local transfer pricing file of both payer and recipient, and would not provide tax authorities in other countries with any additional information or insight. Compiling the data in a global format would result in an undue additional compliance burden for businesses, particularly as this information is unlikely to be readily available from accounting systems. The volume of information presented to tax authorities would also be extensive, and may detract from other areas of global focus.

**Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?**

The tick box approach currently proposed is unlikely to impose a significant additional burden on taxpayers and we agree with its inclusion. Many groups will include entities which undertake a range of activities and may therefore need to tick several of the boxes.

Code G should be expanded to include ‘Finance and leasing’. In addition, we suggest that an additional category of “Regulated financial services” could be used to differentiate financial institutions from unregulated groups that conduct “Finance” activities in parts of their business.

There should be an exemption from reporting air transport and shipping activities covered by a treaty determining taxation rights, such as Article 8 of the OECD Model Tax Convention or a separate bilateral agreement between governments.

**Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.**

Further guidance as to which transactions would be considered material would be welcomed by businesses. An absolute materiality is likely to be difficult as a result of variations in the size and nature of local economies.
The suggested exemption for small and medium-sized enterprises (‘SMEs’) from preparing transfer pricing documentation except upon specific request of the tax administration is helpful. It has been the experience of the UK that both smaller businesses and the UK tax authority benefit from the UK’s existing SME exemption (which exempts SMEs from both arm’s length pricing and documentation requirements, with limited exceptions), as the tax authority can focus its resources on larger transactions and companies where more tax is at stake. The exemption in the UK does have restrictions – for example, where an SME is transacting with a related party in a country with which the UK does not have a full double tax treaty – to prevent abuse. The Discussion Draft does not include a definition of an SME and one option here is to use the European Union definitions of SMEs which are used in tax legislation within the European Union.2

An obligation for SMEs to provide information and documents upon specific request by tax authorities should give the business sufficient time for preparation. Requests should be limited to specific information related to areas of concern and not a requirement to prepare full transfer pricing documentation.

SMEs should also be exempt from provision of country-by-country information. International expansion should be encouraged for smaller businesses without a disproportionate burden of tax compliance.

Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

Express confirmation that taxpayers are not required to update searches on an annual basis is helpful. However, consideration should be given to removing the requirement for annual updates of financial data for comparables in relation to low risk transactions where appropriate arm’s length outcomes are unlikely to vary from year to year. Such an approach would remain consistent with the application of the most appropriate transfer pricing method. It would be helpful to ensure consistency with the work of the EU Joint Transfer Pricing Forum (‘EU JTPF’) in their ‘Guidelines on low value adding intra-group services’3 and the OECD’s work on bilateral safe harbours4 in this area.

The proposals contained in the Discussion Draft would result in significant upfront global documentation requirements for all multinational taxpayers, regardless of the level of risk associated with the transactions undertaken, the number and scope of Advance Pricing Agreements obtained or the past compliance history of the group. It would be helpful if the OECD could consider incentives for compliance that reduce the administrative burden on compliant businesses over time.

Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

A common language for transfer pricing documentation, including any master file and local file, would allow businesses to prepare their transfer pricing documentation on a consistent basis. Given that many tax authorities will have the capability of reviewing documentation in English, and indeed that not all local files will be reviewed by tax authorities every year, an option should be available for taxpayers to prepare


all of their transfer pricing documentation in English. Tax authorities should have the right under an audit to request a translation of relevant documents provided an appropriate timetable be given. We would recommend a minimum of 45 days to allow sufficient time for a good quality translation to be obtained.

The country-by-country template is largely numerical and should be prepared in English without need for translation.

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

Confidentiality is a key issue for taxpayers and there must be assurance that there will be no public disclosure of trade secrets, scientific secrets, tax or other confidential information. The most appropriate method to achieve this is via the sharing mechanism – see further comments below.

Consideration should be given as to whether extremely commercially sensitive information could be withheld from the master file and local file but made available for tax authorities to review at the business's premises.

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- **a.** The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- **b.** Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
- **c.** Some combination of the above.

A key issue for taxpayers is confidentiality. Businesses are likely to be most concerned about the confidentiality of certain types of information such as commercially sensitive intellectual property, the location of high value assets and assets with military, defence or other strategic value. In addition, global tax information should remain confidential to tax authorities and not publically disclosed in countries where local information is routinely publically disclosed.

Option b., filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions, is the appropriate option for sharing the country-by-country template and master file information. The OECD Model Tax Convention and Model Agreement on Exchange of Information on Tax Matters both contain confidentiality restrictions that provide protection that information can only be disclosed to tax authorities for use in the assessment and collection of taxes covered by the agreements. Restricting access to the country-by-country template and the master file to those countries which have committed to treaty information exchange provisions could have the wider benefit of encouraging more countries to enter into these agreements thus enhancing global transparency.

This approach will also ensure that confidential information that is unrelated to local subsidiaries will not be shared more widely than appropriate within the multinational group, reducing the risk of it being leaked to competitors.

Using a ‘most appropriate approach’ to decisions around master file preparation will also be helpful, as intellectual property information may be restricted to those business lines or geographies for whom it is relevant.
Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

APAs, other rulings and MAP cases should be reported to tax authorities operating in jurisdictions party to the transactions covered. This information is not relevant to other tax authorities and should be included in the local file rather than the master file, provided that they remain current. MAP claims in particular may relate to much earlier periods and may no longer be relevant due to changes in business operations or transfer pricing approach.
Appendix 2 – Specific Comments on the Model Template of Country-by-Country Reporting (Annex III to Chapter V)

The common template for country-by-country reporting should be separate from transfer pricing documentation and not part of a master file approach.

The purpose of the country-by-country common template is to provide tax authorities with information on the global ‘big picture’ of the multinational group that local information (tax returns, statutory accounts and local transfer pricing documentation) does not. This ‘big picture’ information should be a helpful tool for tax authorities in performing a risk assessment of local entities, for example in relation to transfer pricing matters in accordance with the principles of the OECD’s Draft Transfer Pricing Risk Assessment Handbook, but it will not, of itself, be sufficient to determine there is an underpayment of tax.

The information provided in the template should not be subject to detailed audit by individual tax authorities, nor require reconciliation to local returns. A multinational’s parent company tax authority should instead ensure that the common template is appropriately completed.

The G8 Communique from June 2013 called for ‘…comprehensive and relevant information on the financial position of multinational enterprises’ (emphasis added). Any information which does not contribute to building up the ‘big picture’ or which is better provided through local compliance requirements will place an undue burden on businesses with no corresponding benefit for tax authorities and should be excluded.

Some businesses have expressed concern that some of the information proposed could encourage tax authorities to take a formulary apportionment-type approach to assessing whether there is an understatement of tax. The OECD/G20 Action Plan confirms that the BEPS project is not considering a move to a formulary approach, and the OECD’s guidance on the country-by-country common template should make this clear to prevent unnecessary audits and MAP cases.

Model template information

The information in the model template should primarily be prepared on a country-by-country rather than entity-by-entity basis. The table below indicates which columns we consider should be included or excluded from the template, with reasons for exclusion.

<table>
<thead>
<tr>
<th>Column</th>
<th>Include or exclude</th>
<th>Reason(s) for exclusion and other comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Include</td>
<td>This is the basis of the request for information from the G8 and G20.</td>
</tr>
<tr>
<td>Constituent entities organised in the country</td>
<td>Include</td>
<td>List the entity names where data is provided on an aggregated basis by country.</td>
</tr>
<tr>
<td>Place of effective management</td>
<td>Exclude, subject to specific treatment.</td>
<td>List the entity names where the country of residence differs from the country of constituent entity, and list permanent establishments of constituent entities. We note that not all domestic legislation or bilateral double tax treaties use an effective management test to determine residence.</td>
</tr>
<tr>
<td>Important business activity code(s)</td>
<td>Include</td>
<td>This approach is helpful as in most cases it will provide useful ‘big picture’ information. Many entities which hold intellectual property also undertake significant activities and ‘Intellectual property management’ would be a better description for code B. Code G could be expanded to include ‘Finance and leasing’. We also suggest there should be a separate code for ‘Regulated financial services’ to distinguish from intragroup financing activities.</td>
</tr>
<tr>
<td>Revenues</td>
<td>Include, on an aggregated basis</td>
<td>Revenues by country provide a useful indicator of scale. Information should be aggregated by country rather than consolidated, as country-level consolidations will not be currently prepared and will not be ‘readily available’. Consolidation will not add meaningfully to the ‘big picture’, as tax paid will be based on unconsolidated (entity level) results.</td>
</tr>
<tr>
<td>Earnings before income tax</td>
<td>Include</td>
<td>Earnings may be a profit or a loss before tax. Consolidation will not add meaningfully to the ‘big picture’ as unrealised profits will also have been taxed at the local entity level.</td>
</tr>
<tr>
<td>Income tax paid (on cash basis)</td>
<td>Include, as one column for all tax paid</td>
<td>On balance, UK businesses consider that cash tax paid is the preferred measure, particularly as it is absolute. Businesses do not distinguish between tax paid to one country or another in their accounting systems, and we do not consider that this distinction will add to tax authorities’ understanding of the ‘big picture’ and should be removed.</td>
</tr>
<tr>
<td>Column</td>
<td>Include or exclude</td>
<td>Reason(s) for exclusion and other comments</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>----------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Total withholding tax paid</td>
<td>Exclude, with option for businesses to include</td>
<td>For most businesses this will add significantly to the cost of obtaining the information without making a material or meaningful difference to the outcome as withholding tax may be credited against taxation in the country of residence. For some businesses who incur large amounts of withholding tax due to the nature of their businesses or the countries in which they operate, flexibility could be provided by allowing an option for taxpayers to include withholding tax not credited either within tax paid or separately. If the option is selected, it should be invoked for all countries within the multinational group in order that information is provided on a consistent basis.</td>
</tr>
<tr>
<td>Stated capital and accumulated earnings</td>
<td>Exclude</td>
<td>This information does not add to the ‘big picture’ information for tax authorities on a global basis and will be duplicated where it is already clearly available from local statutory accounts. This is not relevant to year-on-year taxable income, and is not a good indicator of scale given differences in group distribution policies.</td>
</tr>
<tr>
<td>Number of employees</td>
<td>Include</td>
<td>This is an important indicator of economic activity on a global basis, and scale.</td>
</tr>
<tr>
<td>Total employee expense</td>
<td>Potentially include, for cash salaries and bonuses only</td>
<td>Some businesses are concerned about the cost of inclusion of employee expense, but there are cases when this would provide a distinction between large numbers of low-paid employees and value creators. The OECD should therefore consider whether the benefits from including this information are commensurate with the cost of obtaining it. The inclusion of non-cash payments or benefits such as share options would add significantly to the cost of producing the information without any significant benefit to tax authorities in analysing the ‘big picture’. Employees with significant share options are likely to enjoy substantial salaries and/or bonuses as well. For simplicity and to keep businesses’ cost proportionate, any requirement for reporting employee expense should be limited to more readily available information in respect of salaries and bonuses.</td>
</tr>
<tr>
<td>Tangible assets other than cash and cash equivalents</td>
<td>Exclude</td>
<td>Tangible assets only form part of the asset base of most businesses and must be considered alongside intangible assets, cash, and financial assets to form a complete picture. This is particularly the case for specific industries, such as banking and insurance. Including tangible assets other than cash on their own could result in artificial distortions; for example, two similar businesses, which differ only in their GAAP and/or depreciation policies, may own similar factories but report very different book values.</td>
</tr>
<tr>
<td><strong>Column</strong></td>
<td><strong>Include or exclude</strong></td>
<td><strong>Reason(s) for exclusion and other comments</strong></td>
</tr>
<tr>
<td>------------</td>
<td>------------------------</td>
<td>---------------------------------------------</td>
</tr>
<tr>
<td>Royalties, interest, and service fees paid to and received from constituent entities</td>
<td>Exclude</td>
<td>The information does not add to the ‘big picture’ on a global basis for tax authorities and the volume required is likely to obscure other, more useful, data. This information will already be included, and is better suited to, local tax returns and/or the local file of transfer pricing documentation. Each payment is relevant only to the two countries involved, and will not provide relevant information to third countries undertaking risk assessment. The cost of providing on a global basis such detailed information, which will not always be readily available from accounting systems, would be significant. In addition, there would be other issues with providing this information in this format. We note that not all countries adopt the OECD treaty definitions of royalties and interest, and ‘service fees’ is an undefined term.</td>
</tr>
<tr>
<td>Additional information</td>
<td>Limit</td>
<td>The country-by-country information should provide a ‘big picture’ global overview of the multinational’s business on a stand-alone basis. Additional information should not be routinely required from taxpayers in the common template, but should be dealt with through local tax returns or other local information. No supplementary pages should be permitted, to prevent tax authorities from being ‘swamped’ with excess information.</td>
</tr>
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</table>
Appendix 3 – Additional Comments on Transfer Pricing Documentation and the Proposed Master File and Local File

Compliance with the arm’s length principle

Taxpayers need to invest resources in reaching consistent and cogent transfer pricing positions. It is important that documentation requirements are appropriate to the transactions under consideration to ensure attention and resources are focussed on the most important and/or complex matters.

For countries such as the UK that operate a self-assessment system for corporation tax, a highly-specified approach to transfer pricing documentation is not consistent with the approach taken to other areas of tax compliance. That does not mean that the UK tax authorities do not require companies to keep records for transfer pricing purposes, nor to have contemporaneous documentation that can be requested, but the approach taken is commensurate with the size and complexity of the transactions being priced.

It seems that one consequence of the proposals will be that the compliance burden will increase for all taxpayers in order to achieve standardisation, alongside an increased volume of information provided to tax authorities.

Commonality of format and approach

A standardised approach to transfer pricing documentation would be helpful for tax authorities and taxpayers, and it is acknowledged that there is significant current cost for businesses in meeting local requirements that does not add to any better application of the arm’s length principle.

Experience in the European Union in relation to a master file approach has been that the levels of localisation required often results in businesses producing several sets of information (sometimes more than for separate local entity documentation). This increases costs significantly and is one of the reasons for the relatively low take-up of the European master file option. For example, Italian requirements are that the documentation has to conform to a strict order. The Dutch tax authorities request inclusion of a screenshot of every stage of a comparables search. To the extent a master file approach is followed, guidance from the OECD on the contents of the local file and agreement from countries on its preparation would be welcome.

The documentation framework should look to meet twin objectives of providing useful, relevant information to tax authorities and simplification of the administrative burden of documentation for taxpayers. This latter point is not addressed in the Discussion Draft.

Risk assessment

Effective risk assessment is of fundamental importance in allowing tax administrations to focus their resources on the most important transfer pricing issues. Where detailed information is routinely received by tax authorities for all taxpayers, resource constraints may mean that important issues are swamped and missed.

Between them, the information in the master file and the local file provides information that will be sufficient in most cases to satisfy an audit in relation to a specific transaction. The master file information provides more information than seems necessary for risk assessment alone. It would be helpful if the
OECD would finalise the OECD Draft Transfer Pricing Risk Assessment Handbook\(^6\) in order to provide clarity on risk assessment, which should include discussions with businesses in line with a co-operative compliance approach. The country-by-country information will form part of a tax authorities’ risk assessment in respect of transfer pricing (as well as for other areas of tax).

**Transfer pricing audits**

Under the principles of risk assessment an audit should only be required where the facts indicate an adjustment is likely to be needed. Provided a tax authority has sufficient information to conclude on this point, it should not be necessary to invest taxpayer and tax authority resources in routinely compiling and reviewing large volumes of detailed information. An appropriate framework, particularly under cooperative compliance, is to provide information in stages, including big picture information on a global basis, in tax returns and statutory accounts, in transfer pricing documentation and on audit.

Where a thorough risk assessment suggests that a transfer pricing audit is warranted the tax administration must have the ability to obtain relevant information to conclude on whether an adjustment is required. The emphasis should be on the rights to access this information at the time that it is needed i.e. once a risk assessment has been undertaken. In addition, clear presentation of relevant information, alongside timely communication between tax authorities and multinationals, may lead to a reduction in the number and length of transfer pricing audits which is in the interests of both taxpayers and tax authorities.

**Penalties**

Penalty regimes should be focused firstly on cases where transfer pricing adjustments are required and only secondly on the documentation process itself. In some countries, documentation penalties have become a tool for tax authorities to reverse the burden of proof for transfer pricing matters, or have diverted the focus from compliance with and review of the arm’s length principle itself.

**Comparables**

The use of local rather than regional comparables should be determined on a case by case basis. Guidance in this area should be dealt with through Chapter III of the OECD’s Transfer Pricing Guidelines, as a judgement question in determining arm’s length pricing rather than a documentation requirement.

**Master file and local file**

Businesses should select the ‘most appropriate approach’ to preparation of their transfer pricing documentation on a global, business line, regional or local only basis. If a taxpayer does not prepare a master file, the information requested in the master file should be included in the local file to the extent it is of relevance to local operations.

The proposed master file format currently includes an extensive range of information, and such detailed information (particularly on a global basis) will be resource intensive for tax authorities to review and may result in difficulties in identification of issues. Guidance should be provided as to interpretation of terms such as ‘material’ and ‘important’ to prevent misunderstandings.

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<table>
<thead>
<tr>
<th>Master file information</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organisational structure</td>
<td>On a global basis a chart of legal and ownership structure will be extremely large and complex. In our experience, many businesses do not currently have one legal and ownership structure chart for this reason. (Smaller regional charts may be available).</td>
</tr>
<tr>
<td>Description of MNE’s business(es)</td>
<td>Supply chain and service arrangement charts across a whole business are unlikely to be available except perhaps for centralised, structured businesses. Functional analyses are the cornerstone of transfer pricing analysis, and this will include a huge volume of information. Some businesses will have concerns around confidentiality, particularly on a global basis. It's not clear why the title and country of the 25 most highly compensated employees is relevant or would be useful, and this requirement should be removed. The country-by-country template information will include information on employees and salary costs including the highly-paid. Data protection and privacy rules should be considered too as it is likely that the individuals concerned could be identified easily from their job titles.</td>
</tr>
<tr>
<td>MNE’s intangibles</td>
<td>The primary concern for businesses here will be in relation to preserving confidentiality of potentially highly valuable and sensitive commercial information. Preparation of the master file on a line of business or regional basis will help ensure that only relevant intangibles are included.</td>
</tr>
<tr>
<td>MNE’s intercompany financial activities</td>
<td>Transfer pricing policies for financing arrangements may vary considerably within a multinational group due to differences in the borrowing capacity, interest cover and credit worthiness of individual subsidiaries.</td>
</tr>
<tr>
<td>MNE’s financial and tax position</td>
<td>To reduce the volume of paper, the master file should include the option to provide a link to the financial statements on an MNE’s website rather than the statements themselves. Bilateral APAs and advance and other rulings should be provided in the local files). They are not relevant to third countries, and may reflect a negotiated or compromise position to achieve certainty. Similarly, MAP agreements should be provided in the local files of entities involved in the transactions concerned, to the extent that they are still current or relevant. The country-by-country template should be separate from the transfer pricing master file.</td>
</tr>
<tr>
<td><strong>Local file information</strong></td>
<td><strong>Comments</strong></td>
</tr>
<tr>
<td>---------------------------</td>
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</tr>
<tr>
<td>Local entity</td>
<td>For many businesses, local management will report on business or functional lines, perhaps using a ‘matrix’ approach, and therefore compliance with this requirement will not be straightforward.</td>
</tr>
<tr>
<td>Controlled transactions</td>
<td>This section should cross-refer to the requirements of the OECD Transfer Pricing Guidelines for compliance with the arm’s length principle.</td>
</tr>
<tr>
<td>Financial information</td>
<td>Local entity financial accounts should only be required where they have not already been filed alongside tax returns to avoid duplication of effort. The requirement for information and allocation schedules showing how the transfer pricing financial data ties to the financial statements should be removed from the local file requirements. Tax authorities should instead have the right to request this additional information as part of a transfer pricing audit, following an assessment of risk. An automatic requirement to provide this information would result in a significant extra burden on taxpayers and in most cases will not be useful for tax authorities.</td>
</tr>
</tbody>
</table>
MEMORANDUM

To: OECD, Centre for Tax Policy and Administration, Transfer Pricing
From: Anne Quenedey
Date: 21 February 2014
Subject: Comments on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Dear Madam, Dear Sir

We are pleased to respond to the OECD request to send comments on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting dated 30 January 2014 (hereafter referred to as the “Draft”).

First of all, we are thankful to the OECD for initiating an international and public discussion of ways in which transfer pricing compliance can be made more straight-forward and more consistent among countries, while at the same time providing tax authorities with more focused and useful information for transfer pricing risk assessment and audits.

The balance between the usefulness of the data to the tax authorities for risk assessment and the increased compliance burden costs for taxpayers is a complex and sensitive subject. In that context, we welcome the work that has been done by the OECD to take into consideration the concerns from the business community. This effort must be encouraged and strengthened.

Therefore, we would like to make the following comments:

B.1. Transfer pricing risk assessment

Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

From a general perspective, we agree that it is important to provide tax authorities with tools and sources of information in order to accurately evaluate the existence of transfer pricing risks.

However, we believe that BEPS Action 13 should not lead to development of additional standard forms and questionnaires beyond the country-by-country reporting template. Such reporting template should already contain sufficient information.

We also believe that maximum security must be ensured for the business community with respect to risks of tax reassessments. In this regard:
it must be clearly stated that a tax reassessment cannot be grounded on risk assessment documents,

- the risk assessment documents must be discussed with the taxpayer and it is only when discussions cannot lead to an agreed position that a tax audit may be started by the tax authorities.

B.3. Transfer pricing audit

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

We believe that the scope of the relevant documents and information needed to conduct a thorough transfer pricing audit should not include the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting information (in particular rulings given to associated enterprises by a foreign tax authority).

In our opinion, several legal issues may arise from the implementation of such requirements:

- this could lead to denying the principle of the independence of separate legal entities. Indeed, if a MNE group may be, for accounting or economic purposes, recognized as a whole, legal principles must ensure that each company is legally independent and that the scope of the documents must be limited to what a single legal entity is able to produce in terms of documentation only with respect to its own legal situation. That means that:
  
  • when a company has a normal right of access to a document or a contract on the basis of the law, for example when a shareholder has access to the commercial contracts in which its subsidiary is a party, then providing access to that document or contract to tax authorities can be contemplated,

  • when a company has no right to get access to a document, for example a commercial contract signed between two of its sister companies with which the company has no shareholding relationships, then it cannot be asked to provide such document to tax authorities.

- some documents may contain very sensitive and confidential information for a company and may not be addressed to another affiliated company of the group, notwithstanding that the two companies belong to the same group. When a subsidiary of Country A is required by the tax authorities of Country A to produce key information or documentation belonging to the parent company established in Country B, it may create a confidentiality issue.

C.1. Master file

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

MNE should be given the right to alternatively file entity wide information or line by line of business information. MNE should clearly indicate its choice in that respect in order that it is clear for tax
authorities whether what has been decided is entity wide information or line by line business information.

A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well as on any other issues commentators may identify:

- Should the country-by-country report be part of the master file or should it be a completely separate document?

The country-by-country report (hereafter “CbC report”) should be a completely separate document. It contains certain information that are beyond a risk assessment analysis (see our comments below).

- Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

Depending on the size of the MNE, the most appropriate approach would be different (“top-down” or “bottom-up”). Therefore, MNE should be given the right to use one or the other methodology.

- Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

As mentioned before, the CbC report should be adapted to the profile of the MNE. It should be allowed to provide comprehensive CbC reports under its full responsibility.

- Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

We suggest that MNE be allowed to choose between corporate income tax paid on a cash or due basis. Mentioning withholding tax paid by country is acceptable.

- Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

We believe that the reporting of aggregate cross-border payments between associated enterprises should not be required. Such reporting is beyond a risk assessment analysis.

- Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?
We agree that the CbC report should require reporting the nature of the business activities carried out in a jurisdiction.

**D.1 Contemporaneous documentation**

We fully agree that where a taxpayer reasonably demonstrates that either no comparable data exists or that the costs of locating the comparable data would be disproportionately high relative to the amount at issue, such taxpayer should not be required to incur cost in searching for such data.

In that respect, it could be relevant to define or give practical indications on how such demonstration could be made.

**D.2. Time frame**

We also consider that best practice would extend the date for completion of the Annex III template to one year following the last day of the fiscal year of the ultimate parent entity of the MNE group. We believe that it is a reasonable time to enable collection of the various information required in the CbC report.

**D.3. Materiality**

Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

We fully support the approach of OECD according to which transfer pricing documentation requirements should include specific materiality thresholds to take into account the size and the nature of the local economy, the importance of the MNE group in that economy.

In that respect, it could be relevant to define or give practical indications on what would be a reasonable level of materiality. A kind of 80/20 rule might be contemplated.

**D.5. Frequency of documentation updates**

Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

The simplification of documentation process must remain a core objective. Therefore, we welcome the suggestion of OECD not to update documentation annually. We believe indeed that a 3 years period could be reasonable.

**D.6. Language**

Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

Local file to be drafted in the relevant local language should entail significant additional costs of translation for taxpayers when information or documents requested may relate to other affiliated companies located in other jurisdictions. It is likely that such information or documents only exist either in English or in another local language.
In order to reduce these costs, we suggest that MNE be allowed to choose between English or local language.

D.8. Confidentiality

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

We fully support the principle that tax authorities should ensure that there is no public disclosure of trade secrets, scientific secrets, or other confidential information. However, we believe that other proposals in the Draft may interfere with such principle, in particular regarding the obligation of reporting APA or other rulings in the master file (see our comments above in section B.3.).

E. Implementation

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above.

We believe that the appropriate mechanism should be the direct filing of the master file only in the parent company's jurisdiction and the local file in the local jurisdictions.

Annex I to Chapter V: Transfer pricing documentation – Master file

Some of the following information that are required to be provided according to the Draft should be modified:

- the general description of the MNE’s business should include only a chart showing value added by line of business, not the supply chain for material products and services,
- the functional analysis describing the principal contributions to value creation by individual entities within the group should not be part of the Master file but rather should be included in the local file,
- regarding the title and country of the principal office of each of the 25 most highly compensated employees in the business line, we recommend to provide information only with respect to the top 10 global highly compensated employees,
- the list of important related party agreements related to intangibles should not be part of the Master file but rather should be included in the local files.

Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

The scope of the documents should not include APAs or ruling given to associated enterprises by a tax authority other than the authority requesting the information.

As indicated, several legal issues may arise from the implementation of such requirement (see above our previous comments in section B.3.).
Annex II to Chapter V: Transfer pricing documentation – Local file

Regarding financial information that are required to be provided according to the Draft, it should be clear that financial accounts for a fiscal year should not entail the provision of analytical accounting.

Issues may arise due to the allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements. We do not believe that such reconciliation would be possible in practice.

***

We are at the disposal of the Working Party n°6 in order to contribute further.

Very truly yours,

Anne Quenedey,
Partner
Request for Comments on Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting

To Whom it May Concern,

First of all, we would like to thank you for the opportunity to comment on the Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (hereinafter referred to as “Discussion Draft”), published on 30 January 2014.

DFK International is a worldwide association of independent accounting firms and business advisers. Our members have been meeting the needs of clients with interests in more than one country for over 50 years. Our clients – predominantly small and medium sized entities (“SMEs”) – regularly deal with transfer pricing documentation requirements in different countries. Needless to add, SME taxpayers are by far the largest taxpayer segment in most countries. Thus, we seize this opportunity especially to provide SMEs a voice in this important discussion.

Due to the tight schedule we do not comment on all requests but focus on some aspects of the Discussion Draft of which we are of the opinion that these aspects could be important for international firms, especially SMEs.

B. 1 Transfer pricing risk assessment

1.1 The Discussion Draft requests comments on whether additional forms or questionnaires beyond the template should be included. We have included comments on the current forms as proposed. The notion that the draft Annex III to Chapter V: A Model Template of Country-by-Country Reporting Template (“CBC Report”) will provide tax authorities with the information on [taxpayers] global allocation of the income, economic activity and tax paid necessary to conduct an informed risk assessment assumes it is possible to reliably assess transfer pricing through data points provided in predefined forms. A reliable assessment of transfer pricing risk, however, requires a narrative explaining the unique facts and circumstances surrounding a taxpayer’s controlled transaction(s), including the relevant economic and legal factors that might impact pricing. Forms tend to oversimplify and can signal transfer pricing risk to authorities where none may exist thereby leading to potential misallocation of governmental resources and taxpayer resources alike. Therefore, we would suggest that the current format as proposed does not necessarily provide an effective channel for gathering the information needed to develop a reliable assessment of the transfer pricing risk. In fact, the existing practice in most jurisdictions whereby taxpayers respond to specific tax authority requests seems no less efficient in developing a reliable transfer pricing risk assessment than the proposed CBC Template.
1.2 With regards to the tax authorities sharing their risk assessment with taxpayers, it is our strong belief that taxpayers are the preeminent experts of their businesses, and have a much stronger hold on the facts concerning the strategy, history, and structure of the business than tax authorities. As such, the tax authorities should not only share their risk assessment with taxpayers to confirm factual accuracy of their conclusions, but should consult taxpayers throughout the risk assessment process. This will ensure that limited resources are being properly utilized (both those of the taxpayers and the tax authorities). Further, taxpayers should not be obligated to produce information which is not pertinent to the intercompany transactions at issue (i.e., a global view of a multinational enterprise is often not necessary for selecting or applying the most appropriate method to determine a particular transfer price). Therefore, it should be left to the taxpayer to produce information which shows the full picture related to the transactions, but not to the company as a whole.

1.3 A second reason to promote an environment in which tax authorities share risk assessments is to encourage a more open relationship between tax administrations and taxpayers - one which could improve the reliability of self-assessment and enhance voluntary compliance by taxpayers over a period of time. Further, a standardized sharing process will facilitate a common understanding between tax administrators and taxpayers and ultimately lead to taxpayer behaviour that directly supports tax administrators’ desired outcomes. This will also result in respectful treatment of taxpayers built on mutual trust thereby raising tax morality rather than an authoritarian treatment undermining tax morality.

B. 3 Transfer pricing audit

2.1 The Discussion Draft suggests the implementation of rules relating to the production of information outside of the requesting jurisdiction. In our experience, however, institutional policies of taxpayers often require that certain proprietary information be confined to one location. These informational barriers are necessary to manage business risks (i.e., to protect sensitive information about the business, its products/services and its strategy from competitors, the press, and/or the public) that could negatively impact sustained economic growth. For example, freedom of information laws may protect corporations from having to disclose certain information to the public in one jurisdiction but not others. The historical instability in governmental regimes could also create situations where a jurisdiction that adhered to confidentiality standards in the past is now of the opinion that archived corporate data should be made publicly available. Therefore, it would not be in the interest of sustained economic development to require the sharing of sensitive data. It would also be important to align any such requirements to share information with existing extradition laws and treaties.

2.2 We foresee significant problems regarding the procedural basis for providing the CBC Reports including confidential group-level financial data to all jurisdictions in which a MNE is carrying out business via a Constituent Entity. In cases where the head office of a MNE is not willing to provide the requested CBC Report to a tax administration in a jurisdiction of a separate legal subsidiary, it will be necessary to implement very sophisticated rules to force the non-resident head office, which is not subject to tax in the relevant jurisdiction, to provide the requested information. For example, a minority shareholder of a joint venture organization may not have necessary powers to make its partner share information, and therefore would not be in a position to provide or share required information. It does not seem appropriate to implement rules to punish the resident subsidiary for refusal of the foreign head office, especially if the provided transfer pricing documentation does not supply evidence that transfer prices are not in line with arm’s length principles.

2.3 In the absence of uniform accounting standards being adopted across tax jurisdictions, any shared information may not be directly usable/comparable due to difference in accounting standards.

2.4 Moreover, a requirement to provide the CBC Report in each country would breach existing tax secrecy laws in many jurisdictions thereby requiring necessary changes in existing laws to implement the planned reporting system.
C. A two-tiered approach to transfer pricing documentation

Country-by-Country Reporting and Arm’s length Principle

3.1 The Discussion Draft points out that country-by-country data may be helpful for tax administration in risk assessment, but should not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices. Moreover, the Discussion Draft states very clearly that the information in the CBC Report would not constitute conclusive evidence that transfer prices are or are not appropriate (cf. paragraph 21 of Discussion Draft). We absolutely agree with this statement, but we have serious doubt that the addressees of the information provided in the CBC Report (the respective tax administration) will and can act in line with these statements of the OECD in practice.

3.2 In fact, such wide-spread reporting could be the beginning of the erosion of the arm’s length principle. We believe that there is a significant risk that tax administrations in countries where entities within a multinational group (“Constituent Entities”) report profits below average group profit will assume transfer pricing is responsible for the underperformance of the Constituent Entity in their jurisdiction. Thus, the transfer pricing analysis carried out by the authorities in such countries may be strongly influenced by the CBC Report, which means transfer prices will be adjusted to the extent that the profit of the reviewed Constituent Entity is disproportionate to the average group profit.

3.3 A Country-by-Country based transfer pricing analysis may very well result in a top down approach for assessing transfer pricing risk – starting at the reputed arm’s length profit – which allocates the required profit down to the single transactions. This approach is a stark contrast to the existing “bottom-up” practice of determining the taxable profit of a company by taking the sum of all internal and external transactions of the group under the assumption that all intra-group transactions are consistent with arm’s length principles. In this context it becomes clear that wide-spread requirements to provide a CBC Report could be the first step forward to a global formulary apportionment, which was rejected by the OECD for good reasons (cf. paragraph 1.32 of OECD Transfer Pricing Guidelines 2010).

Country-by-Country Reporting should not be a Part of the Master File

3.4 Within the OECD report “Action plan on Base Erosion and Profit Shifting” it was pointed out that “the rules to be developed will include a requirement that MNE’s provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template” (Action 13, p. 23). Thus, the BEPS Action Plan makes clear that not all jurisdictions where a MNE is carrying out business via a Constituent Entity should be provided with a CBC Report, but only the relevant jurisdictions. In this respect, the question arises at to what jurisdiction is to be qualified as relevant. Clearly, not all jurisdictions are qualified and therefore the prescribed provision of the CBC Report is antithetical to the core premise that taxpayers only provide relevant governments with needed information. The CBC Report, therefore, should be viewed as a separate document from the Master File - one which should be presented only to tax administrations of jurisdictions that need the “big picture” to reliably asses transfer pricing risk.

3.5 We are of the opinion that a jurisdiction cannot be qualified as relevant jurisdiction if a Constituent Entity resident in this jurisdiction carries out only routine functions, does not employ valuable assets and assumes only very limited risks (e.g., does not assume entrepreneurial risk, intangible development risk, etc.). In this case the Constituent Entity is to be qualified as a routine entity, and should report an arm’s length level of routine profit for its activities performed. Its seems straightforward and efficient for a tax authority to assess any transfer pricing risk associated with a Constituent Entity with this type of profile by reference to a functional and risk analysis as well as a comparability analysis including, for example, data for comparable routine service providers. It seems not appropriate, and certainly not necessary, to require a taxpayer to provide financial data for the whole group to the tax administration in such a jurisdiction.
3.6 C.1.18 and 19. of the Discussion Draft states that the section of the Master File that summarizes financial and tax positions includes country-by-country reporting on profits, taxes paid, and indicators of economic activity among each country. This information is country-specific and, depending on the number of countries and entities involved, would place a substantial burden on the taxpayer at the Master File level of documentation. The Master File should not deviate from its main purpose for this section, which is to “contain common standardized information relevant for all MNE group members.”

Usefulness of the Reported Information and Additional Burden for the Taxpayer

3.7 According to the Discussion Draft, the two objectives for requiring transfer pricing documentation are to provide tax administrations with the information (1) necessary to conduct an informed transfer pricing risk assessment, and (2) that is required in order to conduct an appropriate thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction (cf. paragraph 5 of the Discussion Draft). We are of the opinion that the published Model Template of Country-by-Country Reporting and the provided General and Specific Instructions may not be suitable to achieve the outlined objectives. Reasons for this are as follows:

Option on Accounting Standards (cf. Special Instructions “Revenues” and “Earnings before income tax”)

3.8 Taxpayers have the option to report the amount of revenues and other financial information for Constituent Entities on a local GAAP or on an IFRS basis. In addition, the taxpayer can exercise this option for each single Constituent Entity thereby allowing for an MNE to use different accounting standards to determine the required financial data for all Constituent Entities. It is unclear if the option can be exercised per Constituent Entity or per jurisdiction.

3.9 In principle, we welcome this rule because the option should minimize the compliance costs for the taxpayers. The obligation to reconcile the financial data of each Constituent Entity to IFRS or other accounting standards could trigger unreasonable efforts for the taxpayers, especially for SMEs. But, of course, the question arises if such kind of financial data is useful information for tax administrations as addressee of the CBC Report. We are of the opinion that the objectives to provide relevant information to the tax administrations could not be achieved with financial data determined by different accounting standards because the tax administrations will not be able to assess these financial data in a meaningful way.

3.10 It would be helpful to add a column on the CBC Report to identify the accounting standard(s) used to calculate the required financial data for the Constituent Entities.

Reporting of Cash Income Tax Payments (cf. Special Instructions “Income Tax Paid (on Cash Basis)"

3.11 According to the Special Instructions taxpayers have to report cash tax payments during the relevant year but no information on tax accruals must be reported. The level of tax paid in cash in any given year has only minor relevance for the addressees of the CBC Report as the cash income tax payments during the year are the sum of back taxes or tax refunds regarding the previous fiscal year and the prepayments for the relevant fiscal year (often based on a profit projection). In special years the cash tax payments are also including results from tax audits. In addition, the cash tax payments could be influenced by using loss carry forwards or carry backs. In essence, there is no direct link between the reported revenues and earnings before income tax for the relevant year and the reported cash income tax payments for the relevant year. Of course, for taxpayers the cash income tax payments for the relevant year are easy to calculate (which we absolutely welcome), but we cannot see a substantial gain for tax administrations in basing transfer pricing risk assessments on the financial information requested in the CBC Report. It could be useful to report the expected income tax liability for the relevant year (based on the tax accruals) related to the reported earnings before income tax, but this would trigger additional compliance costs for the concerned entities, especially SMEs. In this respect, we do not supporting such an option.
3.12 It might be helpful to include a column on the template to affirm if a group taxation system was used in a country whereby a MNE allocates the taxes to the Constituent Entities in proportion to their shares of EBIT of the tax group.

**Reporting Period (cf. General Instructions “Period Covered by the Annual Template”)**

3.13 According to the General Instructions, the template should cover the fiscal year of the taxpayer. For each Constituent Entity, the template should reflect information for the fiscal year of such Constituent Entity that ends on the same date as the fiscal year of the taxpayer, or that ends within the 12 months period ending on such date. Alternatively, at the option of the Reporting MNE, information for all Constituent Entities may instead be reported for the fiscal year of the Reporting MNE. This means a taxpayer has the option to reconcile the financial data of Constituent Entities with differing fiscal years with the taxpayer’s own reporting period. In doing so, the taxpayer has the possibility to choose the reporting period that best advocates its transfer pricing position as being reasonable and consistent with arm’s length principles.

3.14 In combination with the option to choose the accounting standard (see above), therefore, the taxpayer has ample opportunity to influence the data presented in the CBC Report. But, of course, only large entities will have the resources to use these instruments because verifying and exercising the best option is costly. As a result, the options which were included in the Discussion Draft to relieve taxpayers (especially SMEs) from high bureaucratic burdens give large entities the possibility to influence the relevance of the reporting data.

3.15 It should be noted that there is no column on the template to report the reporting period of the taxpayer or its related parties. In addition, it becomes unclear if a taxpayer can exercise the options in each reporting year and if a change in the reporting period and/or the used accounting standard must be reported to the tax administration.

**D. Compliance Issues**

**Materiality**

4.1 Materiality in the Discussion Draft focuses on the size of local economy and the local entity in question in addition to the size and importance of the MNE group in that region. However, no weight is given to the relative size or importance of the intercompany transaction in question, or to materiality thresholds concerning the transactions themselves (i.e. amount of transaction, percentage of overall intercompany transactions, percentage of transactions compared to sales, etc.).

4.2 In the current regulatory landscape SMEs already face significant compliance burdens when entering new markets to promote economic growth. Therefore, for relatively straight-forward transactions such as buy/sell distribution, contract manufacturing, etc., we recommend consideration of possible exemption for SMEs from the proposed guidelines regarding CBC Reports.

4.3 Further, regarding the definition of materiality, a defined materiality standard will balance the efforts of cost and time needed to comply to the requirements and the potential cost of non-compliance. We would prefer an accounting definition of materiality to that of a legal definition as an accounting definition is more prescriptive and can be measured in relation to the business as a whole and is less subject to interpretation in the courts.
Simplification Measures for SMEs

5.1 The suggestion to perform new comparable searches every three years, with simple financial updates in the interim years, is practical given the lack of resources available to companies to update benchmarks annually. In fact, this practice is already widespread in industry. With regard to the interim year updates, taxpayers should confirm the continued functional comparability of companies identified in a prior study before updating the financial results. This is important as businesses may change their function/risk profile – at least in part – from year to year. Significant changes may require a full update of the comparable search. The decision of whether to update a search more often than every three years should be at the discretion of the taxpayer. Furthermore, where there are safe harbour rules prescribed by tax administrators, the SMEs satisfying the safe harbour threshold should be given flexibility to update comparable searches at their discretion even beyond three years (e.g., every five or six years). Last, it would be appropriate to consider allowing additional flexibility for SMEs with respect to the identification of local country comparables (e.g., promoting the use of regional comparables when local country comparables are not readily available).

5.2 With regards to intangibles, the question of when to update a comparable search for uncontrolled transactions is a bit different. Searches for comparable uncontrolled transactions to evaluate the arm’s length pricing for intangibles should be performed at the time when contracts are negotiated and again if a contract is re-negotiated for any material change. This is because third parties do not regularly include provisions allowing one party to terminate, or renegotiate, the pricing terms specified in an agreement unless the contract is terminated.

Implementation/Tax Administration Filing

6.1 This section of the Discussion Draft seems to leave no doubt that the Master File will be a document required to be filed with one or several taxing authorities on an annual basis. This is a significant shift in current global taxpayer practices and governmental requirements. At present, tax authorities requiring annual filings with the level of detail required in the Master File are in the minority.

6.2 A related question of importance is how the tax authorities will align their use of the information that will be presented in the Master File and CBC Report so that taxpayers can apply transfer pricing policies consistently throughout their global footprint with the expectation that tax authorities will have a common view.

6.3 Presuming without promoting, that a Master File is to be filed, the burden the process places on taxpayers may be mitigated by enabling taxpayers to prepare the Master File over a three-year period. Further, since the proper preparation of a Master File will require substantial resources, SME enterprises should have the option to elect to prepare a Master File if and only if it is clear based on the discretion of the SME that the Master File is necessary for understanding the functions performed, risks assumed and assets employed of the parties involved in a controlled transaction.

Conclusion

7.1 We believe the implementation of the proposed Country-by-Country Reporting guidelines will lead to significant additional administrative burdens and compliance costs especially for SMEs. SMEs tend to have limited resources to handle complex tax matters relative to large corporations and the proposed requirements will further strain SME tax personnel. The potential lost tax revenue attributable to inappropriate transfer pricing (i.e., potential transfer pricing risk) for SMEs is dwarfed by that of the larger corporations. As a result, the marginal costs of compliance are relatively large for this category of companies while the marginal benefits to tax authorities are relatively small. Perhaps the requirement to prepare the CBC Report should be limited to large corporations only (par. 30 on page 6 suggests that all taxpayers should prepare the CBC Report). This would help align local transfer pricing considerations for SMEs currently in place with the proposed requirements set forth in the OECD Discussion Draft, allow
SMEs to focus resources on employment and growth, and enable tax authorities to allocate limited resources where they can provide the largest benefit.

7.2 We believe the significant historical efforts to identify a reasonable method for providing the tax administrations with relevant information must be continued rather than the suggestion of CBC reporting in current form. A possible solution without additional costs for the taxpayers could be the obligation to provide the statutory financial statement of the Constituent Entity for the relevant year if requested by the tax administration. Of course, the procedural framework for the request must be given in the respective jurisdiction. If no statutory financial statement exists, it could be assumed that the Constituent Entity under review is not substantial for the transfer pricing documentation of the group.

7.3 The OECD acknowledges the compliance burden to taxpayers that currently exists. However, full recognition is not given to the number of authorities producing documentation requirements or standards: local country documentation; local country tax return reporting forms; the UN documentation template; and the EU transfer pricing documentation model. Acceptance of a new standard around reporting in practice will take years to implement. Any additional compliance burden brought about by country-by-country reporting in the interim could be crippling to an SME.

We would welcome the opportunity to participate in the public consultation meeting planned on May 19 2014 to provide further explanation on the above mentioned aspects. In the meantime, please do not hesitate to contact one of the undersigned for any questions or any kind of clarification of our comments. We authorize the OECD to publish our comments on the OECD internet site.

Yours sincerely,
For and on behalf of Transfer Pricing Committee of DFK International

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Comment DSM on Discussion Draft Transfer Pricing Documentation/CbC Reporting

1. How to best achieve OECD’s strategic objectives

The OECD’s strategic objectives of achieving more efficient and more focused transfer pricing documentation are welcomed. However, we notice that OECD - driven by G8/G20 etc. - intends to materially increase the compliance burden for taxpayers via proposals to report to tax authorities/tax administrations (TA) - on a country-by-country basis - extensive details of income, cash taxes and business activities. We think that the plans as described in the discussion draft will result in an overload of requested transfer pricing documentation which will not be effective for TA, while the compliance costs for taxpayers will be huge.

In order to achieve the three objectives as mentioned (page 2 discussion draft) but also “…taking into account the compliance costs for business” (BEPS Action Plan 7.19.2013), it is recommended to not further extend the transfer pricing documentation efforts of taxpayers but to apply the approach as explained in the primary, secondary or tertitair approach below.

• Primary: World-wide implementation of co-operative compliance/horizontal monitoring/enhanced relationship in stead

It is recommended to implement worldwide co-operative compliance/horizontal monitoring/enhanced relationship/etc. in order to discuss transfer pricing matters and requests for transfer pricing information in real time. As there are quite some best practices of countries already applying co-operative compliance etc., while others are in the process of piloting this concept, focus on worldwide implementation of co-operative compliance etc. instead of materially increasing the compliance burden of taxpayers would provide a much more sustainable solution for both TA and taxpayers.

• Secondary: Implement the concept of master file and local files but not the country-by-country reporting template

In order to provide a big picture to countries, the information as mentioned in the Annual Report of the taxpayer should provide sufficient financial information and direction in this respect. As a consequence the material increase of compliance burden via implementation of the country-by-country reporting template can be prevented.

• Tertitair: Implement the two-tiered approach: master file, including country-by-country reporting template but based on IFRS information already readily available for the taxpayer, and local files

Master file including country-by-country reporting template (based on IFRS) and local files, but e.g. current extensive transfer pricing documentation reports would not be needed anymore.
2. General

- Uniformity

In accepting the two-tiered approach to transfer pricing documentation, master file including country-by-country reporting template and local files, world-wide uniformity should be strived for by G8/G20/OECD/etc. This in order to eliminate the many local deviations as are currently the case, e.g. timing of updating benchmarks, penalty regimes, etc., etc.

At the same token the retention period of transfer pricing documentation but also the timing of providing transfer pricing documentation should be unified worldwide and for the latter it should be decisive when master file including country-by-country report and local files can reasonably be finalized.

As the current lack of worldwide uniformity has increased the compliance burden and subsequent costs for taxpayers, such a world-wide uniform approach would also help to reduce compliance costs for taxpayers.

- Positioning taxpayer in document

It seems like taxpayers are positioned as the “bad guy” currently not giving appropriate consideration to transfer pricing requirements. We think however that transfer pricing, including documentation, is much more about allocating taxable results between countries, whereby taxpayers are mainly interested in preventing double taxation and reasonable compliance costs. It would be appreciated if efforts would be done to correct this imbalance in the current paper.

- Timing

As the current transfer pricing documentation proposals would have a huge impact on organization of the transfer pricing compliance by taxpayers, it is advised to provide ample time to taxpayers to develop this new format.

- Regional comparables (42)

Regional comparables should be reliable if local comparables are not available or the economic/market circumstances in the region are comparable, whereby an effort should be made to cover most relevant countries if reliable database information is available.

- Wording “business”

It is recommended not to mention “line of business”/“business unit”, like currently at many locations in the paper, as wording will vary per company: Business Group, Business Unit, Product Division, Product Group, Product Line, Line of Business, etc. Only mentioning “line of business”/“business unit” may be confusing for TA. It is therefore recommended to uniformly apply the wording “business”.
3. Ten Questions

• Question 1
  **B1 Transfer risk assessment (page 2 and 3)**

It is recommended to limit transfer pricing documentation requirements to the two-tiered approach with a master file including C-b-C reporting template and local files, so no additional standard forms and questionnaires beyond this should be developed. G8/G20 should be requested to support this approach and to agree on worldwide uniform transfer pricing documentation requirements in order gain efficiency for TA and business.

If the foregoing is not yet feasible, it is preferred that OECD develops one set of standard forms and questionnaires (best practice based on already available forms/Q’s) to be applied worldwide, beyond the C-b-C reporting template. Currently various questionnaires are used by various countries and one standardized approach would help in limiting the administrative burden for taxpayers.

In order to gain transparency on both sides (tax payer - providing transfer pricing documentation - and TA), it is recommended that TA share their risk assessment with taxpayers in all cases.

• Question 2
  **B3 Transfer pricing audit**

Based on the two-tiered approach, local TA will have sufficient information to conduct an informed transfer pricing risk assessment or audit. In case of additional information need, TA should balance this against the costs and administrative burden for taxpayers.

Information and documents in the possession of associated enterprises outside the jurisdiction requesting the information, should be shared via the TA of the involved countries (information sharing such as exchange of information mechanisms).

• Question 3
  **C1 Master file 18**

Taxpayers should be able to prepare the master file by business and not for the MNE group as a whole, as not all transfer pricing documentation is relevant for all countries. E.g. if a business is only operating in Asia it is not efficient to share related transfer pricing documentation outside Asia, which would be the case if a master file should be developed for the MNE group as a whole.

More importantly, confidential business information should only be shared on a need to know basis, which is not the case in the current set-up. Besides TA would get a lot of irrelevant transfer pricing information, which would make it more difficult to digest the master file and will not give efficient insights in line with objectives of the transfer pricing documentation.

It is therefore recommended to prepare the master file on a business wide and not on a group wide basis.

• Question 4 (20)
Question 4.1:
It is recommended that the country-by-country report is part of the master file in order to provide the complete picture at the same moment, i.e. when all information as requested for in the country-by-country report is available.

Question 4.2:
It is recommended that the country-by-country template is not compiled through “bottom-up” reporting from local statutory accounts (in the current draft) as these are not always available and if available this will require additional compliance efforts of taxpayers. Next to that accounting standards may differ from country to country, which will lead to differences that need to be explained additionally (in order to compare apples with apples). This will not be in line with the objectives of the transfer pricing documentation and may create additional compliance burden (time and costs) for taxpayers. It is therefore recommended to apply a “top-down” allocation of the MNE group’s consolidated income among countries allocated per business as this information is already readily available based on IFRS reporting.

Question 4.3:
The country-by-country template should not be prepared on an entity by entity basis as in the current draft, but it should require separate individual country consolidations reporting one aggregate revenue and income number per country (“top-down” approach), as this information is already readily available based on IFRS reporting. As “top-down” reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises, a separate/split Profit & Loss - which is currently already required - should typically be incorporated in the local files and not in the master file.

Question 4.4:
The country-by-country template should require one aggregate number for corporate income tax paid on an accrual basis per country as this information is already readily available based on IFRS reporting. Additional benefit of this approach would be that withholding taxes due are automatically covered in IFRS reporting and a separate reporting of withholding taxes would not be required, which would ease the documentation process. Cash basis tax reporting like currently proposed in country-by-country template will create confusion and not the desired transparency as local specific regulations deviate (e.g. depreciation terms, timing of actual cash payments, etc.), while random moment of paying taxes will influence the cash tax picture as provided in the template. This may lead to differences that need to be explained additionally (in order to compare apples with apples), which will not meet the objectives of the transfer pricing documentation and will create additional compliance burden for taxpayers.

Question 4.5:
It is recommended to report the cross-border payments between associated enterprises in the local files and not in the country-by-country template/master file, as this information is mainly relevant from a local perspective. If the cross border payments - like intra-group payments of royalties, interest and service fees - would be reported per service level agreement etc., no substantial additional burdens on taxpayers would occur.

Question 4.6:
It is recommended that the country-by-country template reports on the nature of the business activities carried out in a jurisdiction. However, it should be considered to apply a more flexible approach as the currently defined codes may be too strict, e.g. code A R&D: expected remuneration may be different if it is mainly R or mainly D or mainly Innovations, etc.; e.g. code B Holding intellectual property: expected remuneration will be different in case legal or economic ownership. It is therefore advised to request the multinational to describe the important business activities in a country whereby the codes are only mentioned as an example.

• Question 5
**D 3 Materiality 29**

Materiality standards: No further transfer pricing documentation should be required, if CUP’s can be documented. Moreover, if the local sales of a specific business of the taxpayer is 5% or less compared with total sales of that business, no master file including country-by-country reporting format and local file should be provided.

- **Question 6**
  
  **D 5 Frequency of documentation updates 34**

  In practice updating of benchmarks every 3 years works well for most businesses. By requiring that succeeding years have to be applied for benchmarks, it may be considered to extend the period to 5 years on the condition that the operating conditions remain the same. This would reduce the compliance costs of multinationals substantially, while no negative impact would occur for countries involved. Assuming the conditions as mentioned, no issues would be raised regarding consistent application of the most appropriate transfer pricing method.

- **Question 7**
  
  **D 6 Language 37**

  Master file and local file should only be prepared in English, as we often see in practice that English is fine, also for local information requests. Where TA believe that translation of relevant parts of the master file or the local file is necessary, they should make specific requests for translation and provide sufficient time to make such translation as comfortable a burden as possible. This approach would reduce the compliance costs of taxpayers.

- **Question 8**
  
  **D 8 Confidentiality 41**

  Taxpayers should be able to prepare the master file by business and not for the MNE group as a whole, as not all transfer pricing documentation - which often contains confidential business information - is relevant for all countries. E.g. if a business is only operating in Asia it is not efficient to share related transfer pricing documentation/confidential business information outside Asia, which would be the case if a master file should be developed for the MNE group as a whole. Confidential business information should only be shared on a need to know basis, which is not the case in the current set-up. Even a master file prepared by business will contain confidential business information (trade secrets, scientific secrets, or other confidential data), which should be handled properly.

  Unilateral APA’s, bilateral APA’s, multilateral APA’s, other rulings and MAP cases should not be part of the master file but only be part of the local file(s), as often confidential business information is involved which should only be shared on a need to know basis.

  It is recommended that TA need pre-approval of taxpayer before using confidential or sensitive company information for other purposes than transfer pricing risk assessment or audit.

- **Question 9**
  
  **E Implementation 45**

  It is recommended to make the master file including country-by-country report available to relevant TA by filing of information in the Group parent company’s jurisdiction and sharing it under treaty information exchange provision. Only applying the treaty will secure a careful process in which confidentiality of business information can be managed properly.

- **Question 10**
Annex master file

Unilateral APA’s, bilateral APA’s, multilateral APA’s, other rulings and MAP cases should not be part of the master file but only be part of the local file(s), as often confidential business information is involved which should only be shared on a need to know basis.

4. Annex I to Chapter V: Transfer pricing documentation - Master file

- The title and country of the principal office of each of the 25 most highly compensated employees in the business line (note: names of such individuals should not be included)

This information is already covered in the master file (functional analysis/key functions performed) and local files (functional analysis/functions performed).

The level of compensation is often related to the position in the market, while for transfer pricing documentation the added value of the person in the business model is most important, which may be different.

Besides personal information of people (though names are not mentioned) would be spread around the world, while the top 25 may change regularly also depending on the definition of “compensation” (e.g. stock-options included or not and which tax regime applicable as these may be very different).

It is therefore recommended to delete this information request from the master file.

- Reference is also made to answers on Q3 and Q8 regarding master file.

5. Annex III to Chapter V: a model template of country-by-country reporting

- It is recommended that the country-by-country template is not compiled through “bottom-up” reporting from local statutory accounts (in the current draft) as these are not always available and if available this will require additional compliance efforts of taxpayers.

Next to that accounting standards differ from country to country, which will lead to differences that need to be explained additionally (in order to compare apples with apples). This will not be in line with the objectives of the transfer pricing documentation and may create additional compliance burden (time and costs) for taxpayers.

It is therefore recommended to apply a “top-down” allocation of the MNE group’s consolidated income among countries allocated per business as this information is already readily available based on IFRS reporting.

To prevent additional complex compliance challenges, no further information should be requested for in this C-b-C report.

6. General instructions for annex III to chapter V

- Period Covered by the Annual Template

It is not clear what to do (or how to allocate) in case of different fiscal year of reporting MNE versus constituent entity and vice versa.

DSM Corporate Fiscal Affairs
February 15, 2014
Dear Madame / Sir:

This letter is in response to the OECD’s request for comments on its most recent Discussion Draft on Transfer Pricing Documentation and Country-by-Country (“CbC”) Reporting issued January 30, 2014, hereinafter referred to as the “Discussion Draft.”

Firstly, we appreciate the enormity of the effort and the strides the OECD is taking in addressing the BEPS Action Plan. As transfer pricing practitioners, we believe that efforts to simplify transfer pricing documentation for taxpayers, while providing meaningful information for tax administrations, is essential to protecting the integrity and value of the arm’s length principles that play a fundamental role in the functioning of the global tax system. We also believe that some of the proposals found in the Discussion Draft (e.g., materiality thresholds, translation requirements, roll-forward of comparable company sets), which we will comment upon directly within this letter, have the ability to simplify transfer pricing documentation.

However, for the most part, we must express our concerns that many of the proposals highlighted within the Discussion Draft will not achieve the objective of simplifying transfer pricing documentation. The tenor of the Discussion Draft suggests that taxpayers are routinely abusing the transfer pricing rules. Yet, in our experience, we find the reverse to be true. Many companies are expending large amounts of resources to prove to tax authorities that they are in compliance. Furthermore, the Discussion Draft places a great deal of faith on tax authorities to exercise reasonable restraint in their risk assessment. However, just as there are opportunities for overly-aggressive taxpayers to exploit the system, so too can there

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1 The thoughts expressed in this paper are those of the authors and do not necessarily reflect the views of Duff & Phelps as a whole or its clients. We also would like to thank Emily Sanborn and Patrick McColgan for their assistance in preparing this response.
be the opportunity for tax authorities to take stances inconsistent with any reasonable arm's length standard, leading to increased controversy and litigation, which is in direct opposition of the stated goal of this initiative.

The initiative to simplify transfer pricing documentation is an important one, and our response focuses solely around those topics raised by the Discussion Draft that would achieve this objective (i.e., to simplify transfer pricing documentation burdens for the taxpayer, while providing the tax authorities with a clear understanding of a company’s transfer pricing system, and whether that system treats each entity under the purview of the tax authority’s jurisdiction in an arm’s length manner).

EXECUTIVE SUMMARY

Our key observations / comments concerning the Discussion Draft are as follows:

1. The current proposals on transfer pricing documentation and country-by-country reporting place an additional and undue burden on the taxpayer, increasing the cost of transfer pricing compliance.

2. The foremost objective in proposing a change to the current documentation guidelines should be simplification and efficacy. Transfer pricing documentation cannot, and should not, be used to provide every piece of information a tax authority could conceivably need. Instead, documentation should provide tax authorities with a high-level overview of how the business functions, the intercompany transactions that make up that business model, and the support for structuring transfer pricing in a particular manner. The current country-by-country template and Master File requirements should be streamlined to avail tax authorities of only essential information to perform a risk assessment. However, the scale of the current information that may be required effectively requires every taxpayer to prepare for a full-scale audit for all of its transfer prices even though it may be wholly compliant with the arm’s length standard and it posed no risk to the tax base of the countries in which it has operations.\(^2\)

3. Having local governments give guidance on materiality thresholds would assist with the goal of simplifying transfer pricing documentation.

4. We support the proposal that comparables be updated only once every three years (Paragraph 34). We believe that this is a reasonable solution that will help to streamline transfer pricing documentation without compromising the integrity of the analysis.

\(^2\) For example, one suggested requirement for the Master File is “The title and country of the principal office of each of the 25 most highly compensated employees in the business line.” It is hard to see the relevance of this for many companies that may only have operations in a few countries with similar tax rates and which have not engaged in any unique transfer pricing structures. Furthermore, this also raises potential privacy concerns for these employees.
5. If a risk assessment is prepared by tax authorities then it should be shared with taxpayers. This would allow discussion and clarification around the relevance of the risks identified by the tax authority, promoting compliance and reducing the potential for costly dispute and litigation.

In addition to our general thoughts presented above, we would like to address specific questions posed by the Discussion Draft that pertain to the simplification of transfer pricing documentation:

**Should preparation of the Master File be undertaken on a line of business or entity-wide basis?** We believe that this will need to be determined on a case-by-case basis. The important question regarding the preparation of a Master File should always be: Does this document meet our objectives (i.e., provides a concise and clear explanation of the business and support for each significant intercompany transaction identified). Furthermore, we believe the following information is critical in achieving that objective:

1. A document that provides a general transfer pricing policy for the various intercompany transactions that a company engages in (e.g., our company’s policy is to establish an operating margin of X percent for distribution activities in region Y, etc.).

2. A list of the entities that are part of the multinational group, along with location of these entities, primary function / characterization(s) of each entity (as noted in the policy document), and whether or not that entity is party to any material intercompany transactions (see comments on Materiality below).

3. For each intercompany transaction identified as material, it would be important to include the parties to the transaction, the dollar amount of that transaction, the type of transaction, and the transfer pricing policy governing that transaction. Such materiality thresholds should be set high enough, or grouping should be allowed, so that a full-scale analysis of a company’s entire set of transactions is not required. Otherwise this would be an onerous requirement.

4. Description of the key value drivers in the business.

5. Any industry drivers or special economic circumstances that help to explain why intercompany pricing is set a certain way.

**Comments Regarding the Development of a country-by-country report template.** We do not feel that the current country-by-country template, as provided in Appendix III of the Discussion Draft meets the objective of simplifying transfer pricing documentation. We believe that to implement this template would place a large administrative burden on the taxpayer, without providing much additional value to tax authorities. In fact, we believe that the volume of information requested would be overwhelming for tax authorities to review, leading to long lead times, misunderstanding of key business lines, and increased controversy and double-taxation. Furthermore, we express concern that such a numerical-
based template (in the absence of qualitative reasoning) could lead some tax authorities away from the arm’s length principle (i.e., toward de-facto formulary apportionment), which would likely lead to further controversy and double-taxation. This approach, if implemented as proposed, would have a high immediate and long-term cost to both taxpayers and tax authorities.

The Discussion Draft also solicited comments concerning several features of its proposed country-by-country template. We address a few specifics below:

1. **Should the country-by-country report be part of the Master File or should it be a completely separate document?** We believe that the country-by-country reporting should be a completely separate document. One benefit of a separate Master File would be that it may be combined with a specific country’s report as needed to satisfy local country documentation requirements in a simplified manner. However, we would like to stress that country-by-country reporting should only be undertaken for countries that either (a) deviate significantly from the policies set forth in the Master File, or (b) are party to a significant intercompany transaction (see comments on Materiality).

2. **Alternative to country-by-country report provided in Appendix III of the Discussion Draft.** We feel that the amount of information requested by the country-by-country template in Appendix III would be unduly burdensome on taxpayers and do not feel that it would simplify transfer pricing documentation or streamline audits. Instead of a specific template, we believe that the information provided in the country-by-country reporting will vary depending on the facts and circumstances of the case.

The overall goal should be to provide a clear understanding of the local entity, as well as its transfer pricing policies, along with support for that policy. Critical pieces of information to this effect could include:

- Local country profit and loss statements
- Headcounts in major departments
- Products / services provided
- Information significant to understanding the intercompany transaction that was not addressed in, or that deviates from, the Master File. In our experience, if this information is required, compiling local country documentation in this manner is less burdensome on the taxpayer to assemble and still will provide the tax authority with a clear picture concerning the operation and policies governing the entity based in its jurisdiction.

**Should there be any specific guidance given on materiality? If so, what form should such materiality standards take?** We strongly support having local governments issue specific guidance on materiality thresholds, and the OECD issue general support for this, as
this would assist in the goal of simplifying transfer pricing documentation while increasing the efficacy of such documentation. Agreed upon materiality thresholds would allow taxpayers and tax authorities to focus upon those transactions that are mutually agreed upon as being significant. Guidelines concerning materiality thresholds would also allow taxpayers to focus their efforts and limited resources on the most significant transactions.

***

We sincerely hope that these suggestions and comments are of assistance in this important initiative. Please let us know if we can be of any further assistance.

Sincerely,

A. Michael Heimert
Duff & Phelps, LLC

Mark W. Schuette
Duff & Phelps, LLC

Dear Sirs,

The European Banking Federation (EBF)\(^1\) welcomes the opportunity to comment on the OECD’s current work on transfer pricing documentation and country by country reporting as part of the Base Erosion and Profit Shifting (BEPS) project.

The EBF is however concerned about the very short time frame for public comments. We consider that the given short time frame is not consistent with the magnitude of the discussion and objectives, and forces respondents, particularly those such as the EBF with a diverse membership, to limit their responses to specific points and refrain from expanding on technical details.

The Federation notes that BEPS action 13 articulates the challenging dual purpose of (i) enhancing transparency for tax administrations and (ii) considers the compliance burden for taxpayers. We welcome the OECD’s attempt to use the update of chapter V to establish a common framework and the proposed two-tier (standardized) documentation package. We encourage the OECD to continue this particular work.

You will find below our responses to the requests for comments raised in the discussion draft. There are, however, two particular points we would like to highlight, which have not been included in our responses.

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\(^1\) Launched in 1960, the European Banking Federation is the voice of the European banking sector from the European Union and European Free Trade Association countries. The EBF represents the interest of some 4,500 banks, large and small, wholesale and retails, local and cross-border financial institutions. Together, these banks account for over 80% of the total assets and deposits and some 80% of all bank loans in the EU alone.
First, is that banks are subject to banking regulations in every jurisdiction in which they operate, and that these regulations can have a material impact on transfer pricing application but are developed independently or in isolation from the tax environment. It is important that the OECD ensures that the BEPS regime aligns with the regulatory regime in a manner that is mutually reinforcing wherever possible.

Second, is that according to paragraph 25 (D.1. Contemporaneous documentation) a taxpayer ordinarily should give consideration to whether its transfer pricing is appropriate for tax purposes before the pricing is established. The EBF urges against devising a regime in which transfer pricing legislation inhibits sound and reasonable business decisions.

We appreciate your consideration of our comments and suggestions and remain at your disposal to contribute further as the work develops.

Yours sincerely,

Guido Ravoet
Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

- Any additional standard form or template will require taxpayers to develop new interfaces to their own systems, increasing the compliance burden and possibly duplicating the required information captured in the Master file or local file.

We believe that priority should be given to the standardization (content and structure) of a Master File and Country Files ahead of country by country reporting. We urge against the creation of new reporting requirements that simply duplicate information already contained in the Master file or in the Country specific documentation prepared according to the known and widely used documentation guidelines.

We consider that instead of inventing templates, chapter V could instead provide detailed guidance about what, if any, additional documentation requirement is really necessary to enhance transparency. If there should be any additional reporting, the amount of data requested should be limited to that which is necessary i.e. missing information in the Master file or local file.

- We consider that each tax authority should be carrying out its own risk assessment i.e. its assessment of the risk in its own jurisdiction, and the risk assessment should be shared with taxpayers to allow an informed and constructive dialogue to take place.

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

- We consider that it should be left to the taxpayer to decide the right approach for the Master file. Conglomerates may, for example, select the option of lines of business, whilst multinational banks with few business lines may choose the entity wide basis.
A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013.

b. Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

- MNEs should be given the choice of whether a top down or bottom up approach is adopted. As long as it is used consistently it achieves both objectives of allowing risk assessment and minimizing the compliance burden imposed on firms.

d. Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

- The discussion draft advocates for disclosure of tax on a cash basis. It could as well be current basis or even a total of current & deferred tax (tax on profit and loss). None of which, however, would tell the full story in relation to transfer pricing.

Financial MNEs (within the EU at least) are generally subject to the CRD IV Directive. For financial institutions subject to CRD IV it would minimise the compliance burden to use the same tax figure (and indeed the same basis of disclosure for all other items). Article 89 sets out disclosure rules for country-by-country reporting which are not dissimilar to the proposed OECD template.

*From 1 January 2015 Member States shall require each institution to disclose annually, specifying, by Member State and by third country in which it has an establishment, the following information on a consolidated basis for the financial year:*

a) name(s), nature of activities and geographical location
b) turnover;

c) number of employees on a full time equivalent basis;
d) profit or loss before tax;
e) tax on profit or loss;
f) public subsidies received.

We would urge that financial institutions be allowed to use this reporting format for transfer pricing purposes – bearing in mind that some branch entities may not be shown separately for CRD IV purposes but would have to be disclosed in the TP template.

We would urge that the position of branches (which are a common feature of banking groups) need to be given further consideration.

Information about controlled transactions (royalties, interest and service fees) will already have to be specified in the documentation files. To include it here would duplicate compliance work.
Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

- Both the Master File and the Country specific files should be filed in English. Each country specific file is often based on a copy of a parent company information and tends thus to be drafted in English. Translation into several languages will be costly, time demanding and may jeopardize the idea of a reduced compliance burden resulted by the two-tier concept.

As to the Master file, it should be acceptable with, for example, English and translation on demand. Translation should in any case be done by people with transfer pricing knowledge to avoid mistaken messages.

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

- Master files may well contain sensitive information which would need to be protected.

- If necessary a tax administration could be given access to read but not to copy sensitive material.

- As regards confidentiality of information in the financial services field, we would urge certain measures to be considered, such as acceptance by tax authorities of e.g. CUP references with blackened out names of clients or suppliers. In our view, a CUP reference should rather be tested on its contractual terms than on the specific name of the client.

- Confidentiality would be enhanced if the master file is filed with the Tax Authority of the jurisdiction in which the top parent company is based. Information could then be exchanged with Tax Authorities of other jurisdictions, under existing agreements or the BEPS suggested multilateral agreement. This agreement could prescribe the use to which the information may be put and shared and additionally could require signatory countries to submit to binding mutual arbitration. Please also see following question and response.

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations.

- The EBF favours disclosure to the parent tax authority and for any information sharing to be through treaty provisions.
European Business Initiative on Taxation (EBIT)


At the time of writing this submission, EBIT Members included: AIRBUS, BP, CATERPILLAR, DEUTSCHE LUFTHANSA, INFORMA, JTI, LDC, MTU, NUTRECO, REED ELSEVIER, ROLLS-ROYCE, SAMSUNG ELECTRONICS, SCHRODERS and TUPPERWARE.
Dear Pascal,

EBIT welcomes this opportunity to provide comments to the OECD on the Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (CBCR) which was released on 30 January 2014.

General Comments

EBIT notes the originally stated intention in the OECD White Paper of 30 July 2013:

- To make transfer pricing compliance simpler and more streamlined; and
- To enable the tax authorities to more effectively assess transfer pricing risk.

In our 31 October 2013 EBIT submission to the OECD for the purposes of the 12-13 November 2013 consultation meeting in Paris, EBIT already welcomed this dual approach. In our paper we asked the OECD for clarification of the sudden addition of the rather open-ended yet crucial phrase for business: “for risk assessment and other purposes” to the OECD’s Memorandum on Transfer Pricing Documentation and Country-by-Country Reporting dated 3 October 2013. (emphasis added)

The primary purpose of CBCR should indeed be to assess transfer pricing risk. However, we wish to express our grave concerns about the "other purposes" for which the CBCR data would be used and, importantly, the apparent “scope creep” in the OECD’s latest Discussion Draft, for instance as evidenced in the 3rd paragraph of the Introduction Box on page 1:

“As the call to develop a common template for country-by-country reporting to tax authorities did not specifically limit the application of country-by-country reporting to transfer pricing administration, the OECD will be giving further consideration to whether information relevant to other aspects of tax administration and the BEPS Action Plan should also be included in the common template.”

In our view the OECD have missed the mark with these very detailed proposals in the Discussion Draft: rather than create something that supports a proportionate and pragmatic assessment of tax risk related to Transfer Pricing with a simpler set of compliance requirements, the OECD appear to be proposing something which is significantly broader in scope thereby creating a burdensome new set of compliance requirements. This in our view also seems to go against the spirit of the OECD’s work on Cooperative Compliance.
EBIT wants to remind the OECD in this respect of the wording of BEPS Action 13, of which the CBCR template forms an integral part:

“Develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNE’s provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template” (emphasis added)

EBIT also wishes to draw the OECD’s attention to paragraph 25 of the Lough Erne G8 final communiqué which states:

“Comprehensive and relevant information on the financial position of multinational enterprises aids all tax administrations effectively to identify and assess tax risks.” (emphasis added)

EBIT notes in particular that both the OECD BEPS Action Plan and the Lough Erne G8 final communiqué were subsequently endorsed by the G20 leaders and finance ministers in Saint-Petersburg.

EBIT also notes that Peter Steeds of UK HMRC (and member of OECD Working Party 6) stated in a speech on 10 February 2014 that the content of the Discussion Draft went beyond what governments need for Transfer Pricing risk assessment. This seems to EBIT to be a fundamental question for the OECD to address.

An important point for EBIT in this debate is to know whether the OECD have any specific recommendations to reduce the Transfer Pricing Documentation burden, and if so, what are these specific recommendations?

**B.1. Transfer pricing risk assessment**

*Re: Comments requested by the OECD as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the CBCR template.*

For the above mentioned reasons, EBIT respectfully asks the OECD to adhere to the guidance and direction provided to the OECD by the G8 and G20 leaders. This means that work on BEPS Action 13 should be restricted and not include development of additional standard forms and questionnaires beyond the CBCR template for Transfer Pricing risk assessment purposes. The initial form and data should be high level only. Additional data can be provided based on subsequent request and depending on the circumstances of individual tax payers.

*Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.*

In general, EBIT fully supports the OECD’s ongoing work on Cooperative Compliance aimed at fundamentally improving mutual trust and transparency between taxpayers and tax authorities. Importantly, Cooperative Compliance prescribes, as per the OECD FTA’s 2008 study, on the one hand, that tax authorities need to be commercially aware, impartial, proportionate in their responses, open about their position on key issues and responsive, and, on the other hand, that taxpayers / MNEs must provide disclosure and transparency.

EBIT therefore considers it to be appropriate and welcomes that the Head Office (or other) tax authority share their (CBCR informed) risk assessment with taxpayers. This will further help to differentiate between low risk and/or compliant taxpayers and others, such that the future compliance burden might be reduced in respect of those taxpayers who can demonstrate a strong compliance record and/or fall within a low risk category.
B.3. Transfer pricing audit

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

First of all, EBIT notes that 64 countries are now signatories to the 2007 Convention on Mutual Administrative Assistance in Tax Matters, including the UK and the US, so any CBCR template/Master file information will be available (normally) to a minimum of 64 countries, and with e.g. the UK (130+ comprehensive tax treaties and 20+ TIEAs) probably 150+ countries. So, in our view, with confidentiality a major concern, tax administrations should only be provided with legally required data that is relevant to the activities in their jurisdiction. This means the CBCR template should be enacted domestically as a legal requirement.

Secondly, whilst taxpayers should make reasonable efforts to provide complete and adequate Transfer Pricing Documentation, tax administrations should exploit existing international information exchange mechanisms, in order to obtain all the relevant information they need in the possession of associated enterprises located outside their jurisdictions for conducting Transfer Pricing audits and risk assessments. However, this should not result in an excessive burden imposed on taxpayers and should be done in the spirit of the OECD’s framework of Cooperative Compliance.

EBIT welcomes the further development of efficient and effective exchange of information of the needed information that is important to tax administrations, in particular efforts by the OECD and the EU to create one global automatic exchange of information (AEOI) standard.

C. A two-tiered approach to transfer pricing documentation

C.1. Master file

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

EBIT welcomes the combined approach of the Master file and local files. However, EBIT would urge the OECD to step up their efforts at developing a truly common, multi-jurisdictional and global template and to not apparently try to reinvent the wheel here but look seriously at existing best practices. EBIT believes that the EU’s (optional) JTPF Master file approach (Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union - EUTPD) is the figurative elephant in the room and is particularly suitable to act as a best practice example and the preferred starting point for the OECD because it works well in practice.

There should be flexibility for taxpayers to adopt either line of business or an entity approach – whatever works best in their specific circumstances.

EBIT believes that tax authorities should be provided with relevant data only and that flexibility, reflecting the differences between MNEs and their ability to provide information in a form that best describes their businesses, and in a proportionate manner, will be key.

Should the country-by-country report be part of the master file or should it be a completely separate document?
EBIT Comments on the OECD’s 30 January 2014 Discussion Draft on TPD and CBCR

EBIT considers that the CBCR template should not be part of the Transfer Pricing Master file but should be held as a separate document which is completed and filed with the tax authority dealing with the parent company of the MNE.

Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

EBIT considers that the different systems, organisations and processes of MNEs are such that it is impossible to achieve a consensus on whether top-down or bottom-up is “better”. Data should be capable of being provided out of existing systems to minimise incremental compliance costs, i.e. maximise the use of existing data sources. EBIT therefore strongly believes that the only OECD recommendation must be, on this specific issue and on all other aspects of CBCR, that a significant level of flexibility and optionality is essential.

Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

EBIT reiterates that the purpose of the CBCR-template is to provide a high level overview for the purposes of a Transfer Pricing risk assessment – the emphasis should therefore be kept on maintaining simplicity. A requirement for additional in country consolidations would likely create significant amounts of additional cost. We wonder however whether the OECD anticipates consistency between taxpayers or within taxpayers, even though it seems to us that the former could not be achieved?

EBIT recognises that following a risk based assessment, a tax authority may in some circumstances wish to drill down to a specific entity level. However, we stress that this should be part of the audit process rather than a supplementary data request in respect of the CBCR submission.

If a top-down approach is followed from the group consolidation system the data will have been compiled in a consistent manner under IFRS principles, in the same currency and for the same reporting period. Data derived from a bottom-up exercise in different currencies, for different periods, under different accounting bases, potentially based on a mix of audited stats and unaudited management accounts is unlikely to be capable of being compared on a country-by-country basis.

To include entity level information will impose an onerous compliance cost on an MNE and a question to pose to the tax authorities is of what use will for big MNE’s 1000 plus lines of data serve?

EBIT considers that the bottom-line for the CBCR-template is that it should provide tax administrations with a meaningful set of data which is comparable. We reiterate that the CBCR-template is only intended to allow for a comparison within MNEs as a function of the big picture transfer pricing risk assessment.
EBIT Comments on the OECD’s 30 January 2014 Discussion Draft on TPD and CBCR

Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?

The CBCR-template should require one number for cash taxes paid per country as this is the basis on which MNE pay their taxes worldwide. Apportionment of a group payment based on the Pre-Tax Profit of each entity is artificial and does not reflect the actual taxable profit for each entity that can be significantly different e.g. due to the availability of tax depreciation.

The tax charge should not generally be used as this will include both current and deferred taxes, plus prior year adjustments and true ups. The tax charge will not enable the user of the data to see clearly and quickly what has been paid in each country in any one year.

However, whilst we consider that cash tax reporting for CBCR is probably the most appropriate method and least difficult approach for most businesses, some groups/sectors may feel that their position can only be properly understood on a tax charge basis (i.e. including deferred tax), and would like the option to report on a charge basis, possibly as an additional voluntary step.

Should the country-by-country template require the reporting of withholding tax paid?

First of all, the taxes reported in the CBCR-template should be those that are relevant to the high level assessment of potential Transfer Pricing risk otherwise the purpose of the CBCR-template is defeated.

Secondly, if reporting is to be simplified for MNEs, any reporting requirement should not extend beyond income taxes (national and to other levels of government) and withholding taxes.

Withholding taxes might be reported from both a payer's and recipient's perspective to reflect any double tax relief that could impact the amount of domestic tax paid by the recipient. With regard to the discussion on whether taxes should be reported on a cash or accrual basis, EBIT believes that taxes actually paid would be the simplest initial measure and provide most consistency. However, this is not without some degree of complexity since not all taxes will be paid within the relevant accounting period. A measure that it is based on the current tax charge in the accounts might provide a more consistent picture. Where there is a significant difference between taxes paid and taxes accrued (i.e. including deferred taxes), a taxpayer may choose to provide a brief supplementary explanation, e.g. due to book/tax depreciation differences. Moreover if the accrual basis is used there needs to be some discussion around what GAAP basis should be used, which will link with other consultation about currency and use of consolidated reporting. It should also be noted that readily available parent company GAAP numbers could include other country income taxes arising (especially for US groups) so will not give a good picture of local taxes.

Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

This could create a significant additional burden depending on the systems configurations of an individual MNE. For example, for some it may require a separate data collection exercise. At the same time, in order to provide a useful and relatively complete reporting overview to the tax administrations, and also for double tax relief related purposes if the amounts paid were considerable, we believe that any potentially significant amounts of withholding tax paid would have to be included.

Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?
According to EBIT, this type of information on cross-border payments between associated enterprises for tax administrations should according to Annex I and Annex II already be documented in the Master file and the local file, which in EBIT’s view means an undesirable duplication of data, which does not add anything substantial to the risk assessment itself but would considerably increase the administrative burden of populating the CBCR-template. The level of detail proposed for the local file should be considered sufficient. EBIT reiterates that BEPS Action 13 calls for a CBCR-template that sets out “the global allocation of the income, economic activity and taxes paid”.

In addition, the inclusion of a wider range of data points will significantly increase the compliance burden associated with completing the CBCR-template. Groups with a substantial number of Constituent Entities could ultimately report tens of thousands of separate pieces of data. EBIT opines that including columns for revenues, earnings before tax, cash tax paid, employee numbers and activity code should provide sufficient information for a high level risk assessment.

EBIT is also unclear about the relevance of some of the data requested in the template, for example, details of place of effective management or details of stated capital and accumulated earnings or tangible assets.

Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

EBIT would expect a CBCR template to include reference to the nature of the activity undertaken in each jurisdiction.

Sector-specific issues can have a direct impact on Transfer Pricing (e.g. price capping schemes/regulated markets/governments subsidies). The OECD should consider providing guidance to tax administrations for the interpretation of data specific to such industry sectors. EBIT also notes that information (such as revenues and earnings before tax) can have widely varying definitions across sectors of industry. Sufficient flexibility should be permitted to accommodate such differences.

C.2. Local file

D. Compliance issues

D.2. Time frame

EBIT considers that if the CBCR-template is to be used for risk assessment purposes it seems to us not unreasonable to expect it by the end of the year and a day after the end of the relevant accounting period of the ultimate parent company of the Group. However, there should be additional time allowed for the preparation of the Master file and the local files.

We note that the EUJTPF recommendation was “The taxpayer should have to submit its EU Transfer Pricing Documentation to the tax administration only at the beginning of a tax audit or upon specific request. By contrast, when filing the tax return, a taxpayer may only be required to submit a short questionnaire or an appropriate risk assessment form.”

EBIT is concerned that the proposed end of the year and a day after the end of the relevant accounting period of the ultimate parent company of the Group as deadline for the CBCR template mentioned in paragraph 28 of the Discussion Draft might be too tight for some
African, Asian and Middle Eastern countries with no Transfer Pricing Documentation requirements, or e.g. in case of acquisitions or other special circumstances, and some degree of flexibility may be needed.

**D.3. Materiality**
Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

EBIT supports the need to take account of materiality thresholds and supports the comments made by BIAC on this subject.

**D.5. Frequency of documentation updates**
Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

EBIT generally welcomes the pragmatic suggestion in paragraph 34. We note that whilst the Master file may be easier to maintain and not be entirely rewritten regularly, the CBCR-template and financial data for the comparables would have to be updated annually, which is nevertheless burdensome and time consuming.

**D.6. Language**
Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

On the important issue of language, EBIT believes that the compromise approach proposed in the Discussion Draft i.e. the Master file being in English but local files being in local language is appropriate, which is also consistent with the recommendations of the EUTPF, although we would also welcome the option for local files being in English, as this would considerably simplify and streamline the process further. For clarity, EBIT would be grateful for confirmation that the CBCR template would be in any case be in English, even if it were not to be part of the Master file.

**D.8 Confidentiality**
Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

There needs to be an absolute guarantee of confidentiality, and this would include provision to restrict the sharing of information with tax administrations where confidentiality cannot be relied on whether as a result of domestic legislation requiring disclosure of tax information or otherwise. On distribution of data, we would expect sharing with treaty partners, subject to confidentiality, and supply on request to other territories where there are relevant subsidiaries and there is no tax treaty with automatic exchange of information, but the subsidiary is either in the EU, or in a country which has signed a TIEA, or which together with the parent country is a signatory of the Mutual Administrative Assistance Convention on tax matters. We strongly believe there should be some restriction on sharing with every tax jurisdiction where there are no material local subsidiaries or activities.

**D.9. Other issues**
EBIT is concerned with the proposed dismissal of multi-country analyses in paragraph 42 of the Discussion Draft. An approach favouring the use of local comparables will not only significantly increase the compliance burden, but could also result in multiple anomalies and inconsistencies. Some small countries might not have any/sufficient third party comparables publicly available at the country level, or the practicality of finding a reasonable local comparable may be limited.
E. Implementation

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company's jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above.

EBIT favours the filing of CBCR template information only with the tax authority in the parent company's jurisdiction and that tax authority should share the information as necessary under the relevant and applicable treaty and EU exchange of information provisions. A reasonable grace period should be granted to get the systems in place and EBIT recommends therefore not commencing the reporting earlier than for the financial year 2015.

Annex I to Chapter V: Transfer pricing documentation - Master file

Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

Annex II to Chapter V: Transfer pricing documentation - Local file

As we set out earlier, EBIT recommends the OECD to follow the best practice approach to Transfer Pricing Documentation recommended by the EUTPF for the content of the Master file and local files, which would exclude all non-Transfer Pricing related data, e.g. place of effective management, details of stated capital, accumulated earnings and tangible assets.

EBIT trusts that the above comments are helpful and will be taken into account by the OECD in finalising its work in this area. We are happy to discuss with and remain committed to a constructive dialogue with the OECD.

Yours sincerely,

The European Business Initiative on Taxation – February 2014

For further information on EBIT, please contact its Secretariat via Bob van der Made, Tel: +31 6 130 96 296; Email: bob.van.der.made@nl.pwc.com).

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Response by Eurodad to the Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Brussels, February 23 2014

Introduction

Eurodad acknowledges the opportunity provided by the OECD to send input for the Discussion Draft on Transfer Pricing Documentation and CbC Reporting. Our submission does not directly correspond to the questions raised in the discussion draft but focuses on a few specific matters, which we find are particularly important.

General remarks

Eurodad supports the work of the BEPS Monitoring Group (BMG) and endorses the general positions of BMP. We would therefore also like to draw attention to the submission by the BMP to this consultation.

Public country-by-country reporting

In addition to the points raised in the submission by the BMG, we would like to emphasize the importance of making the information obtained from country-by-country reporting publically available.

The BEPS action plan specifies that multinational enterprises shall “provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries...” and that this reporting must enhance transparency for tax administrations. This wording does not entail that the reported information must be kept confidential, but rather it leaves open question about whether all or part of the reported information could be made available to the public. However, in the Discussion Draft on Transfer Pricing Documentation and CbC Reporting, which has been developed by the OECD in response to the BEPS action plan, it is explicitly stated that the reporting is intended to be “confidential” and thus, it appears, not available to the public. Furthermore, the question about public access to the information is not included as one of the questions in the discussion draft and thus it appears as if the OECD is not open to discussing this issue.

It is vitally important to ensure that tax administrations receive high quality country-by-country reporting from multinational enterprises and thus have more tools available to ensure that these enterprises comply with the tax regulations. However, the decision to make all this information confidential is problematic for a number of reasons.

Firstly, it means that a number of vital stakeholders, including journalists, parliamentarians, civil society organizations, academia, and the broader public will still not have access to the most basic information about the multinational enterprises operating in our societies. The unavailable data includes information about how much profit multinational enterprises are making in each country, how much taxes they pay in these countries, and whether or not they are channeling financial resources to tax havens. This information is
necessary if we want to ensure a meaningful public debate about taxation of multinational enterprises, as well as to ensure public scrutiny and accountability of multinational enterprises.

Secondly, as we are currently seeing in the debate around automatic exchange of information for tax purposes, there is a clear risk that the confidentiality requirements will be used as an argument for why governments in low-income countries, who do not have specific systems in place to ensure confidentiality of data, should not receive country-by-country reporting from multinational enterprises. There is thus a risk that the BEPS country-by-country reporting system will not help the world’s poorest countries prevent base erosion and profit shifting from their countries, despite the fact that these countries are currently losing large amounts of financial resources due to this problem. In this context, we also find it problematic that the decision by OECD to suggest a confidential country-by-country reporting system seems to have been taken before the regional BEPS consultations of developing countries have even started.

Thirdly, the confidentiality requirements may also prevent public institutions that are not part of the tax administration from accessing the information provided through the BEPS country-by-country reporting system. In a number of situations, including when deciding on public procurement or when entering into public-private partnerships, public institutions could use this information to ensure that public resources are not being used to enhance base erosion and profit shifting or channeled to tax havens.

While we understand the need of enterprises to keep certain types of information confidential to ensure their ability to operate in a competitive market, we do not find that any of the information mentioned in the Discussion Draft on Transfer Pricing Documentation and CbC Reporting falls with this category of information.

**Concluding remarks**

The BEPS action plan came as a political response to a number of scandals concerning multinational enterprises evading and avoiding taxes. It provides an opportunity to establish the transparency needed to support a well-informed public debate about taxation of multinational enterprises. If this opportunity is missed and the current opacity is upheld, the public debate will continue to be driven by scandals and a growing level of mistrust towards multinational enterprises and the taxation system in general. Furthermore, this will also uphold the conditions needed for multinational enterprises to continue avoiding and evading taxes.

This is not in the interest of governments, the public, nor in the interest of the many national and multinational enterprises who pay their fair share of taxes.

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Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Dear Mr. Saint-Amans:

EY appreciates the opportunity to submit these comments to the OECD on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting (“the Discussion Draft”) dated 30 January 2014.

Our view is that the purpose of the OECD Transfer Pricing Guidelines should be to assist taxpayers and tax administrations in determining transfer prices within the framework set by the arm’s length principle and to help prevent and resolve instances of double taxation. In reviewing the Discussion Draft, we have focused on the potential business and commercial implications of the proposals with respect to documentation and reporting.

We appreciate that the OECD is seeking to develop rules “to enhance transparency for tax administrations, taking into account the compliance costs for business.” We are concerned that the proposals in the Discussion Draft would lead to a considerable increase in the administrative burden for business. In particular, we believe that the proposed template for country-by-country reporting is significantly over broad and that such over-breadth not only would mean major new burdens on companies but also would detract from the usefulness of the template to tax authorities in providing the intended global view of a MNC group. In our view, substantial changes in the Discussion Draft are needed in order to achieve an appropriate balance between the burdens on taxpayers and the benefits to tax administrations.

In our submission of 1 October 2013, we provided detailed comments on key aspects of the OECD’s White Paper on Transfer Pricing Documentation (“the White Paper”) dated 30 July 2013. We are pleased that some of those points have been reflected in the Discussion Draft. However, several of our earlier comments have not been addressed in the Discussion Draft. We believe they remain valid points and have incorporated them in this submission.
This submission begins with an executive summary of our comments and recommendations. The detailed discussion is divided into two sections, with the first section focused on the proposed country-by-country reporting template and the second section focused on the other aspects of the transfer pricing documentation proposals.

If you have any questions or would like further elaboration of any of these comments, please contact any of the following:

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Yours sincerely
On behalf of EY

Alex Postma
Comments and Recommendations with respect to the OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Executive Summary

Our key comments and recommendations with respect to the Discussion Draft, as further elaborated on in the Detailed Discussion sections below, are summarized as follows:

1. The Discussion Draft in its current form does not reflect an appropriate balance between the provision of relevant information to tax authorities and the burdens for businesses.

2. The country-by-country reporting template should be used for high-level transfer pricing risk assessment purposes and should not be considered to be a substitute for detailed transfer pricing analysis.

3. The country-by-country reporting template should be a separate document and should not be included in the transfer pricing documentation master file. This would be consistent with the template’s use as a high-level risk assessment tool only.

4. The country-by-country reporting template should provide flexibility as to the data sources to be used to populate it so that MNC groups can use the data that is most readily available under their own systems.

5. The country-by-country reporting template should not require that information be reported on an entity-by-entity basis as such granular reporting would not serve the high-level risk assessment purpose of the template.

6. The scope of the country-by-country reporting template should be narrowed and modified to focus on its intended objective of transfer pricing risk assessment. The template should not be used as information-gathering instrument for other BEPS action points.

7. The country-by-country reporting template should be required to be delivered only to the parent company’s home country and should be shared with other countries under tax information exchange relationships.

8. The master file should only contain information that is relevant for all entities. Information that is only relevant for a single entity or a group of entities can either be included in the local (country) file, or can be shared through the treaty mechanism. This applies for example to information on APAs and MAP matters.

9. We believe that clarity and transparency regarding the risk assessment policies applied by tax authorities could assist taxpayers in the preparation of relevant documentation and would help reduce administrative burdens for both taxpayers and tax authorities. In this regard, tax administrations should share at least their general risk assessment policies with taxpayers.
10. We support the further development of the concepts of “materiality” and “important transactions” to achieve the goal of relevant documentation and relief or reduction of the administrative burden for taxpayers. We recommend that the OECD further consider the use of safe harbors.

11. The guidance on transfer pricing documentation should allow the taxpayer flexibility to adapt to specific facts and circumstances, with the taxpayer providing an explanation regarding the particular adaptation.

12. Given the significant effort that companies would have to expend to prepare the documentation in the format and detail proposed by the OECD, clear rules with regard to the timing of implementation should be established. Companies should be provided sufficient lead time in order to be able to develop the new systems and processes needed in order to comply with the new rules.

13. Finally, we urge the OECD to encourage all countries to actively participate in the global conversation on how transfer pricing documentation rules can be improved, standardized, and simplified.

**Detailed Discussion – Country-by Country Template**

Our detailed comments are focused on several key areas with respect to the design and implementation of the proposed template for country-by-country reporting, including the areas on which comments were specifically requested in the Discussion Draft.

As an overall theme, we believe the scope and delivery of this new template should be consistent with the intended purpose of the template as an initial-step high-level risk assessment tool for tax authorities. Therefore, we believe the template should be kept as simple as possible and should be structured to leverage information that businesses produce for other purposes to the greatest extent possible. The template also should not be overly prescriptive and should accommodate the differences in data sources and other relevant factors that exist across industries and from company to company. Moreover, the template should not include information that is better provided in more detailed form through a different mechanism. In addition, the manner in which the template is to be provided to tax authorities should be structured so as not to exacerbate the burdens on business.

In addition, we would note that many stakeholders are concerned that the country-by-country reporting template in the form proposed could be a first step toward formulary apportionment. It could be useful for the OECD to clarify that this should not be the outcome and reiterate the long-standing commitment to the arm’s length principle.

*Template should be separate from master file*

We believe that the country-by-country reporting template should not be made part of the transfer pricing master file. Contrary to the approach reflected in the Discussion Draft, the template should be a standalone document.

The country-by-country template is to be used by tax authorities for purposes of a first-step high-level risk assessment aimed at determining whether and where to devote resources to conduct a detailed examination. The form and content of the template is similarly high-level. The template should be used only for this risk
assessment purpose and tax authorities should have no further need for the template after they have completed the risk assessment. Once the tax authorities have made a determination to focus attention in a particular area, they should conduct their examination using the more detailed information contained in the taxpayer’s transfer pricing documentation together with any additional information provided by the taxpayer in response to their requests.

Therefore, we recommend that the Discussion Draft be revised to separate the country-by-country reporting template from the master file. This could be viewed effectively as a three-tier documentation approach: (1) the country-by-country reporting template used for initial risk assessment purposes only, (2) the transfer pricing documentation master file containing detailed global information, and (3) the transfer pricing local files containing detailed information relevant to the particular country.

Template should provide for flexibility in data sources

We believe that it is essential that flexibility is provided regarding the data sources to be used to compile the information requested in the template. The information the OECD is seeking with this template generally is not information that is collected by MNC groups in such form for any other purpose. There is no single optimal data source that could be required to be used to populate the template. There are differences in relevant regulatory regimes and financial reporting systems from industry to industry and from company to company that mean that the data source that would require the least adjustment for template purposes and that would result in the most meaningful information in the template will differ. Accordingly, the instructions should not be overly prescriptive as to precisely how companies are to source the information that is to be used to satisfy the template parameters.

Together with this needed flexibility, the template could require that MNC groups identify the particular data source that they are using. The template further could require that MNC groups use such data source consistently across the group and from year to year. In this regard, it should be noted that the potential for different MNC groups to use different data sources would not have any adverse implications for tax authorities as their risk assessments are focused on getting sight of a MNC group’s profile across countries and not on any comparison from one group to another.

With respect to financial information such as revenue and net income, the template should allow use of data sourced from consolidated financial statement reporting and also should allow data sourced from statutory accounts as is reflected in the Discussion Draft. The template should provide MNC groups with flexibility to use the data source that is most reliable and readily available under their own circumstances, with the MNC group identifying the source and using it consistently.

The label “top down” which has been attached to the approach of sourcing data from consolidated financial statement reporting is an inaccurate description of this approach. MNC groups using this approach typically would start not from the final consolidated numbers but rather from the separate reporting unit packages that are the building blocks to such consolidated numbers. A reporting unit may be an entity, a business segment, or a local group of entities. During the process of developing the consolidated financial statements, various adjustments are made at the group level and are “pushed down” to the reporting unit level to the extent they relate to a particular unit. For purposes of the template, it would be appropriate to use these reporting unit numbers before the elimination of all intercompany transactions that is done in consolidation. However, intercompany dividends should be eliminated in order to avoid double counting.
It should be noted that these numbers would not sum to the consolidated financial statement numbers because of the inclusion of intercompany transactions and potential group adjustments that do not relate to any particular unit. Reconciliation to consolidated financial statement numbers would not be practical, but such reconciliation should not be needed given the intended use of the template for a high-level risk assessment.

MNC groups should be allowed alternatively to source the financial data from their statutory accounts (or where statutory accounts are not required for local regulatory purposes, from locally audited financial statements produced for other purposes or from internal management accounts) as is reflected in the draft template. Statutory accounts are produced later than the consolidated financial statements and so may reflect additional information not available earlier. Statutory accounts typically are prepared locally and there may well be little group-level involvement. As in the case of data sourced from consolidated financial statement reporting, some adjustments would need to be made in order to use this data in the template. For example, intercompany dividends would need to be eliminated in order to avoid double counting. Although statutory accounts generally are used in producing local tax returns, the country numbers may not tie to the tax returns. Similar to the consolidated financial statement reporting approach, country numbers under this approach would not sum to consolidated financial statement numbers. Here too a reconciliation would not be practical and should not be needed.

As the Discussion Draft notes, the local due dates for statutory accounts in some cases are well after the end of the year. Therefore, this would need to be factored into the determination of the due date for compilation of the country-by-country template. The Discussion Draft’s recommendation of using a due date that is one year after the close of the fiscal year is a reasonable approach for addressing this timing issue.

**Template should provide for country-by-country reporting**

The proposed template included in the Discussion Draft would require entity-by-entity reporting rather than country-by-country reporting. However, we believe that country-by-country reporting, with entities aggregated by country, is more consistent with the high-level risk assessment purpose of the template.

Reporting that segregates entities within the same country would not provide information that is more useful to tax authorities than aggregated country information. Information provided at that level of granularity would not provide the kind of broad view of an MNC group’s global profile that is the intended purpose of the template. In addition to the sheer magnitude of the information that would be involved for a group that has hundreds or thousands of entities, which is not uncommon, there are a variety of complexities and anomalies that would arise in any entity-based reporting. Groups often operate their separate entities within a country together as if they were one entity. For example, there may be a single employment entity for all the group’s employees within a country. As another example, the local entities within a group often file on a combined basis for local tax purposes so that there is only one taxpaying entity in the country. Any allocation of activity or taxes across entities would be an artificial exercise that would be required only for purposes of the template if entity-based reporting were to be required.

Country-based reporting would avoid these complications and would provide tax authorities with the desired information regarding a company’s global footprint across countries. Such country-based reporting should involve a simple aggregation of the entities resident in each country. The template should not require a formal consolidation of entities that report separately in the country. If a group does have a consolidation in a country for other purposes, that should be used for purposes of country-by-country reporting on the template. Where
there is no consolidation in a country or where there are entities in that country that are not included in a consolidation, little value would be gained from requiring a new accounting consolidation simply for purposes of the template. Moreover, where a group has entities within a country that are in different ownership chains within the group, a formal consolidation would be meaningless. Therefore, the aggregation for country-by-country reporting purposes should be a simple summation of the results with respect to the separate entities in the country.

For purposes of the country-by-country reporting approach, consistent with the materiality concept that is reflected in the Discussion Draft, the template should provide exceptions for entities and countries that are not material to the MNC group’s total global profile. With respect to entities, the template should require reporting only with respect to entities that are included as consolidated in the MNC group’s consolidated financial statements. Using a different grouping for purposes of the template would create unnecessary complexity. Moreover, the more subjective definition that the Discussion Draft would use as the basis for determining the entities included in the template reporting is not practical for this purpose. Limiting template reporting to fully consolidated entities would be consistent with a reasonable approach to materiality.

The provision of a de minimis rule in connection with the country-by-country reporting template also would be helpful in reducing the burden on companies without adversely affecting the quality of the information provided to tax authorities in the template. Where a MNC group’s presence in a particular country is very limited, it should not be required to apply the full reporting requirements of the template to such country as such information with respect to the country would be of very limited value. In this regard, it should be noted that a de minimis rule could be crafted in a way that does not mean that the de minimis countries do not have access to information. For example, the template could include a listing of the de minimis countries so that those countries would have access to the template in the same manner as other countries reported on the template (i.e., from the tax authority of the headquarters country pursuant to a tax information exchange relationship, as discussed in more detail below), thus ensuring that even de minimis countries could obtain the global profile information the template is intended to provide.

The scope of template should be modified and narrowed

The seventeen columns contained in the proposed template include more information than is necessary for its intended use as a high-level risk assessment tool. The information requested seems to be aimed at satisfying information “wants” for (and perhaps even beyond) the other BEPS action points. We believe that the scope of the template should be modified and narrowed significantly, eliminating reporting of information proposed to be required that would be very difficult to produce in the form specified, information that could be highly misleading in the form specified, and information that would be duplicative of information that would be included in more useful form in the transfer pricing documentation master file.

Taxes

Consistent with the discussion above regarding the need for flexibility in how data is sourced and presented, we believe MNC groups should be allowed flexibility to report taxes either on the basis of cash payments during the year, as is reflected on the proposed template, or on the basis of the current tax provision reported for financial statement purposes. Each of these approaches has merit for different reasons, neither approach would provide tax information that would be completely aligned with the other financial information required to
be reported on the template, and the approach that would involve data that is most readily available would
differ from company to company.

Use of cash taxes as the measure would provide tax authorities with information regarding the tax amounts
paid in each country during the particular year and so would correspond to government receipts from the
company during the year. For companies that have a cash statement that separately identifies taxes paid,
using data sourced from this statement likely would be the most efficient approach to providing template
information on taxes. As noted above, however, cash tax amounts would not relate precisely to the income
amounts that are reported on the template and so could be misleading if this disconnect is not recognized.

Use of the current tax provision as the measure would provide tax authorities with information regarding tax
liability that has greater connection to the income for the particular year. Financial statements, both
consolidated financial statements and statutory accounts, include the current tax provision which reflects the
current taxes that relate to the income for the year (although it may also reflect some prior year adjustments).
For companies that may not have an existing statement that separately identifies taxes paid on a cash basis,
using data sourced from the current tax provision on their financial statements would be the most efficient
approach for providing template information on taxes.

For both data sources, and indeed for any annual reporting approach, situations involving losses that are
carried over between years and other post-year adjustments would make meaningful comparisons of the
income and tax numbers on the template challenging at best. Moreover, taking into account deferred tax
liabilities and assets, which reflect taxes to be paid in a future period with respect to the income for the year or
tax attributes such as losses for the year to be used with respect to a future period, together with the current
tax provision would provide a more accurate picture over time of the total income tax liability associated with
the country-based income amounts included in the template.

Stated capital and accumulated earnings

It is not clear how, if at all, information on stated capital and accumulated earnings would be used for purposes
of a high-level risk assessment. We believe that this column should be eliminated from the proposed template.

Total employee expense

Employee compensation information often is not maintained by all entities in a MNC group in the same
manner, valuation of non-cash compensation would be difficult, and compensation information could be quite
sensitive in situations involving only a relatively small number of employees in a particular country so that the
total could reveal personal information. Moreover, information regarding employee compensation is proposed
to be included in the transfer pricing documentation master file which would make inclusion of this information
in the template duplicative. We believe that the column for information on employee compensation expense
should be eliminated from the proposed template.

Tangible assets

Inclusion of a number for tangible assets other than cash or cash equivalents, intangible assets, and financial
assets would provide a highly inaccurate profile of a MNC group’s assets, particularly a group that is in the
financial services industry or that has an intangibles driven business. Use of a book value number would not
provide a useful view even of the group’s tangible assets. Moreover, information regarding assets is proposed to be included in the transfer pricing documentation master file which would make inclusion of this information in the template duplicative. We believe the column for information on tangible assets should be eliminated from the proposed template.

**Intercompany payments**

For most MNC groups, these columns would require the aggregation of myriad intercompany transactions and inclusion of these columns would not provide information that would be useful for risk assessment purposes. Moreover, more detailed information regarding intercompany transactions is included in transfer pricing documentation which would make inclusion of this information in the template duplicative. We believe the six columns for information on intercompany payments and receipts of royalties, interest, and service fees should be eliminated from the proposed template.

**Template should be delivered to parent jurisdiction**

We believe that MNC groups should deliver the country-by-country reporting template to their headquarters country tax authority, which typically is the tax authority with which the company has the most extensive dealings. The headquarters country tax authority should have sole responsibility for considering and addressing whether or not the global company has reasonably satisfied the template reporting requirement. The template would then be shared by the headquarters country tax authority with other relevant tax authorities pursuant to an appropriate relationship with such authorities.

It would be unreasonably burdensome for MNC groups to be required to deliver a template to each country where the group has entities. Such an approach could require the taxpayer to fill out multiple different versions of the template if countries implement their own versions of the template. It also could require parallel discussions with multiple tax authorities regarding compliance with the template requirements.

Sharing of the template by the headquarters country tax authority pursuant to an information exchange relationship would provide the sensitive information on the template with confidentiality protections provided under such relationships. The sharing of the template could be done pursuant to an existing bilateral exchange of information relationship or through a new relationship established for this purpose, including pursuant to a multilateral instrument such as is contemplated under Action 15 of the BEPS Action Plan.

In this regard, the OECD could develop an approach to address the possible situation of a headquarters country that does not require reporting pursuant to the template. In such a case, a group that is headquartered in a country that does not require template reporting could be required to deliver the template directly to each country in which the group has an entity or alternatively the group could elect to treat a country in which it has an entity and which requires the reporting pursuant to the template as its headquarters country for this purpose.
Detailed Discussion – Transfer Pricing Documentation More Generally

Our detailed comments below are organized based on the structure of the Discussion Draft and the proposed replacement of the Documentation chapter of the OECD Transfer Pricing Guidelines.

Section A. Introduction

As a general remark, we are pleased with the OECD’s effort to provide further guidance on transfer pricing documentation and with the progress that has been made compared to the guidance that was presented in the White Paper. In particular we welcome the fact that the guidance included in the Discussion Draft is more detailed and more specific. Nevertheless there are still certain points for which in our view even more specific and concrete guidance is needed in order to achieve the goals of simplification and streamlining of documentation requirements and to reduce the costs of compliance. Our comments in this respect are presented in the sections below.

As stated in paragraph 4 of the Discussion Draft “[a]n important overarching consideration in developing such [transfer pricing] rules is to balance the usefulness of the data to tax administrations for risk assessment and other purposes with any increased compliance burdens placed on taxpayers. In this respect it is noted that clear and widely adopted documentation rules can reduce compliance costs which could otherwise arise in a transfer pricing dispute.” Based on the guidance currently presented in the Discussion Draft, we believe that the OECD has not yet achieved an appropriate balance. In this regard, as further described below, we recommend that the OECD introduce certain safeguards with respect to the relevance of information that taxpayers are required to produce.

Section B. Objectives of transfer pricing documentation requirements

The Discussion Draft identifies three reasons for requiring transfer pricing documentation. The third objective (i.e. “to provide tax administrations with the information that they require in order to conduct an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction”) implies that transfer pricing documentation should contain sufficient information for a tax administration to conduct a transfer pricing audit. Requiring taxpayers to include all information in their transfer pricing documentation that would be required to conduct a transfer pricing audit would in our view impose a disproportionate administrative burden on taxpayers and is in any case clearly impractical, since taxpayers cannot know in advance what information a tax authority might wish to review in order to progress any possible transfer pricing audit. In our view stronger wording is needed that clearly indicates that there is a difference between the amount of information that is required for transfer pricing documentation purposes and the amount of information that may be needed for purposes of conducting a transfer pricing audit.

B.1. Transfer pricing risk assessment

The Discussion Draft raises the question whether work on BEPS action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. We would like to reiterate our comments made in respect of the OECD Risk Assessment Handbook and the White Paper. Currently the information that tax authorities require from taxpayers for their risk assessment purposes varies
across countries. Certain countries require very detailed tax return disclosures. Some countries have introduced very detailed transfer pricing information forms. Completion of such forms is a very time-consuming exercise which often requires extraction of significant data from the ERP systems of taxpayers, analysis of these data, and then presenting such data in the format required. For some taxpayers it is in practice often not reasonably possible to disclose the details of all intercompany transactions in certain countries. This also involves costs which for large taxpayers can be material and in some cases can even exceed the amount of potential tax at stake from transfer pricing risks. At the same time, there is no clear understanding as to whether all information required on that form would be relevant and useful for transfer pricing risk assessment purposes by the tax authorities. For example, it is questionable to what extent pricing information about each product sold in an inter-company transaction may be relevant in cases where the profit-based methods are used by taxpayers.

No additional forms should be developed and requested from taxpayers. If additional forms are to be developed and requested, we would urge the OECD to include specific guidance with a view to harmonizing the information that needs to be provided to tax authorities across countries for their risk assessment purposes or for documentation purposes. There also should be a focus on proportionality: the magnitude of information to be provided to tax authorities should be proportionate to the magnitude of the business of a taxpayer in the specific country.

As regards OECD’s question on the sharing of information regarding the risk assessment, we believe that clarity and transparency regarding risk assessment policies could improve taxpayers’ ability to engage constructively and cooperatively during a risk assessment or audit as they would have a better understanding of the possible concerns a tax administration may have. Furthermore, sharing such information could contribute to the efficiency of a risk assessment as it would enable taxpayers to better direct their efforts with regard to transfer pricing documentation and to present information in a manner that suits the tax administration’s need. In addition, clarity regarding risk assessment policies would allow taxpayers to better plan and manage the resources required (e.g., staff and/or advisors). To a certain extent, introducing materiality thresholds and safe harbors also will contribute to an efficient allocation of resources. In practice, even with materiality standards in place, taxpayers will still have to make decisions regarding the extent and depth of the transfer pricing documentation needed. Insight into the general risk assessment would be helpful, would allow taxpayers to prepare relevant documentation, and would help reduce the administrative burden. We therefore believe the OECD should clearly state that tax administrations should share at least their general risk assessment policies with taxpayers. The OECD could consider also providing examples of particular circumstances in which such information should not be shared.

B.2. Taxpayer’s assessment of its compliance with the arm’s length principle

In general, we concur with the statement in paragraph 12 which says that “[w]hile ideally taxpayers will use transfer pricing documentation as an opportunity to articulate a well thought out basis for their transfer pricing policies, thereby meeting an important objective of such requirements, issues such as costs, time constraints, and competing demands for the attention of relevant personnel can sometimes undermine these objectives. It is therefore important for countries to keep documentation requirements reasonable and focused on material transactions in order to ensure mindful compliance on the most important matters.” However, we believe this statement would be more useful for taxpayers and tax administrations if more guidance and definitions were provided for terms such as “reasonable” and “material”. Furthermore, it should be clear for taxpayers what the consequence is of a certain transaction being material or not: for instance, whether safe harbor rules or
exemption from transfer pricing documentation requirements exist for non-material transactions. For more detailed comments, we refer to our section “D.3. Materiality” below.

Section C. A two-tiered approach to transfer pricing documentation

C.1. Master file

Paragraph 18 states that “The master file should contain common standardized information relevant for all MNE group members” and that “[i]ts purpose is to elicit a reasonably complete picture of the global business, financial reporting, debt structure, tax situation and the allocation of the MNE’s income, economic activity and tax payments so as to assist tax administrations in evaluating the presence of significant transfer pricing risks.” We believe that not all information mentioned in this sentence is actually relevant for all MNE group members.

Information that is only relevant for one entity or a group of entities should not be included in the master file and should be shared through another mechanism: in our view, that should be exchange of information under tax treaty mechanisms. The OECD tax treaty mechanism includes safeguards to maintain confidentiality and to avoid fishing expeditions. The fact that some countries do not have an extensive treaty network can be addressed through the multilateral instrument to be developed under BEPS action 15. Therefore, in our view it would be best practice for one tax administration to be responsible for enforcing compliance with respect to the master file, in particular the country in which the ultimate parent company of the MNE group resides, and to share the information upon request through tax information exchange mechanisms. Note also our similar comments above regarding delivery of the country-by-country reporting template to the parent jurisdiction.

This is particularly relevant in respect of information regarding MAP matters and APAs. We appreciate that such information may be of relevance with respect to certain entities. Including information on MAPs and APAs in the master file would not contribute to the bigger picture view or to the risk assessment in the countries outside this limited circle. At the same time, inclusion of information on MAPs and APAs could well lead to – unwarranted – audit activities and positions. Therefore, inclusion would be a perverse incentive for taxpayers not to enter into APAs and MAPs. This is clearly contrary to the general objectives of the OECD and in particular the objectives of action 14 of the BEPS Action Plan. Information on MAPs and APAs therefore should only be included in the relevant country files, or, if they are to be included in the master file, should only be exchanged through the tax treaty mechanism.

One of our concerns with respect to the master file is that it is not clear which tax administration should be formally responsible for reviewing and enforcing a MNE’s compliance with transfer pricing documentation rules regarding the master file. It seems that an MNE may be legally required to have such documents available in all countries in which it has taxable presence. This raises issues regarding the potential for confidentiality of the information to be breached. Without further guidance, this could also mean that a MNE is potentially exposed to penalties for non-compliance in all of these countries. Therefore, even a small, inadvertent mistake effectively may lead to great consequences. In our view it would be best practice for one tax administration to be responsible for enforcing compliance and reviewing quality with respect to the master file requirements, in particular the country in which the ultimate parent company of the MNE group resides.

We welcome the statement in paragraph 21 that the country-by-country reporting template should not be a substitute for detailed transfer pricing analysis. At the same time, we are concerned that the last sentence of paragraph 21 could be interpreted as the template providing evidence, albeit not conclusive evidence,
regarding transfer pricing. We recommend that the OECD clarify that the template information should not constitute evidence at all, and that only a detailed transfer pricing analysis can be used to prove whether transfer prices are correct or not.

The master file introduces a new concept: “important” in relation to service arrangements, risks, assets etc. The Discussion Draft does not define important, neither does it delineate it from ‘material’. We recommend that the OECD either clarify that this is for companies to explain what concept of importance has been used or provides a definition of the concept.

Section D. Compliance issues

D.1. Contemporaneous documentation

Paragraph 25 suggests that taxpayers should be required to set actual prices at arm’s length before entering into a transaction, and then also confirm an arm’s length outcome. The timing issue was raised before by the OECD in the June 2012 request for input on administrative practices. We refer to our contribution dated 12 September 2012. The statement in the Discussion Draft is confusing, as it seems to require taxpayers to follow both the price setting and the outcome testing approach. The two approaches are difficult to reconcile.

In our view taxpayers should have a choice between price setting and outcome testing. We are of the opinion that in principle the tax administration should follow the approach applied by the taxpayer. So if the taxpayer applies an ex-ante approach on a reasonable basis and the application of such an approach is allowed in that country, the tax administration should respect this method and should be very restrained in applying post-transaction date developments given the risk of hindsight. We recommend that the OECD clarify that both price setting and outcome testing are acceptable as an approach.

The Discussion Draft refers to the financial results at the time of filing its tax return. However, we would like to note that in practice taxpayers also may perform outcome testing at an earlier point in time than the preparation of their tax return. The OECD may consider replacing “at the time the tax return is prepared” by something like “at the time the ex-post approach is applied”.

D.2. Time frame

We believe taxpayers should be granted a reasonable period to prepare the documentation in its suggested form. We refer to our comments on implementation of the changes below in section E.

D.3. Materiality

We recommend introducing specific guidance or definitions for “materiality”. Such guidance or definitions should take into consideration the significance of the transaction and certain features of the transaction. The significance of the transaction depends on the amounts involved (absolute or relative) and the potential tax impact. In this regard, the possible aggregation of transactions should be taken into account. Features of a transaction that may be relevant for determining its materiality could be its frequency (e.g. recurring or one-off), the complexity of the transaction or the functionality with respect to this transaction and the type of transaction (e.g. a routine service or a transaction involving intangibles).
In addition to providing further guidance with respect to “materiality” we believe it should be clear for tax administrations and taxpayers what the consequences are: for instance (partial) relief from transfer pricing documentation requirements (e.g. no economic analysis required) or penalty protection.

In our view the proposed requirement in paragraph 30 for SMEs to complete and file the country-by-country reporting template would likely be an unacceptable compliance burden for SMEs and most particularly for enterprises at the smaller end of the SME spectrum. We recommend that the country-by-country template should be required from SMEs only upon request from tax authorities, in the same way suggested with respect to other information and documents about cross-border transactions.

**D.6. Language**

We welcome the view that the master file should be in one common language, i.e. English. The Discussion Draft states that the local file should likely be prepared in the relevant local language. This requirement would unnecessarily increase the compliance burden. As we expressed in our comments on the White Paper, translation of documentation may be required in certain situations, but due to the cost of translating documents a judicious approach needs to be taken. Therefore, documentation should only be required to be translated if the tax authorities affirmatively request a translation; in the case of such a request, the taxpayer should be allowed a reasonable period of time to produce it.

**D.7. Penalties**

We reiterate our above comment that penalties for the master file should not be duplicative. The headquarters country tax authority should have sole responsibility for considering and addressing whether or not the MNC group has reasonably satisfied the master file requirements. No duplicate penalties at the local level should be levied.

**D.8 Confidentiality**

As indicated above, the master file should be limited to information that is relevant for all entities and all tax authorities. Sharing information that is relevant to some countries only should be done under tax information exchange procedures so as to safeguard confidentiality and to prevent “fishing expeditions”.

**D.9. Other issues**

We strongly disagree with the suggestion in paragraph 42 that merely because local comparables might be reasonably available, a regional comparable set would fall short of the requirement to use the most reliable information. In our view, unless there are clear economic differences between markets from which regional data are drawn, there is no reason to suppose that a regional comparables set would give less reliable information than a local comparables set. Indeed, in many cases we believe that using a wider regional set is likely to give a more reliable answer than using a single-country set, because with a larger potential pool of comparables, it should be easier to find comparables that are economically closer to the tested transaction, and the impact of random variation will also be diluted. The country from which a comparable is drawn is, after all, just one comparability factor, and in our view is often not an important one.
We are concerned that paragraph 42 may encourage tax authorities to disregard by default documentation studies that do not use local comparables (which is a commonly used approach by MNEs), impose penalties for not attempting to obtain local comparables, or both. Such an approach will simply drive up compliance costs for taxpayers with no apparent benefit in terms of better adherence to arm’s length prices. We also note that this approach appears to be contrary to the approach promoted by the EU JTPF in relation to the use of pan-European comparables.

Section E. Implementation

Given the significant efforts companies will have to make to prepare the documentation in the format and detail as suggested by the OECD, clear rules with regard to the timing of implementation should be set. If the OECD should decide to require the master file to be obtained by local taxing authorities directly from local affiliates, this would mean that the requirement to prepare the master file would start with the first country that introduces the master file obligation in domestic law. We strongly urge the OECD to ensure that MNC groups would be allowed sufficient time to prepare for any such future changes.
Comments on the Discussion Draft on Transfer Pricing Documentation and Country-by-country Reporting

Dear Sir or Madam,

Thank you very much for the opportunity to comment on the Discussion Draft on Transfer Pricing Documentation and Country-by-country Reporting (“CbCR”) as of 30 January 2014. We are firmly committed to the success of this project and are pleased to assist in its development. We would like to share a few thoughts that are based on our practical experience of advising multi-national enterprises (MNEs) in matters of transfer pricing, dispute resolution and information exchange.

General Comments on Country-by-country Reporting

The OECD intends to develop rules requiring MNEs to provide all relevant tax authorities with information on their global allocation of income, economic activity and taxes paid on the basis of a common template (“CbCR Template”). The purpose of these rules is to enable the tax authorities to conduct a transfer pricing risk assessment as the basis for preparing and conducting a thorough transfer pricing audit, while new extensive compliance burdens for the taxpayers should be minimized. From our point of view, however, there is a significant risk that the current version of the CbCR Template might either result in misinterpretations and/or a rejection of the internationally accepted arm’s length principle (“ALP”) in favor of the application of a formulary apportionment by tax authorities.
In particular, the current draft version of the CbCR Template requires taxpayers to provide information on the income, taxes paid, revenues, number of employees (and related expenses) as well as tangible assets (and generic business activities). This draft does not, however, make any reference to any request for information on the taxpayer’s functional profile. Therefore, tax authorities are enabled to apply a formulary apportionment based on revenues etc. in order to both verify the reported (taxable) income and conduct the risk assessment. For instance, this could result in misinterpretations if the local taxpayer acts as a routine company like a contract manufacturer. Such a contract manufacturer might have a large number of employees, extensive tangible assets (production equipment) and substantial revenues from the sale of products to its related principal. However, a contract manufacturer would be only entitled to a low, but stable routine return under the ALP due to its limited risk profile. The application of a formulary apportionment for a risk assessment by the tax authorities could, therefore, mean that any routine company is wrongly characterized as “a high risk company”, falsely giving rise to an extensive transfer pricing audit.

Moreover, it seems to be disproportionate that every lower tier company’s residence country should have access to the master file (including the country-by-country data) of MNEs. Rather, this country should have only information on group companies located there and on their intra-group transactions.

Overall, from our point of view the expected benefits of the CbCR do not outweigh its risks and additional compliance burdens. In particular, the following issues have to be taken into account:

- Information provided by CbCR is not necessary for the preparation and conduct of thorough transfer pricing audit under the ALP; instead the (extensive) information provided by the transfer pricing documentation is sufficient for this purpose;

- Risk of misinterpretations of the ALP by tax authorities leading to a global profit split approach;

- Risk that information and data provided by MNEs are not treated confidential;
Unreasonable costs incurred by the collection and provision of the new country-by-
country data for MNEs considering the already existing documentation requirements.

Against this background, we recommend to reconsider the introduction of the CbCR.

**Further Comments**

**1. Production of Information and Documents**

A taxpayer’s obligation to provide tax authorities with information they need to conduct thorough transfer pricing audits requires some legal foundation in the form of duties to co-operate in tax matters. Such duty has to be part of the respective domestic legal provisions. However, even in a case where such duties are being implemented, tax authorities are only entitled to request information and data (e.g. annual financial statements) that taxpayers are effectively able to procure legally as well factually. In our view, this applies particularly to the case where a lower tier group company is requested to submit any (financial) information on its ultimate parent company, as in those cases lower tier group companies are not usually legally entitled to furnish such information, e.g. financial statements, income statements or certain ratio analyses of the ultimate parent company.

**2. Global or Segmented Master File**

If MNEs’ various business divisions have a similar structure so that the principal company is one and the same for all the business divisions, an entity-wide master file is preferable for reasons of efficiency. If the various divisions operate with an allocation of functions and risks different from that of the other group companies (e.g. operating with contract manufacturers in division A and fully-fledged manufacturers in division B), a separate analysis of functions and risks is required for each division. However, from a formal perspective, such information could be included within one entity-wide master file (with separate chapters for each division of business) or within separate master files each relating to one division.
3. Materiality, Frequency and Language

We welcome the statement that not all intra-group transactions are sufficiently material to require full transfer pricing documentation. In our view, it is one of the key points to keep transfer pricing documentation requirements reasonable and to make the increase of compliance costs bearable for taxpayers in order to ensure documentation compliance on the most important items. Otherwise, taxpayers could become so overwhelmed with data collection that they fail to consider and document the most important matters in both the master file and the local file. Therefore, we wish to point out that, from our observations, many companies and permanent establishments (PEs) within MNEs account for only limited added-value to the whole group activities and are even not involved in cross-border transactions. In light of the above, it does not seem to be appropriate to make such compliance demands of each single entity.

However, absolute thresholds alone (e.g. consolidated group revenues of €10m) under which no documentation and reporting is required do not seem appropriate, because any small companies of medium-sized MNEs would have to bear the full compliance burden. Therefore, materiality thresholds should, in addition, be based on the overall intra-group transactions volume or another easy-to-determine point of reference, e.g. the multinational group’s consolidated revenue. A 5% materiality threshold does not seem to be unreasonable.

Moreover, we agree with the statement of the OECD that transfer pricing documentation and comparables should be reviewed and, if necessary, updated annually and every three years, respectively. Such frequency of documentation reviews and updates is reasonable, taking into account that taxes are, in principle, imposed on an annual basis.

Further, we welcome the OECD recommendation that the master file should be prepared in English and the local file in the relevant local language. On the basis of our experience, translations that are only to be prepared upon specific request by tax authorities fulfill the need of both tax authorities and taxpayers. In our view, however, translation requests should be restricted to relevant parts.
4. Penalty Regime

We welcome the OECD attempt to promote a standardized approach to transfer pricing documentation. In our view, however, standardization should not be limited to the information needed. Rather, more consistent transfer pricing documentation rules among countries also require uniform limitations to documentation-related penalty regimes. In particular, we observe large discrepancies between penalty amounts among countries, also in the case of common economic areas like the EU. Country practices go so far that penalties might even exceed transfer pricing adjustments. Considering the fact that penalties cannot be credited for tax purposes, this would result, in effect, in “double taxation”. Therefore, it is our opinion that a penalty threshold should be set. For instance, the penalty may not exceed the taxes paid concerning the transfer pricing adjustment.

Furthermore, country (mal)practices can be observed, according to which taxpayers’ waiver of mutual agreement and arbitration procedures (MAP/AP) reduces the penalty amount. Such malpractice has the (intended) consequence of reducing the incentive for MNEs to seek MAP/AP, which have so far been successful mechanisms for reducing disputes and increasing transparency between tax authorities and taxpayers. Therefore, we recommend that the OECD expressly rejects such malpractice.

5. Confidentiality and Secrecy in Tax Matters

Requesting taxpayers to provide (foreign) tax authorities with sensitive information calls for safeguarding taxpayer’s fundamental right to the certainty that respective information and data are treated confidentially. It is of utmost importance to ensure that sensitive information is not being provided to countries lacking mechanisms to keep data confidential. Hence, imposing obligations on taxpayers to not only provide sensitive information to domestic but also to foreign tax authorities essentially involves the necessity to extend the taxpayer’s right to rely on secrecy in tax matters across national borders.

6. Implementation and Filing Jurisdiction

We recommend that the master file should be only prepared in the jurisdiction of the MNEs headquarters in order to reduce compliance burdens for taxpayers. Sharing information, such
as the master file, should only be possible between tax authorities on the basis of the information exchange provisions stipulated in tax treaties. This is, from our point of view, a successful mechanism for the exchange of information and data between tax authorities.

We are looking forward to the further process and hope that these brief remarks will contribute to the further discussion of the topic.

Yours sincerely,

Dr. Xaver Ditz  Dr. Sven-Eric Bärsch  Dr. Sven Kluge  Dr. Carsten Quilitzsch
Fidal is delighted to present its comments to the OECD on the above Discussion Draft. Our comments are organized in response to the OECD’s specific request for comments in that document and we are grateful for the opportunity to do so.

**General Comments**

We think it is worthwhile, because of the speed at which many of the current OECD transfer pricing initiatives are proceeding, to pause and consider the policy considerations underlying the various projects.

It seems to us that in this effort to standardize transfer pricing documentation, the OECD is at risk of repeating what other multinational forums have done: create an aggregate list of everything desired by all tax authorities worldwide to perform a thorough transfer pricing audit, while not considering the burden that this causes on taxpayers.

We believe not only does more mandatory documentation mean a greater workload for taxpayers, it also means more time to be spent by tax authorities in reviewing and auditing transfer pricing transactions which results in an implied or express expectation of sizeable adjustments. In some jurisdictions, auditors have “official” or “unofficial” adjustment targets based on the number of hours spent on a file (or other targets or incentives for proposing large adjustments). Thus, having to produce and review more documentation is more onerous on taxpayers and tax administrations and arguably creates a bias favouring adjustments triggering double taxation. This is likely to exacerbate the problems faced by the various competent authorities worldwide in trying to deal with the workload of their mutual agreement procedure (MAP) programs, cause longer delays in resolving double taxation, and/or give rise to more cases where double taxation is unresolved.\(^1\)

It is also our experience that many tax authorities do not currently have the resources to properly review transfer pricing documentation prepared pursuant to the existing requirements. In many instances, transfer pricing audits begin and proceed seemingly without regard to the documentation that was prepared by the taxpayer.\(^2\) This generates frustration for the taxpayers concerned who have prepared such documentation. There is a serious concern that, aside from the CbC (which presumably will be systematically reviewed by

\(^1\) In this respect, we favour the inclusion of mandatory arbitration provisions as part of a revision of the MAP provision which could be inserted in the multilateral instrument provided for at BEPS action item 15. This would virtually guarantee timely resolution of all double taxation cases.

\(^2\) It might be useful to consider inserting a very strong recommendation for tax authorities to review transfer pricing documentation as prepared by taxpayers and to provide their views on such documentation before beginning to ask for other documents or to ask transfer pricing-related questions.
tax authorities prior to transfer pricing audits), the OECD’s recommendations contained in the Discussion Draft will only exacerbate this situation.

A risk assessment approach to transfer pricing would be welcome step for more efficient tax audits and better cooperation between tax authorities and taxpayers. However, we are concerned that the current Discussion Draft does not differentiate between what information is needed to perform a risk assessment (and presumably save time and expense for both tax administrations and taxpayers) versus that needed to perform a full transfer pricing audit. It seems to us that, although the Discussion Draft mentions the potentially significant increase in compliance costs for taxpayers, it does very little to relieve it. Thus the result of the Discussion Draft increases the compliance burden for multinational enterprises, while providing no comfort or guarantees that compliant taxpayers will face fewer audits and/or transfer pricing adjustments.

In addition, we believe that the OECD should set up a monitoring program whereby tax authorities would have to report on their respective “investments” in transfer pricing audits relative to the tax revenues generated. For any given transfer pricing adjustment, for example, a tax authority would have to provide information relating to the rationale for transfer pricing audit; the investment in audit hours and external costs; the transfer pricing adjustments made; and the ultimate resolution pursuant to MAP or court decisions and so on. This would enable tax authorities and the OECD to evaluate whether tax authorities are making the best use of a risk assessment approach to transfer pricing.

**Specific Comments**

1. **B1 Transfer Pricing Risk Assessment**

   *We would not welcome a requirement in BEPS Action 13 for additional standard forms and questionnaires.*

   We consider that transfer pricing documented related compliance is already sufficiently burdensome on taxpayers and that any useful and relevant information is already covered in the Discussion Draft’s Master File, CbC and Local File approach. This fact should be borne in mind constantly and any such requirement should not be extended without good reason. Standard forms or questionnaires would only be useful to the extent that the risk assessment process could be further streamlined by the OECD with the forms or questionnaires used instead of, or as replacements for, some or all of the information which is currently proposed for inclusion in the Master File and Local File.

   Where tax authorities have the burden of proof in the first instance, such as in France, taxpayers should not be required to act as their own internal tax auditors producing vast quantities of information that may not in the end even be looked at by a tax authority. Given the significant effort likely to be involved, this may prove to be an unprofitable waste of time and resources for both taxpayers and tax authorities alike, if the latter feel obliged to look at it.

   Targeted questions on the formal opening of tax audit procedures are fairer to both parties and more likely to elicit the kind of specific information which tax authorities are seeking. One size fits all rarely fits anyone.

   *We welcome the sharing of risk assessments with taxpayers.*

   In countries where this is already done (not France), it is very helpful so that taxpayers can focus their efforts and budgets on the areas of transfer pricing most of interest or concern to tax authorities. The sharing of the risk assessment criteria and determination by the tax authorities would assist taxpayers in understanding which part of their business/transactions is creating
concerns for tax authorities, and perhaps remedy those issues if possible. This would allow for better relationships between tax authorities and taxpayers and pave the way for more streamlined transfer pricing audits.

2. **B3 Transfer Pricing Audit**

There are many reasons, such as those related to commercial sensitivities, trade secrets and the like, that mean that subsidiary companies in a multinational group do not have access to all information about the business of the group outside of their jurisdiction(s).

The OECD should bear in mind local country laws that may prevent taxpayers from disclosing information that is not in their power or possession, or requiring them to obtain it. Subsidiary companies do not necessarily have access to information on other group companies unless it is disclosed publicly or to them. Thus it may not be possible to insist on its production.

In this context, we consider that there is already sufficient provision for this in most double tax treaties and we suggest that exchange of information powers continue to be used. In our view there is no need to make additional provision for such in the OECD Guidelines.

3. **C1 Master File**

*Master File by entity or line of business*

We suggest that taxpayers be left to decide whether to prepare Master File documentation on a business line or enterprise wide basis. For some highly diversified groups, the former may make most sense, for other more homogeneous groups, the latter may be the better approach.

The extent to which business line information should be shared between jurisdictions is probably best determined by whether the particular group operates in a jurisdiction. For example, if an entire range of distinct products is not sold, or an entire business division does not operate in a territory, it is perhaps better to consider excluding this information in order not to waste time and resources for both taxpayers and tax authorities.

The final part of this question seems to us to be otiose. If taxpayers are required to prepare complete transfer pricing documentation covering all relevant transactions with related parties, then tax authorities should, in the first instance, be indifferent as to whether this is done on an enterprise wide or business line basis. In many jurisdictions if documentation is found wanting and adjustments are sustained, penalties usually follow. This seems to be us to be sufficient incentive for taxpayers to ensure correct disclosure and compliance.

*Country by country reporting*

We suggest that this is reported separately. Tax authorities may find it useful to ask for the CbC first and then later ask for the Master File in targeting taxpayers for audit in order to avoid having to examine a great deal of information. This could be part of a more efficient risk assessment process. Another option would be to consider the CbC and the Local File before requiring the provision of the Master File and its review.³

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³ See our General Comments at the beginning of this memorandum.
We believe that it should be left to the relevant multinational enterprise to determine, based on its own facts and circumstances, whether a bottom-up or top-down approach would be most appropriate.

The OECD should note that this requirement is likely to add significantly to taxpayers’ compliance costs in terms of time and expenses, including possibly the need to change elements of reporting systems. This should not be underestimated.

We suggest that the CbC template be completed on a country basis, rather than an entity basis as this is the overall data which tax authorities are seeking. However where this would involve the production of country consolidated reporting which is not otherwise prepared, we do not think it would be reasonable to require this given the significant costs likely to be involved. As such, entity reporting may be more straight-forward. However, again, we suggest taxpayers be given a choice on this to best fit their facts and circumstances and allow them to minimize costs.

The determination of cash tax paid or tax accrued for CbC reporting is probably a question for tax administrations to respond to, as it depends what kind of data is being sought. If effective tax rate is a key component of risk assessment then, the accruals basis is more relevant.

As with the corporate tax disclosure, the question on reporting withholding tax is one for tax authorities and depends on the data they are trying to access. Its disclosure should probably not entail significant additional compliance costs.

Similarly the level of disclosure on cross-border transactions and the type of transactions to be disclosed are questions more properly answered by tax authorities. The OECD seems to have highlighted the more significant and potentially contentious ones, in our view.

The reporting of business activities and so on would be extremely burdensome and duplicative of the extant transfer pricing reporting requirements. We suggest that such repetition be avoided. The business activity codes seem to us to be sufficient in this regard.

4. **D3 Materiality**

As mentioned in earlier comments to OECD, we consider that taxpayers are best placed to determine whether any of their related party transactions are immaterial or not. Trying to devise specific guidance in this area is likely to be extremely difficult. To the extent that tax authorities disagree with reasoned tax payer assessments of materiality however, we suggest some safeguards are put in place to prevent the levying of penalties that might otherwise ensue. This is an area where the OECD might be able to relieve some of the additional burden imposed by the Discussion Draft. We believe that a proper materiality threshold would feature a two-pronged test based (1) on the amount of a given transaction and (2) on its relative size within the multinational enterprise’s business. Some countries have attempted to define materiality for transfer pricing reporting, such as in France where details on transactions or groups of transactions over 100,000 EUR now have to be reported to the tax authority on an annual basis.

5. **D5 Frequency of documentation updates**

Paragraph 34 is a helpful statement and we do not think this raises any issues for the consistent application of the most appropriate transfer pricing method.

6. **D6 Language**
Our suggestion, for efficiency and cost-effectiveness, is that both the Master File and Local Files be prepared and accepted in English in principle. To do otherwise would involve potentially unnecessary translation work in preparing the local files. Where tax authorities are unable or unwilling to read local files in English, then we suggest they be empowered to request translations but only on tax audit, as is the practice in France. This would save compliance costs in relation to financial years not subject to audit.

7. **D8 Confidentiality**

This area is a major concern for taxpayers, who must be assured that whatever information is disclosed to tax authorities anywhere in the world, it must be kept confidential. Unfortunately, there have been instances where confidential information, including the fact that a transfer pricing adjustment may have been proposed, has been leaked publicly. We are concerned that such disclosures, although illegal in many jurisdictions, cannot be contained. Thus, we suggest that the OECD Guidelines be amended to provide that taxpayers cannot be forced to disclose confidential information that, if disclosed publicly, may harm their competitive position (such as trade secrets, etc.). The OECD Guidelines could also provide for a mechanism whereby taxpayers could show tax authorities certain confidential documents for on-the-spot consultation, but without allowing them to make copies and, obviously, without the authority to reference such materials explicitly in any transfer pricing analysis.

8. **E Implementation**

In our view the Master file should not be required to be filed in any jurisdiction without the commencement of formal audit procedures following a determination pursuant to a risk assessment based on the CbC and Local File that a transfer pricing audit is warranted.

9. **Annex**

While it is understandable for tax authorities to wish to see the nature of rulings granted by other tax authorities, in practice, it may be difficult to comply with this requirement because, in some circumstances, some tax authorities mandate that certain rulings or APAs be kept confidential from other tax authorities. This is a very real issue in France, where as part of recently enacted law, taxpayers are required to make such disclosures. Thus, taxpayers would face the dilemma of complying with one set of rules while contravening another. In order to avoid these issues, which place taxpayers in a double bind, we believe that it would be best not to force the disclosure of rulings, APAs, etc. but, rather, rely on the CbC and Local Files to identify areas where issues justifying greater scrutiny exist.

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Dear Sirs and Madams,

Financial Services Industry Working Group Response to the OECD Discussion Draft on Transfer Pricing Documentation and Country by Country Reporting

Section 1: Introduction

The Financial Services Industry Working Group (the “FSI Working Group” or “Group”) thanks the OECD for the opportunity to provide comments and feedback on the Discussion Draft of Transfer Pricing Documentation (“TPD”) and Country by Country (“CbC”) Reporting (the “Discussion Draft”). The Group is a coalition of financial services institutions within the Banking, Investment Management and Insurance industries headquartered across the globe. The FSI Working Group believes that the Discussion Draft will have a significant collateral impact on its industry which may not have been intended or anticipated. The FSI Working Group therefore believes it important that the OECD understand and takes account of this impact in its work going forward.

The Group is concerned that the approach proposed in the Discussion Draft fails to achieve the goal of balancing “the usefulness of the data to tax administrators for risk assessment and other purposes with any increased compliance burdens placed on taxpayers.” In addition, we are concerned that the ambitious time frame for concluding this Action Item will not permit sufficient opportunity for input from, and consultation with, the business community to ensure that the guidance ultimately adopted can be successfully implemented in practice. The Group requests that the OECD consider issuing another draft and holding another consultation or comment period given the significant impact this guidance will have on all parties.
**Section 2: Impact of Draft on the Financial Services Industry**

1. The FSI Working Group supports the three objectives for TPD the OECD lists as requirements in paragraph 5 of the January 30, 2013, Discussion Draft, as well as the desire for useful CbC reporting. However, the FSI Working Group considers that, as currently proposed, the burdens placed upon the Financial Services (“FS”) sector by the proposals far outweigh the benefits that the OECD may derive from the new approach.

2. As a general matter, financial sector entities already disclose a significant amount of detail due to the highly regulated nature of the business. Further, many FS businesses operate significantly in branch/PE form and therefore, are largely subject to the KERT based approach adopted as the Authorized OECD Approach (“AOA”) for the application of Article 7 of the OECD Model Double Tax Treaty (the “OECD Model”). Further, for those FS businesses that operate via separate enterprises, a commonly utilised TP methodology is a profit split, although other methods are also frequently utilised. When all these factors are considered, it is the view of the FSI Working Group that the FS industry should not give rise to the base eroding concerns that may be present in other industries. The transfer pricing/profit attribution “value creation” model in FS largely follows where the people are located (and rewards capital, where relevant), and the existing OECD rules for the industry are considered sufficient for the administration of the tax system.

**Section 3: General Overview**

3. The Group is concerned that the two-tiered approach to TPD and the CbC template proposed in the Discussion Draft will result in an enormous implementation and compliance burden on taxpayers and present an unnecessary opportunity for proprietary and sensitive information to be misused.

4. It is with this in mind, that the FSI Working Group respectfully asks the OECD to adopt: (1) a better cost/benefit balance with respect to the information recommended to be gathered by taxpayers; (2) the most stringent confidentiality regime possible – requiring the master file and CbC template be submitted to the parent company’s home tax authority and distributed only through tax treaty instruments (together with penalty mechanisms for countries that violate confidentiality provisions); (3) consistency, globally, in the implementation of the two-tiered documents, including the contents of the local file, and an effective date contingent upon all OECD countries adopting the requirements; (4) flexibility in the derivation and form of data collected; (5) the application of materiality thresholds for small or low risk entities or transactions; and (6) improved dispute resolution mechanisms to address transfer pricing controversy, including improved arbitration provisions, potentially also including baseball-style arbitration.

5. With respect to the first point on the cost/benefit, there are a number of ways a better balance can be achieved. First, the purpose of the master file and CbC template might be revisited. As risk assessment documents, the information requested should not be highly detailed, but merely
sufficient to determine if further inquiry is required. The FSI Working Group considers that the current proposal for the documentation that is to be submitted goes materially beyond what is required for the stated purpose of the risk assessment function.

6. The information requested on the proposed CbC template can be reduced to country and or constituent entity, business activity codes, revenues, earnings before income taxes, and income tax paid. The Group considers that information on assets, and intercompany flows regarding royalties, interest and service fees should be removed from the CbC template and left to the local file. The other items should be removed and left to be dealt with in the course of any audit, etc. to the extent necessary. The Group understands the desire for information about the number of employees and total employee expense; however, detailed guidance regarding the definition of “employee” and the calculation of employee expense will be necessary before these items can meaningfully be reported by taxpayers. Lastly, it would be helpful if the OECD made it clear that the CbC template does not require certification. For large organisations, if the information needs to be certified by the Chief Financial Officer (“CFO”) or another responsible officer, then there is likely to be a requirement to build a control procedure within the organisation to be able to give the certification. This will require time and effort to accomplish without providing much additional value as a risk assessment tool.

7. With respect to confidentiality, this is a paramount concern for the FSI Working Group. The Group considers it very important that strict confidentiality requirements are observed by tax authorities regarding both the CbC template and the master file. Additionally, the Group is concerned about existing data protection rules and would welcome guidance on how these rules are impacted by the OECD’s proposals under the Discussion Draft.

8. Regarding consistency, the FSI Working Group believes that unless the OECD members and G20 tax authorities adopt the documentation proposal as ultimately approved, there will be an ever increasing burden on taxpayers to comply with the peculiarities of each tax authority’s approach to the proposal. Additionally, a consistent date for implementation will give taxpayers time, on a global basis, to prepare systems to deliver the new reporting requirements.

9. The FSI Working Group considers that flexibility in the derivation and form of reporting is important in order to meet the demands of the data requested in the CbC template and the master file. As long as taxpayers adopt a consistent approach in the information they provide, whether top-down or bottom-up financial data used, etc., tax administrators should receive sufficient information in order to perform the risk assessment they seek. This flexibility should be extended to information sought in the local file, as well.

10. The FSI Working Group believes that the OECD should give guidance with respect to materiality thresholds for the purposes of applying the reporting requirements under the new regime. Not only should there be exemptions for the size of an entity, but there also should be exemptions for entities already subject to similar reporting regimes (e.g., for those already subject to EU Reporting under Capital Requirements Directive IV) and exemptions for business lines with little
or no cross-border transactions. Additionally, there should be a requirement that the taxpayer should have a specified majority ownership interest in another entity in order to be required to include that entity in either the CbC template or master file. Like the flexibility point above, the Group believes that materiality threshold guidance should be extended to the local files, as well.

**Section 4: FSI Working Group consensus responses to OECD questions**

**Transfer pricing risk assessment**

Comments are requested as to whether work on BEPS Action 13 should include development of additional forms and questionnaires beyond the country by country reporting template.

11. Paragraphs 5.1 to 5.3 outline the objectives for requiring TPD. These are to allow tax administrations to conduct “an informed transfer pricing risk assessment” to ensure taxpayers have due regard to transfer pricing requirements when pricing transactions and reporting income, and to provide tax administrations with information to conduct an “audit of transfer pricing practices of entities.” It is clear that tax administrations are seeking to have relevant information which seeks to meet the requirement of both a risk assessment (Para 5.1) and an audit of transfer pricing (Para 5.3) through the two-tiered approach of TPD and the CbC reporting template.

12. The FSI Working Group is supportive of the simplification of reporting and reduction of the compliance burden on preparing TPD. Currently, there are materially different standards and requirements for the production of TPD across jurisdictions, and this makes the process of compliance both cumbersome and resource intensive. As such, the FSI Working Group supports a standardisation of the framework for TPD across countries to reduce this compliance burden on taxpayers.

13. The use, therefore, of narrowly tailored standard forms and questionnaires across jurisdictions which allow information to be gathered in a manner which reduces compliance costs and promotes efficiencies should be predicated on a working assumption that these would replace existing questionnaires/forms and would not be incremental to such existing requirements. An approach which is incremental would serve only to increase compliance burdens without achieving what should be a minimum objective of a common accepted framework for transfer pricing risk assessment.

14. The FSI Working Group further advocates the adoption of safe harbours to reduce the compliance burden with respect to the documentation process, such as those for small and medium enterprises, low materiality transactions, and those for routine or easily benchmarked functions.
Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers

15. It is considered that sharing the risk assessment with taxpayers should become a standard practice. The relevant discussion of the risk assessment with taxpayers would also benefit from being conducted at an early stage. The FSI Working Group believe that such an early exchange would promote transparency and better relationships with tax authorities as well as help avoid protracted disputes (these would otherwise tie-up valuable resources for both the taxpayer and tax administrations).

Transfer pricing audit

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

16. The FSI Working Group acknowledges that tax administrations need certain information to effectively carry out both a transfer pricing risk assessment as well as a more detailed transfer pricing audit. In this context, however, there are a number of considerations which should be addressed. First, the expanded master file documentation is likely to contain sensitive and confidential information from a commercial perspective. Second, the compliance burden which will fall on the taxpayer must be balanced with a local tax authority’s need for even more data, especially when that data is outside of the local entity’s possession and perhaps outside of the local taxpayer’s authority to obtain.

17. The Group considers that it is of critical importance that the master file documentation be submitted only to the home tax administration of the Multinational Enterprise’s (“MNE’s”) ultimate parent. Required procedures and arrangements to protect the confidentiality of such information prior to it being shared with other jurisdictions should be required. As such, the FSI Working Group believes that the master file documentation should be shared only under the terms of existing tax treaties or Tax Information Exchange Agreements (“TIEAs”) and to the extent the proposed multilateral instrument the OECD is developing under BEPS Action Item 15 has the appropriate level of confidentiality mechanisms, the highest, then that, too. Finally, if the requesting tax administration misuses the information, there should be an agreed framework of sanctions, such as the withholding of the template information in the future from the offending tax authority. The FSI Working Group believes that the information exchanged should only be used by the requesting tax administration to analyse the particular taxpayer’s transactions for the current year, and not for other purposes.

18. The roles and responsibilities of the local entity must also be considered. The local entity may be performing only certain limited functions relevant to the business operation as a whole. As such, that entity may not be aware of intercompany transactions outside its home jurisdiction nor be
able to mandate other local entities to produce documentation. This supports the view of the Group that the production and provision of the required information should be provided by the group parent entity.

**Master File**

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

19. There are various factors that impact what TPD may be produced by a given organisation, including the number of business lines, geographies, and industries that it may operate within. These factors need to be considered in order to determine whether the master file should be undertaken on a line of business or entity wide basis. We would further suggest that materiality as a concept should be further and better defined as part of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“OECD Guidelines”) so as to reduce the already significant compliance burden for MNEs.

20. The FSI Working Group believes that flexibility should be provided to taxpayers in providing the information on a line of business or entity wide basis. If this is not provided, then given the complexity of most MNEs, the compliance burden for most taxpayers (in terms of resource and cost) will be quite significant and disproportionate to the value created by such documentation in meeting the requirements of TPD as set out in Para 5.1 and 5.3.

21. The FSI Working Group would ask the OECD to take this opportunity to provide some practical guidance on mitigating the detailed requirements for low risk or more routine transactions and potential safe harbours that could be adopted on a G20 and OECD perspective.

A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

**Should the country-by-country report be part of the master file or should it be a completely separate document?**

22. The FSI Working Group has some concerns as to how the CbC template is in practice likely to be utilised by tax administrations. In particular, the concern is that the CbC template may be used in the course of conducting a full audit rather than merely as an aid for risk assessment purposes.
along with the master file. The FSI Working Group also notes the risk for this report to be used as mechanism for de facto formulary apportionment by tax administrations.

23. The Group considers that the CbC template should not be included in the master file but should rather be a separate document which is filed with the MNE’s home tax authority and shared with other tax administrations by tax treaty exchange agreements (including TIEAs and the multilateral instrument discussed above) upon request. In addition, the scope and detail of the CbC template should also be reconsidered, especially with respect to an industry perspective. For example, the inclusion of physical assets for most FS businesses is likely to have limited relevance and will place a compliance burden on producing certain information whose value is extremely limited.

Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

24. Systems capabilities and approach to reporting vary across different FS businesses. As such, it is unlikely that a “one-size-fits-all” approach could feasibly be adopted across all FS businesses. For some, adopting a “bottom-up” approach is likely to be a preferred approach and impose less of a systems and compliance burden. However, for others, the opposite is likely to be true for the “top-down” approach. In either case, the impact on systems and the changes required will mean for most FS businesses a significant investment of resources to produce the reporting required.

25. Given the varying capabilities and approaches by different MNEs, the FSI Working Group requests that flexibility be provided to MNEs in selecting which approach will be the least cumbersome and most efficient for them to provide the information required. The FSI Working Group understands that taxpayers would need to do this on a consistent basis. Such optionality should provide tax administrations with sufficient information for a high-level risk assessment whilst appropriately balancing the compliance burden on MNEs.

26. Finally, the FSI Working Group requests that consideration be given as to how the various requirements involving the master file and CbC template are imposed on taxpayers. Given that for most MNEs, these requirements will impose a significant immediate compliance burden as well as systems changes that could be quite considerable, the FSI Working Group suggest that a phased approach over a number of years may be a sensible roadmap to allow MNEs to fulfil their compliance requirements in a practical and orderly manner rather than overwhelming most MNEs with a sudden and significant change to their reporting requirements. A recommendation is that only one of the three components of the transfer pricing proposal (i.e., CbC template, master file, and local file) be implemented each year.
Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

27. For the same reasons as listed above, the FSI Working Group advocates that optionality be allowed to MNEs to provide information on an entity-by-entity basis or permit separate individual country consolidations as long as the MNEs report on a consistent basis going forward. In addition, the Discussion Draft appears to require, if available, the source of financial and economic factors (including currency) first from the statutory financial statement, next from the Constituent Entity’s audited financial statement, and finally from the Constituent Entity’s internal management accounts. The Group believes that so long as the MNE consistently uses and identifies the information source, there is no discernible benefit derived from mandating a particular information source for preparing the CbC template.

28. Mandating separate individual country consolidation is likely to be an intensive manual process for many MNEs which would significantly increase their compliance burden. Given the stated aim of the template to be simply used as a high-level risk assessment tool, any proposed approach should allow flexibility for the reporting entity.

Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid?

29. MNEs should be allowed to elect to provide information with respect to either national taxes or all corporate income tax paid per entity per country (depending on how the MNE chooses to report). Accordingly, the FSI Working Group believes the OECD should remove the requirement to report withholding tax paid and instead leave this as an option for taxpayers, as this is likely to be an intensive and manual process for many MNEs that would lead to a significant compliance burden. Additionally, the FSI Working Group recommends providing taxpayers the flexibility in providing additional tax-related information that they deem relevant to their overall tax position.
30. The Group supports the provision of one aggregate number for corporate income tax, per entity or per country, depending on the MNE’s election. We recommend that MNEs be provided with flexibility to report either tax paid or accrued, so long as the individual MNEs report information consistently. However, we note that the current tax accrual would provide for better matching, as it is consistent with revenue and earnings reported in the CbC template. Further, as many organisations operate on an accrual basis, such information may be more readily accessible and provide a lesser reporting burden for MNEs.

31. The Group does caution, however, that there may be numerous book/tax differences, tax attributes, credits, and other items that impact the determination of a tax liability separate from the determination of book income. As a result, cash tax paid will typically not be relevant to arm’s length transfer pricing and the determination of reportable net income subject to tax.

32. The FSI Working Group also suggests tax accruals be the recommended approach for two main reasons. First, they represent a more meaningful balance for risk assessment and transfer pricing purposes. Given the numerous tax/book differences, tax attributes, credits, etc. that impact the determination of tax liability separate from the determination of book income, it is likely that cash taxes paid on a legal entity basis may not be directly relevant to arm’s length transfer pricing and the determination of a reportable net income subject to tax. Second, they are less burdensome to report.

Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

33. The current proposed approach requires that such reporting will need to be included in both the master and local file. This is likely to significantly increase the administrative burden for most MNEs whilst at the same time not being clear in how it will assist the risk assessment for tax administrations.

34. Given that the master file already requires reporting some detail on services, intangibles and financial transactions, to require additional reporting in the CbC template is likely to yield limited marginal value compared to the increased administrative burden it will bring.
Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

35. The FSI Working Group notes that there has been some discussion on the possible use of business codes but believes that such business activity codes may result in a greater taxpayer burden than is merited by any benefit to tax authorities, given the lack of clarity to the application of such codes. That being said, if the business activity codes are going to be used, there is merit in adding a business activity code for “Regulated Financial Services.” There is also merit in adding guidance to which code to apply when an entity has multiple activities. Since more detailed information regarding business activity is already being gathered as part of the TPD and considering the number of reporting entities that many MNEs will have, the FSI Working Group believes that requiring this information as part of the CbC report would impose a manual compliance burden which is not commensurate with a high-level risk assessment tool.

Materiality

Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

36. The FSI Working Group strongly advocates the provision of a definition of materiality and incorporating this within the guidance. This would greatly assist both taxpayers and tax administrations in focusing their resources and efforts consistent with the objectives contained in Para 5.1 to 5.3. It would also significantly assist MNEs in managing their compliance burden with respect to TPD and CbC reporting requirements.

37. In establishing the materiality definition, the FSI Working Group recommends that this should be framed by reference to whether the local entity is material to the MNE Parent. If it is not material, then reporting should not be required with respect to that local entity. Further, materiality could also be assisted by focusing on certain types of transactions and excluding others (such as routine services on which safe harbours could be provided) and a financial materiality amount (with reference to the MNE Parent).
Frequency of documentation updates

Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

38. The Group considers that the suggestion in Para 34 is helpful but could be extended further. This in particular relates to achieving a practical balance between the use of local and regional comparables. The FSI Working Group believes that there should be an acceptance of regional comparables where (1) the compliance burden associated with preparing local comparable searches is disproportionate given the size of the transactions; (2) the risk posed is low; or (3) where the local comparable databases are not available. The FSI Working Group also notes that global comparables can be both practical and acceptable to tax administrations.

39. The FSI Working Group also believes that explicit guidance prohibiting the use of “secret comparables” should be established. In addition, imposing the requirement for taxpayers to manually scour Securities and Exchange Commission (“SEC”) equivalent databases for potential comparables, when regional databases are available and are reliable, would impose a significant administrative burden. In the experience of the Group, it is only relatively rarely that there exist meaningful geographic differences that are critical to the validity of the outcome (e.g., for entities with limited functionality and risk profile which are traditionally the tested parties) so as to require local searches. Accordingly, the Group does not support the need for mandatory local searches.

40. There should also be a focus on the harmonisation of local country-specific requirements with those of the local file requirements. With the introduction of TPD local files, there should be an attempt made to remove any unnecessary or duplicative filings such as country-specific tax return disclosures which would merely be additive to the local file requirements.

41. Finally, the FSI Working Group believes that the introduction of safe harbours for routine functions would greatly assist in tax certainty and reduce the amount of effort expended on associated compliance as well as assisting the focus of tax administrations on the more relevant transactions from a transfer pricing perspective.

42. On the freshening of comparables, we believe that this is a helpful suggestion in Para 34 but could be extended further by allowing taxpayers to utilise a search for three years instead of requiring an annual update (albeit a more limited update), particularly for more routine transactions.
Language

Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

43. The FSI Working Group supports the filing of the master file (and CbC template) in English to the reporting MNE’s home tax authority as this will reduce the compliance burden. We would suggest that flexibility be provided, however, in that if a local file is prepared in the local language, there should be no requirement that it be prepared simultaneously in English. Additionally, the Group suggests the OECD recommend that the master file (and CbC template) only be translated to the local language upon a specific request of the local tax authority.

Confidentiality

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

44. Information should only be accessible between tax administrations through tax treaty mechanisms or via TIEAs (or the multilateral instrument, as discussed above) and should remain confidential. As such, the FSI Working Group believes that specific safeguards need to be put in place to protect the confidentiality of the information. Where such information is requested via a tax treaty or TIEA, we recommend that taxpayers be notified of this. Where tax treaties or TIEAs are not in place, we would recommend that safeguards be put in place to protect local entities from being compelled otherwise to provide this information through the threat of penalties or any other mechanisms.
Implementation

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above.

45. The FSI Working Group believes that master file and CbC template should be submitted only to the reporting MNE’s home tax administration and shared with other tax administrations under tax treaties or TIEAs or other similar protocols agreed by the tax administrations that contain strict protocols for the protection of taxpayer information.

46. A phased approach as described above should also be considered for the implementation of the master file and the CbC template so as to allow taxpayers to prepare for the changes that will be required from an operational and a systems perspective and enable them to allow for an orderly transition to the new reporting regime. We would also suggest that some form of grandfathering process be allowed in this transition period whereby flexibility is provided to taxpayers in how they conform to the new requirements.

Annex to Chapter 5: Transfer pricing documentation – Master File

Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file

47. The FSI Working Group believes that Advanced Pricing Agreements (“APAs”), Mutual Agreement Procedures (“MAPs”) and other tax rulings should not form part of the master file. The purpose of the master file is to allow tax administrations to make an effective risk assessment through gaining a better understanding of the context of the controlled transactions. As such, these private agreements, based on particular facts and circumstances peculiar to the jurisdiction in which they were settled, would not serve this purpose.

48. In addition, the experience of the Group indicates that disclosure of these agreements may be a sensitive matter from a tax authority perspective. Any such, disclosure may therefore in the future make accommodations and settlement more difficult. Disclosure of such agreements may in
practice also give them a degree of “precedential” value which is considered inappropriate and potentially misleading. The Group does not, therefore, support their inclusion in the master file.

On behalf of the FSI Working Group, we respectfully submit the Group’s response to the Discussion Draft.

Yours faithfully,

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The Financial Services Industry Working Group, a coalition of more than 35 financial services institutions within the Banking, Investment Management and Insurance industries headquartered in the Americas, Europe and Asia.
Valente Associati GEB Partners  
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General Comments

1. Introduction

The “Discussion Draft on Transfer Pricing Documentation and ChC Reporting” (“Discussion Draft”), issued on January 30th, 2014 provides for some guidance on transfer pricing documentation and country-by-country reporting. The document includes a proposal to replace the text under Chapter V of the Transfer Pricing Guidelines in its entirety, with the provisions included in the Discussion Draft, as further developed.

The Discussion Draft provides guidance:

- for tax administrations, on the information necessary to conduct an informed transfer pricing risk assessment;
- for taxpayers, in identifying documentation that would be most helpful in describing that their transactions are in line with the arm’s length principle;
- in resolving transfer pricing issues and facilitating tax examinations.

If, on the one hand, it is important that tax administrations are able to access all information that is required to conduct a comprehensive audit, on the other hand, taxpayers should carefully evaluate their own compliance with the applicable transfer pricing rules.
2. Relevance of Transfer Pricing Documentation Requirements

Action 13 of the OECD BEPS Action Plan focuses on the re-examination of transfer pricing documentation and aims at developing rules “to enhance transparency for tax administration, taking into consideration compliance costs for business. The rules to be developed will include a requirement for MNEs to provide all relevant governments with needed information on their global allocation of income, economic activity and taxes paid among countries according to a common template”.

The global business community that engages at BIAC is deeply committed to contribute with inputs in the central work programme of the BEPS Action Plan. The main goal is to ensure that any actions that were implemented provide for certainty, predictability and a level-playing field for businesses.

Transfer pricing is a key issue in today’s globalized world. Globalization enabled companies to expand their activities beyond borders, contributing to a re-organization and optimization of their value-chains on a world-scale, and helping companies maximize their returns. However, as we know, it created distortions at an international level, which contributed to heighten awareness and increase focus on transfer pricing activities, especially by multinational enterprises (MNEs).

In the administration of transfer pricing rules, a most relevant issue is the asymmetry of information between taxpayers and tax administrations. This potentially undermines the application of (and compliance with) the arm’s length principle, and enhances opportunities for the implementation of aggressive tax planning schemes leading to base erosion through profit shifting.

In many countries, tax administrations are frequently not in a position to view taxpayers’ global value chain within the context of a “greater picture”. In addition, national divergences in the approaches to transfer pricing documentation requirements lead to significant administrative costs for MNEs. In this respect, it is important that adequate information about the relevant functions performed by group members in respect of intra-group services and other transactions be made available to all tax administrations involved.

Rules regarding transfer pricing documentation should be developed, in order to:

- enhance transparency for tax administrations;
- tackle base erosion and profit shifting schemes;

taking into consideration compliance costs for businesses.
These should include a requirement that MNEs provide all relevant governments with needed information – on their global allocation of profits, taxes paid, and indicators of the location of economic activity among countries in which they operate – according to a common template (so-called, country-by-country reporting).

In developing clear rules on transfer pricing documentation requirements, also documentation-related penalties should be taken into consideration. Imposing sizable penalties on taxpayers that make considerable efforts to evidence – through reliable documentation – that their controlled transactions comply with the arm’s length principle could be unfair. In this regard, no penalties should be applied to taxpayers that are not able to access data/information requested by tax administrations. However, whenever a decision not to impose penalties is made, this should have no impact on the adjustments to be made to prices that are not consistent with the arm’s length principle.

Valente Associati GEB Partners welcomes and supports any initiative aimed at improving consistency in the development of transfer pricing documentation guidance, which:

- is clear;
- ensures a level-playing field for businesses;
- guarantees fairness for taxpayers;
- avoids differences among national transfer pricing regulations.

The desired approach should point at a standardization, in order to favor consistency, transparency and reduce compliance costs connected to the collection and organization of transfer pricing documentation in the different countries in which the MNE operates.

It is well acknowledged at international level that the current transfer pricing documentation rules place a substantial burden on taxpayers. In other words, it is hardly possible for an MNE to follow a consistent documentation approach due to the differences in the requirements imposed by national transfer pricing legislations. Simplified and consolidated compliance obligations by businesses, if achieved, would provide the balance which is currently lacking in the approach to transfer pricing documentation.

In addition, Valente Associati GEB Partners stresses the importance of transparency for tax administrations and tax compliance by taxpayers. Any action in the field of country-by-country reporting should be carried out taking into account the right balance between the usefulness of the data to the tax administrations for risk assessment purposes and the compliance burdens on the taxpayers, while ensuring that specific information must be kept confidential.
Finally, it is important to take a measured approach towards proportionality:

- in identifying the content and the timing of information that is to be provided by taxpayers to tax authorities;
- in setting forth specific provisions on the application of documentation-related penalties.

**Specific Comments to the Issues Outlined in the Discussion Draft**

**B.1. Transfer Pricing Risk Assessment**

Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template.

With the objective of simplifying the documentation burden on taxpayers and ease the work of tax authorities when assessing transfer pricing risk and conducting audits, a further detailed guidance and the development of simplified and standardized forms would certainly be useful.

The current transfer pricing disclosure standards are still left to the single countries, often leading to diversified forms and reporting standards and inefficiencies.

Common standards/guidelines (such as the EU TPD Code of Conduct) and common sources of information (such as commercial databases) already exist and, if constructively coupled with the proposed content of the Master file and Local file contained in Appendix I and II of the *Discussion Draft on Transfer Pricing Documentation and CbC Reporting*, they will provide tax authorities and taxpayers with the necessary tools in order to identify and evaluate transfer pricing policies and relative risks.

What is mainly needed is a common (mandatory) OECD framework among countries that will eliminate local divergences and ease the compliance burden on taxpayers and allow tax authorities to have information presented in a standard format for all countries.

Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.
Removing asymmetry of information among tax administrations and taxpayers is a fundamental element for successfully tackling aggressive tax planning and for tax inspections.

Dialogue and sharing of information between tax administrations and taxpayers should be encouraged, including the disclosure of the risk assessment measures and results to taxpayers.

**B.3. Transfer Pricing Audit**

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

While it is appreciated that tax administrations should be in the position of having all the relevant documentation in order to conduct an audit/risk assessment, excessive burdens should not be imposed on taxpayers. It is often the case that taxpayers, especially local subsidiaries, will not have the financial results of associated enterprises (especially of sister or controlling companies). While taxpayers should make reasonable efforts in order to provide complete and adequate documentation, tax administrations should exploit existing instruments, such as information-exchange mechanisms, in order to obtain information in the possession of associated enterprises located outside their jurisdictions.

Standards and smoother processes should thus be developed/enhanced in order to improve existing mechanisms that impose excessive/unnecessary burdens on taxpayers.

**C. A Two-tiered Approach to Transfer Pricing Documentation**

**C.1. Master File**

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.
The preparation of a Master file on an entity basis is preferable to a line of business approach.

An entity-based approach will most likely suit all different MNEs’ business structures. Having a complete entity-based approach will in any case allow tax administrations to gain complete information on all MNE income and activities concerning the different lines of businesses. In fact, Annex I to Chapter V of the Discussion Draft already provides a description of the MNEs business(es) by business line.

A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n 6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

Should the country-by-country report be part of the master file or should it be a completely separate document?

Preferably, we suggest the country-by-country report to be a separate document rather than an annex to the Master file.

Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

Taxpayers should be allowed the flexibility to choose the option that best suits their business and company structure.

The information to be included in the country-by-country report is probably best assembled by the company consolidating the accounts using internal reporting information (“top-down” approach). However, information taken from the local statutory accounts is most representative and can provide a greater level of detail (“bottom-up” approach).

A “bottom-up” approach is probably the less costly as data are readily available, although some form of consolidation standard might be required (IAS/IFRS), as the use of different accounting GAAPs could lead to uneven information.
Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

Depending on the MNEs’ structure and complexity, a country consolidation can be envisaged, keeping in mind that information would have to be gathered and aggregated by one of the entities. In this case, guidance should be provided on the type of data to be used (statutory/reporting format).

Also, attention should be paid to Permanent Establishment and on the entity that should report its information (the headquarters vs. the country affiliate).

The separate entity approach would probably seem more straightforward as information is already available on each entity’s tax return. As such, minimal further elaboration of the data would be required in order to complete the country-by-country template. However, the complexity of the entity has to be borne in mind as a detailed reporting could be summed up to several hundreds of lines/entities in case of considerable MNE size.

Under a “top-down” model, more guidance is needed on which data source it is best to use (consolidated accounts/specifically designed reporting data) considering that any standard deviating from the one used by the MNE would lead to increased compliance costs.

Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?

A separate entity approach would probably be less burdensome as information is already available on each entity’s tax return. Country consolidation would impose an additional activity on taxpayers since the information on income tax paid/due would have to be aggregated in a consistent manner by one of the entities.
Increased consolidation issues may arise due to possible ongoing litigation/settlement procedures, whereby taxes due are still to be defined. An entity-by-entity approach would facilitate the reporting of this information.

**Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?**

This would be useful information since it will allow different tax administration to locate the country of origin of the taxes paid by the taxpayers in each country, without the need to refer to exchange of information mechanism.

**Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?**

If a separate entity approach is adopted it would be less burdensome as information is already available on each entity’s tax return. However, a common standard for consolidation of this information would have to be developed by the taxpayers (e.g., common currency definition and conversion).

**Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?**

According to Annex I and II, the above information should already be documented in the Master file and Local file as part of the analysed transactions; therefore, the collection of this information and its inclusion in the country-by-country report should not impose a significant burden on taxpayers.

The level of detail proposed by the Local File could be considered sufficient.

Some tax administrations (e.g., Italy), as part of the documentation, require taxpayers to disclose all intercompany transactions. As such, the above information can be readily available to most companies without excessive additional burdens.

**Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?**
The above information is already documented in the Master file and Local file as part of the analysis of the business and industry features affecting the analysed transactions.

As such, the above information can be readily available to most companies without excessive additional burdens. Therefore, adding a specific synthetic requirement in the country-by-country reporting could provide tax administrations with a straightforward insight of the main industry conditions having an impact in transfer pricing policies.

D. Compliance Issues

D.3. Materiality

Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

A specific guideline and definition of materiality is paramount in order to avoid creating an excessive burden on taxpayers and allowing tax authorities to focus on important transactions.

Materiality could be defined in terms of:

- Transaction amount: either in absolute terms (e.g., specific monetary threshold) or in relative terms (e.g., a percentage of turnover/assets/income generated by a specific activity);
- Type of transaction: concentrate on specific transaction type (e.g., company’s core business) and leave aside ancillary transactions;
- Line of business: in case of conglomerate companies with multiple and diversified business units/markets;
- Company dimension: requirements imposed on SMEs should be less stringent and more proportionate.

D.5. Frequency of Documentation Updates

Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

The proposal in paragraph 34 is most welcome, as a clear guidance on the update of database searches is strongly needed. As a matter of fact,
such an approach has been already adopted by many taxpayers and will allow having yearly updated financial information while not imposing the burdensome comparables screening process every year.

Nothing is said on the comparables selection process. Specific wording discouraging *cherry picking* from both taxpayers and tax administration could be added in paragraph 34.

Clear guidance should also be provided on the “*timing issues*”, by including specific wording on the fact that information required to prepare substantial documentation can be usually gathered at various times:

- before the transaction takes place (typically for ex-ante transfer pricing systems where parameters are set prior to the start of a year);
- at the time the transaction takes place (*e.g.*, CUP information for commodities), or
- after the end of the financial year in which the transaction takes place (*e.g.*, comparable searches to test the outcome for ex-post transfer pricing systems).

Information gathered at any of these moments can result in appropriate documentation provided the timing can reasonably be supported.

**D.6. Language**

Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

The Master file should be prepared in the language of the parent company. However, using a common language, such as English or another commonly used language, for the Master file will simplify the compliance work for many taxpayers. We strongly support the suggested approach of having this document translated only if necessary into local language and upon providing sufficient time for the translation to be completed.

**D.8 Confidentiality**

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.
Measures to safeguard confidentiality could be the following:

- Specific anti-infringement procedures could be made available to taxpayers in order to protect them from unauthorized information disclosure by tax administrations if real damage is substantiated;
- Specific channels/technological means for information exchange between taxpayers and tax administrations in order to prevent information leakages;
- Consultation (not filing) of sensitive information at taxpayer premises.

A provision might be set forth so that any information received by tax administrations is to be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the other tax administration concerned with the assessment or collection of (the enforcement or prosecution in respect of, or the determination of appeals in relation to) the taxes concerned.

A provision might also be laid down in order that such persons or authorities use such information only for risk assessment/further audit. They may disclose the information in public court proceedings or in judicial decisions.

Finally, a provision might be set forth to establish that the information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the taxpayers.

**E. Implementation**

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above.

For business/strategic/confidentiality purposes, a parent company might prefer not to disclose information pertaining to the whole Group with each subsidiary in every jurisdiction.

While Local files should be filed by each local company subject to tax in the jurisdiction, treaty exchange of information mechanisms should be
promptly exploited in order to obtain the most sensitive (foreign) information by local tax administrations.

When applying information exchange mechanisms, reference should be made to Article 26 of the OECD Model Tax Convention. In particular:

1. Tax administrations should exchange such information as is foreseeably relevant for carrying out the provisions of the applicable convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the States concerned, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the applicable tax convention.

2. Any information received should be treated as strictly secret and confidential in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of (the enforcement or prosecution in respect of, the determination of appeals in relation to) the taxes concerned. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. A tax administration should not impose on the other the obligation:
   a) to carry out administrative measures at variance with the laws and administrative practice of the other tax administration;
   b) to supply information which is not obtainable under the laws or in the normal course of the administration of the other tax administration;
   c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

4. If information is requested by a tax administration, the other tax administration shall use its information gathering measures to obtain the requested information, even though that other tax administration may not need such information for its own tax purposes and has no domestic interest in such information.
An APA is an agreement between tax administrations pertaining to the way in which certain transfer pricing transactions between taxpayers will be taxed in the future. Hence an APA often prevents the need for a dispute between tax administrations over the transactions included in the APA. APAs are an exemplary method of dispute avoidance.

There are significant advantages for taxpayers and tax administrations that can arise from APAs. In particular:

- **certainty over the taxation treatment of the transactions in the APA**: a certainty enjoyed by both the tax administrations (which no longer have to conduct an audit to establish the correct transfer pricing) and the taxpayers (who know how to establish the correct transfer pricing since this has been agreed between the tax administrations involved).

The MAP provisions allow designated representatives from the governments of the States concerned to interact with the intent to resolve international tax disputes involving cases of double taxation (juridical and economic) as well as inconsistencies in the interpretation and application of the applicable convention.

Since most probable occurrences of double taxation are dealt with automatically in tax conventions through tax credits, exemptions, or the determination of taxing rights of the States concerned, the majority of MAP cases are situations where the taxation of an individual or entity is unclear.

A noteworthy point is that the MAP article in most tax conventions does not compel competent authorities to actually reach an agreement and resolve their tax disputes. They are obliged only to use their best endeavors to reach an agreement. Unfortunately, on occasion competent authorities are unable to come to an agreement. Reasons for unresolved double taxation range from restrictions imposed by domestic law on the tax administration’s ability to reach a compromise and even down to a stalemate on economic issues such as valuations.

Some tax conventions currently include arbitration clauses in their MAP articles, in compliance with Article 25 of the OECD Model Tax Convention.
Together with Article 25, also the EU Arbitration Convention establishes a procedure to resolve disputes where double taxation occurs between enterprises of different Member States as a result of an upward adjustment of profits of an enterprise of one Member State. Whilst most bilateral double taxation treaties include a provision for a corresponding downward adjustment of profits of the associated enterprise concerned, they do not generally impose a binding obligation on the States concerned to eliminate double taxation.

The EU Convention provides for the elimination of double taxation by agreement between the Contracting States including, if necessary, by referring to the opinion of an independent advisory body. The EU Convention thus improves the conditions for cross-border activities in the Internal Market.

Both mechanisms have proven to be useful in preventing (in case of APAs) or defining (in case of MAPs) transfer pricing disputes.

Including specific information on the above in the Master file will allow tax administrations to effectively assess the risk of transfer pricing policies of the MNEs.

Some jurisdictions (e.g., Italy) already provide in their documentation requirements the need to disclose any APAs, rulings or MAPs. A summary of such information will certainly be useful if included in the Master file as it could streamline the work on risk assessment performed by tax administrations.

**Further Comments to Other Paragraphs of the Discussion Draft**

**A. Introduction**

“1. This chapter provides guidance for tax administrations to take into account in developing rules and/or procedures on documentation to be obtained from taxpayers in connection with a transfer pricing inquiry or risk assessment. It also provides guidance to assist taxpayers in identifying documentation that would be most helpful in showing that their transactions satisfy the arm’s length principle and hence in resolving transfer pricing issues and facilitating tax examinations”.

A balance is needed between the usefulness of the data to the tax administrations for risk assessment purposes and compliance burdens on taxpayers. It is important to take a measured approach towards materiality and proportionality in identifying contents and the timing of information that is to be provided by taxpayers to tax authorities, clearly
identifying what is intended by “documentation that would be most helpful in showing that (taxpayers’) transactions satisfy the arm’s length principle”.

**B. Objectives of Transfer Pricing Documentation Requirements**

“5. Three objectives for requiring transfer pricing documentation are:

1. to provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment;
2. to ensure that taxpayers give appropriate consideration to transfer pricing requirements in establishing prices and other conditions for transactions between associated enterprises and in reporting the income derived from such transactions in their tax returns; and
3. to provide tax administrations with the information that they require in order to conduct an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction”.

Applying the arm’s length principle can be a fact-intensive process and can require proper judgment. It may present uncertainty and may impose a heavy administrative burden on taxpayers and tax administrations that can be exacerbated by both legislative and compliance complexity. Therefore, a safe harbor concept could be introduced for Small and Medium Sized Enterprises (“SMEs”).

The obligation of mandatorily preparing a Transfer Pricing Documentation should not be imposed on SMEs with relatively simple ownership structures and operations envisaging, instead, a risk-differentiated approach whereby smaller taxpayers, or taxpayers with relatively small or low risk transactions can align the effort required to prepare documentation with their risk.

**B.2. Taxpayer’s Assessment of its Compliance with the Arm’s Length Principle**

“10. By requiring taxpayers to articulate solid, consistent and cogent transfer pricing positions, transfer pricing documentation can help to ensure that a culture of compliance is created. Well-prepared documentation will give tax administrations some assurance that the taxpayer has analyzed the positions it reports on tax returns, has considered the available comparable data, and has reached consistent transfer pricing positions. Moreover, contemporaneous documentation
requirements can restrain taxpayers from developing justifications for their positions after the fact”.

The requirement to contemporaneously document transfer pricing positions will certainly prove to be a useful instrument in order to create a “compliance culture”. Nonetheless, it should be borne in mind that, according to local transfer pricing laws and regulations, some countries require contemporaneous documentation while others allow MNEs to submit transfer pricing documentation only upon request. Guidance should be provided on the most straightforward approach in order not to impose an excessive burden on taxpayers that may find themselves in the position of preparing/amending/updating the documentation several times during the year.

D.7. Penalties

“36. Many countries have adopted documentation-related penalties to ensure efficient operation of transfer pricing documentation requirements. They are designed to make non-compliance more costly than compliance”.

Applicability of transfer pricing-specific penalties is still (and should continue) to be a feature of local law. As such, MNEs face different penalty environments in different countries, which often leads to increased burdens and uncertainties. A clear guidance should be given by the OECD in terms of (non) applicability of specific/administrative penalties. Transfer pricing documentation, if seen as a risk assessment tool, where well prepared, should give taxpayers the benefit of penalty protection (as it already is in some countries, i.e., Italy) without this decision being too discrentional for tax administrations.

D.9. Other issues

“42. The requirement to use the most reliable information will usually require the use of local comparables over the use of regional comparables where such local comparables are reasonably available. The use of regional comparables in transfer pricing documentation prepared for countries in the same geographic region in situations where appropriate local comparables are available will not, in some cases, comport with the obligation to rely on the most reliable information. While the simplification benefits of limiting the number of comparable searches a company is required to undertake are obvious, and materiality and compliance costs are relevant factors to consider, a desire for simplifying compliance processes should not go so far as to undermine compliance with the requirement to use the most reliable available information. See paragraphs
1.57-1.58 on market differences and multi-country analyses for further detail of when local comparables are to be preferred”.

The paragraph provides a rather general guidance when referring to “most reliable information”. The OECD should shed some light on the use of pan-European, Asian/American benchmarks vs. local comparables, especially if we think of cases such as transactions with African countries, where local comparables (nor databases) do not yet exist.

**Annex III to Chapter V: A Model Template of Country-by-Country Reporting**

The country-by-country template included in the Discussion Draft is rather concise and the risk is seen in the potential use of (financial) information by tax administrations to apply some form of global apportionment of an MNE’s profit rather than applying the OECD’s long-standing arm’s length principle on profits accrued in various jurisdictions, as a result of intercompany trading. For example, no regard is given to intangibles and their value nor to a common definition of royalty (which can differ substantially at local level).

Therefore, it might be useful to include further guidance on this and, most importantly, link the definition of intangibles to the yet-to-be published new Chapter VI of the Guidelines on intangibles, which will have to take into consideration the comments and perplexities expressed by practitioners.
OECD Secretariat
Transfer Pricing Group
Via email: transferpricing@oecd.org

February 23, 2014

To whom it may concern,

Re: Response to the OECD Public Consultation on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting

We appreciate the opportunity to respond to the OECD’s draft restatement of Chapter V of the Transfer Pricing Guidelines, incorporating country by country reporting. As you know, we continue to advocate for public availability of country by country reporting information for the reasons set out in our submission of October 1, 2013 to the OECD’s public consultation on Transfer Documentation Practices. We incorporate those comments herein by reference.

Despite this caveat, we would also like to express our appreciation for the OECD Secretariat’s sincere efforts to grapple with finding an effective way of incorporating country-by-country reporting into a global reporting system. The Secretariat’s hard work is evident in the important questions that they have posed. We also recognize the significant progress that has been made on the issue of country-by-country reporting over the past twelve months.

This submission is supported and endorsed by the Financial Accountability and Corporate Transparency (FACT) Coalition. The FACT Coalition is a Group of more than 30 non-profit organizations in the United States including labor unions, small business associations, faith-based groups, tax justice advocates, and anti-corruption, development, and public interest research organizations.

The Secretariat has set out a number of questions within this consultation document, and we are pleased to provide the following comments on the proposed text of Chapter V and responses to some of those questions for your consideration. The OECD’s questions are in italics, and questions that we have provided responses to are in bold italics.

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Section B.1. Transfer Pricing Risk Assessment

Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. [No
Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

We would strongly caution against sharing risk assessments without a clearly defined objective specific to the taxpayer. Openly sharing risk assessments with taxpayers would enable taxpayers, and in particular the well-resourced accounting firms that service them, to determine what phrases or manner of expressing information may be triggers for higher levels of scrutiny and to analyze trends in enforcement. This type of analysis allows them to create their template for avoidance of these triggers, and reducing tax avoidance is the focus of this exercise.

On the other hand, it might be appropriate for tax authorities to share their risk assessment with a specific taxpayer in order to reduce the frequency in which that taxpayer’s documentation results in erroneous red flags. There may be instances where a taxpayer’s transfer pricing documentation is drafted in a way that raises the red flags that lead to higher scrutiny, perhaps repeatedly, and further review by the tax administration determines that their transfer pricing information and practices are in fact appropriate. They may not have provided sufficient information. They may document certain practices in a manner that will always require further review but could be rectified. In instances such as these, it would be appropriate for the tax administration to share relevant and specific information about their risk assessment with the taxpayer.

Where the tax authorities observe that many taxpayers are encountering/producing similar errors, the appropriate response is to publish general guidance, not to provide those taxpayers with their risk assessments in their entirety.

B.2. Taxpayer’s assessment of its compliance with the arm’s length principle

No questions were posed by the OECD

The OECD states that requiring contemporaneous transfer pricing documentation can be an important tool in preventing companies from developing justifications for their positions after the fact. We fully support this approach, noting that transactions should be priced at the time they are undertaken, which means that the rationale for specific pricing must be developed at the time of the transaction. Post-facto adjustments are then mere fabrications to serve a secondary purpose, likely to be reduction of resulting tax obligations.

B.3. Transfer Pricing Audit

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

While we agree that it is certainly prudent for tax administrations to be able to directly obtain information located outside their country’s borders through information sharing and information exchange mechanisms, this should be a final stop-gap measure. Resorting to this sort of slow, bureaucratic, legal approach should be considered a clear indication that these guidelines have not been followed by the taxpayer or are inadequate.

To ensure that the guidelines are not inadequate, they should include provisions regarding the responsibility of the parent company/ies, perhaps both the immediate and ultimate parent entities, for
ensuring that the requested documentation is provided to tax authorities within a reasonable period of time, wherever those documents may be located.

From personal experience, I have been surprised by what a parent company can compel its subsidiaries to do. I worked for several years as an international finance attorney, arranging loans for parent or mid-level companies in amounts in the hundreds of millions of dollars, euros, pounds or yen, and occasionally in the billions. These loans were secured not only by the stock of the companies, located all over the world, that formed part of the corporate group, but by all of their assets as well. That required the painstaking process of identifying all of the assets of those subsidiaries and going through the various local and national processes of perfecting the lenders’ security interest in those assets. This process required the active cooperation, including the production of a great deal of documentation, by the management of those entities. And I remind you, these entities were merely being used to secure a large loan that was to be paid not to that subsidiary, but to some other company in the group.

Why was the parent so willing to compel compliance from its subsidiaries? The repercussion for failing to do so was default on the loan and automatic repayment. The lesson to be taken from this is that a significant financial repercussion for failure to comply, one that does not even involve law enforcement measures, will compel compliance. It is worth considering the motivational value of clear, decisive, and impactful repercussions for companies failing to comply with transfer pricing documentation obligations.

As a result of my experience in this world of international business transactions, it will be very difficult to convince me that a parent company cannot compel one of its subsidiaries to produce some transfer pricing documentation, regardless of where that subsidiary is located. It should be difficult for the OECD to accept this suggestion as well.

C. A two-tiered approach to transfer pricing documentation

C.1 Master file

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

We recommend that the Master File be prepared on an entity-wide basis. A Master File prepared according to business lines either assumes that an entity will only belong to one business line, or will create confusion and greater opportunity for financial obfuscation where one entity is actually a part of more than one business line.

A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:
• **Should the country-by-country report be part of the master file or should it be a completely separate document?**

The country-by-country report should be a stand-alone document that forms part of the master file. The risk assessment process is to be based on the master file, and the country-by-country report should be an integral part of that risk assessment and hence should be included in the master file. The master file should also be required to be certified as true, complete, and correct by the person responsible for its preparation, and the country-by-country report should be included under that certification.

• **Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?**

[We have no comment.]

• **Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?**

[We have no comment.]

• **Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?**

In order to understand its own tax position, a company must have already determined each of these tax data points for each entity. We see no reason why information that must already be in the hands of the corporation should not be provided to the tax authorities through country-by-country reporting. As a result, we do not recognize significant additional burdens on taxpayers.

• **Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?**

Yes, reporting of aggregate cross-border payments between associated enterprises should be required. Again, this information must be determined by the corporation for accounting purposes and we see no reason why it would not be provided to tax authorities. We also see no reason why information on transactions relating to the trade in intangibles and services should be excluded. As has been discussed
many times over in OECD meetings, in the media, and among government leaders, pricing of trade in intangibles and services may not be an exact science, but excluding it from reporting requirements sends the message that it will be ignored by tax authorities. That should be neither the message nor the practice.

• Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

As a matter of sound corporate governance, a multinational company should have a record of every one of its subsidiaries, their location, and understand their unique functions. There is no reason why this information should not form part of the company’s reporting requirements.

We understand that it may be fairly easy for a multinational to describe, for example, the function of one of its manufacturing, packaging, distribution, or transportation entities, but that it may find that is more difficult to describe the function of one of its finance or pass-through entities. It is important for the OECD to recognize that the difficulty a corporation might feel in describing the function of its finance or pass-through entities is unlikely to be related to not understanding the nature and purpose of the entity, but rather in not wanting to state the nature and purpose of those entities in a written document. Again, the objective of country-by-country reporting is not only to make it easier to spot tax evasion, but to identify the trends and methods of egregious tax avoidance as well. This information provides critical pieces of that puzzle.

D.3 Materiality

Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

Permitting materiality thresholds will undermine the objective of developing a true picture of corporate activities, and prevent accurate reconciliation when necessary. As a result, we oppose the introduction of materiality thresholds.

Having said that, should the OECD ultimately decide to permit exclusion of non-material transactions (against our advice), we do support the use of the reference criteria listed by the OECD in determining what that threshold should be. However we would strongly advise against leaving the creation of the formula to be used in weighing those factors to individual companies. Doing so would inject an unnecessary subjective element into the reporting requirements. If the OECD chooses to adopt this approach, it should also develop an appropriate universal formula for determining materiality for all companies.

The OECD has not sought specific comment with respect to their recommendation regarding the simplification of documentation requirements for SMEs, but we would like to offer the following thoughts. An SME will have to undergo the same process for making transfer pricing determinations, and goes through the same process of basic accounting. By definition, an SME is a smaller corporate group. Therefore it will have fewer transactions, fewer entities to account for, etc. Its compliance burden will, because of the nature of the corporate group, already be reduced. We are unclear as to why SMEs should be subject to additional reductions in reporting requirements.
D.5. Frequency of documentation updates

Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

We are somewhat unclear as to what the OECD is suggesting in paragraph 34. However we note that the market or comparable price of some assets subject to intra-group transfer may fluctuate significantly year-on-year, or even within the year, such as commodities. A blanket approach may not be appropriate here.

D.7. Penalties

The OECD has not sought specific comment with respect to their recommendation regarding penalties, but we would like to provide the following thoughts.

The final paragraph of the penalties section suggests that tax authorities should be able to craft appropriate penalty reductions or exemptions for companies that comply with documentation requirements in good faith. We think that it is important to stress the difference between penalties being imposed for failure to provide adequate documentation (in which case we can understand an appropriate reduction in penalty for good faith efforts), and penalties for inappropriate or inadequate transfer pricing methodology or determinations contained in that documentation. In the latter scenario, which is the substantive compliance with law, it is not appropriate to decrease penalties based on a “good faith” defense. The penalty should be based on the extent and severity of the failure to comply with the law, which inherently adjusts the penalty to fit the crime. We note that the “good faith” compliance argument is one often used by companies with respect to liability for bribery offenses and it is no more valid in this setting than in that one.

D.8 Confidentiality

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

[We have no comments.]

E. Implementation

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

• The direct local filing of the information by MNE group members subject to tax in the jurisdiction;

• Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;

• Some combination of the above.
This is an extremely important issue. We strongly advise the OECD to require MNEs to provide the master file and the local file directly to tax authorities in each jurisdiction in which one of its entities either is subject to taxation or could have been subject to taxation but owed no tax that year.

We believe that the OECD and the G20 are well aware of the significant limitations of an “information upon request” system, as well as the financial and administrative burden it imposes on tax authorities.

The information at issue here is information generated by companies and prepared by companies. It should also be provided by companies. There is absolutely no justification for creating an additional administrative burden for tax authorities, which must be paid for by the citizens of each country, in order for a company to provide its accounting and tax information to a foreign tax authority. This is especially true when such a scheme would be far less efficient than the alternative.

**Annex I – Transfer pricing documentation – Master file**

*Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.*

We believe this information should be included in the documentation provided to tax authorities, or in the case of APAs a notation that the price is the result of an APA, with a willingness to provide the APA upon request. We would expect that it would be in the interest of companies to supply reference to other rulings and MAP cases in support of their transfer pricing decisions.

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Thank you for your consideration of our comments. Should you have any questions or if you would like to discuss any part of this submission in greater detail, please contact:

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GFIA comments on the OECD Discussion Draft on Transfer Pricing Documentation (“TPD”) and Country By Country Reporting (“CbCR”)

Executive Summary

The GFIA supports the principle of disclosure of information to tax authorities and providing them with a high level risk assessment tool that gives tax authorities around the world a better view of multinational groups as a whole.

The GFIA’s understanding is that the draft CbCR template is to be used by tax authorities as a risk assessment tool. GFIA believes that the level of detail proposed in the current draft goes beyond what is needed for effective risk assessment and may significantly increase the compliance burden on insurance companies.

Flexibility in compiling the CbCR template is needed in order to avoid a disproportionate compliance burden on the insurance sector. In our view granting such flexibility will still enable tax authorities to carry out a high level risk assessment.

In developing the CbCR standard, a uniform global solution is needed. Inconsistent national or regional tax information rules would lead to duplicate reporting, excessive costs and complex system designs for tax authorities and insurance companies who operate with scarce resources.

Introduction

The GFIA welcomes the opportunity to comment on the OECD draft discussion paper on Transfer Pricing Documentation (“TPD”) and Country-By-Country Reporting (“CbCR”).

GFIA recognizes the importance of transfer pricing documentation within multi-national entities (“MNEs”) and the need to enhance transparency for tax administration purposes taking into account the compliance costs to businesses. However, GFIA believes that both improving transparency and reducing compliance burden should both be at the very heart of this initiative. Therefore, the OECD should make sure that its common standard would eliminate local differences and reduce the compliance burden for the insurance sector.

Inconsistent national or regional tax information rules on the other hand would lead to duplicate reporting, excessive costs and complex system designs for tax authorities and insurance companies who operate with scarce resources. The risk of overlapping and inconsistent reporting requirements is real, as there are currently a number of different ongoing initiatives in the area of CbCR. For instance, in addition to the OECD proposal, the European Parliament has recently proposed\(^1\) to introduce country-by country

\(^1\) ECON opinion on the EC proposal for Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of nonfinancial and diversity information by certain large companies and groups.
reporting to large undertakings. We believe it is essential that there is consistency of approach between
the different initiatives in order to keep the compliance burden manageable and avoid confusion.

Despite our general support for the introduction of a common global standard, we are concerned that the
level of detail proposed in the current draft goes beyond what is needed for effective risk assessment and
may significantly increase the compliance burden on insurance companies. In particular, we are
concerned that this proposal would result in a need to establish an entirely new reporting system by the
insurance sector.

In this respect, GFIA would like to highlight seven key messages that require further attention in order to
ensure a pragmatic balance between providing tax authorities with the information they need in order to
conduct transfer pricing risk assessment on the one hand, and compliance burden imposed on business
on the other.

Key messages

1. Flexibility over a “bottom-up” or “top-down” approach (C.1. Master File).

Should the country-by-country template be compiled using “bottom-up” reporting from local statutory
accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE
group’s consolidated income among countries?

We are of the view that taxpayers should be given the flexibility of using either a “bottom-up” or a “top-
down” approach in their CbCR. Insurance companies are organised in different ways and use different
systems to report financial information both internally and externally.

2. Flexibility over an entity or country based reporting (C.1. Master File)

Should the country-by-country template be prepared on an entity by entity basis as in the current
draft or should it require separate individual country consolidations reporting one aggregate revenue
and income number per country if the “bottom-up” approach is used?

The GFIA believes that taxpayers should be given the option of disclosing aggregate financial information
on an entity or country basis.

Some groups will have hundreds or even thousands of entities and some level of country consolidation is
likely to be required to ensure that the volume of data is manageable and so that the information is useful
for tax authorities’ high level risk assessments. Furthermore, CbCR on an entity-by-entity basis could
result in a significant compliance burden, especially for those taxpayers who have limited financial
information readily available on an individual entity basis such as partnerships or trusts.

On the other hand, for smaller groups preparing the information on an entity basis may be more
manageable and useful. Therefore, it is essential that flexibility is permitted.
3. CbCR should be submitted as a separate document (C.1 Master File).

*Should the country-by-country report be part of the master file or should it be a completely separate document?*

We believe that the CbCR report should be a stand-alone document, which is separate from the master and local file of TP documentation. The CbCR report and the TP documentation serve different purposes, and may be subject to different filing timeline and materiality standards. Therefore, keeping the two documents separate would help streamline both taxpayer compliance and tax authority administration of the reported information.

Furthermore, the proposed CbCR template would contain detailed group-wide information that is not generally available to local entities. It is also likely to contain confidential information that should not be distributed to local tax authorities automatically unless it is relevant to the local tax position.

4. Reporting on tax due basis (C.1 Master File).

*Should the country-by country template require one aggregate number for corporate income tax paid on a cash basis or tax due basis per country?*

The GFIA believes that the aggregate corporate income tax paid by country should be collected on a "tax cost basis" (including both, current and deferred tax charge or expense). The collection of cash tax paid for the period may not present the full picture for risk assessment purposes. This is especially important for the insurance industry where timing differences between income for accounting and taxation can be significant and volatile. Furthermore, many jurisdictions impose other basis of taxation, such as tax on gross premiums, capital employed or investment income. Where these taxes are imposed in lieu of regular corporate income taxes, these taxes should be included in the relevant CbCR.

5. No reporting on intra-group payments (C.1 Master File).

*Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?*

Keeping in mind that the CbCR template is intended to be a high level risk assessment tool, in our view there is no need to include intra-group payments of royalties, interest and service fees, because reporting on such payments goes beyond the original idea of providing a high level risk assessment for tax authorities.

Furthermore, reporting on intra group payments would significantly increase the administrative burden since intra group payments will already be included in the transfer pricing documentation (master file and local file).

As a result, groups with many entities would be required to report thousands of separate transactions, in multiple local currencies and multiple local GAAPs.

6. Materiality thresholds should be introduced (D.3 Materiality)

*Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.*
The GFIA believes that the materiality thresholds should be provided in order to ensure effective risk assessment and to reduce the compliance burden on businesses.

Furthermore, as preparing transfer pricing documentation is time consuming and expensive, special consideration should be given to small and medium sized groups. Such groups should not be required to incur compliance costs that are disproportionate to the nature, scope and complexity of their intra-group transactions.

7. Master file should be submitted only in the parent company’s jurisdiction (E. Implementation).

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above.

GFIA’s preference is to file only in the parent company jurisdiction. Information to other local tax authorities should only be shared under treaty or information exchange agreements. These provisions can provide protection of confidentiality from inappropriate use of information.

About the GFIA

Through its 37 member associations, the Global Federation of Insurance Associations (GFIA) represents the interests of insurers and reinsurers in 56 countries. These companies account for around 87% of total insurance premiums worldwide. The GFIA is incorporated in Switzerland and its secretariat is based in Brussels.
21st February 2014

TransferPricing@ocead.org
Public Consultation
Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Dear OECD

GKN plc response to Discussion Draft on Transfer Pricing Documentation and CbC Reporting


General

Overall, we view the proposals positively; a move towards a more standardised approach to transfer pricing documentation and information to be provided to tax administrations is welcomed. This should assist in the preparation of such documentation on a global level, hopefully leading to cost efficiencies for the group and a reduction in uncertainty regarding the contents of transfer pricing documentation.

We agree that an objective of the proposals should be to facilitate tax administrations performing risk assessments with adequate and relevant information to hand, reducing the need for extensive correspondence, meetings, and so on with taxpayers. This should enable tax administrations to focus limited resource on high risk areas. This will, ultimately, depend on the manner in which the proposals are implemented, and the form in which the information is to be provided.

The proposals should not unreasonably increase the administrative burden for the group. In addition, the information provided should be relevant and meaningful, and not open to misinterpretation by the tax administrations as this would diminish the value of such information and detract from the objectives of the proposals.

In our view, the support and agreement by all relevant tax administrations will be critical to the success of the proposals. If certain tax administrations do not agree to the proposals, or request additional information not reasonably required as part of an audit process (i.e. outside of the objectives set out in B.3) this would not result in achieving a consistent and effective approach for MNEs such as GKN.
Chapter V Documentation

A. Introduction

We note the use of the language that this guidance is for tax administrations to “take into account” – as noted above, we have some concerns that various administrations may unilaterally request additional or different information which would then defeat the purpose of these guidelines. We accept that the work of the OECD will not necessarily be taken into the legislation of each country, however we would wish to see some agreement from the various tax administrations that these guidelines will be followed and that taxpayers can rely on them when preparing transfer pricing documentation. At the current time a number of countries deviate from the OECD Guidelines and this increases compliance costs, and uncertainty, for taxpayers.

We fully agree with the statement made in paragraph 4 regarding the need to balance the usefulness of any data provided with the compliance burdens placed on taxpayers.

B. Objectives of transfer pricing documentation requirements

We also agree with the stated objectives in paragraph 5. Transfer pricing documentation cannot anticipate every question a tax administration has and there will be occasions where additional information is required. However, we are concerned that the provision of increased, detailed information to the tax administrations may result in the receipt of increased requests from the tax administrations to explain the information, provide reconciliations and further analysis, or provide explanations for issues which are not of direct relevance to the tax affairs of the entities in their jurisdiction. This could result in a significantly higher burden for the group. We appreciate that this concern cannot be easily addressed, but would like to see more guidance to administrations indicating they should only request more detailed analysis where there is a specifically identified risk and the information is clearly required to assess the transfer pricing position in their country.

Should work on BEPS Action 13 include development of additional standard forms and questionnaires beyond the country-by-country reporting template?

We note the comment in paragraph 9 regarding the various methods of “data-gathering” currently adopted in different territories, and agree a standardised approach is to be welcomed.

Some territories have significantly more onerous requirements than others, and our concern is that in seeking to develop additional standard forms and questionnaires, we will end up with the highest level of information being required for all territories (i.e. the bar is raised to the highest level as those territories are not prepared to cede their requirements to those recommended by the OECD).

It will be difficult to strike a balance between introducing additional forms and the compliance burden placed on companies. We believe that this could be considered further once initial results and outcome of the proposals in this document are reviewed (as noted below, we assume that there will be a post-implementation review to confirm the approach is meeting the needs and expectations of the relevant stakeholders). We would also request that the OECD recommend all jurisdictions review their territory-specific reporting in light of the
proposed Country-by-Country template, and reduce/eliminate these requirements where duplication occurs.

There is a significant amount of information already being requested as part of the proposed CbC template which should, in our view, provide tax administrations with sufficient information to perform an informed risk assessment. Any additional information, to the extent not contained in the transfer pricing documentation, should be obtained under normal procedures within domestic legislation.

In what circumstances might it be appropriate for tax administrations to share their risk assessment with taxpayers?

We feel that, where a risk assessment has been undertaken, this should be shared with the taxpayer. We anticipate some tax administrations may view this somewhat sceptically but, as a UK headquartered group, we have experienced this approach working with HM Revenue & Customs and can advocate that this approach is beneficial to both the taxpayer and the tax administration.

The ability to discuss issues in a non-confrontational manner (and often in person rather than having lengthy written correspondence) can help resolve issues and clarify potential misunderstandings. However, we also recognise this would require a certain level of investment from both parties and, in the current economic climate the ability to resource such a risk-sharing approach may be practically limited.

We would also note that this would be most beneficial within a wider building of relationships between the entity and the tax administration. This will not naturally fit with the current approach of a number of tax administrations. Both sides need to be prepared to discuss issues openly, and, should either party be intransigent this would be ineffective.

We address the specific query regarding materiality below, but agree with the statement made in paragraph 12 regarding maintaining a focus on material transactions.

What is the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information?

We note the focus of the paper is on the exchange of information/mutual assistance provisions in force, which is understandable. Although we agree that this can be a useful tool for tax administrations, we also note that this can also lengthen audit times and place additional resource pressures on the overseas tax administration. It could also prompt the opening of tax audits in the other jurisdiction/use of information powers if the overseas tax administration does not already have the information.

An alternative approach could be for such information requests to be sent to the parent company to respond on a voluntary basis. In the interests of co-operation the parent company can then act as intermediary between the overseas jurisdictions. In most cases of tax administration audit, the Head Office would at the very least be informed of an audit and would probably be providing input from a group perspective into issues such as transfer pricing.
It would seem logical therefore for such requests to be channelled through Head office. The requesting administration could inform the overseas tax administration of the request so that all parties are kept informed.

This should not result in the head office company being obliged to file the requested documentation as there would be limited statutory protections for providing such information, but it may speed up the process of obtaining such information.

It would be important that tax administrations did not view any non-compliance with a request to a head office to be tantamount to non-co-operation. There will be occasions where a head office does not see the relevance of a specific information request and therefore may choose not to supply the information. For example, information may be requested in relation to a division that does not operate within a territory.

In the event that the auditing tax administration deems this information is essential, any information not provided by the parent company could be requested from the tax administration as a secondary source if not provided (i.e. our proposal would sit within the framework of Mutual Assistance/Exchange of information rather than as an alternative).

In all cases, enhanced co-operation/information exchanging should be restricted to that information relevant to assess the tax position of the company under review – not a fishing expedition to obtain as much information as possible from the parent company.

It is imperative that whatever option is adopted the information is kept confidential and must not enter the public domain.

As a general comment, we would expect instances of tax administrations requiring information and documents in the possession of associated enterprises outside their jurisdiction to be by exception and would not wish to see a substantial increase in such requests as a result of these proposals. Indeed, we would expect such instances to reduce in number as a result of the significant volume of information that is proposed to be included within the master and local files.

C. A two-tiered approach to transfer pricing documentation

We are fully in favour of countries adopting a standardised approach to transfer pricing documentation (paragraph 16). A key question that remains to be answered is how countries will ensure their rules are in accordance with this approach. As noted above there seems little point in attempting to standardise the transfer pricing documentation if each country then interprets the rules in a different way and/or requests additional information.

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<tr>
<th>Should the preparation of the master file be undertaken on a line of business or entity wide basis?</th>
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In our opinion this should depend on the most relevant presentation for the group. For some groups where there are clear divisional structures a line of business approach would result in a more meaningful analysis than a purely entity wide basis. For example, different divisions within a group may have different methods of setting transfer pricing. Another benefit of a line of business approach is that this could enable tax administrations to identify which sections of the master file are relevant to them (for example, where there is only one entity from one line of business in their territory).
As the intention is to include all entities within the local file (and also the CbC reporting template), if a divisional structure for the transfer pricing documentation is considered the best way to explain the group and its functions then this is how a group should approach its documentation. Ultimately we feel it should be up to the group to determine the best way to provide the information – is there a need to be prescriptive in this regard as long as the information is provided in a sensible manner?

**How can governments ensure that the master file covers all MNE income and activities if line of business reporting is permitted?**

We would query whether this is needed. In most territories there are sanctions if full disclosure is not made and we would perceive it as being in our best interests to ensure all income and activities are covered.

Reconciliations of the CbC data to the financial information contained in Group Accounts could be requested to ensure all data is covered, but this would require a significant amount of work for a Group and may not provide that much more comfort to a tax administration. As most consolidated accounts are required to disclose key subsidiaries the tax administrations can obtain comfort that all material activities have been disclosed from a review of the accounts.

In summary, we don’t see significant merit in having additional measures to prove that all income and activities are covered if a business line approach is used.

**Should country by country reporting be part of the master file or separate?**

There are many differences in domestic requirements for the timing of preparation and submission of transfer pricing documentation to the tax administrations. It is proposed that there be a single deadline for the submission of the CbC template. It would seem logical therefore for these to be prepared as two separate documents. If the template were to form part of the master file this may require the master file to be submitted to all tax administrations. We cannot believe that every administration will require the master file of every MNE as they simply would not have the resources to review this information.

**Should the reporting be “bottom up” or “top down”?**

We have a clear preference for a top down approach, but only if the group can complete the CbC template using the same accounting framework (i.e. IFRS) for all territories, which it is indicated would be possible in Annex III. This would significantly limit the extent to which the requirements place an additional administration burden onto the group, and would enable tax administrations to make meaningful comparisons between countries and entities.

There will be differences between the local statutory accounts, and the data submitted for group reporting purposes. This can include exchange movements, differences in accounting treatment under IFRS versus local GAAP, consolidation adjustments, immaterial items, etc. In addition, non-coterminous year ends would result in information not being readily comparable between the CbC template and local accounts. However these should not detract from the overall view of the group’s allocation of income and taxes borne which is sought under the CbC template for the purposes of a risk review to be performed. Requests for detailed reconciliations between CbC and local statutory accounts would increase the administrative burden and would not, in our opinion, provide any more relevant information.
than that which would be contained in the local file (as the local file would contain all details of profits and transactions under local GAAP, etc.)

The bottom up approach has the benefits of using local data that can be reconciled to the statutory accounts and tax returns. However, this would in our opinion significantly increase the administration burden for groups. Entities within the same territories may operate different accounting systems and thus, further analysis and checking may be required to ensure that all the information is correct and accurate.

The top down approach, at least for our group, would enable the template to be completed with minimal time from each financial controller in each entity – a bottom up approach would require a substantial amount of local controller time to pull the information together in addition to head office time in reviewing the data to ensure overall accuracy and completeness.

In our view, it may depend on what the tax administrations would be seeking to use the information for; would they be trying to compare the results and tax yield across a number of territories to identify where there may be transfer pricing risks, or enable comparisons between similar entities across their territory?

As the purpose of the CbC template is to enable a risk assessment to be undertaken, we feel that a top down approach should provide sufficiently reliable and comparable information to enable comparisons to be made. Taxpayers could be asked to disclose which GAAP is used in completing the template if this would help make the position clear.

We question whether a top down or bottom up approach is required to be prescribed, or whether MNEs should have the choice as to how they prepare the template – provided relevant information is captured (such as GAAP, currency used, etc) we do not see that the results (and conclusions reached) would be materially different whichever approach was used.

As is noted in the document, it is necessary to weigh up the additional administration burden placed on MNEs whilst ensuring the resulting information is reliable and fit for purpose.

Should the template be prepared on an entity-by entity basis or should it require individual country consolidations?

If a top-down approach is used, we could report either on a consolidated basis or an entity basis. If a bottom up approach is used and consolidated information is required, this would place a disproportionate burden on groups who currently are most likely to undertake a consolidation at a group level and not at an individual country level.

Most groups do not perform a country-consolidation eliminating transactions within that country with associated companies only (except perhaps in those territories where local tax consolidations are in force). As noted above, there may be different accounting systems used in a single territory, and this would therefore require the group to take the data from those systems and then manually consolidate the results. There may also be situations where companies within the same territory adopt different GAAPs – which GAAP would a country consolidation be prepared under?

A territory may have a number of entities undertaking very different functions – we are not convinced that a consolidated approach would enable as meaningful a comparison to be made.
Should the template require one aggregate number for CIT paid on a cash or due basis?

Cash payments may be easiest for a company to track, but are likely to provide less meaningful information than corporate income taxes that are due. Cash tax payments would present less meaningful information for a number of reasons:

- Cash payments can be calculated on completely different bases across a number of territories (e.g. forecast CIT liability, prior year liability, etc)
- Differing payment schedules can give very different results even if the same liability would be due (i.e. some countries require payment in the year, others after the year, some entities may not be a payment on account regime)
- If repayments (or significant additional payments) are then due in a following year this could distort figures.

A key disadvantage of actual tax due is that it would take longer to have the information available for all countries (i.e. in the UK actual liabilities may not be known until 31 December following the relevant year).

There should be a clear definition of corporate income tax for each territory so that all tax information is consistent (i.e. would surcharges be included/excluded, etc). How is it intended that tax credits such as research and development credits be reported?

How would additional payments in following years as a result of tax audit/settlement be dealt with? This could distort the figures and result in less meaningful information.

Should the template require the reporting of withholding tax paid?

This would require systems changes to capture the information, but should not be too onerous a requirement. Where a company is required to withhold tax, this is a tax suffered by the recipient of the income, but paid by the payee company. In our view, this most naturally falls to be reported under the company who has suffered the tax (i.e. the recipient of the income).

Should reporting of aggregate cross-border payments between associated enterprises be required?

Reporting of aggregate cross-border payments to associated enterprises should not be required in the country by country reporting template. Our key issue is that this could cause more need for reconciliation and explanation than the template would allow for. This information would be included in the local file rather than in the template. This level of detail could significantly increase the information included in the CbC template and detract from one of the main objectives of the template (to provide adequate information without being excessive).

Would a requirement for reporting intra-group payments of royalties, interest and service fees place an additional burden?

If reported at a high level (i.e. in aggregate rather than by recipient), the reporting of intra-group payments of royalties, interest and service fees, should not add too significant an admin burden. However, we feel that this information is best included in the master and local files
rather than the reporting template. One reason for this is that there are often inconsistent
definitions of what is a royalty or service fee in different territories which could cause
confusion. Potentially a company could be asked to state on the CbC template whether they
make such payments as this could be a factor in assessing risk with the tax administration
then reviewing the details in the transfer pricing documentation if they wished.

**Should reporting require reporting of the nature of the business activities carried out?**

An overview of the type of activity on the CbC template in line with the classification code
suggested seems reasonable. It would have to be recognised by administrations that there
may be grey areas between business activities and a company may have a number of
activities. The classification codes would not give any sense of scale of the respective
activities.

**Comments on template not noted above**

Some of the information requested will be difficult for branches to complete – such as capital
and reserves. Consideration needs to be given as to how this should be defined.

The template is required to be completed by all associated enterprises – although the
common meaning of this is taken to be subsidiary companies or companies under common
control, the actual definition in the OECD Transfer Pricing Guidelines (and Article 9 of OECD
Model Tax Convention) opens this up to all Joint Ventures and investments. This broad
definition would place a significantly more onerous requirement on MNEs and should be
reviewed. We would propose that joint ventures be excluded and that, for a group such as us
who report under IFRS, we include all entities consolidated into our ultimate parent
company’s accounts.

If a bottom-up approach is to be adopted, it may be useful to include a column requesting
details of the period that the information is for – this would help identify those companies
with non-coterminous year ends, or short or long accounting periods rendering the
information more meaningful and hopefully resulting in fewer queries from tax
administrations.

Place of effective management can be difficult to define – we would propose this be amended
to the primary territory of tax residence. Where there is no such territory (i.e. Hong Kong) this
could be entered as “None” with an explanation in the Additional Information.

It is noted that the initial proposal is for the amounts to be reported in the entity’s functional
currency – we query whether this would enable meaningful comparisons to be made? As
noted above, entities within a territory can use different currencies and this would not, in our
view, enable accurate comparisons between countries to be made. In addition, a company
can have a different functional currency to the currency in which it calculates its tax liability.
For these reasons, we feel the option of reporting under a single currency enables more
meaningful comparisons to be made.

Linked to the above, we agree with the proposal that MNEs can elect to report all amounts
under consistent accounting principles and translated on a consistent basis. However, we
would not want this to result in many additional queries and requests for reconciliations from
the tax administrations. We would wish this to be extended so that data from the Group
Accounts system can be used rather than taking data from the local statutory accounts.
If reporting is to be on an entity basis, we do not understand how tax paid on a consolidated group basis allocated to the group members would be that meaningful. How would you treat loss-making companies that are part of an overall profitable tax group. In our opinion, highlighting that the companies are in a tax consolidated group and which company is responsible for paying the tax would be more meaningful and less open to misinterpretation.

The proposed reporting of the number of employees raises a number of issues. For example, the proposed treatment of seconded employees may be difficult – should this include anyone seconded in the period, or just those at the year end? Is it proposed that agency workers be included? The average number of employees may be more useful than the year end figure as the year end figure is not necessarily indicative of the full year’s activity. You should also consider how the reporting deals with part-time workers. Some businesses will have large numbers of part-time workers, if they are reported separately, rather than as a number of full-time equivalents this could lead to difficulties in comparing organisations.

The measurement of total employee expense needs further clarification – for example how would rewards such as share options be measured – different GAAPs have different requirements in this regard.

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<th>Comments regarding master file contents</th>
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<tbody>
<tr>
<td>Materiality will be key – see comments below</td>
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<tr>
<td>The requirements regarding the 25 most highly compensated employees in the business line raises serious concerns regarding confidentiality. In addition, how would “principal office” be defined? As noted above, how would non-cash compensation be measured?</td>
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<td>We feel the reporting of MAPs should not be required. Such reporting could be prejudicial to any MAP discussions between tax administrations, and could result in an increase in audits in other territories. MAP conclusions (particularly where the tax administrations are obliged to eliminate double taxation) do not necessarily represent what either tax administration would normally consider to be arm’s length and as such we would not want the results reached to prejudice any other discussions with tax administrations. There is also the issue of taxpayer (and tax administration) confidentiality to be considered. The reporting of APAs may be useful, although it will depend on the level of detail that will be required, and is subject to concerns raised regarding MAPs.</td>
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D. Compliance Issues

We agree with the proposal for extending the date for completion on the CbC template to one year following the last day of the fiscal year of the ultimate parent entity.

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<th>Specific guideline on materiality</th>
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| Ideally there would be a specific guideline on materiality to avoid uncertainty. However, we appreciate how difficult this would be. What is not material in a group context may be in an individual territory context (and vice versa). Not providing a definition could result in additional disputes between tax administrations and taxpayers. Measures such as not reporting intra-group trading where such trading falls below a de minimis level of sales or purchases for a subsidiary would be useful. We do not propose that absolute measures of materiality be applied and feel that proportionate measures are most appropriate (except in
the instance of SMEs where absolute measures should be applied to determine if a group is a SME). It may be appropriate to give indicative factors and guidance as to what may and may not be material rather prescriptive ratios.

### Measures to simplify the documentation process

We welcome the proposal that full searches should not have to be completed each year, however we are not convinced that updating the financial results of the entities significantly reduces the burden (especially if local territory searches are required), or proportionately increases the reliability of the results.

It is disappointing to note that the OECD does not intend to address the issue of regional vs local comparables. Being obliged to find specific local comparables represents a significant burden for companies. From experience we know that in some territories there are no local comparables and the time and expense of performing a local search is burdensome to deliver a nil result. It is unfortunate that the proposed standardisation could not be extended to include the use of regional comparables.

### Translation requirements

We agree with the proposals that the master file should be prepared in English, with tax administrations requesting specific sections be translated if required. We certainly do not feel that the master report should be translated in full for any jurisdiction – this would give rise to a significant burden (and potential additional cost).

### Penalties

As noted above, we believe penalties can be useful in encouraging compliance. However we feel these should be applied in a consistent and reasonable manner, taking into account the co-operation of the taxpayer. Where a company has acted in good faith, it should not be penalised.

We are concerned that paragraph 40 suggests there could be a shift in the onus of proof to the taxpayer. We do not agree that taxpayers should in all cases bear the burden of proof. In fact, where a group has prepared transfer pricing documentation justifying why pricing is at arm’s length, it should not have to provide information ad infinitum to counteract tax administration challenges. We are concerned that paragraph 40 could be used by some tax administrations to adopt an intransigent approach to discussing transfer pricing by simply saying the taxpayer has not provided sufficient evidence.

If penalties are to be utilised, we would advocate behavioural penalties rather than absolute penalties as by definition there is a vast amount of information within a MNE and on occasion transactions may be missed, or alternative views taken as to what is important to be disclosed. A company using its best efforts to comply with the proposals should not be penalised, provided they have not been careless or negligent. There will also be a period of learning for both parties in the first few years of preparing the documentation where tax administrations and companies will be seeking to implement the rules and determine what level of detail is required. During this period some leniency should be awarded to companies regarding the contents of their documentation.
Confidentiality

This is a key concern. The information could be submitted to the taxing administration of the parent company and then disseminated to the various overseas taxing administrations. Would this be automatic, or would it need to be requested by the overseas administrations (the former is probably more resource-intensive)? This potentially provides scope for commercially sensitive details to become public — presumably the parent tax administration central office would send the information to the overseas central office who may then pass this to the local auditor?

Each stage in the chain has the potential for information to become insecure. It is important to note that on occasion, groups would not want subsidiaries to have access to all the financial data of all other subsidiary operations.

Therefore, we propose an alternative. A request could be made by the overseas taxing administration to the entity in their jurisdiction that the parent company to provide the template. This could then be sent direct to the overseas administration by the parent company, ensuring only the “owner” of the information and the tax administration receives it. Any questions on the template could then be addressed to the parent entity as suggested above.

Mechanism for making master file and CbC reporting available

We consider that direct filing by the MNE members is the least attractive approach. This increases the risk of information ceasing to be confidential and potentially results in commercially sensitive information being provided across all subsidiaries.

Our preference is for either the tax administration in the home state to provide the information, or for the head office of the MNE to provide the information. We also feel this should be in response to a request from the overseas taxing administration so as to ensure it is actually required and will not merely sit in an inbox/in-tray. If the information has been requested, in our opinion it is more likely to be treated as important and confidential — if a mass of reports are made to one tax administration by another the security of that information could be compromised.

Other

We would propose that a review be undertaken once the proposals are final to ensure that the proposals are delivering what is wanted by the relevant stakeholders, and determining the compliance burden. In this way improvements can be made to ensure the correct balance is being struck.

Yours sincerely

John Searle
Head of Taxation
Global BEPS Working Group

Comments on OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting

23 February 2014

The Global BEPS Working Group appreciates the opportunity to provide comments to the OECD on the 30 January 2014 Discussion Draft on Transfer Pricing Documentation and CbC Reporting. These comments focus in particular on the proposed template for country-by-country reporting.

The Global BEPS Working Group is made up of thirteen global companies that are geographically and industry diverse. These companies have joined together to provide input to policymakers on the implications for global businesses of the focus areas and potential proposals for response under the OECD BEPS Action Plan.

The diversity of the companies that make up the Global BEPS Working Group highlights the broad range of considerations and challenges relevant to implementation of a country-by-country reporting requirement. The Working Group members are headquartered in eight different countries. Some of the Working Group members use IFRS for their financial statements while others use U.S. GAAP. Some of the Working Group members have operations in upwards of 25 countries while others are in more than 150 countries. Some of the Working Group members have hundreds of entities in their groups while others have several thousand entities. All of the Working Group members are integrated global businesses with multiple currencies and myriad intercompany transactions within their corporate groups.

Our comments are focused on several key areas with respect to the design and implementation of the country-by-country reporting template:

- The design and operation of the template should be consistent with its intended use as a high-level risk assessment tool.
- The template should be separate from the master file.
- The template should provide for country-by-country reporting rather than entity-by-entity reporting.
- The template should provide flexibility regarding data sources to allow companies to use the data that is most readily available under its own systems to populate the template.
• The scope of the template should be modified and narrowed by eliminating information categories that are not likely to contribute meaningfully to the high-level risk assessment purpose of the template.
• The template should be delivered to the tax authorities of the MNC group’s parent country and shared with other tax authorities under the protections of information exchange relationships.

Template Should be Consistent with High-Level Risk Assessment Purpose

As an overarching matter, we believe that the design and scope of the country-by-country reporting template should be driven by its intended use as a high-level risk assessment tool. The G8 Leaders Declaration in June 2014 committed to “a common template for multinationals to report to tax authorities where they make their profits and pay their taxes across the world” and emphasized the benefits of information “presented in a standardized format focusing on high level information on the global allocation of profits and taxes paid.” Following release of the BEPS Action Plan, the OECD has stressed that the purpose of the country-by-country template is high-level risk assessment.

Consistent with this purpose, the template should be kept as simple as possible. Given the number of countries in which many MNC groups operate and the fact that business information typically is not maintained on such a country-by-country basis, even a “simple” template will represent a new burden for companies. The magnitude of the new burden will depend on the parameters of the template and the manner in which it is implemented.

Also consistent with this purpose, the template should be structured so that companies can leverage information that is otherwise being produced for other purposes wherever possible. Any design choices that facilitate the use of data that is maintained for other purposes will reduce, although by no means eliminate, the burdens associated with compliance with this new reporting requirement.

Similarly, the template requirements should not be overly prescriptive or rigid. In this regard, the July 2013 White Paper on Transfer Pricing Documentation noted with respect to the contemplated country-by-country information that it was essential that “all involved in preparing and reviewing such data understand that risk assessment is a first step and that precision may not be necessary.” In other words, “close” is good enough to serve the high-level risk assessment purpose. In this regard, for example, the Discussion Draft allows data to be reported in the applicable currency and accounting standards of the original records, even though this likely will mean inconsistencies across the group. In the same vein, allowing reporting based on prescribed
ranges rather than mandating reporting of specific figures also could be an appropriate approach and would be consistent with a reasonable materiality standard.

In addition, the template should not include information that can be better provided to tax authorities through a different avenue. The country-by-country reporting template is just one element of the additional reporting that is contemplated by the OECD. The Discussion Draft also details a two-tier approach to transfer pricing documentation that involves both a global master file and local country files. The proposed master file envisions the provision of extensive information regarding all aspects of a group’s global business, including diagrams of legal, ownership and management structure; descriptions of all major lines of business; detailed information regarding intangible assets; detailed information regarding intercompany financial activities; and a broad range of other financial, tax, and operational information.

With these overarching considerations in mind, and as discussed with more specifics below, we urge the OECD to rethink the approach reflected in the Discussion Draft of a template that includes seventeen columns of data and a separate row for each and every entity within a corporate group. One way to put this in context is to consider that a MNC group with 500 entities, which would not be unusual at all, would have to enter more than 8000 individual data points. A narrower scope is consistent with the high-level risk assessment purpose of the template; indeed, such a scope could well provide a clearer view of the global footprint and risk profile of a company. An approach that is less prescriptive will allow companies to leverage the information that is most readily available. Moreover, as the OECD has recognized, precision is not needed for this first-step risk assessment. In addition, the content of the template can be reduced by eliminating reporting that is duplicative of more meaningful information proposed to be provided as part of the transfer pricing master file.

Finally, it is important to recognize that this initial high-level risk assessment is very different than a detailed transfer pricing analysis. The nature of the information in the country-by-country reporting template also is quite different. As such, the template should be used only for risk assessment purposes. Once a determination is made to focus attention in a particular area, tax authorities should set aside the template in favor of reliance on the more detailed information contained in the transfer pricing documentation or provided in response to requests for additional information. Therefore, responding to one of the specific questions in the Discussion Draft, we believe the template should not be considered to be part of the transfer pricing master file. Rather, the country-by-country reporting template should be a standalone document that is used only for its specified purpose of high-level risk assessment.
Template Should Provide for Country-by-Country Reporting

Entities aggregated by country

The proposed template included in the Discussion Draft would require entity-by-entity reporting rather than country-by-country reporting. However, the Discussion Draft asks for comments regarding whether the template instead should provide for country-based reporting. We believe that country-by-country reporting, with entities aggregated by home country, is more consistent with the high-level risk assessment purpose of the template.

The template should provide for reporting on a country-by-country basis that includes aggregated information where a MNC group has more than one entity within a country. It should not require entity-by-entity reporting within a country. Reporting that segregates entities within the same country would not provide information that is more meaningful. Indeed, such information would include significant “noise” that could well make it significantly less useful for country risk assessment purposes than aggregated information. For example, it is quite common for groups to use a single employment entity for all their employees within a country. Separate reporting of that entity would not provide meaningful economic activity information either for that entity or for the other entities within the country that deploy those employees in their businesses.

Another example of the inherent difficulties in entity-based reporting for template purposes is situations that involve combined reporting for tax purposes within a country. As the Discussion Draft acknowledges, separate entity reporting would mean that the taxes for the entities in that combined group, which are paid by one entity, would need to be divided among the entities in the group in some manner; otherwise all the taxes would be reported with respect to the one entity that is the taxpayer for the combined group and the other entities would show no taxes. However, any such allocation, including the Discussion Draft’s approach of allocating based on shares of a book income measure, would be artificial. In some cases, such as those involving groups that include some entities with taxable income and others with losses, an artificial allocation of group taxes across the entities could be quite distortive. These issues would not arise with country-based reporting, which would provide the tax authorities with the high-level information regarding the spread of a company’s global footprint across countries that is described in the BEPS Action Plan as the aim of this new reporting requirement.

Aggregating entities within a country for purposes of the template would avoid these complications and would provide more useful, and less misleading, information. Aggregation for this purpose should not involve a formal consolidation of entities that report separately in the country. In many cases, a consolidation would be extremely difficult to do and would not provide meaningful information. Many MNC groups have entities in a country that are commonly controlled but that are not held under a single entity within the country. As such, the
entities in the country do not represent a subgroup with a top company and subsidiaries below it. A consolidation of such companies would not be appropriate. Similarly, branches in a country, which are treated as separate entities under the Discussion Draft, would not naturally be consolidated with any other entities in the country.

If a group does have a consolidation in a country for other purposes, that should be used for purposes of country-by-country reporting on the template. Where there is no consolidation in a country or where there are entities in that country that are not included in a consolidation, there would be little value in requiring an extra level of accounting consolidation simply for purposes of the template. The aggregation for country-by-country reporting purposes should be a simple summation of the results with respect to the separate entities in the country. This will use the most readily available information to provide country-based information in a manner consistent with the high-level risk assessment purpose of the template.

**Exclusion for non-consolidated entities**

The template should require reporting only with respect to entities that are included as consolidated in the MNC group’s consolidated financial statements. This is how companies keep their financial systems. Using a different grouping for purposes of the template would create unnecessary complexity. Moreover, the information that is maintained in the financial system for a non-consolidated entity can be very different than the information that is maintained for a consolidated entity. The more subjective definition of control for transfer pricing purposes, which the Discussion Draft would use as the basis for determining the entities included in the template reporting, is not used by companies for purposes of their financial systems.

Where an entity that is considered to be controlled under transfer pricing standards has transactions with members of the consolidated group, information will be available in the transfer pricing documentation. Where an entity that is considered to be controlled under transfer pricing standards does not have any transactions with members of the consolidated group, including such entity in the group for purposes of the country-by-country template would not provide information that would enhance the high level risk assessment. Limiting the template reporting to consolidated entities would be consistent with a reasonable approach to materiality.

**De minimis exception**

The provision of a de minimis rule in connection with the country-by-country reporting template would be very helpful in reducing the burden on companies without adversely affecting the quality of the information provided in the template. Where a MNC group’s presence in a particular country is very limited, it should not be required to apply the full reporting
requirements of the template to such country as such information with respect to the country would be of very limited value.

One approach to a de minimis rule in this context would be to provide an exception from full reporting in the template for any country that does not meet a de minimis threshold (for example, a country where the group’s net income is less than say 5% of the aggregate group net income as reported on the template, coupled with a requirement that the template include full reporting that covers substantially all of the group’s global activity (for example, full reporting that covers at least say 90% of the group’s net income). Such an approach would be consistent with a reasonable approach to materiality.

Where companies choose to apply the de minimis rule, the template could include a list of the countries that fall below the de minimis threshold and would specify the percentage of total profits that such countries in aggregate represent. The template columns would not be required to be filled in for these de minimis countries. However, the tax authorities of the countries on the de minimis list would have access to the template in the same manner as the tax authorities of countries with full reporting in the template.

Under this approach, the tax authorities of the countries that fall in the de minimis category for an MNC group would have access to the full information about the other non de minimis countries in which the group operates. It is information about the group’s presence and activities in such other countries that would be most relevant to these tax authorities for high-level risk assessment purposes.

**Template Should Allow Flexibility Regarding Data Sources**

*Flexibility to use most readily available data source*

The country-by-country reporting template should provide companies with flexibility regarding the data to be used for each category of information required to be reported. The data source that will produce the most reliable information and that will be most readily available (or that will be available at all) is dependent on a variety of factors that will differ from company to company, including the company’s management and financial reporting systems and accounting processes, the breadth and complexity of the company’s group structure, the company’s business or businesses, the types of intercompany transactions, and the regulatory regime or regimes applicable to the company. Differences in IFRS and GAAP rules can also affect the data that is available.
The country-by-country information that the OECD is seeking with this template generally is not information that is collected by MNC groups in such form for any other purpose. There is no “perfect” data source that could be required to be used for the template. Rather, production of this country-by-country information will, at least to a very significant extent, be a new exercise that will require a reconfiguration of existing data with adjustments to meet the template parameters. The differences in relevant systems and circumstances noted above mean that the data source that would require the least adjustment and that would result in the most meaningful information will differ from company to company. Therefore, the template should not be overly prescriptive with respect to precisely how companies source the information that is to be used to satisfy the parameters. With no single data source that is perfect, allowing flexibility regarding the data source to be used will ensure that companies can use the data that is most readily available and requires the least adjustment to adapt it for this purpose.

We recognize that tax authorities may have an interest in knowing which data source a MNC group chooses to use to meet the specified parameters of the template. Therefore, the template could require that groups identify the data source that is used. The template also could require that groups use their chosen data source consistently from year to year (absent a change in relevant facts that would justify a change in the data source, with such change disclosed on the template).

This approach to the template is in keeping with its first-step, high-level risk assessment purpose. It allows for the use of the best available information, consistently sourced year to year. The fact that two different MNC groups might use two different data sources is not relevant for this risk assessment exercise, which is focused on getting a clear picture of a company’s profile across countries and not on comparing one company to another.

*Use of data sourced from consolidated financial statement reporting*

In response to one of the questions in the Discussion Draft, we believe that the template should allow use of data sourced from consolidated financial statement reporting. However, the use of such data should not be required. Rather, the template should provide flexibility as to the data used to source the required information regarding revenue and net income.

As an initial matter, we would note that the label “top down” which is colloquially used to identify this approach actually is quite misleading. Despite this label, this approach typically would not involve starting with global consolidated income from the financial statements and then disaggregating that single number to get to country-based income numbers. Rather, the starting point for this approach typically would be the separate reporting unit packages that are the starting point for the production of the consolidated financial statements. A reporting unit may represent an entity, a business segment, or a local group of entities. These reporting unit
packages are produced quite quickly after year-end. They typically are calculated in the accounting approach of the parent company, so that all the packages would be in IFRS or US GAAP for example.

After delivery of these packages, various adjustments then are made at the group level. These adjustments typically are “pushed down” to the reporting unit level where they relate to a particular reporting unit and are kept at the group level as “topside adjustments” where they are of a type that cannot be associated with any particular reporting unit. Thus, some adjustments will be incorporated in the separate reporting unit financial numbers, but other adjustments are maintained at the group level because of the nature of the adjustment.

For purposes of producing consolidated financial statements, all intercompany transactions are eliminated, including dividends, interest, royalties, and sales. For purposes of the country-by-country template, it would be appropriate to eliminate intercompany dividends in order to avoid double (or multiple) counting of the underlying earnings. However, given OECD’s risk-assessment focus for the country-by-country reporting template, it would be appropriate to keep the income and/or expense associated with intercompany transactions (other than dividends) in the separate reporting unit numbers (and therefore not to eliminate intercompany transactions from the numbers contained in the separate reporting unit packages). The resulting separate reporting unit numbers, aggregated by country where there are multiple reporting units in a country, would provide the country-by-country data to populate the template.

It should be noted that the country numbers produced for the template using this approach would not sum to the consolidated financial statement income number and a reconciliation would not be practical. One reason for the difference in the total numbers is that the country numbers would include intercompany transactions, which would be eliminated in the consolidation. While many intercompany transactions involve equal and offsetting entries, such as interest income and interest expense, some intercompany transactions would have a positive value, such as an intercompany sale of goods where the goods remain in the inventory of the purchasing entity; the profit with respect to such an intercompany sale would be in the income of the seller in the country numbers but would be eliminated in the consolidated numbers. The country numbers also would not include those group-level adjustments that are not associated with any particular reporting unit. In most cases, the aggregate of income by country would exceed consolidated income because, for example, of the inclusion of profit on intercompany sales in inventory.

The use of consolidated financial statement reporting as the data source for the country-by-country template is illustrated in a simplified example that is attached.
Use of data sourced from statutory accounts

As the discussion above and the attached illustration shows, populating the country-by-country template with consolidated financial statement reporting data really represents an alternative form of “bottom up” approach which is not dissimilar to the approach of sourcing country data for the template from the local-country statutory accounts, which is the approach for which the label “bottom up” approach is colloquially used. While we do not think that the template should require the use of statutory accounts data, we do believe that such data should be permitted. As noted above, the template should provide flexibility as to the data used to source the required information regarding revenue and net income.

Statutory accounts generally are locally-audited financial statements for the local reporting units within a MNC group that are required for regulatory purposes in many countries. Statutory accounts typically are produced later than the consolidated financial statements and so may reflect additional information not available at the time the consolidated financial statements are produced. There may well be little group-level involvement with respect to the statutory accounts, which typically are prepared locally. Statutory accounts generally are the starting point for local tax returns. Statutory accounts typically are produced in each local GAAP which means differences from country to country, although in some cases they may be produced under the common accounting approach of the parent company. The Discussion Draft acknowledges that there typically will be differences in accounting standards and currencies across the entities within the group. As the Discussion Draft further recognizes, not all countries require statutory accounts or require statutory accounts for all local entities so in those countries alternative sources of information would be locally audited financial statements produced for other purposes or internal management accounts of the entity.

Because statutory accounts (or local books) represent local reporting, they could be seen as a natural starting point for sourcing the data for the country-by-country template. However, it should be noted that some adjustments would need to be made in order to use this data in the template. Intercompany dividends would need to be eliminated in order to avoid double counting. Although statutory accounts generally are used in producing local tax returns, the country numbers may not tie to the tax returns. As with the approach described above, country numbers under this approach would not sum to the consolidated financial statement numbers and a reconciliation would not be practical.

As the Discussion Draft notes, the local due dates for statutory accounts in some cases are well after the end of the year. Therefore, this would need to be factored into the determination of the due date for compilation of the country-by-country template. The Discussion Draft’s recommendation of using a due date that is one year after the close of the fiscal year is a reasonable approach for addressing this timing issue.
Use of other data sources

While data from the production of the consolidated financial statements and data from the statutory accounts are two primary sources for revenue and income information to be provided on the template, depending on a MNC group’s financial reporting systems and accounting processes, there may be other sources that would be reliable and more readily available. For example, for companies in highly regulated industries, there may be reports produced for regulatory purposes that are a good alternative source for the template information. Alternatively, for companies that do all their internal financial reporting on a line of business basis across countries and across entities, a good source of information on a country basis may be the local tax returns (for those countries where returns are required). Moreover, for U.S.-based groups, the data contained in U.S. tax filings, such as the information on foreign subsidiaries in the Forms 5471, could be a good source of income information for the template. These, and other, data sources also should be acceptable for template purposes. Any of these data sources, identified and used consistently from year to year, would provide a measure of income suitable for the high-level risk assessment purpose of the template.

Scope of Template Should be Modified and Narrowed

The seventeen columns contained in the proposed template include more information than is necessary for the high-level risk assessment purpose of the country-by-country template. Moreover, some of the information proposed to be required would be very difficult to produce in the form specified. Some of the information would be highly misleading in the form specified. And some of the information would be duplicative of information that would be included in more useful form in the transfer pricing documentation master file. We believe that the scope of the template should be narrowed in the following respects.

Country of organization and place of effective management

The proposed template would group entities based on their country of organization and then would include a column requiring that the place of effective management be reported for each entity. We believe that the template could be streamlined and more meaningful information provided to tax authorities if entities are grouped based on their country of tax residence rather than their country of organization. This would eliminate the need for the place of effective management column. With this reorganization of the template, it would also be appropriate to change the first tax column in the same manner. Thus, instead of reporting taxes paid to the country of organization this column would require reporting of taxes paid to the country of tax residence.
Business activity codes

The use of broad business activity codes in the proposed template is welcome. The requirement that MNC groups report the codes for “important” business activities should provide companies with appropriate flexibility to include multiple business activity codes in a reasonable manner.

Taxes

As noted above, the first column of taxes should be adjusted to require reporting of taxes paid to the covered entities’ country of tax residence rather than their country of organization. With respect to the other two columns of tax information – taxes paid to all other countries and withholding taxes – there would appear to be significant overlap. Clarification regarding how to report withholding taxes and whether withholding taxes are to be reported in the column for taxes paid to other countries in addition to being reported in the withholding tax column would be helpful.

In addition, consistent with the discussion above regarding the need for flexibility in how data is sourced and presented, we believe MNC groups should be allowed flexibility to report taxes either on the basis of cash payments during the year, as is reflected on the proposed template, or on the basis of the current tax provision reported for financial statement purposes. Each of these approaches has merit for different reasons, neither approach would provide tax information that would be completely aligned with the other financial information required to be reported on the template, and the approach that would involve data that is most readily available would differ from company to company.

Use of cash taxes as the measure would provide tax authorities with information regarding the tax amounts paid in each country during the particular year and so would correspond to government receipts from the company during the year. Companies that use IFRS, in particular, typically have a cash statement that separately identifies taxes paid. For these companies, using data sourced from this statement likely would be the most efficient approach to providing template information on taxes. As noted above, cash tax amounts would not relate precisely to the income amounts that are reported on the template and so could be misleading if this disconnect is not recognized.

Use of the current tax provision as the measure would provide tax authorities with information regarding tax liability that has greater connection to the income information provided so a comparison between the tax and income amounts by country could be seen as more meaningful. Financial statements, both consolidated financial statements and statutory accounts, include the current tax provision which reflects the current taxes that relate to the income for the year (although it may also reflect some prior year adjustments). Non-IFRS companies typically do
not have the same type of existing statement that separately identifies taxes paid on a cash basis. For these companies, using data sourced from the current tax provision on their financial statements would be the most efficient approach for providing template information on taxes.

It should be noted that for both data sources, and indeed for any annual reporting approach, situations involving losses that are carried over between years and other post-year adjustments would make meaningful comparisons of the income and tax numbers on the template challenging at best. It should be further noted that financial statements also include deferred tax liabilities and assets, which reflect taxes to be paid in a future period with respect to the income for the year or tax attributes such as losses for the year to be used with respect to a future period. Taking into account such deferred tax amounts together with the current tax provision would provide a more accurate picture over time of the total income tax liability associated with the country-based income amounts that are to be reported on the template.

**Stated capital and accumulated earnings**

We believe that the column for stated capital and accumulated earnings should be eliminated from the proposed template. It is not clear how, if at all, this information would be used. Moreover, branches that are treated as entities for purposes of the template would not have a measure of stated capital and accumulated earnings to include in the country reporting. The country-by-country reporting template should not require reporting of stated capital and accumulated earnings because such information would not meaningfully contribute to the high-level risk assessment for which the template is to be used.

**Number of employees**

The proposed template’s reporting of number of employees based on payroll records is an appropriate approach. However, we believe that it is overly prescriptive to require that the reporting be done using the number of employees as of the last day of the entity’s fiscal year. Rather, MNC groups should be allowed to report the number maintained for other purposes and identify the basis for the number. For example, for U.K. statutory accounts purposes, employees are reported using the average number for the year; for a company that prepares U.K. statutory accounts, reporting on this basis should be acceptable. Similarly, the treatment of seconded employees also should not be prescribed. Many groups include employees seconded to an entity in that entity’s payroll numbers consistent with the approach specified on the proposed template. However, groups that record seconded employees differently for payroll purposes should be allowed to use their payroll approach for purposes of the template as well.
**Total employee expense**

We believe that the column for information on employee compensation expense should be eliminated from the proposed template. Such compensation information may not be maintained by all entities in a MNC group in the same manner. Valuation of non-cash compensation, as is specified in the Discussion Draft, would be difficult. Compensation information could be quite sensitive in situations involving only a relatively small number of employees in a particular country so that the total could reveal information about individual employees. Moreover, information regarding employee compensation is proposed to be included in the transfer pricing documentation master file and so inclusion of this information in the template would be duplicative.

The country-by-country reporting template should not require reporting of total employee expense because such information would not meaningfully contribute to the high-level risk assessment for which the template is to be used.

**Tangible assets**

We believe the column for information on tangible assets should be eliminated from the proposed template. The Discussion Draft would require inclusion of the book value of tangible assets other than cash or cash equivalents, intangible assets, and financial assets. Including such information would provide a highly inaccurate profile of the group’s assets. The misleading nature of this information is further exacerbated by the use of book value, which would not provide a useful view of the group’s assets. Moreover, the business activity codes that are required to be reported would provide sufficient information so that this asset measure is not needed as an informal proxy for identifying what activity is conducted in the country. Finally, the information regarding assets is proposed to be included in the transfer pricing documentation master file and so inclusion of this information in the template would be duplicative.

The country-by-country reporting template should not require reporting of tangible assets because such information would not meaningfully contribute to the high-level risk assessment for which the template is to be used.

**Intercompany payments**

We believe the six columns for information on intercompany payments and receipts of royalties, interest, and service fees should be eliminated from the proposed template. For most MNC groups, these columns would require the aggregation of myriad intercompany transactions. Moreover, the business activity codes that are required to be reported would provide sufficient information so that these measures are not needed to help identify what activity is conducted in
the country. Finally, more detailed information regarding intercompany transactions is included in
transfer pricing documentation and so inclusion of this information in the template would be
duplicative.

The country-by-country reporting template should not require reporting of intercompany
payments and receipts because such information would not meaningfully contribute to the high-
level risk assessment for which the template is to be used.

**Template Should be Delivered to Parent Country Tax Authorities**

We believe that MNC groups should deliver the country-by-country reporting template to their
headquarters country tax authority, which typically is the tax authority with which the company
has the most extensive dealings. The headquarters country tax authority should have sole
responsibility for considering and addressing whether or not the global company has reasonably
satisfied the template reporting requirement. The template would then be shared by the
headquarters country tax authority with other relevant tax authorities pursuant to an appropriate
relationship with such authorities. We also believe that the headquarters tax authority should
inform the company when and with which countries the template is shared.

Sharing of information by the headquarters country tax authority pursuant to an information
exchange relationship would be subject to the confidentiality protections provided under such
relationships which typically would be consistent with the confidentiality protections of the
headquarters country. The sharing of the template could be done pursuant to an existing bilateral
exchange of information relationship or through a new relationship established for this purpose,
including pursuant to a multilateral instrument such as is contemplated under Action 15 of the
BEPS Action Plan. What is critical is that the information is shared with tax authorities subject
to robust confidentiality protections as the potential damage from improper use of the
information expected to be reported on the template would be severe.

It would be unreasonably burdensome for MNC groups to be required to deliver a template to
each country where the company group has entities. Such an approach could involve a company
having to fill out multiple versions of the template where countries have legislated different
versions of the template. It also could involve parallel discussions with multiple tax authorities
regarding the sufficiency of the company’s compliance with the requirements of the template (or
templates). Most significantly, the global information of the group would be subject to the
confidentiality practices of each of the countries to which the template is provided, some of
which may provide little or no protection against disclosure.
It should be noted that the OECD could develop an approach to address the situation of a headquarters country that does not require reporting pursuant to the template. For example, rules could require a group that is headquartered in a country that does not require template reporting to deliver the template directly to each country in which the group has an entity unless the group elects to treat a country in which it has an entity and which requires the reporting pursuant to the template as its headquarters country for this purpose.

Finally, as discussed above, we believe that the country-by-country reporting template should be considered to be completely separate from the transfer pricing documentation master file given the distinct purposes each are intended to serve.

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In closing, we would like to note that the proposed new reporting requirements would mean that tax authorities would have substantial information about the global profile of companies that have operations in their country and that all tax authorities would have this same information. We urge the OECD to take this into account in advancing the work on Action 14 on improving the MAP process. For example, agreement by a tax authority to allow mandatory arbitration to resolve disputes could be a condition precedent to the template being shared with such tax authority pursuant to an information exchange relationship.

We are happy to provide additional information or to answer questions regarding these comments. We would welcome the opportunity to discuss these important matters in more detail.

For more information regarding these comments, please contact Barbara Angus at barbara.angus@ey.com or +1.202.327.5824.
Illustration

Use of “Top Down” Approach – Separate Country versus Consolidated Profits

Parent is a pure holding company in a territorial tax jurisdiction. Its only income is dividends from its four direct subsidiaries. Each subsidiary is located in a different country. All four direct subsidiaries pay current year dividends equal to their entire net profit. This is a simplified illustration of a company group, with only five entities and five countries involved, limited group level adjustments and intercompany flows, and all amounts shown in a single currency.

Sub 1 is a U.S. manufacturing company that sells to unrelated customers in the United States and exports to a related distribution company in Canada. Sub 2 is the Canadian distribution company that purchases from Sub 1. Sub 3 is a Luxembourg company that is a group finance and licensing company and that owns certain IP rights that are licensed within the group. Sub 4 is a U.K. company that was recently acquired by Parent at a significant premium to its book value. It is a services company for the U.K. market.

Under consolidated purchase accounting required under Parent’s GAAP rules, Parent provided a stepped-up basis in Sub 4’s consolidated assets equal to 1000 in identifiable intangibles with a 10 year life and an additional 500 in goodwill with an indefinite life. Sub 4 has a subsidiary in the same business in Ireland. No portion of the purchase accounting step-up was "pushed down" to the separate entity book or statutory accounts of Sub 4, nor was there any allocation of the step-up value as between Sub 4 and its Irish subsidiary.

Sub 1 has total sales of 2000, of which 400 were sales to Sub 2. Its total cost of goods sold was 1000 and its SG&A expenses were 300. It also pays interest and royalties of 100 and 200, respectively, to Sub 3. Such payments are exempt from withholding tax under the U.S.-Luxembourg treaty (based on the derivative benefits clause in the U.S.-Luxembourg treaty).

Sub 2 has sales of 600 and SG&A expenses of 100. It pays interest to Sub 3 of 100 which is subject to 10% Canadian withholding tax. At the end of the year it has inventory on hand of 100 out of the 400 of goods that it had purchased from Sub 1. (It had no inventory on hand at the beginning of the year.)

Sub 3 has total interest income from Sub 1 and Sub 2 of 200. It has royalty income of 200 from Sub 1. It has total expenses of 150.

Sub 4 has services income of 500 and total expenses of 300, not including any amortization of the purchase price allocable to intangibles. In consolidation, 100 of amortization expense is booked for this amount. Its Irish subsidiary breaks even for the year.

The individual P&Ls of the separate entities by country and the computation of consolidated profit and loss are as follows:
<table>
<thead>
<tr>
<th></th>
<th>Parent</th>
<th>Sub 1 (U.S.)</th>
<th>Sub 2 (Can)</th>
<th>Sub 3 (Lux)</th>
<th>Sub 4 (U.K.)</th>
<th>Consolidated Adjustments</th>
<th>Consolidated Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sales</strong></td>
<td>2000</td>
<td>600</td>
<td></td>
<td></td>
<td></td>
<td>(400)</td>
<td>2200</td>
</tr>
<tr>
<td><strong>Costs</strong></td>
<td>(1000)</td>
<td>(300)</td>
<td></td>
<td></td>
<td></td>
<td>300</td>
<td>1000</td>
</tr>
<tr>
<td><strong>Gross Profit</strong></td>
<td>1000</td>
<td>300</td>
<td></td>
<td></td>
<td></td>
<td>(100)</td>
<td>1200</td>
</tr>
<tr>
<td><strong>Services</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>500</td>
<td>500</td>
</tr>
<tr>
<td><strong>Interest</strong></td>
<td>200</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(200)</td>
<td></td>
</tr>
<tr>
<td><strong>Royalties</strong></td>
<td>200</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>--</td>
<td></td>
</tr>
<tr>
<td><strong>Dividends</strong></td>
<td>950</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(950)</td>
<td></td>
</tr>
<tr>
<td><strong>Total Gross Income</strong></td>
<td>950</td>
<td>1000</td>
<td>300</td>
<td>400</td>
<td>500</td>
<td>(1450)</td>
<td>1700</td>
</tr>
</tbody>
</table>

| **Expense**         |        |              |             |             |              |                         |                     |
| **SG&A**            | 300    | 100          | 150         | 300         |              |                         | 850                 |
| **Interest**        | 100    | 100          |             |             |              | (200)                    |                     |
| **Royalties**       | 200    |              |             |             |              | (200)                    |                     |
| **IP Amortization** |        |              |             |             |              |                         |                     |
| **Net Profit Pre-Tax** | 950   | 400          | 100         | 250         | 200          | (1150)                   | 750                 |

### Consolidation Journal Entries

<table>
<thead>
<tr>
<th></th>
<th>Net P&amp;L</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>DB</td>
</tr>
<tr>
<td></td>
<td>CR</td>
</tr>
<tr>
<td></td>
<td>CR</td>
</tr>
<tr>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>DB</td>
</tr>
<tr>
<td></td>
<td>DR</td>
</tr>
<tr>
<td></td>
<td>CR</td>
</tr>
<tr>
<td></td>
<td>CR</td>
</tr>
<tr>
<td>3</td>
<td></td>
</tr>
<tr>
<td></td>
<td>DR</td>
</tr>
<tr>
<td></td>
<td>CR</td>
</tr>
<tr>
<td>4</td>
<td></td>
</tr>
<tr>
<td></td>
<td>DR</td>
</tr>
<tr>
<td></td>
<td>CR</td>
</tr>
</tbody>
</table>

1150
The separate entity/country information that is used to produce the consolidated financial statements could be used as the starting point for the country-by-country template in the following manner:

<table>
<thead>
<tr>
<th>Country</th>
<th>Net Profit</th>
<th>With Push Down of Purchase Accounting Effect</th>
<th>With Elimination of Intercompany Dividends</th>
<th>Consolidated Profit (after Intercompany Eliminations)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent</td>
<td>950</td>
<td>950</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Sub 1 (U.S.)</td>
<td>400</td>
<td>400</td>
<td>400</td>
<td>600</td>
</tr>
<tr>
<td>Sub 2 (Canada)</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>200</td>
</tr>
<tr>
<td>Sub 3 (Lux)</td>
<td>250</td>
<td>250</td>
<td>250</td>
<td>(150)</td>
</tr>
<tr>
<td>Sub 4 (U.K.)</td>
<td>200</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>1900</td>
<td>1800</td>
<td>850</td>
<td>750</td>
</tr>
</tbody>
</table>

The first column shows the net profit information for each separate entity/country that would feed into the computation of the consolidated financial statements. The second column shows the separate entity/country information adjusted to reflect the push down of the effect of the step-up from purchase accounting: Sub 4’s net profit is reduced by 100 which represents the amortization of the portion of its purchase price allocable to intangible assets.

The third column shows the separate entity/country information further adjusted to eliminate intercompany dividends: Parent’s net profit is reduced to 0 to eliminate the 950 of dividends it received from its four direct subsidiaries so the aggregate income does not reflect a double counting of the earnings distributed as a dividend. The information in the third column represents separate entity/country information including intercompany transactions other than dividends. This information is the information typically contained in the separate entity/country reporting packages that feed into the consolidated financial statements, modified to reflect adjustments that relate to a separate entity and thus are pushed down and to eliminate intercompany dividends so as to avoid a double counting of such earnings. The third column reflects information that would be appropriate for inclusion in the country-by-country reporting template.

The fourth column shows the consolidated profit after elimination of all intercompany transactions. The total consolidated net profit of 750 in this column is the amount shown on the consolidated financial statements. This column shows the consolidated profit number divided among the separate entities/countries. The separate entity/country information in this column reflects the information in the third column adjusted to eliminate intercompany transactions. The total consolidated net profit of 750 in this column differs from the total of 850 of net profit in the third column because of the intercompany profit in inventory. The total net profit of 850 in the third column, which includes intercompany transactions, includes Sub 1’s sale to Sub 2 of 100 of
goods which remained in Sub 2’s inventory at year end. The total consolidated net profit of 750 in the fourth column reflects the elimination of this 100 sale that remains in Sub 2’s inventory; such sale will be included in the consolidated profit when the inventory is sold to a third party.
Mr. Pascal Saint-Amans  
OECD  
Centre for Tax Policy & Administration 2 rue Andre Pascal  
75775 Paris Cedex 16  
FRANCE  

23 February 2014  

Dear Mr. Saint-Amans,  

Response to Discussion Draft on Transfer Pricing Documentation and Country by Country Reporting  

Grant Thornton International Ltd, with input from certain of its member firms and their clients, welcomes the opportunity to comment on the discussion draft issued on 30 January 2014 regarding transfer pricing documentation and country-by-country (CbC) reporting.  

We applaud the OECD’s continuing efforts to provide guidance to tax administrations regarding documentation requirements that might, over time, be adopted by all OECD countries, thereby providing both tax authorities and taxpayers, with a clear and consistent framework for showing that their transactions satisfy the arm’s length principle.  

We appreciate the spirit of openness which the sharing of this early draft demonstrates. We would however refer to our comments of 30 September 2013 at the scoping stage, several of which have not been addressed, or not fully addressed, by the discussion draft.  

Developing guidance around the risk assessment process, for both tax administrations and taxpayers, is a challenging yet important endeavour. As will be seen in the following discussion, we believe that transfer pricing compliance by all MNEs will be significantly enhanced by having a well-developed risk assessment process in place. This process could include tax authorities providing consistent guidance regarding the factors that could create an enhanced risk of audit. Given that country-by-country reporting is intended to be part of the risk assessment process, we have specific suggestions regarding the form that such reporting should take.  

Likewise, establishing a standard approach to transfer pricing documentation is a laudable goal but also a significant challenge. As you noted, there exists tremendous variety in the transfer pricing laws and practices of tax authorities both in terms of tax return disclosure and documentation requirements. Getting to a consistent practice will in many cases require a country to take either administrative or legislative action to adopt rules that might differ significantly from that country’s current practice.  

Finally, the discussion draft requests comments regarding materiality standards, and whether any more specific guidance could be provided. Our recommendations regarding materiality focus on
reasonableness, and on developing a flexible approach to materiality, rather than a rigid numbers-based approach. We believe that, just as transfer pricing itself is an inherently factual exercise, where no two companies are exactly alike, so too the determination of which transactions are material to a particular company cannot always be measured in absolute values or percentages of the total business activity. It is important, therefore, that whatever guidance is issued provide flexibility and consider materiality from the perspective of the group.

Therefore, our comments and recommendations can be summarized as follows:

- Regarding risk assessment, establish a flexible format for taxpayers to include specific information about their material intercompany transactions at the time the tax return is filed;
- Regarding documentation, not to specify the Master File / Local File structure unless and until countries agree not to impose additional local rules for documentation;
- Regarding materiality, establish standards that will both reduce the extent of required documentation and exempt certain taxpayers from specific reporting requirements regarding documentation
- Respect taxpayers' confidentiality.

A discussion of each item is presented below, and a summary of the responses of some of our clients to the questions posed by the OECD in the discussion draft is attached as an appendix.

**Treat Risk Assessment Separately from Documentation**

The discussion draft seems to conflate documentation and risk assessment, for example on page 2, Para. V.B.5 identifies as an objective for requiring transfer pricing documentation “to provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment.” Whilst we agree that both tax administrations and taxpayers need to conduct a transfer pricing risk assessment, we believe that it is important not to mix up the process of documenting specific transactions with the process of analyzing the taxpayer's overall risk of a transfer pricing audit or adjustment. The objective of a risk assessment transfer pricing regime should be to provide information to tax authorities contemporaneously (i.e. along with parent company tax returns) and to allow taxpayers to demonstrate mindful compliance. Risk ratings for taxpayers could then be established based on the initial information, and future documentation requirements could be scaled to risk ratings.

The objective of transfer pricing documentation, on the other hand, is to demonstrate, with regard to one or more material intercompany transactions, that the results of the transactions are consistent with the arm’s length standard. Therefore, we suggest that the OECD may be better served by separating the discussion regarding risk assessment from that regarding transfer pricing documentation, and consider a framework where risk assessment and documentation are different exercises done in different stages.

We would suggest that the first stage of review, i.e. risk assessment, be comprised of a review of tax returns, either CbC reporting or transfer pricing disclosures filed with tax returns, and/or information in the public domain.

We would also like to see some recognition by tax administration that unless current local rules are reduced, new requirements will inevitably be an extra burden. The OECD can help here by strong recommendations, for example that if and when CbC is adopted, local rules for tax return disclosures should be removed.
Allow Flexibility and Reduce Reliance on the Master File / Local File Structure for Documentation

Similarly, unless the Master File/Local File structure is going to be adopted by all countries as constituting adequate documentation by consensus, the Master File/Country File approach is only likely to add to the burden.

In our experience, where the compliance burden exceeds the anticipated benefit, e.g., in the avoidance of fines or penalties, the level of mindful compliance is significantly reduced, and taxpayers who become frustrated in attempting to comply with rules that do not fit their circumstances are more likely to become non-compliant.

The information requested in the CbC, the Master File and the Local Files is far too prescriptive in our view and too onerous. It would be preferable to start with a very limited list of requirements than to start with a huge 'wish list' as in the discussion draft annexes, and then hope to pare this down in future.

Allow Taxpayers to Prudently Scale the Level of Documentation and Be Exempted from a Documentation Requirement Where the Intercompany Activity is not Material

We would like to expand on the idea of the ‘principles of effective documentation’ and focus on materiality. This consideration resonates particularly clearly with our clients. We appreciate the OECD’s acknowledgement that “not every intercompany transfer requires the same level of documentation” and that “not all transactions are sufficiently material to require full documentation” and we believe materiality should be considered both from the perspective of the size of the transaction (relative to the size of the taxpayer) as well as the size of the taxpayer (relative to other taxpayers).

We applaud the OECD’s efforts with respect to exploring the suitability of safe harbours, and we support their application to certain transactions, and to SMEs in general.

Respect Confidentiality

As can be seen from the views of our clients (attached) they regard confidentiality as paramount as it can severely affect their commercial operations if information on their business fell into the hands of their competitors. Taxpayers confidentiality must be respected, and information shared with, and between, tax authorities only under treaty or exchange of information provisions.

We very much appreciate the OECD’s efforts with respect to the discussion draft and look forward to further material. We trust you found these comments helpful, and we welcome the posting of these comments on the OECD website if you deem appropriate.

Your Faithfully

Francesca.Lagerberg@gti.gt.com
Always % of revenue guidelines would be helpful. Also, deminimis

Administrations and is therefore likely that local files will be prepared

Generally, the master file typically should be prepared and submitted

Should the country-by-country report be part of the master file or

The OECD have also included a number of technical and practical

In what circumstances would you consider it appropriate for tax

What reasonable measures could be taken to simplify the

Approach to translation requirements?

We believe confidentiality is of paramount importance and

Information provision in tax treaties (see also Q8). Agreed.

Require tax authorities to demonstrate the reasonableness

Documentation only needs to be updated when significant

Should it be a completely separate document?

We have some concerns about the validity of this

Safeguards from recipient countries eg. via exchange of

It's reasonable for significant local files to be in the local

Language but excerpts from master files should only be

Its reasonable for comparable searches every 3 years, rolling

What is the advantage of performing local files in the local

It would be costly for companies to prepare their local files in a

Should not be required. My experience is that MAP settlements are often done on a

We have some concerns about the validity of this

We agree with your comment below, confidentiality is of

Maintained.

Currently use English unless stated. Worried that that using other language could lead

There needs to be consistency for the documentation process

MAP cases should be required as part of the master file?

Question Client 1 Client 2 Client 3 Client 4 Client 5 Client 6 Client 7 Client 8 GTIL

No. The requirements of the Master File should be sufficient

Entity wide basis, with sections on each business line.

Line of business.

Main example is our technical glass business, which is nearly 100% in

Sometimes authorities ask for copies of TP Docs prepared for other countries. If

We now perform our main searches every 3 years, with financial updates in the

Template countryfile. If local tax authorities adopted this it would reduce the

Entity bases dependant on business flexibility

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Currently use English unless stated. Worried that that using other language could lead

There needs to be consistency for the documentation process

MAP cases should be required as part of the master file?
By email: Transfer Pricing@OECD.org
21 February 2014

Dear Sirs,

RESPONSE TO OECD DISCUSSION DRAFT ON TRANSFER PRICING DOCUMENTATION AND CbC REPORTING

Grosvenor Group Limited

Grosvenor Group Limited (‘GGL’) is a UK based privately owned international property group which operates as a property investor, developer and real estate fund manager. It has operations in the UK, Canada, the USA, France, Sweden, Luxembourg, Japan, China and Hong Kong. At 31 December 2012 GGL’s assets under management were £12.2bn of which approximately £6bn are outside of the United Kingdom.

We welcome the OECD’s invitation for comments on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting (the ‘Discussion Document’).

General observations

Our responses to the specific questions raised by the Discussion Document are set out in the Appendix. However, we have some general observations as set out below.

It appears to us that the CbC Reporting Template has become a separate tool to the transfer pricing documentation and that it may in the future be detached from transfer pricing reporting. It is important that the architecture of the CbC Reporting is properly considered at the outset, as what is agreed now will drive the information that will be provided and the future approach of taxpayers and MNEs for years to come. It is therefore important that it takes into account features that are distinct to specific business sectors.

We are sympathetic to the ultimate goal of the OECD and the objectives of the Discussion Document. However, without taking into account the features that are relevant to different business sectors such as real estate groups there is a risk that the information that is provided is at best irrelevant and at worst mis-leading which may result in additional costs for both tax authorities and MNEs as they clarify misunderstandings and focus on identifying the correct facts.

A fundamental, feature of real estate groups is that the business operations and associated economic activity are all derived from fixed tangible assets (i.e. the real estate). Under most countries’ tax systems the income and gains that are derived from the real estate are taxed in the country where the real estate is located. As a fixed asset there is limited opportunity for real estate groups to structure their business operations so that the income and gains are taxed in another country from those where the economic activity take place.

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We ask that clear guidance is provided to businesses to ensure that the reporting can be made efficiently, without creating additional work, and costs for both tax authorities and tax payers.

In particular, our specific observations are:

1. **Definition of an MNE**

The requirement for an MNE to report and how an MNE is defined¹ raises specific issues for real estate groups, such as ours.

**Joint ventures**

- Real estate groups typically contain real estate assets in ventures, which can involve parties from different jurisdictions coming together to acquire a real estate asset located in a third country. In the case of GGL, our joint venture investments in large cities like London and Hong Kong are prime examples, where the size of investments can be considerable requiring international investors to come together to fund the acquisition and development of a property.

- If such joint venture structures fall within the OECD’s definition of a MNE there needs to be clarification of how such joint ventures are treated i.e. do the results of the JV entity itself constitute a separate MNE or does the MNE also include the joint venture partners? If the later, assuming the partners are also MNEs, how are partners to treat the JV in their own CbC reporting template as the accounting treatment for joint ventures varies according to the relevant local GAAP (see below)? Similar questions arise in relation to which entity prepares the transfer pricing master file and where is the ‘cut-off’ between the JV’s own transactions and those of its shareholders. Unless the peculiarities of joint ventures are taken into consideration there must be a risk of duplicate and/or mis-leading information being reported which could cause confusion for tax authorities and lead to unnecessary and time consuming questions being asked of taxpayers.

**Real estate funds**

- Similarly real estate funds involve investors coming together to acquire a portfolio of real estate properties which again could be caught within the definition of an MNE. The same issues regarding identification of the appropriate MNE entity arise. In the context of funds an additional question arises if the actual fund entity is transparent (e.g. a partnership) and does not have to file a tax return or prepare consolidated accounts under its local law. Will the fund entity be required to prepare a CbC template? Who will its ‘master’ tax authority be? Does a fund manager fall within the definition of an MNE even if it has no legal or beneficial interest in the fund?

¹ The OECD Guidelines for Multinational Enterprises 2011 Edition states that “A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed”.

We would therefore seek clarity from the OECD in what is and what is not included in the definition of an MNE.

2. Confidentiality

The Master file will contain details of transactions between certain affiliates that have no bearing on local affiliates in another jurisdiction so care needs to be taken on access to confidential and sensitive information. For instance, in the context of GGL’s fund management business, this could potentially allow the tax authority of a third party investor in our funds who have no connection with our proprietary business to have access to information about our proprietary business which is confidential to GGL and is of no relevance to the third party fund investor nor its tax authority. This information could also include market sensitive data that would be detrimental to our business.

We suggest that funds and joint ventures are specifically excluded, or if included we recommend that the OECD incorporate robust safeguards over how and to whom the data is shown.

3. Interaction of transfer pricing documentation and the CbC Reporting Template

The Discussion Document appears to treat the CbC Reporting Template as an extension of the Transfer Pricing documentation. We feel it is increasingly likely that tax authorities will want greater CbC reporting in the future, therefore we believe that the two should be treated as separate documents.

We acknowledge the need to improve transfer pricing documentation and that it is sensible to have a common standard. However, a one size approach does not fit all and the proposals for the transfer pricing documentation files place a significant burden on real estate groups that are not commensurate with the potential for transfer pricing risk, for example intangibles, R&D and intra-group service fees are largely irrelevant for real estate groups.

In our view the CbC Reporting template should be focused on basic information about revenue, tax liabilities, employees and financing. The CbC Reporting Template does not need to include information about intangibles, R&D and service fees when such information would already be included in the transfer pricing documentation file (either the local file, or in the master file if the transactions are significant for the MNE). This would ease the reporting burden for MNEs, like real estate groups, where cross-border transactions between affiliates is not a material feature of the business.

4. CbC Reporting Template

We have the following specific points to make in relation to the CbC Reporting Template:

- What is the definition of revenue for real estate groups? Is it net rental income (less administration costs) or does it also include unrealised gains/losses on revaluation of properties? Net rental income typically represents the entity’s taxable profit on which its tax liability is charged. However distortions between tax and accounting profits arise when unrealised gains/losses are included as unrealised amounts do not form part of the taxable profit and are only brought into tax when the properties are sold. It is typical in a real
estate group for the tax charge in the income statement and tax paid to be very different due to the deferred tax element on future potential profits.

- Also in relation to the lack of correlation between revenues and tax paid, different countries have their own tax regimes with different rules to determine the tax base, resulting in different tax liabilities between companies in different countries even though they are carrying on the exact same business activities. As it stands the CbC Reporting template could produce inconsistent results even within a single MNE.

- We would also note that many real estate groups operate as REITs which have no tax charge in respect of their qualifying property business, so in comparison with other non-REIT real estate groups or other industry sectors would lead to differences in view over taxes paid.

- Property groups are generally not employee intensive businesses. Typically real estate groups have a single employee company for the group with a series of property owning SPVs (and some joint ventures) that have no employees of their own. Therefore we do not believe that employee numbers and employee expenses are an appropriate indicator of economic activity for real estate groups.

- How are the results from joint ventures to be reported in the CbC Reporting Template? GGL holds investments in many joint ventures. Under IFRS accounting, GGL includes its share of the joint ventures’ income/loss on an ‘after tax basis’. Logically, it does not seem appropriate to include the JV’s results in the CbC Reporting Template as the investment is simply that (i.e. an investment) and not a true reflection of GGL’s economic activity. We would therefore expect the joint venture’s results to be excluded. If joint venture results are to be included, this presents practical issues as we do not currently have details of the breakdown of tax liability on an entity by entity basis and, to obtain this information would require consent of other partners and amendment of joint venture documentation.

In light of the above we would recommend that as an absolute minimum, the CbC Reporting Template includes an code for real estate businesses.

As a non-REIT international real estate group we would be pleased to assist the OECD in developing the proposals outlined in the Discussion Document.

Yours faithfully

Jeremy Moore
Group Tax Director
Appendix

Specific questions raised by the OECD on the Discussion Document

1. Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

Although it is very helpful to have standardisation from both a taxpayer side and a tax authority side, a one size fits all solution can be too narrow and inflexible. Additional standard forms and questionnaires will only be beneficial if they can get the balance right. The impact of additional forms on the compliance costs for all businesses is also an important factor.

Based on our experience in the UK of HMRC sharing with us their tax compliance risk assessment, we believe this is beneficial as it allows tax authorities to increase their understanding of the taxpayer’s business and better focus any subsequent enquiries on areas of ‘real’ risk. In our view it should be ‘best practice’ for tax authorities to share their risk assessment with taxpayers as part of the move to greater transparency.

2. Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

We do think that such rules should be included. A specific concern is how tax authorities will distinguish between information that is confidential to another part of the business or which for legal reasons cannot be provided by the associated enterprise (e.g. there is no common control relationship but regarded as connected/associated for transfer pricing purposes). To allow tax authorities to make such requests would create are significant commercial ramifications for joint ventures and real estate funds.

Generally, the scope of such measures must guard against ‘fishing expeditions’. How can the requesting tax authority and the associated enterprise agree that the information is ‘relevant and appropriate’ to the transfer pricing enquiry of the requesting tax authority.

3. Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

In our view, the master file should be prepared on an entity wide basis. To include lines of business will only increase the scope for confusion.

4. A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:
Should the country-by-country report be part of the master file or should it be a completely separate document?

A completely separate document (see comments in main letter)

Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

A top-down approach would be more efficient and would involve less change to existing accounting systems. For example, US companies are not currently required to prepare individual statutory accounts under US accounting rules/US company law so a bottom-up approach would create a significant burden.

Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

We agree with a top-down approach and tentative view of WP6 of what this would have to include. For GGL this would involve an additional burden but not a significant one as aggregate reporting is currently undertaken on a country by country basis. As we do not have a large number of cross-border transactions the necessary adjustments should not create a material burden.

Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

In view of the significant divergence between the tax charge and tax paid, arising from the requirement to include deferred tax on unrealised gains we would prefer to follow a tax due basis rather than tax paid.

We do not think that withholding tax liabilities adds much value to the understanding of an MNE’s overall tax profile. If withholding taxes are included, it will be important to be clear that the withholding tax is a liability of the recipient even though it is paid by the payer.
• Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

We do not think that this cross-border payment information needs to be included in the CbC Reporting Template. Such transactions and the aggregate amounts should be disclosed in the transfer pricing documentation in any event, which will allow tax authorities can identify the transactions and establish the extent of possible risk.

• Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

Yes, we agree that a description of the business activities would help in interpreting the results.

5. Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

Yes, specific materiality guideline should be included as financial statements are prepared on a materiality basis and so guidance will be required.

6. Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

We agree that, it would be a pragmatic approach that there is no need to update comparables where operating conditions remain unchanged for three years. The same approach should also apply to financing as under UK rules the transfer pricing position only needs to be updated where there is a change to the terms or conditions of the financing.

7. Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

The master-file should be in English as this a commonly accepted international language of business. The local file should be prepared in the local language.

8. Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

Tax authorities should request via the provisions of tax treaties. The information request provisions should also require the requesting tax authority to obtain permission from the MNE so that it could object.

9. Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
• Filing of information in the parent company's jurisdiction and sharing it under treaty information exchange provisions;

• Some combination of the above.

Direct local filing would be more efficient provided the scope of information in the master file is restricted to deal with sensitive and confidential information as discussed elsewhere in the response.

10. Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

We do not believe that reporting of APAs and other rulings would add anything. Presumably the relevant tax authorities who are party to the original ruling would have a copy already and we believe that another tax authority is unlikely to consider the ruling as binding on it. In our view it would be better that the tax payer offered to give a ruling in support of their position only at the stage of a challenge by a tax authority.
Dear Pascal,

We are pleased to participate in the Public Consultation about the Discussion Draft on Transfer Pricing Documentation and CbC Reporting, published on January 30th, 2014. In Grupo Consultor EFE we are convinced on the need to enrich international regulations in transfer pricing. As practice leaders in Mexico and Latin America, we worry about providing our comments from a global perspective but being watchful of the existing needs and current conditions in emerging markets.

For a better understanding of our letter of comments, we have divided it in three major aspects: Transfer Pricing Risk Assessment, Master file and Local file.

**Transfer Pricing Risk Assessment**

Regarding requested comments on the Transfer Pricing Risk Assessment, there are two main topics. The first one related with the need to develop additional standard forms and questionnaires beyond the CbC reporting template in order to work on BEPS Action Plan number 13. The second question regarding the possibility for tax authorities to share their risk assessment plan with taxpayers.

1. We consider that the development of the Master file and the CbC Report complies with the principal objective of Action 13 of the BEPS Action Plan, which searches to implement rules that enhance the transparency of intercompany transactions of MNEs. In our opinion, requesting additional information beyond the Master file and the CbC Report, would generate an excessive tax burden, resulting in a none-existing simplification both for taxpayers and tax authorities.

2. Regarding the possibility of the tax authority sharing their Transfer Pricing Risk Assessment with taxpayers, our firm believes that taking this action into place, will allow companies to develop best
corporate practices in transfer pricing policies, which would result in a more efficient level of compliance and certainty. This process should be carried on a friendly basis to encourage taxpayers into looking after their transfer pricing practices.

As mentioned in paragraph 9, tax authorities from each jurisdiction should create, develop and/or maintain active the necessary tools that act as information sources of the economic activities between a taxpayer and its related parties.

**Master File**

**Multinational group as a whole or by line of business**

Even that MNEs may share some characteristics in their business structure, we must not overlook that in a transfer pricing approach each transaction is unique for the elements that interact within. Therefore, tax authorities should maintain a flexible point of view when establishing rules on this topic, due to the fact that depending on the type of transaction and the industry of the MNE, its functional structure may vary and a unique approach may generate additional tax burdens that will not provide added value to the documentation.

**Structure of the CbC Reporting Template**

The CbC Reporting Template must be a tool that allows tax administrations to obtain an overall panorama that identifies base erosion and profit shifting to low or no tax jurisdictions.

1. The CbC should be part of the Master file.
2. Our firm suggests a “bottom-up” structure on the CbC Report. This type of approach will push companies into having a more detailed oriented information system between countries as well as additional compliance costs. Nonetheless, MNEs already have systems that will allow the sharing of this type of information and the additional cost, if any, may not be representative compared to the reduced risk of a transfer pricing challenge.
3. Entity by entity basis as in the current draft.
4. Yes, the CbC should require both income tax paid and withholding tax paid.
5. As mentioned in point number 2, this type of information is already existent, so it should be reported in the CbC.
6. Yes, the CbC should require reporting the nature of the business activities carried out in a jurisdiction and would not impose significant additional burdens on taxpayers.

Local File

Materiality

In order to define which transactions should be subject to a full documentation, the tax authorities should observe three main independent assumptions:

a) Relevance of the entity within the MNE: It must be considered if the entity under scope is truly relevant over the total income of the multinational enterprise. This information could be obtained from the CbC in the Master file. The relevance degree should be addressed by each jurisdiction accordingly to the size of its market.

b) Size of the entity: Each jurisdiction should establish the minimum revenue of its taxpayers in order to consider them obligated to comply with transfer pricing rules.

c) Amount of the intercompany transactions: Each country should establish a minimum amount for each type of intercompany transaction to consider it material to documentation.

Retention of documents

Every jurisdiction should require electronic filing of the Transfer Pricing Documentation at a certain date when financial information of comparable companies is available for the year under analysis, in order to avoid modifications when the tax authority challenges the taxpayer. We recommend establishing this date on June 30th of each year.

Frequency of documentation updates

We do not agree on Paragraph 34 based on the fact that the main purpose of transfer pricing rules is to revise the arm’s length principle in current economic conditions. Therefore, using the same comparable companies for a three year period may reduce the accuracy of the conclusions.
Language

Master file and CbC Reporting should be prepared and surrendered to each country in English. Local file should be prepared and submitted in the relevant local language.

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On behalf of our firm, we respectfully submit our response to the Discussion Draft on Transfer Pricing Documentation and CbC Reporting. For any clarification of this response, please contact the undersigned.

With gratitude,

Lic. Adrián J. Romero
Managing Partner - Global CEO

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Comments on OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting

From Ian Bowler, independent consultant and author of the Report (April 2012) to the ‘Transparency in Financial Reporting’ Sub-Group of the OECD Informal Task Force on Tax and Development on ‘Central registration and public availability of statutory accounts in developing countries’

February 2014

Introduction

I comment in my personal capacity, as author of the Report on ‘Central registration and public availability of statutory accounts in developing countries’\(^1\). The views expressed here are my own.

I submitted comments in November 2013 on the October memorandum on the current topic, noting the potential risk assessment benefits of statutory accounts as identified in my 2012 report, and so supporting the use of accounts-based data for the country-by-country reports. I welcome, therefore, the current draft’s proposal of an entity-by-entity basis using data from local statutory accounts. The categories of data included (and the level of precision required) should be what is needed for initial risk assessment, no more, so that the compliance cost is no more than necessary. It is important that the reports are made available to all relevant tax authorities. My comments are set out more fully below.

Country-by-country template - approach

Entity-by-entity data from local statutory accounts would be useful for the intended risk-assessment purpose as it would show an interested tax authority the income and tax of the relevant entity itself, which would be more pertinent than the country consolidated position. Group companies in a particular country can have different profiles, for example because of an exemption or incentive applicable to one company but not another, or losses useable by one company but not another. In countries that require public filing of statutory accounts, the data on individual companies is available.

If only aggregated country figures were to be available, the differences just mentioned would of course not be visible, but the aggregate figure could hint that one or other of these issues could be present – a lower than expected country tax figure relative to country profit could be explained by the existence of an exemption, an incentive or losses within the group, but the significance of such issues to a particular company’s position would not be shown. Still, aggregate country data would be of some risk assessment benefit, as a general impression of country tax relative to country profit would be given, which could enable further enquiries about the particular company in question.

A bottom-up approach is likely to be more informative and useful for risk assessment than top-down reporting. The aim of the template, as I understand it, is to give an interested tax authority an

indication of the profile of a particular relevant entity (typically a counter-party in a transaction with the taxpayer under consideration, or another participant in the value chain) or of the country grouping to which it belongs. The usefulness of a top-down allocation of worldwide numbers would be dependent on the allocation methodology and how fairly that indicated the actual local risk indicators (local tax, profit and substance).

I note the tentative view that top-down reporting would require elimination of intra-group intra-country transactions. It seems to me that this would make the figures even less representative of the actual revenue, tax and substance of individual entities and so less useful as risk indicators. For instance, I have already commented above that entities in a country can have different tax attributes in a country group – this can mean that intra-group transactions are not net neutral for tax purposes, particularly not in cash tax terms. Also, if in-country transactions are eliminated, should not attributable capital, employees, etc. also be eliminated to avoid misleading comparisons? A bottom-up approach would avoid those concerns.

**Country-by-country template – content**

The proposed template should be a useful early-stage risk assessment tool, so it is important that the template is workable and not too onerous to prepare or use. It should contain enough data for the early-stage risk assessment that is its aim, but not more than that.

**Accounts profit and cash tax** should be the main items – these should give a broad indication of low-tax entities whose role may merit further consideration. Similarly, figures for **capital, employees and tangible assets** should give a rough idea of **substance** and so whether the company can be truly carrying out the functions or truly bearing the risks that are claimed for it.

**Figures for interest, royalties and service fees** would go a stage deeper into the detail and may not be necessary at the initial risk assessment stage. Some of these may be needed if early investigations show a potential issue, but only on some companies and not all, and other different data may also be needed; requiring it at the template stage could be too early and so could be wasteful of compliance effort.

Similarly, I question whether further information is needed in the template to address other aspects of tax administration and the BEPS Action Plan, beyond transfer pricing. The core data proposed (income, tax and ‘substance’ as above) should be indicative for other purposes (such as controlled foreign company issues) and may prompt questions beyond transfer pricing – low tax could follow from use of a hybrid or of a potentially harmful tax practice, for instance, and further targeted questions could be asked by a particular tax authority as it considers relevant in the particular circumstance. However that does not mean that information on those issues should be required from all companies as a matter of course at the start, and seen by all the group’s tax authorities as will be the case with the template.

In making my comments I am aware that completing the country-by-country template is bound to have some compliance cost; I am also conscious that many companies are already required to prepare (and often to file) audited accounts, so (at least for that large category of companies) it would be efficient in compliance terms if the information for the template can be derived from statutory accounts. The April 2012 report showed that filed accounts would include income, tax,
capital and employee compensation figures, but other data such as intra-group transactions may not be identified.

The draft template requires disclosure of each company’s place of effective management. I support the disclosure of residence information, but question whether effective management as defined in the Model Tax Convention would always be relevant. Identification of an entity’s tax residence starts with the applicable local law (which may or may not turn on effective management) and may involve a relevant treaty (whose residence provisions may operate by reference to effective management or other factors). Accordingly, OECD-defined effective management may or may not be relevant in a particular case. I remain of the view that a company will know where it considers itself tax resident and so that the template could require disclosure of location of tax residence, instead of effective management.

**Country-by-country template – accounts and tax**

I support the approach to accounts data set out in the draft Specific Instructions. As I commented before, statutory accounts or other audited accounts will be available in many cases, whether or not required to be filed publicly, and these should be the main sources of data. I am pleased to see that common currencies and common accounting policies are not required, for this early stage risk assessment tool – a broad indication, not precision, is needed. Guidance should make clear the purpose of the template and explain that reconciliation to global consolidated figures (for example) may not be possible.

On tax data, I note my previous comment that cash tax figures may be available from cash flow statements of companies reporting under IAS, that cash tax would be the preferable measure for the template because it is not clouded by provisions and releases, but that over time either cash tax or accounts tax would be of indicative risk assessment benefit.

I note that there is no exclusion from the template requirement for SMEs, and am surprised at this given the frequent exclusion of small companies from accounts filing requirements. Although the draft would allow use of management accounts, there would still be some compliance burden for small companies preparing the template.

**Country-by-country template – access**

It is crucial that any tax authority which could benefit from the broad risk-assessment data in a country-by-country template has access to the template. If that does not happen, the purpose of the template will not be fulfilled.

The report in April 2012 proposed the public filing of accounts, in part because the information in the filed accounts would be available to tax authorities (especially developing country tax authorities) without going through lengthy information exchange processes and even if information exchange agreements were not in place – noting that developing countries have fewer such agreements than more developed countries. I recognise that the country-by-country template is to be filed with tax authorities only, and is not to be made public. It is important that confidentiality is maintained. So long as that is the case, though, there should not be other barriers to tax authorities receiving the templates. There should be appropriate mechanisms to make sure that templates are available to tax authorities, even if they do not have extensive information exchange relationships,
subject only to necessary confidentiality requirements. The template is a welcome initiative and should be available to developing as well as to developed country tax authorities.

Additional standard forms

The discussion draft asks whether other standard forms should be recommended. My April 2012 report\(^2\) noted the extra disclosure which some tax administrations require as regards intra-group transactions; examples are Denmark, South Africa, Canada (T106) and USA (Form 5472). Some representatives of business had recommended that filings like these should be required generally, telling a tax authority of all related party transactions above a particular monetary threshold, the identity of the counterparty, the type of transaction and the basis for pricing – with more information possibly being required for transactions with companies in low tax rate territories. The report noted that filings of this nature could be beneficial for developing country tax authorities, albeit as well as (not instead of) publicly filed accounts. Similarly, I can see that a standard filing of this nature, by each taxpayer to its own tax authority on its own transactions, would be useful and proportionate, in addition to the country-by-country template.

Ian Bowler

\(^2\) At paragraph 7.1
February 23, 2014

VIA E-MAIL

Mr. Joseph L. Andrus  
Head, Transfer Pricing Unit  
Centre for Tax Policy & Administration  
Organisation for Economic Co-operation and Development  
2, rue André-Pascal  
75016 Paris  
France  
TransferPricing@oecd.org

Re: Comments on Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Dear Mr. Andrus:

The International Alliance for Principled Taxation (IAPT or Alliance) is a group of about two dozen major multinational corporations based throughout the world, and representing business sectors as diverse as consumer products, media, mining, telecommunications, oilfield services, transportation, medical equipment, food products, luxury goods, computer technology, energy, pharmaceuticals, entertainment, software, beverages, automotive, IT systems, publishing, electronics, and consulting. The group’s purpose is to promote the development and application of international tax rules and policies based on principles designed to prevent double taxation and to provide predictable treatment to businesses operating internationally.

The Alliance appreciates the opportunity to provide input to the OECD with respect to its Discussion Draft on Transfer Pricing Documentation and CbC Reporting (Discussion Draft) released on January 30, 2014. Our comments are set forth in Annex 1 to this letter.

As you know, the IAPT submitted comments on the July 2013 White Paper on Transfer Pricing Documentation on September 30, 2013 and on Action 13 of the July 2013 BEPS Action Plan on
October 16, 2013, and we include copies of those comments as Annexes 2 and 3 to this letter for reference.

As outlined in our attached comments, we believe that significant changes need to be made to the proposed transfer pricing documentation guidance generally in the Discussion Draft, and to the proposed CbC reporting template in particular, to strike that appropriate balance. In its current form, the Discussion Draft misses the objective of producing guidance by which transfer pricing documentation rules can be “improved, standardised and simplified”. By virtue of the overly broad scope of the data being requested, the proposed documentation package, including the CbC reporting template, risks imposing serious new costs, burdens, and complications on taxpayers, without a commensurate improvement to the administration of transfer pricing rules. We have made every effort to provide constructive suggestions on how we believe the Discussion Draft can best be improved and to set forth the rationale for our suggestions.

Once again, the Alliance appreciates the opportunity to comment on this important element of the BEPS project and stands ready to respond to any questions or to provide further input as the work of Working Party 6 on this item continues.

Sincerely yours on behalf of the Alliance,

Mary C. Bennett  
Baker & McKenzie LLP  
Counsel to the Alliance

Caroline Silberztein  
Baker & McKenzie SCP  
Counsel to the Alliance

Annex 1: Comments on the January 30, 2014 Discussion Draft  
ANNEX 1

INTERNATIONAL ALLIANCE FOR PRINCIPLED TAXATION

COMMENTS ON JANUARY 30, 2014 DISCUSSION DRAFT ON TRANSFER PRICING DOCUMENTATION AND CBC REPORTING

FEBRUARY 23, 2014
IAPT Comments on the January 30, 2014 Discussion Draft on Transfer Pricing Documentation and CbC Reporting

EXECUTIVE SUMMARY

1. The IAPT welcomes the OECD initiative to standardize the transfer pricing documentation requirements which in our view should allow for improving the quality and effectiveness of transfer pricing risk assessment and audit processes while balancing the compliance and enforcement costs. Our members however have strong concerns with a number of aspects of the current proposals as follows:

Issues Relating to the Master File / Local File Proposed Documentation Requirements

2. In our view the third objective assigned in the Discussion Draft to Transfer Pricing Documentation (providing tax authorities with information needed to conduct thorough audits) is over-ambitious and unrealistic and leads the proposals to contain an inappropriately inflated number of information requests.

3. We find that the proposed templates include requests for a vast amount of information, not all of which is useful to tax authorities and not all of which will effectively be read and exploited.

4. The proposals would create very significant implementation costs as well as increased compliance costs for taxpayers. The OECD must balance the costs involved by its proposals with the usefulness and relevance of the information requested.

5. Our main concerns are in relation to the Master File which, as currently designed, is more of a “Global Transparency File” than what is generally understood as a transfer pricing Master File. It currently includes a significant number of items which in our view should either be in the Local Files or should not be in the TPD at all. We also have concerns with some of the proposed contents of the Local File although we find the design of the Local File to be generally relevant and reasonable.

6. We believe that the proposals should include clear benefits for compliant taxpayers in terms of burden of proof benefits, lower penalties, reduced audits, or other benefits. As drafted, the proposals lack any clear benefit from the risk assessment phase for low risk taxpayers / transactions.

7. The extent of information and documents requested from a domestic taxpayer that are in the possession of foreign associated enterprises goes beyond what is justified for transfer pricing risk assessment and for a principled application of the arm’s length principle.
8. The proposals raise significant confidentiality concerns, due to the nature and extensiveness of the information requested as well as to the proposed sharing of such information on a global basis. We believe the OECD should take confidentiality issues seriously and that communications of taxpayer confidential information should be organized through competent authorities only, with reinforced confidentiality standards.

9. We also have implementation issues related to the proposal that TPD should be prepared on a contemporaneous basis and to the general time frame for preparing, filing and updating the TPD including the benchmarks in it, as well as comments on translation issues.

10. We strongly support the setting of materiality thresholds in both the Master File and the Local Files.

11. We have listed a number of proposed steps that the OECD should in our view consider to rebalance the proposed requirements.

**Issues Relating to the CbC Reporting Template**

12. As proposed in the Discussion Draft, the template for CbC reporting poses a number of serious problems.

13. First, the extraordinarily detailed template demands far more information than is needed for the high level risk assessment tool the OECD was mandated to develop. This level of detail brings with it several bad consequences:

   - It needlessly raises the cost of compliance for taxpayers. Members of the IAPT have estimated that the obligation to produce 17 data items for each entity within their global groups (i.e., generally meaning thousands or even tens of thousands of separate data points for each report) will typically cost them in the millions of US dollars in both initial set-up and annual ongoing costs.

   - It implies that the template offers far greater tax risk assessment benefits than a critical review of its features would reveal, with the result that tax administrations may be misled into placing too great a reliance on this tool as an accurate predictor of tax risk, to the serious detriment of both taxpayers and the tax administrations themselves.

   - It greatly heightens the concerns surrounding potential breaches of the confidentiality of the data reported, which could increase the resistance to making the report available to a broad range of tax authorities.

14. The IAPT therefore recommends limiting the CbC template data elements to those identified by the G8 and G20 as needed to provide a high level risk assessment tool.
15. Second, the proposed inclusion of the CbC report within the Master File of the transfer pricing documentation package raises serious concerns that the report will be interpreted as a particularly useful transfer pricing risk assessment tool and may even be used in place of much more well-designed tools available to tax administrations for that purpose. This could lead to needless audit inquiries and costly disputes, draining the resources of both taxpayers and tax authorities. This concern is particularly acute in light of the proposed template’s focus on data elements that are much more relevant to a global formulary apportionment calculation than to an evaluation of compliance with the arm’s length principle, and in light of the Discussion Draft’s total lack of any guidance as to the manner in which the template should be used and the data’s inherent limitations for accurately measuring proper arm’s length returns.

16. The IAPT therefore recommends that the OECD separate the CbC reporting template from the transfer pricing documentation package and also that it provide guidance on how tax authorities should (and should not) evaluate and use the template data.

17. Third, the proposal to share the report with tax authorities worldwide outside the context of intergovernmental exchange of information (EOI) relationships, and therefore outside the context of the confidentiality obligations those relationships impose, creates serious concerns about the extent to which the highly granular and potentially commercially sensitive information demanded by the template can be protected from intentional or inadvertent unauthorized public disclosure. These concerns seem particularly troubling when the OECD/G20-endorsed Multilateral Convention on Mutual Administrative Assistance in Tax Matters gives governments worldwide a straightforward means of access to global EOI relationships, without any need to engage in time-consuming bilateral negotiations or to develop extensive tax treaty networks.

18. The IAPT therefore recommends that the CbC report be filed with the parent company’s home country tax authority as the Discussion Draft contemplates, but that it then be shared with other tax authorities only through a formal EOI channel (whether spontaneously or upon request), so that confidentiality obligations will apply to the recipient governments.

19. Fourth, the proposed template fails to adopt simple design features that could substantially lessen the burden of compliance imposed on taxpayers without sacrificing any material tax administration benefit for governments. One such design feature would be to allow MNE groups to choose whether to prepare their report based on the “bottom-up” approach contemplated by the Discussion Draft (e.g., starting with local statutory accounts where available) or on a “top-down” approach using data available from their existing global accounting systems. Another cost-saving design feature would be reasonable de minimis thresholds which would relieve groups of the need to include in the report multiple data point entries for every last entity in the group, regardless of how minor a share of the group’s worldwide profits that entity represented. Flexibility in the form of reasonable optionality on how individual data elements could be measured would also help to reduce the costs of compliance.

20. The IAPT therefore recommends that the OECD introduce flexibility options and de minimis thresholds into the CbC template to shrink the costs of compliance while maintaining fitness for purpose.
1 - General comments

1.1 Objectives of Transfer Pricing Documentation (TPD) (section B of the Discussion Draft)

21. The IAPT believes that the main objectives of TPD should be (i) to provide tax administrations and taxpayers with the information needed to do a proper risk assessment at an early stage and (ii) subsequently to form the basis of a transfer pricing audit where the tax authority decides based on its risk assessment exercise that such an audit is needed.

22. We believe that the third objective set forth in section B, paragraph 5 of the OECD Discussion Draft is over ambitious and inappropriate. It is not realistic that TPD would provide tax administrations with “the information that they require in order to conduct an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction”. A thorough transfer pricing audit typically takes months and requires a significant amount of documentation and analysis to be produced.

23. As noted at paragraph 14 of the Discussion Draft, not all the information needed to perform a thorough audit can be obtained through TPD, and tax administrations typically have information powers in the context of audits that allow them to ask information that goes beyond TPD requirements. We do not support the notion that TPD should be as exhaustive as possible so as to avoid the need for information requests as part of the audit. Such information requests are inevitable and they form part of the normal dialogue between tax administrations and taxpayers. Their effectiveness is a matter of domestic legislation. They cannot be replaced with inflated global, contemporaneous TPD requirements.

24. As suggested at paragraph 4 of the Discussion Draft, we are very much in favor of the OECD developing “rules so that transfer pricing compliance is more straight-forward and more consistent among countries, while at the same time providing tax administrations with more focused and useful information [emphasis added] for transfer pricing risk assessments and audits. An important overarching consideration in developing such rules is to balance the usefulness of the data to tax administrations for risk assessment and other purposes with any increased compliance burdens placed on taxpayers [emphasis added].” Accordingly, we do not believe that taxpayers should be required to collect and compile exhaustive information on a global and contemporaneous basis, irrespective of what areas of their business operations will subsequently be audited and of what questions will subsequently be asked by tax authorities.

1.2 Do the proposed templates achieve the proposed objectives? Usefulness of requested information to tax authorities

25. For the reasons explained below, we find that the proposed documentation standard in the Discussion Draft fails to balance the usefulness of the data to tax administrations for risk assessment and other purposes with any increased compliance burdens placed on taxpayers. In our view, the currently proposed templates would create an extraordinarily costly and burdensome standard, without clear benefits to the application of international tax principles by tax administrations. Taxpayers would be
required to disclose globally a vast amount of information that may or may not be used by individual tax authorities in their risk assessment (given tax administrations’ resource constraints) and, where they are used, may or may not be used in an informed and appropriate manner. We therefore suggest that the OECD should do further work to determine what information is effectively relevant and for what purpose (risk assessment or audit, local or global) and to what country(ies). It should then design more focused questions that relate to the specific risk(s) identified and apply to the relevant circumstances.

26. We provide some specific comments on the proposed contents of the Master File in section 2.4 below. For instance, it is hard to see how it is relevant to the application of the arm’s length principle to ask information about “The title and country of the principal office of each of the 25 most highly compensated employees in the business line”. In our view asking such a broad question can only bring confusion and encourage unprincipled approaches with risks of misinterpretation and misapplication of the data beyond the original intent of the Master File. Accordingly, we recommend this question be removed from the Master File. As a general matter, the content of the Master File should focus on the evaluation of significant transfer pricing risks and should not contain information that could be used to evaluate risks in other non-transfer pricing areas. Well-focused questions can be asked in local audits to the extent relevant to a particular country.

27. Usefulness of information requested should be assessed based on the arm’s length principle. We welcome the OECD’s renewed support for the arm’s length principle. As long as the arm’s length principle is the applicable legal standard in treaties and domestic laws, we believe that the OECD should be extremely careful not to develop a documentation standard that can be seen as being implicitly based on some global formulary apportionment test or as encouraging administrative approaches that are based on apportionment.

28. It also follows that the OECD should not try to bring data collection from Item 11 of the BEPS Action Plan into the TPD package. Generally speaking, tax authorities would likely not have the resources to properly analyse the vast amount of information that would be requested under the proposed templates. Too much, unfocused information would defeat the objective of improving the quality of risk assessment and audits as well as the objective of limiting the compliance and enforcement costs.

1.3 Confidentiality (section D.8 of the Discussion Draft)

29. Confidentiality is critical for the new proposed TPD requirements to work as taxpayer buy-in will be dependent on each of the respective tax authorities around the world being able to provide concrete assurances that their information is going to be safeguarded. For example, there is a risk that confidential information could be taken out of context and used inappropriately to further political agendas or to discredit certain companies, industries or business sectors. The OECD should take the lead in building a framework that assists with this process, and jurisdictions that are part of this initiative need to sign off on that framework.
30. Confidentiality issues relate to the potential leakage of information including:

- Trade secrets or commercially sensitive information (e.g. disclosure to all tax administrations of a global description of the principal contributions to value creation by individual entities within the group and global detailed information on intangibles as currently contemplated in the Master File);

- Information that may be investor sensitive (e.g. in relation to listed companies, or to companies that are potentially investing or divesting assets or parts of businesses). In practice a lot of information may be classified as confidential within MNE organizations (e.g. information on global strategies, information related to ongoing tax audits, etc.); and

- Information that may pose legal and employee relationship concerns and even personal security threats (e.g. information on most highly compensated employees). The latter is in effect a real concern for MNEs operating in regions of the world where personal security standards are low. More generally, providing even anonymous information about specific employees can raise a host of legal and employee relationship concerns.

31. There are several ways in which the OECD should in our view protect confidentiality.

- First, by refraining from asking of taxpayers that they disclose in their Master File and Local Files information that is not necessary to risk assessment or local transfer pricing determination. TPD should not be a wish list of “nice to have” information that may or may not be reviewed.

- Second, by requesting that the relevant information be filed with and only with the tax authorities concerned. Note that we fully agree that general, high level information on the group as a whole is useful to all tax authorities. We find, however, that the proposed Master File template contains lots of information requests that go well beyond what is useful and relevant to all tax authorities, and we accordingly recommend that some portions of the Master File be moved to the Local Files. Our comments on the proposed contents of the Master File are found in section 2.4 below.

- Third, while we agree that some information relating to foreign associated enterprises should be included in the Local Files (as described in TPG 3.20-3.23) and we are not defending a narrow one-sided approach of TPD, we nevertheless believe that sensitive information that goes beyond what should reasonably be expected in the Local Files should be communicated through Competent Authorities.

32. We understand that some countries, especially in the developing world, do not have a comprehensive treaty network and accordingly may not be able to obtain through exchange of information (EOI) as much information as they would like on what is happening outside their borders. We are of the strong view that the solution to this problem is to encourage the conclusion of additional
bilateral treaties, TIEAs and/or a multilateral Convention, such as the OECD/COE Multilateral Convention on Mutual Assistance in Tax Matters. The latter Convention is now open to participation by all countries around the world, and there are currently 64 signatories and another 13 jurisdictions covered by extension, with more countries coming on board virtually every month. The Secretary-General of the OECD has urged all countries to sign the Multilateral Convention, calling it “the most comprehensive multilateral instrument available for tax co-operation and exchange of information”, and the G20 leaders at their 2012 Los Cabos meeting similarly strongly encouraged all countries to sign. No country needs a network of double taxation avoidance treaties to join the Multilateral Convention. That Convention, like the other instruments mentioned above, contains provisions aimed at guaranteeing the confidentiality of information exchanged pursuant to its terms. Our experience is that government-to-government communications can be better (even though not fully) protected than the ones which take place between a taxpayer and a tax administration. We do not believe that the solution is to bypass EOI standards, but rather to expand their territorial scope and ensure that they are properly applied by all jurisdictions that sign off on them.

33. Finally, tax authorities requesting / obtaining taxpayer information should commit themselves to strict processes in order to protect the confidentiality of taxpayer information in their possession. This includes material penalties in case of breach of confidentiality, secure systems (especially if taxpayers are required to electronically submit data or if tax authorities electronically share data), control audits, limiting the number of people involved, etc.

34. We provide in sections 2.2 and 2.14 below some further comments in relation to the process for tax authorities obtaining information on foreign associated enterprises and the filing process for the Master File.

1.4 Feasibility and costs

35. In the BEPS Action Plan the OECD was directed to “[d]evelop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into account the compliance costs for business [emphasis added].” The OECD indicates at paragraph 4 of the Discussion Draft that “In this respect it is noted that clear and widely adopted documentation rules can reduce compliance costs which could otherwise arise in a transfer pricing dispute.” While it is true that widely harmonized TPD can reduce compliance costs compared to diverse TPD requirements of a similar level of detail, it must be emphasized that the current OECD proposals would represent a significant increase in compliance costs. Our members estimate that the investment in Information Technology costs to produce the proposed Master File and Local Files (not including the country-by-country reporting) would amount to several USD millions per MNE group, not including the human resource costs as compliance units would need to be built up and processes to collect information will need to be designed and put in place.
1.5 Proposed steps to rebalance the proposed requirements

36. Because of the material cost implications of the proposed TPD model, we believe that the OECD should:

- Revisit the list of proposed information requests and restrict its demands to information that is actually useful and relevant to the application of international transfer pricing principles.

- Clearly identify what the shortcomings are in the current transfer pricing documentation standards. For instance, are there cases where tax authorities were not able to complete transfer pricing audits in a satisfactory manner because of lack of TPD, and if so what were the missing information pieces?

- Recommend that tax authorities limit their requests for additional information on top of the information in the TPD to items that are in effect relevant to the risk assessment or audit of their domestic taxpayers. There is a fear in the business community that the extensive and global nature of the Master File may lead to more questions, possible misinterpretation and misuse of data, and less focused, rather than to more efficient audit processes - hence additional costs to deal with these new enquiries and delays in resolving audits.

- Ensure that compliant taxpayers benefit from this costly exercise. The benefits should not only consist in lower penalties, but could for instance also include alleviated Local File requirements for taxpayers that are assessed as low risk as part of the risk assessment phase, alleviated transfer pricing audits for low risk taxpayers / transactions and/or other mechanisms consistent with enhanced relationship concepts (speeded up resolution of APAs or disputes for instance).

- The burden of proof should be on tax administrations in case they want to challenge the analyses documented by a taxpayer on the TPD. In particular, tax administrations should not substitute their transfer pricing method or comparables to those of the taxpayer without due rationale.

- Remind tax authorities that they should base their TP assessments on sound technical reasons in line with existing international tax principles and treaties, not based on formulary approaches or purely for tax revenue motivations.

- Ensure that the new TPD replace rather than add onto existing domestic requirements. Sufficient time should be given to MNEs to transition from the existing domestic TPD requirements to the new ones. Unless all countries around the globe adopt the new standard at the same time, taxpayers will continue to deal with multiple models for a while.

- Strongly suggest that tax authorities put significant efforts into the improvement of dispute resolution, including by promoting a broader adoption of mandatory arbitration. Audit and dispute resolution should be speeded up within a reasonable time frame and countries that adopt these extensive TPD rules should also adopt mandatory arbitration provisions to ensure that
taxpayers’ resources are not overburdened with controversy activities for indeterminate amounts of time. Countries should allocate more resources to their competent authority teams. Furthermore, consideration should be given to the possible involvement of competent authority at earlier stages of transfer pricing audits to ensure more balanced development of cases and more timely settlement of claims. Bilateral or multilateral dispute resolution should be encouraged as opposed to unilateral action. We also recommend that the OECD develop clearly defined multilateral dispute resolution procedures, including multilateral MAP and APAs.

- Monitor the practical implementation of the new TPD requirements, including by inviting comments from the business community about issues faced in practice. Commit to a serious review, maybe a couple of years after multiple country implementation, of what information is really used in practice and how. This should include an evaluation process whereby the documentation requirements are reviewed from perspectives such as usefulness, relevance, compliance burdens, etc., and appropriate adjustments are made.

2. Specific comments

2.1 Transfer pricing risk assessment (section B.1 of the Discussion Draft)

Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template.

37. The IAPT is of the view that there should not be any further work to develop additional standard forms and questionnaires beyond the country-by-country reporting template. The proposed OECD template is already extremely detailed and onerous. It echoes the PATA experience whereby the usefulness of the whole standardization exercise was somewhat hindered by adding to the common list each participating country’s documentation requirements, instead of a careful review of what is really needed and the determination of a common denominator.

38. The objective of the risk assessment phase should be to allow both tax authorities and taxpayers to better focus their resources. The proposed new TPD requirements, especially those in relation to the Master File (not including the country-by-country reporting), are likely to require USD multi millions of IT and human resources investment by taxpayers (including the development of systems, their maintenance, and the creation of compliance units). The OECD should take into account the consequences of its proposed inclusion of a comprehensive risk assessment phase in the TPD model by:

- Requesting tax authorities to provide feedback to taxpayers about the risk assessment performed,
• Alleviating the compliance burden (e.g. at Entity Files level) for taxpayers that are found to be low risk.

• Requesting tax authorities to focus their audit efforts on companies with higher risk, and to reduce inquiries for less risky taxpayers. This can be a potential reward for this massive work and also a measure to deter BEPS.

Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

39. The IAPT is in favor of tax authorities sharing with taxpayers their general risk assessment criteria as well as the taxpayer’s specific risk “rating” as part of this framework. Such a transparency effort by tax administrations can provide guidance and assist taxpayers in addressing any concerns at an earlier stage and more appropriately, keep the process efficient from their perspective, with a positive effect on compliance. Some jurisdictions that have adopted a risk review procedure are already sharing their results with taxpayers.

2.2 Information and documents in the possession of foreign associated enterprises (section B.3 of the Discussion Draft)

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

40. The production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information raises a number of concerns.

41. First, there are concerns in relation to access to information and confidentiality. Domestic taxpayers typically have some level of information related to the foreign associated enterprises they are transacting with, but they may not have access to all the information that is potentially demanded by tax authorities on foreign parties. Groups protect the confidentiality of sensitive commercial and financial information and not all the information on all the entities of an MNE group is accessible to all the other
entities of the group. There can be confidentiality considerations in relation to minority shareholders, joint ventures, board members, competition law, etc.

42. Second, many jurisdictions may find that penalizing a taxpayer for not providing information that is not in its possession and/or that is not relevant to the determination of its tax results is illegal.

43. In our view, information that extends beyond the country’s borders and that is not available to the local taxpayer should:

- be requested through competent authorities (in order to better preserve confidentiality, as discussed under section 1.3 above) and

- involve requests directed exclusively to the country of the parent company (or of a regional parent company nominated by the group to that effect). In effect, the whole Master File concept would be a failure if it led to multiple information requests being sent by a vast number of countries where the group has affiliates to a vast number of other countries where the group has other affiliates. The Master File information and additional requests related to it should be centrally managed.

44. Finally, we note that while full transparency is required from taxpayers, there should be additional efforts from tax authorities, too, for instance with respect to those that continue to use secret comparables in a manner discouraged by the Transfer Pricing Guidelines.¹

2.3 A two-tier approach to transfer pricing documentation (section C of the Discussion Draft)

45. We generally support the 2-tier approach proposed by the OECD. However, we note that the “Master File” concept proposed in the Discussion Draft is much more far-reaching than what is generally understood as a “Master File” in today’s practice. It is much more a “Global File” which aims to provide global transparency of the business, tax, and transfer pricing set-up. The CbC template complements this as it makes all global profits, taxes, etc., transparent. The proposed Local File is similar to what in many cases today is a full local TP documentation.

46. The Master File template should be reviewed to contain only high level information that provides useful background on the group and is relevant to all countries. In effect, we do not believe that the Master File should support the tax authorities’ trying to expand the level of information regardless of

¹ See TPG 3.36.
whether it is relevant to local subsidiaries. The fact that an MNE has profits outside of Country X does not necessarily mean that more profits are attributable to Country X. Accordingly, we believe that the Master File should be less of a “blueprint” (open approach) and more of an initial assessment “filter”. In our view a more balanced approach would be to use the Master File to help tax administrations decide how much time, effort, and resources should be devoted to reviewing the local file and local transactions. The OECD could review the experience from EU countries in applying the EU TPD format and more closely align its recommendations with the EU Master File concept.

2.4 Master File (section C.1 of the Discussion Draft)

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

47. The IAPT supports a flexible approach in respect of a line-of-business versus entity-wide approach. Transfer pricing is very facts and circumstances driven, and the economic analysis to support the arm’s length nature of the transactions is dependent on the taxpayer’s transfer pricing model and how the business units are organized. It would be difficult to develop a one-size fits all approach. It would be good for instance to give taxpayers flexibility to provide an entity-wide description of their overall transfer pricing for countries with just distribution activities, rather than a full explanation of the whole value chain for many different businesses.

48. Accordingly, taxpayers should have the flexibility to provide Master Files on a business line or entity-wide basis depending on what is most appropriate in view of their business organisation. If a group operates several business lines worldwide, but only one of them in a given country, then it may not be necessary to provide in that country’s Master File detailed information on all business lines. In such cases it can be sufficient to provide only a high level overview of the various business lines operated by the group with an indication that the taxpayer in the country concerned belongs to one of them.

49. Depending on the group organization there may also be horizontal functions (finance, accounting, legal, human resources, etc.) which are relevant to several business lines. Groups should retain the flexibility to report them in the most relevant and efficient way (e.g. allocated to the various business lines, or as a separate business line of its own).
2.5 Local File (section C.2 of the Discussion Draft)

50. Based on the description of the Local File at paragraph 23 and in Annex II, it is unclear to us whether the Local File is an “Entity File” or a “Country File”.

51. Where an MNE group has more than one entity in a country, we suggest that flexibility be retained to file Local Files at an entity or country level depending on what is most appropriate given the group’s organization. For instance, if the group owns one local country holding company which in turn owns a series of operating companies all active in the same business line and tax consolidated, it may make sense to file a single Country File for them all. On the other hand, if the group owns in a country several entities that have no direct ownership link and no business relationship with one another, it may make sense for them to prepare Entity Files at their level.

2.6 Contemporaneous documentation (section D.1 of the Discussion Draft)

52. Paragraph 25 suggests that a taxpayer ordinarily should give consideration to whether its transfer pricing is appropriate for tax purposes before the pricing is established and should confirm the arm’s length nature of its financial results at the time of filing its tax return. We request that the OECD clarify that taxpayer-initiated transfer pricing adjustments aimed at ensuring consistency of controlled transactions as determined at the time of the filing of the return should be accepted by tax authorities, whether they consist in upward or downward adjustments for the country concerned. This is the only practical solution to be able to satisfy the requirement set forth in paragraph 25. Unfortunately, the practice with respect to post year-end taxpayer adjustments varies among countries. Some countries only accept upward adjustments, thus creating systemic double taxation.

2.7 Time frame (section D.2 of the Discussion Draft)

27. [...] The best practice is to require that both the master file and the local file be prepared no later than the due date for the filing of the tax return for the fiscal year in question. In countries pursuing policies of auditing transactions as they occur under co-operative compliance programmes, it may be necessary for certain information to be provided in advance of the filing of the tax return.

53. In a number of countries, transfer pricing documentation currently needs to be available upon request at the time of an audit, not at the time of the filing of the return. This allows taxpayers to prepare documentation covering 2, sometimes 3 years at the same time. The proposed requirement for contemporaneous documentation in the Discussion Draft would create significant additional costs and
compliance burden, while most tax authorities would likely not review the Local Files until an audit starts. We would support retaining the flexibility to provide the Local Files at the start of the audit, consistently with the objective assigned to this document of providing the information needed to start the transfer pricing review.

54. In any event, it would be very impractical to prepare the documentation at the time of the transactions, as suggested in paragraph 11 of the Discussion Draft. There are some one-time transactions (e.g., a sale of IP) for which this may work, but in most cases intragroup transactions happen daily.

55. Because the information required under the Discussion Draft is difficult and costly to obtain, and because the necessary systems changes needed to generate some of the information (particularly in the CbC template) will take time to implement, the OECD should recommend that entry into effect of the rules be delayed for a reasonable time period, at least two years from official adoption, so that MNEs can adapt their processes and procedures to comply with the rules. IAPT member companies that have experience trying to implement even some quite limited CbC reporting regimes (e.g., requiring data only on taxes paid) have learned that much work is involved in setting up systems to capture even one data element in a format that was previously not required, and that two years is by no means an excessive period for such implementation work to be successfully completed.

2.8 Materiality (section D.3 of the Discussion Draft)

| 29. [...] [T]ransfer pricing documentation requirements should include specific materiality thresholds that take into account the size and the nature of the local economy, the importance of the MNE group in that economy, and the size and nature of local operating entities, in addition to the overall size and nature of the MNE group. [...] Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take. |

56. We agree that TPD requirements should include specific materiality thresholds that take into account the size and the nature of the local economy, the importance of the MNE group in that economy, and the size and nature of local operating entities, in addition to the overall size and nature of the MNE group.

57. In our view, differing materiality thresholds could be set for the Master File and the Local Files. The Master File is for a high-level risk assessment use, so for this purpose materiality should be relatively high. Lower materiality thresholds can be set in domestic legislation or practices for Local Files, better reflecting the size of the local economy and local affiliate.
58. We note that materiality should be approached differently for country-by-country reporting and transfer pricing documentation. See our comments on country-by-country reporting in section 3.4.1.

2.9 Frequency of documentation updates (section D.5 of the Discussion Draft)

<table>
<thead>
<tr>
<th>Paragraph</th>
<th>Text</th>
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<tbody>
<tr>
<td>33. [...]</td>
<td>In general, both the master file and local file should be reviewed and updated annually. It is recognised, however, that in many situations business descriptions, functional analyses, and descriptions of comparables may not change significantly from year to year.</td>
</tr>
<tr>
<td>34.</td>
<td>In order to simplify compliance burdens on taxpayers, tax administrations may determine, as long as the operating conditions remain unchanged, that the searches in databases for comparables supporting part of the local file be updated every 3 years rather than annually. Financial data for the comparables should nonetheless be updated every year in order to apply the arm’s length principle reliably.</td>
</tr>
<tr>
<td>Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?</td>
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</table>

59. In today’s practice, many companies update their benchmarks on a three-year basis. In those cases the data collected typically relates to three years, for instance benchmarks performed in 2014 will typically concern 2011-2013 (or 2010-2012 if information on 2013 is not yet available at the time the benchmarking study is performed). The proposal in the Discussion Draft that the selection of comparables could be updated every 3 years, but the financial data on the comparables should nevertheless be updated every year is therefore not a simplification of compliance burden.

60. We believe that the frequency of updates should depend on the nature, the size and the complexity of the transactions and on whether or not they are carried out in a stable business and economic environment, as currently indicated at TPG 3.82.

61. Furthermore, IAPT members are interested in the development of safe harbors that could help taxpayers focus on fundamental risk assessment and avoid the need to perform systematic benchmarking studies.
2.10 Language (section D.6 of the Discussion Draft)

35. As a general matter the master file should be prepared and submitted to all tax administrations in English. However, transfer pricing documentation should be useful to local country tax administrations seeking to undertake a risk assessment, and therefore at least the local file should likely be prepared in the relevant local language. Where tax administrations believe that translation of relevant parts of the master file is necessary, they should make specific requests for translation and provide sufficient time to make such translation as comfortable a burden as possible.

Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

62. We agree that the Master File should be prepared in one language only - otherwise, the concept of a central, standardized Master File would be significantly impeded. Although English is the most widely used language in the transfer pricing world, we suggest that MNEs should retain the flexibility to use their functioning language which may or may not be English and which presumably corresponds to the location of the parent company and of the majority of the business operations.

63. Flexibility should be retained to prepare Local Files in local language or in the group’s functioning language, as many groups centralize the production of Local Files for cost efficiency purposes. We also note that benchmarking studies are often performed in English, for instance where regional benchmarks are prepared or where they are outsourced to a service provider; but they may contain information in local languages, e.g. where a local database is used or local comparables’ websites checked. So, flexibility should be maintained to avoid the need to translate vast amounts of information in multiple languages.

2.11 Penalties, burden of proof (section D.7 of the Discussion Draft)

64. The proposed new TPD model would represent a very significant time and money investment for taxpayers. Compliant taxpayers should benefit from this costly exercise in terms of penalty protection and burden of proof. The burden of proof should be on the tax administration if it wishes to challenge the analyses performed by the taxpayer and provided in the TPD.
2.12 Confidentiality (section D.8 of the Discussion Draft)

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

65. Our comments on confidentiality are above in section 1.3.

2.13 Other issues (section D.9 of the Discussion Draft)

66. We note that the proposed guidance on regional benchmarks at paragraph 42 of the Discussion Draft is more restrictive than the guidance in TPG 3.35. This is regrettable given the costs that would be incurred if local benchmarking studies have to be provided for all transactions and refreshed every year while the benefits in terms of reliability of performing local rather than regional benchmarking studies is often dubious. Local databases often do not contain sufficient comparable information, which can make them less reliable than regional ones (i.e., it becomes necessary to apply less stringent comparability standards in order to arrive at a sufficient number of data points). In our view, regional benchmarks should generally be accepted unless there are good reasons to believe that local market conditions materially differ from regional ones.

2.14 Implementation: filing process (section E of the Discussion Draft)

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above.

67. We support the second of the proposed options, i.e. the filing of the Master File with the parent company’s tax administration and the sharing of Master File data through competent authorities only, subject to having reasonable comfort that the other authority also has safe processes in place to protect
confidentiality of taxpayer information. The sharing of data with foreign tax administrations outside an EOI or TIEA or multilateral convention context should be subject to penalties.

68. In addition, whatever the Master File format that will be retained, the same protection should apply to any request for additional information on foreign associated enterprises.

69. Sensitive information could be put at the disposal of tax administrations for review in taxpayer premises. Secured channels and processes should be put in place for information that needs to be filed electronically or otherwise.

2.15 Proposed contents of the Master File

<table>
<thead>
<tr>
<th>Proposed contents of the Master File</th>
<th>IAPT Comments</th>
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</thead>
<tbody>
<tr>
<td><strong>Organisational structure</strong></td>
<td></td>
</tr>
<tr>
<td>Chart illustrating the MNE’s legal and ownership structure and geographical location of operating entities.</td>
<td>Large MNE groups with hundreds or more legal entities should be allowed to provide a simplified chart. Furthermore, groups will need to pick a date as legal charts can change on a daily basis.</td>
</tr>
<tr>
<td><strong>Description of MNE’s business(es)</strong></td>
<td></td>
</tr>
<tr>
<td>For each of the MNE’s major business lines: General written description of the MNE’s business including:</td>
<td>This information is not readily available, and processes would need to be developed to compile and organize it. Only high level information on broad categories of products / services should be included in the Master File. Any more detailed information should be in the relevant Local Files.</td>
</tr>
<tr>
<td>o Important drivers of business profit</td>
<td></td>
</tr>
<tr>
<td>o Chart showing supply chain for material products and services</td>
<td>In the Master File there should be only an overview of the most significant service arrangements.</td>
</tr>
<tr>
<td>o Chart showing important service arrangements between members of the MNE group other than R&amp;D services</td>
<td></td>
</tr>
<tr>
<td>o A description of the main geographic markets for material products and services</td>
<td></td>
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</table>
- A written functional analysis describing the principal contributions to value creation by individual entities within the group, i.e. key functions performed, important risks assumed, and important assets used. Functional analysis at entity level should only be required in the Local Files. The Master File can only include high level functional analyses, e.g. for the most significant entities (e.g., it could be “the owner of the main IP rights for the APAC zone” if there is one) or categories of entities (e.g., “all the EMEA distributors”).

- A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year. Global restructurings should be broadly described in the Master File; smaller restructurings should be in the relevant Local Files.

- The title and country of the principal office of each of the 25 most highly compensated employees in the business line (note: names of such individuals should not be included). This information should not be included in the TPD. It is not relevant to TP determinations. It raises a number of legal concerns and confidentiality issues as described in section 1.3 above. Note that for an MNE group which operates 5 business lines this would represent 125 people to track, with issues related to the definition of compensation (e.g., including or excluding stock-base compensation? deferred payments? employee benefits? expatriation allowances? etc.).

### MNE’s intangibles

- A description of the MNE’s overall strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management. The Master File should only contain an overview of key intangibles, not a list of IP registrations.

- A list of material intangibles or groups of intangibles of the MNE group and which entities own them. The Master File should only contain a high level overview of important related party agreements related to intangibles. Details should be in Local Files of countries concerned.

- A list of important related party agreements related to intangibles, including cost contribution arrangements, principal research service agreements and license agreements.

- A description of the group’s transfer pricing policies related to R&D and intangibles. The Master File should only contain a high level description of the transfer pricing policies related to R&D and intangibles.
Details of should be in the relevant Local Files.

<table>
<thead>
<tr>
<th>Details</th>
<th>Notes</th>
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<tbody>
<tr>
<td>• A description of any material transfers of interests in intangibles among associated enterprises during the fiscal year concerned, including the entities, countries, and compensation involved.</td>
<td>This information should be in the relevant Local Files, not in the Master File. Please confirm that this is information about sales of intangibles, not licensing.</td>
</tr>
<tr>
<td><strong>MNE’s intercompany financial activities</strong></td>
<td></td>
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<tr>
<td>• A description of how the group is financed, including identification of important financing arrangements with unrelated lenders.</td>
<td>The Master File should only contain a high level overview of external financing arrangements.</td>
</tr>
<tr>
<td>• The identification of any members of the MNE group that provide a central financing function for the group, including the country under whose laws the entity is organised and place of effective management of such entities.</td>
<td>A “central financing function” should be clearly and narrowly defined. For example, an operating entity with numerous related party receivables and payables (including related party loans) should not necessarily be considered as undertaking a “central financing function”.</td>
</tr>
<tr>
<td>• A description of the MNE’s general transfer pricing policies related to financing arrangements between associated enterprises.</td>
<td></td>
</tr>
<tr>
<td><strong>MNE’s financial and tax positions</strong></td>
<td></td>
</tr>
<tr>
<td>• MNE’s annual consolidated financial statement for the fiscal year concerned.</td>
<td>Only if the group prepares consolidated accounts.</td>
</tr>
<tr>
<td>• A list and brief description of the MNE group’s applicable unilateral and bilateral/multilateral APAs and Advance rulings.</td>
<td>This information should be in the Local Files of the countries affected by the APA, not in the Master File.</td>
</tr>
<tr>
<td>• A list and brief description of other relevant tax rulings related to the allocation of income to particular jurisdictions.</td>
<td>This information should be in the Local Files of the countries affected by the ruling, not in the Master File.</td>
</tr>
<tr>
<td>• A list and brief description of transfer pricing matters pending under treaty MAP or resolved in MAP during the last two years.</td>
<td>This information should be in the Local Files of the countries affected by the MAP, not in the Master File.</td>
</tr>
<tr>
<td>• Country-by-country reporting template according to Annex III.</td>
<td>See our comments on country-by-country reporting in section 3.</td>
</tr>
</tbody>
</table>

### 2.16 Proposed contents of the Local File

70. We find that the requirements under the proposed Local File are overall reasonable and relevant. We would support the setting of materiality thresholds as discussed in section 2.7 above. We also have a few specific comments as follows:
Proposed contents of the Local File | IAPT Comments
---|---
A description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices. | The relevance of this information to transfer pricing analyses is not obvious. We request that the OECD explain why this information is requested and how it will be used.

Annual local entity financial accounts for the fiscal year concerned. If audited statements exist they should be supplied and if they do not existing unaudited statements should be supplied. | This information should not be part of the TPD report. We assume this is documentation obtained by tax authorities as part of their audit and is typically provided with the annual tax return.

Information and allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements. | This information is not always available and may be complex to obtain. MNEs should be given the option to provide the local file based on a single accounting method, such as the accounting method used by the parent company. We suggest replacing this item with “Indication of the financial data on which the transfer pricing method is applied. Information and/or allocation schedules showing how such data may be tied to the local or consolidated annual financial statements in total.”

3- **Country-by-Country Reporting Template (Annex III of the Discussion Draft)**

3.1 **Introductory comments**

71. As proposed in the Discussion Draft, the template for CbC reporting poses a number of serious problems.

72. First, the extraordinarily detailed template demands far more information than is needed for the high level risk assessment tool the OECD was mandated to develop. This level of detail brings with it several bad consequences:
• It needlessly raises the cost of compliance for taxpayers. Members of the IAPT have estimated that the obligation to produce 17 data items for each entity within their global groups (i.e., generally meaning thousands or even tens of thousands of separate data points for each report) will typically cost them in the millions of US dollars in both initial set-up and annual ongoing costs.

• It implies that the template offers far greater tax risk assessment benefits than a critical review of its features would reveal, with the result that tax administrations may be misled into placing too great a reliance on this tool as an accurate predictor of tax risk, to the serious detriment of both taxpayers and the tax administrations themselves.

• It greatly heightens the concerns surrounding potential breaches of the confidentiality of the data reported, which could increase the resistance to making the report available to a broad range of tax authorities.

73. The IAPT therefore recommends limiting the CbC template data elements to those identified by the G8 and G20 as needed to provide a high level risk assessment tool.

74. Second, the proposed inclusion of the CbC report within the Master File of the transfer pricing documentation package raises serious concerns that the report will be interpreted as a particularly useful transfer pricing risk assessment tool and may even be used in place of much more well-designed tools available to tax administrations for that purpose. This could lead to needless audit inquiries and costly disputes, draining the resources of both taxpayers and tax authorities. This concern is particularly acute in light of the proposed template’s focus on data elements that are much more relevant to a global formulary apportionment calculation than to an evaluation of compliance with the arm’s length principle, and in light of the Discussion Draft’s total lack of any guidance as to the manner in which the template should be used and the data’s inherent limitations for accurately measuring proper arm’s length returns.

75. The IAPT therefore recommends that the OECD separate the CbC reporting template from the transfer pricing documentation package and also that it provide guidance on how tax authorities should (and should not) evaluate and use the template data.

76. Third, the proposal to share the report with tax authorities worldwide outside the context of intergovernmental exchange of information (EOI) relationships, and therefore outside the context of the confidentiality obligations those relationships impose, creates serious concerns about the extent to which the highly granular and potentially commercially sensitive information demanded by the template can be protected from intentional or inadvertent unauthorized public disclosure. These concerns seem particularly troubling when the OECD/G20-endorsed Multilateral Convention on Mutual Administrative Assistance in Tax Matters gives governments worldwide a straightforward means of access to global EOI relationships, without any need to engage in time-consuming bilateral negotiations or to develop extensive tax treaty networks.
77. The IAPT therefore recommends that the CbC report be filed with the parent company’s home country tax authority as the Discussion Draft contemplates, but that it then be shared with other tax authorities only through a formal EOI channel (whether spontaneously or upon request), so that confidentiality obligations will apply to the recipient governments.

78. Fourth, the proposed template fails to adopt simple design features that could substantially lessen the burden of compliance imposed on taxpayers without sacrificing any material tax administration benefit for governments. One such design feature would be to allow MNE groups to choose whether to prepare their report based on the “bottom-up” approach contemplated by the Discussion Draft (e.g., starting with local statutory accounts where available) or on a “top-down” approach using data available from their existing global accounting systems. Another cost-saving design feature would be reasonable de minimis thresholds which would relieve groups of the need to include in the report multiple data point entries for every last entity in the group, regardless of how minor a share of the group’s worldwide profits that entity represented. Flexibility in the form of reasonable optionality on how individual data elements could be measured would also help to reduce the costs of compliance.

79. The IAPT therefore recommends that the OECD introduce flexibility options and de minimis thresholds into the CbC template to shrink the costs of compliance while maintaining fitness for purpose.

80. Our detailed comments on these issues relating to the CbC report are set out below.

3.2 Purpose and scope of the CbC report

81. A fundamental problem which becomes immediately obvious upon a review of the Discussion Draft’s section on the proposed CbC reporting template is that the Discussion Draft does not make clear what the intended purpose of the CbC report is, nor provide any explanation for how the proposed template would fulfill that intended purpose. In order to make rational decisions about the design of the CbC reporting template, it is necessary to articulate the purpose of this tool and to evaluate how each data item being sought is necessary to achieve that purpose. Vague references to the possibility that the CbC data “may be relevant in risk assessment processes” (see paragraph 21 of the Discussion Draft) are insufficient to justify the requirement to produce highly detailed data elements, at great cost. Such references do not explain what risks are being assessed (e.g., transfer pricing risks? stateless income risks?), how the demanded information might be relevant to determining the existence of those risks, or how detailed the information needs to be to ensure the desired level of risk assessment (e.g., high level risk assessment? deep dive risk assessment?).

82. Without an articulation of a well-defined purpose for the CbC report, there is a strong risk, which seems to be borne out by the very detailed nature of the proposed template, that the template will simply grow into an unfocused accumulation of a mass of data with no clear guidance on its significance or how the data should be interpreted. The lack of an articulated purpose also means there is no way to perform a reasoned cost-benefit analysis on the template’s design. Lacking any such clear explanation for why
anything further is needed, the IAPT believes that the data elements included in the CbC template should be substantially cut back to incorporate only the high level overview elements contemplated by the mandate given to the OECD.

83. The Discussion Draft itself reveals the clear ambivalence of the OECD on the purpose of the CbC template. This ambivalence is perhaps not surprising, as a review of the circumstances leading to the development of the proposed template will illustrate.

84. The February 2013 BEPS Report published by the OECD spoke generally of the need to develop “documentation requirements able to provide tax auditors with the full picture of business operations worldwide”, but did not limit that need to transfer pricing nor make any mention of a CbC reporting template as a mechanism to achieve that goal.

85. The call to the OECD to develop a CbC reporting template, “focusing on high level information on the global allocation of profits and taxes paid”, was first made from the G8 summit meeting held on June 17-18, 2013 at Lough Erne, and the G8 recommended this in order to help “all tax administrations effectively to identify and assess tax risks”. Again, there was no stated link to transfer pricing administration nor any call for CbC data elements beyond profits and taxes paid.

86. The first linkage of the CbC template with a transfer pricing risk assessment purpose appeared in the OECD’s July 2013 BEPS Action Plan, which included the CbC reporting template initiative in Action 13 (Re-examine transfer pricing documentation) and added the idea of reporting CbC “economic indicators” to the profits and taxes paid data elements called for by the G8.2

On the other hand, those who would like to see a global formulary apportionment regime replace the arm’s length principle clearly view a detailed CbC reporting template as an invaluable transfer pricing risk assessment tool. One proponent suggested this tool should guide tax authorities in determining where to expend their transfer pricing audit resources under current law:

Country-by-country reporting … provides the information needed to undertake a unitary apportionment overlay onto any set of group accounts with remarkably little effort expended. I admit that is not by chance -- it is by design. The intention is that group country-by-country reporting be available to a tax authority in readily computable format -- for example, a spreadsheet. Then sales by source and destination, labor by head count and cost, and physical asset data by location can all be correlated with reported profit and, crucially, intragroup activity. If the resulting unitary apportionment looks close to the profit allocation that the group of companies has made having taken its intragroup trading into account, there is little reason for a tax investigation. The best use of resources would be to move on and look at another group, which may have richer pickings. But if, alternatively, there was significant mismatch, either across the group as a whole or between just some states, the basis for a targeted investigation, with the prima facie evidence of transfer mispricing being already available, would be there for each and every tax authority involved to see.

Richard Murphy, “Lough Erne and Country-by-Country Reporting”, Worldwide Tax Daily, July 15, 2013 (2013 WTD 135-14). In the same article, Mr. Murphy cited with approval the statement that “The true prize for the Tax Justice Network is a system of unitary taxation. Country by Country reporting and Automatic Information Exchange are pre requisites for such a system....”
87. The G20 leaders, in the Tax Annex to their September 2013 St. Petersburg Declaration, described the BEPS Action Plan as calling for “more transparency, including through a common template for companies to report to tax administrations on their worldwide allocation of profits and tax” — again, no reference to transfer pricing or additional data elements.

88. The preamble to the current Discussion Draft states: “As the call to develop a common template for country-by-country reporting to tax authorities did not specifically limit the application of country-by-country reporting to transfer pricing administration, the OECD will be giving further consideration to whether information relevant to other aspects of tax administration and the BEPS Action Plan should also be included in the common template.” The Discussion Draft also asks whether the CbC report should be part of the master file component of the transfer pricing documentation package or a completely separate document. It also asks whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the CbC reporting template.

89. The Discussion Draft itself provides virtually no explanation for the intended purpose of the CbC reporting template and says nothing about the reason for including any of its particular data elements. The full discussion on that issue is at paragraph 21, which says only:

The country-by-country data required in the master file may be helpful in risk assessment processes. However, such information should not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices, a full functional analysis or a full comparability analysis. The information in the country-by-country reporting template would not constitute conclusive evidence that transfer prices are or are not appropriate.

90. As indicated earlier, the Discussion Draft describes the objectives of the proposed transfer pricing documentation requirements generally, apparently including the CbC report, as threefold: (1) for transfer pricing risk assessment; (2) to ensure taxpayers properly assess their compliance with the arm’s length principle; and (3) to provide information needed to conduct a thorough transfer pricing audit.

91. The IAPT has several reactions to the issues raised by this background.

92. First, regarding the objectives cited in the Discussion Draft itself, CbC reporting is not at all suited, and should not be considered an appropriate tool for, at least two of the three. Specifically, CbC reporting has no relevance whatever to ensuring a taxpayer has “analysed the positions it reports on tax returns, has considered the available comparable data, and has reached consistent transfer pricing positions”. That analysis can be amply ensured through other elements of the transfer pricing documentation package, but the production of the CbC report’s formulary breakdown of profits and activities is not at all suited to ensuring the taxpayer has properly analyzed and applied the arm’s length principle through a rigorous functional and comparability analysis. As stated in the OECD’s own Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPG), a global formulary apportionment approach to determining transfer prices “would not be acceptable in theory,
implementation, or practice”, so it is hard to see how conducting a global formulary apportionment analysis, as the CbC reporting template contemplates, could ensure the taxpayer’s compliance with the arm’s length principle. Moreover, as discussed above, the transfer pricing documentation package as a whole, but the CbC report in particular, cannot and should not attempt to function as a tool to provide the information needed “to conduct a thorough transfer pricing audit”.

Should the country-by-country report be part of the master file or should it be a completely separate document?

93. Second, as regards the potential use of the CbC reporting template as a risk assessment tool, the basic incompatibility of this tool’s formulary apportionment approach with the functional and comparability analysis-driven approach of the TPG’s arm’s length principle justifies extreme caution in placing much reliance on this mechanism as a valuable transfer pricing risk assessment tool. The OECD has done a fair amount of work on transfer pricing risk assessment, and it is clear from that work that a CbC analysis of the formulary apportionment of a group’s worldwide profits as compared with its reported profits would not rank high as an effective or efficient transfer pricing risk assessment tool.

94. For example, the Forum on Tax Administration’s 2012 report on Dealing Effectively with the Challenges of Transfer Pricing listed 9 features of a taxpayer’s situation that could suggest transfer risk: none of those would require a CbC report to detect. Similarly, the Draft Handbook on Transfer Pricing Risk Assessment produced by the Steering Committee of the OECD Global Forum on Transfer Pricing in April 2013 contains some discussion of the potential usefulness of comparing an entity’s profitability to that of the group as a whole or a part of the group, but that discussion is significantly caveated with warnings about how misleading simple ratio comparisons can be in determining proper arm’s length results.

3 TPG, paragraph 1.15. See also Section C of Chapter I of the TPG for a discussion of why the OECD does not accept global formulary apportionment as an appropriate alternative to the arm’s length principle.

4 See Forum on Tax Administration, Dealing Effectively with the Challenges of Transfer Pricing, OECD (Paris, 2012), Table 1, page 25.

5 See, e.g., Draft Handbook on Transfer Pricing Risk Assessment paragraphs 57 et seq. (“It should be noted that the effect on profitability from the risks borne by the parties, which might be substantial, is not easily encapsulated in financial ratios gathered at the risk assessment phase.”); “Allocation of losses will depend on the way risks and functions are allocated in the MNE group and may require consideration of several years of information.”; “If the group as a whole is making healthy profits and the local
95. It is important, therefore, that the OECD not over-sell the potential usefulness of the CbC mechanism as a transfer pricing risk assessment tool and not over-load it with data elements in the misguided belief (or creating the misguided impression) that it will become a valuable TP risk assessment tool in that way. This is important for both tax administrations and taxpayers. As the FTA’s report cited above clearly states:

Discussions with business, their advisers and tax administrations indicate that where audits and enquiries are not based on effective risk assessment cases last much longer, and all too often the most significant transfer pricing issues are missed. As a result enquiries are more costly than they need be and much less effective in recovering tax revenue than they should be.6

96. Thus, the assumption, reflected in one commentator’s statement quoted above, that any misalignment between the results of the CbC’s formulary apportionment analysis and the taxpayer’s reported results reflects “prima facie evidence of transfer mispricing” is a very troubling one to taxpayers and should also be very troubling for tax administrations. To the extent that the OECD’s final guidance makes any suggestion that the CbC report may be a useful transfer pricing risk assessment tool, it should also provide clear guidance on the inherent limitations of that mechanism for that purpose, and not limit itself to a statement that the report does not provide “conclusive evidence” of inappropriate transfer pricing. In any event, the CbC report should not be part of the TPD Master File, as including it in the TPD package provides a misleading impression of its significance for transfer pricing purposes.

97. This leaves the question of whether the CbC report is a potentially useful risk assessment tool for non-transfer pricing tax risks. One can imagine that a high level CbC tool (i.e., one limited to reporting income and taxes, as the G8 and G20 recommended) would potentially reveal cases of so-called “nowhere taxed income” or “double non-taxation” of the type that gave rise to the BEPS concerns. But for such purposes, there would not be any need to require the kind of detailed CbC data elements contemplated by the Discussion Draft.

98. As a third point, the IAPT notes the OECD’s statement that it is considering whether the CbC reporting template should be expanded to include “information relevant to other aspects of tax administration and the BEPS Action Plan”. We assume that this may relate primarily to Action Item 11
(Establish methodologies to collect and analyse data on BEPS and the actions to address it). The OECD has not yet published anything to indicate which data elements it may be interested in examining as part of the Action Item 11 exercise nor why any particular data elements would be relevant for that purpose. At this stage, the IAPT believes it would be premature to comment on that Action Item, other than to strongly urge the OECD to refrain from including in the CbC reporting template any data elements that delegates may think might be desirable under that Action Item, without subjecting such proposals to a transparent analysis of their purpose and likely cost and efficacy. Any such data elements that have crept into the currently proposed CbC reporting template should be deleted and held for such time as their purpose and usefulness can be adequately evaluated in the proper context, and not as part of a TPD analysis.

Recommendations:

99. Based upon these reactions, the IAPT makes the following recommendations regarding the scope and purpose of the CbC reporting template:

- **The CbC report should not be part of the TPD package**, but should instead be a completely separate document.

- **The total inability of the CbC report to meet two of the three stated objectives of a TPD package** should be explicitly acknowledged.

- **The OECD’s final guidance should provide clear guidance on the inherent limitations of the CbC report for transfer pricing risk assessment purposes**, to the extent it retains any suggestion that the mechanism may be useful for that purpose, and not limit itself to a statement that the report does not provide “conclusive evidence” of inappropriate transfer pricing.

- **Beyond the income and taxes paid data elements suggested by the G8 and G20, the OECD should not include any data elements in the CbC reporting template** for which it has not conducted a thorough and transparent analysis and explanation as to their potential usefulness for tax administration purposes and the potential cost of their inclusion from the perspective of taxpayers and tax administrations alike.

3.3 Design of the CbC Reporting Template

3.3.1 Economic Activity Indicators

100. The current version of the template, in the view of the IAPT, is much more detailed than could be justified from the perspective of providing a high level risk assessment mechanism. For the reasons outlined above, the IAPT recommends that the OECD reconsider the inclusion of economic activity indicator data elements in the CbC reporting template without a thorough and transparent analysis and explanation of the potential usefulness of their inclusion for tax administration purposes. That analysis
and explanation are lacking in the Discussion Draft. In the absence of any such analysis from the OECD, the IAPT has a number of comments on the elements included in the Discussion Draft’s template.

101. Regarding the requirement to report stated capital and accumulated earnings on a Constituent Entity basis, IAPT members have struggled to identify any reason such a data element for a group’s worldwide entities would be relevant to tax administration in any particular country where the group operates. We note that such information about local entities of the group would typically be available to local tax authorities. Our members report, however, this information is generally compiled at the local level, and that collating this data at the central level would require substantial effort, since it is not compiled on an entity-by-entity basis at that level. Even if it could be compiled, the relevance of the data is particularly doubtful given the differences that exist from country to country in what is meant by “stated capital”. Moreover, for those groups that wish to be able to do “top-down” reporting on a country consolidation (rather than entity-by-entity) basis, as described further below, it would not be possible to generate this data element. Difficulties would also arise in producing this data for Constituent Entities that are not corporate entities (e.g., permanent establishments, joint ventures, etc.). Accordingly, the IAPT’s strong recommendation is to delete this item from the CbC template.

102. Regarding the requirement to report the number of employees, most IAPT members believe they could produce information on this item without undue difficulty, although, as with other items in the template, there will be expense involved in making the necessary systems changes to be able to centrally compile this information from a global group’s hundreds of entities. There can also be problems in coming up with precise figures for an item such as this, particularly if the template is overly prescriptive. For example, difficulties can arise due to the fact that, as acknowledged by the Commentary on Article 15 of the OECD Model Tax Convention, countries’ rules may differ on whether they consider a seconded individual to be an employee of the sending or receiving entity. IAPT members urge some flexibility in the approach to reporting the number of employees on a CbC basis item if, contrary to our recommendation, it is retained in the template. For example, some local accounting standards require companies to keep and report data in their statutory accounts showing the average number of employees per year rather than the number on the last day of the fiscal year, as the Discussion Draft requires. Some groups may have conventions for counting full-time versus part-time employees, etc. One way of making this requirement less burdensome, without sacrificing a reasonable level of detail, would be to allow the figures to be reported on the basis of ranges (e.g., 0-5 employees, 6-20 employees, 21-100 employees, 101-1000 employees, more than 1000 employees). As with any other data element, however, the IAPT does not believe it should be included in the template unless there is an explanation of its relevance for tax administration purposes and guidance on how the required information should (and should not) be used by tax authorities.

103. Regarding the data item on total employee expense, IAPT members see greater difficulties in compiling this information. For example, entity-by-entity (or CbC) accounting data for employee expenses may not include equity compensation, because equity compensation is ordinarily recorded on the parent company books and is not uniformly cross-charged to local countries. Therefore, additional
manual work may be required when reporting on local country employee expenses to estimate cross-charges that are not required or not otherwise allowed for accounting purposes. This is especially problematic for technology companies with widely distributed research teams across countries. Quantification of other forms of non-cash remuneration may also be problematical. More fundamentally, the IAPT questions the value of this data element, particularly in view of the burdens associated with producing it. Variations in wage rates from country to country may make comparisons based on this factor particularly meaningless. We accordingly recommend that this item be deleted from the template.

104. Regarding the requirement to report the book value of tangible assets (other than cash and cash equivalents) on the balance sheet of each Constituent Entity as of the last day of the relevant fiscal year, IAPT members note that the relevance of tangible assets to the profitability of an enterprise will vary greatly depending on the enterprise’s business model (e.g. such assets are often relatively unimportant to services businesses, financial enterprises, or businesses with significant intangible assets), and that book value can also be a grossly misleading indicator of such assets’ current contribution to profit generation. Some enterprises’ substantial use of leased assets in particular jurisdictions can also make this ratio particularly meaningless. Accordingly, the IAPT recommends against inclusion of this factor in the CbC template in the absence of a clear explanation of its intended purpose and usefulness. We note that information about such assets that are locally held would typically be available to local tax authorities.

Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

105. Regarding the requirement to report royalties, interest, and service fees paid to and received from Constituent Entities on an entity-by-entity (or CbC) basis, the IAPT members foresee very substantial costs in breaking out such data from local accounts and centrally compiling the information on this. We also struggle to understand the need for this degree of detail from a high level risk assessment perspective, particularly given that information about such payments involving local entities would typically be available to the local tax authorities anyway. The members suggest that one alternative, which would be much less burdensome, would involve ticking a box to indicate whether each entity made or received such related party payments during the year, without having to separately quantify each amount. The IAPT also notes that it is not clear how groups are intended to respond to such a requirement for Constituent Entities in the form of permanent establishments (e.g., whether notional payments need to be computed).
3.3.2 “Bottom-up” versus “top-down” approach / entity-by-entity versus CbC

Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

106. The IAPT strongly advocates that groups be able to choose whether they will produce the CbC report using a “bottom-up” or “top-down” approach. Thus, we recommend that the template permit (but not require) a “top-down” allocation of an MNE’s consolidated income. Even where the relevant information may exist in local level accounting data, many companies have indicated that the cost of compiling that information from the “bottom up”, both at the initial set-up phase and on an ongoing basis thereafter, would greatly exceed the costs associated with using the “top-down” data available for compiling consolidated accounts to produce CbC (or entity-by-entity) reports, including the costs necessary to tweak the “top-down” accounting systems to produce the CbC data in the form contemplated. This is true even on the assumption, which members believe should be explicitly reflected in the OECD guidance, that neither approach’s results would need to be audited or reconciled with the group’s consolidated financial statements or local returns and that tax authorities would not be entitled to ask for such reconciliation.

107. For example, for large groups that are active in dozens (if not upwards of one hundred or more) countries around the world, and that often have hundreds if not thousands of subsidiaries, all preparing local “bottom-up” data under different accounting systems and principles, using different formats, currencies, fiscal years, and languages, and at different times, the IT systems work and/or manpower
needed to be able to compile that information centrally, extract from it tens of thousands of separate data points required by the CbC template, and produce from it a single CbC report would be astronomical (estimated by some member companies in the tens of millions of dollars). For such groups, the ability to use the data generated to produce group-wide consolidated accounts, under a single accounting system and set of principles, and a single currency, fiscal year, language, and deadline, would involve much less cost, even though some work would be required to produce from those data the required template report. IAPT members believe they can produce one of either entity-by-entity or CbC data, but not both in many cases, using that source (including, where necessary, separately reflecting the data of permanent establishments and, where a country-level consolidation is used, reflecting revenue and earnings attributable to cross-border transactions between associated enterprises but eliminating revenue and transactions between group entities within the same country).

108. With respect to the question of whether entity-by-entity or CbC consolidations should be reported on the CbC template, the IAPT strongly recommends that either approach be allowed, but that neither be the sole required approach. A number of groups have indicated that they could generate CbC consolidated information from their data, but that it would take considerable work, not required for any other purpose, to manually refine that to produce entity-by-entity data. Other groups have indicated that their systems would allow for the production of entity-by-entity data, and that it would involve additional work for them to go through the step of eliminating intra-country transactions to produce consolidated CbC data. This is another example where different groups, starting from different accounting systems, can produce some form of reasonable CbC reporting template data using information that is obtainable through their existing systems without excessive cost, but where forcing all groups to adhere to a single arbitrary approach will involve very substantial costs for some. Of course, groups deciding to produce consolidated country CbC data would still provide the names and business activity codes for the individual group entities within each country.

3.3.3 Taxes paid / withholding taxes

Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

109. In our October submission, the IAPT had discussed the relative merits of reporting taxes based on a “cash paid” basis versus an accrued tax basis and had expressed some preference for the latter, on the
theory that it would be more likely to show a coherent correlation to the income reported for the relevant year. We note, however, that the Discussion Draft has selected the “cash taxes paid” measurement, and we confirm that is a manageable approach for our members.

110. Particularly because of the existence of groups that file consolidated tax returns covering multiple entities in particular countries and that compute a single corporate income tax liability for those countries, the IAPT would urge that the template include the option of reporting one aggregate number for corporate income tax paid to a country, rather than having to show an entity-by-entity breakdown within that country. The latter step, which is currently required by the Discussion Draft, seems unnecessary for this sort of high level risk assessment document.

111. The IAPT notes that the template includes a column for income tax paid “to all other countries” and suggests that the OECD clarify what circumstances are intended to be covered by that column. For example, are the amounts included in that column supposed to exclude withholding taxes paid to other countries (and reportable in the next column)? If a company in Country A with a PE in Country B pays income taxes to Country B on the PE’s profits, are those taxes supposed to be reported by the company itself in that column (even though the PE, presumably reporting as a Country B Constituent Entity, would have reported those taxes on its own line as paid to its “country of organization”)? How should taxes paid by a parent company under a controlled foreign corporation regime be reflected on the CbC template?

112. Regarding the definition of “income tax” for purposes of the template, we believe the OECD should clarify that this includes all forms of taxes imposed on companies’ income or in lieu of such taxes, including sector-specific charges (e.g. production taxes, tonnage taxes, signature bonuses, etc.) and sub-national level income taxes, etc.).

113. In our October submission, we had indicated it probably made sense to attribute withholding taxes to the country to which is attributed the income on which those taxes are imposed, rather than to the country to which the withholding tax is paid. We see that the Discussion Draft has adopted this approach, and we confirm that IAPT members generally believe they will be able to report that item as requested. As with other items, however, there will, of course, be costs involved in changing systems to be able to capture this data element in the form required.

3.3.4 Business activities

Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on
114. The IAPT notes that the template calls for groups to report the important business activity or activities carried out by each Constituent Entity, based upon a coding system set forth in the instructions to the template. The members generally believe that they should be able to comply with this requirement as requested without undue burden. That being said, we recommend that instead of asking for identification of each entity’s “important” business activities (a classification about which views could easily differ), the template could better ask for the entity’s “main” or “principal” business activities.

115. As discussed above, the IAPT believes that the level of detail on economic activity required by the currently proposed template is already excessive and too burdensome, given the limited purpose of this tool, and we therefore do not recommend adding other measures of economic activity to the template.

3.4 Compliance issues regarding the CbC template

116. We have addressed a number of compliance issues regarding the Discussion Draft in our comments above in sections 1 and 2, and many of those, including in particular the comments on confidentiality in section 1.3, apply just as much to the CbC reporting template as to any other part of the proposed TPD package. We therefore comment below only on those compliance issues that are of particular relevance to the CbC template.

3.4.1 Materiality (section D.3 of the Discussion Draft)

Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

117. In our October submission, we had recommended that the CbC template have certain de minimis thresholds, so that not every dollar of income derived worldwide by a group would need to be broken down on a CbC basis in order to give countries where the group has operations a high level indication of whether the group has derived significant amounts of income in low-tax countries. Note that our recommendation was not aimed at withholding CbC information from any country. It was simply aimed
at reducing the amount of detailed reporting work that would have to be done about countries that represent a small slice of the group’s worldwide income.

118. Having now seen the amount of detail that is proposed to be included in the CbC report (i.e., 17 separate data items are required to be reported for every entity in every country where a group does business), the IAPT believes that this sort of de minimis relief makes more sense than ever. Accordingly, we repeat here our recommendation from October and strongly urge the OECD to give it serious consideration:

The IAPT suggests that serious consideration be given to incorporating reasonable de minimis or materiality thresholds in any of the CbC reporting to be required. For groups that have operations in dozens of countries around the world, a full-blown CbC allocation of multiple information elements to each of 100-plus countries could become a very resource-intensive and costly exercise. The most cogent explanation for the justification for a CbC reporting requirement is that it would allow countries to do tax risk assessment by eyeballing whether a group has a high concentration of income in a low tax jurisdiction where it conducts little economic activity. This objective could be satisfied without requiring a group to do a full-blown allocation of every dollar of income or other reportable item to each of the many dozens of countries in which it does business.

For example, an approach which required a group to account for a high percentage of its total income (say, 80%) on a CbC basis, or for the 20 or 30 countries in which it had the highest levels of income, or for any country that represented more than some de minimis (say, 5%) portion of its worldwide income could presumably satisfy the principal objective of the proposal while minimizing the compliance to a significant extent. The IAPT urges the OECD to give serious consideration to some form of de minimis threshold below which allocations to individual countries would not need to be made. Of course, every country in which a group has operations can require a tax return reporting income and economic activity in that country, so the CbC report is not necessary to inform the local tax administration about the group’s results in its own country, nor will the CbC report be the only transfer pricing documentation a country will receive to assist it in its tax risk assessment exercise. For these reasons, de minimis thresholds would represent a very reasonable balancing of interests.

3.4.2 Confidentiality (section D.8 of the Discussion Draft)

119. The CbC reporting template, and in particular the excessively detailed version of it set forth in the Discussion Draft, raises serious issues about how to protect the confidentiality of sensitive business information in a report designed to be shared with dozens of tax administrations across the globe with quite different local laws and practices relating to the protection of confidential taxpayer information. We have explained in section 1.3 above why we believe the exclusive channel for transmitting the CbC report
to tax authorities other than those in the parent company’s home jurisdiction should be through formal EOI arrangements, and why we believe the different options for governments to gain access to those arrangements, including the Multilateral Convention on Mutual Assistance in Tax Matters, belies any suggestion that the EOI route is an unsatisfactory one for any group of countries. Countries that are unwilling to avail themselves of those readily accessible arrangements, and to commit to the confidentiality obligations they entail, should be viewed as creating their own legitimate barriers to access to CbC information.

3.4.3 Implementation (section E of the Discussion Draft)

120. The IAPT notes with approval the recommendation at paragraph 45 of the Discussion Draft that the CbC report should be completed under the direction of the parent company of the MNE group. That being said, we also note that the Discussion Draft stops short of stating what we believe to be important corollaries to that recommendation. These are that the parent company should be able to prepare one CbC report in accordance with the domestic law requirements of its home jurisdiction, and that a report so prepared would be deemed sufficient to satisfy the CbC reporting requirements of any other jurisdiction where the MNE group had operations. This would avoid the possibility that a group would be faced with having to comply with multiple countries’ varying implementation of the common template in their domestic legislation. A further corollary is that neither the parent company nor any member of the group could be penalized by any country where the group has operations for failure to comply with that country’s domestic CbC legislation if the parent prepared its report in accordance with such parent country domestic legislation. These points are particularly important because of the fact that the CbC template, which has been rapidly prepared and is being given little time for detailed review by taxpayers or governments, includes so many data elements which raise significant issues of interpretation and application. The IAPT therefore recommends that the OECD include these explicit recommendations in its final guidance.
ANNEX 2

INTERNATIONAL ALLIANCE FOR PRINCIPLED TAXATION

COMMENTS ON JULY 30, 2013 WHITE PAPER ON TRANSFER PRICING DOCUMENTATION

SEPTEMBER 30, 2013
VIA E-MAIL

Mr. Joseph L. Andrus
Head of Transfer Pricing Unit
Tax Treaty, Transfer Pricing & Financial Transactions Division
Centre for Tax Policy & Administration
Organisation for Economic Co-operation and Development
2, rue André-Pascal
75016 Paris
France
TransferPricing@oecd.org

Re: Comments on White Paper on Transfer Pricing Documentation

Dear Mr. Andrus:

The International Alliance for Principled Taxation (IAPT or Alliance) is a group of about two dozen major multinational corporations based throughout the world, and representing business sectors as diverse as consumer products, media, mining, telecommunications, oilfield services, transportation, medical equipment, food products, luxury goods, computer technology, energy, pharmaceuticals, entertainment, software, beverages, automotive, IT systems, publishing, and electronics. The group’s purpose is to promote the development and application of international tax rules and policies based on principles designed to prevent double taxation and to provide predictable treatment to businesses operating internationally.

The IAPT thanks the OECD for providing this opportunity to comment on the White Paper on Transfer Pricing Documentation.

The IAPT recognizes that tax administrations need adequate and sufficient taxpayer information to be able to effectively enforce the arm’s length principle. We support an OECD initiative on transfer pricing documentation (TPD) which would “enhance transparency for tax administration, taking into consideration the compliance costs for business” as announced in the BEPS Action Plan. We support the OECD attempt to “move towards a simpler and more efficient compliance with transfer pricing documentation rules” by setting out a possible coordinated approach to transfer pricing documentation.

In doing so, we believe that the OECD should take into account a few essential guiding principles.
In general

- Some harmonization / standardization could be beneficial. We note however that templates tend to provide long lists of information and documents, many of which are not relevant to all taxpayers, industries or activities. The same information may not be relevant for a manufacturer, a distributor, a research and development entity, an intangible property company, a shared service centre, a financial entity, etc. Templates with country or industry variations could prove to be even more burdensome. It is therefore important that the template provided by the OECD remain realistic and not over-burdensome.

- Any transfer pricing documentation requirements enforced by countries on the basis of the OECD proposal should not be incremental to but replace what already exists in domestic legislation, in order to avoid that in a particular country two sets of transfer pricing documentation requirements would exist.

- We generally support the proposed two-tier structure consisting of a masterfile and a series of local files, to the extent that each of these two components is appropriately delineated. In practice, the masterfile and the local file would both be filed by local entities with their local tax authorities, so that it is important to clearly assign different objectives to these two components and to avoid unnecessary repetition.

- In our view, four types of documentation requirements should be distinguished:
  
  o Information filed with the tax return should be limited to information relevant for tax authorities to do risk assessment analysis and determine what taxpayers / transactions to audit. Such information should be simple for the company to extract from its accounting system (e.g. nature and volume of taxpayer’s transactions with associated enterprises).
  
  o The masterfile should contain information relevant to transfer pricing analysis that is relevant to all the countries where the group (or a business unit or division of the group) operates.
  
  o The local files should contain information that is relevant to transfer pricing analysis in relation to a given country. Flexibility should be retained to produce local files covering all the entities in a particular country, or entity files covering one entity only, depending on what makes sense in a particular case. For instance, if an MNE group owns in a given country two entities which belong to different divisions or business lines and do not interact with each other, filing two separate entity files rather than one country file may be more appropriate.
  
  o Country-by-country reporting: this is a separate topic about which the IAPT plans to comment separately as part of its comments on the BEPS Action Plan. It should not be included in the TPD requirements as such, as it has potential implications well beyond transfer pricing.

- Information which is not relevant to risk assessment or transfer pricing analysis should not be required. TPD is not about administrations requesting a long list of “nice to have” documents.

- The OECD should be mindful of the costs that will be involved for businesses if it prescribes the production of information that does not exist and that necessitates significant investment (in time and IT systems). For instance, a breaking down of value chain analyses / supply
chains per product line per legal entity is an example of a huge undertaking which would create significant uncertainty (lacking a clear definition of what is required) and heavy compliance costs.

Requests for information such as a “Chart showing supply chain for material products and services”, “A written functional analysis showing the principal contributions to value creation by individual entities within the group”, “details as to which companies are entitled to returns from relevant intangibles” underestimate the complexity of producing such analyses in complex MNE groups with complex operations and a variety of products, services, and situations.

We believe that the adoption of de minimis rules in documentation requirements should be encouraged. The current proposal in the White Paper could lead to an explosion of documentation costs. Consistently with one of its announced objectives, the OECD should promote administrative and compliance simplification in the transfer pricing area.

• In addition to the contents of the documentation requirements, the timing for producing documentation is a critical issue. Not all information needs to be filed with the tax return. As noted at paragraph 79 of the White Paper, there is a risk assessment component to transfer pricing documentation which should be differentiated from the audit process itself. We support the notion that transfer pricing documentation should be twofold: information needed to perform risk assessment (such as the amount of intragroup transactions) could be filed with the tax return, while transfer pricing analyses needed to support the selection and application of the transfer pricing method (such as the functional analysis and benchmarks) should be produced at a later stage. In some countries, transfer pricing analyses are to be produced at the start of an audit upon request from the tax administration. We believe that this is a good practice.

Furthermore, not all information can realistically be filed with the tax return. For instance, in many countries comparables from transactions contemporaneous to the transaction of the taxpayer are not available at the time of the filing of the return.

Also, flexibility should be retained for MNE groups to produce portions of transfer pricing documentation covering several years in cases where the circumstances warrant it. This can be the case for instance for local entities carrying out small, low risk activities in a stable environment (see TPG 3.80-3.83).

• Finally, we believe that tax administrations should be committed to take into account the contents of the transfer pricing documentation produced by the taxpayer when such documentation has been established following the arm’s length principle and the OECD Transfer Pricing Guidelines. Transfer pricing documentation is costly and it can be a very frustrating process if tax auditors disregard it for no good reason. To be successful, any initiative to strengthen transfer pricing documentation requirements should be accompanied by improved certainty for compliant taxpayers. In particular, tax administrations should not substitute a transfer pricing method for the one selected by the taxpayer if the latter has been selected in accordance with the guidance in Chapter II of the Transfer Pricing Guidelines.1 Otherwise, transfer pricing documentation becomes an unbalanced exercise which only provides information to tax authorities without providing any certainty to taxpayers.

1 This issue is linked to our comment on the proposed revision of paragraph 2.9 of the Transfer Pricing Guidelines, see separate comment letter on the Revised Discussion Draft on Transfer Pricing Aspects of Intangibles.
Masterfile

- The information in the masterfile should be information which is susceptible of shedding light on the compliance with the arm’s length principle and transfer pricing regulations by the entities in the jurisdictions concerned. While we understand that tax administrations are concerned that they lack a “big picture” view of a taxpayer’s global value chain, we think that a balanced approach is needed. We find that the items of information to be included in the masterfile as currently listed in Table 1 of the White Paper exceed by far what can reasonably be expected to be relevant to effectively enforce the arm’s length principle. They would create huge compliance costs for taxpayers without being necessarily helpful for tax administrations to apply transfer pricing regulations. It would be detrimental to the enforcement of the arm’s length principle if vast amounts of information irrelevant to the application of the arm’s length principle were systematically produced.

- We provide in Annex 1 a proposed list of contents for what we believe would be helpful in a masterfile.

- As acknowledged at paragraph 76 of the White Paper, there are issues regarding the usefulness of the masterfile in a business where more than one line of business is pursued. A coordinated documentation system would have sufficient flexibility to allow the taxpayer to supply masterfile information either on a company-wide basis or by line of business, depending on which would provide the most relevant transfer pricing information to tax authorities. Depending on the range of its activities, an MNE could have multiple masterfiles which might be broken down by business lines or particular activities or some other reasonable manner.

- In our view, the masterfile should be the common denominator for all countries where the group (or business unit or division of the group) operates. Information which is not relevant to all countries should go to the local files of the entities concerned.

- It follows that the information in the masterfile should be general, high level information. More granular information can be requested in the local files. For instance, the masterfile could contain an overview of a major business restructuring having affected the group globally, while the details of a business restructuring affecting a particular country would be in the local file. Similarly, the masterfile could contain an overview of the key functions, assets and risks of the group, with a detailed functional analysis and list of intangibles affecting a particular country being provided in the relevant local file. Similarly, the masterfile should contain an overview of the transfer pricing policy but the details of application and possible local variations should be in the local files.

- We find that many of the items currently listed in the proposed masterfile in Table 1 of the White Paper are either not relevant to transfer pricing analyses or too detailed to be part of a masterfile. It is also unclear to us what is meant by some of them, for instance “geographical location of key management personnel”, and we do not understand how such information is expected to be used by tax authorities.

- An important concern with the proposed masterfile in Table 1 of the White Paper is that it seems to be based on the premise that MNE groups have or are able to produce and that tax administrations should base their transfer pricing analyses on profit split / global formulary apportionment types of approaches. The OECD should not encourage tax authorities to make transfer pricing assessments on the basis of factors which have more to do with the global
profitability of the group and the countries where profits are located, than with the actual economic activity performed in the country conducting the audit.

- The debate on country-by-country reporting is a complex one, especially when it comes to assigning clear objectives to it, determining the nature of information which should possibly be required to be disclosed on a country-by-country basis, the format of the reporting, and the bodies and countries to which it should be reported. This discussion needs to be carried out separately from the design of transfer pricing documentation; we appreciate the OECD’s invitation to comment separately on the country-by-country reporting element of Action 13 of the BEPS Action Plan, and we intend to do so in a separate letter. We do not think that “A schedule showing for each country in which the MNE does business the total number of employees in the country” should be included in the masterfile. We find that the discussion at paragraph 72 of the White Paper is overly simplistic.

Local file

- We find that the list of information provided in Table 2 with respect to the local file is generally fine, with the exception of two items:
  
  o In the local entity section, “A description of the management structure of the local entity, to whom local management reports and the geographical location of senior executives”. It is unclear to us what exactly is requested and how this affects the transfer pricing analysis; and

  o In the financial information section, “Information and allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements”. It is also unclear to us what exactly is requested. Large companies consolidate many legal entities and many lines of business and, therefore, tracing through any particular local country details to the annual group financial statements would be very difficult. We think that such information is generally not available and should only be required if it adds significant value to the transfer pricing analysis.

We provide in Annex 2 a proposed list of contents for what we believe would be most helpful to be included in the local file.

Economic analyses

- We are disappointed with the statement at paragraph 77, 3rd bullet point that “A desire for simplifying compliance processes should not go as far as to undermine compliance with the requirement to use the most reliable available information.” In practice, the costs of performing local database searches are significant and such local searches should only be required when there are reasons to believe that regional searches provide outcomes that materially deviate from local ones, for instance because of significant market differences.

***

We recognise the critical importance of the work undertaken by the OECD in the area of transfer pricing documentation. We encourage the OECD to involve business representatives in this work in order to ensure that the practical recommendations which will be developed are helpful for tax
administrations, are workable in practice for taxpayers, and do not set an unrealistic standard. The IAPT is willing to constructively contribute to this work by participating in any working group which may be set up with private sector representatives.

Sincerely yours on behalf of the Alliance,

[Signature]

Caroline Silberztein
Baker & McKenzie SCP
Counsel to the Alliance

cc: Ms. Michelle Levac, Chair, Working Party 6
Annex 1 - Proposed contents for a masterfile

The following elements could be usefully included in the masterfile to the extent they are relevant to the transfer pricing analysis for all the countries concerned (see comments in the body of our letter for further explanations of what we believe should be the overarching principles for designing transfer pricing documentation including a masterfile):

a) A general description of the multinational enterprise group’s [or business unit’s, or division’s, depending on whether the masterfile is prepared for the group, a business unit or a division):
   - Brief history,
   - Overview of the main lines of business / products / activities (depending on what is most relevant to the circumstances of the case),
   - Overview of the geographical footprint of the multinational enterprise group [or business unit, or division],
   - Key facts and figures (depending on what is most relevant to the circumstances of the case).

b) A general description of the legal ownership structure, including a simplified chart showing the main relevant entities and their ownership links. [Note to the OECD: MNE groups can have hundreds of legal entities, with changes to the legal chart happening throughout the year, so that the requirement in the masterfile should be limited to what is helpful for tax administrations to understand the global environment in which the taxpayer is operating.]

c) An overview of the industry and key economic factors which affected the activity during the period covered in the masterfile.

d) An overview of the business and business strategy, including changes compared to the previous period; a general description of the important drivers of business profit, significant risks, list of the main markets for material products and services, key competitors.

e) An overview of the global value chain, including:
   - a general description of the multinational enterprise group’s [or business unit’s, or division’s] operational structure (including an identification of the main categories of entities or functions (for instance: manufacturers, distributors, logistic platforms, R&D centres, shared service centres, etc.).
   - key tangible and intangible assets used. [Note to the OECD: more detailed information will be provided by each of the entities concerned in their local files.]
   - a general description of the main controlled transactions, their nature (e.g. licenses, sale of semi-finished products, services, financial transactions) and direction of invoice flows (i.e. who is the seller, who is the buyer). [Note to the OECD: more detailed information will be provided by each of the entities concerned in their local files.]
f) An overview of significant changes which took place during the period covered by the masterfile, including significant business restructurings which affected the multinational enterprise group [or business unit, or division] within the meaning of Chapter IX of the TPG that took place during the year. [Note to the OECD: more detailed information will be provided by each of the entities concerned in their local files. The OECD suggests in the White Paper that the description of business restructurings should go back 5 years. We find that this would be an excessively burdensome requirement, especially for the first year of implementation of such a requirement, which would not add much value to the transfer pricing analysis of the current year.]

g) A general overview of the group’s [or business unit’s, or division’s] financing policy.

h) A general description of the multinational enterprise group’s [or business unit’s, or division’s] inter-company transfer pricing policy.
Annex 2 - Proposed contents for a local file

A local file should only be required from entities that have material transactions with associated enterprises. The following elements could be usefully included in the local file to the extent they are relevant to assess the conformity with the arm’s length principle of the entity filing it (see comments in the body of our letter for further explanations of what we believe should be the overarching principles for designing transfer pricing documentation including a local file):

a) Presentation of the entity filing the local file:
   - Address and tax identification number (if any) of the local entity filing the local file.
   - Identification and brief corporate history of the local entity, e.g. date of creation, mergers, etc.
   - Indication of the lines of business / products / activities in which the local entity is involved (depending on what is most relevant to the circumstances of the case).
   - Simplified legal chart showing the control relationship between the local entity and the foreign associated enterprises with which it carries out significant controlled transactions.
   - Copy of the entity’s corporate income tax return for the period covered in the local file.

b) Business environment:
   - Description of the key industry and economic factors which affected the business of the local entity during the period covered in the local file.
   - Description of the local entity’s business and business strategy, including changes compared to the previous period; important drivers of business profit, significant risks, list of the main markets for material products and services, key competitors.
   - List of significant intangibles owned or used by the local entity.

c) Identification of material controlled transactions in which the local entity is involved:
   - Their nature (e.g. sale of goods, provision of services, licence, financial transactions, etc.).
   - Identification of the foreign party to the transaction.
   - Aggregate amounts per category of transactions.
   - List of the material contracts entered into between the local entity and foreign associated enterprises.

d) For significant transactions or categories of transactions with foreign associated enterprises:
   - A detailed comparability analysis, including a functional analysis of the controlled transaction, and changes compared to the prior period (see TPG
3.20-3.23 and 1.33-1.63). [Note to the OECD: in accordance with the guidance in TPG 3.20-3.23, the functional analysis of the controlled transaction includes a functional analysis of all the parties involved, including the foreign associated enterprise(s).]

- Where relevant: a description and justification of the evaluation of combined transactions or intentional set-offs (see TPG 3.9-3.17).
- An explanation of the transfer pricing method used by the group to set the transfer price.
- Where it is different: an explanation of the selection of the most appropriate transfer pricing method used to test the conformity of the transactions with the arm’s length principle (see TPG 2.2-2.11).
- Where a transactional profit method is used: an explanation of the selection of the most appropriate financial indicator (see TPG 2.76 and 2.131).
- Where a one-sided method is used: an explanation of the selection of the tested party (see TPG 3.18-3.19).
- Financial information on the prices charged in the controlled transaction (in the case of a comparable uncontrolled price method) or on the relevant financial indicator at the level of the tested party (in the case of a cost plus, resale price or transactional net margin method) or parties (in the case of a profit split), supporting the transfer pricing analysis.
- Description of the process for selecting internal and external comparables. Sources of information used, screening criteria (see TPG 3.24-3.46).
- Where relevant, an explanation of the comparability adjustments made, rationale for making them, and determination (see TPG 3.47-3.54).
- Summary schedules of relevant financial data for comparables used in the analysis.
- Where relevant, an explanation of the use of multiple year data (see TPG 3.75-3.79).
- Presentation of the arm’s length range (see TPG 3.55-3.66).
- Conclusion on conformity (or not) with the arm’s length principle. Corrective measures implemented if and where needed.

e) Business restructuring:

- Description of any material business restructuring within the meaning of Chapter IX of the TPG that has affected the local entity during the period covered in the local file.
- For any material business restructuring transaction having affected the local entity during the period covered in the local file:
  - Explanation of the business reasons for the business restructuring and identification of the restructuring transactions.
Description of any transfer of valuable tangible or intangible assets, valuation thereof and assessment of compliance with the arm’s length principle.

Description of the termination or substantial renegotiation of existing arrangements and conditions thereof and assessment of compliance with the arm’s length principle.

f) Others:

- A list of unilateral or bilateral APAs affecting the determination of the transfer prices of the local entity.

- A list of cost sharing agreements affecting the determination of the transfer prices of the local entity.
ANNEX 3

INTERNATIONAL ALLIANCE FOR PRINCIPLED TAXATION

COMMENTS ON ACTION ITEM 13 OF THE JULY 19, 2013 BEPS ACTION PLAN

OCTOBER 16, 2013
IAPT Comments on BEPS Action # 13 (Re-examine transfer pricing documentation)

**ACTION 13**

Re-examine transfer pricing documentation

Develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNE’s provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template.

**Introduction**

The IAPT welcomes the OECD initiative to develop guidance and recommendations on transfer pricing documentation with a view to achieving the goal stated in the *White Paper on Transfer Pricing Documentation* (the White Paper) released on July 30, 2013, namely “to make transfer pricing compliance simpler and more straightforward, while at the same time providing tax authorities with more focused and useful information for consideration in connection with transfer pricing risk assessment and transfer pricing audits”. We note that the OECD has invited comments on the White Paper as a “first step” in soliciting public input on how transfer pricing documentation rules can be “improved, standardised and simplified”. While the OECD’s work on transfer pricing documentation was initiated before the formal launch of the BEPS project, an important new element was introduced by the directive which emanated from the G8 summit meeting of June 17-18, 2013. That directive called on the OECD to “develop a common template for country-by-country reporting to tax authorities by major multinational enterprises, taking account of concerns regarding non-cooperative jurisdictions”, noting the need for information to be “presented in a standardised format focusing on high level information on the global allocation of profits and taxes paid”.

The OECD has made it clear that the White Paper is an interim step in fulfilling the mandate of Action 13, and that the work done on the White Paper will be “integrated with the work on transfer pricing documentation identified in the BEPS Action Plan”. In addition to soliciting comments on the White Paper itself, the OECD has specifically invited comments “on the most appropriate means of implementing the transfer pricing documentation directives of the BEPS Action Plan”. In particular, it has invited comments “on whether additional or other possible mechanisms can be developed for complying with the transfer pricing documentation elements of the BEPS Action Plan”. Also, through the memorandum it released on October 3, 2013, the OECD solicited business input on “a number of important implementation issues to be addressed in developing a credible proposal regarding country-by-country reporting”.

The IAPT greatly appreciated the opportunity to comment on the White Paper itself, and we have done so separately (see our letter of September 30, 2013). We equally appreciate the opportunity to provide additional input on Action 13, and we offer the comments below in an effort to be responsive to that
invitation. These comments focus specifically on the directive to develop a common template for country-by-country reporting to relevant tax authorities with respect to profits and taxes paid.

**Development of a common template for country-by-country reporting**

*Preliminary comment.* As an initial comment, the IAPT strongly endorses two elements of the initiative to work on a common template for country-by-country (CbC) reporting to tax authorities. First, as reflected in the G8 mandate itself, the objective should be to aid “all tax administrations effectively to identify and assess tax risks”. We believe this properly puts the focus on the extent to which CbC reporting can help tax administrations to determine whether taxpayers are complying with the applicable law relating to transfer pricing. This is particularly relevant in light of the fact that the transfer pricing rules in force in most jurisdictions are, and are expected to remain, firmly rooted in the arm’s length principle (the ALP). Thus, the focus should be on whether and to what extent CbC reporting enhances risk assessment under the ALP. Given that the type of global allocations contemplated by CbC reporting bear little relationship to the application of the transactional transfer pricing methods accepted for use in applying the ALP, the IAPT notes that CbC reporting is likely to be a fairly weak tool for tax administrations’ efforts to reliably assess transfer pricing risk.

Second, as reflected in Action 13, the OECD’s intention is to develop new rules “taking into consideration the compliance costs for business”. This consideration is critical to achieving the right balance in whatever rules may be developed. In addition to the comments provided here, the IAPT stands ready to help the OECD to realistically evaluate the compliance costs for business of any specific approaches the OECD may wish to consider to CbC reporting. In view of the OECD’s September 2014 deadline for completing its work on Action 13, we note the need for early consultation with business on those approaches if there is to be an informed assessment of the related compliance costs, and we greatly appreciate the efforts made by the OECD so far to obtain input on this issue.

*Survey of existing tax reporting requirements.* As an initial step in its development of a common template for CbC reporting, the OECD may find it useful to review existing CbC-type tax reporting requirements imposed on multinational groups by various countries. The most relevant requirements are probably those imposed by the countries where the parent company of the multinational group is located, often in connection with application of those countries’ CFC regimes. In our experience, those requirements, where they exist, vary widely, ranging for example from the fairly detailed financial information the United States requires U.S. parent corporations to report annually with respect to each of their CFCs (see, e.g., Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations)\(^1\) to the relatively light reporting obligations imposed in other parent company jurisdictions. This may give insights into the kind of information that is available and that is already being collected and reported for other purposes, both of which are key considerations in determining potential compliance costs. Of course, such information which is already reported to one tax administration is presumably available for sharing with other tax administrations with which the first administration has a tax information exchange relationship and for which the information is foreseeably relevant to the determination of tax liability in the latter countries.

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1 The Form 5471 requires information regarding the name and country of the CFC, plus an income statement, balance sheet, and report on transactions with related parties, etc.
Other existing documentation. It is also useful to consider other types of documentation already prepared by MNE groups. These may include the following:

- **Group financial statements.** Publicly traded MNEs are typically required to publish group-wide financial statements on at least an annual basis. These are typically prepared fairly quickly after the end of the accounting year and are generally based on the parent country’s GAAP or IFRS. The statements themselves do not present data on either a country-by-country or entity-by-entity basis. Different groups use different “building blocks” to prepare their financial statements. Some base their statements on business line data, which can easily cross both entity and country lines. Others base their statements on geographical segment data, which again can cross entity and country lines. Intragroup items are generally eliminated as the data is rolled up into the consolidated group statement. The statements will be prepared using a single currency.

- **Local statutory accounts.** Many, but by no means all, countries require locally incorporated or managed companies to file “statutory accounts” with the local authorities. These are often prepared well after the close of the relevant year (which may vary from country to country), sometimes 1-2 years later. They are generally prepared based on local GAAP (i.e., the accounting principles used in preparing these statements will often vary entity-by-entity across the group) and based on the local currency. They will typically include intragroup transactions. Because they reflect the results of the relevant entity, they may include income, taxes, and other economic factors which cross country lines (e.g., if the entity is operating in more than one country). An aggregation of the results shown in the local statutory accounts will not “tie” to the results shown in the consolidated group accounts due to a number of factors, including different accounting years, different GAAP, lack of elimination of intragroup transactions, different currencies, etc.

- **Tax returns.** Group entities are generally required to file tax returns in every taxing jurisdiction where they are resident or where they conduct business beyond a certain threshold level (e.g., through a permanent establishment). These returns are generally prepared on an entity basis, although they may be prepared on a consolidated basis (e.g., if multiple group entities are resident / operating in a single country) or on the basis of part of the entity’s activity (e.g., where the entity has a permanent establishment in the country). They must typically be based on local country tax principles and the local currency. Depending on the requirements of the local tax system, the returns may include data which cross country lines. The returns are typically filed some number of months after the close of the relevant tax year (which may differ country-by-country or entity-by-entity across the group) and are subject to subsequent adjustment. No tax returns are required in countries that do not have income tax systems.

- **Management accounts.** Groups’ practices vary widely in relation to the preparation of management accounts. Some groups may produce such accounts on an entity-by-entity basis, others based on business line or other segments. Groups’ approaches to the preparation of management accounts may change over time as the groups’ business needs change. Some groups

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2 Privately held MNEs are generally not required to prepare such statements.
have management accounts prepared on a country-by-country basis using IFRS, but that is probably the exception rather than the rule.

The foregoing suggests that it would be difficult if not impossible to identify any single set of existing documentation that will easily lend itself to the preparation of precise country-by-country data which can be tied to a group’s consolidated financial statement. The availability, and potential relevance from a transfer pricing risk perspective, of different sources of data may vary tremendously group to group and industry to industry. Regardless of the data source selected, none of the IAPT member companies expect to be able to produce a CbC report without some adjustments to their system and some monetary investment. Therefore, the approach to be taken by the OECD to the design of a “common template” should ideally involve some measure of flexibility (to reflect the differing circumstances of different groups) and of “rough justice”. Moreover, on the assumption that the OECD’s CbC regime will not require the production of data that can easily be tied to a group’s consolidated financial statement, it would be very useful for the OECD to signal to tax administrations that such reconciliations should not be demanded upon audit.

Identification of the “countries” in CbC reporting. Broadly speaking, there are two geographic issues to consider in analysing a potential CbC reporting system. One relates to identifying the countries to which the reporting would be made. The other relates to the principles to be used in attributing the relevant information elements to specific countries. The first of these is addressed immediately below, the other later in this comment.

Which countries may require CbC reporting. Regarding the first issue, Action 13 contemplates that the information will be provided by “MNE’s” to “all relevant governments”. The G8 mandate makes reference to requiring reporting by “major multinational enterprises” to “tax authorities in the countries in which [the] multinationals operate”. We assume that any reporting requirement based on the common template to be developed would necessarily be implemented through domestic legislation by individual countries, imposing a reporting obligation on some category of taxpayers over which they have taxing jurisdiction. Implicit in the notion of the common template is the assumption that it will be possible to: (1) identify the members of the MNE group whose information is to be included in the common template; and (2) identify the countries that have sufficient taxing jurisdiction over one or more members of the group to be entitled to impose a reporting obligation relating to the group’s global information broken down on a CbC basis.

For purposes of identifying the members of the group whose information is to be included in the common template, it will obviously be necessary for the OECD to identify some set of principles by which that identification should be made (e.g., what level of common ownership or control makes an entity a member of the MNE group). Ideally, those principles would be harmonized across all jurisdictions implementing the CbC reporting requirement, so that groups will not be faced with the burden of compiling and maintaining different sets of information depending on which country was imposing the reporting obligation. As indicated below, we would suggest that an appropriate way to achieve harmonization on this and other aspects of any CbC reporting regime would be to allow each group to prepare its report based on the domestic legislation requirements of its parent company jurisdiction (or of another group member jurisdiction if the parent company jurisdiction has not implemented a CbC
reporting requirement), provided those requirements are compliant with the common template approach to be developed by the OECD, and then to allow that report to be used to satisfy the CbC reporting requirement that might be introduced by any other jurisdiction in which the group has operations.

The question of which countries should be entitled to impose reporting obligations on one or more members of the group raises a number of issues. Given that the purpose of the exercise is to assist with transfer pricing risk assessment, a starting point should presumably be that a country should not impose the reporting obligation if no member of the group is resident in that country or has a “permanent establishment”-type presence there. For example, if a group’s only contact with a country is that it derives income from sources in that country as a result of transactions with unrelated persons there, the country has no transfer pricing-related interest in obtaining information about the group’s global operations.

A secondary issue is whether a group should be subject to potential reporting obligations arising from the domestic legislation of every country in which one or more of its members is resident or has a PE-type presence. In its description of the “global masterfile” concept, the White Paper says that, “Information relevant to all countries could be assembled one time on an MNE wide basis and be supplied to any country requesting documentation.” We submit that any CbC reporting obligations should be based on information compiled in accordance with the common template-compliant legislation of the group’s parent company jurisdiction, and that countries where the group has subsidiaries or PEs should only be entitled to request a copy of that information. This would avoid the possibility that a group would be faced with having to comply with multiple countries’ varying implementation of the common template (e.g., due to differences in currency, accounting principles, taxable periods, or other factors). It would also recognize the practical limitations that local subsidiaries or branches may face in obtaining information about other parts of the group in a format necessary to comply with locally imposed requirements. In cases where the parent company jurisdiction may not have imposed a CbC reporting requirement, the group should be able to tailor its package to the common template-compliant CbC requirements imposed by some other jurisdiction where the group has a presence and should then be able to supply a copy of that package to any other jurisdiction entitled to seek CbC information from the group.

Finally, the IAPT notes that CbC reporting regimes could involve the reporting of information at a fairly granular level, well beyond what any group would be required or inclined to release publicly, and the unauthorized disclosure of which would potentially have adverse competitive implications for the reporting group. This concern has ramifications for the mechanism by which the CbC report would be shared with tax administrations from jurisdictions other than the group’s parent company country.

Where an exchange of information relationship exists between the parent company country and the country where any of the group subsidiaries is located, the IAPT believes that the latter country’s primary channel for obtaining the report should be by way of an information request to the parent country tax administration. This would ensure that the report information provided by the parent country tax

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3 The term “PE-type presence” is used to reflect the fact that the determination of whether a nonresident entity is subject to net basis taxation in a country due to the level of its presence there typically depends on whether the entity’s presence passes a domestic law or applicable treaty threshold for what constitutes a “permanent establishment” or some similar standard, but there is no globally applicable set of principles for determining whether that threshold has been passed.
administration to the other country would be subject to the confidentiality restrictions built into exchange of information agreements. Requesting governments should not be concerned about potential delays in obtaining the report information from the parent country tax administration, because the latter would not need to do independent information gathering (i.e., the typical source of delays in satisfying EOI requests) to comply with the request. Groups should not suffer any local law penalty from failing to file a report in a subsidiary country if the subsidiary country tax administration has failed to file an information request with the parent country tax administration. Moreover, for those countries that would not be in a position to request a copy of the report from the parent country tax administration due to a lack of EOI relationship, the IAPT recommends that the OECD’s adoption of any common template for CbC reporting be accompanied by a policy statement strongly endorsing robust domestic law confidentiality obligations on tax administrations seeking this kind of reporting through their domestic law mechanism.

**Information elements to be reported.** Another fundamental issue to consider in evaluating a potential CbC reporting regime is what elements of information the regime should cover. For example, the G8 mandate referred to a “global allocation of profits and taxes paid”. Action 13 refers to a “global allocation of the income, economic activity and taxes paid among countries”. Thus, both refer to some measure of “profits” or “income” and to “taxes paid” on a CbC basis, whereas the OECD formulation goes further to specify some measure of unspecified “economic activity” on a CbC basis.

The selection of elements may be relevant to the goal of providing a “big picture” of a group’s “global value chain”. For example, being able to determine where within a group income or profits are derived may help to show where important sites of the value chain are located, and being able to determine what level of local taxes those profits bore may help, in a very blunt way, to determine whether there appears to be a tax risk worth examining further. Without knowing what types of information are contemplated by the reference to “economic activity”, it is hard to evaluate how relevant they would be to providing the kind of “big picture” considered useful.

It is interesting to note that Annex 1 of the White Paper includes the results of a survey of 27 different transfer pricing documentation regimes from around the world and reports that none of those regimes currently includes a requirement to report CbC “sales”, “operating income”, or “tax paid”. We note that paragraph 72 of the White Paper refers to the possibility of requiring CbC information about “employees” and “assets”, and that Table 1 to the White Paper suggests that a transfer pricing documentation masterfile should include: “A schedule showing for each country in which the MNE does business the total number of employees in the country” and “A copy of the company’s consolidating income statement for the most recent year”.

The OECD’s October 3, 2013 Memorandum on Transfer Pricing Documentation and Country By Country Reporting (the “CbC Memorandum”) indicates that some measure of both income and taxes on a CbC basis will be required, and that consideration will be give to requiring other items as well and lists a number of possibilities (e.g., revenue by location of customers, tangible assets, employees or payroll, R&D expenditures, marketing expenditures, intangibles, senior management). The IAPT would simply note that the potential relevance of individual factors to a transfer pricing risk assessment would certainly depend upon the significance of those factors to the particular industry or the particular group’s business model.
We urge the OECD to think carefully about achieving the appropriate balance in determining the information elements to be included in the template, with a constant view towards weighing the likelihood that the particular element may contribute significantly to the utility of the “big picture” being sought against the costs involved in requiring identification, quantification, and reporting of elements on a CbC basis that may not currently be captured by groups’ internal accounting and reporting systems and/or may pose difficult issues of measurement methodology or geographic allocation. Each of the potential information elements raises special issues on how to perform an allocation on a CbC basis and how to measure the information element. Our comments below elaborate on some of those issues.

**Reporting of “income” or “profits” on a CbC basis.** We understand from the *CbC Memorandum* that the OECD is contemplating requiring some form of profit allocation on a CbC basis. This raises a number of issues.

For example, putting aside for the moment questions of measurement, assuming one wants to allocate a factor such as “income” or “profits” to particular countries, what set of principles will govern that determination? Will it be based on the residence of the group member that derived the income or profits (e.g., so that all income or profits of a subsidiary resident in Country A will be attributed to Country A)? Will it instead be based on some notion of the “source” of the income or profit, without regard to the residence of the group member earning it? If the latter, what rules will determine that “source”? Will income of a non-resident company be “sourced” in a country only if it is attributable to a PE-type presence there? Or might it also be attributed to a country based on concepts of source that are not tied to the recipient’s presence in the country (e.g., location of the customer)? Will the principles be based on tax rules or some other set of rules? If based on tax rules, will they take into account domestic law and treaty provisions? Will the applicable principles be determined by some single set of rules applicable in the group’s parent jurisdiction, or will the group need to make reference to locally applicable rules in all of the jurisdictions with which it has any contact (thereby potentially necessitating completely different CbC reporting packages for every jurisdiction, if each jurisdiction could require its own principles to be applied to the group’s worldwide operations)? From a compliance perspective, the least feasible approach is probably one that would require income to be attributed based on source rules that do not depend on the residence or PE location of the taxpayer.

Another set of issues that can pose significant challenges would relate to determining the principles by which to measure any of the factors included in the CbC reporting template, including income. For example, should measurements be done based on accounting principles? If so, what type of accounting principles? Tax principles? In either case, whose principles? Over what period? In what currency or currencies? What conversion rules should be used? Should calculations (e.g., of income on a CbC basis) be gross or net? How should intragroup transactions be taken into account?

The *CbC Memorandum* aptly captures various pros and cons of different options for reporting some form of net income figure (e.g., whether income drawn from local statutory accounts, taxable income drawn from local tax returns, or contribution to consolidated income drawn from internal consolidating income statements).

Different groups face different situations in respect of their ability to produce any kind of CbC analysis of profits based on their existing systems. In general, however, most IAPT members believe it would be
most feasible and sensible to base the report on entity-by-entity EBIT numbers computed on an IFRS or other GAAP basis used for preparation of the group’s consolidated financial statements. Most members believe they could derive this, with some effort, from their systems, including by treating branches as if they were separate entities. Such numbers would reflect intragroup transactions and would seem more relevant to a transfer pricing analysis than other measurements (e.g. profit before tax or net profit). Members believe this measurement would be more meaningful than taxable income from tax returns or profits numbers from statutory accounts which would reflect differing tax or accounting rules in different countries. That being said, the IAPT urges the OECD to be pragmatic and lean towards allowing groups to select the relevant data item from the source options that are most likely to be available, without significant compliance burdens, to their group members. Members note that a consistent approach within a group is more important than requiring a prescriptively standardized approach by all groups.

**Reporting of taxes on a CbC basis.** As with income, issues of definition, attribution, and measurement arise in relation to reporting taxes on a CbC basis.

For measuring taxes paid, what taxes are taken into account? While many groups may wish the CbC reporting template to take account of their “total tax contribution” to a country (i.e., by recording a broad range of the taxes they pay there), from a corporate income tax risk perspective it may make more sense to limit the taxes to corporate income taxes. Members believe withholding taxes imposed in lieu of income taxes should be included, and they note that sector-specific taxes such as production taxes and tonnage taxes as well as sub-national level taxes may need to be taken into account (although not separately stated).

Should the tax number be based on taxes paid or taxes accrued? How should tax refunds, deferred tax items, etc., be treated? While cash taxes paid may be fairly easy to measure, the fact that taxes are often paid a year or more after the close of the relevant taxable year, and that refunds of a prior year’s tax may be received in the current year, may make that measure less informative from a risk assessment perspective. To the extent the template might require reporting of taxes paid by entity, there is also the difficulty that where consolidated tax systems exist, typically only one entity is actually paying the tax. Reporting intercompany tax payments or intercompany tax allocations (for consolidated groups) would likely create more confusion and further limit the usefulness of the information. These issues cause the IAPT member companies generally to prefer a measure based on income taxes accrued with respect to the income being reported for that year, excluding deferred taxes and reserves (essentially the current tax provision).

As far as attribution of taxes on a CbC basis goes, it is obviously possible to determine the country to which the taxes are paid or accrued. However, the question is whether that should always be the relevant attribution. For example, if a subsidiary in Country A has developed an intangible and exploits it by licensing the intangible to unrelated parties in Countries B and C, and if that subsidiary pays source-based withholding taxes to Countries B and C, the credit for which eliminates its potential residence-based tax liability to Country A, does it make sense (from a risk assessment perspective) to attribute those taxes to Countries B and C, where the subsidiary has no operations, or to Country A, where the operations have been carried out which gave rise to the tax payments? The common template will need to give clear guidance on that issue. From a risk assessment perspective, the IAPT suggests it probably makes sense to
attribute withholding taxes to the country to which is attributed the income on which those taxes are imposed (e.g., the country of residence or PE of the recipient), rather than to the country to which the withholding tax is paid.

**Reporting of other items on a CbC basis.** In considering other potential information elements to include in a CbC reporting regime to reflect “economic activity” on a CbC basis, questions also arise about the definition, measurement, and geographic attribution of each element. For example, similar general questions of measurement that arise with respect to reporting income on a CbC basis also arise for other items (i.e., should measurements be done based on accounting principles? If so, what type of accounting principles? Tax principles? In either case, whose principles? Over what period? In what currency or currencies? What conversion rules should be used? Should calculations be gross or net? How should intragroup transactions be taken into account?).

With respect to information about employees, groups’ situations differ. Some groups are able to determine headcount on an entity-by-entity basis, whereas others can only determine payroll on that basis under their existing systems. Others can do neither easily. Questions can arise regarding the attribution on a CbC basis of either headcount or payroll for employees. For example, should employees be allocated to the jurisdiction (or pro rata to the jurisdictions) where they perform services? To the jurisdiction where they are primarily based? To the jurisdiction to which their services are charged out within the group? How should the group report contractors it hires or joint ventures in which it participates?

A similar set of questions would apply to the attribution of assets, if they were included as a CbC factor to be reported – e.g., should they be allocated to the jurisdiction of residence of the group member that owns the asset? Or should physical assets be located to the country where they are physically located? Should principles such as those developed in the context of the OECD’s work on the attribution of profits to permanent establishments (i.e., relating to identifying the location of the significant people functions relevant to the economic ownership of assets) be relevant?

The answer to each of the above questions could have very substantial implications from a compliance cost perspective, and it will be critical to explore those implications in order to make an informed decision about how to strike the right balance in designing the common template. The IAPT notes that for most groups it would likely be much less costly to do geographic allocations on an entity-by-entity basis, rather than an item-by-item basis, given existing accounting practices. On the whole, the IAPT recommends a policy that would give groups flexibility, subject to internal consistency in approach, in how they would report any such additional items on a CbC basis.

**De minimis thresholds.** Depending on how some of the above questions are answered, the proposed common template could create enormous compliance costs for large MNEs. The IAPT suggests that serious consideration be given to incorporating reasonable *de minimis* or materiality thresholds in any of the CbC reporting to be required. For groups that have operations in dozens of countries around the world, a full-blown CbC allocation of multiple information elements to each of 100-plus countries could become a very resource-intensive and costly exercise. The most cogent explanation for the justification for a CbC reporting requirement is that it would allow countries to do tax risk assessment by eyeballing whether a group has a high concentration of income in a low tax jurisdiction where it conducts little
economic activity. This objective could be satisfied without requiring a group to do a full-blown allocation of every dollar of income or other reportable item to each of the many dozens of countries in which it does business.

For example, an approach which required a group to account for a high percentage of its total income (say, 80%) on a CbC basis, or for the 20 or 30 countries in which it had the highest levels of income, or for any country that represented more than some de minimis (say, 5%) portion of its worldwide income could presumably satisfy the principal objective of the proposal while minimizing the compliance to a significant extent. The IAPT urges the OECD to give serious consideration to some form of de minimis threshold below which allocations to individual countries would not need to be made. Of course, every country in which a group has operations can require a tax return reporting income and economic activity in that country, so the CbC report is not necessary to inform the local tax administration about the group’s results in its own country, nor will the CbC report be the only transfer pricing documentation a country will receive to assist it in its tax risk assessment exercise. For these reasons, de minimis thresholds would represent a very reasonable balancing of interests.

Special circumstances. The common template should also be flexible enough to accommodate special circumstances a group may face that could affect its ability to produce data in a specified form. For example, where a group makes an acquisition, it is often the case that some transitional period, often a number of years, is required before the accounting systems of the acquired affiliates can be fully integrated with those of the acquiring group. The common template should allow for the possibility of some hybrid form of reporting to the extent necessary to accommodate such situations.

Explanations. Regardless of the features of the common template, there will inevitably be cases where a group will be concerned that the resulting data could give rise to increased audit scrutiny in multiple countries, notwithstanding the existence of legitimate reasons for what may appear to be anomalous results. The IAPT therefore suggests that consideration be given to including in the CbC reporting regime the possibility for the group to provide an explanation for such cases, so as to minimize the risk of unnecessarily triggering audits which could be resource-intensive for governments and the taxpayer alike. The IAPT also respectfully suggests to the OECD that introduction of CbC reporting requirements will likely intensify tax audit inquiries and tax disputes around the world. This reinforces the need, mentioned elsewhere in our comments for the OECD to intensify its efforts to improve mechanisms for the resolution of multilateral tax disputes.
21 February 2014

VIA E-MAIL

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Re: OECD Discussion Draft on Transfer Pricing Documentation and Country By Country Reporting

Dear Mr. Andrus,

On behalf of the International Air Transport Association (IATA) and our 240 member airlines, I am writing again to restate our concerns expressed in our submission dated 6 November 2013 on the OECD Memorandum on Transfer Pricing Documentation and Country By Country reporting.

Indeed, having read the OECD discussion draft of revised guidance on transfer pricing documentation and CbC reporting (30 January 2014), we see no reference to our comments and the planned treatment of the aviation industry. Therefore, by this follow-up letter we simply wish to reiterate our position for a special exemption scheme from country-by-country reporting initiatives as it relates to airline and shipping income.

We note the OECD objective as listed under Section B.1, Item 7:

“Effective risk identification and assessment constitute a crucial early stage in the process of selecting appropriate cases for transfer pricing audits or inquiries and in focusing such audits on the most important issues”.

As stated in our initial comments, airline and shipping activities do not constitute “BEPS activity” and should therefore be exempt from the country-by-country reporting requirement. In the event that airlines, despite their special activities, would be required to provide templates they should only be required to do so for countries where a treaty network, a reciprocal note or a local law exemption does not exist and, thus, local reporting is required.
Solely with regard to situations described in the above paragraph, we would like to also address some of the questions outlined in the draft on pages 5 and 6, as follows:

- Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

  Comment: As there are no guidelines or methodology to arrive at the template and it is very important to ensure that the information required in the template tie up with local information already available to local tax authorities, hence it indicates a “bottom-up” approach is more appropriate. However, in order to leave enough possibilities for the companies to consider their specific circumstances in each single case, the OECD may wish to leave this decision to the companies themselves, i.e. allowing both “bottom-up” and “top-down” reporting. Concerning the additional systems requirements and compliance costs, in particular for the airline industry the costs would be substantial (e.g. SAP systems or the like must be adapted since the requested information on a CbC level is not always available).

- Should the country-by-country template be prepared on an entity by entity basis?

  Comment: We would support an entity by entity basis as, in most cases, this information should be prepared anyhow for each entity, whereas a consolidated approach is not necessarily done in each single case. Although, some jurisdictions do permit consolidation and again perhaps flexibility would be a prudent approach.

- Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?

  Comment: We would support a cash basis approach. However, we acknowledge that where an entity has carry forward losses then the utility of such information will be questioned.

- Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such approach?

  Comment: We request that airlines be deemed a specialist sector with different reporting requirements.

In addition, we are concerned with the fact that, as mentioned in Annex 1 to Chapter V, the master file is to include a “description of how the group is financed, including identification of important financing arrangements with unrelated lenders.” We seriously question why this would be relevant to the taxing authorities and we consider this to be private information to the company.
In conclusion, Article 8 of the OECD Model Tax Convention already provides for special treatment of profits from international air transport to only be taxed in airlines’ home countries. In our opinion, this legitimately calls for the OECD to align its BEPS Action Plan to the Model Convention and include similar special treatment for our industry.

With these comments, we look forward to your consideration and to hear from you soon as to the intended treatment of income from airline shipping activities.

IATA would be most interested to contribute to any further work the OECD may undertake on this important topic, and should there be any meetings open to the public, we would be interested to participate.

Best regards,

Charlotte Fantoli  
Manager, Industry Taxation  
fantolic@iata.org

Encl: IATA’s letter dated 6 November with its attached comments on the Memorandum on transfer pricing documentation and CbC reporting

cc: Pascal Saint-Amans, Director, Centre for Tax Policy and Administration, OECD  
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Jacques Sasseville, Head of Tax Treaties Unit, OECD  
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6 November 2013

VIA E-MAIL

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Re: OECD Memorandum on Transfer Pricing Documentation and Country By Country Reporting

Dear Mr. Andrus,

On behalf of the International Air Transport Association (IATA), I am writing to express our interest in the work to be undertaken by the OECD following release of its Memorandum on Transfer Pricing Documentation and Country By Country Reporting (dated 3 October 2013) (“Memorandum”) ahead of an OECD Working Party meeting and public consultation process in November 2013.

The Memorandum outlines important implementation issues identified by the OECD in developing a template for the country by country reporting of income, taxes paid and economic activity to governments. We understand this work reflects the OECD’s BEPS Action Plan in addressing transfer pricing documentation and performance of risk assessment by governments.

IATA is the trade association for the world’s airlines, representing some 240 airlines or 84% of total air traffic. The outcome of the OECD’s discussion on, and development of, country by country reporting is extremely important to the IATA membership, and we believe we could contribute very constructively to the OECD’s analysis of the issues. Accordingly, we have prepared the attached preliminary comments on the Memorandum.
I would also like to take this opportunity to express IATA’s interest in contributing further to any ongoing work the OECD may undertake with respect to this specific development.

Please do not hesitate to contact me if you would like to pursue this offer of further dialogue.

Thank you very much for your kind consideration of this letter.

Sincerely,

Charlotte Fantoli
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Attachment: IATA Preliminary Comments on the Memorandum

CC: Pascal Saint-Amans, Director, Centre for Tax Policy and Administration, OECD
    Jacques Sasseville, Head of Tax Treaties Unit, OECD
INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA) :
PRELIMINARY COMMENTS ON OECD’S MEMORANDUM ON TRANSFER PRICING DOCUMENTATION
AND COUNTRY BY COUNTRY REPORTING

Introduction

1. IATA is the trade association for the world’s airlines, representing some 240 airlines or 84% of total air traffic. Our member companies are based in over 125 countries and engage in air transport operations in virtually every country around the globe.

2. Our member companies’ ability to conduct their air transport operations without facing crippling compliance burdens and multiple taxation risks depends almost entirely upon the consensus in favor of exclusively residence-based taxation of airlines’ income from international traffic, as reflected in Article 8 (Shipping, inland waterways transport and air transport) of the UN Model Tax Convention and in the identical language of Article 8 of the OECD Model Tax Convention.

3. Many of the countries, in which our member companies have their effective management or residence, have concluded income tax treaties which reflect the terms of the abovementioned Article 8.

4. Action 13 in the OECD’s BEPS Action Plan calls on the OECD to develop requirements for taxpayers to report income, taxes paid and indicators of economic activity to governments according to a common template.

5. The Memorandum highlights important implementation issues to be addressed in developing a credible reporting system, specifically:
   1) what information should be required; and
   2) what mechanisms should be developed for reporting and sharing the information.

The main elements of the first issue are identifying the relevant income earned in a country that should be reported (and consequently the source of this information) and the taxes paid by country.

6. The Memorandum acknowledges that there is a need to balance the usefulness of the information reported to tax administrators for risk assessment purposes and the compliance burden placed on taxpayers. Specifically, the Memorandum notes that it would be preferable for any template to limit the required information to “data readily available to corporate management so that companies will not need to go through a time consuming and expensive process of constructing new data”.

7. Given the basis of taxation of airlines’ income from international traffic is generally residence-based, IATA has accordingly a strong interest in the manner in which the proposed reporting requirements apply to the airline industry, so as to minimize the compliance burden placed on airlines operating in multiple jurisdictions.
**Tax treaties**

8. The policy of including in treaties a reciprocal exemption for income from the operation of aircraft in international traffic dates back as far as the 1928 League of Nations Model Tax Convention. The rationale then was the same as it is today, namely a recognition that for businesses operating in this sector, “lack of implementation of this rule of reciprocal exemption involves either multiple taxation or considerable difficulties of income allocation in a very large number of taxing jurisdictions.”

9. In jurisdictions where there is no applicable tax treaty, airlines generally have to use a complicated calculation formula (either Maritime, Calcutta or Massachusetts formulas) to allocate income (and expenses) to the particular non-treaty jurisdiction. This involves time consuming administrative work and compliance costs and is the basis for why Article 8 was inserted into the Model Tax Convention.

10. As the UN’s International Civil Aviation Organization (ICAO) has further noted, decisions in favor of reciprocal exemptions were made because “multiple taxation on the … income of international air transport, as well as taxes on its sale and use, were considered as major obstacles to further development of international air transport. Non-observance of the principle of reciprocal exemption envisaged in these policies was also seen as risking retaliatory action with adverse repercussions on international air transport, which plays a major role in the development and expansion of international trade and travel.”

11. In light of the extensive tax treaty network and the protections they afford in revenue preservation, and the regulatory requirements that airlines must meet simply in order to conduct flight operations, it is submitted that the airline industry does not produce detailed profit and loss information by country and is not generally susceptible to engaging in BEPS activity such as transfer pricing manipulation.

**Transfer Pricing**

12. Bilateral air service agreements (ASAs) between States (or groups of states) have emerged as the main way for engaging in international air transportation services. While there has been a lot of progress in opening up of air transport markets, ownership and control restrictions are a common feature of these agreements. As part of ASA agreements, contracting States will designate their national airlines the right to operate flights between States. Most States specify limits on foreign ownership and control for their national airlines as well as often require comparable restrictions for carriers to be considered to be from the other ASA contracting State. Airlines commonly need to exhibit characteristics of substantial ownership and effective control by State’s nationals to be qualified for designation. The ‘nationality’ feature in the airline industry makes it very unlikely for BEPS issues to be of concern. While greater ownership and capital market liberalization has been supported by several key stakeholders in industry and some States, the practical reality is that a wide-spread liberalized approach to ownership and capital market liberalization is still some time away and unlikely to be seen in the short to medium term.

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Compliance costs

13. The Memorandum has highlighted the difficulty of reporting income for multinational groups. This difficulty is also exacerbated for airlines, as in most instances the preparation of financial statements in non-home jurisdictions is not statutorily required or produced. The industry generally operates through an overseas local branch structure because of the regulatory requirements in order to conduct flight operations. There is often no requirement under the branch structure operated by airlines for local books and records to support statutory filings. Therefore information is not available to provide the country by country suggested reports.

14. For airlines to comply with country by country reporting requirements to disclose income and taxes will require substantial and very costly system changes. These changes to the way airlines currently operate will add another layer of administration costs and burden to an industry already operating on very narrow margins.

Usefulness of reporting

15. As highlighted above the reporting of no or little corporate income tax paid in a particular country will be due to both the relevant income tax treaties and genuine economic conditions and not any BEPS activity.

16. The majority of taxes paid by airlines are ticket based departure taxes. As such the allocation of profit is not a relevant indicator of the airlines’ contributions to individual countries.

17. The taxes paid by airlines are also not entirely comparable by country. In some jurisdictions, tax is levied on a gross receipts basis (for example, Philippines gross billings tax) and in others, such as where the income calculation formulas mentioned above are used, the starting point for the tax calculation may be worldwide profits with applicable adjustments. Certain tax treaties may also apply reduced tax rates based on the particular airline’s place of management.

18. There may also be inconsistency between the various jurisdictions in determining the tax base in terms of defining the local jurisdiction income (for example, potential bases could be sales made in a country, sales with a leg starting in a country, or 50% of the round trip income sold for the country) and thereby further contributing to the difficulty of reporting in a particular jurisdiction. This is further complicated with the majority of sales now being online.

19. In light of the above and as a result of the treaty network, there must be a very big question mark over the value of information provided in the same format as other industries as it might serve to confuse instead of enlighten.

Other reporting suggestions

20. Further, some of the additional information suggestions to capture measures of economic activity other than income and taxes (such as revenue by location of customers, research expenditure, marketing expenditure and location of intangibles by country) are unlikely to be readily accessible from airlines’ existing business systems.
21. It is also considered that it is not clear that the provision of this information would better place revenue authorities in a position to effectively carry out risk assessments or provide revenue authorities with a meaningful measure of potential transfer pricing activity by airlines.

**Conclusion**

22. In conclusion, it is our view that the airline industry should be exempt from country by country reporting in relation to Article 8 income as long as the tax treaties continue to allocate taxing rights to the country of residence and/or effective management of airlines.

23. Presently, due largely to Article 8, it is not appropriate or possible for airlines to provide the information outlined in the Memorandum without a substantial increase in compliance, administrative and system costs.

24. It is considered that provision of the information in the format proposed will confuse instead of providing transparency.

25. Should airlines not be exempt from such reporting, we do support a uniform (and if possible airline industry tailor-made) approach across jurisdictions as being far preferable to every country developing its own reporting requirements. However, even then, a clear framework that takes account of the peculiarities of the airline industry is imperative.

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26. IATA appreciates the opportunity to provide these comments and looks forward to working with the OECD on this development including possible exemption to address our concerns.
February 21, 2014

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75775 Paris Cedex 16
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Sent via e-mail: TransferPricing@oecd.org

Re: Proposed Discussion Draft — Transfer Pricing Documentation & CbC Reporting

Dear Monsieurs & Mesdames,

The International Bar Association would like to take this opportunity to comment on the Proposed Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting, released on January 30, 2014.

The International Bar Association (IBA), the global voice of the legal profession, includes over 45,000 of the world’s top lawyers and 197 Bar Associations and Law Societies worldwide. The IBA is registered with OECD with number 1037 55828722666-53.

We are submitting our comments on behalf of the IBA Taxes Committee which has 1037 members from around the world. This committee formed a Working Group to respond to the OECD BEPS Action Plan initiatives and members of this Working Group developed the enclosed draft.

The comments made in this report are the personal opinions of the Working Group participants and should not be taken as representing the views of their firms, employers or any other person or body of persons apart from the IBA Taxes Committee of which they are a member.
Sincerely,

Claire Kennedy
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IBA Taxes Committee
Canada

Antonio Barba de Alba
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Introduction

The IBA Taxes Committee ("Committee") has read with interest the Discussion Draft on Transfer Pricing Documentation and Country-by-Country ("CbC") Reporting, dated 30 January 2014 (the "Draft"), which is intended to replace in its entirety Chapter V of the Transfer Pricing Guidelines. The Committee thanks the OECD for the opportunity to provide written comments.

Our submission provides some general comments on the Draft as a whole and then addresses the specific questions posed by the Draft in turn.

In summary, we recommend that the OECD afford sufficient flexibility to taxpayers to address transfer pricing ("TP") documentation in an efficient manner, having regard to existing financial and management reporting, and to incorporate adequate de minimis thresholds and/or safe harbours. The Committee is concerned that the newly suggested documentation requirements must be carefully monitored and implemented, if at all, at a pace that will not be disruptive to international business. The Committee believes that in many jurisdictions documentation shortages do not hamper tax administrations nor will more documentation necessarily change TP patterns or aid substantially in the administration of TP rules. We urge the OECD to adopt an approach that genuinely balances the legitimate needs of tax administrations for sufficient TP disclosure with the need to avoid the imposition of unnecessary or excessive compliance costs on businesses.

Commentary

General Comments

The Committee acknowledges the three objectives for TP documentation identified in the Draft, namely:

(i) to provide tax administrations with necessary information for TP risk assessment;
(ii) to ensure taxpayers give appropriate consideration to TP requirements in both planning and reporting of intercompany transactions; and
(iii) to provide tax administrations with sufficient information to conduct TP audits of entities subject to tax in their jurisdictions.

In the Committee's experience, most taxpayers with cross-border associated entity transactions are keenly aware of the need for adequate TP compliance and we do not consider that the Draft is necessary to ensure that such taxpayers give adequate consideration to TP requirements from a planning and reporting perspective. The fact that taxpayers and tax administrations do not always agree on TP structuring and reporting – as evidenced by the volume of TP disputes – is not evidence that taxpayers do not give the matter adequate consideration. It is frankly a function of the complexity of global commerce and uncertainty around the application of the arm's length principle.
As regards objectives (i) and (iii), the Committee acknowledges the need for tax administrations to have adequate TP disclosure by taxpayers for risk assessment and audit purposes but respectfully submits that the Draft goes much too far and creates unduly burdensome reporting requirements without allowing for sufficient flexibility on the part of taxpayers in meeting these burdens. The Committee stresses the need to consider the significant costs already borne by multinational enterprises on TP compliance and to evaluate dispassionately whether additional measures can be justified having regard to their costs, especially given the continued fragility in the global recovery.

The Committee also recommends that tax administrations should ensure that the TP documentation, including CbC reporting, be reviewed by those in the administration sufficiently senior and experienced in TP to assess the information fairly. In our experience, not all front line auditors are sufficiently experienced with related party cross-border transactions to develop valid reassessment or penalty proposals and we are concerned that significantly increasing the amount and variety of information available to them (including regarding jurisdictions irrelevant to them), without adequate internal guidance, will vastly increase the incidence of double taxation, which will in turn require relief via MAP proceedings or domestic court or administrative cases, all of which come with significant cost for taxpayers and governments. In short, the goal of ensuring consistency of TP documentation prepared by taxpayers should be twinned with the goal of ensuring consistency of TP administration across jurisdictions by eliminating subjective application of TP rules on the part of tax administrators.

Finally, as a general comment, we are concerned that the Draft does not adequately address taxpayer concerns regarding the confidentiality of the detailed, highly commercially sensitive information requested from taxpayers. While we are obviously aware of the obligations of confidentiality that already exist for tax administrations, we do want to ensure that tax administrations are giving due regard to how the CbC and other information proposed to be collected by tax administrations will be kept confidential in light of the extent of the sharing of information that is contemplated by the Draft, by domestic disclosure requirements and by sophisticated and prevalent hacking attempts.

**Specific Responses to Questions Posed by the Draft**

1. Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

A case may be made for additional standardized reporting beyond the CbC reporting, on the basis that standardized reporting should reduce the effort and associated cost to comply with individual country reporting provided, however, that any additional forms and questionnaires do not represent simply the cumulative burden of individual OECD member country reporting as it currently stands and instead represent a true rationalization of current requirements. If OECD members are not willing to negotiate a simplified, common standard and insist on maintaining their own current requirements, then no additional forms and questionnaires should be proposed.
As regards sharing of risk assessments, the Committee is of the view that fairness and transparency require that the risk assessment be shared with the particular taxpayer. A tax administration’s failure to share its risk assessment with the taxpayer would breach the taxpayer’s right of defense. It is a well established principle both in countries with common law and civil law traditions that the administration must disclose all relevant documents and background information used in an administrative assessment. Allowing tax administrations to use non-disclosed information would contravene this principle. We note that certain countries already disclose the risk assessments and would encourage the OECD to establish this standard.

We agree that exchange of information mechanisms can assist in this regard and note the recent OECD developments regarding automatic exchange of information. The Committee also points to the Canadian provision (s. 231.1(6) of the Income Tax Act (Canada)), pursuant to which a taxpayer that fails to substantially comply with a requirement for information is prohibited from introducing any information covered by the requirement as evidence in any subsequent judicial proceeding, as an example of an effective enforcement mechanism.

For large conglomerates with highly diversified businesses, enterprise-wide reporting would be onerous and replete with irrelevant information that would confuse rather than clarify risk assessments and tax compliance. Taxpayers should be allowed flexibility to assess whether enterprise-wide or business line reporting is most appropriate. If tax administrations later determine that the documentation was willfully or negligently inadequate and material TP adjustments were sustained, then the appropriate recourse is via penalties. We must emphasize that a good faith effort to meet the documentation standards should not result in penalties and that tax administrations should not prospectively address concerns regarding inadequate documentation with ever longer lists of information to be included in TP reporting.

More generally, this question illustrates the difficulty of approaching needs for documentation without proper focus on cross-border flows. Great cost and expense and potentially unreliable

1 We expect that a proper risk assessment ought not to rely on proprietary third-party information but we direct you to our comments on necessary safeguards under item 8.
data could result if taxpayers are expected to construct books and records that would not be kept in the ordinary course of business. Any benefit to tax administrations from a risk assessment standpoint in a few cases would be more than offset by the costs imposed on taxpayers generally and the shift of resources away from a more direct evaluation of cross-border flows under the arm’s length principle.

4. A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party 6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

4.1. Should the country-by-country report be part of the master file or should it be a completely separate document?

4.2. Should the country-by-country template be compiled using "bottom-up" reporting from local statutory accounts as in the current draft, or should it require (or permit) a "top-down" allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the "bottom-up" or "top-down" approach?

4.3. Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the "bottom-up" approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

4.4. Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

4.5. Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

4.6. Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

The Draft proposes a two-tier documentation approach whereby two sets of standardized documents would be maintained by all MNE members annually viz. the 'Master File' and the 'Local File'. According to the Draft, the Master File will provide tax administrations with information on the ownership of IP, the allocation of income, taxes and corresponding TP risks among different tax jurisdictions, complemented by the Local File, which is to be maintained in accordance with local TP legislation and is intended to provide information on particular, controlled transaction(s).

The Committee makes the following comments and recommendations:

(i) The existing Chapter V of the OECD Transfer Pricing Guidelines states that the information requests by the tax authorities should be limited to the transactions in question and we are concerned that the Draft poses a risk of 'overload of information' and may not actually facilitate proper risk assessment. This is
especially true if the information is used by auditors who are not sufficiently experienced in TP matters or even in cross-border commercial transactions to fairly assess the information in question. It should therefore be incumbent upon tax administrations to ensure that any risk assessment or audit initiative emanating from tax auditors be vetted internally by a sufficiently experienced group of senior, experience tax administrators – ideally with a national perspective – to ensure consistency and fairness. The Canadian Transfer Pricing review committee, which vets penalty recommendations, may provide a useful example that could be extended.

(ii) Providing equivalent information on the entire global operations of MNE to tax administrations in each country, irrespective of the size of operations of the MNE in that country, is excessive and onerous. There should be appropriate *de minimis* thresholds and/or safe harbours for taxpayers to reduce this burden.

(iii) The information required to be maintained as per the discussion draft will pose practical challenges to the taxpayer in terms of significant increase in compliance cost. To the *greatest* extent possible, the documentation package should be based on information that is readily available in existing financial and management reports and should make allowances for differences in local accounting and other reporting standards. It should not be incumbent upon taxpayers to obtain special valuations or customized accounting treatments simply to satisfy TP documentation in the Master and Local files (i.e., in the absence of a transaction or other commercial requirement).

(iv) As regards intercompany royalty, interest and service fee reporting and also withholding tax reporting, the OECD should give careful consideration to the information already required to be reported in various jurisdictions and should develop a streamlined approach reflecting the essential reporting while avoiding duplicative or overlapping requirements that would be imposed by simply demanding cumulative reporting that reflects all existing requirements in member countries.

(v) Any new information reporting and maintenance requirements should be phased in slowly with fair and reasonable estimates of compliance costs along with fair, reasonable, and specific estimates of expected uses and benefits of any newly required documentation.

(vi) Tax administrations should estimate the percentage of any newly created documentation that will be reviewed by the administrations and the level at which such review will occur. These estimates should be published for public comment. The utilization of all newly required documentation should be periodically reviewed and underutilized documentation deleted from documentation requirements. Periodic reporting of the continued usefulness of such documentation should be published. Finally, new documentation requirements should not be imposed unless a tax administration determines for specific reasons
publicly articulated that existing documentation requirements are not adequate. Tax administrations should delete any older documentation requirements that will be duplicative of new requirements.

5. Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

The Draft advocates that the local jurisdiction should adopt specific materiality thresholds which may be based on size and nature of its economy, importance of the MNE group in its economy and size and nature of local entities to the overall size and nature of the MNE group. The OECD should provide explicit guidance to tax administrations to ensure that materiality thresholds are consistent and to avoid a patchwork of rules that will be burdensome for taxpayers in preparing TP documentation. An obvious basis for the application of materiality thresholds should be the amount of the transaction in absolute terms and also in relative terms, for example as a percentage of local entity revenues, EBITDA or taxable income (again using metrics readily available from existing financial or management reporting). There may be other measures appropriate to determine these thresholds. Wherever possible, flexibility should be afforded to taxpayers, for example by establishing de minimis threshold as the greater or lesser of two or more measures. Abuse of de minimis thresholds in cases where material TP adjustments are sustained should be addressed through penalty mechanisms, not through unduly onerous reporting requirements in the first instance.

6. Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? [That tax administrations allow searching in databases for comparables every three years but financial data for comparables every year.] Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

We agree with the comments in paragraph 26 (where taxpayers can reasonably demonstrate that no comparables exist or none can be established at reasonable cost relative to amounts at issue, such data should not be required) and also in paragraph 28 (re timing of Annex III template). The Committee also endorses the recommendation in paragraph 34 (updating of comparable every 3 years in the absence of changes).

The Draft observes that local comparables should be preferred over regional comparables as the former are more reliable (para 42). We believe that choice of comparables should be dependent on the selection of tested party. Understanding of the functions and risks is imperative to identify which transacting entity performs complex functions, and hence decide which entity should be selected as the tested party. Accordingly, in a case where reliable comparable data is available using regional comparables, those should be permitted.

As regards other measures to simplify the documentation process, we direct your attention to our earlier comments regarding sources of information (i.e., existing financial and management reporting), use of adequate de minimis thresholds/safe harbours, and extending flexibility to taxpayers in determining sufficiency of reporting and addressing cases of wilfully or negligently inadequate reporting (provided material TP adjustments are sustained) through penalties, not through burdensome, unduly prescriptive reporting standards.
Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

This is again an area where flexibility should be afforded and taxpayers should be allowed to report in a manner consistent with their underlying reporting. It is not clear why the cost of translation should necessarily be borne by the taxpayer and not the tax administrations.

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

We recommend that tax administrations establish and publish procedures undertaken to protect confidentiality of taxpayer information and establish a review process culminating in a periodic published report as to any breaches in confidentiality. We recommend that the OECD publish periodically a list of countries that have experienced substantial confidentiality breaches.

We also urge the OECD to consider the disclosure requirements in member countries that can afford opportunities for competitors to obtain commercially sensitive information and to propose to member countries appropriate measures (legislative if need be) to safeguard confidentiality. The Committee directs your attention to the Swedish case (RA 1985 Ab65, dated 1985-05-06) in which the Supreme Administrative Court ruled that proprietary, commercially sensitive information collected by the Swedish tax authority in the course of an audit of a Swedish subsidiary of BP, which the tax authority relied upon in a parallel TP dispute with a Swedish Shell subsidiary, had to be disclosed to the Shell subsidiary to permit it a right of full defence in its tax proceeding.

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

9.1. The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
9.2. Filing of information in the parent company's jurisdiction and sharing it under treaty information exchange provisions;
9.3. Some combination of the above.

We direct your attention to our earlier comments regarding the heightened need for ensuring the confidentiality of information sought, including CbC reporting.

More specifically, regarding the most appropriate mechanism for making the master file and CbC report available to the relevant tax administration, first, the term "relevant tax administration" must be defined. Fishing expeditions should be discouraged and some material nexus should be demonstrated by a tax administration to entitle it to obtain information not directly relevant to the operation of an entity within its jurisdiction. Confidentiality standards should be vigorously observed.

We also note that obliging a parent MNE to share the CbC template with all its subsidiaries may not be commercially desirable and may not sufficiently safeguard the confidentiality of information. However, we recognize that sharing of all information through the treaty network may protect confidentiality but would be a time consuming process. Accordingly, a combination
of the two methods may be adopted for sharing of information, and to address confidentiality concerns. Under this approach, the CbC template could be shared between treaty partners through the treaty on an *as needed* basis.

The Committee also takes exception to the requirement in Annex I to provide the title and country of the principal office of each of the 25 most highly compensated employees in the business line. We do not see why this information is necessary for adequate TP documentation and if it were to fall into the wrong hands, it could present a security risk to the individuals (even though they are not named). We repeat our concern regarding the prevalence of sophisticated hacking operations and other intentional attacks on the security of electronic data. This requirement under Annex I should be eliminated.

**Penalties**

As we have previously recommended, the OECD should avoid setting onerous, highly prescriptive documentation requirements to prospectively address concerns regarding inadequate documentation. Inadequate documentation should be addressed via penalty mechanisms in cases where the lack of documentation is accompanied by material TP errors.

The Draft suggests that penalties may be imposed (albeit at a lower rate) if a TP adjustment is made and sustained, notwithstanding timely submission of TP documentation. The Committee recommends that once an MNE fulfils the prescribed documentation requirements, it should be relieved of any liability for penalties, and absolved from any special burden of proof. Moreover, penalties should only obtain where the documentation is negligently or willfully deficient and there is material underreporting not because the standards are applied in an unreasonable manner by a particular tax auditor. Appropriate oversight should be provided by experienced officials within the tax administration for all penalty proposals.

**Conclusion**

In summary, we urge the OECD to afford sufficient flexibility to taxpayers to address TP documentation in an efficient manner, having regard to existing financial and operational reporting and to incorporate adequate *de minimis* thresholds and/or safe harbours. We urge the OECD to adopt an approach that genuinely balances the legitimate needs of tax administrations for sufficient TP disclosure with the need to avoid the imposition of unnecessary or excessive compliance costs on businesses.

Documentation that is wilfully or negligently inadequate should be addressed by penalty mechanisms (provided it is accompanied by material, sustained TP adjustments) not through onerous, excessively prescriptive documentation requirements in the first instance.

It goes without saying that it is incumbent upon tax administrations to safeguard the confidentiality of the information, much of which is highly commercially sensitive. In some cases, especially as regards senior management disclosures in Annex I, the required reporting goes too far.
Tax administrations should also ensure that TP documentation is used by personnel with sufficient relevant experience to assess the information fairly and/or to ensure internal review by experienced tax administrators – ideally with national experience – to ensure balance and consistency in the risk assessments, tax reassessments and penalties based on TP matters. The goal of ensuring consistency of TP documentation prepared by taxpayers should be twinned with the goal of ensuring consistency of TP administration across jurisdictions by eliminating subjective application of TP rules on the part of tax administrators. Only this dual approach will realized the benefits of the increased TP transparency to yield reduced administration costs to both governments and taxpayers while ensuring fairness.
Submission on the OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting

February 21st 2014
Mr. Joseph L. Andrus  
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CC: BIAC  
BusinessEurope

21st February 2014

Ref: OECD Discussion draft on Transfer Pricing Documentation (TPD) and Country by Country (CBC) reporting

Dear Sir,

I am writing to you on behalf of Ibec, which represents the interests of Irish business including indigenous and multinational enterprises, MNEs and SMEs, spanning all sectors of the Irish economy. Ibec and its sector associations work with government and policy makers both nationally and internationally to shape business conditions and drive economic growth.

Ibec welcomes the opportunity to communicate the views of its members on the OECD public consultation draft paper on Transfer Pricing Documentation (TPD) and Country by Country (CBC) reporting (published 30 January 2014). Ibec is a member of both BIAC and BusinessEurope and broadly supports the responses submitted by these stakeholders on the discussion draft. We wish to highlight the importance that Irish business attaches to a number of specific issues particularly in relation to compliance/costs burdens, confidentiality of the proposed new reporting framework and flexibility.

Ibec supports the development of a new OECD framework for TPD that will contribute to simplifying and standardising existing reporting requirements for business and facilitating tax administration reviews. These core objectives are unlikely to be achieved, however, through the imposition of additional new reporting requirements which, conversely, will increase costs and compliance burdens for business.

The OECD has explicitly stated that its work in this area should ‘take into account the compliance cost for business’. This commitment is not evident in the proposals outlined in the discussion draft. While businesses have not been able to do a detailed compliance cost assessment of the proposed reporting requirements, some initial analyses by MNEs suggest set-up systems costs of over €10 mn and annual reporting costs of €2 mn or more. These costs will obviously vary from group to group and will depend on the precise requirements agreed, but it is clear that the costs involved would be substantial and would represent a significant compliance and regulatory burden.

The scale and breadth of information sought under the proposed new framework as outlined in the current discussion draft will place costly and challenging compliance burdens on business. The rationale in seeking some of the detailed information -including commercially sensitive data- is not clear, and it goes far beyond what is needed for a high-level risk assessment. Furthermore, Irish business has expressed serious concerns about the confidentiality of market sensitive information to be collected under the proposed framework. For publicly quoted companies this would cause
particular difficulties in relation to how they manage information flows and communicate with their investors on issues such as corporate strategy.

We also believe that the information sought in the CBC template would lead to increased transfer pricing disputes, and indeed double taxation, as countries would use arbitrary indicators such as the number of employees as a means to dispute their share of a tax base. This would run counter to the overall objective of the entire BEPS process and wider objectives of the OECD to support international cooperation and economic development.

Ibec considers that the level and detail of information sought in the current country-by-country (CBC) report draft template exceeds what is required for high level risk assessments. The diversity of business and business operations means that the information currently sought in the draft CBC report template cannot be compiled without significantly upgrading or replacing existing financial reporting systems resulting in prohibitive costs for Irish businesses which are already investing significant resources in meeting current TPD requirements. Furthermore, to reduce compliance burdens, information sought for the CBC report should not duplicate data already available elsewhere or contained in the Transfer Pricing Master File or Local File.

Ibec suggests that the OECD should undertake a detailed impact analysis to assess on the one hand, the potentially significant costs and major compliance burdens to business of the proposed new reporting requirements, and on the other hand, the value and relevance of this information to tax administrations. An impact analysis will also highlight if and where information in the CBC report template is currently available to tax administrations under existing regulations, before the introduction of new obligations that could overburden both taxpayers and tax administrations with unnecessary data that is not specifically relevant for TPD and risk assessment purposes.

Ibec also calls for flexibility in any new framework: ‘one-size fits all’ approaches to diverse businesses and business models will add to compliance burdens. Promoting flexibility will allow businesses to choose the approach that is best suited to their individual operating models and reporting methods, and which will facilitate the timely provision of relevant information to tax administrations.

In relation to other questions raised in the OECD discussion draft:

B.1.  Transfer pricing risk assessment – sharing risk assessments with taxpayers

Ibec welcomes the proposal for greater engagement between tax administrations and taxpayers through the sharing of risk assessments. This level of bilateral engagement can contribute to clarifying and resolving potentially problematic issues at an early stage which can deliver efficiencies for both taxpayers and tax administrations over the longer term. Ibec would also suggest reducing the burden of TPD requirements to a period of 3 years where tax administrations conclude that a business is engaged in low-risk transactions and there has been no material change to the business.

C.1.   Preparation of Master File on line of business or entity wide basis

Given the scale and complexity of MNE operations, collating group-wide information in one document will prove challenging and could undermine the core objective of the Master File which is to provide a broad picture overview of activities. The provision of such large amounts of detailed information will also be counterproductive as tax administrations struggle to review data efficiently. It is critical that diverse businesses managing complex business operations are permitted to retain the flexibility to provide relevant information in the most efficient and resource-effective manner possible. If applied consistently, either the line of business or the entity wide approach should provide relevant information to tax administrations while balancing the compliance burden imposed on MNEs.

C.1. (i) CBC report: part of the master file or separate document?

Ibec supports the preparation of a CBC report as a stand-alone risk assessment template only. Ibec has already highlighted its concerns about the excessive level of detail and information required in the current CBC report draft. To fulfill its main objective and to avoid unnecessary burdens for business, the template should limit information sought to a small number of “key risk indicators” (revenue,
earnings before tax and taxes paid) which are more valid for risk assessment purposes and also more readily available to business. Businesses would also be in a position to identify (through a check the box processor similar) the relevance or otherwise of other indicators which would inform the high-level risk assessment. Many of the measures proposed for inclusion in the CBC template are either already available to tax or are not key risk indicators, and Ibec questions the rationale and relevance for the purposes of risk assessment of including requests for data such as employee numbers and employee expenses. There would be considerable systems, reporting and audit costs involved in the provision of this information. In many cases, the indicators would also provide considerable definitional challenges.

C.1. (ii) CBC report: “bottom-up” or “top-down” approaches
Any new framework should include flexibility to allow businesses to assess and adopt the approach that is best suited to their individual operating models. Either of the two approaches, if consistently applied, will provide relevant information to tax administrations for risk assessment and a flexible approach will help minimise additional system requirements and compliance costs for business. In addressing this issue with a sample of Irish businesses, it is clear that there are a range of different business structures and reporting structures in place and unless flexibility is provided many businesses will be faced will excessive and unnecessary compliance cost burdens. Companies should be allowed to review their approach every three years.

C.1. (iv) Inclusion of withholding tax paid in CBC report
Ibec considers that requiring taxpayers to report withholding taxes paid in the CBC report is onerous and unnecessary and again suggests that an impact analysis should assess if the significantly increased compliance burdens and related costs to business are commensurate with the anticipated benefits of business providing this information.

C.1. (v) Inclusion of aggregate cross-border payments, intra-group payments of royalties, interest and service fees in CBC report
Ibec notes that information on aggregate cross-border payments and intra-group payments is already required in the Master File and considers that further duplication in the CBC report is unnecessary and would add to cost/compliance burdens. It also considers that a requirement to include the nature of business activities is unnecessary for a high-level risk assessment.

D.3. Materiality
Ibec considers that the OECD should propose clearly defined thresholds and guidance to taxpayers on establishing thresholds to avoid the risk that taxpayers will define materiality levels that will not be accepted by tax administrations. Ibec welcomes the OECD proposal that detailed materiality levels should be taken into account for each local jurisdiction in which the taxpayer operates; OECD guidance on materiality levels would also be useful in this context.

Strong consideration should also be given to excluding low risk transactions from transfer pricing requirements and exempting SMEs (costs and compliance burdens disproportionate to the scale and scope of SME intra-group transactions). The use of safe harbour rules should also be considered for routine and common service fees for larger enterprises to reduce or eliminate compliance and resource costs.

D.5. Frequency of documentation updates
Ibec welcomes the suggestion in paragraph 34 aimed at simplifying compliance for taxpayers. Ibec would also propose that the Master File and Local File should be updated only every 3 years unless there is a material change in the nature of the business.

D.6. Language/translation
Files should be completed in English to mitigate the burden of translation into local languages

D.7. Penalties
Ibec considers that as long as reasonable efforts are made to maintain documentation and there remains ambiguity of interpretation because of the lack of a prescriptive/finite list of documents
required, income adjustments and interest should be applied instead of documentation-related penalties.

D.8. Confidentiality
Ibec members have expressed strong concerns about the protection of confidential taxpayer information and commercially sensitive data particularly given the likelihood under the proposed framework that Master Files on MNE operations will be circulated among tax administrations in all states where an MNE is active but where legislation to protect confidentiality may not be in place or fully applied. Ibec members have expressed the view that the CBC report, Master File and Local File should not include any commercially sensitive information besides data which is available in the public domain.

Ibec calls on the OECD to develop the strongest provisions to ensure the highest levels of confidentiality and the protection of commercially sensitive data against potential disclosure to third parties. Ibec considers that the Master File and CBC report should be filed with the MNE parent’s home tax administration, to be shared with other jurisdictions (when requested) only under existing bilateral tax treaty provisions or Tax Information Exchange Agreements (TIEAs) to guarantee confidentiality. Other measures for consideration by the OECD to maintain confidentiality include the review (rather than filing) of sensitive information at taxpayer premises and the introduction of legally binding confidentiality agreements between taxpayers and tax administrations.

D.9 Other issues – comparables
Ibec believes that taxpayer comparables from recognised databases should be accepted; it may not be possible to obtain local comparables for many business activities and the use of pan-regional comparables will often provide more accurate benchmark comparables.

E. Implementation
To facilitate efficient transposition and compliance, it is essential that the TPD and CBC reporting regulations are clear and unambiguous. This will avoid varying interpretations by leading to the application of different rules and levels of transposition which could result in a challenging and confusing regulatory environment for taxpayers. The OECD should also produce regulation to ensure that businesses submitting CBC reports are assured that the information will be interpreted consistently between tax. Ibec also considers that no additional documentation requirements should be imposed at a country level once consensus is agreed at an OECD level between business and tax on the BEPS process.

Ibec also calls on the OECD to plan a phased rollout of any new regulatory framework. A clear start date for the entry-into-force of the new framework must be followed by the adoption of reasonable timeframes which will allow taxpayers and tax administrations to transition to new requirements and to comply with the more burdensome requirements and systems changes necessary.

I would like to take this opportunity to thank the OECD for its invitation to submit views on the Discussion Draft. Ibec looks forward to continued engagement with the OECD as discussions on TPD/CBC reporting and the broader BEPS project proceed over the coming months.

Yours sincerely,

_____________________
Fergal O’Brien
Head of Policy and Chief Economist
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Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
2, rue André Pascal
75775 Paris Cedex 16
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Via e-mail

Re: Comments – Transfer Pricing Documentation / Country-by-Country Reporting

To Whom It May Concern:

On January 30, 2014, the OECD released for public consultation a *Discussion Draft on Transfer Pricing Documentation and CbC Reporting* (Discussion Draft). In connection with that release, the OECD requested comments on the Discussion Draft generally, and also identified specific areas where stakeholder comments might be particularly illuminating. This letter is submitted in response to that invitation.

Although the substance of our comments below has been informed through thoughtful dialogue with colleagues in private practice, industry and civil society, the views expressed herein are ours alone. We have neither been engaged by an organization to provide, nor expressed a commitment to any person to advance, the viewpoints expressed below.

**General comments**

As a preliminary matter, we would like to express our gratitude to the OECD for its efforts in advancing the public dialogue regarding the important topics of transfer pricing documentation (TPD) standardization and tax transparency. Without question these two items weigh heavily on the minds of tax executives and administrators alike, as optimization in the area carries with it the promise of increased efficiency and certainty for both.
That joint interest is prominently recognized in Action 13 of the BEPS Action Plan, which speaks in explicit terms of balancing the informational needs of tax administrators against the compliance costs to taxpayers. Implicit in this language is the notion that successful implementation of a global TPD standardization or tax transparency initiative requires cooperation amongst stakeholders and a sense of mutual benefit.

Unfortunately, the Discussion Draft appears to tip the scales significantly in favor of tax administrators, and leaves open to question what material improvements to the status quo (whether in terms of cost or controversy mitigation) the adoption of this framework would produce for taxpayers. While Action 13 necessarily contemplated an increase in the volume of taxpayer information disclosed, the proposed (and theoretically attractive) two-tier approach, as presently crafted, seems to magnify compliance burdens without clearly delivering workable solutions to the expanding problem of fragmented local reporting requirements.

Further still, and perhaps most importantly, the Discussion Draft’s proposal to merge the country-by-country template with the master file will amplify controversy risk (i.e., uncertainty) for compliant taxpayers. Because the country-by-country template can be interpreted to support formula-based pricing, its inclusion within a framework of data that is focused on arm’s length pricing (i.e., the master file) can only give rise to confusion, mischief and controversy. As a general principle, efforts to enhance “big picture” awareness, or to supply sufficient data to ensure the proper application of arm’s length principles, should not operate to expand the risk of intractable tax controversy nor promote the incidence of double taxation.

With this background, our comments to the Discussion Draft are offered below.

**Country-by-country reporting should be dislodged from the master file**

The OECD’s July 2013 release of its *White Paper on Transfer Pricing Documentation* (White Paper) generated a substantial level of stakeholder commentary, and one issue that emerges forcefully from the commentary is the concern that the master file’s purpose may be too broadly construed. The Discussion Draft similarly appears to contemplate a broad role for the master file – e.g., for use as a tool in making high-level tax risk assessments and for use in transmitting enterprise-wide data and analytics that are relevant in determining whether a proper arm’s length price has been charged – which may result in the master file itself (as presently drafted) frustrating other important policy objectives such as simplification and utility (from a risk assessment perspective) and clarity (from a pricing perspective). As presently structured, the master file errs on the side of supplying more data than is necessary (or perhaps even quickly digestible) for making an initial tax-risk evaluation and, more importantly, provides this data in a context that seemingly opens the door for potential misinterpretation and mischief.

In particular, the merging of the country-by-country reporting template into the master file structure has the potential to generate significant misunderstanding and controversy given the country-by-country template’s factual presentation of formulary apportionment factors while the focus of the master file itself is on data and analyses directed at deriving the proper (arm’s length) related-party pricing. Although this potential for misunderstanding and controversy presumably is unintended, the merging
of the country-by-country template with the master file may increase the risk that wide-scale implementation of any Action 13 output will be harder to achieve.

As suggested earlier, it is not unreasonable to expect that taxpayers may be averse to the existence of the country-by-country template elements within the master file, in light of the strong message that this may convey to countries inclined to raise formula-based challenges to related-party pricing matters. However, we also believe that administrators that champion the arm’s length standard may be similarly reluctant to support a merging of the country-by-country template and the master file, given the potential competent authority burdens that may ensue. Further, administrators from countries that employ foreign tax credit regimes may find the combination undesirable, particularly if it could be perceived as lending support to arguments that generate otherwise unintended consequences (e.g., a perception that the pursuit of competent authority relief is futile).

In light of the foregoing considerations, we recommend that the OECD separate the country-by-country template from the master file. We believe this separation will reiterate the OECD’s previously-articulated commitment to arm’s length principles, mitigate concerns associated with the structure of the master file, and make the country-by-country template available for potential utilization as a high-level tax-risk assessment vehicle. While we recognize that additional work will be necessary to assess the practical utility of the resulting multi-tiered approach, we believe it is desirable to separate from the master file data that might be interpreted as implying support for formulary apportionment.

**Only a government-to-government exchange of information should be promoted**

The Discussion Draft embraces TPD standardization efficiencies by relying significantly on an integrated relationship between the master and local files. To implement this approach, however, the Discussion Draft contemplates that a MNE group parent would prepare the master file and distribute it to group entities so that the file “could then be obtained by local taxing authorities directly from local affiliates.”

While this approach endeavors to promote certainty and efficiency for local tax administrators, it generates material security concerns for taxpayers by placing potentially sensitive business data and secrets in the hands of remote employees. Further, this mechanism does not constitute a pragmatic solution even for tax administrators, if local legislative or judicial bodies refuse to compel the production of data not otherwise in the possession or control of local taxpaying entities.

We believe that taxpayer security concerns in this area are valid, and we have ourselves witnessed situations where highly-sensitive strategic, technologically-relevant or pricing-competitive data has been subjected to protracted internal vetting processes before receiving general counsel or executive-suite clearance for release to the tax department. We also have witnessed situations where data that is accessible by one core MNE team (e.g., the head office tax or treasury group) is restricted from wider internal dissemination (e.g., to local country teams), particularly where such data is associated with business strategy (e.g., intellectual property development and exploitation) or business realignments. Accordingly, we believe the Discussion Draft’s proposed master file exchange mechanism is untenable – particularly in an era of enhanced labor market mobility and an increased proliferation of private/public data infringement – regardless of whether the master file’s primary function is to facilitate high-level tax risk assessment.
Despite these shortcomings, a tiered approach to TPD standardization could be viable where the master file exchange is predicated on information exchange provisions already available in established treaty networks. In our opinion, a system based on government-to-government exchange mechanisms would be attractive in that it should (a) allay many taxpayer concerns associated with the wider internal dissemination of sensitive company data (particularly where the local finance team does not manage local tax controversy), (b) ensure that the most secure channels (i.e., those developed through deliberative processes that take privacy considerations into account) are utilized for any transmission of sensitive information to foreign governments,1 (c) place taxpayers in a pre-audit posture of compliance (rather than creating a perception of non-compliance, which could occur if a private exchange mechanism were adopted and a taxpayer declined to transmit the master file to a local affiliate for valid reasons), (d) provide more appropriate avenues of recourse should transmitted data be misused or mishandled, and (e) foster a more regular dialogue amongst tax administrators.

Although the timeline for securing relevant data under this system may be lengthened, reasonable measures can be taken to improve the timing of any desired information exchange. Further, even modest delays should be tolerable, except perhaps where the primary function of such data is to facilitate a high-level tax risk assessment.

We strongly recommend that the OECD abandon the private exchange approach to sharing master file data, and instead adopt a government-to-government mechanism for exchange. In addition, we believe that it may be prudent to relegate the master file’s tax-risk assessment function to another vehicle – so long as this may be accomplished in a way that mitigates burdens and promotes simplicity – in order to optimize timing and relevance considerations for tax administrators.

Finally, we believe that a MNE’s “home country” (i.e., the country in which the group parent is tax resident) should play the central role in architecting, collecting and transmitting any master file information. The MNE’s home country presumably is in the best position to know what (and in what format) information is available, how it is best presented to treaty partners, and what measures are appropriate to adequately protect sensitive business information.

It should be noted that the system described above could be applied with equal vigor to various tax transparency initiatives, as relevant (e.g., should a separate vehicle – such as the country-by-country template – be selected to function as a high-level tax-risk assessment tool).

Any inclusion of data regarding ad hoc arrangements should be voluntary

The Discussion Draft contemplates that a MNE’s master file will include certain descriptive information regarding the group’s collection of ad hoc tax arrangements. More specifically, it mandates that a MNE identify and describe all APAs and similar advance rulings, all transfer pricing matters currently pending or recently resolved in MAP, and all other tax rulings that may relate to the

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allocation of income to particular jurisdictions. This proposal, while perhaps well-intentioned, is misguided.

If the master file’s primary function is to convey data that is relevant in determining whether a proper arm’s length price has been charged, then it is questionable whether the MNE’s ad hoc arrangements are relevant to that purpose. It is difficult to imagine a compelling rationale for why an ad hoc arrangement, which is formulated in reference to discrete facts and circumstances germane to a specific undertaking involving identified group members, should be presented in a manner that suggests it is of probative value for purposes of determining a proper arm’s length price between affiliates that are not the subject of the arrangement.

These arrangements are typically predicated on robust negotiations involving at least one non-market participant, and therefore often reflect trade-offs (e.g., to achieve certainty) that would not otherwise influence an agreement between two market participants. As a result, taxpayers and tax administrators often have a mutual interest in ensuring that the details of these arrangements remain private. While tax administrators arguably have an interest in (and presumably will be familiar with) ad hoc arrangements involving local affiliates, other ad hoc arrangements of a MNE group would have little relevance in assessing local pricing matters between related parties.

Even under an expansive view of the master file (i.e., that it also functions as a tax-risk assessment tool), the case for specifically disclosing ad hoc arrangements is unpersuasive. One problem with mandatory disclosure in this context is that it perpetuates a misconception that these arrangements imply aggressive taxpayer behavior, when in truth they are often the product of pragmatic decision-making by taxpayers and tax administrators. Thus, mandatory approaches seem to unnecessarily impair a taxpayer’s initial standing with tax administrators.

Mandatory disclosure would also demand a tremendous commitment of taxpayer resources to summarize arrangements (which may be exceedingly complex) and respond to inquiries. Here, it is the level and continuous nature of the resource commitment that is troubling, since a superficial presentation of all arrangements is required – even those not specifically relevant to local taxation – and this is certain to lead to some level of confusion, and invite frequent, and possibly even superfluous, inquiries.

Finally, the Discussion Draft approach is troubling in that it essentially directs all MNEs to divulge to every tax administrator extremely sensitive proprietary data (e.g., strategic insight into the group’s tolerance for tax risk, its global approach to negotiating or resolving tax matters, etc.), by mandating that all group arrangements be summarized in a single data array (i.e., the master file). The obvious concern here is that this information may then be used for improper purposes (e.g., to exploit local affiliates). Voluntary (or narrowly-crafted quasi-voluntary) disclosure regimes would avoid all or most of the problems noted above, yet presumably could be tailored to sensibly contribute to “big picture” awareness.

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2 In the United States, APAs and MAP-related closing agreements are deemed confidential and disclosure restrictions are meticulously observed. See U.S. Internal Revenue Code Sec. 6103.
We recommend that the OECD eliminate the requirement that a MNE list and describe its ad hoc arrangements as part of a master file or other record. These arrangements are the product of unique sets of facts, circumstances, and trade-offs that are unique to those facts and circumstances, and therefore have little bearing on the question of whether a proper arm’s length price has been charged in transactions between affiliates that are not covered by the particular arrangement.

Further, even where the reporting rationale is predicated on assessing tax risk, we are not persuaded that the probative value of information obtained by administrators is sufficient to justify the burdens and inequities to which taxpayers may be subjected. Because ad hoc arrangements play a central role in ensuring that the global matrix of tax systems operates efficiently (e.g., tax positions can be settled, certainty can be attained), there is genuine risk that any mandatory reporting model could deter taxpayers from pursuing these helpful instruments.

If the OECD nevertheless concludes that this reporting is essential to its Action 13 mandate, then we recommend that any such disclosure must be narrowly-focused and that alternative disclosure formats (e.g., check-the-box) be considered. Further, we also recommend that the OECD articulate with specificity how each reported item is relevant to and furthers the goals of proper tax administration (e.g., it should describe the role of MAP settlements in tax-risk analysis).

Concluding remarks

We recognize that the OECD’s work in respect of Action 13 (and BEPS generally) is necessarily iterative and incremental, and appreciate that the Discussion Draft is reflective of early-stage thinking rather than broad consensus. As a result, and in light of timing constraints, we purposefully limited our comments above to certain key issues that require early resolution in order for this project to successfully advance. However, we believe the Discussion Draft raises other significant issues that also merit further consideration.

Despite the limited scope of our letter, we also recognize that nuanced issues or implications often arise in projects or as a result of recommendations or comments. Therefore, we believe there are a few additional observations (identified below) that may be helpful to the OECD as it advances its work in this area.

- **Purpose of master file** – If the country-by-country template is separated from the master file, it will be necessary to reconsider its purpose in the overall scheme of TPD standardization and simplification. One possibility is that it might be merged with the local file. Another possibility is that the master file might be presented as a “best practices” (internal) approach to generating proper TPD.

- **Contours of the country-by-country template** – For reasons set forth in our comments above, the country-by-country template should be separated from the master file. While this separation would permit the country-by-country template to function as a tax-transparency/risk-assessment vehicle, relevant reporting contours (e.g., the items to be identified and the method of display) will continue to be a central issue just as they are today. For instance, the issues associated with fiscal transparency (e.g., how a partnership or other transparent entity should be treated for reporting purposes, vis-à-vis its owners) will
continue to be relevant, and the OECD will still need to establish clear guidelines as to how reporting in this area will operate (e.g., to avoid increasing compliance burdens for MNEs and to assist administrators in interpreting reported data). Similarly, if reporting of ad hoc arrangements is deemed essential to the Action 13 mandate, then the method for reporting such information will remain open for debate.

- Practical considerations – To facilitate the adoption of any Action 13 output, the OECD might consider whether it would be prudent to publish an extensive, granular and on-the-record benefits / burdens analysis. The OECD might also consider whether its Action 13 timeframe dovetails appropriately with timelines associated with other potentially-relevant BEPS initiatives (e.g., Action 4, Action 12).

Thank you for the opportunity to share our views on the Discussion Draft. We hope that our thoughts and suggestions are helpful to the OECD’s work in this area, and we look forward to participating further in the public dialogue on transfer pricing and BEPS, as appropriate.

Please do not hesitate to contact us if you have questions or if we can be of further assistance.

Sincerely,

J. Brian Davis

Patrick J. Smith

Douglas M. Andre

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3 This foundation may be of assistance to countries later seeking to implement OECD proposals. In the United States, for instance, administrative agencies may not promulgate regulations without first engaging in a cost-benefit analysis and concluding that the rules are tailored so as to impose the least burden to society (taking into account various factors, including burdens to business). See Executive Order 12866 (Sept. 30, 1993).
Dear Sir

Comments on OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting, 30 January 2014

The Institute of Chartered Accountants Australia (the Institute) welcomes the opportunity to respond to the OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting (the Discussion Draft), published on 30 January 2014.

About the Institute

The Institute represents accounting and business professionals in Australia and around the globe. Members strive to uphold financial integrity through a commitment to ethics and acting in the public interest.

We focus on educating candidates through the Chartered Accountants Program and engage in advocacy and thought leadership underpinned by our members' knowledge and experience. We influence a range of policy areas impacting the Australian economy and domestic and international capital markets.

A watershed member vote in 2013 set the course for the Institute to amalgamate with the New Zealand Institute of Chartered Accountants, subject to obtaining formal government approvals and effecting amendments to constituent documents. The proposed new institute – Chartered Accountants Australia and New Zealand – is expected to have more than 90,000 members in total with over 17,000 candidates, giving us greater scale and influence on the world stage.

Our submission

The Institute is a member of the Base Erosion and Profit Shifting (BEPS) Tax Advisory Group established by the Australian Treasury. A number of Treasury officials assist the OECD on the BEPS project.

Our submission reflects the views of the Institute’s Tax Policy group. Unfortunately, it has not been possible for the Institute to fully consult with members (particularly specialist transfer pricing practitioners) given the limited time made available to respond to the Discussion Draft.

Accordingly, our submission does not address all of the issues on which the OECD has sought comment.
However, we understand that the OECD will also receive comments from the major accounting firms which reflect insights gained from transfer pricing practitioners and the clients they serve.

In the Attachments to this covering letter, you will find our:

- General comments (Attachment A), and
- Specific comments on issues raised in the Discussion Draft (Attachment B)

If you would like to discuss any aspect of this submission further, please do not hesitate to contact me on +61 2 9290 5609.

Yours faithfully,

Michael Croker
Head of Tax Policy
Institute of Chartered Accountants Australia
The Institute of Chartered Accountants Australia makes the following general comments on the Discussion Draft.

**An education campaign on what ‘quality’ transfer pricing documentation looks like**

As noted in the OECD TPG, paragraph 5.16, the current guidance in Chapter V does not provide for an exhaustive list of documents to be included in a transfer pricing documentation package:

“...it is not possible to define in any generalised way the precise extent and nature of information that would be reasonable for the tax administration to require and for the taxpayer to produce at the time of the examination”.

That said, there is very little in the way of publicly available educational material on what ‘quality’ transfer pricing looks like from the perspective of the revenue authorities – for example:

- The type of documentation a revenue agency expects to see
- The level of commercial detail expected in such documentation
- The level of tax detail expected in such documentation (e.g. to establish the arm’s length principle, comparables)

We also note that some revenue agencies offer more assistance to business than others (e.g. some agencies assist businesses by offering an arm’s length benchmarking analysis as part of their taxpayer help programs).

Paragraph 3 of the Discussion draft highlights the practical problem by noting ‘a significant increase in compliance costs for taxpayers’ but then pointing out that ‘...tax administrations often find transfer pricing documentation to be less than fully informative and not adequate for their tax enforcement and risk assessment needs.’

The impression gained is that business is spending more in attempting to comply but their efforts still fall short. The truth may be that both revenue agencies and MNEs still have much to learn about acceptable standards of documentation.

Also, paragraph 43 of the Discussion Draft states that: “…mandatory use of consulting firms to prepare transfer pricing documentation is not recommended provided the internal personnel preparing the documentation are qualified and have access to the appropriate data.” (Emphasis added). The obvious issue of what those qualifications are and how they can be obtained is left unanswered.

**Recommendation**

If a co-ordinated OECD approach to transfer pricing documentation is coming with new information requirements, now is an opportune time for the OECD to encourage revenue agencies to better educate tax practitioners working in practice and in MNEs on the standard of documentation expected. Examples from actual transfer pricing investigations (with identifying information deleted) should be used.

In the absence of an education campaign and a better commercial understanding of what transfer pricing documentation is required, compliance costs will remain high as MNEs inevitably resort to the services of large professional firms with in-house expertise in this area.

**The potential role for audit teams in collating basic transfer pricing information**

In practice, the audit teams of professional accounting firms will be in a position to collect and verify some of the master file data referred to in paragraph C.1 of the Discussion Draft as part of the statutory audit of the MNE. Indeed, audit teams typically prepare and maintain a file whose purpose is similar to that stated in paragraph 18 (i.e. understanding the client’s structure, business etc).

Audit teams are also well-placed to provide some of the proposed country-by-country reporting data in Annex III to Chapter V of the Discussion Draft.
We acknowledge that there are many issues to address in this context (e.g. governance, independence) and that many MNE’s engage audit services from a firm different to that which provides tax-related services. In some cases, the audit service provider for the same MNE will differ from country to country.

Nonetheless, we are raising the role of audit teams in the context of an Australian Taxation Office (ATO) initiative known as the ‘External Compliance Assurance Project’ (ECAP). ECAP is still at the initial consultation stage, but its aim is to use the company’s natural accounting systems and annual assurance procedures to support the ATO’s own compliance objectives. It is envisaged that ECAP would focus on basic assurance work, focusing on factual matters.

For both the ATO and the corporate taxpayer who chooses to use this facility, ECAP is seen as a potential compliance cost reduction measure.

The Discussion Paper states at paragraph 43 that: “It is not recommended, particularly at the stage of risk assessment, to require that the transfer pricing documentation should be certified by an outside auditor or other third party.”

In Australia at least, it is possible that the ATO will see merit in a certification process that involves external auditors.

We also submit that, given the risk associated with transfer pricing investigations, some MNEs will rely heavily on third parties (e.g. transfer pricing specialists from a professional firm) to assist in the preparation of master file and country-by-country reporting data.

**Recommendation**

In practice, a MNE may choose to use the services of an auditor or other third party in developing transfer pricing data and we suggest that paragraph 43 be amended to reflect that a MNE is quite entitled to choose to do so.

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**The use of technology in transfer pricing documentation reporting**

In a world where revenue agencies increasingly require large business taxpayers to report tax data and remit taxes electronically, it is surprising that the Discussion Draft does not canvass the issue of supplying master file and country by country data by electronic means.

Indeed, the draft should in our view place some of the compliance cost associated with the OECD proposals on revenue agencies themselves by recommending cross-agency collaboration on data collection arrangements.

If transfer pricing information is to be standardised, the mechanism for reporting it should be standardised as well. This would not only streamline the task of reporting, but also the sharing of data amongst revenue collection agencies.

Subject to appropriate safeguards to protect confidentiality (see below), standard electronic reporting might also help address concerns about confidentiality.

We hope that information on the relevant technical aspects (e.g. compatible transmission systems) will be developed at a later date.

**Recommendation**

The Discussion Draft (Section E) should refer to the desirability of a standard electronic reporting framework for implementing the proposed two-tier transfer pricing approach. This framework should be developed in a collaborative project undertaken by participating revenue agencies.
The Institute of Chartered Accountants Australia makes the following specific comments on the Discussion Draft.

The paragraph references relate to those used in the Discussion Draft.

**B.1 Transfer pricing risk assessment**

We do not recommend the development of additional standard forms and questionnaires beyond the proposed country-by-country reporting template.

Experience suggests that, despite the best of intentions, the OECD cannot devise forms and questionnaires that adequately cater for the diverse issues that may be relevant to a particular:

- Jurisdiction (e.g. a particular country may be heavily reliant on particular industry sectors)
- Tax agency (e.g. a tax agency may wish to obtain highly detailed data on particular activities or transactions, such as financial transaction, as part of its local transfer pricing enforcement program)
- MNE (e.g. a MNE operating in the mining sector will provide different transfer pricing information than say, a MNE operating in the financial services sector).

In practice, MNEs will provide such additional information in a format that suits their circumstances.

Also, large companies already bear substantial day-to-day compliance burdens (e.g. form-filling, responding to tax agency information requests and completing tax agency surveys): completing additional OECD-generated paperwork only adds to this workload.

**B.3 Transfer pricing audit**

Production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information could be achieved through rules in each jurisdiction which deny local enterprises the ability to rely on those ‘out-of-jurisdiction’ documents in dealings with the local revenue agency or judicial proceedings.

**C.1 Master file**

**D.3 Materiality**

The questions posed in these sections of the Discussion Draft indicate that the OECD working party would benefit from additional insights from those:

- experienced in the preparation of statutory accounts and management reports
- who manage the day-to-day internal reporting function within MNEs.

The focus should be on populating the proposed reporting template with data already produced from the natural systems and assurance reports of MNEs to the fullest extent possible, rather than creating a need for additional reports simply to satisfy the needs of transfer pricing personnel in tax agencies.

This is because the Discussion Draft proposals focus on basic data collection (as distinct from ‘reporting’ in an accounting sense). We agree with the comment in paragraph 21 that, in practice, this limited form of country-by-country data will not be a substitute for a detailed transfer pricing analysis of individual transactions and prices. Individual revenue agencies will continue to require a full functional analysis or a full comparability analysis for example.

Accordingly, the data collation process envisaged in the Discussion Draft should focus on minimising the compliance costs involved.

On some topics canvassed in the Discussion Draft therefore, such as whether to use bottom up or top down approaches, a flexible approach should be tolerated.
Reasonable estimates of employee numbers should also be allowed.

And for data on commercially sensitive matters centrally managed within a MNE (intellectual property for example), the local country affiliate should be allowed to respond by referring the revenue agency to the parent company.

D.8 Confidentiality

Important confidentiality issues are dealt with in a single paragraph in the Discussion Draft.

The general, aspirational wording used in paragraph 41 only serves to highlight the OECD’s practical difficulty in developing suitably robust standards that provide some assurance to MNEs that data will not be used inappropriately.

The Institute believes that MNEs will have legitimate concerns that the cross-jurisdictional tax information sharing framework envisaged by the OECD will be prone to breaches. This is particularly true of parent company master file information shared with local country subsidiaries.

An alternative model which has the master file maintained and stored centrally by the parent entity and made available upon request by the relevant tax agency should be explored.

There are also a host of issues which, in our view, can only be addressed via binding agency to agency protocols. These include:

- Taxpayer secrecy safeguards within the domestic law and agreement on the circumstances in which such secrecy safeguards do not apply in a particular jurisdiction
- Data access arrangements that apply within a particular revenue agency (i.e. what level of authorisation is required)
- The application of national privacy standards (or principles) operating within the jurisdiction
- The maintenance of industry best-practice data protection standards

The reference in paragraph 41 to disclosure in court proceedings or judicial decisions is, in most cases, a matter for the courts and the evidentiary procedural rules that govern their operation: a tax agency is unlikely to be able to give assurances as to confidentiality when litigation occurs.

Note also that confidentiality is not just an important issue for MNEs.

The security of sensitive tax data should be of particular concern to the senior management of revenue agencies. Apart from reputational damage to their agency, MNEs may be denied due process and revenue collections could be affected as a result of a breach of confidentiality.

In some jurisdictions, MNEs may also have legal redress against a revenue agency for breach of confidentiality (e.g. damages for defective administration).

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**Recommendation**

Existing inter-tax agency protocols for sharing tax-related information should be reviewed and strengthened as part of the flow-on projects necessary to implement the OECD’s information sharing recommendations.

Transfer pricing information and other data should not be shared with an agency unwilling to implement and abide by such protocols.
TRANSFER PRICING DOCUMENTATION AND CbC REPORTING

Comments submitted on 23 February 2014 by ICAEW Tax Faculty in response to OECD discussion draft OECD Transfer Pricing Documentation and CbC Reporting published on 30 January 2014

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the discussion draft Transfer pricing documentation and CbC Reporting http://www.oecd.org/ctp/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf, the discussion draft, published by OECD on 30 January 2014.

2. We should be happy to discuss any aspect of our comments and we would welcome the opportunity to take part in the public consultation which is to take place on 19 May 2014.

3. Information about the Tax Faculty and ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty’s Ten Tenets for a Better Tax System by which we benchmark proposals to change the tax system.

WHO WE ARE

4. ICAEW is a world leading professional membership organisation that promotes, develops and supports over 142,000 chartered accountants worldwide. We provide qualifications and professional development, share our knowledge, insight and technical expertise, and protect the quality and integrity of the accountancy and finance profession.

5. As leaders in accountancy, finance and business our members have the knowledge, skills and commitment to maintain the highest professional standards and integrity. Together we contribute to the success of individuals, organisations, communities and economies around the world.

6. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

MAJOR POINTS

7. The two main objectives of Action 13 are clearly set out in the discussion draft as follows: one is to provide more relevant information to tax administrations so that they can carry out better informed transfer pricing risk assessments and the second is to keep any increased compliance costs for business to an absolute minimum.

8. The three objectives for transfer pricing documentation are set out in paragraph 5 of the discussion draft:

   - to provide sufficient information for tax administrations to conduct an informed transfer pricing risk assessment;
   - to ensure taxpayers properly consider transfer pricing when setting prices and other arrangements between associated companies and when completing tax returns; and
   - to provide tax administrations with sufficient information to conduct an appropriately thorough audit of transfer pricing practices of entities which are subject to tax in their jurisdiction.

9. In the light of these objectives we are concerned that the model template of country by country (CbC) reporting is, at the moment, too detailed and, as set out in the next section, it could potentially be used for other purposes which is not as set out in the published version of Action 13 which has been agreed by all the participating countries in this G20/OECD initiative.
10. In terms of the amount of information required, and the number of columns currently in the model template, we believe that a number of them could be dispensed with without detracting from the value of the package of information provided.

Model template of CbC reporting – and its potential uses

11. We are concerned that the amount of information that is likely to be required, if the Model Template of CbC reporting is adopted as currently set out in the discussion draft, will pose burdens on business which are not commensurate with the overall objective of this Action which is

“to enable tax authorities to more effectively assess transfer pricing risk” and

“to make transfer pricing compliance simpler and more streamlined”

for business as was set out in the *White Paper on Transfer Pricing Documentation*¹ published on 30 July 2013.

12. This statement captured the essence of Action 13, published earlier in July 2013, which is to

“Develop rules regarding transfer pricing documentation to enhance transparency for tax administration taking into consideration the compliance costs for business.”

13. But in the third paragraph in the opening statement of the discussion draft there is an indication that CbC data is to have a wider purpose than merely to act as an aid to risk assessment:

“As the call to develop a common template for country-by-country reporting to tax authorities did not specifically limit the application of country-by-country reporting to transfer pricing administration, the OECD will be giving further consideration to whether information relevant to other aspects of tax administration and the BEPS Action Plan should also be included in the common template.”

14. We would ask OECD to provide us with a clear indication as to where and when the G20 and OECD have agreed that CbC Reporting is going to be used for more than just transfer pricing risk assessment.

15. It is not stated in the Action Plan itself and recent comments by the UK delegate to Working Party 6 indicate that in his view the Discussion Draft goes beyond what governments need for transfer pricing risk assessment.

16. We are extremely concerned that this amounts to “mission creep” and would put an administrative burden on business that is not in keeping with what was the objective of Action 13 when it was agreed in July 2013.

RESPONSES TO CONSULTATION QUESTIONS

Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

17. We have dealt above with our concern that the CbC model template could be used for other purposes other than the transfer pricing risk assessment. We don’t think it should be.

18. This question asks whether there should be other standard forms and questionnaires beyond the CbC reporting template and we do not believe that there should be.

19. It does seem entirely appropriate for the tax authority to share its risk assessment with the taxpayer which is being risk assessed. This is very much in line with the OECD collaborative cooperation model and we believe will lead to more constructive working practices between tax administrations and taxpayers and their advisers.

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

20. As there are an increasing number of signatories, currently 64, to the Convention on Mutual Administrative Assistance in Tax Matters there is widespread concern about the confidentiality of information that is provided to tax authorities. We believe there may be reluctance to provide some of the information required under the CbC model template unless business is required to do so as a result of specific domestic legal requirements to make the production of such information mandatory. If providing information were to become mandatory then, as an absolute quid pro quo, this needs to be combined with stricter safeguards to guarantee that the information provided will remain confidential.

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

21. We believe OECD should take advantage of existing best practice such as the EU’s (optional) Joint Transfer Pricing Forum (JTPF) Master file approach (Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union) in setting out the standards on what should be included in the master file.

22. We do not believe the master file should be undertaken on a line of business basis as that will almost certainly require a disaggregation of entity level data.

23. We are aware that some multinational businesses have very large purely domestic businesses in some single jurisdiction markets, such as the United States, and the data requirements should be such that that local US business does not have to submit lots of information which is not relevant for transfer pricing risk assessment. Data requests for such businesses should be restricted to high level overviews of the global business.

A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

- Should the country-by-country report be part of the master file or should it be a completely separate document?
- Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?
- Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations
reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

- Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

- Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

- Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

24. We think there needs to be a specific CbC template for high-level risk assessment.

25. We think there are arguments for and against the CbC report being part of the master file. If it is part of the master file then the risk is reduced of the report being “hijacked” for other purposes beyond transfer pricing risk assessment. But there are also timing considerations because the CbC report is going to be produced sometime after the accounting year end whereas the transfer pricing master file should be current or prospective. We have not reached a firm conclusion as to which of these contrary arguments should prevail.

26. We believe that business should be given the option as to whether the CbC report is prepared on a top down or bottom up basis as it is clear from our, ICAEW, discussions with business and tax advisers that no single method is going to be equally feasible, or appropriate, for all businesses.

27. If the method chosen is bottom up then there should not be a supplementary requirement for there to be extensive reconciliation to the published group account numbers.

28. In relation to corporate income tax figures we have some sympathy for reporting the amount as shown in the accounts. For the sake of clarity the relevant column should be headed up “corporate income tax” and not “income tax” as in the current version of the discussion draft as the latter would be potentially misleading in countries such as the UK.

Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

29. The concept of materiality needs to be carefully defined and provide clear rules as to how it is to be determined in particular circumstances. Materiality needs to take into account the global size of the operations. We do, however, appreciate that there may have to be some leeway for developing countries where too high a materiality level would prevent meaningful reporting of
data relevant to that particular country if a group materiality is used without some flexibility built in to it.

Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

30. The proposals seem sensible.

Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

31. We think it is right that the master file should be in English and we presume that will cover the CbC template as well.

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

32. We are concerned that confidentiality, which is an enormously important issue for business, is not given sufficient weight in the current version of the discussion draft and is, at the moment, covered in a single, short, paragraph, numbered 41.

33. The OECD Forum on Transparency and Exchange of Information for Tax Purposes published in 2012 a guide on the protection of confidentiality of information *Keeping it Safe* which contains a number of recommendations in Part III. The report and recommendations need to be reviewed and updated as necessary to reflect the fact that the current era is now one of automatic exchange of information.

34. The importance of confidentiality was also reflected in the OECD report *A Step Change in Tax Transparency* presented to the G8 meeting in June 2013. That report noted at paragraph 12:

“Before entering into an agreement to exchange information automatically with another country, it is essential that the receiving country has the legal framework and administrative capacity and processes in place to ensure the confidentiality of the information received and that such information is only used for the purposes specified in the instrument.”

35. We recommend that the discussion draft should be amended to refer to the report *Keeping it Safe*.

36. We also recommend that the Global Forum should be instructed, as a matter of urgency, to review the existing report and update it to reflect the significant changes in the world of information exchange that have taken place despite the relative short period since it was published.

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above.

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37. We favour the filing of CbC template information solely with the tax authority in the parent company's jurisdiction and that tax authority should share the information, as necessary, under the relevant and applicable treaty and EU exchange of information provisions.

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APPENDIX 1

ICA EW TAX FACULTY’S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.

2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.

3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.

4. Easy to collect and to calculate: a person’s tax liability should be easy to calculate and straightforward and cheap to collect.

5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.

6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.

7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.

8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.

10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see icaew.com/en/technical/tax/tax-faculty/~/media/Files/Technical/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)
23 February 2014

By email: TransferPricing@oecd.org

Dear Sir


ICAP is fully supportive of efforts to ensure full transparency of information to tax authorities to ensure they are able to assess tax effectively and to ensure public confidence in their effectiveness in doing so, and hence welcomes the opportunity to provide comments on the Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (the “Discussion Draft”), published on 30 January 2014.

Ensuring transparency by ensuring information security

The single most critical factor in this area is absolute clarity on the objectives of the exercise. It is vital that the three distinct objectives here are identified, and that the solutions proposed directly address those objectives. Those objectives are:

- restoring public confidence in the tax contribution of corporate taxpayers;
- facilitating efficient tax assessment by giving tax authorities the tools to perform high level risk assessments; and
- equipping tax authorities with the information needed to efficiently review and test detailed transfer pricing arrangements.

We consider the key elements of each below.

Restoring public confidence

Objective: to require sufficient public disclosure from companies to allow stakeholders to satisfy themselves that tax is being paid appropriately in line with national laws, or to identify potential areas of law change to rebalance international tax contributions.

Solution: information disclosed should be very high level to protect the commercial interests of the company; and it should cover whether tax affairs have been challenged and agreed by tax authorities and that tax authorities had the information required to effect that challenge.

Facilitating risk assessment

Objective: to require a level of disclosure, privately to tax administrations, that allows them sufficient transparency to identify areas of concern, and areas of no concern, to ensure resources are appropriately directed at risk areas.
Solution: information disclosed should be kept high level to avoid obscuring the message and rendering its purpose redundant; and it should be at a level that corporates will be comfortable to have shared among global tax authorities, irrespective of whether a particular bilateral transaction involves that jurisdiction.

Ensuring efficient transfer pricing review

Objective: to provide tax authorities with high quality information whilst making the process more efficient for global corporations and tax administrations through appropriate standardisation.

Solution: information will be highly detailed and commercially sensitive and should be disclosed to the full extent, but only to the extent necessary for tax administrations to assess accurately, fully and reliably the local tax position.

Only by agreeing clear delineations between the disclosure classifications will multinational enterprises be assured that commercially sensitive information will be safeguarded and appropriately used.

Specific comment on proposals

We consider that the Discussion Draft has moved beyond the original objectives on transparency, with no clear articulation of the benefits it will deliver, or methodologies to assess its effectiveness as part of the broader BEPS Action Plan.

In our view, the Discussion Draft attempts to bring together two distinct objectives that would be better addressed by two separate outputs:

- delivering a breakdown of the global results of MNE’s to facilitate a high level risk assessment (CBCR).
- ensuring taxpayers give appropriate consideration to transfer pricing requirements, and provide tax administrations with information to facilitate an informed transfer pricing risk assessment (the Master and local files).

It is not apparent to us that the Discussion Draft allows any opportunity for taxpayers to reduce the disproportionate compliance burden. This could be achieved by for example, reducing documentation requirements for low risk taxpayers or low risk transactions, and permitting choice regarding the reporting source data for preparing the CBCR template.

Related developments

Most vitally, we urge that caution is exercised to respect the significant difference between the current proposals and any separate proposals relating to public disclosure (such as the CBCR requirements of CRD IV, Dodd-Frank or as discussed in the context of the EU Non-Financial Reporting Directive, and the existing requirements with IFRS 8).

Beyond that we note the comments submitted by the UK CBI / 100 Group and support those views.

Yours faithfully,

David Ireland
CFO Group Finance
ICAP plc
ICC comments on the OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting

1. Introduction

1.1. The International Chamber of Commerce (ICC) is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization.

1.2. ICC is a longstanding proponent of corporate transparency—dating back to work on the conduct of multinational enterprises in the 1920s. ICC members are fully committed to improved tax transparency and have welcomed key developments in many countries such as the introduction of horizontal monitoring, individual risk assessments and/or enhanced relationships between tax payers and authorities. The OECD is to be commended for its role in furthering this agenda over the past decade.

1.3. In this context, ICC has broadly welcomed the G8 commitment to “create a common template for multinationals to report to tax authorities where they make their profits and pay their taxes across the world”. We are grateful for the opportunity to comment on the OECD’s Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (CbCR).

1.4. The comments set out below are based on broad consultations with member companies throughout the ICC network in over 130 countries.

2. General comments

2.1. ICC is concerned that the draft CbCR template goes significantly beyond the stated aim to develop a high-level risk assessment tool to provide tax authorities with a better view of multinational groups’ global activity and taxes paid. As a result, the draft instrument, if introduced, would likely entail highly disproportionate compliance costs—estimated by several ICC members at tens of millions USD, both in terms of transitional and ongoing costs.

2.2. We note that there is no indication within the commentary to suggest that the OECD working group has factored in likely compliance burdens for business—an issue which is specifically referenced in the BEPS action plan on these proposals. Further clarity on cost considerations would be appreciated in due course.

2.3. We also have significant concerns that the proposed content of the report could encourage the application of formulary apportionment-type calculations by tax authorities to propose transfer pricing adjustments. We welcome several public comments made by the OECD that formulary apportionment should not be pursued as an option to replace the arm’s length principle; but there is nevertheless significant concern amongst ICC members that the level of detail in the
draft CbCR template risks undermining this approach. This may have significant implications for global trade – an issue that we would encourage the Working Group to consider carefully as it further develops the CbCR template.

2.4. In this context, ICC considers it essential that the draft CbCR template is further refined in order to: (a) enhance the proposed instrument as a risk assessment tool; (b) eliminate unnecessary compliance costs; and (c) avoid any inadvertent move towards formulary apportionment. This can be best achieved by: (i) refining the data set; and (ii) ensuring an appropriate degree of flexibility for businesses in choosing the source of that data.

2.5. Detailed comments on each of the questions set out in the Consultation Document are provided below.

3. Master file and Implementation Approach

Should the country-by-country report be part of the master file or should it be a completely separate document, what is the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations?

3.1. In line with the original G8 mandate, the CbCR template should be limited to high-level data which is required to establish the footprint of a multinational company—and by extension determine which countries within its footprint give cause for concern and identify where further questions should be raised. In our view, the information requested in the draft instrument far exceeds what is necessary for this purpose and, moreover, includes information which could fall under business secrecy rules in certain countries.

3.2. As such, it is our view that data fields should be limited to where profits are earned, taxes are paid, and assets, people and functions located. Given that the template already contains more data than is necessary, we are—as a general principle—concerned by the possible introduction of additional forms or questionnaires.

3.3. If it is to be used as a risk management tool, the CbCR template should not be part of the Master File but should be a separate document that is completed and filed with the tax authority dealing with the parent company. The CbCR template addresses information that is independent from transfer pricing and has no connection with arms-length pricing—for instance, the inclusion of taxes paid in each country. It is of some concern that the Discussion Draft appears to conflate these separate objectives in some places.

3.4. Once filed with the parent company tax authority, the template should be shared between tax authorities using the network of treaty and exchange agreements. These contain safeguards to ensure that data remains confidential. The CbCR template should not be required to be filed by each company within the group.
3.5. Such an approach would bring a number of important benefits. First, with regard to cost-benefit considerations, it should be noted that a lot of companies and permanent establishments within a multinational group constitute only a very small part of the group activities. Requiring the same set of data from each single entity would create a disproportionate compliance cost without any tangible gain in terms of enhanced transparency. These costs would be largely negated by requiring only the parent company file data with its home tax authority.

3.6. Second, this approach would ensure that the information will only be used for its intended purpose under the tax confidentiality rules applicable under existing exchange agreements. There is significant concern amongst ICC members that if the country-by-country report is part of the master file—and as a result information for hundreds of legal entities has to be provided to all the tax authorities around the world—the information will find its way to the public where it will be subject to misinterpretation and abuse for public campaigns.

3.7. ICC considers that standard forms and questionnaires should only be developed if they facilitate the production of relevant information in a standard format—and in doing so obviate the need to produce less targeted and immaterial information. A standard global format for local information showing the nature and amounts of intra-group arrangements could be considered if it were to replace the local file. We are nevertheless concerned that despite the OECD’s best intentions, it may prove very difficult to reduce existing local country requirements. As such, any new OECD templates and questionnaires would add to, rather than replace separate country reporting requirements. This would be of significant concern to business.

4. Design of the template

Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

4.1. Every multinational company will differ in its internal systems and therefore the cost of providing CbCR data will vary from one organisation to another. This is an important reason why the CbCR template should include a choice on source of data.

4.2. From our consultations within the ICC network it is apparent that some companies will prefer a top down approach; others (such as those that have decentralised reporting systems) the bottom up approach. A degree of flexibility is therefore required to avoid the risk of arbitrarily imposing costs on some groups.
4.3. A more important consideration, in our view, is that whichever method is used it needs to be applied consistently so that tax authorities have a comparable picture year on year from which to identify trends in and changes to a particular company’s business model. It is important to reiterate that the intention of CbCR is not to allow for comparison across multinationals, but within these companies. Therefore, so long as the template is completed using consistent principles by each MNE, the data should allow tax authorities to see directional information in order to undertake a high-level risk assessment.

4.4. In this connection, flexibility should be allowed, subject to tax authorities being able to ask why the taxpayer has used a particular route and confirmation by taxpayer that no material divisions or activities are left out.

4.5. The OECD draft assumes that the use of a top down approach will require an allocation of profit across countries. It should be noted that this is not the case. No allocation is required: what is capable of being reported are the actual results from the group consolidation system.

4.6. The complexity of these issues means that any new CbCR regime should be accompanied by an appropriate phase-in period, to provide businesses with sufficient time to pull data together across legal entities and present such information accurately and consistently.

5. Entity or Country Level Reporting

Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used?

5.1. The CbCR template should be compiled on a country basis. In our opinion, including a total for each country—together with columns for external sales, intercompany sales, profit before tax, cash tax paid, employee numbers and activity code—should provide sufficient information for tax authorities to conduct a robust risk assessment.

5.2. To include entity level information will impose an onerous compliance cost on multinational companies. Some groups will have thousands of entities, leading to reports running to hundreds of pages. It is unclear to us what specific purpose such additional information will serve. Do tax authorities have the time and resources to review the data in such detail? Moreover, why would a tax authority in “Country A” be interested in the detail of every company within “Country B” where there is no connection between the two jurisdictions? In this connection, we believe that an excess of (largely irrelevant) data is likely to diminish the utility of the CbCR template as a risk assessment tool.
6. Taxes Incurred Methodology

Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?

6.1. The template should require one number for cash taxes paid per country as this is the basis on which multinationals pay their taxes worldwide. Apportionment of a group payment across entities based on the pre-tax profit of each is artificial and does not reflect the actual taxable profit that can be significantly different—e.g. due to the availability of tax depreciation.

6.2. The tax charge in the accounts should not be used as this will include both current and deferred taxes, plus prior year adjustments and true ups. The tax charge will not enable the user of the data to see clearly and quickly what has been paid in each country in any one year.

7. Disclosure of Specific Types of Intra-Group Transaction

Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers? Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

7.1. We consider cash paid to be the most appropriate measure for inclusion in the template. Does “due basis” mean the profit and loss account charge under the accruals concept or does it refer to the year-end liability shown in the balance sheet? We believe that an aggregate number for each country is needed.

7.2. The CbCR template should not include information that is already proposed to be included in transfer pricing documentation such as the Master and Local file—arguably intra group royalties, interest and service fees are included in these. The issue is that local files will show the figures but just for one jurisdiction; the proposed template shows all countries together. Such data is also potentially included in APAs and other rulings, but again disclosure of this information may be limited to the countries party to specific agreements.

7.3. If the CbCR template is to include royalties, interest and service fees there could be significant additional work required with the associated compliance costs. This is because the underlying accounting policies within groups can be different for different types of payment and charges. Where an item is not consistently recorded in any system, the template may potentially require a change to the financial accounting policies and practices of a group globally. This will impose a disproportionate compliance cost compared to the benefit to be gained if a multinational group is to satisfy the Master and Local file requirements.
7.4. Withholding tax should be included. There are some cases where (due to the nature of the business structure) withholding tax is a significant part of corporation tax paid. There will be an additional burden.

8. **Materiality**

Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

8.1. The country-by-country template should be prepared to take account of materiality considerations from a MNE perspective—including consideration as to whether operations in a particular country are material to that country even if not material to the group. The local file should consider a potentially lower level of materiality specific to that country.

8.2. What could pose a challenge to materiality is the occurrence of free-of-cost transactions (e.g. guarantee fees), or transactions such as advertising and marketing expenses that exceed, for instance, the bright-line test. These transactions will not ordinarily be reported because they are below materiality level and therefore, deserve special treatment for disclosure purposes.

9. **Documentation process**

Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

9.1. Paragraph 23 of the Discussion Draft appears to suggest that a comparables analysis would be required in each local file for each year for each transaction. This would entail significant cost for limited benefit. Accordingly, ICC recommends that the suggestion in paragraph 34 be formally adopted to require comparables analysis only every three years for all transactions.

10. **Confidentiality**

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

10.1. ICC members consider it imperative that further consideration is given to the measures in place to safeguard the confidentiality of data provided under the CbCR. This is particularly important where disclosures may contain sensitive commercial information.

10.2. Measures to protect the information could include:

- anti-infringement procedures available to taxpayers in order to protect them from unauthorised information disclosure by tax administrations if real damage is demonstrated;
- secure channels/technological means for information exchange between taxpayers and tax administrations in order to prevent information leakage;
- limiting sharing of data between tax authorities to entities within those particular jurisdictions and their intercompany activities (i.e. rather than disclosing the full master file); and
- reviewing (rather than filing) of sensitive information at taxpayer premises.
By email
TransferPricing@oecd.org
Working Party No. 6 of the Committee on Fiscal Affairs
Organization for Economic Co-operation and Development (OECD)

Subject: Comments on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting

We welcome the OECD’s efforts at revisiting and developing guidelines for transfer pricing documentation.

After carefully reviewing the document, we do consider that the global approach regarding transfer pricing documentation of a multinational group must have to take into account the additional effort and costs that taxpayers at a local level would have to incur in order to fulfill this transfer pricing documentation global approach.

Below are the comments prepared by the Transfer Pricing Committee of the International Fiscal Association Mexican branch (IFA Grupo Mexicano, A.C.) in connection with the abovementioned public consultation draft.

Transfer pricing risk assessment

Comments are requested by the OECD as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

In this regard, BEPS Action 13 establishes that “The actions to counter BEPS must be complemented with actions that ensure certainty and predictability for business. Work to improve the effectiveness of the mutual agreement procedure (MAP) will be an important complement to the work on BEPS issues. The interpretation and application of novel rules resulting from the work described above could introduce elements of uncertainty that should be minimized as much as possible. Work will therefore be undertaken in order to
examine and address obstacles that prevent countries from solving treaty-related disputes under the MAP. Consideration will also be given to supplementing the existing MAP provisions in tax treaties with a mandatory and binding arbitration provision.”

If the taxpayers are required to produce information of other related parties, such as transactions carried out between different related parties, intangibles of other related parties, among other information that the local taxpayer is not obliged to have in its files by its domestic law, the effectiveness of the MAP would discouraged.

Improving the mechanism of exchange of information between tax authorities would be helpful in these processes.

**Transfer pricing audit**

Paragraph 14 states that “…*regardless of how comprehensive transfer pricing documentation requirements may be, situations will inevitable arise when tax administration wish to obtain information not included in the documentation package*.”

Transfer pricing audits show that the information required by the tax authorities depends to a great extent on the characteristics of the case at hand. Even if a standardized format is used for documentation purposes, additional information requirements should be expected to take place frequently. The design of the master file and the local file should not result in demanding from the MNCs an over comprehensive documentation package, as it can result in a very high compliance burden which at the same is unlikely it will satisfy the transfer pricing enquiries of the tax authorities regardless of its level of detail.

Paragraph 15 provides that “*It may be often the case that the documents and other information required for a transfer pricing audit will be in the possession of members of the MNE group other than the local affiliate under examination. Often the necessary documents will be located outside the country whose tax administration is conducting the audit.*”

Given the above, OECD is requesting comments regarding the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

From local entities standpoint, relevant difficulties may arise in order to obtain information of other related parties to be provided to local tax administrations conducting an audit process.
In addition, it is very important to consider the obligations established for the taxpayers by its domestic laws, regarding documentation to be held in case of a tax audit. This should also have to be considered for the statute of limitations for the tax authorities in connection with the information they may request from the taxpayers.

Again, if the tax authorities require specific information from a different tax jurisdiction, it should be obtained through a mechanism for exchange of information between tax authorities.

Moreover, there are many subsidiaries from two or more different stockholders, which are not related parties between them; therefore confidentiality issues would arise for that subsidiary if requested by the tax authorities to provide information of their stockholders.

**Master file**

Paragraph 18 provides that “The master file should contain common standardized information relevant for all MNE group members. Its purpose is to elicit a reasonable complete picture of the global business, financial reporting, debt structure, tax situation and the allocation of the MNE’s income, economic activity and tax payments so as to assist tax administrations in evaluating the presence of significant transfer pricing risks. Tax payers should be able to prepare the master file either for the MNE group as a whole or by line of business, depending on which would provide the most relevant transfer pricing information to tax administrations.”

OECD is requesting comments as to whether preparation of the master file should be undertaken on a line of business or entity wide basis, stating that consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries, and that consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

Regarding the aforementioned, it is important to define at a first stage that local entities rarely have access to global information and usually take part of only a line of business or on a specific business or activity within the group. The aforementioned also occurs when a local company is a subsidiary of two or more different unrelated stockholders given that one of the stockholders would not share information to any other unrelated group.
Furthermore, when transactions are carried out between independent parties, it is not possible for an entity to provide the tax authorities, neither it is obliged to have information regarding other transactions carried out by the counterparty with its related parties. This should be considered as an arm’s length behavior that should also be taken into consideration for related party transactions.

In addition, OECD is requesting comments regarding the following:

• Should the country-by-country report be part of the master file or should it be a completely separate document?

• Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

• Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

• Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

• Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?
• Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?"

The country-by-country report should be prepared on an entity by entity basis, since it would show the information required by local tax administrations without generating additional costs to taxpayers. This is, the information of the template should be only applicable for the local taxpayer with respect to its related party transactions.

Information from other countries and nonresidents should be requested or exchanged between tax authorities through an information exchange mechanism, informing the involved taxpayers that such request is in process. Once a request from a tax authority to the authority from the other country is in process, the local subsidiaries should collaborate with the local tax authorities in connection with the information and documentation it may be required at that local level.

Materiality

Paragraph 29 establishes that “Not all transactions that occur between associated enterprises are sufficiently material to require full documentation. Obviously, tax administrations have an interest in seeing the most important information while at the same time they also have an interest in seeing that MNE’s are not so overwhelmed with compliance demands that they fail to consider and document the most important items. Thus, transfer pricing documentation requirements should include specific materiality thresholds that take into account the size and nature of the local economy, the importance of the MNE group in that economy, and the size and nature of local operating entities, in addition to the overall size and nature of the MNE group.”

OECD is requesting comments as to whether any more specific guideline or materiality could be provided and what form such materiality standards could be taken.

Certainly, a definition of materiality would derive in subjectivity regarding what is considered or not as material.
Although, there are some non-recurrent operations that are also non-significant, which may be considered as immaterial. This should be included in the contemporaneous transfer pricing documentation but the full analysis as determining method, comparable, among other information, should be optional.

**Frequency of documentation updates**

Paragraph 34 establishes that “In order to simplify compliance burdens on taxpayers, tax administrations may determine, as long as the operating conditions remain unchanged, that the searches in databases for comparables supporting part of the local file to be updated every 3 years rather than annually. Financial data for the comparables should nonetheless be updated every year in order to apply the arm’s length principle reliably.”

In this regard, OECD is requesting comments regarding reasonable measures that could be taken to simplify the documentation process.

Our comment is that this can only be applied on a case-by-case basis. This, considering that certain industries are quite stable and do not present significant changes every year, and certain industries with an opposite situation showing important changes every year. Other factor to be taken into consideration is whether the functions, assets and risks associated to the transaction under analysis change or remain stable from one year to the other.

**Language**

Paragraph 35 establishes that “The necessity of providing documentation in local language may constitute a complicating factor with respect to transfer pricing compliance to the extent that substantial time and cost may be involved in translating documents. As a general matter the master file should be prepared and submitted to all tax administrations in English. However, transfer pricing documentation should be useful to local country tax administrations seeking to undertake a risk assessment, and therefore at least the local file should likely be prepared in the relevant local language. Where tax administrations believe that translation of relevant parts of the master file is necessary, they should make specific requests for translation and provide sufficient time to make such translation as comfortable a burden as possible.”

OECD is requesting comments regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.
Information to be filed to the local tax authorities is usually mandatory to be filed in the local language, as established in the domestic law. Translations to English language should result in additional costs for MNE’s.

Implementation

Comments are requested by the OECD regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include: The direct local filing of the information by MNE group members subject to tax in the jurisdiction; filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions; some combination of the above.

We consider that information regarding local intercompany transactions should be directly filed before tax authorities, since this would represent simple compliance rules as well as it do not imply additional administrative charge and costs to taxpayers.

A master file may be prepared by the parent company, and if its domestic law requires that taxpayer to file transfer pricing information of all its subsidiaries and its related party transactions, then a master file should be useful for that tax administration. Other tax administrations should request this information from that tax authority considering information exchange provisions.

General comments

The two-tier approach to the transfer pricing documentation of a MNE must be a “second step” preceded by relevant modifications to existing local legislations that are needed to reduce the current differences among basic concepts that usually translate into obstacles for taxpayers to efficiently comply with transfer pricing regulations. Before requesting MNEs’ for more information, it might be more useful to promote a consensus among countries on basic concepts such as the one for “related parties”; otherwise important differences would still exist among jurisdictions that would not permit achieving simplification and documentation effectiveness nor common understanding of facts. Thus, consistency needs to be achieved before suggesting the implementation of a two-tier approach; consistency that will allow and assure both tax administrations and taxpayers that information at hand will be properly interpreted and used. As currently no same or similar rules and concepts exist in every country, it is likely that an effort to produce a master file will not result in the anticipated outcome but will only translate into even more burdensome TP compliance and documentation processes. Important differences that need to be addressed as a “first step” are:
“Related party” definition: When providing information of relevant transactions among members of the same Group, what are the legal entities that would need to be considered, based on which local regulations / definitions? Even within one country taxpayers find differences between what should be understood for “related parties” for transfer pricing, accounting principles and even for custom purposes. A “joint venture” might be a Related Party for Country A; whereas it might be deemed as a third party for Country B.

Arbitration Process: An appropriate arbitration process on a global basis needs to be available for taxpayers; one that considers not only those countries with which a given country has entered into tax treaties to avoid double taxation but also any other with which the taxpayer has conducted intercompany transactions and has access to the master file. From a taxpayer standpoint, providing access to global documentation and/or tax positions of the MNEs to all tax administrations in which the MNEs conducts its business operations and considering the tax collection required by all tax administrations will most probably imply a significant increase in double taxation of the MNEs. On this regard, it is also critical to consider the appropriate use of said information by the tax authorities, which is a baseline assumption of the document but might not necessarily be the reality in all countries or by all tax administrations.

International Norms of Financial Information: Currently there are different norms of financial information been used by each country. There has also been an attempt to unify the reporting norms by using the IFRS. However, current documentation regulations require taxpayers to conduct economic analyses based on the locally accepted norms of financial information, which in most cases, differ from one country to the other. Another fact that the document does not consider is the financial information used to conduct the analyses. Will it be the generally accepted accounting norms used in the host country of the parent company? Will it be accepted by each local tax authority?

Language: A similar situation occurs with the language in which the global transfer pricing documentation must be written. Currently, some countries only accept documentation produced in local language. Therefore, in order for the documentation to be produced by each MNEs to be directly applicable to all tax jurisdictions, tax administrations must also agree to a given language (English is suggested in the proposed draft). Otherwise, global documentation would need to be translated into each and every language applicable in the tax jurisdictions in which the taxpayer conducts its business operations (and/or intercompany transactions).
• **Thresholds:** There are significant inconsistencies in the intercompany transactions that are required to be documented in each tax jurisdiction. In some jurisdictions all intercompany transactions (domestic and foreign) must be documented notwithstanding the amount of the intercompany transaction. In other countries either because the documentation requirement only applies to intercompany transactions exceeding certain amounts or given that the documentation provides penalty protection and the penalties are only imposed when adjustment exceeds specific amounts, transactions that do not exceed specific amounts are not necessarily documented. This might imply that not all intercompany transactions are documented in all tax jurisdictions.

• **Deadlines:** Different deadlines to meet local transfer pricing requirements need to be considered as well, moreover when it seems to be intended for taxpayers to provide global documentation to all tax authorities by the time annual tax returns are filed in each tax jurisdiction.

It might be reasonably concluded that the lack of consistency in the above mentioned concepts (which is not carefully discussed in the document) will not allow tax administrations to clearly understand how global documentation and available information relates to local taxpayer’s activity.

* * * * *

Should you have any question or comment in connection with the foregoing, please do not hesitate to contact us.

Sincerely,

IFA Grupo Mexicano A.C.
(International Fiscal Association, Mexican Branch)
Transfer pricing committee
13th February 2014

By email to: TransferPricing@oecd.org

Dear Sir,

**OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting**

IHG welcomes the opportunity to submit comments on the OECD Discussion Draft on Transfer Pricing Documentation and CbC reporting ('The Discussion Draft'). Our area of primary concern and comment relates to the CbC proposals. We also have a number of comments on the finer detail of the broader documentation proposals.

IHG is a global organisation with a broad portfolio of nine hotel brands including InterContinental® Hotels & Resorts, Hotel Indigo®, Crowne Plaza® Hotels & Resorts, Holiday Inn® Hotels and Resorts, Holiday Inn Express®, Staybridge Suites®, Candlewood Suites®, EVEN™ Hotels and HUALUXE™ Hotels & Resorts. IHG franchises, leases, manages or owns over 4,600 hotels and 679,000 guest rooms in nearly 100 countries and territories. Its primary franchise and management business involves providing a package of services and rights to enable third-party hotel owners to deliver hotel services which reflect the standards and character of the IHG brand concerned. The provision of hotel franchise and management services will, in itself, typically require either limited or no IHG presence in the local jurisdiction where the hotel is.

IHG is supportive of the BEPS Action Plan in general, including the Action 13 objectives of improving transparency and information flow for Tax Authorities. We are concerned however that the CbC proposals currently set out in The Discussion Draft reflect a lack of clarity as to the risk assessment purpose for which the information is being gathered. That leads to a consequent lack of focus on what information will most usefully and efficiently serve that purpose. There also appears to be a limited appreciation of the accounting systems aspects and practicalities of compliance. This combination unfortunately means that the proposals in The Discussion Draft would lead to costs and practical problems of compliance which would be wholly disproportionate to the benefits delivered to Tax Authorities in general. We therefore consider that the proposals need amendment to make them simpler and more targeted if the OECD is to address the part of its Action 13 remit which requires it to take into consideration the compliance costs for business.

We set out some general and then more detailed CbC related comments below, and some general comments concerning the broader master file / local file approach, before addressing the specific CbC and broader documentation related questions raised in The Discussion Draft.
General CbC Comments

1. Lack of clarity as to the purpose for which information is being gathered

We believe that discussion and finalisation of the template requirements would be assisted by the provision of a (non-exhaustive) list of some examples of the types of risks which the template is intended to help address. This would provide a clear reference point for assessing to what extent the categories and forms of information which it is currently proposed to include in the template will contribute towards risk assessment, and to what extent they may detract from risk assessment processes by providing large amounts of redundant or non-comparable information which makes it more difficult to see and understand the value chain and key drivers.

2. Materiality and proportionality considerations

A primary difficulty with the current CbC proposals is that they do not take into account any considerations of materiality. They thus impose detailed and onerous reporting requirements whatever the scale or income of the local presence. This aspect is disproportionate when considered in isolation, but also contributes significantly to the scale and nature of the other issues and difficulties discussed below. These materiality aspects are of course relevant to the broader master file and local file documentation proposals set out in The Discussion Draft. Thus paragraphs 26, 29 and 30 recognise the significance of issues of materiality and proportionality but then specifically require them to be ignored for CbC purposes. The absence of materiality considerations in the CbC proposals means that it will be difficult to gain a clear picture of the value chain and key drivers because that picture will be hidden within a large volume of immaterial data.

3. Central records and local records – cost impacts

There seems to be an implicit assumption in the CbC aspects of The Discussion Draft that, just because information may be needed or available somewhere in a global organisation, it will be available centrally. This is false. That false assumption has very significant cost implications.

Accounting and tax return or other information prepared in accordance with local formats and requirements (i.e. the start of a ‘bottom up’ process) is not needed centrally except to the extent it is material to central accounting or management requirements. Correspondingly, such information will not generally be available centrally. Instead information to meet local needs and requirements will typically be serviced by local staff with local knowledge – whether in-house or under outsourcing arrangements.

The CbC requirements will, even in suitably simplified form, require the development of substantial new processes and systems for gathering and analysing information centrally. That is likely to require the development of automated systems and new manual processes at both the centre and in each location (from whatever in-house or outsource provider is currently in place). The CbC information requirements currently suggested are so extensive that it is difficult to assess the potential scale of the associated cost. It is very possible however that the incremental cost could be in the order of a 50% to 100% increase in global tax compliance costs.
The issue previously raised of materiality is extremely relevant here. Where local jurisdictions are immaterial in global terms the relevant information is less likely to already be held centrally. Conversely the incremental cost associated with getting additional information from immaterial jurisdictions is likely to be higher than from material ones – because there are no local economies of scale in terms of administrative support. Furthermore, in practical terms, the effort will be wasted – because the location will probably be immaterial from a Tax Authority perspective also.

A failure to apply normal materiality concepts to CbC requirements will thus result in a large amount of unnecessary cost which will make no contribution to the underlying objectives of Action 13. It would also present a risk that the disproportionate costs associated with small scale or marginal jurisdictions would present a barrier to expansion into new jurisdictions or an added incentive to withdraw from marginal existing jurisdictions.

4. **Entity by entity versus information by jurisdiction**

The Discussion Draft poses alternatives for consideration of either providing entity by entity information (with ‘entity’ deemed to include branches and PEs) or providing information which is consolidated by jurisdiction.

Both of these approaches are likely to require the preparation of new, or reformatted / reorganised, data which is not required for other purposes. The production of data which is consolidated by jurisdiction would be an exceptionally onerous new accounting requirement which would require the building of completely new accounting systems and processes for each jurisdiction concerned. If this were required then the already high cost of CbC would be multiplied several times further. It is not at all clear why it is even suggested – as the entity by entity information currently suggested would not enable the determination of the equivalent information.

The entity by entity approach will – in the absence of materiality thresholds – require the capture and presentation of data for a very large number of entities. It will also require entity work which is not otherwise needed as a matter of course where there is no statutory requirement for the entity data – e.g. in the US. In those cases entity data would only be extracted and put into summarised P&L and Balance Sheet format where there is a particular one-off need to do so for a particular entity; whereas the CbC proposal would create a large scale and recurring need for that.

There is no obvious reason why The Discussion Draft is so prescriptive in setting a precise and uniform basis of presentation. It would, for example, seem most logical, simplest, and cheapest to prescribe or permit as a general rule presentation in whatever is the grouping used for tax return filing purposes in the jurisdiction concerned. If necessary this could be supplemented by specifying special cases where there is a requirement to present entity only data (e.g. where tax returns are prepared on the basis that an entity is not tax resident in any jurisdiction).
5. Comparability and consistency issues

The bottom up entity by entity approach proposed will of course result in data which reflects many different accounting policies and currencies. There will thus not necessarily be any consistency or comparability between individual entries. The total of the data entries will, even if translated to a common currency, normally add up to figures which are materially different from consolidated group figures (e.g. as a result of these GAAP differences, as a result of intra-group dividends, or due to branch data being counted twice in separate contexts).

6. Transfer Pricing for CbC compliance costs

As CbC compliance costs are likely to be very material, clear principles need to be established or confirmed concerning how associated compliance costs should be allocated and borne.

Detailed Comments on CbC template

1. It is noted that what is captured under the caption ‘revenues’ in the template will differ according to the Accounting GAAP followed in the relevant accounts as different GAAPs will have different classification rules concerning what does or does not constitute ‘revenue’ in the context of a particular business. It is however understood from the notes to Annex III that it is these accounts figures which should be picked up (whatever they include or do not include). On that basis the listing of different component items of ‘revenues’ which is given in the Annex III Instructions would appear redundant - ‘revenues’ will be whatever they are for local accounting purposes.

2. Similar issues may arise with respect to other columns of the Annex. Specifying prescriptive rules as to what should or shouldn’t be included in a particular category will effectively require a special purpose tax computation to analyse and adjust accounting data if the accounting categorisation used differs (or potentially might differ) from that prescribed. Such special purpose analyses and adjustments will be very onerous and expensive. Classifications used for the relevant accounting purpose should be followed.

3. The Annex note concerning ‘revenues’ (and by implication other notes where relevant) suggest management accounts as a potential source of information. Management accounting information would not necessarily (or ordinarily) be prepared on an entity basis. It would normally be prepared on whatever functional or market segment basis is most useful for management decision making. For cross-border services that may, for example, allocate revenues to a different jurisdiction to that appropriate for entity accounting or tax purposes. Management accounting information is therefore unlikely to be an appropriate CbC data source.

4. The ‘place of effective management’ may not be known centrally for some companies and may be an unclear concept for branches and PEs. Determining where effective management is can sometimes be a difficult factual question and it may be a time consuming and burdensome ‘manual’ process of central query to establish this for all entities.
5. The ‘Important business activity’ code(s) require review and expansion. They do not, for example, include any code for a business of providing services to third parties.

6. ‘Earnings before income tax’ will of course be a figure which includes all accounting profits or gains and thus not necessarily just those sources for which ‘revenues’ are reported on the template. Different accounting policies can of course also produce different measures of earnings and thus figures which are not comparable to other earnings figures on the template.

7. The income tax column for ‘taxes paid to all other countries’ should presumably include withholding taxes borne on relevant amounts received in year. If so then there seems no need to include a separate withholding tax column.

8. The suggestion that income tax paid should be allocated according to EBIT where an entity is paying tax as a representative member of a group seems to introduce an excessive and unnecessary additional layer of computational requirement. It is also likely to produce distorted and meaningless information – for example, where there are distortions due to exempt dividends or gains (and such exemptions are fundamental mechanisms for preventing multiple taxation of the same profits). Special purpose allocation of tax payments would be unnecessary if the presentation were permitted to follow tax groupings, or to the extent that payments in lieu of taxes such as UK group relief payments were reflected.

9. There is no reason to expect that all entity types in all jurisdictions will have a concept or category which corresponds to ‘stated capital and accumulated earnings’.

10. The note concerning the column for ‘total employee’ expense suggests that that figure should include all non-cash payments or benefits such as employee option schemes. This is a wholly impractical suggestion. Without detailed employee by employee audit there is no way of knowing centrally whether or not the accounts used as source data include, or are required to include, a figure for all such items. There is furthermore no standard or consistent accounting measure or classification for non-cash benefits such as share incentives. Different accounting rules may give different figures or different classifications (e.g. of amounts to equity instead of P&L). The only practical data to include for employee expense is whatever figure is included in the accounting records used as the source for the Annex.

**General comments concerning master file / local file approach**

We are strong supporters of this approach as the right generic approach. We believe however that there are some modifications of detail or approach which would help achieve the objective of providing a more standardised and cost effective approach for both taxpayers and tax authorities.
We agree with the general concept that the master file should contain common standardised information which is relevant for all MNE group members. We also agree with the general approach and content set out in Annex I subject to two points (one concerning what should not be in the master file and one concerning what else might be):

a) In our view the master file should not include any of the information set out under the Annex I heading ‘MNE’s financial and tax position’ other than the consolidated financial statements. All other items (other than the CbC template where we comment separately) concern specific agreements reached with particular tax authorities or concern disputes with particular tax authorities. Whereas there may be issues which are potentially common between those matters and consideration of a comparable issue in a particular jurisdiction, those are issues which have been discussed in the context of the specific jurisdictions and transactions concerned. That may give rise to issues which are specific to that particular relationship or position. It may be, for example, that agreement was reached because, considering the specific case in point, it was preferred to reach an agreement rather than pursue a costly and time consuming dispute and not because there was a meeting of minds.

Inclusion of these jurisdiction specific agreements in the master file would mean that those agreements would potentially set a broader precedent, with tax authorities seeking ‘most favoured nation’ status as represented by agreements reached elsewhere. The negotiation of individual agreements would thus have to take that context into account. That is liable to undermine APA and ruling processes.

We therefore believe that is most appropriate for these items to be included in the relevant local file rather than in the master file.

b) The approach currently suggested is for each local file to include a full and separate functional analysis and transfer pricing analysis for each material category of controlled transactions in which the entity is involved. It will often be the case however that the type of transaction concerned and the relevant functional and transfer pricing analysis will be common across many different entities within the MNE group. Where there is this commonality it seems more efficient and logical for the common aspects of the analysis for entities which have the same business profile to be contained within a sub-section of the master file and then cross referred to in the local file, rather than duplicated in each separate local file. That would provide a significant simplification. It would also provide comfort to tax authorities that a consistent approach was being taken across the MNE rather than a cherry picking approach of whatever method was most favourable in the particular context.

**Comments concerning specific questions raised in The Discussion Draft**

1. *Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template.*

   No. The requirements suggested in The Discussion Draft are already extremely onerous. BEPS Actions need to be addressed and implemented in a manner which is appropriately targeted on the risks concerned and is proportionate to those risks.
2. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

It should be normal practice for tax authorities to share their risk assessment with taxpayers wherever the materiality of the presence of the taxpayer, or of the risks assessed, is likely to require the devotion of significant tax authority resource to considering the taxpayers affairs. That is best practised both from the perspective of testing whether that risk assessment is accurate, and in terms of encouraging a change in taxpayer behaviour if there are behavioural aspects contributing to an assessment as high risk.

3. Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

We see this as a difficult area because, while we recognise that circumstances can arise where tax authorities have a proper interest in obtaining additional information (for the reasons described in The Discussion Document), taxpayers will also have a proper concern with retaining protections available against excessive or intrusive requests. It is essential in this respect that tax is paid because it is due, and not because the enquiry powers of tax authorities are so unconstrained that tax which is not due is paid so as to limit an enquiry process. Against that background the right balance would seem to be guidance measures which emphasise an approach of transparency and cooperation as best practise, supplemented by exchange of information provisions between tax authorities which facilitate the enforcement of reasonable requests.

4. Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

In our view preparation of the master file should be undertaken on whatever basis is best suited to giving a clear and concise understanding of the common background and value drivers necessary for understanding and considering individual local transactions (i.e. so that an individual local file in conjunction with the relevant master files will give a clear picture). We believe that that is most likely to be on a line of business basis (treating overlapping or closely related businesses as one line of business) in conjunction with some mapping to give an understanding of what main entities (or types of entities) and locations do what. What the master file is intended to capture and convey is an understanding of the key elements of the supply and value chains for a particular business. The presentation and communication of that can only be confused if materially different business lines are mixed together, including perhaps business lines which have
no relevance at all to the particular location concerned. The master file for a particular business line should perhaps include basic commentary concerning what other business lines the MNE is involved in, and whether their supply or value chains overlap to any material degree with the business line concerned, but no more than that. If two distinct business lines are carried on in a particular location then two separate master files will of course then be relevant and should be available in accordance with normal processes.

5. Should the country-by-country report be part of the master file or should it be a completely separate document?

In our view this should be a completely separate document. If, as The Discussion Draft currently proposes, entity by entity CbC information is going to need to be prepared irrespective of the scale of those local activities then extremely granular detail will be incorporated for small scale jurisdictions. In some cases this may amount to information concerning a single contract and single employee in a particular jurisdiction or entity. Such information is extremely sensitive and should only be available to tax authorities in general via a separate document which is provided to the parent jurisdiction initially and then made available to other tax authorities under appropriate exchange of information protections.

6. Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top down” approach?

There should be optionality provided for taxpayers to use either a ‘bottom up’ or ‘top down’ approach, subject to a consistent approach being adopted. Taxpayer’s accounting and consolidation systems will be set up in a variety of different ways which meet their existing regulatory and management needs and their particular business fact patterns. Whether a ‘bottom up’ or ‘top down’ approach is more practical will depend on their particular profile. If, for example, the existing set up derives local accounts figures by locally performed extraction and adjustment of figures used for consolidated accounts purposes (i.e. a top down approach in that context) then imposing a ‘bottom up’ approach would require a preliminary centralisation to produce or obtain the starting data at the bottom end. There would then be a need to perform the ‘bottom-up’ approach envisaged.

As set out in the general comments section, whichever approach is taken, material systems change and compliance cost are expected. The proposals currently set out in The Discussion Draft are likely to be particularly onerous in this respect and a cost estimate of a 50% to 100% increase in global tax compliance costs has been given above as an indicator of the scale of the demands suggested. The costs could be substantially higher if additional in country consolidation requirements were imposed — as is suggested as a possibility if there is a move away from entity by entity information. Given the scale and nature of the demands, the preparation of plans and cost estimates for compliance would however itself be a significant task, and thus the figures given should be seen as indicative of broad scale rather than as a calculated costing.
The most significant drivers of cost are firstly the absence of any materiality cut-off; secondly the prescriptive nature of both the broad process and of some of the fine detail (i.e. prescribing ‘bottom up’ and also notes which suggest further analysis and adjustment of local accounting figures may be needed); and thirdly the inclusion of a number of information requirements concerning local substance which may need the creation of wholly new processes for centralised enquiry and information gathering.

7. Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

As indicated in the general comments section, and in comments on earlier questions, the template should not follow either of the routes suggested in the question. A more natural and useful solution would be to follow in country tax return classifications and groupings as the norm while identifying special situations or classes where additional or more detailed information is required. This will better align the requirements with existing processes and requirements rather than imposing a need for new global accounting system set ups. That would not remove costs due to the absence of materiality concepts but would reduce the number of new and otherwise redundant processes.

It is recognised that whether ‘top down’ or ‘bottom up’ approaches are followed then there will be a need to be able to segregate intra-group transactions from third party transactions and make appropriate disclosure in that central filing. There will be cost associated with that – and perhaps material cost – but it is recognised that that is a fundamental of the CbC proposal.

The question suggests that, for ‘top-down’ reporting, that would include a requirement to separate cross-border related party transactions from in-country related party transactions. It is noted that that requirement is not present for the ‘bottom up’ approach suggested in The Discussion Draft. It is not clear why additional requirements should be imposed for a ‘top down’ approach.

As indicated, a requirement for separate individual country consolidations would be a massive additional burden. It would require the creation of many, many new accounting consolidation processes and associated system changes and needs. That would result in a further large multiplying factor in what are already likely to be very costly proposals.
There is no obvious reason why additional source and characterisation of income, and allocation of cost requirements, would be required for a top-down model. These issues are not altered by the direction in which accounting data is collected and sorted. There will for example be an existing need to deal with these issues consistently when using data prepared for consolidated accounting purposes as either the source for local accounts data, or as the basis for local tax accrual estimates included in consolidated accounts.

8. Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

The information required should be consistent with the splits and classifications in the template – i.e. whether following entity by entity approaches, or in-country tax grouping approaches, or aggregated country approaches. If sub-totalling by country is required then that should not be a significant additional burden. That in-country tax payment data should be presented in conjunction with the data in the template concerning foreign taxes directly borne on the same income (i.e. by its nature the template will not capture underlying taxes on dividends but does capture foreign direct taxes on branch income or foreign withholding taxes on receipts). Otherwise a distorted picture of tax borne will be given (although distortion due to the necessary omission of underlying foreign taxes on profits received as dividends is unavoidable).

The template should include withholding taxes borne; as they are a part of those foreign taxes. There is however no obvious reason to show withholding taxes separately from other foreign taxes borne. A requirement to report withholding taxes (whether separately or as part of the main figure for foreign taxes borne) is not expected to impose a significant additional burden provided that an additional CbC split of that withholding tax by jurisdiction is not required (or a split between withholding tax borne on intra-group fees from withholding tax on external fees).

9. Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

It is recognised that reporting of major categories of intra-group payments is likely to be needed if CbC is going to play a useful role in Transfer Pricing risk assessment. As CbC is intended to be a high level risk assessment tool and not a detailed analysis tool, aggregate figures by category should be sufficient. Inclusion of such requirements will require changes to central processes for data analysis and classification, and thus will give rise to costs and preparation lead-times. Those costs may be material but can be understood as being necessary and proportionate. Optionality concerning whether to use a ‘top-down’ or ‘bottom-up’ approach would be a significant factor in ensuring that the costs of this intra-group analysis could be kept at proportionate levels. It should then be possible to source the data by amending tagging within existing accounting systems rather than there being a need for a ‘new build’ approach.
10. Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

A tick-box type approach to identify activity types carried on should not result in a significant burden. It is noted however that the business codes in The Discussion Draft seem quite limited – including no code for an external service business. Measures of economic activity required should be limited to basic data concerning employee numbers and employee costs (using the figures extracted from the relevant accounting source). Additional information is not likely to be relevant as a standard matter across different business models – and in many cases could only be obtained centrally via a high cost, resource intensive, central enquiry process which would be disproportionate if required on a universal rather than a targeted basis. As an example of the former point, information concerning tangible fixed assets may be pretty irrelevant for a service business, but relevant for a manufacturing business.

11. Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

Paragraph 29 of The Discussion Draft makes useful and relevant comments concerning materiality issues. These principles should be applied more broadly, in particular when considering the scope of CbC requirements, but also when considering what constitutes a SME in the context of paragraph 30. Thus it is local materiality criteria which should be relevant – and global criteria should not be taken into account to the extent that they have no local relevance. The approach suggested for SME’s in paragraph 30 is therefore appropriate but should apply by reference to local scale and not impose more onerous requirements as a result of overseas factors.

It is noted that the Annex II requirements for the local file are extremely extensive and would require the devotion of significant resource and cost. The approach we suggest under our general comments of putting generic analysis of similar entities in the master file would help to limit this cost.

It may also be useful to give some additional clarification concerning the phrase ‘material category of controlled transactions’ in Annex II. That should include comment that some controlled transactions may not fall in any ‘material category of controlled transaction’ and that a simplified approach may be appropriate in that context. For example it seems appropriate that small scale peripheral support functions of the type which may either be dealt with in-house or out-sourced should be dealt with simply, with the functional analysis limited to little more than a supported description in those terms.
12. Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

The suggestion in paragraph 34 is helpful. The requirement for annual updating of financial data for comparables should be caveated to allow less frequent updating where that is appropriate in the context of the nature of the business, tested item and comparables. For example, where long term contracts are concerned (both externally and internally), annual update in years following an internal contract signing – which is consistent with the comparables prevailing at that time – is excessive.

13. Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

The approach suggested to translation is broadly reasonable but will result in translation costs for local files whether or not they are needed for the purpose of audit. There are links here to considerations of materiality and proportionality elsewhere (e.g. tax authorities are likely to devote resource to auditing less material entities far less frequently). It should be acceptable – either generally or for less material entities – for local files to also be prepared and maintained in English and then only translated when needed (e.g. on provision of suitable notice of need by local tax authorities).

14. Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

The two main measures are local tax authority controls, which should, as best practise, be supported by suitable local sanction (whether as an employment matter or as legal matter), and exchange of information protections for international data. The latter requires careful consideration as to what international information should be available to Tax Authorities generally and directly via the master file, and what only on request from the parent jurisdiction under exchange of information provisions.

15. Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above

For the reasons given above CbC information should be filed with the parent company jurisdiction and available under treaty information exchange provisions. There may be similar sensitivities for certain business models with respect to master file information and
so a similar approach could be considered more broadly – but, as that information may be fundamental to an understanding of the appropriateness of the transfer pricing approach adopted locally, there is likely to be a need to either have the information directly available or have more flexible routes for ensuring it is available on request.

There are some subsidiary points to consider in this respect:

a. The documents should not form part of the tax return. That is particularly pertinent to maintaining the confidentiality the OECD proposes – given that in some jurisdictions tax returns are public documents. For the CbC document that is also essential from the perspective of comparative lead-time issues and associated penalty provisions. The CbC document requires global information and complex global processes. A correspondingly lengthy lead time should be provided for its preparation – and not whatever is the shortest period set globally for tax return filing; and

b. Consideration should be given to the standard of accuracy required for a CbC document so that it is clear that the processes and materiality levels to be applied in its preparation can be set at levels which are appropriate to its function as a high level risk assessment tool and not at the greater standards of accuracy appropriate for primary tax return filings. This would also help address issues of cost.

16. Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

For the reasons given in the General Comments section these items should not form part of the master file.

We hope that the above comments are helpful. We would be happy to provide additional explanation and comment whether within the forum of the proposed public consultation or otherwise.

Yours faithfully,

C.P. Garwood
Head of Group Tax
21 February 2014

By email to: TransferPricing@oecd.org

Dear Sirs

Consultation on draft OECD “Transfer pricing documentation and CbC reporting”

We are pleased to provide in the attached paper our comments on the above consultation document dated 30 January 2014.

IMI plc is a specialist engineering company that designs, manufactures and services highly engineered products which control the precise movement of fluids. Its innovative technologies, built around valves and actuators, enable vital processes to operate safely, cleanly, efficiently and cost effectively. The Group works with industrial customers across a range of high growth sectors, including energy, transportation and infrastructure. IMI employs over 12,000 people, has manufacturing facilities in more than 20 countries worldwide and operates a global service network. The Company is listed on the London Stock Exchange and is a member of the FTSE100. Further information is available at www.imiplc.com.

The attached comments follow the order of questions in the OECD paper and are aimed at improving the practical working of the proposed initiatives in accordance with their originally stated objectives, as well as enhancing the clarity of the information being collected and minimising the burdens on business. We understand the need for transparency in the global dealings by multinational companies and the process of fairness in the allocations of taxes around the world under arm's length principles, whilst at the same time ensuring that business flourishes and is not overburdened. Accordingly, we largely support the OECD proposals on simplifying transfer pricing documentation requirements but have significant reservations on the detail requested and practical costs of the extent of CbC reporting envisaged by the draft document.

In summary:

- On balance, IMI supports a “bottoms-up” collection of the information, provided this is closely tied to the local statutory accounts, which is most relevant to the local tax authorities;
- There will be costs to IMI in establishing the systems to capture this information;
- The CbCR should use an entity basis and not local country consolidations as in many cases the legal corporate structure is different;
- Keep taxes as one figure – this risk assessment is presumably about the level of taxes paid, not where they are paid;
- Reporting intra-group payments of royalties, interest and service fees is practically difficult for many reasons and is misguided as any one country does not need to know for its risk assessment such payments between another two countries;
- A high level of materiality should be set for requiring the production of the CbCR and for the entities to be included.
We would therefore strongly urge the OECD to seek to collect “less for now”, but in a well-targeted manner, through the CbC reporting, and then review the information and its uses within 2-3 years to consider whether it has met its desired objectives and if the collection of further data is either required or appropriate. This progressive and measured approach will ensure that the OECD recommendations do deliver accurate tax risk assessment and have the support of business and governments. There are undoubtedly some tax authorities that would like to seek more information without fully understanding the implications, and this should be restrained at the moment in the interests of understanding the significance of the initial round of data collection.

We would be pleased to discuss any of the attached comments in further detail.

Yours faithfully

[Signature]

Douglas Hurt
Finance Director
This document sets out IMI plc’s comments on the specific questions raised in the Public Consultation on OECD: DISCUSSION DRAFT ON TRANSFER PRICING DOCUMENTATION AND CbC REPORTING dated 30 January 2014.

1. Should work on BEPS Action 13 include development of additional standard forms and questionnaires beyond the country-by-country reporting template.

Not if this represents information additional to that available locally through existing local country reporting and documentation requirements. Local governments obtain local taxpayer information through their own country tax returns and enquiries. The difference with CBCR is that this reports multi-country data and should be used sparingly to not compromise commercial confidentiality, drive burdensome reporting processes, and generate misleading information. There is already a considerable amount of information included in the planned CBCR approach which appears excessive for the needs of a local risk assessment.

a. In what circumstances might it be appropriate for tax authorities to share their risk assessment with taxpayers.

In all circumstances sharing risk assessments would foster better relationships and embrace transparency by tax authorities in a similar manner to taxpayers. There is often a risk that information may have been misinterpreted and by sharing with the taxpayer such mistakes can be corrected. In the UK, HMRC shares such risk assessments with the taxpayer which has worked well. Also taxpayers sometimes do not understand the purpose of any enquiry and if supported by clearly addressing a fairly judged tax risk then this enhances cooperation by taxpayers.

2. What is the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

The master file should be available to all associated enterprises, subject to later comments on relevance, materiality and confidentiality. Further information powers should be secured through treaty exchange of information procedures.

Whether or not the master file is shared should however depend on the relevance of its content. If a Group is operated along a number of distinct Business Divisions with limited cross divisional intercompany activity, it may be more appropriate to prepare a Master File along those business lines (as discussed below). This will avoid the need to share information that is irrelevant to the local risk analysis and avoid confusion in trying to make inappropriate cross-divisional comparisons.

3. Should preparation of the master file be undertaken on a line of business or entity wide basis? Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.
There should be flexibility in terms of the content of the Master File so that it can be prepared according to how the taxpayer runs its business. For example, if a Group of companies is operated on a Divisional basis, it may be appropriate to have Divisional Master Files so as not to confuse with information that is irrelevant to a particular Division. In general, business is far more complex globally than may affect any particular country and so there must be flexibility to limit the Master File data provided to a particular country according to the relevant business. Therefore, it is considered important that the Master File may be divided up into various files with targeted relevance. The appropriate Master files for a particular company, coupled with its local file should form the necessary transfer pricing documentation.

Governments should be appraised that the Master Files are intended to support the local arm’s length pricing and not the CBCR data.

4. In connection with country-by-country reporting:

a) Should the country-by-country report be part of the master file or should it be a completely separate document?

The CBCR should not form part of the master file. The CBCR should stand alone for specific request by a tax authority. The transfer pricing documentation is intended to support intercompany pricing, whereas the CBCR discloses the overall results of the taxpayer globally and has no direct link with the transfer pricing documentation.

b) Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries?

The compilation of the CBCR should be left as flexible as possible to enable companies to adopt a bottom up or top down approach (or a combination of both) provided there is clarity and consistency over how it is completed.

The approach adopted will very much depend on the reporting systems of each taxpayer and the preference will likely vary from taxpayer to taxpayer. IMI could, within reason, manage both approaches but, if a top down approach is used, the taxpayer should not be required to automatically provide a local GAAP reconciliation or disclosure of the group’s consolidated workpapers to every jurisdiction, without a proven reasonable line of enquiry.

On balance IMI supports a “bottom-up” approach as this more readily ties into local statutory accounts under local GAAP (from which tax returns are prepared) and removes extensive reconciliation to information reported for preparation of the IFRS based consolidated accounts. However, this is subject to the CBCR being amended as discussed later to require information that is readily obtainable from the statutory accounts without significant additional adjustments. We are assuming that the proposed timescale for completing the CBCR template will hold.
c) What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the "bottom-up" or "top-down" approach?

In a top down approach, it may be possible to leverage off group reporting systems where results are consolidated at a Group level on an IFRS basis. However the systems were not designed with CBC reporting in mind and there would need to be a review and reconfiguration where appropriate to ensure fit for this additional purpose. There would undoubtedly be additional costs to achieve this and in assuring the country data was correct.

From a bottom up perspective, typically groups do not collect the local statutory accounts data in a consolidated format and so there would be additional costs in developing a system to gather the required information by entity in a consistent manner. Additional resources would be required to collate and report the required information and there would need to be sufficient timing after the group’s year end to report the CBCR data.

The administrative burdens of either approach would appear quite significant, possibly more so with bottom up reporting (although the latter may mitigate questions at a later stage).

In summary there should be an element of flexibility to allow a bottom up or top down approach depending on what best suits the business.

d) Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the "bottom-up" approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country.

Whilst many groups, such as IMI, prepare consolidated accounts, they do not necessarily perform local country consolidations and the systems may not be set up to do so. In the rare exceptions that local consolidated accounts are required they are generally prepared on a local GAAP basis outside of the IFRS based Group reporting systems. In terms of the bottom up approach, without standard systems across businesses for local GAAP reporting, the production of consolidated data would be extremely costly. At best a combination set of accounts may be possible, but of limited merit for the expense required.

In summary the CBCR should be prepared on an entity basis, aligning to the taxable entity in each country. Combining entities from different business lines would potentially undermine the usefulness of any information the report is intended to convey.
e) Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers?

Yes. Please see the responses above.

f) What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

The CBCR exercise must be driven by local GAAP tying back to the Profits before Tax in the statutory accounts which is typically the starting point on a tax return to taxable income locally. In connection with joint ventures and non-company legal forms further guidance may be required but the default should be local GAAP.

g) Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?

Firstly, any analysis should be on an entity basis in order to tie into a company’s local statutory accounts. The most natural figure to use would likely be the tax paid which should tie into the cash flow in a company’s accounts where available. Further analysis may be required from the local entity to establish the split between local and foreign taxes.

It should however be noted that there can be year on year distortions to cash tax paid for a number of reasons (e.g. one off items outside the ordinary course of business, basis for which payments on account are made etc).

It may be more appropriate to use the tax due figure (assumed to represent the tax liability per the tax return) but this figure is not readily reported in the accounts which would mean further effort in extracting the relevant data across multiple jurisdictions.

h) Should the country-by-country template require the reporting of withholding tax paid?

Not separately to taxes paid. A company’s accounting will capture all taxes paid by an entity. Withholding taxes typically represent a tax borne by the recipient, who may then be able to credit the withholding tax against the local taxation on the associated income stream. However, more often than not, third party agreements have ‘gross-up’ clauses for withholding taxes due to difficulties in recovering them, and so this economically throws the withholding tax cost back onto the payer. As it is also simpler for the payer to record the withholding taxes paid, it would be recommended to leave the withholding tax as part of the tax paid by the company actually paying it to the tax authority.

i) Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

This would not be too complex if reported by the payer of the withholding tax. Where we suffer withholding taxes on receipts then this is typically only recognised in the calculation of the remaining taxes to be paid in the local tax returns at a later
date.

j) Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail?

No. This is not readily obtainable in a consolidated format and significant resources would be required to prepare globally. Without being audited, for which considerable expense would be incurred, the data would be at risk of inaccuracy.

In any event the local transfer pricing file for a particular entity should contain details of its cross border transactions with associated enterprises.

k) Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

Yes. These amounts are not centrally reported nor do they appear in statutory accounts. New reporting codes and processing systems would need to be established to extract this information on a paid basis. We recommend that these last 6 columns should be removed from the CBCR template.

l) Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction?

We consider that this is helpful to explain the important business activities undertaken, provided that a simple set of coding, with clear descriptions and guidance, is used as proposed in the draft CBCR template.

m) Are there any features of specialist sectors that would need to be accommodated in such an approach?

As a diversified engineering group, we feel that the main sectors are covered.

n) Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers?

Not significant

o) What other measures of economic activity should be reported?

We consider that ‘tangible assets’ should be expanded to include acquired intangible assets. We assume that “Stated Capital & Accumulated Earnings” is essentially shareholder funds, although this does require better definition. The balancing figure would therefore seem to be cash and cash equivalents. Is this the intention? We are uncertain how much this part balance sheet analysis brings to the risk analysis. It certainly requires better definition.

p) Any other comments?

• If the Group does not prepare consolidated accounts on a country basis, is it clear that the Country total can simply be an aggregation of the entities disclosed as
opposed to consolidation? Where different functional accounting currencies are used in entities in the same jurisdiction, the totals will not of course be meaningful.

- To ease the compliance burden we recommend that the total employee expense should simply be extracted from the information that is contained in the financial statements (as opposed to total expense including all non-cash payments or benefits such as employee option schemes)

- Paragraph 21 of the Discussion Draft states that the information in the CBCR template would not constitute conclusive evidence that transfer prices are not appropriate. It is our view that the information in the CBCR should not be used to draw conclusions as to the appropriateness or otherwise of transfer prices but rather it is a risk tool in conjunction with other sources of information such as the transfer pricing documentation.

- Standardisation of the approach across OECD member states in terms of their domestic approach would be helpful

- The CBCR should only be available to OECD member states

5. **Could any more specific guideline on materiality be provided and what form could such materiality standards take?**

Yes there should be considerably more guidance on materiality. In particular, the following points are important:

- There should be an overall revenue financial threshold in a country before these transfer pricing documentation requirements are required.
- There should be an overall group revenue requirement before a group needs to produce a CBC report.
- Furthermore, the individual companies on the CBC report should only be included as a separate line where their individual revenues exceed a certain financial level.

6. **Could reasonable measures be taken to simplify the documentation process.**

a) **Is the suggestion in paragraph 34 helpful?**

Yes. However, it should go further to discuss the ability to use database searches across geographical regions, rather than countries where either the sample size is too small to be significantly reliable or where the function operates on a global basis such that country comparisons are irrelevant or where the financial scale of the intercompany transactions is below a certain threshold.

b) **Does it raise issues regarding consistent application of the most appropriate transfer pricing method?**

No. If a transfer pricing method is to change in such a period then a more frequent comparable study may be required.
7. What is the most appropriate approach to translation requirements, considering the need of both taxpayers and governments?

The CBCR and master files should be documented in the language of the parent company’s jurisdiction. It should be then up to the local governments to translate that file as required. Local governments already will have the locally reported data on the local tax returns, local transfer pricing file (normally in local language) and local accounting and source information. Further translation of other non-local documents should be at the cost of the local tax authority, unless the taxpayer decides otherwise.

8. What measures can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

Confidentiality can apply in two areas: internal and external. There may be elements of the Master File that a taxpayer would not want to share with its local businesses which might include detailed cost accounting data, salary information, etc. In this respect there may need to be a means of facilitating the foreign party liaising directly with the local tax authority. With regard to external confidentiality we would expect the tax authority to use utmost care to protect such. It may be appropriate in certain cases to have some material marked as confidential which may only be viewed by a tax authority and not removed except in critical circumstances for an assessment. The taxpayers should be entitled to cite commercial confidentiality reasons for ‘gaps’ in the transfer pricing documentation in first production to tax authorities. This information only later being provided where the tax authority have specific transfer pricing concerns.

9. What is the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

a) The direct local filing of the information by MNE group members subject to tax in the jurisdiction;

In many cases this might be irrelevant, excessively and unnecessarily supplement existing transfer pricing filing requirements and create significant administrative burden (depending on the level of standardisation of reporting). It is therefore considered that this approach is inappropriate.

b) Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;

This is our recommended approach, with the option to request it through the taxpayer in the first instance.

c) Some combination of the above.

Possibly where treaty information exchange is impractical. However, the CBCR information should only be shared in the format specified by the parent company’s tax jurisdiction’s rules.
10. *Should reporting of APAs, other rulings and MAP cases be required as part of the master file.*

Not mandatorily. This should be at the discretion of the taxpayer as a private arrangement between the country and taxpayer.
February 23, 2014

Transfer Pricing Documentation and Country-by-Country Reporting
Comments by The Insurance Company Working Group on BEPS

I. Introduction and Summary of Comments

These comments are being submitted to the OECD by the Insurance Working Group on Base Erosion and Profit Shifting (BEPS), which consists of insurance companies conducting international business, in response to the OECD’s Discussion Draft on Transfer Pricing Documentation and CbC Reporting (30 January 2014). The Discussion Draft consists of a proposed new text of Chapter V (Documentation) of the OECD Transfer Pricing Guidelines, including a model template for country-by-country (CbC) reporting. These comments respond to the OECD’s requests for comments on the Discussion Draft, focusing on issues relevant to insurance companies.

Like many other financial services companies, insurance companies have unique characteristics that make country-by-country reporting challenging for both the industry and tax administrators. The economic and business characteristics of insurance companies are very different from industrial and other companies. Insurance companies accept premiums from customers and invest those premiums in assets that ensure that the company’s financial commitments to its customers can be met over the long term. Insurance companies are heavily regulated, but regulation differs from jurisdiction to jurisdiction, meaning that required reserves and capital necessary to be maintained by the company to meet obligations will differ from country to country. Insurance companies, in order to maximize efficient use of reserves and capital, will reinsure and thus pool risks to related and unrelated parties, oftentimes in different jurisdictions.

Reinsurance is a critical element of the insurance business model, is priced using the arm’s length standard, and is necessary to diversify risk, protect a company’s capital position, and increase its capacity to take on additional risk. From a tax perspective, related-party reinsurance is a recognized element of the business. However, the type of high-level data gathering proposed by the Discussion Draft could easily give tax administrations a distorted tax picture unless these common non-tax-driven insurance industry transactions are well understood.

Regulators, as well as policyholders, demand that capital is in place to support insurance obligations. As a result, location of capital is an important indicator of where economic activities occur and value is created. A high-level risk assessment needs to take into account the true factors relating to where those economic activities occur, and not be distorted by false or irrelevant indicators.
Business and regulatory constraints also mean that insurance companies operate in branch form more often than most other companies, but it may be difficult and impractical to allocate capital to a branch or track intracompany transactions.

These and other characteristics of insurance companies make it particularly difficult to craft a “one size fits all” country-by-country template that accurately and clearly represents the economics of the insurance business, as well as providing tax authorities with a tool to perform a high-level risk assessment. A template that might be useful for assessing risk for non-insurance companies would provide a tax administration with a very misleading picture of an insurance company.

For the reasons discussed below, we believe the draft template, if finalized and adopted by participating countries, would create just such a distorted picture for tax administrators. One option would be to create a separate template tailored to insurance and other financial services companies, but we fear that tailoring the template for particular industries, or adding more required fields and columns to the current draft template, would complicate the risk assessment platform for both taxpayers and tax administrators. An alternative approach, which is incorporated into our recommendations, is to streamline the template, ensuring that the template seeks the data, and only the data, required to undertake a high-level risk assessment, while permitting as much flexibility as possible for a company to most accurately provide its data points on a consistent basis.

Our main comments on the Discussion Draft may be summarized as follows:

- It is important to preserve flexibility with respect to the methods used by MNE groups to compile and report required information, bearing in mind that new reporting requirements involve a significant compliance burden on taxpayers and that the purpose of the CbC reporting template is to enable tax authorities to undertake a high-level transfer pricing risk assessment.

- The draft CbC reporting template is overly broad, requesting various types of information that are not necessary for the purposes of a high-level transfer pricing risk assessment. From an insurance industry perspective, some of the categories of data requested in the draft template will not provide an accurate assessment of a company’s business or tax situation. Stated capital and data on tangible assets are examples of data points that would be inaccurate or misleading if provided by an insurance company. Indeed, the number of employees in a country could be misleading, since some companies sell products using an employee agent force while other companies in the same MNE group may use independent agents to sell their products. Again, allowing maximum flexibility for companies to consistently provide information that best reflects the workings of their business is paramount. The information provided should be sufficient as long as the MNE group provides it on a consistent basis with respect to the group.
• The CbC template should be separate from the Master File and should be filed only with the tax authorities of the home country of the MNE group’s parent company. The template can then be shared with other countries under tax information exchange procedures. This will protect the confidentiality of the information, as intended by the member governments of the OECD and G20.

II. Comments on the Discussion Draft

1. General Comments

The Discussion Draft requests comments as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the CbC reporting template. We see no benefit in developing additional standard forms or questionnaires above and beyond the CbC reporting template. It is possible in some cases that circumstances unique to the insurance industry may require providing information to the taxing authority that would not be useful coming from other MNEs, but such information should be provided on a voluntary basis in the “Additional information” section of the template or in the audit context, not as part of required information for the risk assessment process. As noted above, the reporting template should permit as much flexibility as possible for a company to most accurately provide its data points on a consistent basis.

2. Contents of the Master File

The Discussion Draft sets forth a two-tiered approach to transfer pricing documentation, “consisting of (i) a master file containing standardized information relevant for all MNE group members, and (ii) a local file referring specifically to material transactions of the local taxpayer.” The contents of the Master File are listed in Annex I of the Discussion Draft. The list requires reporting of group-wide information concerning the operations of each of the group’s major business lines, as well as information regarding the ownership and use of intangibles, the group’s financing arrangements, consolidated financial statements, and information on transfer pricing policies, rulings, agreements, and any pending or recently resolved Mutual Agreement Procedure cases. In addition, the country-by-country reporting template in Annex III is listed as a component of the Master File. The Master File is intended to be given to the tax authorities in each country where the group files a tax return, for the purpose of transfer pricing risk assessment.

We have the following comments regarding the Master File:

First, MNEs should not be required to include information on advance pricing agreements, transfer pricing rulings, or MAP proceedings. This information is not related to the MNE group as a whole, but rather relates to taxation of a particular entity in a particular country regarding a particular issue. It would not appear to be relevant or necessary to a transfer pricing risk
assessment by a different country’s tax authorities, who are likely to be looking at a different entity or entities. Such information is not “relevant for all MNE group members” as the Discussion Draft states in paragraph 18 as the standard for information in the Master File.

Second, the Discussion Draft requests comment as to whether preparation of the Master File should be undertaken on a line of business or group-wide basis. Keeping in mind that the Master File would contain standardized information for all MNE members, and therefore covers the entire world, providing information in the Master File on a line of business basis may be consistent with the corporate structure of some MNEs, in which each business line is ostensibly separate, while for others it would be a challenge to break apart lines of business that are commingled and operated out of the same legal entities.

Third, we would prefer the CbC template to be separate from the Master File. This would enable the Master File and Local File to be provided (if required under local law) directly to tax authorities in countries other than the home country of the parent company of an MNE group, without putting at risk the protection of confidentiality regarding information in the CbC template that is afforded by filing the template only in the parent company’s home jurisdiction (from whence it can be provided to other countries under tax information exchange relationships).

Fourth, the proposed requirement of reporting the title and country location of each of the 25 most highly compensated employees in each business line is problematic, due to the sensitivity of the information both externally and internally within the group. This information does not seem necessary for a transfer pricing risk assessment and therefore should not be required.

Finally, we recommend that the Master File require less information regarding routine related-party services provided among group members. Routine services should only require a relatively short description and explanation of the transfer pricing method. Similarly, to the extent that intangibles are not a major value-driver for an insurance group, the information required for the Master File in this regard should be limited accordingly.

3. **CbC template: entity-by-entity vs. country-by-country**

The country-by-country reporting template should provide for information on a per-country basis, whether the information is derived by aggregating separate entities' data or by using consolidated financial information. Those companies that want to display entity data rather than country aggregate data could do so as is provided for in the draft template. Some MNE groups (including some of the Working Group members) have thousands of legal entities in the group. For financial services MNEs, the use of many separate entities is partly due to the fact that some, but not all, of the groups’ entities and activities are regulated by local governments. Requiring a separate row in the template for each entity could make the template unwieldy and burdensome for both taxpayers and tax authorities.
In addition, significant difficulties could arise in reporting per-entity information for permanent establishments that are Constituent Entities as defined in the General Instructions for Annex III in the Discussion Draft. This is discussed further below.

Since the purpose of the template is to provide tax authorities with global country-by-country information on the reporting MNE group for a high-level risk assessment, it does not seem necessary for entity-by-entity reporting to be required in the template. Specific per-entity information will be provided to tax authorities in the Local File.

In all cases, we recommend that the reporting MNE be given the flexibility to use either consolidated per-country information or aggregated per-country information from the relevant Constituent Entities, or a combined approach involving the aggregation of unconsolidated entities’ information with a consolidated number.

4. **CbC template: bottom-up vs. top-down approach**

MNE groups should be permitted to consistently report per-country numbers in the template using either a bottom-up approach based on aggregation of information in the relevant Constituent Entities’ financial statements (as described in the Specific Instructions for Annex III of the Discussion Draft, under the “Revenues” heading) or a top-down approach involving allocation of the group’s global consolidated financial information to individual countries. An explanation of the method chosen can be required to be provided in the “Additional information” section of the template, with MNE groups required to choose one method and apply it consistently.

As noted above, the template is a high-level risk assessment tool; therefore, it should be adequate for tax authorities to receive per-country information in the template that is computed on any consistent and reasonable basis, provided that an explanation of the computation method is also provided to the tax authorities in the template.

5. **CbC template: materiality threshold**

Paragraph 12 of the Discussion Draft states that it is “important for countries to keep documentation requirements reasonable and focused on material transactions in order to ensure mindful compliance on the most important matters.” We fully agree with this concept. A high-level risk assessment tool such as the CbC template should not require the reporting of non-material information.

Paragraph 29 of the Discussion Draft recognizes the need for a materiality threshold, but does not recommend a particular threshold for use in all countries. Rather, the paragraph indicates that materiality thresholds should take into account the size and nature of the local economy and the size and nature of local operating entities in addition to the overall size and nature of
the MNE group. While different thresholds might be appropriate for different countries in the case of information reported in the Local File, we believe that a common and specific materiality threshold is needed for the information in the Master File and the CbC template.

We suggest the following approach: provided that the CbC template reflects at least 90% of the MNE group’s global total of a key measure (e.g., revenue or perhaps another measure), the group’s activity and Constituent Entities in a particular country should be considered immaterial and non-reportable if the group’s revenue (or other measure) in that country is less than 1% of the group’s global total of that measure. An appropriate exclusion also should be provided for entities in the group that are immaterial.

6. **CbC template: scope of requested information**

The template should not include information on the following:

- Place of effective management of Constituent Entities
- Stated capital and accumulated earnings
- Total employee expense
- Tangible assets (or other types of assets)
- Royalties, interest, or service fees paid to or received from Constituent Entities

None of the items listed above are identified in the OECD Action Plan on BEPS, which calls for country-by-country reporting of “income, economic activity, and taxes paid among countries.” The listed items do not seem necessary for a high-level transfer pricing risk assessment and, in the case of insurance companies, will provide an inaccurate picture of where economic activity is actually taking place. The remaining attributes in the draft CbC template would provide tax authorities a basis on which to determine whether further inquiry is needed to evaluate the taxpayer’s transfer pricing compliance.

Specifically, information regarding economic activity of the reporting MNE group in each country can be represented for purposes of this high-level template with the "important business activity codes" and the number of employees. The place of effective management is not always easy to determine for an entity in an MNE group, and a representation in the CbC template for each Constituent Entity could have repercussions beyond the transfer pricing risk assessment that the template is intended to facilitate. In the case of insurance companies specifically, this concept can also have meaning in insurance regulatory law with very different connotations. Reporting on this template could imply a regulatory presence, which could result in criminal sanctions if not previously authorized by the regulator.

Information on stated capital, accumulated earnings, total employee expense, assets, and related-party payments of royalties, interest, and service fees can all be obtained for relevant entities in the Local File, but do not on their own help a tax authority try to make sense of how the local numbers tie into the company’s global numbers.
Determining total employee expense would involve valuing the employer’s obligations with respect to pensions and other long-term remuneration, including employees’ equity-based compensation rights. Reporting practices in this regard vary between countries for the purposes of the statutory accounts of Constituent Entities.

The reporting of stated capital, for an insurance group, would not be meaningful for the purposes of risk assessment. As noted in paragraphs 15 and 16 of the OECD Report on the Attribution of Profits to Permanent Establishments (Part IV), the term “capital” for an insurance company is multifaceted, referring alternatively to different measures of capital both within a particular country and between different countries. In addition, reporting capital on a per-country basis would also be particularly problematic for the insurance industry because insurance companies often maintain foreign branches which do not have their own stated capital, but rather are supported by the capital of the entity as a whole. We recommend that the stated capital column be deleted from the template, and recommend that insurance groups can report information regarding their capital, as appropriately defined by them, or their financial assets more generally, in either the “Additional information” section of the template or the column currently headed “Tangible assets.”

The reporting of tangible assets on a per-country basis might be meaningful in measuring in-country economic activity of MNE groups whose business is based on the use of tangible assets. In the case of insurance companies, however, tangible assets are a relatively unimportant part of the overall business. In addition, it does not seem necessary for information on related-party payments to be in the CbC template, because this type of information is called for in the Master File and in the Local File.

Therefore, we suggest that the items listed at the beginning of this section be deleted from the CbC template. As a fallback, we recommend that, if the OECD were to decide to retain the tangible-assets item, the stated-capital item, or the related-party payments items in the CbC template, any Code H (Insurance) entities should be exempted from reporting those items.

We also believe that the definition of Constituent Entity, which is based on a subjective standard, is not sufficiently certain for use in the template. For the purposes of the CbC reporting template, the inclusion of entities that are fully consolidated in the group’s consolidated financial statements is the most appropriate standard. This standard is consistent with the grouping that is used in companies’ financial systems.

7. **CbC template: income tax paid and total withholding tax paid**

The draft template requires the reporting of income tax (including withholding tax) on a cash basis. We realize that this is an area in which there are many different opinions. In fact, in the context of implementation of CRD IV, it appears that different member states may adopt different standards. For purposes of the template, we suggest that MNE groups should have the alternative of reporting information on an accrued basis (both current and deferred), in
order to reduce the risk of a misleading presentation. Because earnings before tax (reported in column J of the template) is not the same as taxable income, there could be a severe mismatch if only cash taxes paid are shown in the template. Accrued taxes, particularly current tax liability, should be most appropriate for the purposes of a high-level risk assessment.

Finally, we note that insurance groups may wish to report insurance premium taxes or excise taxes withheld on cross-border premium payments in the “Additional information” section of the template.

8. Compliance Issues: Frequency of Documentation Updates

Paragraph 34 of the Discussion Draft provides that "[f]inancial data for the comparables should ... be updated every year in order to apply the arm’s length principle reliably." However, for cyclical industries such as the insurance industry, a single year of data is generally not representative; therefore, multiple years of data may be required to provide useful comparables. In cases where comparables are identified on a multi-year basis, there seems little to be gained by updating financial data annually. Accordingly, we propose that the Discussion Draft be revised to provide that financial data be updated only as changes in circumstances reasonably require.

9. Compliance Issues: Local vs. Regional or Global Comparables

Paragraph 42 of the Discussion Draft states that "the requirement to use the most reliable information will usually require the use of local comparables over the use of regional comparables where such local comparables are reasonably available."

The current wording in the draft implies a hierarchy of location over other comparability factors, which may not reflect as reliably the facts and circumstances of a truly globalized multinational enterprise. Paragraph 3.38 of the OECD Guidelines already recognizes the need for a pragmatic solution for finding comparables based on the facts and circumstances of the case. Our proposal is to change paragraph 42 to refer to the existing process as the basis for selecting comparables.

10. Implementation

In our view, the most appropriate way to make the CbC template available to tax authorities would be for the MNE to be required to file the information in the parent company’s jurisdiction only. The information could then be provided to other countries’ tax authorities under tax information exchange procedures. This approach would protect the confidentiality of taxpayer information, as intended by government authorities. It is similar to the approach
taken in implementing FATCA among countries that have signed a Model 1 intergovernmental agreement.
Insurance Europe comments on the OECD Discussion Draft on Transfer Pricing Documentation ("TPD") and Country by Country Reporting ("CbCR")

Summary

Insurance Europe supports the OECD’s efforts to enhance transparency towards tax authorities, on the basis of the principle of disclosure of information, in order to enable tax authorities to get a better view of multinational groups as a whole.

This being said, Insurance Europe believes that the objectives of improving transparency and of reducing the compliance burden for business should both be at the very heart of this initiative. With respect to the compliance burden, the OECD should take account of all existing reporting requirements that Multi-National Entities ("MNEs") face and the information tax authorities currently have before imposing new reporting requirements on insurance companies.

The draft CbCR template was designed to provide tax authorities with relevant information in order to conduct an efficient risk assessment. Insurance Europe believes that the level of detail proposed in the draft goes beyond this objective and is concerned that this will significantly increase the compliance burden and costs faced by insurance companies.

It is Insurance Europe’s strong view that the OECD should permit flexibility in compiling the CbCR template in a number of respects. In particular, the insurance sector should be given flexibility in: (1) using either a “bottom-up” or a “top-down” approach in their CbCR template; (2) disclosing aggregate financial information on an entity or country basis, and (3) preparing their master file on a group-wide or business line basis. Insurance Europe believes that granting such flexibility would decrease the compliance burden of insurance sector while still enabling tax authorities to conduct efficient risk assessment.

Insurance Europe upholds that in developing TPD standard to combat tax avoidance, a global standardised solution is needed, given that tax avoidance is a global issue. As such, any measures addressing this issue
should also have a global reach. National and/or regional tax information rules lead to duplicate reporting, excessive costs and complex system designs for tax authorities and insurance companies alike and should therefore be avoided as much as possible.

It should be stressed that this risk of overlapping and inconsistent reporting requirements is real, as there are currently a number of ongoing initiatives in the area of CbCR. For instance, in addition to the OECD proposal, the European Parliament has recently proposed to consider the introduction of CbCR to large undertakings when reviewing the accounting directive in 2018. For instance, in addition to the OECD proposal, the European Parliament has recently proposed to introduce CbCR for large undertakings. Ensuring consistency between these different initiatives should be a priority for all policy makers involved in these discussions.

Insurance Europe believes that confidentiality needs to be maintained. It has to be noted that the proposed CbCR template containing detailed group-wide information will be disclosed to all countries with different level of data protection. In our view, in order to ensure confidentiality of data the information should not be distributed to local tax authorities unless it is relevant the local tax position. This being said, it is important the CbCR is delivered as a separate document. We comment below on the questions put forward in the OECD Discussion Draft.

We comment below on the questions put forward in the OECD Discussion Draft.

**Specific Comments**

1. Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

Insurance Europe believes that the OECD should not seek to develop additional standard forms and questionnaires beyond the CbCR template. In our view, the OECD should only consider additional standard forms and questionnaires only if the CbCR template proves to be unworkable and not does to meet its objectives.

In our view sharing risk assessment with tax authorities with taxpayers would be a good practice. From a practical point of view, sharing risk assessment would allow MNEs to tailor local documentation, allowing for more efficient risk based focus. Furthermore, sharing the risk assessment may prevent tax authorities from initiating an audit procedure in case where the taxpayer could easily explain the tax authorities’ concerns.

2. Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

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1 European Parliament’s Legal Affairs Committee (JURI) report on the EC proposal for a Directive on disclosure of non-financial and diversity information by certain large companies and groups.
Insurance Europe recognises that tax authorities require access to relevant information in order to conduct transfer pricing audits and risk assessments. This should however be achieved without imposing an unnecessary burden on the insurance sector. In particular, in case tax authorities request specific information which a local entity does not have a direct access to, tax administrators should exploit existing instruments, such as information-exchange mechanisms, in order to obtain the information from associated entity located outside their jurisdiction.

It should be noted that often within an insurance group transfer pricing compliance is organised in a decentralised way, meaning that it is the competence of local entities to comply with transfer pricing obligations and there is no entity that has a comprehensive view of all transfer pricing information across the group.

3. Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

Insurance Europe believes that flexibility should be granted to entities in providing the information on a line of business or entity wide basis.

It is not uncommon for insurance groups to operate on a line of business basis, with segmentation of operations between, inter alia, life insurance, non-life insurance, reinsurance, investment management and other financial services/products. In consequence, transfer pricing models vary per business activity. For instance, the value chains of a reinsurer differ significantly from the value chains of an asset manager, even though both entities are part of the same insurance group.

Therefore, the preparation of global information on a group-wide basis and not per line of business may not be straightforward. This may result in a master file document that is large and complex for businesses to prepare and unhelpful for tax authorities faced with an excess of potentially irrelevant data.

On the other hand, some insurance groups may focus on a particular line of business, in which case it would be easier to prepare their master file on a group-wide basis.

4. A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

4.1. Should the country-by-country report be part of the master file or should it be a completely separate document?

We believe that the CbCR report should be a stand-alone document, which is separate from the master and local file of TP documentation. The CbCR report and the TP documentation serve different purposes, and may be subject to different filing timelines and materiality standards. Therefore, keeping the two documents separate would help streamline both taxpayer compliance and the administration of the reported information by the tax authorities.
Furthermore, the proposed CbCR template would contain detailed group-wide information that is generally not available to local entities. It is also likely to contain confidential information that should not be distributed to local tax authorities automatically unless it is relevant to the local tax assessment.

4.2. Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

Insurance Europe believes that taxpayers should be given the flexibility of using either a “bottom-up” or a “top-down” approach in their CbCR. Insurance companies are organised in different ways and use different systems to report financial information both internally and externally.

Having regard to the fact that the purpose of the CbCR template is to provide a high level tax risk assessment within a particular MNE, it should be flexible enough to the usage of the most meaningful data compiled in the most effective way possible for each MNE. Any cost and burden associated with the preparation of the CbCR template should be commensurate with its purpose as a high-level risk assessment tool, and significant systems changes and updates should, as much as possible, be avoided. Therefore, any information to be provided should be based as far as possible on already available data. Imposing one approach would impose significant, additional compliance costs without necessarily helping tax authorities when carrying out a high level risk assessment.

4.3. Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

Insurance Europe believes that taxpayers should be given the option of disclosing aggregate financial information on an entity or country basis.

Some groups have hundreds or even thousands of entities and some level of country consolidation is likely to be required to ensure that the volume of data is manageable and so that the information is useful for tax authorities’ high level risk assessments. Furthermore, CbCR on an entity-by-entity basis could result in a significant compliance burden, especially for those taxpayers who have limited financial information readily available on an individual entity basis such as partnerships or trusts.

On the other hand, for smaller groups preparing the information on an entity basis may be more manageable and useful. Therefore, it is essential that flexibility is permitted.
4.4. Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid?

Insurance Europe believes that the aggregate corporate income tax paid by country should be collected on a “tax due basis”. The collection of cash tax paid for the period may not present the full picture for risk assessment purposes. This is especially important for the insurance industry where timing differences between income for accounting and taxation can be significant. Furthermore, many jurisdictions have a different basis of taxation, such as tax on gross premiums, capital employed or investment income. Where these taxes are imposed in lieu of regular corporate income taxes, these taxes should be included in the relevant CbCR.

4.5. Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

Keeping in mind that the CbCR template is intended to be a high level risk assessment tool, in our view there is no need to include intra-group payments of royalties, interest and service fees. Reporting on intra-group payments goes beyond the original idea of providing a high level risk assessment for tax authorities.

Furthermore, reporting on intra-group payments would significantly increase the administrative burden since intra-group payments will already be included in the transfer pricing documentation (master file and local file).

As a result, groups with many entities would be required to report thousands of separate transactions, in multiple local currencies and multiple local accounting principles (GAAPs).

4.6. Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

Insurance Europe believes that it is not necessary to report on the business activities at entity level. The business activity codes included in the draft CbCR template instructions already provide sufficient information for tax authorities as part of its high-level risk assessment.

Providing such information at entity level would be onerous, as the information would have to be extracted manually from accounts, and it would not seem to enhance the understanding of the operations as a whole.

5. Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

Insurance Europe believes that materiality thresholds should be provided in order to ensure effective risk assessment and to reduce the compliance burden on businesses.
Furthermore, as preparing transfer pricing documentation is time consuming and expensive, special consideration should be given to small and medium sized groups. Such groups should not be required to incur compliance costs that are disproportionate to the nature, scope and complexity of their intra-group transactions.

There are a number of ways to achieve it, for instance a combination of:

- Excluding small entities from the MNE group, such as for instance entities representing less than 5% of the total, to the extent that such entities are not material to the country where they operate.
- Considering transaction amounts as a specific monetary threshold.

6. Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

The comments in paragraph 34 are moving in the right direction, but further simplification and more flexibility would be helpful.

There should be a harmonisation of local documentation requirements (local files). With the introduction of the CbCR template, there should be an attempt to remove any unnecessary or duplicative filings, such as tax return disclosures.

Furthermore, the listed information in the specific instruction of the draft CbCR template should be defined more precisely and accompanied by detailed explanations.

7. Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments

The suggestion in paragraph 35 of the Discussion Draft seems sensible. Using a common language, such as English, for the master file will simplify compliance. As the costs associated with translations can be burdensome we strongly support the suggested approach of having this document translated only if necessary into the local language(s), ensuring that sufficient time is available for the translation to be completed. If there is a need to translate into multiple languages, then the content in the master file needs to be kept as simple as possible.

The CbCR template should be issued and completed in English and the local country files in local language.

8. Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

Confidentiality is essential. The supplied documents will contain extremely sensitive information that tax authorities must protect from disclosure. Protection requires, at a minimum, that the template be maintained by the home country of the ultimate parent and be available under exchange of information provisions of tax treaties (or other exchange of information provisions in other agreements).
9. Comments are requested regarding the most appropriate mechanism for making the master file and
country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange
  provisions;
- Some combination of the above.

In Insurance Europe’s view, the master file for the purpose of reporting should be submitted only in the parent
company’s jurisdiction. Information to other local tax authorities should only be shared under treaty or
information exchange agreements. These provisions can provide protection of confidentiality from
inappropriate use of information.

10. Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases
should be required as part of the master file.

The master file should only contain information that is relevant in helping tax authorities get a better
understanding of intra-group transactions that are included in the local files.

APAs, other rulings and MAP cases are all specific to certain transactions and across particular jurisdictions
within a group. As such they will only be relevant to certain tax authorities.

To include sufficient information on APAs, rulings and MAP cases allowing tax authorities to determine whether
they are relevant for their own risk assessment purposes would require the disclosure of a substantial amount
of information, which would further increase the compliance burden. The more sensible approach would be for
tax authorities to undertake their own high-level risk assessment and then to ask for more detailed
information as regards areas which are of concern to them.

Insurance Europe therefore believes that details of APAs, rulings or MAP cases should only be provided if they
are relevant to a tax authority.

11. Other comments on the CBCR Template

Insurance Europe would like to put forward the following additional comments on the requirements of the
CbCR template:

- Timeframe

The OECD should propose a sensible timetable for implementation. Since the CbCR template
encompasses the entire group, MNEs would be potentially exposed to an unreasonable and unrealistic
global reporting commitment timetable if one relevant jurisdiction chose to implement the CbCR
template significantly in advance of other governments.
We agree that the most appropriate completion date for the country-by-country template should be 12 months following the year end date of the parent company.

- Effective Management

"Effective Management" should be replaced by "Tax Residence" as this is a more commonly understood concept.

Insurance Europe is the European insurance and reinsurance federation. Through its 34 member bodies — the national insurance associations — Insurance Europe represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe’s economic growth and development. European insurers generate premium income of more than €1 100bn, employ almost one million people and invest almost €8 400bn in the economy.

www.insuranceeurope.eu
February 21, 2014

Keith Damsky
The Interpublic Group of Companies
1114 Avenue of the Americas, 16th Floor
New York, NY 10036

RE: Key Considerations Regarding the Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting

To Whom it May Concern:

I am pleased to submit the enclosed Interpublic Group of Companies’ (“IPG”) comments on certain aspects of the Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (the “Discussion Draft”) that provides guidance for tax authorities and taxpayers alike in connection with a transfer pricing inquiry, risk assessment, and tax examination. IPG applauds the efforts of the OECD to increase transparency in addressing transfer pricing issues, all the while intending to find equilibrium with the marginal benefit to tax administrators and the marginal cost imposed on corporate tax departments operating with shrinking budgets, limited resources, and strained personnel. In this regard, we take this opportunity to provide our candid comments and concerns regarding the important transfer pricing documentation and country-by-country reporting components of the BEPS Action Plan.

IPG anticipates that there will be many comments regarding the procedural details described in the Discussion Draft, and that there will be many general comments related to high costs of compliance and resource strain. Rather than delving into each detailed procedural element or expanding on the high burden which taxpayers and tax authorities alike will have to continue to endure to pursue the equitable principles upon which we all agree, we have chosen to highlight those few items that we believe are important to our company, similarly situated taxpayers, and tax authorities reviewing such transactions.

In the above context, we respectfully request that the OECD address the following specific issues:

I. Chapter V of the Transfer Pricing Guidelines should provide an exclusion for low risk taxpayers and/or low risk intercompany transactions from the increased reporting requirements based on a bright line test. Such a test could, for example, entail a minimum effective tax rate to identify low risk taxpayers and/or a specified set of transaction classifications to identify low risk intercompany transactions.

II. If a bright line test cannot be agreed, Chapter V of the Transfer Pricing Guidelines should call upon tax authorities to proactively undertake the risk assessments envisioned by the initiative and explicitly exclude low risk
taxpayers or particular low risk transactions thereby identified from the increased documentation requirements (while remaining subject to the normal existing documentation standards) for a reasonable period following the risk assessment.

III. To balance the heightened responsibility of taxpayers to submit an expanded set of information, Chapter V of the Transfer Pricing Guidelines should impose a commensurate level of accountability on the part of the tax authority to employ the expanded information in an efficient and equitable manner. In particular, safeguards should be implemented to minimize the risk of an expansion in the number of inquiries which could not be reasonably expected to enhance either the assessment of transfer pricing risks or the evaluation of adherence to the arm’s length principle.

IV. Chapter V of the Transfer Pricing Guidelines should not expose a company to the internal dissemination of sensitive information that could have potentially serious adverse implications within the company’s own organization. In this context, a company should have the option to keep Master and Local country files centrally to be provided directly to the tax authority by the central HQ staff when requested. Further, we would submit that it is generally unnecessary for a particular tax authority to have access to the local country file of any other country.

We attach the details of our comments hereto. We very much appreciate your consideration of these comments and would be happy to be available to you to address any questions you have at issue or to provide additional assistance.

Respectfully submitted,

s/Keith Damsky, Director of Transfer Pricing
Key Considerations Regarding the Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting

I. Exclusion of Low Risk Taxpayers and/or Intercompany Transactions from the increased Reporting Requirements

We request that the OECD consider implementing a bright line test to exclude low risk taxpayers and/or low risk specific intercompany transactions from the increased documentation burden.

Firstly, many taxpayers have a published (reported) effective tax rate in a range which demonstrates that its global operations are subject to an overall normalized rate. In those cases, the taxpayer should not be subject to greater documentation requirements than current standards. Alleviating such taxpayers from the increased cost and burden of the higher proposed documentation standard (and the relevant tax authority as well from its review burden) is equitable, rational (from a resource allocation perspective), and in keeping with the stated goals of the proposed new standard. Further, by forcing public companies to make reference to a published rate, it would naturally tend to place companies in a kind of “public forum” environment, thereby creating a *de facto* “public accountability” standard.

For example, in the case of a U.S. multinational group in which the common parent is a S.E.C. registrant company, a 30% or greater normalized, officially published effective tax rate is a strong indication that the group’s overall operations have not been structured in a manner that misaligns with the overall stated objectives of the OECD’s BEPS initiative.

Secondly, low risk intercompany transactions should continue to be assessed in accordance with current documentation requirements that have already proven to be robust enough to ensure no transparency issues for the tax authorities in assessing these intercompany transactions. We submit two common examples of such low risk transactions immediately below:

1. Headquarters and central services provided to related entities should be excluded as a routine, low risk transaction.

2. Strict pass-through expenses should also be excluded from the extended documentation requirements. Thus, where a related party (A) incurs a cost from a third party on behalf of another related party (B) and (A) passes the third party’s cost directly through to (B), the transaction should not be subject to the elevated documentation requirement.
II. Use of Documentation for True Risk Assessment

We request that the OECD provide an alternative ameliorative measure if the situations described in Section I are not initially excluded from the scope of the elevated documentation requirement.

Specifically, if the situations described in Section I are not excluded initially, then we request the OECD to propose that the increased level of documentation be utilized proactively for risk assessment purposes and, in turn, after such risk assessment is completed low risk situations as described in (I) above are excluded from the increased documentation requirements (and subject to the normal existing documentation standards) prospectively until a reassessment is warranted. The UK successfully undertook a similar risk assessment initiative a few years ago, and we suggest that its key principles be considered as part of this initiative.

III. Accountability of Tax Authority

We request that the OECD implement a mechanism to ensure that a tax authority uses the extended information in a manner consistent with tenets of the BEPS initiative.

The Discussion Draft’s overarching tenet is to balance the usefulness of the increased data to the tax authorities for risk assessment and other purposes on the one hand, with the increased burdens placed on taxpayers on the other hand. In this regard, we would propose that the responsibility of taxpayers to provide an expanded complement of data should go hand in hand with a mechanism to ensure that the tax authority uses this information efficiently and in the intended spirit. The availability of the increased information could result in an expanded number of queries on audit, potentially focusing on details of reduced relevance. Such a focus will challenge resources of taxpayers and tax authorities alike and potentially result in less technically grounded assessments – a result that we believe to be contrary to the spirit of the BEPS goals.

To buttress the initiative’s goals, we propose that if a transfer pricing assessment is made at the field level and subsequently overturned (perhaps in a context where it is clear that the initial assessment was not technically grounded) then the taxpayer should be afforded a period of two or three prospective tax years without a further detailed audit of the same intercompany transaction. (This view, of course, assumes that the relevant operational facts remain substantively the same.) In effect, the proposal provides a taxpayer with a de facto prospective protection period similar to an APA if its particular intercompany transaction that was initially challenged was found to be fully supportable. We believe that such a rule would prevent the potential unintended use of such increased detailed documentation.
IV. Confidentiality

We request that the OECD provide measures to address the exceedingly important issue of confidentiality faced by certain industries by not forcing corporations to disseminate sensitive information internally.

We find that the Discussion Draft does not fully recognize the operational concerns that certain companies and particular industries might have regarding confidentiality of information. For certain companies, the risk associated with a breach of confidentiality is not limited to the potential for public disclosure. Internal dissemination of sensitive information could have potentially serious adverse implications within the company’s own organization. For example, a company with multiple business lines, or legal entity structures with mixed divisions could be placed in a compromised position of having to share across divisional lines confidential financial, personnel and client data in order to consolidate/prepare the information requested by the Discussion Draft. Of critical concern are those situations in which a minority shareholder exists.

Providing the proposed level of detailed information could create unnecessary personnel and management issues. These risks are particularly acute in the advertising industry, in which mitigation of the classic “client conflict” issue demands the maintenance of absolute confidentiality across network/divisional lines. Further, in the advertising industry a common acquisition model leaves a minority shareholder management team in place. In such instances, it is critical to maintain strict confidentiality of group, client and sister company information.

We submit two recommendations, discussed in pertinent part immediately below, which address these confidentiality issues:

1. We recommend that a company have the option to keep the Master and Local country files centrally to be provided directly to the tax authority by the central HQ staff when requested.

2. As a corollary of the confidentiality principles, we recommend that a tax authority should not have access to the Local country file of any other country. To the extent there is a need to share information across tax jurisdictions, the Master file adequately satisfies that role.
OECD Committee on Fiscal Affairs
2, rue André Pascal
75775 Paris

Submitted by Email to transferpricing@oecd.org

21 February 2014

Dear Sir/Madam

Submission in response to OECD Discussion Draft on Transfer Pricing Documentation and Country by Country Reporting

Please find enclosed our submission in response to the Discussion Draft on Transfer Pricing Documentation and Country by Country Reporting that was released on 30 January 2014.

We welcome this Public Consultation and trust that our comments can add to the constructive debate that is taking place at the minute.

We are available for further discussion on any of the matters raised in our submission.

Yours truly,

________________________
Helen O’Sullivan

President
Irish Tax Institute
Irish Tax Institute

Response to OECD Discussion Draft: Transfer Pricing Documentation and Country by Country Reporting

February 2014
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About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland’s AITI Chartered Tax Advisers (CTA) and is the only professional body exclusively dedicated to tax. Our members provide tax expertise to thousands of businesses and individuals in Ireland and internationally. In addition many hold senior roles within professional service firms, global companies, Government, Revenue and state bodies.

The Institute is the leading provider of tax qualifications in Ireland, educating the finest minds in tax and business for over thirty years. Our AITI Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice.

A respected body on tax policy and administration, the Institute engages at the most senior levels across Government, business and state organisations. Representing the views and expertise of its members, it plays an important role in the fiscal and tax administrative discussions and decisions in Ireland and in the EU.
Format of our response to the Discussion Draft

The Irish Tax Institute is writing in response to the Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (CbC) which was released on 30 January 2014.

The submission we have prepared is based on detailed feedback from a number of our members. We have structured this response in the following way, for ease of reference:

Section A – Key Issues identified
Section B – Further comment on Country by Country Reporting template
Section C – Response to Consultation Questions

Section A  Key issues identified

There are certain key principles which we believe are important to comment on, as part of our response to this overall review.

1. Assessing the compliance cost to business

The ‘Action Plan on Base Erosion and Profit Shifting’ fully acknowledges the need for business compliance costs to be recognised in any new documentation rules that are developed. Action 13 outlines the intention to:

“develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business”.

Action 10 notes that:

“transfer pricing documentation requirements should be less burdensome and more targeted”.

This principle is further highlighted in the Discussion Draft itself at Paragraph 4,

“an important overarching consideration in developing such rules is to balance the usefulness of the data to tax administrations for risk assessment and other purposes with any increased compliance burden on taxpayers”.

And at Paragraph 26,

“taxpayers should not be expected to incur disproportionately high costs and burdens in producing transfer pricing documentation”.


We welcome this recognition of the compliance burden to business. However, a number of the proposals currently included in the Discussion Draft would undoubtedly increase this burden.

The proposal to require a Master File to be prepared in addition to existing local country documentation requirements, adds to the complexity and cost of complying with the transfer pricing regime which goes against the aim of simplicity.

If that additional cost was to be extrapolated across the entire international business community it would undoubtedly run to many tens, if not hundreds of millions of Euros. Given the scale of this burden, we believe it is essential that a full impact assessment be carried out before any final decisions are made on the extent of increased documentation requirements.

2. Improving risk assessment

The key objective of an effective transfer pricing documentation regime is to provide information necessary for tax authorities to undertake proper risk assessments. To be effective, tax authorities must identify the transfer pricing risks that need to be managed and ensure that the documentation they are seeking focuses on these risks.

The information being sought in the Country-by-Country Template and the Master File and Local File goes beyond what a tax authority would actually need and could use to assess transfer pricing risk. For example, how would information on employee numbers or withholding taxes impact on the pricing of a transaction?

For example, the Master File requires details of the taxpayers strategy for developing intangibles, details of the highest paid employees and details of APA’s and tax rulings etc. There is also a considerable amount of information required in the CbC template which seems much broader than might be needed for a transfer pricing assessment e.g. number of employees, total employee expense, total withholding tax paid etc.

Some of the information which businesses are being asked to provide is already available to tax authorities from other sources e.g. Capital and Accumulated Earnings are already available in the Financial Statements. Unnecessary duplication of work is the inevitable result which is highly inefficient and costly.

The information being sought should be necessary for the assessment of the transfer pricing risk identified and not otherwise already available to the tax authorities - the provision of information has a high cost attached in terms of resources and it is important to strike the correct balance here.
3. **One size does not fit all**

Flexibility is key to allow businesses of various types in different sectors that are structured differently to report differently. Different businesses will find it easier to provide information in different formats e.g. some groups structure their information around their brands, some around business units, some around legal entities. A large number of groups operate different ERP systems across the group which will add to the complexity and cost of compliance. A bottom up approach might be easier for some and a top down approach for others etc. Taxpayers should also be provided with flexibility in deciding whether to file CbC reports at entity or country level.

We would therefore urge that flexibility and optionality for taxpayers be allowed in determining the format that information is provided in. Flexibility can play a significant role in reducing the compliance costs for taxpayers and provided a taxpayer adopts that particular approach on a consistent basis, this flexibility should not reduce the usefulness of the information provided.

4. **Confidentiality of information**

Some of the information that is being sought in the CbC template and the Master file/local file is very sensitive commercial information and businesses are understandably concerned to ensure its confidentiality. To provide reassurance to business that their confidential information will be safeguarded, it is imperative that the information only be shared by tax authorities under treaty exchange provisions.

5. **Materiality**

Materiality is key in ensuring that compliance costs are kept proportionate to the risks at issue. It is important that consistent and reasonable materiality limits are agreed and adhered to by all participating countries. A requirement to include low value and low risk inter-company transactions could greatly increase the compliance burden and cost on taxpayers.

SMEs, who may currently not be required to comply with comprehensive transfer pricing regimes, may nonetheless have to complete CbC reports which could add significant costs. Materiality limits must be applied in this area.

6. **Achieving simplicity**

This Public Consultation is a useful opportunity to consider simplification measures that could otherwise improve the transfer pricing compliance regime. There are some useful suggestions in the Discussion Draft, such as 3 yearly reviews of comparables at Paragraph 34. There needs to be more emphasis on this important aspect of the review, particularly in light of the significantly
increased transfer pricing documentation requirements and the Country-by-
Country reporting regime being proposed. We have set out some additional
simplification measures in our responses to the consultation questions in Section
C.

7. Consistent interpretation by countries/companies

Different countries may adopt different interpretations to the information being
requested. Greater clarity is therefore needed as to exactly what information is
required for the CbC template and the Master/Local files to ensure a consistent
approach. It is also vital that countries cooperate to ensure that consistent
approaches are applied by countries to accepting price comparables and to help
quickly resolve any disputes that arise.

Different companies also adopt different measures and the information provided
could be inconsistent in dealing with different industry groupings or even within
the same industry (see Section B for examples of this).

Different interpretations will inevitably increase the complexity and cost of
compliance, limit the usefulness of the information to tax authorities and in some
situations will create confusion.
Section B Further comment on Country by Country Reporting (Annex III template)

We appreciate the objectives that the OECD is trying to achieve by introducing a country by country reporting requirement. The Irish Government in its October 2013 ‘International Tax Strategy Statement’ expressed its support for the on-going work at OECD level on country-by-country reporting.

However, some concerns arise for businesses as to the level and type of information required to be included in the CbC reporting template and the manner in which it is to be submitted to tax authorities.

- **Place of effective management**: Different tests are likely to be applied in different jurisdictions.
- **Business activity codes**: It is unclear how this information is useful/to be used by tax authorities. In fact, some businesses/companies may be involved in a number of different types of activities which will create confusion in trying to use the relevant code.
- **Revenues**: It is unclear if the term “revenue” refers to the gross revenue or net revenue figure. Additionally, given the differences in local GAAPs and local currencies, the information may not be usefully compared to information from entities in other countries.
- **Income Tax Paid – Cash Basis**: It is unclear how this information will assist in transfer pricing risk assessment. Requiring tax paid to be reported across each jurisdiction may lead to misleading information due to factors such as double tax credits. The template should instead require only the company’s total tax charge to be reported.
- **Total Withholding Tax paid**: It is unclear how this information will assist in transfer pricing risk assessment. Further guidance is also necessary as to which withholding taxes this requirement would apply to.
- **Capital and Accumulated Earnings**: This information is already available to tax authorities from the entity’s financial statements.
- **Number employees and related compensation expense**: It is unclear why this information is relevant from a transfer pricing risk assessment perspective. The number of employees may not be related to the value adding activities of the group. Significant costs are likely to be incurred in compiling this information for each group entity. Additionally there may not be consistency in how compensation is calculated, for example, different approaches may be taken in valuing share options.
- **Tangible non-cash assets**: Book values will vary depending on accounting treatments adopted by various entities. The information is already available from an entity’s financial statements.
- **Intercompany payments**: This information should be available from the local transfer pricing files. In the absence of an appropriate materiality threshold, compiling this information would be very costly for taxpayers.
Our responses to the Consultation Questions in Section C below, provide further detail and analysis on CbC reporting.
Section C  Response to Consultation Questions

1. Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

For the reasons noted above, we feel that the compliance burden already associated with the CbC reporting template is very extensive and an impact assessment is required to try and quantify this cost. We are not in favour of increasing the compliance costs even further with additional standard forms and questionnaires.

In the interests of transparency, it would be useful for tax authorities to provide details of risk assessments to taxpayers.

2. Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

Taxpayers should not be required to produce information from any group entities in which the group does not have a controlling interest. Otherwise the taxpayer may not have access to the relevant information.

We have concerns about any proposals which could override bilateral tax treaties.

3. Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

Flexibility is needed for taxpayers in order to minimise the cost of compiling information and taxpayers should therefore be given a choice as to whether the master file is compiled on a line of business or entity wide basis. There is no ‘one-size-fits all’ approach for all taxpayers as different businesses have very different organisational structures. Requiring all taxpayers to comply with one approach would greatly increase the compliance costs for certain taxpayers. Provided that a taxpayer adopts a particular approach on a consistent basis, this should not reduce the quality of the information provided.

4. A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by
countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

a. Should the country-by-country report be part of the master file or should it be a completely separate document?

We would advocate that the CbC reports are not filed as part of the master file. This would provide greater flexibility in terms of the filing date for the reports. The deadline for an entity to file should be based on the entity’s reporting period rather than the parent company’s reporting period especially given the differences in reporting dates by country.

b. Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

Taxpayers should be allowed to choose between a “top-down” or a “bottom-up” approach. We refer to our comments above, on the need for a flexible approach.

c. Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

Flexibility should be provided to taxpayers in order to minimize compliance costs. Entity level reporting could create significant extra work for MNE’s with multiple entities in one jurisdiction who operate a consolidated financial system.
Furthermore, a taxpayer may have entities in the same country engaging in very different lines of business. The group information may not currently consolidate information on a country basis and requiring a country level consolidation may impose a significant compliance cost on such businesses.

d. **Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?**

As outlined above, there is concern that the cost of compiling such information would be disproportionate to the usefulness of the information to tax authorities in performing transfer pricing risk assessments.

e. **Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?**

Reporting of this information appears to go beyond the information tax authorities’ need to perform transfer pricing risk assessment. The high cost of compiling a lot of the information is likely to be disproportionate to the potential usefulness of the information to tax authorities in performing transfer pricing risk assessment.

f. **Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?**

This information is likely to already be available to tax authorities as part of the current transfer pricing documentation requirements.

5. **Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.**

Guidance on materiality is needed to ensure consistency across jurisdictions. There should at a minimum be a materiality threshold for reporting intercompany transactions. Safe harbours for certain types of transactions should also be considered.
In Ireland, SMEs are not currently required to prepare transfer pricing documentation. The proposal for SMEs to be required to complete CbC reports would impose a significant compliance burden on a large number of taxpayers.

6. **Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?**

The proposed approach to the frequency that transfer pricing comparables must be updated may be helpful. Flexibility should be also provided for in terms of what comparable data can be used.

Additional simplification measures such as use of safe harbours for certain types of transactions and materiality thresholds for inter-company transactions must also be considered.

7. **Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.**

While it is helpful that the proposal would only require the master file to be prepared in English, local tax authorities may require the master file to be translated to the local language and in practice this is likely to occur and cause additional administration costs to the taxpayer.

8. **Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.**

Confidentiality is of major concern to taxpayers. It is important that adequate procedures and safeguards are put in place to ensure that confidential information is not put at risk and accountability on this matter would be important.

9. **Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:**
   - a. The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
   - b. Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
   - c. Some combination of the above.

We would favour the option of filing information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions. This would be preferable from a confidentiality perspective as it may reduce the risk of confidential information being exposed.
10. *Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.*

Requiring this information to be reported appears to go beyond the information which tax authorities actually need to perform transfer pricing risk assessments.
Leiden, 21 February 2014

Joseph L. Andrus  
Head of the Transfer Pricing Unit  
Centre for Tax Policy and Administration  
OECD

sent via email to: TransferPricing@OECD.org

With this letter the International Tax Center Leiden respectfully submits comments on the *Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting* (dated 30 January 2014) ("the draft"). If there is any specific point from our comments that you would like to discuss more in detail please do not hesitate to contact us.

1. Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

*ITC Leiden comment:*

If the objective is to gather information for case selection for audits, we strongly advocate for separate forms or questionnaires other than transfer pricing documentation. The tool for case selection should preferably be the country by country document (as a separate document from transfer pricing documentation) or a short series of questionnaires attached to the tax return.

Most companies and their advisors see transfer pricing documentation as a compliance exercise, aiming primarily to meet the legal requirements and shift the burden of proof to the tax authorities. In most countries today, transfer pricing documentation does not need to be updated yearly and only a few countries (since recently France, China, to some extent Italy and Russia and a few other countries) require specific forms with transfer pricing information to be filed with the tax return. Also, transfer pricing is clearly perceived as a commodity in the market, with very little value added seen by taxpayers and tax advisors. As an example, a transfer pricing documentation report that was sold in the market for 30K to 40K Euro 15 years ago (one or two intercompany transactions, a good functional analysis, CUP analysis, industry analysis, etc) is sold today for around 15K Euro. This is the result of the perceived low value added of the service, some price competition between service providers, and companies facing the fact that instead of having to prepare transfer pricing documentation in only 5-10 countries (as was the case 10 years ago), now they need to do it in 30-40 or even more countries. For a medium size company, the numbers add up very fast. When only a few thousand Euros are available for a transfer pricing report, it is unavoidable that the information included in that report will be very high level.

It will take years, if it is at all possible, to change this market perception that documentation is a commodity. Also, if the authorities ask any transfer pricing advisor (whether in house with a multinational or a service provider) if, when writing a transfer pricing report, they are trying to...
highlight risks to the tax authorities or trying to comply with the minimum legal documentation requirements, the answer will always be the second: today, it is not at all the objective of transfer pricing documentation to provide a roadmap of risks to the tax authorities, quite the opposite.

Therefore, if the objective is for taxpayers to perform some type of self-assessment of risks, then the transfer pricing documentation is insufficient for this purpose. It seems that a more appropriate starting point for this discussion would be the "Handbook on Transfer Pricing Risk Assessment" instead of the OECD Guidelines as such. The UK has in place some processes than can be used as an example. The work/processes used by financial auditors to book Fin 48 provisions is also relevant and there are some lessons to be learned from how that process is applied in practice. Tailored questionnaires such as those China has put in place seem more appropriate that transfer pricing documentation as such. Also, if a taxpayer is classified as low risk (for example because they do not have transactions with tax havens or because they have APAs or as outcome of the risk assessment process) then it would be reasonable to require a more simplified transfer pricing documentation requirement.

2. Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

*ITC Leiden comment:*

Some of the master information that is proposed in the current draft is often not available to the subsidiary of a multinational. In fact, some of the information (like salaries of top 25 employees) may never be available to the subsidiary.

Some multinationals are very centralized and have their transfer pricing documentation prepared by the headquarters. They could, if they have the resources, compile the master file. However, many other multinationals delegate tax compliance (and transfer pricing documentation is seen as part of that) to the subsidiary. In those cases, it would be impossible for the subsidiary to gather the information required to prepare the master file.

Also, many SMEs enjoy simplified reporting requirements: they do not need to prepare this type of information for any other reason, so for them it would be even more burdensome to prepare these documents.

Given all these factors, tax authorities need to consider the implications deriving from a demand for information that is not necessarily available to all affiliates and in some cases may be of confidential nature. In situations where the information requested is of a confidential nature, the only practical way to obtain it would be to require companies to provide this information only upon audit, and through the information exchange mechanisms provided by tax treaties. In that sense we would recommend to separate the master file in two parts: 1) information that needs to be available to the local tax authorities upon request (this would be the minimum information required to understand the context of the relevant intercompany transaction), and 2) information that is confidential or commercially sensitive, available to the local tax authorities only through information exchange.

In the context of a transfer pricing audit, and depending on the scope and nature of the audit, the taxpayer could volunteer the information from other jurisdictions, as in fact most of the times taxpayers do today in the context of a "friendly" transfer pricing audit.
3. Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

**ITC Leiden comment:**

Following the work of the EUJTPF in 2006 (EU Code of Conduct on Transfer Pricing Documentation), many companies adopted the concept of the master file and local file, not only in Europe but worldwide. This was primarily because transfer pricing documentation requirements were multiplying at that time and having a master file was useful to put things in order. This was a good attempt to systematize the process of preparing transfer pricing documentation in multiple countries. Today, companies use the concept & name “masterfile” even though the final product/report may not bear any resemblance at all to the recommendations of the EUJTPF. Comparing the master file of any company with that of a peer in the same sector could show several differences in terms of content, details, quality, etc. This is not necessarily because the business is different, but because the “idea of the master file” is translated differently by different countries and companies. Some companies do not use the concept of a master file at all and have transfer pricing documentation in place that is much better than some others may have. If these differences can be seen in a European context, it is reasonable to expect similar differences at an even larger scale from the perspective of the OECD. Different countries will translate the concept of the master file in different ways in their local legislation which may result, not in simpler or better documentation, but in larger transfer pricing reports.

Based on practice that followed the publication of the work of the EUJTPF, it is possible to conclude that a laudable attempt to simplify and standardize transfer pricing documentation requirements may lead to increased compliance, more paperwork and less clarity.

If the requirement of the master file is made compulsory, then it is important to acknowledge that there are many ways a multinational company can be organized: divisional, matrix, country driven, product driven, etc. The same company can change from one organization to another several times.

If the master file becomes compulsory, then it must not be just a name but what needs to be included in the master file needs to be clearly defined, and it should be relevant to the tax authorities that require it. A specific line of business or division may have a shared services center in Asia, but if this is not relevant for the sales subsidiary in France, does it need to be included in the master file? Arguably yes in the Asian master file to be used by other Asian operating companies but not in the European master file. Do all companies need to disclose their full legal chart? Many companies have several hundreds or thousands legal entities. Why is the title and country (tax residence? nationality?) of the 25 most highly compensated employees in the business line necessary? Why is this all relevant? When is it relevant? Is this a door that is being opened to a "back of the envelope" computation based on some sort of formula?

The concept of master file does not translate easily to a global context. Do companies need to have different types of master files? Should the master files be prepared per region, per business line or even per division? The answer may be different for each company.
A description of the overall business model, the value drivers of the business, the key functions risks and assets performed in other parts of the world, the relevant intangibles used, etc., have always been relevant to the analysis of a specific control transaction. Although treating this as a requirement of a master file makes the intention clearer, the implementation is more complex.

The goal of a master file should be to provide a comprehensive overview of the business, business model, approach to market, summary of operations and characterization of activities and transactions from a transfer pricing perspective. Any additional information, which is too granular and specific, may be counterproductive especially because it may be read out of context.

4. A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

- Should the country-by-country report be part of the master file or should it be a completely separate document?

**ITC Leiden comment:**

As mentioned in comment 3 above we do not agree with the concept of a broad master file concept. Any information in the master file needs to be concise and relevant to the local intercompany transaction under review only. The example included now in Annex I is very broad. If the information is not strictly required to understand the context of the controlled transactions, it should not be required as part of the master file. For example, how will the company include a full legal chart? For many companies a full legal chart may be several pages long. It may not be possible to include, as an example, a chart showing the "supply chain" for material products and services and for all divisions, or for all products including those that are not sold locally. This does not appear necessary.

Also, for simplicity, and to avoid confusing things, we would recommend that the country by country questionnaire should be made a separate document.

From a practical perspective, a company may decide to ask one of its advisors to do the transfer pricing documentation and another to prepare the country by country reporting. In fact, it is probably preferable that these documents are separated as a control mechanism. The country by country document/template may also need to be updated or expanded more regularly than the transfer pricing documentation. For example, in the future there could be specific templates by industry, the template could have a compulsory section and a voluntary disclosure section. As this document is likely to evolve with time, it is logical to have it as a separate document.

- Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group's consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

**ITC Leiden comment:**
As in the case of a company preparing its financial reports, both approaches are necessary. It would be useless to use a bottom up approach if when trying to consolidate the numbers/profits they don’t match. Overall a top down approach seems to make more sense: this is what would be done in any event as an overall check in order to have a thorough understanding of the transaction and how “system profits” are allocated throughout the supply chain. In any event, a perfect reconciliation will not be possible. Differences in GAAPs, among other items, will often prove to be too complex to address on the basis of a pure bottom-up analysis especially if it focuses only on one financial year.

If a top down approach is chosen, there needs to be a limit to the amount of granularity that the information would require, many companies cannot match consolidated financials to legal entity financials.

• Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

*ITC Leiden comment:*

The approach chosen should allow for flexibility. Since consolidation within a country consolidation may require time and investment in resources, the purpose of the analysis to be conducted should be a guide to identify the balance between too little and too much information.

One needs to realize that, although in one jurisdiction one MNE may have multiple entities, consolidating their results would be meaningless if, for instance, they operate in different business divisions.

In-country intercompany transactions may be a useful source of data and although they do not always fall within the scope of TP compliance or BEPS, they do provide useful data points in order to understand the business model and the interactions between different parts of the same enterprise. At the same time, asking for granular information for each and every entity may be a daunting exercise for large multinationals. Insofar as possible, MNEs should be able to rely on what is already available.

One approach to simplify the exercise could be to ask a general description of the activities (broad) carried out in each jurisdiction, together with an indication of the overall number of individuals, possibly categorized per areas of responsibility, function etc. In addition, an indication of the overall metrics for the business/es (e.g. revenues, profits, assets etc.) and, relative to that, the intercompany receipts / payments and WIP, per category of transactions (e.g. goods, services, capital etc.).
• Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

*ITC Leiden comment:*

Tax metrics are usually developed both on accrued tax as well as on cash tax. In the short term there are arguments in favour of looking at accrued tax. Cash tax can be tested over a long period of time. If there is uncertainty on the amounts due / accrued because of, e.g., a dispute, then cash tax can be used as a proxy.

Information on withholding taxes can be of use in understanding better the full picture in the country of source, but, depending on the purpose of the analysis, this data may need to be isolated from the other taxes levied on domestic taxpayers as the analytics would otherwise be biased.

• Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

*ITC Leiden comment:*

This may be in fact a useful piece of information for tax authorities, insofar as they do not already have this information. Companies generally already do this in their local annual accounts. If the company is not required to prepare annual accounts, or this is not required information in the accounts, then collating this information may be very burdensome.

• Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

*ITC Leiden comment:*

A broad description of the activities performed in a country is useful information and it should be included.

Regulatory aspects may be extremely important for specific sectors hence once again flexibility on how to present and elaborate on the information is high in demand. One example could for instance be import quotas for specific products (e.g., some commodities or natural resources), which may translate in a particular corporate organization / way to operate in a country. Price regulations in the pharmaceutical sector is another example. There are other sectors that are heavily regulated in different ways (defence, government procurement, hazardous goods, gambling) and these regulations or industry characteristics dictate the way companies do business in a specific location.
5. Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

*ITC Leiden comment:*

One of the few countries that has contemporaneous transfer pricing documentation requirements is the US. One cannot however say that because of these requirements, the quality of transfer pricing reports prepared for US transfer pricing documentation purposes is better than what is prepared/requested in other countries. In fact, the opposite effect is probably achieved: quality of information is more important than quantity. As a practical matter, countries where there is more time and effort (and share of the total budget available, which is always limited) spent on transfer pricing documentation are countries that have transfer pricing rules that are "somehow different", like Italy, with a very specific format, or China or Russia, with very specific questionnaires. It would be impossible however for multinationals to meet the requirements of all countries if they are all different. It would also be impossible for tax authorities to review tons of information. Again, the focus should be on quality not quantity of information.

From our point of view the focus of transfer pricing documentation should not be on materiality, or at least not every year. The most material transactions for most industrial companies are purchases of goods, whereas very few companies use this transaction as a planning tool as such. If a company documents this transaction once, there does not appear to be any reason why it should need to repeat the documentation every year. It would only have to be done if there was a major change, like a change to the ownership of raw materials, or a sudden change in prices (oil shocks) or a business restructuring.

The focus of transfer pricing documentation should be on extraordinary transactions, transactions with tax havens, companies with results that are not aligned with the industry, etc. By focusing on materiality and the contemporaneous nature of the documentation, large tax payers are penalised, whether or not they are engaging on what the press has called "transfer mis-pricing". By requiring transfer pricing documentation to be contemporaneous, the OECD will only increase the number of copy paste reports companies prepare, devaluing even further transfer pricing documentation. This is exactly what should be avoided to minimise standard template reports.

6. Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

*ITC Leiden comment:*

The requirement to update benchmarks only every 3 years is very reasonable. Requiring that the financials of the benchmark is adapted annually is burdensome and has very little added value. In practice, by using an average and an interquartile range, profit level indicators or prices will be similar from one year to another, unless there has been, for example, a shock in the market, which would be a reason to do a new benchmark in any case. The legislation of many countries today does not require yearly updates (neither of benchmarks nor of the financials of the benchmark) so this new requirement will certainly increase compliance.

In practice, these benchmarks have very little added value and the cost of preparing them is very high. Time spent on a bad benchmark is time not spent on a good functional analysis.
7. Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

ITC Leiden comment:

The cost of translating the local file, the master file or both is relatively low compared to the preparation of the report, so it should be feasible to have it prepared in the local language upon audit or upon request. To have all reports prepared in the local language contemporaneously would be very burdensome and not practical. The responsible person/people at HQs or shared services centre needs to review (and often prepare) the transfer pricing reports so if they need to be done in local language they cannot do this.

8. Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

ITC Leiden comment:

In many multinational enterprises, some of the information that is suggested to be included in the master file is simply not available to the subsidiary (for example, information about top 25 employees, reorganizations in other parts of the world (which may affect the local company later on), information about value of intangibles owned by other companies, information about third party investors) and the parent company would not allow the subsidiary to access this information.

As mentioned before, in situations where the information requested is of a confidential nature, the only practical way to obtain it would be to require companies to provide this information only upon audit, and through the information exchange mechanisms provided by tax treaties. In that sense we would recommend that the master file should be separated in two parts: information that needs to be available to the local tax authorities upon request, this would be the minimum required to understand the context of the relevant intercompany transaction. Confidential or commercially sensitive information may only be available to the local tax authorities through an information exchange.

9. Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company's jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above.

ITC Leiden comment:

Country by country reports could be required to be available upon request, as long as its content is based on general and publicly available information. On the other hand, the tax authorities of the country requesting it should be very transparent as to the intended use and as to the conclusions of their analysis before any action is undertaken in classifying the risk of the company.
The master file, especially if it includes confidential information like the draft now suggest, should only be available under exchange of information.

External transfer pricing advisors or members from the tax administration moving to the private sector should be required to sign strict Non-Disclosure Agreements.

10. Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

*ITC Leiden comment:*

There is the danger of cherry picking and / or beggar thy neighbour-type of approach. We suggest that only information that is relevant to the specific country should be provided.

11. Comments on the content of the Master file

*ITC Leiden comments included between square brackets:*

Organisational structure

- Chart illustrating the MNE’s legal and ownership structure and geographical location of operating entities.

[Show all intercompany relationships to the extent that they relate directly or indirectly to the operating companies relevant to this master file. Operating companies does not mean only companies with third party revenue. It is better to use the word “active companies”.

Description of MNE’s business(es)

For each of the MNE’s major business lines [To the extent that they are relevant to the scope of this master file]:

- General written description of the MNE’s business including:
  - Important drivers of business profit
  - Chart showing supply chain for material products and services [Summary chart]
  - Chart showing important service arrangements between members of the MNE group other than R&D services
  - A description of the main geographic markets for material products and services
  - A written functional analysis describing the principal contributions to value creation by individual entities within the group, i.e. key functions performed, important risks assumed, and important assets used
  - A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year [To the extent that they are relevant to the scope of this master file. Business restructuring understood in the sense of Chapter 9 of the OECD Guidelines].
  - The title and country of the principal office of each of the 25 most highly compensated employees in the business line (note: names of such individuals should not be included) [Optional]

MNE’s intangibles [Commercially sensitive information or confidential information can be described in general terms]
• A description of the MNE’s overall strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management. [This can be very confidential information in some groups, may require Non Disclosure Agreement from the advisor preparing the report and from the Tax Authorities].
• A list of material intangibles or groups of intangibles of the MNE group and which entities own them [legal ownership or economic ownership?].
• A list of important related party agreements related to intangibles, including cost contribution arrangements, principal research service agreements and license agreements.
• A description of the group's transfer pricing policies related to R&D and intangibles.
• A description of any material transfers of interests in intangibles among associated enterprises during the fiscal year concerned, including the entities, countries, and compensation involved.

MNE’s intercompany financial activities [Commercially sensitive information or confidential information can be described in general terms]

• A description of how the group is financed, including identification of important financing arrangements with unrelated lenders. [This can be very confidential information in some groups, may require Non Disclosure Agreement from the advisor preparing the report and from the Tax Authorities].
• The identification of any members of the MNE group that provide a central financing function for the group, including the country under whose laws the entity is organised and place of effective management of such entities.
• A description of the MNE’s general transfer pricing policies related to financing arrangements between associated enterprises.

MNE’s financial and tax positions

• MNE’s annual consolidated financial statement for the fiscal year concerned.
• A list and brief description of the MNE group’s applicable unilateral and bilateral/multilateral APAs and Advance rulings. [Companies should be required to provide only relevant APAs, to the extent they affect any of the companies dealing directly or indirectly with the local company. ATRs are often not relevant. Most companies have many ATRs. This information is often not centralized at the headquarters level and it would be practically impossible for the local company to obtain all ATRs (even if they could be somehow relevant) if the headquarters does not have them.]
• A list and brief description of other relevant tax rulings related to the allocation of income to particular jurisdictions.
• A list and brief description of transfer pricing matters pending under treaty MAP or resolved in MAP during the last two years.
• Country-by-country reporting template according to Annex III. [Separate document.]

[The information proposed for the local file seems generally appropriate.]
Centre for Tax Policy & Administration,  
Organisation for Economic Co-operation and Development,  
Paris

For e-mail transmission to: transferpricing@oecd.org

21st February 2014

Dear Sir/Madam,

Thank you for inviting comments on the Discussion Draft on transfer pricing documentation and country-by-country reporting issued on 30th January 2014. We appreciate the opportunity to provide input and have focused on issues of specific relevance to insurance groups.

The International Underwriting Association of London (IUA) represents international and wholesale insurance and reinsurance companies operating in or through London. Its purpose is to promote and enhance the business environment for its members. We estimate that premium income for the London company market in 2012 was £24.225bn.

We have two overriding comments relating to the proposals for master and local files:

- It is important that each local country tax jurisdiction accepts the level of information provided in the master file and does not use local legislation to request more detailed information about the MNE group in general.
- Similarly, local tax administrations should be encouraged to accept the level of information envisaged in the local file as set out in Annex II and not use local legislation to request more detailed information about specific transactions. The local file should only deal with adjustments required under the local law of the jurisdiction.

The executive summary sets out the key points of our detailed responses.

Executive summary

Groups must be given flexibility in the reporting of information so that what is provided is useful and relevant to the tax administration in the context of the individual MNE group without creating an undue compliance burden.

The country-by-country template should be a stand-alone document which provides only the information required for risk assessment. Detailed information on intra-group transactions should be provided in the master file.

It is crucial that the confidentiality of information provided be safeguarded. We recommend that the template and master file should be provided solely to the parent company’s tax administration, on request, and that other tax administrations use the treaty information exchange provisions route to obtain what they require.
Our detailed comments on the issues raised in the Discussion Draft are set out in the attached Appendix 1 and our vision of how an abridged country-by-country reporting template should look in Appendix 2.

We hope you will find this submission helpful and would be happy to provide you with further comments.

Yours faithfully

N. J. Lowe
Nick Lowe
Director of Government Affairs
Detailed comments

1. **Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.**

We do not consider that there is currently any need for developing additional standard forms and questionnaires beyond the country-by-country reporting template. Given the comment at paragraph 3 that “tax administrations often find transfer pricing documentation to be less than fully informative and not adequate for their tax enforcement and risk assessment needs”, we consider that the focus should be on ensuring that any information in the country-by-country template and in the master and local files contains only relevant and focused information.

From our experience with the UK tax authorities, we have found it useful for tax authorities to share their risk assessment with taxpayers: the insight into the tax authorities’ concerns has helped taxpayers to provide more focused information.

2. **Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.**

It is likely to be difficult to devise and implement rules in this area that will be consistent with legal obligations and requirements in all jurisdictions and for that reason we suggest that tax authorities will have to continue to rely on taxpayers to produce whatever information and documents they may be legally permitted to.

It would be helpful to provide clearer guidance on the meaning of associated enterprise for this purpose. While the reference is to Article 9 of the Model Treaty, in practice, enterprises will only be able to provide information and documents where there is over 50% control of the other party. We would therefore suggest that any possible rules are framed with that threshold in mind.

3. **Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.**

Flexibility is required here: taxpayers should be encouraged to provide information according to how it most appropriately reflects their business model. For example, an insurance group might provide information split between life and non-life business. Perhaps some reference to the principles underlying the Handbook on Transfer Pricing Risk Assessment would be helpful to give context here.
On a point of detail, we suggest that the title and country of the principal office of each of the 25 most highly compensated employees in the business should not be included in the master file (this is set out in Annex I to Chapter V). We do not see the relevance of such information in this context. It would be a considerable compliance effort to source the data and the individuals concerned would be easily identified from the information.

4. A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

4.1. Should the country-by-country report be part of the master file or should it be a completely separate document?

As the call to develop a common template for the country-by-country report has not specifically been limited to transfer pricing administration, we consider that this report should be a separate document from the master file. That will allow tax authorities to use it to conduct a risk assessment more generally, if required.

4.2. Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

The systems requirements and compliance costs of providing information will vary depending on how each group prepares or compiles its own consolidated information. Some groups have a global “top-down” approach, under which each legal entity or business unit provides information in a globally consistent format. Other groups will build up their consolidated position from local financial information, which is then adjusted to conform with group level reporting requirements.

Flexibility of approach is vital and we recommend that each group should be able to choose whichever method fits more easily with its own approach to preparing financial information, so long as it follows the approach consistently from year to year. For example, we would expect many insurance groups which prepare consolidated accounts to find it easier to use a “top-down” approach.

4.3. Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations
impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

We propose allowing taxpayers the flexibility to complete the country-by-country template in a meaningful way – that may mean on an entity-by-entity basis, it may mean one aggregate revenue and income number per country or, where there are disparate activities within the same country, revenue and income might be shown separately for each activity or sector.

The emphasis should be on encouraging taxpayers to provide the information which they consider most relevant for tax authorities in a format which keeps the administrative burden to a minimum. The template currently groups revenue and income by country and requests sub-totals by country, so effectively the aggregate by country is already presented. If a taxpayer chooses to present only the aggregated disclosure by country, that should be treated as acceptable so long as the activities within each country are similar, for example, if the activities are all broadly in the same sector.

We have set out below our comments on the individual columns of the template:

- **Constituent Entities Organised in the Country** – we agree that it should be possible for the information to be provided on a country-by-country basis, so long as the activities within a particular country are in the same sector. If there is more than one activity (for example, more than one of the categories identified by a separate business code), then the information should be provided for each specific business activity.

- **Place of Effective Management** – we recommend that “Country of Tax Residence” is substituted for Place of Effective Management. The instructions state that the place of effective management should be determined in accordance with Article 4 of the OECD Model Tax Convention and Commentary. Article 4 uses this term in the context of a tie-breaker where a company is resident in two contracting states, so it appears that tax residence would be more widely applicable. The same comment applies to the reference in Annex I (master file) to “place of effective management”.

For clarity, we suggest that where the Constituent Entity is a PE, this column should be left blank, as the country in which the PE is situated will already have been included in Column 2.

- **Important business activity code(s)** – see our comments at 4.6 below.

- **Revenues** – in the case of insurance companies, we suggest that it is clarified that these should include premiums net of reinsurance, on an earned basis. The premiums net of reinsurance figure represents the revenues retained by the insurer in the relevant jurisdiction. The earned basis would be consistent with the earnings figure taken from financial statements.
- **Earnings Before Income Tax** – we suggest adding “unless the taxpayer has elected to report all amounts (relating to economic activity) under consistent accounting principles and translated on a consistent basis to a single currency”.

- **Income Tax Paid** – see our comments at 4.4 below.

- **Total Withholding Tax Paid** – see our comments at 4.4 below.

- **Stated capital and accumulated earnings**

  PEs do not typically have capital, so for clarity, we suggest that the Specific Instructions state that this should be left blank in the case of a PE unless there is a defined capital requirement for regulatory purposes.

- **Number of Employees**

  We would suggest a note to encourage taxpayers to provide narrative in the Additional Information box where, for example, the business model is that employees are employed by group service companies rather than by each legal entity within the group.

  The use of service companies to employ staff is common in insurance MNEs and re-analysing the information to show employee numbers and expense in the Constituent Entity to which they are seconded would be particularly onerous. In such cases, we suggest allowing the taxpayer to elect to present information on total employee numbers and the related employee expense in the employing company itself.

- **Total Employee Expense**

  We do not see this information as relevant to the risk assessment and suggest that it be omitted.

- **Tangible Assets other than Cash and Cash Equivalents**

  We do not see this information as relevant to the risk assessment and suggest that it be omitted. It would be more appropriate to include such information in the master file where such assets are significant for the group.

  We comment on disclosure of cross-border intra-group transactions in section 4.5 below.

**4.4. Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?**
**Income taxes**

For comparability purposes, we suggest reporting the corporate income tax due as accounted for (i.e. on an accruals basis) rather than payments of tax. The tax accruals basis figure reflects more accurately the total cash tax that will be paid on the revenues and earnings that are being reported. By contrast, cash payments reflect the impact of local accounting and tax rules on timing.

We appreciate that there is public focus on cash tax payments, but those are only part of the picture and we consider that reporting the tax due on the accruals basis would help tax authorities to understand the full amount of cash tax being generated by the reported revenue and earnings in any particular jurisdiction.

We do not see that splitting the income tax paid between the country of organisation and other countries adds to the risk assessment and suggest that a single figure of tax due is reported.

**Withholding taxes**

We do not see that it is relevant for general risk assessment or for transfer pricing to provide information on withholding taxes and we suggest that it be omitted from the template.

MNE insurance groups have large portfolios of investments supporting their underwriting activities and therefore tend to incur withholding taxes across a number of jurisdictions and investment lines. It would be both onerous and not very meaningful for these groups to provide details of withholding taxes on investment income.

4.5. Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

We consider that reporting intra-group payments would impose significant additional burdens on taxpayers and in any event that all the information that a tax authority requires for risk assessment purposes can be provided in a simpler and more complete way. Our suggestion is that there should be a simple question to be answered yes/no, for example, “Are there any intra-group transactions?” The tax authority can then consult the master and/or local files if “Yes” is ticked.

The proposed Annex I to Chapter V already suggests that the following should be included in the master file: “a list of material intangibles or groups of intangibles of the MNE group and which entities own them” and “a description of the MNE’s general transfer pricing policies related to financing arrangements between associated enterprises”, while the proposed Annex II to Chapter V already suggests that the following should be included in the local file: “for each material category of controlled transactions in which the entity is involved, provide …aggregate amount of intercompany charges for each category of transactions”.
We therefore suggest that the following columns should be omitted from the Template of Country-by Country Reporting:

- Royalties Paid to Constituent Entities
- Royalties Received from Constituent Entities
- Interest Paid to Constituent Entities
- Interest Received from Constituent Entities
- Services Fees Paid to Constituent Entities
- Services Fees Received from Constituent Entities

4.6. Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

The draft template already contains a list of business activity categories which we consider to be a sensible approach. We additionally suggest that the reporting of business activities should only be required for the group’s significant entities. In many MNE groups, there will be a large number of relatively inactive companies, such as legacy companies and sub-holding companies, and we do not see the value in providing business activity detail for them.

5. Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

We suggest that tax authorities leave individual taxpayers to determine materiality. Materiality depends upon the size of the group and nature of its activities. Taxpayers are already familiar with materiality in the context of financial reporting and external audit scrutiny and we do not consider it practical to offer any separate materiality guidance for this purpose.

If, however, there is a need to provide materiality standards, we suggest that a very specific test is given, to give certainty for both taxpayer and tax authority. For example, any activities which account for 5% or less of the MNE’s global revenue could be considered non-material.

6. Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

We welcome the proposal to update searches every three years where operating conditions remain unchanged. We would further suggest that updating the financial data for the comparables should follow the same timeframe. That would reduce compliance costs and, provided the operating conditions remain unchanged, should still allow the arm’s length principle to be applied.
7. Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

We suggest that the master file be prepared in a language commonly used and understood by the majority of the jurisdictions in which the MNE group has tax filing obligations. We suggest that selected extracts from the master file be translated only at the specific request of a tax authority.

In the case of PEs, the documentation in the local file for a specific transaction may apply both for the legal entity as a whole and for its individual PEs. As an example, in the insurance sector, a number of companies operate with an extended branch structure for capital efficiency purposes and the controlled transaction at legal entity level is the same as the one that needs to be documented for each of the legal entity’s PEs in different tax jurisdictions. If the language of the local country file for the legal entity is one which is commonly used and understood, for example English, it would be helpful if local tax jurisdictions were to accept local documentation in English and ask for specific extracts to be translated only if needed. If that could be agreed for PEs, despite any specific local tax legislation prescribing that this should be in the local language, it would reduce the cost of compliance.

8. Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

Please see our response to question 9 below.

9. Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

9.1. The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
9.2. Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
9.3. Some combination of the above.

We propose that the master file and country-by-country report be made available to the parent company’s tax administration on specific request. We suggest that these documents can then be made available by the parent company’s tax administration to other tax authorities under treaty information exchange provisions. That would provide safeguards to the MNE group on the confidentiality of the information provided.

10. Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

We think it helpful for the master file to include details of the existence of APAs, other rulings and MAP cases, and the dates for which any agreement applies. However, in order to preserve taxpayer confidentiality, we suggest that copies of any such agreements should not be considered to form part of the master file.
Annex III to Chapter V: A Model Template of Country-by-Country Reporting

Overview of allocation of income, taxes and business activities on a country-by-country basis

<table>
<thead>
<tr>
<th>Country</th>
<th>Constituent Entities Organised in the Country</th>
<th>Tax Residence</th>
<th>Important business activity code(s)</th>
<th>Revenues</th>
<th>Earnings before Income Tax</th>
<th>Income Tax due on Earnings</th>
<th>Stated capital and accumulated earnings</th>
<th>Number of Employees</th>
<th>Any transactions with other Constituent Entities (Yes/No)?</th>
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Appendix 2
Working Party No.6
Committee on Fiscal Affairs
Organization for Economic Co-operation and Development

Accounting & Tax Committee
Japan Foreign Trade Council, Inc.

Comments on Discussion draft on transfer pricing documentation and Country by Country reporting

The following are the comments of the Accounting & Tax Committee of the Japan Foreign Trade Council, Inc. (JFTC) in response to the invitation to public comments by the OECD regarding the “Discussion draft on transfer pricing documentation and Country by Country reporting.”

The JFTC is a trade-industry association with Japanese trading companies and trading organizations as its core members. One of the main activities of JFTC’s Accounting & Tax Committee is to submit specific policy proposals and requests concerning tax matters. Member companies of the JFTC Accounting & Tax Committee are listed at the end of this document.

Overall Comments

1. We understand that the original purpose of the BEPS Action Plan is to counter tax avoidance (or aggressive tax planning) carried out by certain companies and to ensure fair competitive conditions for all companies in operating their business. This being the case, we believe it is unreasonable and unproductive to impose an excessive and additional burden on the large number of other entities that are not engaged in types of activities envisaged by BEPS.

2. We agree that a two-tier structure consisting of a master file containing standardized information relevant to all MNE group members and a local file referring specifically to material transactions of the local taxpayer may reduce the administrative burden and costs to both the tax authority and taxpayers to some extent. However, the contents of the transfer pricing documentation contained in the current proposal would place an excessive burden on taxpayers. Moreover, the burden related to compliance has not been taken into account. The contents of the master file and CbC reporting should be limited to the information already available at the ultimate parent company in periodical financial reports (such as Annual Reports or Annual Securities Reports).

3. It is our understanding that the primary purpose of CbC reporting is to provide tax authorities with the information necessary for risk assessment.
However, it is difficult to believe that appropriate risk assessment can be undertaken solely on the basis of country-by-country profits and other quantitative information. At the present stage, the question of how CbC reporting is to be specifically used in risk assessment has not been adequately discussed or considered. Under these conditions, we strongly fear that such superficial information will, due to misunderstanding and misinterpretations, ultimately lead to incorrect risk assessments, resulting in an increase in disputes between tax authorities and taxpayers in a number of countries.

4. In addition, we believe the process through which master files are submitted is problematic. Under the current proposal, there would be a risk that confidential information such as business strategies of MNE group members and APA agreements between specific countries may leak not only from the tax authority but also from related local parties, and this would have a negative impact on business activities.

5. When a tax authority is interested in gaining an overall view of a taxpayer’s global value chain, we believe the following would be an effective approach. The first priority would be to engage the taxpayer in dialog and to thereby develop a deeper understanding of its business model. Based on this, the tax authority would request the submission of the necessary information on specific transactions. In this connection, due attention should be paid to the balance between the usefulness of information and the burden of compliance placed on the taxpayer.

Specific Comments

B.1. Transfer Pricing Risk Assessment

Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template.

6. BEPS Action 13 states that its objective is to develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into account the compliance costs for business. The rules would specifically require MNEs to provide relevant governments with the required information on their global allocation of income, economic activities and taxes paid among countries according to a common template.

7. The objective of BEPS Action 13 is already achieved through the submission of sufficient information in CbC reporting, the master files and the local files.
8. Therefore, additional standard forms and questionnaires going beyond the CbC reporting template would simply increase the burden on taxpayers and should not be adopted in view of cost of compliance to business.

9. Moreover, the identification and analysis of truly necessary information can be expected to become increasingly difficult as the scope of information collected is expanded.

10. If information going beyond the CbC reporting template is needed for purposes other than transfer pricing risk assessment, the necessary information should be specified and the tax authority should engage in direct discussions with the taxpayer in the course of a tax audit.

Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

11. Discussions fostering cooperative relations for maintaining and enhancing tax compliance are mutually beneficial to both tax authorities and taxpayers. From this perspective, tax authorities should not stop at mechanically interpreting the information submitted by taxpayers. Instead, it is important to promote mutual understanding by sharing information on transactions deemed a possible risk on a timely basis.

12. It is particularly important to share information when the tax authority has identified risk in cases where the taxpayer has justified transfer pricing in its transfer pricing documentation. In such instances, the tax authority should convey the reasons for its judgment to the taxpayer and provide the taxpayer with an opportunity to explain itself. This form of dialog can be expected to resolve misunderstandings between tax authorities and taxpayers.

B.3. Transfer Pricing Audit

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

13. It is stated that when necessary documents are located outside the country where the audit is being conducted, it is important for tax authorities to be able to obtain this information directly or through information sharing. However, as a matter of principle, the audit rights are restricted to the jurisdiction in which the audit is being conducted. It would therefore be extremely inappropriate if the intent is to allow tax
authorities to have direct access to taxpayers located outside their jurisdiction. We therefore propose the deletion of “directly” from the discussion draft.

14. If rules are to be developed for the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information, the first action should be to specify the information pertaining to related transactions carried out in jurisdictions other than the country of audit, and to obtain the necessary information based on treaty information exchange provisions existing among the relevant governments.

15. Suppose a subsidiary is formed through a joint venture agreement. The leakage of information to this subsidiary concerning other subsidiaries of an MNE group that is in competition with one of the partnering companies may have a particularly serious negative impact on business. For this reason, such information should be obtained based on treaty information exchange provisions among governments.

16. Governments participating in the BEPS Action Plan should endeavor to enhance information exchange networks and ensure their efficient management. Unless due efforts are made to develop such information exchange mechanisms among governments, we cannot agree with the adoption of rules allowing tax authorities to “directly” obtain information from beyond its national borders.

17. Even in the case of information exchange between tax authorities, the reasons why information exchange is deemed necessary should be disclosed to the taxpayers in advance.

C.1. Master File

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

18. The master file contains common standardized information relevant to all MNE group members, and does not contain information relevant to individual group members. Regarding the level of common standardized information, entities should be allowed to choose between the following two options: reporting by line of business or reporting by entity wide basis,
since the taxpayer has the best understanding of the general nature and specifics of its business activities.

19. The master file can be very useful to both taxpayers and the tax authorities. However, the CbC reporting template should not be included in the master file because its primary purpose is to facilitate risk assessment by tax authorities. CbC reporting would contain information of a highly confidential nature. Information that serves different purposes and is of completely different levels of confidentiality should be contained in separate documents.

20. From the perspective of avoiding excessive cost to taxpayers, the choice of whether to adopt a bottom-up or top-down approach should be left to taxpayers.

21. To ensure fairness among all taxpayers, the establishment of consistent tax rules and regulations among the countries is important. For example, the countries participating in this Action Plan should introduce a regulation requesting their resident companies to submit sufficient information to the ultimate parent company resident in other countries.

Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?
22. Regardless of whether a bottom-up or top-down approach is adopted, any requirement to collect information in addition to what is already on hand for consolidated financial reporting preparation purposes would place an excessive burden on taxpayers.

23. If bottom-up reporting is adopted, it would be impractical to aggregate income and revenue per country. Likewise, if the top-down reporting is adopted, it would clearly become an additional burden to the taxpayers and also impractical without fundamental alterations to the information system also resulting in significant cost and burden, in order to reflect revenue and earnings attributable to cross-border transactions between associated enterprises, while eliminating revenue and transactions between group entities within the same country.

24. For the ultimate parent companies in MNE group collecting financial information on an entity by entity basis, the entity by entity basis preparation of CbC reporting is practical. However, since the decision on whether an entity constitutes an “associated enterprise” in the context of the Transfer Pricing Guidelines requires considerations of qualitative factors, an objective determination is practically difficult. Moreover, quantitative criteria pertaining to the definition of an associated enterprise differ significantly among countries, making it difficult to produce a report that is consistent for the entire group. For example, some countries’ transfer pricing taxation regimes consider associated relations to exist even when the equity stake is below 50 percent. In many such cases, it would be practically impossible to collect necessary information from a company unless it is a consolidated subsidiary for accounting purposes in which the entity holds voting rights in excess of 50 percent. Therefore, given that the purpose of CbC reporting is to understand the outline of an MNE group, and given that CbC reporting is not intended for use in the analysis of detailed transfer pricing, the scope of Constituent Entity covered in CbC reporting should be limited to consolidated subsidiaries in accordance with generally accepted accounting standards.

25. Information pertaining to total corporate taxes paid and withholding taxes paid per country is not necessarily available to the parent company of the MNE group. Obtaining this information would require the development of systems and other measures, and would place an excessive burden on taxpayers.
26. The objective of CbC reporting is mainly the risk assessment in order to understand the outline of an MNE group, therefore, it is not necessary to separately report the corporate tax paid and withholding tax. The corporation tax expense for accounting purpose should be sufficient.

Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

27. Specific material criteria are established for the collection of financial data from subsidiaries for the preparation of consolidated financial statements. If these criteria are not applied to CbC reporting, a taxpayer would be required to produce additional information regarding transactions of limited materiality. Given that risk assessment is the primary purpose of CbC reporting, this requirement could place an excessive burden on taxpayers.

Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

28. The current CbC reporting template requires the reporting of “important business activity codes.” For this reason, we believe that the objective of BEPS Action Plan 13 has already been achieved. Detailed information on the economic activities of individual companies is included in the local file. Reporting the same information in CbC reporting would require duplication and should be avoided.

D.2. Preparation of Documentation and Time Frame

29. One of the purposes of transfer pricing documentation is to ensure taxpayers to perform studies relating to the application of appropriate price and terms to transactions with associated enterprises, and the filing of appropriate income from such transactions. Under the present proposal, the preparation of master files and local files places an excessive burden on taxpayers. Therefore, the items required in the master and local files should first be carefully reviewed and selected. Moreover, in countries with a relatively short time between the end of the business year and due date for filing tax returns, contemporaneous documentation should not be recommended.
D.3. Materiality

Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

30. Considering that the primary purpose of CbC reporting is to facilitate MNE risk assessment, we believe that it is necessary and essential to establish materiality standards that take into account the balance between the usefulness of information and the cost to taxpayers. Materiality standards should not be based on absolute amounts. Instead, such factors as scale of business, amount of transactions undertaken with associated enterprises, and the share of associated transactions in total transactions should be considered in judging materiality.

31. We strongly propose that some form of materiality standard be established. One possibility would be to adopt the same concept used in determining materiality in the preparation of financial statements and financial audits. For example, subsidiaries whose revenue (or profits) stand below a certain level in relation to the consolidated revenue of the MNE group (or alternatively, in relation to consolidated income before taxes or income after taxes) would be excluded from the scope of reporting.

D.5. Frequency of Documentation Updates

Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

32. Paragraph 34 proposes searches in databases for comparables every three years, as long as the operating conditions remain unchanged. We believe this to be a useful proposal because it takes into account efficient transfer pricing documentation process by taxpayers.

D.6. Language

Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.
33. We agree with using English in the preparation and submission of master files, and we believe verbatim translation of master files produced in English to local language is, as a rule, unnecessary. However, an explicit provision should be included to allow the submission of a summary translation when requested by the tax authorities. As for the language of local files, taxpayers should be permitted to choose between using English and the local language.

34. Due attention should be paid to avoiding the placement of an excessive burden on taxpayers in the preparation of both master and local files. As a rule, the verbatim translation should need to be prepared by tax authorities.

D.7. Penalties

35. Burden of proof should rest with the authorities, so long as documentation has been submitted without delay and such documentation does not contain misrepresentations due to gross negligence or willful misconduct.

D.8. Confidentiality

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

36. The proposed contents of the master file and CbC reporting include highly confidential information. This may lead to the following problems.

- Important contracts are normally subject to non-disclosure agreements binding both parties.
- Publicly listed companies are subject to strict restrictions placed on them under the laws and regulations of stock exchanges and others.
- Sharing financial information and other confidential information pertaining to a subsidiary with other subsidiaries can give rise to business-related problems and legal issues related to breach of confidentiality.

37. Therefore, the contents of the master file should be limited to information common to all subsidiaries, which is of a general nature and not subject to restrictions on disclosure for reasons of confidentiality. Among the proposed information to be included in the master file, following items should be excluded from the information required, since those items are either not relevant to transfer pricing or highly confidential.

- Chart showing supply chain for material products and services
There is a concern regarding the negative impact on the business if a joint venture partner of a MNE group who is at the same time the competitor to a customer of a MNE group receives such information.

- A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year. (There is a concern of breach of confidentiality clause of relevant contracts with the counterparties of the transactions)
- The title and country of the principal office of each of the 25 most highly compensated employees in the business line
- A list and brief description of the MNE group’s applicable unilateral and bilateral/multilateral APAs and Advance rulings
- A list and brief description of other relevant tax rulings related to the allocation of income to particular jurisdictions
- A list and brief description of transfer pricing matters pending under treaty MAP or resolved in MAP during the last two years.

38. Since the CbC reporting contain highly confidential information, it should be submitted by the ultimate parent entity of the MNE group to its own local tax authority. Sharing of the contents of the CbC reporting with other tax administrations should be undertaken in accordance with treaty information exchange provisions.

E. Implementation

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions
- Some combination of the above

39. As stated under D.8 above, the contents of the CbC reporting in particular are of a highly confidential nature. Therefore, CbC reporting should be submitted by the ultimate parent entity of the MNE group solely to its own local tax authority. Sharing of the contents of the CbC reporting with other tax administrations should be undertaken in accordance with treaty information exchange provisions. From the perspective of protecting confidentiality, we are opposed to the compulsory sharing of CbC reporting with MNE group members in each country.

40. When information requested under treaty information exchange provisions relates to countries other than the country requesting the information, processes should be established requiring the taxpayer’s prior consent to release the information.
41. Furthermore, if information related to countries other than the country requesting the information is to be submitted to the tax authority, taking into consideration that the purpose of the CbC reporting is to perform risk assessment mainly to select the entities to be audited and also taking into account the confidentiality of the contents of CbC reporting, it would be desirable for information related to other countries to be submitted in collected form.

42. Information related to APA, other rulings and MAP cases strictly reflects the result of negotiations with relevant tax authorities on specific transactions. For this reason, we believe it would not be appropriate to disclose such information to the tax authorities of other jurisdictions.

Annex 1 Master File

Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

43. Information related to APA, other rulings and MAP cases reflects agreements and ongoing discussions on specific transactions among relevant tax authorities (or with the relevant tax authorities), and should not be included in the master file, which comprises common standardized information relevant to all MNE group members. Moreover, in certain instances, taxpayers are bound by a duty of confidentiality and would not be able to disclose this information to subsidiaries or tax authorities that are unrelated to the transaction in question. Therefore, such information should not be included in the master file. As stated under D.8, the contents of the master file should be limited to information common to all subsidiaries, which is of a general nature and not subject to restrictions on disclosure for reasons of confidentiality.
Japan Foreign Trade Council, Inc.

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February 21, 2014

Committee on Fiscal Affairs
The Organisation for Economic Co-operation and Development

International Tax Committee
Japan Machinery Center for Trade and Investment

Comments on Action 13 of the Action Plan on Base Erosion and Profit Shifting, “Discussion Draft on Transfer Pricing Documentation and CbC Reporting”

Japan Machinery Center for Trade and Investment ("JMC") is a non-profit organisation that was established in 1952 to promote sound development of foreign trade relating to machinery in Japan by multi-national entities ("MNE"), and includes the major machinery manufacturers, trading companies, and engineering companies. To enhance the international competitive strength of the machinery industry in Japan, an international tax committee was established in beginning of 1990 to study and encourage the developments of domestic and foreign international taxation systems.
URL: http://www.jmcti.org/jmchomepage/english/index.htm

JMC has decided to submit an opinion on Action 13 of the Action Plan on BEPS as it has a significant impact on JMC members, composed of companies engaging in extensive export of machineries and exporting vendors making investments. Our opinion is based on the “Comments on Discussion Draft on Transfer Pricing Documentation and Country by Country Reporting” submitted by KEIDANREN to the OECD with full agreement and support, along with JMC specific issues.
I. Comments from JMC

<General Comment>

1. JMC is expecting an enhancement of transparency with reduction in the compliance cost for businesses through a standardized template, and more clarity regarding standards with the framework of the two-tiered approach of master file and local file as proposed by the OECD in “Public Consultation DISCUSSION DRAFT ON TRANSFER PRICING DOCUMENTATION AND CbC REPORTING” issued on January 30, 2014.

However, JMC would like to make following comments based on the fact that the current proposal includes an approach, which is doubtful in its applicability from practical perspective, and the content required resulting in excessive administrative burden on the taxpayers.

2. JMC is composed of over 250 Japanese exporting vendors of machinery representing leading manufacturers, trade companies, and engineering companies. Each member company manages its operation with “appropriate tax payment” as one of the key social responsibility, placing serious weight on tax compliance. Under the CFC (tax haven) rules in Japan, tax avoidance schemes conducted by some Western MNE, indicated in the BEPS report as examples, cannot be accepted; and no actual example of practice of aggressive tax planning with intentional transfer of intangibles and profits to low tax jurisdiction, as raised as part of the BEPS discussions, has been observed.

Rather, although double non-taxation arrangements are focused on and are discussed as a core issue of the BEPS project, we would request the OECD to remember the fact that many companies have suffered from double taxation issues in practice and that, even if the tax treaty exists, the mutual agreement procedures for relief from double taxation do not work in some cases. We would insist that, in considering the BEPS issues, the OECD should also discuss the above problematic issues on the relief measures of double taxation.

<Specific Comments>

3. Regarding the master file
① Definition/standard of the master file

JMC requests the following points to be clearly stated for the preparation of master file. In case the definition/standard applied (i.e. applied accounting standard, scope of related party, principle of materiality) is not clearly stipulated by the OECD, the taxpayer may apply the standard in the jurisdiction of the parent entity. In addition, in the case both parent and the subsidiary are publicly listed companies, both companies should be liable to prepare the master file for their own business, and it is inappropriate for the parent company to be solely responsible for the preparation of the master file.

② Content of the master file

Information regarding the APAs and Rulings as well as MAP is listed as part of the information to be included in the master file. However APAs and Advance rulings as well as MAP with certain tax authorities are conducted with a high degree of confidentiality. As such, without a rational reason for unrelated tax authorities to obtain such information, we request the requirement to be deleted from the information to be included in the master file.

Other than the information above, the following information should be deleted from the list of information to be included in the master file given the highly confidential nature of the information, and the applicability of such information is questionable.

- Chart showing supply chain for material products and services
- A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year
- A list of important related party agreements related to intangibles, including cost contribution arrangements, principal research service agreements and license agreements
- A description of the group’s transfer pricing policies related to R&D and intangibles
- A description of any material transfers of interests in intangibles among associated enterprises during the fiscal year concerned, including the entities, countries, and compensation involved
- A description of the MNE’s general transfer pricing policies related to financing arrangements between associated enterprises

(The information above can be noted in the local file as necessary)
Countries that are located in the main office and title of each of the 25 most highly compensated employees in each business field

It is to be noted that the functional analysis written business overview of MNE should be sufficient to be described by reference to the range of information that has been disclosed in the annual securities reports, annual reports, and other financial reports.

4. Regarding CbC report

① Implementation

The following comments are requested in the box under “E. Implementation” of Chapter V

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

・ The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
・ Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
・ Some combination of the above.

This point is highly critical and from our perspective, even if country-by-country reporting is unavoidable, it should be sufficient that the parent company submit this report to the authorities of the country where the parent company is. In addition, if the country-by-country report information of a company is required by the authorities of the country where the subsidiary company is located, this information should be shared in accordance with the exchange of information provisions in the tax treaty or other agreement with the authority of the country where the parent company is located. In this case, it may be pointed out that it is difficult to exchange the information with countries and regions without any valid information exchange provisions. Rather from our perspective the role of the OECD is per se to encourage prevention of double taxation by proactive conclusion of tax treaties and information exchange agreements. It must clear that the local file must not be shared.

We oppose the concept that the subsidiaries of multinational companies are required
to submit this report to the authorities in the countries where multinational companies have business, for the following reasons:

(1) Security/confidentiality concerns

Country-by-country reporting is likely to require highly-confidential information including sales, pretax income, taxes paid, number of employees, payroll, total assets, etc. Usually, since only the parent company is possibly able to keep all of this information, the subsidiary only obtains the information relating to itself and subsidiaries under this subsidiary, except for public information like the annual report which the parent company discloses. If subsidiaries are required to submit the country-by-country report to the authorities where these subsidiaries are located, it will have a material influence on the corporate governance of multinational companies since the subsidiaries will know and hold the above highly-confidential information. We also believe that the information relating to MAP and APA that are discussed with the tax authorities in a specific country is extremely confidential information.

(2) Administrative burden

An affiliated group of companies can include several purely domestic companies which do not or rarely have transactions with an overseas affiliated company and several companies which are not subject to documentation obligations under the transfer pricing system. If information relating to all of the affiliated companies globally is required to be submitted under country-by-country reporting, the administrative burden for this report will be unimaginably enormous. We think that it is impossible to collect and record this information completely.

For example, in the case MNE has various business operations within the group, though a significant portion of master file may be irrelevant to many parts of the CbC report of each entity of this group, the entity will be requested to explain the detail of information submitted to the tax authority with the responsibility of the each entity. Thus, the required administrative burden is far beyond expected and enormous.

In addition, the definition of a foreign affiliated person under the transfer pricing provisions is different in each country. Therefore, it is essential for multinational companies which have operations in each country and region to clarify the definition of a “subsidiary” that is subject to country-by-country reporting. If country-by-country reporting is required in compliance with the transfer pricing provisions of each
country, it is impossible to maintain consistency with the purpose of the action plan of reporting uniform and standardized information by using a template. It should be clarified as to what should be the uniform reporting standard and the reasons for such standard.

② CbC report: Concerns regarding the necessity and unintended use of the report

As mentioned above, we have strong doubt about the approach. We believe that the approach of requiring all companies to submit additional information that places excessive burden on them, without it being clear as to the usefulness of information provided, is wrong.

Many of our member companies are actively engaged with business in Asian emerging countries, establishing manufacturing and distribution subsidiaries in these emerging countries. In the recent years, these emerging countries have trended towards the implementation of transfer pricing system allocating more profit to MNE affiliates operating in these emerging countries on the basis of market specific features such as location savings and market premium. Under such conditions, we are afraid that the required provision of information related to global allocation of income as well as taxes paid among countries/jurisdiction of MNE may generate inaccurate risk assessments and result in arguments between tax authorities and taxpayers in certain emerging countries. Annex III provides “A Model Template of Country-by-Country (“CbC”) reporting (Overview of allocation of income, taxes and business activities on a country-by-country basis)” and we are concerned that the risk of double taxation may rise as the information may simply be used as a split factor in applying profit split method. Thus, for the reasons above, we are against the concept of including CbC report as part of the master file.

We are concerned that BEPS issues, which were initially discussed as tax avoidance problems by some MNE in Europe, might turn to be discussed in different contexts, such as tax conflicts between emerging countries and industrial countries.

II. Synopses strongly agreed by JMC regarding the issues addressed in the "Comment on Discussion Draft on Transfer Pricing Documentation and Country by Country Reporting" submitted by KEIDANREN.
1. We believe that the best way for tax administrations to gain a comprehensive “big picture” understanding of a taxpayer’s global value chain is through direct, open and transparent dialogue with the taxpayer. After such direct dialogue, rather than relying on the country-by-country reporting information which may only provide confusion, the tax authority would be able to request information on specific transactions where they consider that there may be a transfer pricing risk.

2. An approach is far more preferable than moving directly to country-by-country reporting for all taxpayers, regardless of their compliance history or risk, which would result in a reduced compliance burden and more appropriate risk assessment. Therefore, it would be a reasonable approach to do a Gateway Test that a tax administration would determine whether they would request additional information to a company in its jurisdiction depending on the result of the risk assessment through cooperative relationship with the company.

3. Since country-by-country income and taxes of multinational companies and other data relating to the measurement of economic activities are not available immediately and there are questions about the usefulness of such information, we oppose the introduction of a new system for obtaining such information. Even if it is inevitable to introduce this system, for example, it should be permitted to use public accounting information in order to minimize the increased additional administrative burden to multinational companies. Further, this new system must not create a requirement for the collection of new data which companies do not currently gather.

JMC is submitting the above comments to the OECD Public Consultation for the first time because the topic is of significant importance for many exporting companies of Japan. We highly appreciate the opportunity to provide these comments.

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February 23, 2014

OECD Secretariat
Transfer Pricing Group
Via email: transferpricing@oecd.org

Re: Response to the OECD Public Consultation on the Discussion Draft on Transfer Pricing

To whom it may concern,

On behalf of Jubilee USA Network’s 75 US member organizations and more than 400 faith communities, we welcome the opportunity to respond to the OECD’s draft restatement of Chapter V of the Transfer Pricing Guidelines, incorporating country by country reporting. Further, we appreciate the OECD Secretariat’s attempts to help incorporate country-by-country reporting into a comprehensive global system.

Fundamentally, Jubilee USA Network addresses the structural causes of poverty. Our efforts on debt, taxation and transparency lead us to support the implementation of country by country reporting. Globally, a number of corporations and other actors avoid taxes in the places they are operating and take advantage of the lack of basic transparent global reporting regulations. Not only does this behaviour take resources from those living in extreme poverty, it creates a double blow for vulnerable populations as this lack of reporting bolsters corruption.

In our official response, I am pleased to offer that Jubilee USA Network fully endorses the comments submitted by the Director of Government Affairs, Heather A. Lowe, on behalf of Global Financial Integrity. We join their analysis in order to strengthen the guidelines.

In recent years, we have seen the OECD, G20, G8, European Union and US Congress seriously grapple with the issues of country by country reporting and global tax avoidance. Implementation of strong global guidelines that require reporting from multinational corporations will stem corruption and can deter tax avoidance.

Gratefully,

Eric LeCompte
Executive Director
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