PUBLIC COMMENTS RECEIVED
VOLUME IV - Letters S to Z

Discussion Draft on Transfer Pricing Documentation and CbC Reporting

23 February 2014
21 February 2014

Dear Mr Saint-Amans

Response by SABMiller plc to the OECD Discussion draft on transfer pricing documentation and country-by-country reporting

The SABMiller Group is one of the world's leading brewers, involved in the manufacture, distribution and sale of beverages across six continents. Listed on the London Stock Exchange it is ranked as one of the top 20 companies on the FTSE. It has some 70,000 employees, with over 200 branded beverages sold in over 75 countries, including a number of market-leading local brands. As a large multinational group transfer pricing is clearly an important area for the Group.

SABMiller’s Approach to Tax encourages open and transparent engagement with tax authorities and therefore we welcome the opportunity to comment on the discussion draft. We appreciate the OECD's engagement with taxpayers on how the OECD plan to enable better sharing of information between taxpayers and tax authorities, and to encourage a transparent and open relationship between the relevant parties.

General Matters

Overall, we see the development of the transfer pricing documentation proposals as positive as they bring clarity and consistency to what is currently a very wide and varied set of enquiries from multiple jurisdictions. However, in addressing the Action 13 objective of ‘taking into account the compliance costs for business’ we believe certain key points are fundamental;

1. OECD country-by-country reporting requirements should be aligned to, and consistent with, any recommendations currently being prepared in the European Parliament,

2. Significant amounts of commercially confidential data will now be available in a single document and this data must be absolutely safeguarded. We provide further comments re: para 41 below,

3. In acknowledgment of taxpayers providing this additional data, and investing in the systems and processes required, it is our opinion that commitment is required from individual countries that subscribe to these proposals that their transfer pricing documentation requirements will follow the suggested requirements and not proliferate with additional local requirements. We provide further comments re: para 45 below.
Speaking for SABMiller, our existing transfer pricing documentation substantially covers the requirements suggested for the master file and local file, albeit that it will require some re-working to fit the proposed format. We anticipate that the enhanced requirements will require at least one additional full time resource centrally, supported by additional resource and cost impacts in our 75 countries to fully meet the proposals.

**Specific Matters**

We respond to the specific issues raised on the revised Chapter V guidance below with the annotated relevant paragraph number, together with our additional general 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.

[Para 9] We do not believe that BEPS Action 13 needs to develop additional standard forms and questionnaires beyond the country-by-country reporting template because the proposals are already comprehensive and are sufficient to form a risk assessment.

We also believe that where tax authorities already request such information as part of the existing domestic tax return requirements, e.g. Australia’s international dealing schedule, then such duplication should be removed and only one form of reporting should be required of the taxpayer.

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

[Para 9] In our opinion risk assessments should always be shared with the taxpayer because this builds trust, openness and transparency on both sides. We believe that the sharing of risk assessments will assist taxpayers and tax authorities together by demonstrating the role, and value, of the additional documentation provided by the taxpayer, and remove misunderstandings that may have arisen in formulating the risk assessment.

**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 possession of associated enterprises outside the jurisdiction requesting the information.

[Para 15] In line with our comments above at para 9 on openness and transparency, and later on confidentiality at para 41; when information is requested by other tax authorities our firm opinion is that the taxpayer should be informed and given the first opportunity to respond, liaise with its related party and for it to respond directly. Tax authority to tax authority sharing of taxpayer documentation should be in exceptional circumstances and only if the taxpayer fails to provide the required information.

We reach this position because it is the taxpayer who has the relationship with the tax authority. By providing the data itself the taxpayer builds on this relationship, ensures complete and consistent information is provided, and the taxpayer who holds the original documentation is fully aware of what is being provided to whom.
C.1. & C.2. Master file and local file structure

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. ...

[Para 18] In our view the master file should be prepared on a statutory entity basis. If groups wish to break out further by business line then this should be available by election as this may be more appropriate to certain entities and help manage their compliance burden. We believe if the master file is just prepared on business lines, which do not agree to tax computations, then tax authorities will inevitably require reconciliations which will increase the compliance burden.

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 as any other issues commentators may identify:
- Should country-by-country report be part of the master file or should it be completely separate document?

[Para 20] If the requirements are as per the current proposal then we agree with the proposal that the country-by-country report should form part of the master file. However if the requirements on country-by-country reporting proliferate beyond transfer pricing then separate reporting may be appropriate.

- Should the country-by-country template be complied 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?

Our existing systems would enable us to complete "top-down" reporting with limited additional work. However, we anticipate this approach leading to burdensome reconciliations of consolidated data to local statutory accounts, driven by differences caused by, for example, non co-terminus period ends, consolidation adjustments, foreign exchange rates used and preparation under different accounting policy regimes.

We do not see such extensive reconciliation analysis as value-add or risk-reducing to either taxpayers or tax authorities. Therefore, we reach the inevitable conclusion that the information in the template should be prepared on a "bottom-up" basis so that the additional information to be provided is consistent with what is reported in local tax computations.

"Bottom-up" reporting will require significant investment in new processes and initial set up costs for the business. However, in our opinion it will minimise the reconciliations that would inevitably follow under a "top-down" approach. The information provided will be more recognisable (and therefore potentially more useable and useful) to tax authorities since it will be drawn from the companies' local statutory accounts, used as the basis for local tax return filing.

We therefore recommend "bottom-up" but, to limit the compliance burden, no reconciliation should be required from the country-by-country template totals to consolidated group information that may be published elsewhere.
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 consolidation reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? ... Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? ...

We recommend entity by entity reporting. Separate country consolidations, where not required for any other purpose, would introduce an additional burden on taxpayers.

If country consolidated data is provided then tax authorities should not request further reconciliation to legal entity data, otherwise tax authorities will inevitably request further analysis and reconciliations from the template, which is not tax risk assessment, nor tax compliance. The local tax returns with the authorities should provide all of the necessary tax compliance data.

Should the country-by-country template require one aggregate number for corporate income tax paid on the case 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 analysis of tax amounts, if a requirement, should be based upon the corporate tax liability in the annual corporate tax return. This is a more robust measure of tax due than cash tax paid which can be distorted by different payment-on-account regimes, loss utilisation rules, timing of tax audit settlements etc..

We do not understand how the requirement for WHT information will inform the transfer pricing risk assessment. Collection of taxpayer WHT information should not impose a significant additional burden 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 intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

We do not understand why the proposed template only identifies certain specific related party transactions to be disclosed (royalties, interest & service fees) but omits intercompany sales of product. If these separate lines are going to be required then also asking for an aggregate figure adds little value.

In our view a requirement for intra-group payments of royalties, interest and service fees should not 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? ...

The reporting of the nature of the business activities carried out in a jurisdiction would aid understanding. The proposed company classification by codes is both simple and logical.
D.2. Time frame

[Para 28] We agree that the time frame to complete the master file should be at least one year following the end of the parent entity’s financial year. Some local statutory accounts are not finalised for some months after the year-end, after which further time would be required in order to compile the data into the country-by-country template. Countries should therefore be prepared that the master file template for any given year may not be prepared at the time of local tax filing.

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.

[Para 29] Specific guidance on materiality should be set. Materiality standards would need to be set by reference to an absolute amount per inter-company transaction type. Limits based on profitability levels would not work as the profitability level is impacted by the transfer pricing itself.

Further, the requirements should include clarification on materiality levels concerning when a specific entity may not need to be included within the country-by-country template. For example, would exclusions be permitted for dormant companies, could a de-minimis level of transactions mean that the entity is not required to be included?

D.5. Frequency of documentation updates

Comments are requested regarding reasonable measure 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?

[Para 34] We agree that under constant operating conditions and constant application of the same TP method, then database searches for comparables should only be required every three years.

D.6. Language

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

[Para 35] The approach being proposed for master file language is sensible and logical; however, the local file should also be acceptable in English given the common use of English across the business world and the potential for sharing of documentation referred to at para 15. This would enable taxpayers to consolidate some elements of local file preparation centrally, or regionally, which will reduce the compliance cost of the documentation and country-by-country reporting proposals.

D.7. Penalties

[Para 40] We agree with the statement that penalty mitigation when documentation meets Chapter V requirements is an incentive and benefit for taxpayers to meet the enhanced requirements. We look forward to hearing from the OECD how it might propose this in the member state legislation reviews.
D.8. Confidentiality & sharing of information

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.

[Para 41] As noted above in our comments re: para 15, our position is for the information (including the master file) to always be provided directly by the taxpayer in the local country to ensure complete information is provided, and the taxpayer controls the dissemination of its own financial and tax data.

We maintain concerns regarding sharing of data between tax authorities. Where data is shared the taxpayer group should be informed of such exchanges, and any exchange of data should be facilitated by a legal construct, such as a treaty.

Country-by-country reporting represents a significant amount of commercial data consolidated into a single document. We would request further details how data security will be managed to ensure no data leaks given how valuable the data could be in, say, a merger and acquisition context.

Existing taxpayer to tax authority 'data upload' IT applications exist such as EMCS and VIES. If these platforms are tested and considered to be robust and secure then this would be a logical place to begin maintenance of secure data.

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.

[Para 45] We recommend filing the master file documentation in the parent company's jurisdiction and sharing the information under treaty information provisions, and we reiterate our comments above re: para 15, that the sharing of information should be by the taxpayer.

In acknowledgment of taxpayers providing this additional data, and investing in the systems and processes required, it is our opinion that commitment is required that individual country transfer pricing documentation requirements will follow the OECD BEPS requirements and not proliferate with additional local requirements. Given that the initial conformation to the master file and requested financial data will require some initial setup, and additional process going forward, this reciprocal gesture would help to mitigate the resource impact. The OECD response to comments should address how they plan to ensure there is no local proliferation of requirements.
Annex I

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

As part of the increased transparency and open and constructive relationships the Chapter V revision seeks to achieve, we see providing an overview of future arising APAs, rulings and MAP cases as sensible.

Conclusion

Overall, as commented, we support the initiative to create greater consistency between transfer pricing documentation requirements and provide tax authorities with the required information in order to conduct informed transfer pricing risk assessments.

If you would like to contact us directly in relation to any of the above issues we would be more than happy to discuss in more detail.

Yours faithfully,

[Signature]

Graham Holford
Group Head of Tax, SABMiller plc
It is understandable the suggestion to have a form to get information from other countries where the related parties of the local subsidiary are located. However, it should be taken into account that not always, a subsidiary will have access to information outside the scope of its functions and responsibilities. Also, it should be made clear that in some cases, the financial information that is requested in the Country-by-Country report, will not necessarily reflect the regular course of business. That is, some related parties may reflect a loss or a high profitability, derived from an extraordinary transaction, not related to transfer pricing. Therefore, tax authorities may take course of action derived from such situations, resulting in unnecessary efforts and costs for both the taxpayer and the tax authority.

Risk assessments are not suggested to be shared by the tax authority with taxpayers, on a particular basis before starting an audit. In such cases, taxpayers may be warned to situations that may be reviewed, and have enough time to prepare for such audit. However, it may be wise to share general comments on a general basis regarding overall comments by tax authorities. Therefore, taxpayers will have a sense of what the tax authorities expect to see and what they expect to challenge, in order to prepare documentation in time.

Regarding the possible rules related to the production of information and documents in the possession of related parties, as mentioned before, a local subsidiary will find it difficult to get said information. In many cases, such information could be considered as confidential within the Multi National Enterprise. Therefore, if rules require for entities to be obligated to provide said information, they will be in default and subject to penalties, based on situations out of their scope or control.

Regarding the preparation of a Master File, said document results on a costly enterprise for an MNE, that in some cases, does not provide too much benefits. Master Files are beneficial for the holding entity, which has to show their functions and risks to the tax authority of the jurisdiction where they are located. However, they may contain some information that is not required or useful for its subsidiaries. Also, in some cases, some MNE’s do not include immaterial transactions, since they are not required to. But for some subsidiaries, there may be their only transaction, and therefore, a material one. Thus, some subsidiaries are not included in the master file.

On the topic of the frequency of documentation updates, it is advisable to have documentation for each fiscal year. This is due to the fact, that each transaction is different in each year. Also, comparable information should be updated also every year, in order to have contemporaneous
information, that reflects the results of the industry or market, in the year the tested intercompany transactions were performed.

With respect to language, many countries require to have all documentation filed in the local language. This is also due to the fact that not all personnel in the tax authorities will necessarily speak English. Also, if transfer pricing cases go to court, local language will prevail, even though they could be requested to be translated.

Regarding confidentiality of sensitive information, this is a sensitive topic for MNE. Such information should only be provided upon request by the tax authorities under the course of an audit, and based on what is the benefit of providing said information. It is not advisable to include it in documentation that can be available to parties which should not have access to said information.

Information that can be included in the Master File, and circulated to subsidiaries to be included in their local information, is the Functional Analysis. This information generally describes the functions performed by each entity, and can help the tax authorities to understand the transfer pricing structure of the MNE to which the local subsidiary under review belongs to.

Regarding the risk assessment issue, tax authorities need to request an informative return, which many countries already do. Said information must be basic compared to full transfer pricing documentation, in order to be the startup point for a risk assessment. Tax authorities should then use other information they have access, like tax return, or audited financial statements, among others, in order to complete their risk assessment.
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Discussion Draft on Transfer Pricing Documentation and CbC Reporting issued on 30 January 2014

Dear Sir or Madam,

I am pleased to respond to the OECD’s request for comments. This comment was prepared with my very best intentions to help with this process and is submitted today on my own capacity.

In comparison to comments by tax experts, I would like to highlight my views and comments from Finance and Accounting point of view in particular when it comes to the CbC reporting.

For a couple of years, I am Head of the Global Transfer Price Management of the Merck Group, a large German-based Pharmaceuticals & Chemicals Company. My organization - being part of the Finance, Accounting and Controlling organization - manages all operational transfer pricing aspects in terms of implementation, monitoring, data reporting and supervision of IC transactions within the group. Our key competencies are Transfer pricing data, processes and systems in the field of Finance combined with significant communication and coordination efforts. The major focus of our activities is on the global steering of the operational transfer prices for all divisions / subsidiaries of the Merck Group in accordance with the conditions and guidelines set forth by the corporate tax department. Consequently corporate financial reporting systems are our expertise.

I am an Industrial Engineer and worked 13 years in various management and senior management positions in Finance, Accounting and Controlling. Based on extensive international experience in these fields I have specialized now for more than 3 years in the field of Operational Transfer pricing bridging Tax requirements to Finance, Accounting, IT, Business Intelligence and applicable data reporting systems.

I provide my comments on the draft to contribute useful thoughts and Finance expert insights from a industry practice point of view. Please contact me in case you would like to discuss them in further detail or in any consultation.

Sincerely,

Dr Frank Schoeneborn

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Introductory general comments
As in previous consultations, I assume that the majority of comments as part of the public discussion will be submitted from tax experts. Being an expert in the Finance function, I would like to comment in particular to the questions you raised with the Country-by-Country template and the requested data.

For years now, I have the strong impression that there is a kind of disconnect and misunderstanding when it comes to financial data and their availability. Tax departments of MNE groups approach their colleagues from Finance and ask for data which fit to their highly specific Transfer pricing view. It may frequently happen today that the answer from Finance is simply: “These data are not available. We have to do a manual analysis in Microsoft Excel to prepare these data, for sure this will take weeks. Our standard reporting systems are based on the ERP-system (e.g. SAP, Oracle etc.) and not prepared to answer your requests.”.

Tax experts may be surprised but the reason is that the focus from Finance and Accounting is totally different than the viewing angle which is applied from Transfer Pricing. Systems were simply not set up to answer questions on profitability in the relevant dimensions of Transfer Pricing. Guiding principles from IFRS plus internal management requirements were determining the scene. From global headquarters perspective, the level of detail in centrally available data is far less than that what is available locally in the single legal entity of a MNE group where local finance people can look into every single posting in the local system if necessary. Here, required data can be – at least manually - derived from local systems to meet local documentation requirements and answering tax auditor questions - but for the concerned and locally audited legal entity only. Now with BEPS, when global value chains come in the focus, a new dimension of globally consistent and integrated data will be needed to evaluate what is really happening in an MNE group to understand the “big picture”. This is truly another evolutionary level of mindset and data complexity. So now everyone involved in these processes from whatever background has to lift his mind from local to global and must understand that systems and data might not be already available to meet these new data reporting requirements on short notice. The underlying reasons will be broadly explained with this document.

Tax function to meet Finance function
With my comments, I provide a structured overview and illustrate current and future problems and difficulties of the Finance practice in the light of the BEPS initiative. It is definitely not that I do not understand the reasons why any additional data are needed. Finance and Management Accountants have related skills in using systems and a professional analytical expertise on which data are needed to give the right insights and answers on questions from Top Management and Business managers. So the same should apply for any Transfer pricing data analysis. Tax experts (no matter if the MNE group’s Tax department or external tax auditors) are the “customers” for the data. The Finance function has to prepare and provide what is needed on time in high quality. I personally assume that a very limited number of Finance experts worldwide working in MNE groups have a reasonable and robust experience in understanding Transfer pricing, what kind of data are really necessary from Tax point of view and what the latest global trends in Transfer pricing are. Considering the BEPS initiative and what has already been addressed last year as part of the action plan in points 10, 11 and 13, a huge lack of awareness in Finance will become visible as time goes by, but the contribution from Finance function will be more and more important and ultimately the critical success factor in mid-term.
In my perspective, action 13 illustrated the demand: „Transparency also relates to transfer pricing and value-chain analyses. A key issue in the administration of transfer pricing rules is the asymmetry of information between taxpayers and tax administrations. This potentially undermines the administration of the arm’s length principle and enhances opportunities for BEPS. In many countries, tax administrations have little capability of developing a “big picture” view of a taxpayer’s global value chain. In addition, …“.

Certainly, there is a real knowledge asymmetry in cases where the tax payer has all the data and information on the profit allocation along the cross-border value chains enriched with information what taxes were paid where. But in case the data are not available yet, it is unknown to everyone whether the actual profit allocation along the value chain is not in line with the Arm’s length principle.

I am not aware whether the action plan with the items 10, 11 and 13 in particular has been already broadly discussed in Finance communities evaluating potential consequences which may affect their area of responsibility in the coming years. I personally assume that this is not the case at all. Therefore I see the urgent need that this gap has to be closed as soon as possible and Finance function should be aware and has to prepare for the future. Meeting data reporting requirements from Transfer pricing will be a continuous challenge and not an one-time exercise. It underlines the – in my view – high importance of a close cooperation between Accountants, Controllers, Financial Analysts and Tax experts to ensure the successful transfer pricing data management in MNE groups. IT departments can play a supportive role.

It is very important that concerning level of reporting, IFRS regulations are considered when discussing the CbC reporting template. In principle, the accounting standard IFRS 8 describes how entities should report information about their operating segments in annual financial statements and interim financial reports on entity and group level and gives requirements for related disclosures about products and services, geographical areas and major customers. I recommend that Transfer pricing experts should have a closer look on what is given from IFRS view1:

Core principle — An entity shall disclose information to enable users of its financial statements to evaluate the nature and financial effects of the business activities in which it engages and the economic environments in which it operates.

The IFRS specifies how an entity should report information about its operating segments in annual financial statements and ... requires an entity to report selected information about its operating segments in interim financial reports. .... The IFRS requires an entity to report financial and descriptive information about its reportable segments. Reportable segments are operating segments or aggregations of operating segments that meet specified criteria. Operating segments are components of an entity about which separate financial information is available that is evaluated regularly by the chief operating decision maker in deciding how to allocate resources and in assessing performance. Generally, financial information is required to be reported on the same basis as is used internally for evaluating operating segment performance and deciding how to allocate resources to operating segments. The IFRS requires an entity to report a measure of operating segment profit or loss and of segment assets... It requires reconciliations of total reportable segment revenues, total profit or loss, total assets, liabilities and other amounts disclosed for reportable segments to corresponding amounts in the entity's financial statements. The IFRS requires an entity to report information about the revenues derived from its products or services (or groups of similar products and services), about the countries in which it earns revenues and holds assets, and about major customers, regardless of whether that information is used by management in making operating decisions. However, the IFRS does not require an entity to report information that is not prepared for internal use if the necessary information is not available and the cost to develop it would be excessive. The IFRS also requires an entity to give descriptive information about the way the operating segments were determined, the products and services provided by the segments, differences between the measurements used in reporting segment information and those used in the entity's financial statements, and changes in the measurement of segment amounts from period to period.

Figure 1 IFRS 8 - Operating segments

Consequently one objective of my comments to the discussion draft is to foster the understanding of each other. All transfer pricing stakeholders should have the same understanding on “segment reporting”, “transaction category”, “Business line”, “Business activity”, “Management accounts”, local vs. global etc. Therefore, I want to contribute to a much more clear terminology as I observed that Tax function and Finance function sometime don’t talk the same “language” resulting in a lack of understanding. The same impression I have when I read the discussion draft and analyzed the drafted CbC reporting template. I consider it of utmost importance that Accounting and Finance opinions are considered as well. Tax experts might have a limited view on what consequences new regulatory decisions e.g. for transfer pricing documentation data content might cause. When discussions on potential additional burden on tax payers take place, the voice of Finance function is as important as the one from Tax function.

Business activity, Transaction category and Transfer pricing method

As addressed in the discussion draft on Transfer pricing documentation, any evaluation starts with some basic questions: “What happens in the legal entity?”, “What substance is there, which function(s) do exist?”, “How is the single legal entity transaction-wise connected with other MNE Group companies?”. Each group company carries at least one, in practice very often several parallel or even many different functions from Transfer pricing perspective. In simple cases it can be a pure local sales- and distribution company, a production company, a research company, an IP-managing company, a logistics hub or pure service-providing group company. But in practice, you find many companies being part of a MNE group which contain multiple functions simultaneously. For reasons of efficiency or by historic reasons, they run a wide range of business activities “under one roof”. For example, a company is the relevant IP owner and producer of a portfolio of products and exports them to other group companies. At the same time the company acts for other group companies as local distributor in its country. Furthermore, the company might provide and receive services such as IT or HR to and from other MNE group members.

For my perspective it is very important in the discussion to distinguish between executed functions (see “Business Activity code”) such as research, production, sales, service…. in connection to the “transaction category and applied TP method”. Types of transaction categories are well known in the Transfer pricing expert network but less familiar to the Finance community. It relates to the setup considering assumed functions and risks as Tax categorizes the activities. Well-known risk-reduced setups like contract research, contract or toll manufacturing, limited risk distribution are meant here. Alternatively, it might be full-fledged activities. Finally, any inter-company provisions of IP rights or capital have to be evaluated separately as well causing the payment of intercompany royalties or interests.

I recommend a clear terminology and characterization of activities, transaction categories and what kind of data segmentation is really thought of. This will definitely be helpful for further discussion on all stakeholder levels. In my view the discussion draft on the CbC reporting template has to be significantly improved in terms of precision. The introduction of a “Business activity code” with a common understanding like on page 18 is a step in the right direction but needs to be further elaborated when reporting data requested. In Finance it is always helpful to know in advance: “what exactly is needed?”. In the course of this document I will further deep dive into this part.
Today’s Transfer pricing data challenge –
Provide local profitability segmentation by concerned business lines and transaction categories

As said, it is rarely the perfect case given that there is only one central “principal company” and all other companies of a MNE group only have one function (“business activity”) that is risk-reduced or limited by e.g. providing routine services. Much more often the opposite is the case. Many times there are crossover relationships between several group companies. Ongoing efficiency and consolidation initiatives in (previously highly decentralized) MNE groups to reduce the number of MNE group companies are increasing this complexity from the transfer pricing perspective even more. Consequently, for these more complex legal entities with multiple functions, operating with different business lines and transaction categories there is already today a significant challenge for Accounting, Finance, Controlling and IT. Different business lines and functions plus associated risks of a single member of MNE group generate different contributions to its total profit. Is each of these profit elements at Arm's length, the overall result of the company is at Arm's length as well. Without such an additional segmentation of the local income statement by business lines and transaction categories, it may create room for difficult discussions earlier or later. In practice, existing ERP systems do not provide that kind of data aggregation in most cases. Instead, Microsoft Excel is used with significant manual effort in the Tax and Finance function. Usually the necessary P&L segmentation is done locally based on the numbers available out of the local ERP system of the member of a MNE group. Hence, local GAAP data are available for that work and can be used. At least with these results, the member of the MNE group can locally present plausible figures and proof the appropriate level of profitability. In the opposite, on global level, I do not see any option to use other data than the MNE group’s financial reporting standards like e.g. IFRS standards. Local GAAP data are not submitted to the headquarters and I wonder for the discussed central master file approach whether such additional data flow to the headquarters is really an option to be seriously considered in future.

As a first summary, the P&L of a MNE group member with all its income and expenses has to be split in full into business lines and the applied transfer pricing methods by transaction category. Only this reporting will enable the adequate monitoring of the right profit level indicators (PLI), which are derived from the underlying applied Transfer pricing method. Exactly this (besides any management accounting views) additional income segmentation is necessary for documenting its Arm’s length operating margins. This has been a problem which already appears on local levels today even before any BEPS activities have been initiated.

Tomorrow’s Transfer pricing data challenge –
Perform Global Value Chain Profitability Analysis (GVCPA) for a “Country-by-Country” reporting

Occasionally even today, it may be necessary to provide an inter-company analysis of the actual “profit-split” situation between transaction-wise linked members of a MNE group contributing to one global value chain. For the Finance function, it is not about the question what is the reasonable allocation key or what is the right allocation of profit to the involved legal entities based on a function and risk analysis plus any 3rd party benchmarks. It is just about the initial questions: “Do we talk about a globally highly profitable business?”, “Or is this specific cross border value-chain something which actually does not create any value (profit) for the MNE group at all?”, “So before starting any discussion with tax experts about the “correct Arm’s length” allocation, what is the total profit (Earnings before tax = EBT) of the value chain on global level at all?” followed by “What is the actual profit split among the involved MNE group companies today?” and “What tax is paid where based on these profits?”. The answers to these questions are surely of highest
interest for the Tax authorities and for Tax departments of MNEs as well but they have to be provided by Finance.

I guess transfer pricing experts who are not familiar with details of financial reporting systems might think that these data are available somewhere within the MNE group, at least in the headquarters. It is no surprise: MNE groups publish their global financial results quarterly and it seems that as precondition, there must be the information how the profit is allocated to countries and where what amount is taxed. And exactly this piece is the part which stands for the mentioned “information asymmetry” in the BEPS paperwork. This task sounds simple, the data should be easy to identify and derive from the group’s financial reporting systems. Yes, there is the total profit per member company of a MNE group available including the paid tax. But what if not all members of the MNE group contribute to the same global value chain? In case there are more members of a MNE group involved in one value chain and more different global value chains have to be considered due to several business lines, the technical financial reporting level of the total legal entity is definitely not the right one.

### A prototype model to understand CbC reporting template challenges

I experienced that technical discussions on financial reporting capabilities often create problems when discussing opportunities and limitations of data and systems within the Transfer pricing stakeholder network. Misunderstandings on what is really meant do create major issues when people discuss the content of the data. Therefore for delivering my comments to the CbC reporting template, I decided to develop a comprehensive exemplary CbC prototype model to illustrate the typical challenges MNE groups have when it comes to data provision and reporting. This model has a certain but hardly to reduce complexity but explains (in addition the financial reporting data issues) terminologies around “operational segment reporting”, “transaction category”, “Business line”, “Business activity”, “Management accounts” considering both local and global dimensions.

I am convinced that this prototype model can significantly help to enable a comprehensive discussion on the objectives and content for the CbC template in the coming months on OECD level. Strategically it may help Finance and IT to prepare for professional solutions addressing the potential future changes in new reporting requirements resulting from the BEPS initiative.²

The case: a German MNE group „HeidelGroup“ consists of 5 member companies in Germany, France, Belgium, Netherlands and Switzerland. The group produces and distributes customer specific products in 3 business (product) lines „Salts“, „Liquid gas“ and „Oils“ for dedicated industrial applications. The production and distribution of Salt is a commodity business and done in a 2 step production process in 2 plants (in GER and FRA). The premium ”Liquid gas“ products are produced in GER only and “Oils” in FRA only (but as a contract manufacturer of the HeidelGER Co.). Group’s sales to 3rd party customer take place in FRA and BEL only. The HeidelFRA Co. provides IT and HR services to HeidelGER Co. and HeidelBEL Co.. Due to historic reasons there is a local business for instruments in FRA. The HeidelGER Co. is considered as the principal. Finally there is a trademark IP holding company in Netherlands which provides the trademark license for sales and marketing of the products and a financing company in Switzerland which provided intercompany loans to HeidelFRA Co. and HeidelBEL Co..

² Based on feedback from the public consultation and discussion on OECD level, maybe a publication of this model might be an option to foster awareness in Finance and Tax on the multidimensional complexity.
The following chart illustrates these transactional relationships. This is what is discussed in the documentation draft as part of the master file (mentioned under annex 1: "chart showing supply-chain for material products and services").

I wonder how such a chart could look like when a larger MNE group consists of dozens or hundreds of members. Therefore I recommend to concentrate in the transfer pricing documentation on the material relations covering e.g. 80% of the total intercompany transaction volume or to allow written description as well as alternative to a chart.

When analyzing this chart a simple initial question could be “What are the global value chains addressed by the BEPS initiative to be more intensively analyzed?” Probably there are 3 core ones:

- Global value chain for “Salt”
- Global value chain for “Liquid Gas”
- Global value chain for “Oil”
- To be further analyzed concerning the interaction with the following additional IC transactions:
  - Financing by HeidelCH Co.
  - Trademark by HeidelNL Co.
  - Service provided by HeidelFRA Co.
When having a look into the drafted CbC template and the mentioned “business activity code on page 18, the information content for the HeidelGroup would look like the table below as the evaluation takes place on total legal entity level:

<table>
<thead>
<tr>
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<tbody>
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<td>A</td>
<td>R&amp;D</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>Holding intellectual property</td>
<td></td>
<td></td>
<td></td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>C</td>
<td>Purchasing and Procurement</td>
<td>C</td>
<td>C</td>
<td>C</td>
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<tr>
<td>D</td>
<td>Manufacturing and Production</td>
<td>D</td>
<td>D</td>
<td></td>
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<tr>
<td>E</td>
<td>Sales, Marketing and Distribution</td>
<td>E</td>
<td>E</td>
<td>E</td>
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<tr>
<td>F</td>
<td>Administrative and Support Service</td>
<td>F</td>
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<tr>
<td>G</td>
<td>Finance</td>
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<tr>
<td>H</td>
<td>Insurance</td>
<td></td>
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<tr>
<td>I</td>
<td>Holding company</td>
<td>I</td>
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<td></td>
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<tr>
<td>J</td>
<td>Other2</td>
<td></td>
<td></td>
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<td></td>
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</tr>
</tbody>
</table>

**Figure 3 Business Activity Codes**

In my view for the prototype model of the HeidelGroup, this table is less helpful to understand the single entities’ interaction with the “big picture” and the underlying structures.

In order to address the difficulties in terminology and issues in Accounting and Finance, the model assumes that all transactional relationships have been evaluated by the MNE group’s Tax experts considering function and risk profiles. To ensure Arm’s length remuneration for each member company of the HeidelGroup, the Transfer pricing methods and profit level indicators are as follows for the respective business lines and transaction types:

**HeidelGER Co.** Principal entity (residual profits)

- **HeidelFRA Co.** Production and Selling-through of Salt: C+15% on material cost
  - Local sale of Salt: TNMM +4%
  - Liquid Gas Selling-through: Handling fee 5% on material cost
  - Local sale of Liquid Gas: TNMM +6%
  - Oil contract manufacturer for „HeidelGER Co.“: C+10% on total CoGs
  - HR & IT Service provide: C+5%
  - Local buy-&sale of Instruments: local entrepreneur
  - Group trademark by HeidelNL Co.: License of 2% on all 3rd party sales
  - IC loan by HeidelCH Co.: Interest rate based on market

- **HeidelBEL Co.** Local sale of Salt in Belgium: TNMM +4%
  - Local sale of Liquid Gas: TNMM +6%
  - Local sale of Oil: TNMM +8%
  - Group trademark by Heidel NL Co.: License of 2% on all 3rd party sales
  - IC loan by Heidel CH Co.: Interest rate based on market
As the HeidelGroup supplies key account customers in Chemicals and Life Science industry it has been organized into 2 divisions “Chemicals” and “Life Science”. The whole P&L reporting was set up to reflect these management structures in line with the IFRS 8 requirements as already explained. Consequently, the P&L reporting on legal entity level is segmented accordingly and provides a breakdown into these 2 divisions. Some publications in the area of Transfer pricing might call these operative segments as “Management accounts”. The same data segmentation is available on consolidated HeidelGroup level.

The model uses exemplary data to illustrate all the transactions and accounting interactions, the data are presented in the tables below. The assignment of Sales and Cogs to the operative segments are based on the final application and use of the products at the final MNE group’s customers, all other expenses are also reasonably allocated to the 2 divisions based on the IFRS 8 segmentation approach. A deeper level of the P&L is not necessary for managing the business and consequently not available. The tables show the P&L for the 5 group companies plus the consolidated HeidelGroup in the IFRS 8 / management view.
Comment on Discussion Draft on Transfer Pricing Documentation and CbC Reporting issued on 30 January 2014

Dr Frank Schoeneborn, Heidelberg, Germany

Figure 4  Financial reporting by operative segments

The discussion draft refers in Annex I to “MNEs annual consolidated financial statement for the fiscal year concerned plus additional financials (EBT and paid tax) by country. When considering the drafted CbC Reporting template the data to be submitted should be the following based on the technical reporting level “legal entity”: 

Figure 5  CbC template reporting as drafted on legal entity level

The question is whether these data are supportive to conduct a meaningful TP analysis and to get the “big picture”. When looking on the described setup of the HeidelGroup I the value-chain map, I wonder how the global financial statement figures should help to audit Arm’s length profit allocations in particular when it comes to single countries and their specific business setup. Maybe not all global MNE group’s global value chains and related intercompany transactions are relevant to all jurisdictions.

For the modeled prototype, the underlying value chains and the selected TP methods for the various intercompany transactions confirm the need to consider the additional segmentation. This relates to what I verbally explained in the chapter “Today’s Transfer pricing data challenge – Provide local profitability segmentation by concerned business lines and transaction categories”. So even under today’s requirements the modeled HeidelGroup has to segment the P&Ls of their single legal entities into the different transaction categories. HeidelFRA Co. and HeidelBEL Co. are the most complex members of the HeidelGroup in the model and therefore of highest interest. Their data are shown below and illustrate what is needed. On the left, the IFRS operational segments approach is presented, on the right the specific Transfer pricing result segmentation. The red-marked figures refer to the Profit level indicators which were defined by the Tax department to ensure Arm’s length remuneration on the respective legal entity level.
Figure 6 Financial reporting by business line and transaction category (HeidelFRA Co. and HeidelBEL Co.)

The additional processing of financial data in this dimension is definitely a very big challenge. The available view based on IFRS 8 is completely disconnected from transfer pricing reporting requirements. In the example presented here, the view on the income statement of each company of the HeidelGroup is absolutely contrary. This raises the question for Finance departments which are less aware of Transfer pricing matters, whether in addition to the existing management perspective this additional data breakdown view can (must?) be provided. On total level of the analyzed legal entity, all P&L line items must be congruent in any case.

I want to emphasize that - for the help of understanding - the prototype model data tables show value-wise margins “in ideally balanced state”, meaning the TP-method-related margins which were set by the MNE’s Tax department are exactly met for each company and each transaction category.

In practice, demand, price and cost dynamics will create variances and deviations from these target margins. So it is another challenge in MNE groups to frequently calculate, adjust and upload the prices on SKU (stock-keeping-unit) level for all products (in the example for business lines “Salts, Liquid gas and Oils”) along the whole global value chain in the various ERP systems of the involved companies of the MNE group. Seasonally changing intercompany-traded quantities and actual cost will have to be considered in
this continuous “price setting approach”. Any plan or forecast data - if available at all at that level - can help in but definitely will not be enough to ensure that the desired EBT level is achieved in each company involved in the global value chain at the year end. In my opinion, all these operational challenges are rarely discussed and should be much more addressed as core activities of the newly evolving field “Operational Transfer pricing”. But as contributing to the CbC reporting discussion, I do not want to discuss this in further detail within this document.

**HeidelGroup – the prototype’s Global Value Chain Profit Analysis (GVCPA)**

Objective is - as outlined in the discussion draft on the CbC Reporting template - the reasonable insight to local but global financials as well enabling tax authorities to get an understanding of the MNE group’s “big picture”. The drafted CbC reporting template with profitability data on legal entity level will not be reasonable and comprehensive for the prototype model, information are misleading, the reported data simply do not fit to the structure of the HeidelGroup. So what options are there to get the right insights?

Assuming there are different opinions from Tax authorities in Germany, France and Belgium concerning the correct Arm's length profit allocation of the “Salt business line”. Every country contributes to the total “Salt business” profit. So the total profit of the Salt business line along the complete value chain combined with the disclose of the actual profit split is requested: “what proportion of global Salt's profit is actually allocated to and taxed by the HeidelGroup's companies?”. MNE group’s Finance department will not have these data available as no global P&L for the “Business Line Salt” has been reported anywhere. The default group consolidation and IFRS operative segment reporting is based on divisions.

The solution: first, the aforementioned P&L breakdown of all MNE member’s P&Ls by business lines and transaction categories is key precondition. Second, another Finance process of group consolidation has to be performed based on these segmented data. The transaction category per business line within one company will be summarized and then consolidated on all MNE group’s companies to come up with a globally consolidated business line income statement. Remarkably, the HR and IT services are to be considered as global value chains separately, presenting e.g. the gain on the cost+ surcharge to be allocated fairly to the company in France (HeidelFRA Co.). The same applies for IP and capital provisions.

At the consolidated Group level, the identical global EBT is reported as when the process is done by operational segments (=divisions) based on IFRS 8. Now for all companies of the prototype model, all P&L data are available with segmentation by business line (global value chain) and transaction category on local and global level, it becomes possible to report the actual global MNE group’s profit, it’s split into the identified global value chains of the HeidelGroup. The actual profit split between the cross-border involved companies of the Heidelgroup including the effective tax paid on that can be reported now:
Dr Frank Schoeneborn, Heidelberg, Germany

Comment on Discussion Draft on Transfer Pricing Documentation and CbC Reporting issued on 30 January 2014

Therefore, the meaningful CbC reporting template would contain the EBT and paid tax by Heidelgroup’s legal entities and identified global value chains plus the actual profit split:

![Figure 7](image)

**Figure 7** Financial reporting with Global Value Chain Profitability Analysis (GVCPA) for Heidelgroup

The EBT profit share of the individual companies contributing to global value chains could be made transparent. The same applies for the paid tax. These data will allow an analysis to evaluate a country’s contribution to the global value chain (e.g. business line) or to the total MNE group’s EBT on global level.

![Figure 8](image)

**Figure 8** CbC template reporting on legal entity level with global value chain consideration
A comparison to the effectively paid taxes in the respective countries could provide further insights for any interested stakeholder to get a “big picture” of the total HeidelGroup.

I definitely have to emphasize that for the presented prototype model the finally reported data were only possible to calculate due to full data transparency and – compared to cases in industry practice - limited complexity. Although the understanding of the model requires some time, it illustrates very clearly the dimensions that may arise from such inquiries as presented in the discussion draft on the CbC reporting. The technical requirements for such an extra additional consolidation in parallel to the management and IFRS consolidation (just for Transfer pricing reporting requirements) are hardly to oversee.

In the model all data were derived from the available segmentation of the P&L in business lines and transaction categories for all legal entities. I assume it is unlikely that these segmentations and necessary data for a performing the GVCPA are available somewhere in industry practice today. The ad-hoc manual creation of such data by using Microsoft Excel in a consistent and continuous way is also hard to imagine. The prototype model including the corresponding segmented income statements may be seen as academic\(^3\), but when I understand the intentions of the CbC Reporting template right, there are indications that future transfer pricing documentations could demand for such a global profit data transparency.

**Short comments on other elements of the proposed CbC Reporting template**

Besides my comments regarding source and characterization of income and cost allocation in a consistent way by illustrating the GVCPA, there are a few more specific items of the proposed CbC template which need further consideration.

To report the amount of total personal expenses, additional data reporting flows from local entities to the central headquarters are necessary. Usually MNE group’s report their local and global P&L in the Cost-of-sales format. Consequently, personal expenses are a portion of many P&L lines (CoGs for production workforce, Marketing & Sales, Administration, R&D...). So I did with the HeidelGroup model. The alternative is the nature-of-expense format. But this is in most cases not available on global level and definitely will call for additional data mining again. An analysis of the IFRS guidance is recommendable as well.

The CbC template asks for headcount data by legal entity. This is probably easy. But in order to support the “big picture”, the headcount in each company of a MNE group should (must) be allocated to the identified global value chains of the group as well (“What number of people in which legal entity contribute to which global value chain?”). The same applies for the personal expenses of a MNE group’s legal entity. Once the cost amount is reported in total, it has to be allocated as well to the global value chain(s) within a MNE group company. In principle, these personal expenses were already allocated to value chains as part of e.g. Marketing-and-Sales-cost when doing the GVCPA (see above).

In my opinion, the CbC template must be compiled by top down approach from MNE group’s data. The use of bottom-up local statutory accounts and a validation link to other MNE group member’s local statutory...

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\(^3\) All data of the model are consistent, available and transparent, the consolidation to Group was done with 100% IC partner information (in practice it is rarely the case). The model results presented in the tables are reproducible. Impacts from inventory changes or currency deviations were not considered.
accounts will create inconsistent data and will cause confusion and additional questions. Besides the transaction category and business line dimension, the legal entity should be the 3rd technical level in any case. Pre-consolidations on country level will make no sense, as it is not a simplification for MNE groups. In my view it will lead to double work in Finance. Usually all MNE group have financial data for their unconsolidated single legal entities and for the total consolidated MNE group available, pre-consolidations on country level are processed on particular cases only.

Aggregated cross border payments e.g. for services are hardly to collect and report. The relevant data are stored in the (intercompany) Accounts Payables/Receivables with the IC-partner information. This level is available in local company ERP systems, they are usually not available on group level for an easy submission to a central master file. Additional data requests to local finance organizations must be introduced by the MNE groups. I do not recommend a collection of such data at all.

Finally I recommend adding a Business activity “IT services” to the list as it is a frequently service rendered.

State-of-play in Finance
Today in most cases, the existing and productive ERP systems (e.g. SAP, Oracle, Sage, Infor etc…) of many MNE groups don’t provide the data for a segmentation of the income statement in accordance with the relevant tax transaction categories. Instead, IFRS requirements have been the driver. The same applies to any global consolidated reporting with respect to an envisaged actual “profit split report”. Besides that, common defects in existing systems can be identified in the underlying product master data and non-transparent intercompany invoice flows which are not standardized and harmonized across countries. Often the lack of relevant “intercompany partner” information creates difficulties on global level because for group consolidation of the P&L dummy partners might be applicable as well. Sometimes even a management accounting key question like global contribution margin analysis along the supply and value flows with drilldowns by final customer, final country etc is impossible to be answered due to inadequate reporting systems. The analysis down to EBT level is even more complicated.

Further challenges result from completely different and not harmonized ERP systems, which are used in parallel within many MNE groups. Varying charts of accounts and inconsistent structures e.g. in the area of cost centers or in the structure of the income statement complicate an efficient data analysis from a central headquarters perspective massively. Especially for cross-border analyses, in many cases different systems must be used to collect the base data followed by manual rework just to conduct a reasonable Transfer pricing analysis. No surprise, the most common but obviously weakest solution is to deal with the extensive manual re-sorting, collecting and calculating of the P&L results of a MNE group member with the help of Microsoft Excel. Needless to say, there is no efficiency and the additional risk to make mistakes in data processing. Such an “offline” approach is hardly advisable, in particular in case when possibly years later a transfer pricing audit takes place and the original files with the corresponding calculation rules and the employees (from Finance or Tax) who prepared the work should not be available anymore.

In view of the discussion of a CbC reporting template as drafted, the expected administrative effort and the inherited complexity must ask for reasonableness and proportionality for MNE groups. Sure, whether and how existing ERPs can serve special Transfer pricing financial reporting needs has to be evaluated and checked on case by case basis. Currently, it is difficult for me to give a comprehensive and reliable assessment on the international state of existing IT solutions to transfer pricing.
So far, there is little exchange of information and almost no practice reports available on which reporting tools are in use to meet the Tax department’s financial data requirements. When reference is made to IT tools in transfer pricing, mostly supportive programs and systems for the efficient creation, management, editing and updating of global and local transfer pricing documentation are meant. It is more on efficient management of written documents than creating, calculating and aggregating financial data, which, however, must be integrated as well. I cannot provide a proven study on the state-of-art but I feel there less in this area than the Tax expert community expects.

**Conclusion and personal recommendation**

Although the BEPS discussion and the recent draft on transfer pricing documentation and CbC Reporting is addressing the question of additional burden for tax payers meaning additional administration costs incurred, it calls for clear and unambiguous disclosure and complete transparency about the actual distribution of profits along all cross-border value-adding transaction chains. Tax authorities of all countries involved shall be enabled to get information how much consolidated profit (EBT) for the Group is earned by a global transaction chain in total and what part of it is taxed in which involved tax jurisdiction. This corresponds exactly to the requirements as in detail explained in my HeidelGroup prototype model which ends up with a 100% transparent full Profit Split Analysis along the global value chains.

Should these new transparency requirements including a GVCPA – as potentially part of the CbC template - be concretized and adapted quickly (due to presumably fast implementation options) and result in updated local tax laws, regulations and enhanced documentation requirements, this would be for the fast majority of MNE groups and their Accounting, Finance, Controlling and IT departments an outstanding challenge. It would have a massive impact on financial reporting systems, data structures and automatic or manual processes in order to produce required data. Certainly, the global profit of a MNE group is already disclosed in high quality on time when the submission of the transfer pricing documentation to the tax authorities is due what requires a closer look on what is discussed on p.7. in D2/28 with respect to “time frame”. All numbers must be able to be re-tracked and thus defensible in terms of data quality and source. So in my opinion there will be no alternative than using professional and automated reporting solutions from IT on the long run but this will take significant efforts at tax payers and a reasonable period of time.

In the future representatives from Finance, Tax and IT function will have to intensify their cooperation on Transfer pricing to manage any upcoming challenges in particular when it comes to financial data reporting analytics. In the past, the data-wise fulfillment of local documentation requirements was largely sufficient and relatively less complex. In future when the global focus might be the dominating one, it is truly another level and data structures and reporting systems must keep pace with the fast-growing demands from Transfer pricing perspective. The “BEPS” initiative of the OECD sends clear signals on the direction of the expectations. Consequently, Tax experts of MNE groups are well advised to approach their Accounting, Controlling and Finance experts to ask what such data requirements like proposed in the CbC template might cause. Reporting systems and processes, data flows and the analysis of financial results, all these areas are traditionally the territory of Management Accounting experts and Financial Analysts and in these
departments, a potential administrative burden would pop up. Financial reporting solutions in response to potentially upcoming Transfer pricing challenges must be found jointly by Finance and Tax function.

In my view the significance of the transfer pricing method “profit split” will rise. Even without considering key Transfer pricing aspects like functions and risks, I assume that at least for validation and reasonability checks an actual profit split analysis along the global value chains (GVCPA) will be the key financial information with the highest interest for all stakeholders on the long run. Again, if these additional data will become part of the Transfer pricing documentation, a number of question marks will be placed by the Finance community and many efforts will have to follow. In my opinion the management of expectations is very important and one contribution in helping that process already in today’s early stage of public discussion is my comment to the OECD discussion draft submitted hereby.
OECD. Discussion Draft on Transfer Pricing January 30, 2014.

Comments from Armand Sibony (Certified Public Accountant and Expert Comptable)

1. Objectives of transfer pricing documentation requirements.
   a. The objective of avoiding excessive documentation compliance burdens and achieve the three objectives at reasonable cost should be clearly stated in the new Chapter V.

2. Prerequisites of an informative auditable transfer pricing documentation
   a. The documentation is dependent on the quality of the information system of the company for its accounting as well as its marketing aspects.
   b. To be useful, the cost accounting system should be sufficiently elaborate and documented which is not systematically the case.
   c. The COGS and gross margins calculations differ according to which cost method is adopted by the Company. As a consequence, tax authorities will, most often, have to restate the production or distribution costs to apply the arm’s length principle.
      i. Certain companies need to work with a direct costing method to evaluate the gross margin contribution of a production line to the other unallocated costs (Admin, M&S, R&D...)
      ii. Other Companies chose to work with a full cost method giving a different gross margin analysis.
   d. Gross margins analyses are used for strategic decisions as they relate to the profitability and the business perspectives of existing product lines. The accounting part is an important spin off that should be used with care.
e. The marketing information could be very critical to understand the business under audit.
   i. Companies gather economic as well as financial information to position strategically their various businesses and compare them to their competition.
   ii. Such information is of strategic nature is very sensitive.
   iii. It will help the audit of transfer prices. However it is hardly mentioned in Chapter V.

3. Transfer Pricing risk assessment
   a. Reporting Templates: they should include a SWAT analysis if it helps assess the cost evolution per product line
   b. As regards to tax authorities sharing their risk assessment with tax payers, it seems it's a two way street. Transparency both ways appears necessary as to the methods and content of information from the Company or from outside the company (data bases from different sources). It should be encouraged. It will help avoid misunderstandings, time spent to replicate the other side information and at the end of the day reduces time and costs of the audit.
   c. Transparency can be a good starting point for negotiations. As a consequence, negotiations can be on substance.

4. Transfer pricing audit: Information and documentation outside the jurisdiction requesting the information.
   a. Transfer pricing documentation includes analyses of transactions and comparables from related parties as well as from outside parties to comfort the internal documentation.
   b. The documentation provided to tax authorities should be sufficient for them to form an opinion of the transfer price. It includes internal and external comparables and analyses. It is a matter of judgment.
   c. In certain cases, to add clarification to matters of judgment, tax authorities could inquire as to additional comparables that the company used and did not find pertinent to include in the documentation provided.
   d. This kind of inquiry is also a matter of judgment on a case by case basis.

5. Master file
   a. A master file is similar to a permanent file in an accounting audit documentation of a MNE.
   b. Since the ultimate objective is to prove the reasonableness of a transfer price of a specific product and or service, the master file should be expanded by line of business to allow a thorough understanding of the transfer price adopted at the individual product or service under consideration.
   c. Country by country report.
      i. This is also a matter of significance and of judgment.
      ii. In most cases, one master file including all information including country by country should be made available, as long as the county listed is informative for the audit.
iii. The bottom up vs. top down approach country by country template will depend on the nature and complexity of the business.

iv. What appears important is to obtain reconciliation between a top down and a bottom up on an overall basis as well as on a country basis as necessary.

v. MNEs use consolidated financial statements prepared according to a set of accounting principles. In certain instances, first sets of consolidations are prepared by country or group of countries. Technically, intercompany transactions are eliminated for consolidation purposes. There is no need for consolidation preparation schedules.

1. To prove the adequacy of a certain intercompany price, it might be useful to deconsolidate the related transactions.

2. An additional guidance is to make available, on request, certain country by country consolidations that the company in all transparency did not deem appropriate to provide with the master file.

3. Regarding taxes paid. A guiding principle is to provide per country the reconciliation between actual tax rates and effective tax rates. This information is ready on a 10 K for a US MNE. It should be provided deconsolidated and consolidated for the purpose of the master file.

6. Materiality
   a. Materiality is the key element in the preparation of the local file
   b. Materiality is a matter of judgment
   c. However, industry practices and accounting and audit standards tend to quantify materiality. Is considered material when it exceeds 5% of net results or 5% of EBIT.

7. Frequency of documentation updates.
   a. Suggestion of paragraph 34 appears reasonable.
      i. Financial data and related comparables are updated annually
      ii. Information which is of a more permanent nature is updated every three years.
      iii. Annually however, the permanent information is revisited for significant mergers, acquisitions and disinvestments.

8. Language
   a. A master file in English and local file in local language is practical.

9. Confidentiality
   a. Confidentiality is a key issue
   b. Of course one cannot ask tax authorities to sign a non-disclosure. However, judgment should be exercised as to the information which is shown and available but not necessarily copied in the master file or the local file.
   c. Companies should make sure that they provide information with a rating as to its level of confidentiality. Certain trade secrets, internal pricing methods...are very sensitive in nature.
d. In case of court proceeding, a law firm should help in ways to provide the information to keep it confidential.

10. Implementation
   a. Master file information should be filed in the parent company’s jurisdiction. It is made available under treaty information exchange provisions
   b. Certain information of the Master file that is pertinent for the local entity should be part of the filing of the local entity: organization; pricing methods; comparables internal and external.

I am at your disposal to discuss any of the above comments.

With Kind regards,

Armand SIBONY
Dear Sirs,

We welcome the opportunity to comment on the OECD's Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting, published on 30 January 2014, and support the OECD in its effort to launch a global conversation on how a common approach to transfer pricing documentation to be adopted by the countries can be improved.

The Discussion Draft has the goal to replace the Chapter V of the Transfer Pricing Guidelines and, therefore, provides a revised guidance on transfer pricing documentation requirements and includes a common template for the reporting of detailed global information to tax authorities on a country-by-country basis. This work is intended to improve the original Chapter V and we are particularly pleased at the willingness of the OECD to consider the goal to provide common rules worldwide.

Before setting out our comments on the draft it is worth stating that we are concerned that the draft proposes to request significantly more detailed information than necessary to satisfy the requirement of action 13 of the BEPS action plan and would cause an unreasonable compliance burden for taxpayers.

We agree to have our comments posted on the OECD website.

Sincerely yours,

Siemens Aktiengesellschaft

Dr. Christian Kaeser

Dr. Sven Bremer
Enclosure

1) Introduction

We applaud the release of the OECD Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting. As already mentioned in our Comments on the White Paper on Transfer Pricing Documentation, presented on 1st October 2013, a number of practical issues still need to be considered in order to improve transfer pricing documentation. We are pleased to have the opportunity to provide our comments on this work as well and contribute to improvement of the guidance to assist taxpayers in presenting documentation that meets the needs of both tax authorities' and taxpayers'.

Siemens is a multinational Enterprise (MNE) representing a broad spectrum of sectors which are based throughout the world. Siemens is active in around 190 countries, occupying leading technology positions worldwide with its business activities in the Energy, Healthcare, Industry and Infrastructure & Cities sectors. Siemens employs approx. 360,000 people around the world and has more than 285 manufacturing locations, office buildings, warehouses, research and development facilities or sales offices in nearly every country around the globe.

In our Comments on the White Paper on Transfer Pricing Documentation, we presented our internal documentation approach as an example of how requirements of different jurisdictions could be addressed and still fulfill tax authorities' and MNE's concerns. As a matter of fact, Siemens' German tax administration considered the Siemens documentation approach as being one of the best approaches presented to them. In order to avoid duplication of information, please find our Comments on the OECD White Paper attached, which presents our effective documentation approach.

In the following we provide our comments on the Discussion Draft addressing critical topics and presenting some suggestions according to our experience. Subsequently, we present our conclusion.

We trust that our comments on the Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting will be considered by the OECD in its project of improvement of Chapter V of the OECD's Transfer Pricing Guidelines.

2) Comments on the OECD Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting

The Discussion Draft presents three objectives for transfer pricing documentation: "1. 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."

We believe that those targets are reasonable and we work on the best practice to fulfill those concerns. However, in the design of a more streamlined and consistent approach to this documentation, it is important to require information of taxpayers that complies with these objectives and does not exceed them. The OECD intends to simplify and streamline the information on a global level. This should have the goals of providing more transparency to tax authorities and as well as more focused but less time-consuming work for taxpayers.

The last sentence of paragraph 3 of this section mentions 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 understand that local tax requirements have become considerably more burdensome by requesting very detailed information that goes beyond the level of detail necessary for adequate risk assessment. The transfer pricing documentation must be standardized, simplified and streamlined in order to improve global consistency, but still complying with local requirements. In this way, both taxpayers and tax administrations requirements are fulfilled.
a) "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."

In our view there is no need to develop additional forms and questionnaires. We consider that the two-tiered approach to transfer pricing documentation would be sufficient to achieve the objectives described in Section B of the Draft.

The inclusion of additional forms and questionnaires would require more costs and efforts for MNEs without providing any protection and still not completely deal with tax authorities' concerns.

Specific forms seem to simplify the process and provide a brief standardized overview of MNE’s business. However, under the current existing transfer pricing framework, a considerable emphasis is put on detailed analysis on the circumstances of individual transactions.

A form based approach might work for smaller companies with simple value chain and relatively simple transactions. For MNEs organized in various divisions within a matrix and with complicated value chains, the picture resulting from providing the numbers into a standardized format or questionnaire might be oversimplified and, therefore, most probably will not meet the minimum requirements for a risk assessment.

Regarding the sharing of risk assessment, we fully support this approach. It allows early discussion and clarifications in case of misunderstandings. Once the taxpayer receives the information about the risk assessment, he can better prepare and provide information which complies with the expectations and needs of tax authorities.

b) "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 requirements relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information will increase significantly the time-consuming work related to the transfer pricing documentation analysis and it would involve the sharing of sensitive or proprietary information which is not directly related to the arm's length analysis.

Further, the legal aspects of one jurisdiction being able to compel the production of documents of an entity outside of the scope of its jurisdiction need to be carefully considered. This also may be a violation of the legal rights of the associated entity if they are not doing business in the requesting jurisdiction. We believe that such a tool should be used sparingly.

That being said, this would only work if access to effective Mutual Agreement Procedures (MAP) is ensured for the taxpayer(s) impacted. For the time being that is the case only within the EU and in a few DTT.

c) "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."

As already mentioned in our Comments on the White Paper, today's business must be seen as a global one, where the transfer pricing information must be provided with a worldwide perspective. In this respect, taxpayers must provide a documentation considering multi-jurisdictional ramifications, and tax authorities need to reform their local regulations.

Unfortunately, we have experienced that numerous countries require transfer pricing documentation covering only local interest (e.g. BRICS states). That results in large documentation inconsistencies for MNEs and limits information transparency for tax authorities. A documentation oriented to provide "big picture" information complies with the interests of all concerned parties. The international coordination of information contributes to global consistency and cost savings for MNEs and transparency for tax authorities.
However, the local fiscal secrecy of one country must be taken into consideration and be respected by the tax auditor. Additionally, because all various business lines within a MNE may not use the same business models or apply the same type of transaction, a preparation per business line seems to be the more appropriate approach. Every country should receive the information of the business line which is relevant to its country, but if a certain business is not conducted in a country, there should be no requirement to provide such information.

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

We believe that there should be a clear delineation between the master file and country-by-country report. To our understanding, the action plan does not mandate that the country-by-country report should be part of the master file and in our opinion envisions this as a stand-alone document. Therefore, we would suggest that the country-by-country report should not be part of the master file.

Furthermore, it is a document which may not be relevant to all tax authorities in countries where a MNE is active. Some requirements presented in this report go beyond the necessary information to verify the arm’s length principle.

The requirements could result in application of formulary apportionment calculations by the tax authorities which we strongly believe should not be considered as an option to replace the arm’s length principle. In addition, we believe that the country-by-country report itself works against the goal of the OECD White Paper - simplification and streamlining of transfer pricing documentation requirements.

e) 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?

Provided the intention of the country-by-country report is an overview on the group’s overall tax situation, a bottom up reporting would be rather useless, because - due to various accounting standards - it would materially reduce the comparability of the figures.

Additionally, it is frequently the case that local statutory accounts may have different accounting years than the MNE’s consolidated financial statements. Given that most MNEs already prepare consolidated financials using international accounting rules, the country-by-country report could leverage from the data that already exists.

Further, from a data gathering perspective, it is likely more efficient for the MNE to coordinate the preparation of such a report from a top-down perspective where most of the information is already available, rather than depending on a bottom up approach which would doubtlessly require significant efforts, coordination, reconciliations and reworks before a complete and correct product would be available.

Additionally, the BEPS project has already emphasized the importance of providing transfer pricing documentation reflecting a “big picture” of MNE’s business. The intention to improve cooperative work between taxpayers and tax authorities is noteworthy, but global consistency should be considered as priority for both. We believe that the “top-down” approach should be more appropriate, considering that this approach starts with the big picture and breaks down from there into smaller segments.

In any case even with a “top-down” allocation additional options will be required. In a big MNE various accounting systems are used, depending on the respective business or countries. The data from these systems has to be compiled and worked on so that the country-by-country reporting obligation can be fulfilled. The cost will inevitably range between 1 to 5 FTE depending on the MNE.

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f) 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?

For MNEs such as Siemens detailed information on an entity by entity basis with hundreds of separate entities may be overwhelming for tax authorities and hence present a less useful "big picture" of MNEs business. Therefore, the reporting should rather be based on consolidated figures. This would allow MNEs, operating in many jurisdictions to be reported on a single sheet. However, the approach should follow the steps taken to prepare consolidated financials and therefore make use of already existing data. Additional consolidation measures would increase the compliance burden.

We would like to point out that the transfer pricing requirements are already quite burdensome. Therefore, in addition to all information already required to be presented in the master file and in the local file, we understand that such requirement for separate individual country consolidations will impose significant burdens and cost without adding significant value to the information already presented to the tax administrations. Again, we believe that the purpose of the country by country reporting should be to provide the tax authorities with a basis for a risk assessment, not to provide all of the information needed to perform a complete audit. Should a particular tax authority wish to get information for a country without transactions between group entities in the same countries, such information can be requested in the course of an audit.

Some tax authorities require the analysis of transactions individually, which increases documentation complexity. It would be prudent if the level of the transaction aggregation could be defined in a consistent way with the nature of the business of the MNE. The practice shows that the high level of aggregation is still the best consistent approach to document the required information.

One big challenge for MNEs is the analysis of tested parties with hybrid functions. Segmented financial data by function is hardly available and the efforts to obtain them are not reasonably justified for every case. It becomes quite difficult to obtain profitability data on transactional level from the IT system when the reporting entity performs different functions. IT systems usually have been designed for business purposes targeted at the performance of the company in different markets, whereas for TP purposes the financial statements should be segregated by type of function. In absence of segmented financial data, a weighted benchmarking range can be regarded as a solution. In other cases, segmented financial statements might possibly be manually prepared.

g) 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 support the reporting of cash taxes paid. Taking into account our foregoing comments that the report should be on a consolidated basis rather than on an entity by entity basis, cash tax paid could be reported on the same consolidated basis.

Having this said, we believe that some issues may arise from this requirement. For example, there can be a lag between taxes paid on a cash basis and the profits’ setting. Another issue is related to current legal proceedings where the related taxes due are still open. Therefore, inconsistencies will arise and this type of information will not increase the quality of the arm's length analysis.

With regard to withholding taxes paid we believe, this would add a significant burden to the documentation, especially if the template is meant to ask for this information for each country where the taxes are withheld.
h) 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?

Most of the data required by the new country-by-country report is already provided in the transfer pricing documentation or financial statements. We consider that the last six columns of the country-by-country reporting detailing intercompany payments of royalties, interest and service fees should be removed from the template as such detailed information is not necessary to achieve the objective of the action plan of providing a view of the global allocation of income, economic activities conducted and taxes paid.

Such data should already sufficiently be captured in the transfer pricing documentation and should largely identify the IP held, group finance operations and services provided.

As mentioned before, Siemens understands that in case tax authorities need additional information, it is possible for tax authorities to request more information or during an audit. Each country would be able to get details of intercompany payments made or received by its resident entities under the local transfer pricing documentation (local file) or other domestic documentation requirements.

It is important to mention that the transfer pricing documentation is already considerably burdensome for taxpayers and sufficiently complete for risk assessment purposes. Any additional requirement would impose significant costs and burdens to taxpayers without adding value to the information related to risk assessment.

i) 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 nature of business activities is already provided in the transfer pricing documentation. This would only duplicate compliance burden. As already mentioned above, if more information is needed for risk assessment purposes, tax authorities could request such information from the taxpayers.

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

We believe that any additional guidance on materiality would be generally a key to effective documentation.

We suggest that the materiality could be considered on entity, country or group level. Considering the domestic focus of local audits, we believe that a materiality on a group level would be quite unrealistic. If we take into account the country level, it could result in inconsistencies, because local entities might consider transactions as material and in the headquarters view, a higher level of materiality would be more appropriate.

Mentioning the transactions to be analyzed, MNEs with high transaction amounts are almost forced to define an internal threshold in order to prepare its transfer pricing documentation. It is quite impossible — and unnecessary — to analyze all transactions of the group, especially the ones with low amounts which do not denote significant impact.

Materiality thresholds could be established on transaction amount (e.g. monetary threshold or percentage of turnover) or type of transaction (e.g. entity’s principal business and/or valuable transactions).

k) 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 with the proposal of paragraph 34. We strongly support the suggestion to prepare financial updates instead of performing new comparable searches every year.

Moreover we propose to conduct in the first year the full economic analysis and to perform the update of the benchmarking study in the next year. The update would fulfill the expectations of tax authorities and it would reduce costs for MNEs considerably.
Additionally, we believe that the preparation each year of new comparable searches would not significantly improve the quality of the information in relation to the update and, therefore, add no value for either taxpayer or tax authorities.

Regarding simplification of the documentation process, please refer to the annex of the present Comments. As already mentioned in our introduction, our Comments on the White Paper on Transfer Pricing Documentation provides our documentation approach as an example of how requirements of different jurisdictions could be flexible and still fulfill tax authorities’ and MNE’s concerns. Global consistency should be strongly encouraged by the OECD, because inconsistencies on the requirements result in considerable challenges for MNEs.

\[ \text{i)} \text{ Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.} \]

Considering the necessity of translating the documentation, Siemens’ documentation approach is generally in English language. However, more and more countries are requesting TP documentation and when they institute the requirement, they require the documentation to be in their local language...

We understand that the complete documentation should be in English (not only the master file as suggested by the Discussion Draft). It is important to mention that some countries might not accept the two-tier approach suggested by the OECD and then require the complete documentation to be provided in local language.

It would be helpful if the OECD could establish a clear statement determining that, as a general rule, the whole documentation could be provided in English and that the translation of specific parts of the documentation into local language should be provided upon request by local tax authorities.

\[ \text{m)} \text{ Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.} \]

As already mentioned, we believe that the information already required by the tax authorities is adequate to analyze the risk assessment and the arm’s length principle.

In case further information is needed, tax authorities can request such information from taxpayers during the audit process. It is important to mention again that the requirements are already very burdensome to the taxpayers. The presentation of a comprehensive documentation reflects the *bona fides* of the MNE, thus, it should assure penalty protection. Unfortunately, that does not occur. This is an example that more and more taxpayers should provide more burdensome information and do not receive any assurance. Paragraph 73 of the OECD White Paper describes the essence of the transfer pricing documentation: taxpayers’ description of transfer pricing methods and the analysis they apply to demonstrate compliance with the arm’s length principle. This should be elaborated in a robust comparability analysis by analyzing the functions, assets and risks relevant to the transfer pricing analysis for transactions that are material for local tax authorities. This essence should be respected and, therefore, no further confidential information - which will not add any significant value to achieve such essence - should be required. It is important to mention that some information cannot be provided to local entities for legal reasons (e.g. civil litigation) and not for tax purposes. There are also business reasons why this level of information should not be shared with affiliated entities. There is a considerable risk that the documentation might include confidential and commercially sensitive information. The risk of reputation damage for MNEs should also be considered when data can be misinterpreted without additional explanations. The confidentiality of this information should be safeguarded and the information received by a tax authority should always be considered as confidential.

However, there is no assurance for MNEs that the confidentiality will be respected or compliance mechanisms around treaty exchange of information provisions could be warranted. If there is no legal agreement or legal regulation about the confidentiality of exchange of information, there is no guarantee for the MNE. The OECD Model Tax Convention is a “soft law” and, therefore, not binding by law. Further, all countries are not members of the OECD, so not bound by its recommendations.

There should be consequences for tax administrations in case the confidentiality is not respected. The share of some sensitive information might open the “pandora’s box” and increase the disputes without contributing with the arm’s length analysis.
n) 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 would suggest that each local entity should have access to the master file report and provide it with the local file to the local tax authority only. In case another jurisdiction wishes to have access to the master file and/or to the country-by-country reporting, it should be requested from the headquarter.

Many MNEs such as Siemens happen to have several business divisons/segments which are not necessarily integrated with each other e.g. Healthcare vs. Windpower, and/or are separately organized and/or operationally independent. We believe that such information should not be shared or included in the master file or country-by-country reporting if a constituent entity organized in one country is not active in that kind of business.

o) 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 that the MAP and APA are specific to the countries involved and, therefore, should not be part of the masterfile, but only presented to tax authorities that are involved in the MAP/APA settlement.

3) Conclusion

Based on the considerations discussed above, we believe that the proposed rules work against the original goal suggested by the OECD White Paper and that these rules, if implemented, will increase the costs of compliance for MNEs. In almost every instance, the Discussion Draft suggests increased documentation burdens and demands difficult data options. It must be considered that the implementation of such burdensome requirements will result in considerable increase of budget and time-consuming work for taxpayers.

We believe that the reporting of tangible property, number of employees and payroll expense in practice might result in adjustments more in line with a formulary apportionment type of transfer pricing system - drifting away from the arm’s length principle - along with the potential for increased disputes and double taxation. The goal should be to have information that aids in risk assessment, but does not substitute for the normal audit process.

Most of the expected outputs of the Discussion Draft will require significant work at the individual country level in terms of determining whether, when and how to implement OECD’s recommendations. We believe that the OECD’s goal of more transparent transfer pricing documentation can only be achieved if the OECD countries and observers adopt common standards. However, there has been no commitment from OECD countries or non-OECD members that they will adopt these common standards. Indeed, we are concerned that one possible outcome of the OECD project is that countries will begin to require their own version of the country by country reporting concept, but each requiring that information in their own format and with their own areas of interest, requiring yet more documentation from the MNEs.

It is important for consistency and compliance that transfer pricing documentation presents the “big picture” of MNE’s business and not only a “snapshot” of each operation. It would be helpful if local tax authorities accept documentation based on a global perspective instead of only on a local perspective. Another help would be if all jurisdictions require similar and consistent transfer pricing related information. The OECD also supports such practice (BEPS2 and White Paper3), given that the BEPS states that divergences of countries’ transfer pricing documentation requirements lead to significant administrative costs for business. Additionally, it would be prudent if the OECD could establish a transfer pricing documentation model that focuses on the most significant controlled transactions, without increasing the burden of requirements.

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3 OECD, “White Paper on Transfer Pricing Documentation”, Public Consultation, section 1, paragraph 2, (July 2013)
The OECD has indicated that the template is intended to be used for high-level risk assessment purposes. However, we understand that the draft contemplates very detailed reporting which goes beyond such goal. The requirements should not go beyond what is appropriate for a transfer pricing risk assessment. It is necessary to define a balance between tax authorities’ need for information and the potential compliance burden for MNEs. Unfortunately, uniformity and simplification of transfer pricing documentation are not the main goal of the Discussion Draft. There are some information required that a local entity may not have access to and which have no impact on the analysis of the arm’s length principle (e.g. data on the 25 most highly compensated executives). Some detailed requirements (e.g. identification of the individuals that have direct or indirect reporting relationships) might have only limited value to tax administrations and, at the same time, will increase compliance burden for local taxpayers.

Transfer pricing documentation should enable tax administrations to identify tax risk. But it should not lead to taxpayers spending a compliance effort disproportionate to the value of the information provided. Consequently, transfer pricing documentation should only provide necessary information while tax administrations could reserve the right to require details during the audit process. Otherwise, it would be more difficult for the tax authorities to fully review the massive transfer pricing documentation and the preparation might increase the compliance costs of taxpayers.

Therefore, a) tax authorities should largely require information that is directly related to the economic analysis which verifies the arm’s length nature of the related party transactions, b) the requirement of transfer pricing related information should be similar and consistent in all legislations, c) the level of the transaction aggregation should be defined in a consistent way with the nature of the business of the MNE. If these proposals are enacted, they will result in a significant reduction of cost and effort for the taxpayer, while at the same time obtaining a much more concise documentation which will facilitate tax authorities’ reviewing job.

We look forward to the opportunity to continue to provide input on these important issues as the process moves forward. Thank you again for the opportunity to share our ideas and issues with the OECD’s Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting.

If you have any questions about the submission, please contact Dr. Sven Bremer (Global Head of Transfer Pricing) at +49 89 636 30242 (or sven.bremer@siemens.com).

4) Appendix

- Siemens’ Comments on the OECD White Paper on Transfer Pricing Documentation as of October 1, 2013
February 23, 2014

Joseph L. Andrus
Head of Transfer Pricing Unit
OECD Committee on Fiscal Affairs
transferpricing@oecd.org

Re: OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting

My name is Steven D. Harris. I am an attorney whose practice is limited to transfer pricing. This is an area in which I have both governmental and private sector experience. During the period 1994 – 1998, I was employed by the Office of Associate Chief Counsel (International) of the Internal Revenue Service. During that time, I served in a variety of capacities, including team leader, senior technical reviewer, branch chief and acting director of the IRS Advance Pricing Agreement Program. From 1998 through 2011, I was a principal with KPMG LLP, where among my duties I was the practice leader for KPMG International’s Global Transfer Pricing Resolution Network. From 2012 to the present, I have provided independent transfer pricing consultation services to clients. Over my 20-year career in transfer pricing, I have focused on identifying and resolving proactively actual or potential transfer pricing controversies.

I welcome the opportunity to present my views regarding portions of the OECD’s Discussion Draft on Transfer Pricing Documentation and CbC Reporting (“Discussion Draft”). I have no objection to publication of these comments by the OECD.

Reasonableness and Reliability

As a preliminary matter, I would note that the proposed Introduction to Chapter V of the OECD Transfer Pricing Guidelines ("Guidelines") indicates that previous language in the 1995 Guidelines "put an emphasis on the need for reasonableness in the documentation process from the perspective of both taxpayers and tax administrations, as well as on the desire for a greater level of cooperation between tax administrations and taxpayers in addressing documentation issues in order to avoid excessive documentation compliance burdens while at the same time providing for adequate information to apply the arm’s length principle reliably.” I believe it is important to restate and reinforce this language in the introduction to the new Guidelines.
Reasonableness should be at the cornerstone of the Guidelines. Transfer pricing documentation requirements are reasonable if they provide local tax administrations with enough information on material transactions that affect that jurisdiction to be able to identify potentially problematic issues (a risk assessment) and then begin the process of undertaking further review (examination or inquiry). It is important that documentation requirements balance the interests of both taxpayers and tax administrations. Requiring a multinational enterprise (MNE) to provide voluminous data of marginal value does not provide for efficient tax administration, while at the same time imposing costs on the MNE related to internal personnel and outside advisor time that eat away at profit margins unnecessarily. A company's ability to grow its business and to compete globally should be of primary concern to all tax administrations, for economic growth drives profitability and expands the base for taxation.

The Discussion Draft acknowledges in paragraphs 26 that taxpayers "should not be expected to incur disproportionately high costs and burdens in producing documentation." Paragraph 29 states further that "tax administrations have an interest in seeing the most important information while at the same time they also have an interest in seeing that MNEs are not so overwhelmed with compliance demands that they fail to consider and document the most important items."

Notwithstanding these general statements of intent, the net result of implementation by tax authorities globally, should they implement requirements entirely consistent with each other (a virtually impossible feat), would be that most MNEs would have to dramatically increase their tax technical and accounting staff to account for all the transactions required to be reported, even assuming a clearly understood and easily applied materiality threshold. Involvement by outside advisors, auditors and accountants would also dramatically increase costs.

The burden that these proposed guidelines would impose upon MNEs, as well as related materiality thresholds, will certainly be the subject of many of the comments that the OECD will receive. I would like to focus my further comments based upon particular issues I have encountered in my experience as a governmental official and also as an advisor to multinational clients that also warrant full consideration by the OECD, which do not appear to be addressed in the proposed Guidelines. In particular, I am concerned about [1] Addition of a definition of a Constituent Entity"; and [2] Utilization by non-OECD countries.

**Definition of “Constituent Entity”**

I recognize that the proposal under discussion is to replace and substantially expand the OECD guidance with respect to only transfer pricing documentation. This proposal needs to be considered in the context of other chapters of the Guidelines and other relevant guidance. However, the scope of these proposed changes is so sweeping that further guidance may be appropriate particularly with respect to the "Constituent Entities" for which detailed information would be required to be included in the CbC Template.

A definition is appropriate for several reasons. First, different countries have different definitions regarding the entities or series of transactions subject to their jurisdiction.
In the United States, for example, Internal Revenue Code sec. 482 (and related transfer pricing regulations) applies to any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests. . . . Focusing on "control" of course means that an entity may have control of another by means not only of ownership but also by means of management or board control, or control through debt. For example, during my tenure with the IRS APA Program, it was necessary in one case to infer control for purposes of considering a request for an Advance Pricing Agreement.

Another OECD member country, Japan, does have a clearer definition of what constitutes control. Japan's transfer pricing rule in Paragraph 1-4, Article 39-12, applies to transactions of Japanese entities with associated foreign corporations, where one of the entities holds fifty percent or more of the stock or investment in the other.

To further illustrate the differences in definition of entities subject to domestic transfer pricing laws, Mexico's transfer pricing rules, contained in paragraphs 5 and 6 of Article 179 of the Income Tax Law, provide that parties are related when one of them "participates directly or indirectly in the management, control or capital of the other[s]." The law further provides that members of joint ventures are deemed to be related, as are permanent establishments.

Let's consider a situation where two unrelated parties in the United States (USCO) and Japan (JCO) agree to form a joint venture to conduct business in Mexico through a newly-formed Mexican corporation (MXCO). JCO in this hypothetical contributes 75 percent of the capital to finance MXCO, while USCO provides the remaining 25 percent of startup capital and also agrees to provide ongoing management expertise. Control of the board of directors of MXCO is split, with each party providing three directors. The parties agree to split profits or losses on a 50-50 basis.

For purposes of compliance with CbC reporting in the proposed Guidelines, would USCO or JCO be required to include MXCO as a "Constituent Entity"? Or would they both be required? From a US perspective, control by USCO might be argued to be present through exercise of management control as well as entitlement to fifty percent of the profit or loss. From a Japanese perspective, control by JCO would likely exist due to the size of its initial investment, well in excess of the 50% threshold. A well-crafted definition for purposes of CbC reporting would reduce confusion and inefficiency.

Second, in addition to the question of which country's transfer pricing rules would apply in determining whether an entity is a Constituent Entity, it is necessary to consider how to treat inactive entities. At a minimum, the definition of "materiality" should indicate that inactive entities, i.e., those with nominal assets, capital or employees with no ongoing business, need not be included in the CbC report.

Finally, consideration should also be given to how to treat for CbC reporting purposes permanent establishments, hybrid and passthrough entities (such as partnerships and limited liability companies) and holding companies, so that MNEs have a clear understanding of the scope of review that would be required in preparing the CbC template.
Utilization by non-OECD Tax Administrations

The thirty members of the OECD are not the only countries with an interest in or requirement for transfer pricing documentation. In fact, at last count, eighty countries around the world – from Andorra to Zambia – have transfer pricing requirements of one sort or another. Transfer pricing rules in a number of these countries refer to the OECD Guidelines. However, a number of other much larger countries that do not have OECD member status – in my own experience China and India [which have observer status] – have expansive transfer pricing documentation and enforcement requirements. I believe we can reasonably assume that these tax administrations will want to have access to the same information as their counterparts in OECD member countries. For situations where the entities are affiliates of the ultimate parent located in another jurisdiction, it is reasonable to expect that they would either ask a local affiliate to provide it or request it through tax treaty information exchange provisions. It is not inappropriate for tax administrations in non-OECD member countries to have access to the same documentation as tax administrations in member countries have.

The issue presented here is the extent to which MNEs may be subject to expanded and intrusive transfer pricing inquiries not only from tax administrations within OECD member countries, but also from the other fifty which are not OECD members. Consideration should be given to the implications of the new Guidelines [assuming substantial adoption by most OECD member tax administrations], particularly with respect to burden, materiality and confidentiality provisions, for all countries with which an MNE does business rather than just OECD member countries.

Conclusion

These proposed changes to Chapter V of the OECD Transfer Pricing Guidelines are expansive and sweeping. I recognize the OECD’s goal of moving forward expeditiously with all components of its July 2013 BEPS Action Plan. However, considering the implications of these proposed changes on MNEs and tax administrations alike, I would encourage due deliberation of these and all other comments before finalization.

Regards,

Steven D. Harris
Attorney-at-Law
RE: Discussion draft on transfer pricing documentation and CbC reporting – Public consultation

Dear Sirs,

We refer to the Discussion draft on transfer pricing documentation and CbC reporting, published on 30 January 2014, and welcome the opportunity to provide our comments on it.

In our opinion, the matters at issue should be examined taking into consideration the provisions of the EU Code of Conduct on transfer pricing documentation with a view to harmonizing and standardizing information, without disregarding the purpose of reducing the costs and time necessary to prepare the set of documents.

Although it cannot be denied that the transfer pricing documentation is necessary for Tax authorities in order to carry out a preliminary risk evaluation in respect of the transfer pricing policy adopted by a multinational group and is aimed at implementing the fundamental principle of cooperation between taxpayer and tax authorities, it is however necessary to note that the preparation of the set of documents is a burdensome activity, which requires the involvement of significant resources in order to coordinate and manage the flow of information. After all, the mapping of all intercompany transactions, the disclosure of the related contractual conditions, as well as the justification underlying each single change to the strategic choice affecting the intercompany exchanges is far from simple, whether the above refers to large and consolidated multinational groups or newly-incorporated and smaller groups. It is therefore important to evaluate the benefit expected in respect of the above activities and, consequently, to minimize the risk in terms of the penalties which might be applied if, at the time of a tax audit, the Tax authority should deem it adequate to adjust the intercompany prices applied. Accordingly, it is necessary to guarantee a multinational company which provides the Tax authority with information and figures, which otherwise were not available to it, clear and exhaustive guidelines to be observed in order for the documentation to be adequate
for penalty protection purposes. Therefore, consistently with the purposes of the transfer pricing documentation, we deem that a set of documents including the mapping of all intercompany transactions in which the company is involved, an exhaustive functional analysis able to identify how many and which risks are borne by the multinational company, as well as the development of a logic argumentative process enabling to verify the correctness of the evaluation process of the compliance of intercompany prices in respect of the arm’s length value can be considered adequate to obtain the penalty protection.

In our opinion, in fact, it is not reasonable to demand that the adequacy of the transfer pricing documentation is evaluated also with reference to the procedure applied to verify the compliance of the prices applied for the transactions audited and the results of the analysis of comparability, of which selection and verification ensue from a merely technical evaluation which does not affect in any way the correctness and truthfulness of the information provided. In brief, the documentation should be considered adequate to guarantee the penalty protection any time it includes complete and true information on the intercompany transactions actually relevant in the context in which they occur, as well as the argumentative process underlying the selection of the procedure and the comparability analysis, if any, in compliance with the OECD regulations. In our opinion, the document under consideration should clearly prescribe all the above.

We also realize that the judgment of adequacy might be complex and, anyway, affected by subjective judgments. On this regard, we deem it is advisable to introduce the possibility for either the taxpayer and tax authorities to refer the judgment of adequacy related to the set of documents prepared in compliance with the model proposed in the document at issue to an independent international “guarantor” acting in its capacity as arbitrator, established within the OECD. This “entity” might be introduced through a dedicated procedure based on the model of the current EU Arbitration Convention on transfer pricing.

Another important matter on which we have been requested to provide comments is the definition of the materiality level, i.e. the identification of the intercompany transactions which must be considered material and must consequently be disclosed through the documentation prepared by the multinational firm. We specify that the EU Code of Conduct (and, so far as it may herein be relevant, the Italian regulations on TP documentation) does not provide any clarification and the limit is established based on a discretional evaluation, according to the reasonability parameters of the firm. On this regard, the establishment of a criterion representing the safe harbour rule should take into consideration the relevance of the transaction in terms of either the value and the potential risk; therefore, regardless of the quantity index applied, a quality analysis must necessarily be conducted, at least with regard to the most complex transactions. In particular, we deem that such complex transactions
include financial transactions (loans and cash pooling agreements), along with the cost allocation agreements and management service agreements to which the multinational firm is party, regardless of their absolute value. As regards the transactions which do not fall within the above categories, it is sufficient to establish the level of impact of sale or purchase transactions on the aggregate amount of revenues or costs; if the value of the transaction is immaterial because its impact is below the percentage established (which could reasonably be set at 1%), the multinational firm should be entitled not to perform a complete analysis of that type of transaction in the transfer pricing documentation, but it could solely mention its existence and immateriality.

The evaluation of the materiality of transactions should anyway be developed separately from the associated companies involved; accordingly, any time a transaction occurring between two affiliates resident in OECD countries appears to be actually material for a firm and at the same time immaterial for the counterparty, there would be no obligation of disclosure in the hands of the latter arising from the fact that it is material for the first firm.

In order to simplify the activities performed to prepare the transfer pricing documentation, par. 34 of the OECD document under consideration states that it is possible to carry out an update of the comparability analysis every 3 years, if the operating conditions of the multinational firm do not change in the period under consideration. We deem that this provision is useful and functional to the reduction of documentation required. This is valid specifically for the firms carrying out low-value intercompany transactions, in our opinion those not exceeding Euro 5 million of intercompany annual turnover. Therefore, any time the operation of a multinational firm observing the above mentioned limit does not change in the subsequent period and the method adopted in the transfer pricing documentation is the Transactional Net Margin, it will not be necessary to carry out any other search for comparables in the two subsequent years, since it is sufficient to update the financial figures of the comparables previously identified. In order to adopt a consistent and non-discriminating approach depending on the transfer pricing method chosen, we deem it would be advisable to apply this simplified procedure even when the firm adopts the traditional methods, i.e. when the comparable analysis is carried out with reference to “internal” transactions, provided that in that case even the economic conditions characterizing the reference internal benchmark do not change.

Another issue which it has been requested to comment on is the definition of the approach to be adopted to prepare the transfer pricing documentation; once the information to be reported in the master file and local file is defined, it is necessary to evaluate whether the analysis must be performed with a bottom-up or top-down approach, either of which however must be necessarily adopted to define the transfer pricing policy of each single group company
required in the documentation. In our opinion, it has to be underlined that the top-down approach (i.e. defining the transfer pricing policy and preparing the documentation starting from the allocation of the consolidated income among the several group companies) would entail that solely with regard to the parent company the analysis and the definition of prices would be carried out on an ex-post basis. The definition of the transfer pricing policy on an ex-ante basis, in the event of a top-down approach, would imply an ex-ante valuation of the group consolidated income as well as the forecast of the reference markets’ main dynamics which could affect the affiliated companies. This is a far more complex evaluation than the transfer pricing policy definition (and subsequent documentation) based on the result of the single resident firm, which would need more information and a longer time for preparation and this would be hardly compatible with the timing requirements often set for the preparation of the transfer pricing documentation. It should also be taken into due consideration, in the perspective of a top-down approach, the end-year adjustments, which are sometimes required in order to adjust the price applied in the intercompany transactions to the arm’s length price. Since it is more difficult to define the transfer pricing policy on an ex-ante and consolidated basis, the adjustments required at year-end might be excessive and not always feasible and we should not disregard that, in the event of associated firms resident in non-OECD Countries, the allocation of the consolidated income according to the arm’s length principle could entail an unfair attribution, thus increasing the risk of adjustments. In our opinion, the bottom-up approach is the most consistent with the purposes of the documentation.

As regards the documentation structure, we deem it is advisable that the type of information required and the contents of the set of documents requested by the OECD are substantially compliant with the provisions of the EU Code of Conduct. This would enable multinational firms, which have already prepared the documentation file based on the European model (which has been implemented by several domestic legal systems, including the Italian system), to easily make it compliant with the model at issue.

Finally, it is worth providing some comments on par. 15 of the document, i.e. on the possibility for the Tax authority to request a resident firm, at the time of an audit, to provide further documentation and data on foreign associated firms.

With a view to increasing transfer pricing voluntary disclosure through the preparation of documentation as much uniform as possible, we deem that the request for further information or documents supporting the local transfer pricing policy should be referred solely to specific cases. In particular, this type of request by the local Tax authorities would certainly be reasonable if it referred to information directly linked with the transactions in which the resident company is involved, which are necessary for the verification of the compliance with
the arm’s length principle in that transaction, on which the State of the resident firm has the power of taxation. Accordingly, the request by the Tax authority to provide, for instance, invoices demonstrating the actual existence of the transaction and the supporting agreements would be lawful; while it would fall outside its remit to request for general information on the profitability of any foreign affiliated company or on the sale prices applied by such affiliates in the transactions to which the documentation does not refer. We underline that the identification of information to be disclosed to the Tax authority also depends on the procedure utilized to verify the compliance of intercompany prices. In particular, if an income method is adopted, e.g. the profit split method, it is clear that the verification of the correct application of the methodology requires the availability of detailed information on the foreign affiliates entitled to allocate the profit, because the profit to be allocated has been earned with the implementation of strongly integrated strategies and operations which do not enable an arm’s length valuation based on information regarding the single firm. In this case, it will be necessary to provide the local Tax authority with detailed information on the profitability obtained by the non-resident associates in the controlled transactions.

Furthermore, if the evaluation of the information regarding the non-resident companies of the group are regarded as essential, the Tax authorities could anyway utilize the procedures available to exchange the information provided for by the treaties.

It is also necessary to note that, in the event of associated companies resident in non-OECD countries applying price determination principles other than the arm’s length principle (i.e. aimed at establishing a maximum price as parameter to evaluate the correctness of the intercompany transaction), the collection of information deriving from them and demonstrating that the margin obtained by the non-resident associate in its reference market is fair might give rise to distorting consequences, i.e. inducing the Tax authority to reallocate a portion of the profit of the foreign associate to the resident company, by reference to a different valuation generated by the application of the OECD principles with regard to the fairness of the profit earned in the foreign market. The divergence of the criteria for the valuation of the arm’s length value should be adequately explained in the set of documents, specifying the need to comply with the local regulations and the transactions to which such regulations should apply. If the multinational firm provides such information in a clear and transparent manner, the Tax authority should not disallow the price set for an intercompany transaction solely by reference to a different valuation of the profit level which the foreign associate should have obtained in its own reference market, if the transfer pricing rules in force in the (OECD) country of residence of the audited firm were applied.
Basel, 18 February 2014
St. 30 / JBR

OECD request for public comments on the discussion draft on transfer pricing documentation and country-by-country reporting

Dear Madam,
Dear Sir,

The Swiss Bankers Association would like to take the opportunity and provide its input on the recent WP6 work on transfer pricing documentation and Country-by-Country (“CbC”) reporting that should entirely replace Chapter V of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“OECD TPG”).

Our views are based on long time experience of our members with drafting, updating and explaining transfer pricing documentations for Multinational Enterprises (“MNE”) operating in multiple countries with several interrelated financial services business lines.

Please see below our comments to the specific issues:

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.

Overall, we welcome the transfer pricing documentation initiative of WP6 that focuses on the standardization of requirements in all countries. Such a step will make the preparation and update of a two-tiered set documentation easier-to-be-managed by a MNE without excessive administrative burden. Moreover, we are happy to see that WP6 tries to replace the mere framework rules contained in the existing Chapter V of TPG with certain guidance on what should be included in the Master file and in the Country specific files.
In our view, “Annex I to Chapter V: Transfer pricing documentation – Master file” only gives examples of what a Master file should contain, though, such a form of guidance cannot guarantee that all (at least OECD) countries, where a MNE has its taxable presence, will consider the same Master file as comprehensive.

Therefore, both the tax authorities and MNEs would benefit, if a fixed structure and content of a two-tiered transfer pricing documentation would be presented in the new Chapter V (and its annexes) of the OECD TPG. On the one hand, MNEs would welcome, if a clear guidance, on what a comprehensive TP documentation should contain, would be determined. On the other hand, such guidance would present limits, beyond which tax authorities would not have to go.

Perhaps, the European Union Transfer Pricing Documentation¹ (“EU TPD”) rules could serve as an example. These are often used by MNEs as a practical guideline, when they produce their transfer pricing documentation (both Master file and Country specific file) in-house.

The chart below depicts the differences between the above mention TPD standards, i.e. OECD TPG Chapter V, EU TPD.

**Chart: The differences between the selected documentation standards**

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¹Reference is made to Code of Conduct on transfer pricing documentation for associated enterprises in the EU from 07.11.2005; COM(2005) 543
In terms of CbC reporting, we believe that priority should be given to the standardization (content and structure) of Master File and Country Files. There should not be created new reporting requirements that simply repeat information already mentioned in the Master file or in the Country specific documentation prepared according to the known and widely used documentation guidelines.

If there should be any additional reporting, such as CbC reporting, the amount of data requested should be limited to the absolutely necessary ones. In other words, CbC should only list data that are missing in the Master file of Country specific file, e.g. income tax paid in individual countries.

Finally, we see the necessity in sharing the tax authorities’ risk assessment with the taxpayers only during a tax audit.

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.

In a two-tiered approach, any jurisdiction where a MNE is located should have access to the Master File, where the core information common to all entities of a MNE is presented. Besides that, a country, where a MNE has a taxable presence, should not be entitled to require additional information from other jurisdictions. In our view, the individual country specific files drafted e.g. according to the EU TPD rules provide enough information on intra-group transactions that have impact on the tax base in the respective country.

The entitlement of a jurisdiction- where a MNE has a taxable presence- to require information from different jurisdictions leads to an excessive administrative burden for MNEs. We would therefore advocate against such entitlement.

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.

We suggest that the preparation of the master file should be based on the line of business basis. Such a structured presentation of the MNE’s business set-up is easier to be understood. We believe that especially in the financial services area, a deep business understanding is essential for thorough assessment of the arm’s length character. Nevertheless the functional and risk profiles of individual entities should be presented in the master file as well.

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2 As mentioned in our comment on the 3rd topic, we believe that a Master file structured according to the individual business lines helps the reader from outside the business to easier develop the minimum required business understanding.
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?

If CbC reporting should be introduced at all, it should be a separate document that would be available to all jurisdictions, in which the MNE has a taxable presence. Such a structure would enable to update CbC yearly, whereas the Master file could be updated only once in three years, or if a restructuring takes place.3

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?

Bottom-up approach is preferred, as statutory accounts tend to be more relevant for determining the taxable base in individual countries. Top-down approach (consolidated figures) would eliminate intra-group transactions taking place within the same jurisdiction. This might not be desired, if there are several corporate income tax rates in that country.

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?

Entity by entity approach should be preferred. A separate individual country consolidation does not reflect that there are entities with different tax rates, or entities that operate several business lines with different value chains within one country. Ultimately, consolidation at the country level presents an additional costly administration burden.

3 Reference is made to our comments on the 6th topic.
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?

If the corporate income tax paid per country should be reported, than on a due basis. This is because the due dates for cash payments differ from country to country. Due basis (or accrual basis) is closer to the statutory financial accounting that tends to be relevant for corporate income tax purposes in most of the countries. Last but not least, there is hardly any MNE that keeps cash accounting nowadays.

We understand that globally acting MNEs bear besides the corporate income tax also not-refundable withholding taxes that in fact increase the overall tax burden. For this reason, we believe that such costs should be disclosed in the reporting.

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?

No, reporting of aggregate cross-border payments between associated enterprises should not be required. We do not see any necessity in introducing a new requirement to report intra-group payments of royalties, interest and service fees. These pieces of information should already be mentioned and documented both in the Master file and in Country files in the chapter describing intra-group transaction flows. No need to duplicate such data.

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?

No, the CbC reporting template should not create duplicity. The nature of business activities in our view (and according to the best practice) should already be mentioned both in the Master file and in the Country specific documentation.

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4 See Chapter 4.2 of the Master file structure and Chapter 5.2 of the Country specific file of EU CoC TPD.
5 See Chapter 4.2 d of the Master file structure and Chapter 5.2 b of the Country specific file of EU CoC TPD.
5. Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

It is highly appreciated that WP6 brought up this topic. In our view, there are two fields where materiality matters. Firstly, it is the size of the MNE and its entities in a specific jurisdiction that should be taken into account when imposing transfer pricing documentation requirements. Secondly, intra-group transactions falling under a certain volume threshold should not be exposed to the full documentation burden.

In terms of the size of the MNE and its entities, we would welcome, if a light version of a Master file and Country specific files would be introduced for smaller entities. For example, a MNE would not be considered as small, if at least two of the three following values are exceeded: turnover\(^6\) of USD 40 million, total assets of USD 20 million and 250 full-time employees in two consecutive years, on a group consolidated basis.

As regards the materiality of individual intra-group transactions, we believe that any intra-group transaction that does not exceed (on an aggregate basis per year) the threshold of 1% of total\(^7\) revenues or USD 50,000 (whichever is less) should not be exposed to documentation burden.

This would in practice mean that the MNE does not have to cover such an intra-group transaction in the Master file or in the Country Specific File. However, there would still have to be a Service Level Agreement concluded to fulfill the accounting requirements in individual countries.

On the contrary, intra-group transactions exceeding the above mentioned materiality threshold should be fully documented.

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?

Yearly updates of a transfer pricing documentation would present excessive administrative burden for MNEs. It would be highly appreciated, if documentation updates were only required once in three years, unless a transfer pricing restructuring takes place. Should there be any change in the functional and risk profile of an entity, an update would be required. In the year of the documentation update, the relating benchmarking studies should also be updated in order to match with the most recent functional and risk profile.

Moreover, we would appreciate, if WP6 could acknowledge in the newly drafted Chapter V that low value added routine functions that are typically remunerated by Cost plus (e.g. management & administrative services) do not need to be benchmarked, if the

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6 The term “turnover” should be exactly defined especially for financial services.

7 Total revenues = both third party revenues and intra-group revenues
cost plus mark-up amounts from 3 to 10 per cent. Such a profit mark-up could be considered as at arm's length.

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

We believe that tax authorities’ personnel examining transfer pricing and international tax issues should be expected to read documents in English. It goes without saying that OECD (and also UN) publishes all transfer pricing relevant documents primarily (and often only) in English. Therefore, personnel that test the arm’s length character of MNEs intra-group charges have to know English.

For these reasons, we would appreciate, if both the Master File and the Country specific files could be filed in English. Translation of Country specific files into local languages is too costly, time demanding and presents as such an excessive administrative burden to MNEs. Not to mention that every Country specific file tends to be anyway first drafted in English in order to ensure that the document fulfills the group documentation standard criteria. Only in a second step, the translation into local language would take place. Any translation would need to be performed by people with at least some transfer pricing knowledge, otherwise the main message of the report would be lost in the translation.

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.

As regards confidentiality of information in the financial services field, we would highly appreciate, if tax authorities in jurisdictions, in which a MNE operates, would commonly accept 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.

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.

We suggest that tax authorities in the jurisdiction, where the MNE group has a taxable presence, simply request the Master file and all its appendices from the MNE’s headquarter, after a tax audit in that jurisdiction was announced.

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8 Similar approach has adopted EUJTPF in Art 65 of its Guidelines on low value adding intra-group services.
Our concern is, that a regular (e.g. annual) filing of a Master file would be certainly connected with the requirement of annual updates. This would again present an excessive administrative burden for MNEs.

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 suggest that only APAs should be part of the master file, as they tend to be essential for getting a deep understanding of regional or overall MNEs set-ups.

On the contrary, MAP cases only relate to ex-post qualification or transfer pricing assessment conflicts between two countries with a double tax treaty in place. In our experience, tax payers that were confronted with an economic double taxation of intra-group transactions, that took place in the past, tend to eliminate the future threat of another economic double taxation resulting from the same intra-group transactions by the means of a bilateral APA.

Therefore, we believe that, MAP cases do not have direct impact on the current regional or overall MNEs set-ups.

Yours sincerely,
Swiss Bankers Association

Urs Kapalle    Jean Brunisholz
Comments of SwissHoldings to the Discussion Draft on Transfer Pricing Documentation and CbC Reporting, released by OECD on 30 January 2014

Dear Mr. Andrus

The business federation SwissHoldings represents the interests of 58 Swiss based multinational enterprises from the manufacturing and service sectors (excluding the financial sector). SwissHoldings is pleased to provide comments on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting (hereafter referred to as “the Draft”).

SwissHoldings believes that the Draft is a good starting point for improved and more precise guidelines covering transfer pricing documentation and to reduce uncertainties about the required content. We also acknowledge the information requirements of tax authorities.

We split our comments into a section summarizing the general comments including Key Messages and Recommendations and a section summarizing our Specific Comments to the Draft and comment requests of the OECD.

I. GENERAL COMMENTS

A. Key Messages

1. Current proposal of Master File and CbC Reporting is too extensive and goes far beyond what is needed for the purpose of doing a proper tax risk assessment. Current proposal would lead to significantly higher compliance costs for MNEs with no benefit in terms of risk assessment or enhanced cooperation between taxpayers and tax authorities.

2. Extensive - non-comparable - additional information and data does not lead to more transparency. It will create more confusion and questions which are not related to the entity and transaction under review. Hence, a reduction of formal requirements and a focus on material transactions, information and data is the key for balance and defining best practice transfer pricing documentation requirements, whilst at the same time providing sufficient transparency to perform proper tax risk assessment.

3. The proposed extensive documentation requirements included in the master file (and CbC reporting) will most likely lead to more extensive audits due to inappropriate non-arm’s length comparison of functions, profits, transactions and the audit expanding to a global value chain/transfer pricing audit; with no increase in efficiency. Hence, we need to strengthen the arm’s length principle and also ensure that tax audits in the future are focused and efficient (in the interest of both taxpayer and authorities). The extensive
documentation needs to be handled with confidentiality and should not be shared with jurisdictions that cannot meet this standard.

B. Recommendations

1. Flexibility is a key element for a best practice documentation approach, and more is required in the following areas:
   - Form and structure of the documents – substance over form
   - Preparation of master file on a group or business line basis
   - Application of top-down or bottom up-approach
   - Reporting by country or entity
   - Disclosure of tax payment (cash tax vs. tax due including/excluding withholding taxes)
   - Updating of financial data of the comparables
   The documentation approach must respect available reporting systems and easily accessible key information and data.

2. Master & local file
   - Scope of master file too extensive and does not cover useful information for risk assessment purposes (e.g., reporting all intercompany transactions, APAs, list of IP, supply chains, etc.)
   - Master file must be focused on information and data which is relevant to the whole group or division
   - Scope of master file must be reduced to enable taxpayer to combine and submit it together with local file (if scope is not reduced master file shall only be filed at jurisdiction of parent company and shared under treaty exchange information)
   - Both need to be prepared in English (penalty protection) with translation prepared only upon request
   - Both shall be submitted to tax authorities upon request within a reasonable time frame (min 60 days) and not together with the tax return

3. CBC Reporting should be
   - prepared as a separate document
   - filed at the jurisdiction of the parent company
   - limited in its scope to revenues, profit and tax (due/or paid) shared only under treaty exchange information (to prevent misuse of confidential information)

4. Materiality thresholds need to be considered for all three documents (master file, local file and the separate CBCR). For risk assessment purposes coverage of 80% of revenues and profits should be sufficient for the CBCR.

5. Depending on the final scope of the new documentation requirements, MNEs should be given sufficient time to change their current documentation concepts according to the new standards (minimum three years, no retroactive application).

II. SPECIFIC COMMENTS

The current structure and extensive scope of the proposed new documentation requirements are not practical and would be nearly impossible to implement for large multi-business groups as further outlined below. They will create significant additional compliance and transition costs for the implementation of the new standards and to change the current documentation concepts developed over many years (including costs for advisors and lawyers because of increased numbers of disputes based on misinterpretations); with no benefit for taxpayers and tax authorities.
We are very concerned that the proposed extensive documentation requirements will lead to more extensive and controversial tax audits. We expect that the focus during audits will unfortunately concentrate on the new - often not relevant, clear or useful - information and data, and that the focus on the transactional based functional analysis (of the constituent entity), a fundamental principle of the arm’s length principle, will be lost. As a consequence, in future tax audits functionally non comparable data/information (profit levels, transactions, APA term, etc.) of company X in country Y would need to be explained with regard to the constituent entity (the legal entity under audit). With the revised guidelines we should strengthen the arm’s length principle and ensure we remain focused on the functional analysis of individual (or economically aggregated) transactions or activities of the constituent entity. Further clarification and guidance is required to ensure an efficient audit process.

From this perspective, we would welcome further support to reduce formal requirements and the administrative burden imposed on taxpayers and in particular to provide more flexibility on the scope, structure and type of documentation to be provided. Flexibility and a focus on material transactions is key to address the various needs of MNEs from different industries and with very different sizes, business models, complexities, IT/reporting systems and a total number of legal entities which range from a handful to thousands.

Our more specific comments follow the structure of the Draft and the specific requests for comments.

[Par 7]: We would like to clarify that not only tax administrations are operating with “limited resources”; MNEs also have the same challenge. Therefore, in the interest of both parties, more balanced and focused documentation rules need to be developed; this is unfortunately not yet the case in the current extensive draft.

[Par 9], Comment Request 1: We support the exchange of tax authorities’ risk assessment with taxpayers as this facilitates cooperation and transparency. As the current proposal is already extensive, we do not recommend expanding the requirements with additional “standard forms” and “questionnaires” which would only further increase the compliance burden for MNEs; unless their intention is to streamline and simplify the current scope (e.g., accepting table format for functional and risks analysis).

[Par 14]: Financial results of associated enterprises are only useful for a TP audit/risk assessment on a transactional basis. However, this level of information often does not exist and/or is only relevant when a profit split method is applied, which in most instances is not the case.

[Par 15], Comment Request 2: Rules for exchange of information already exist and are sufficient. We would like to clarify that the information request must be relevant for the transaction(s) under review in order to ensure an efficient and focused audit process.

[Par 18], Comment Request 3: Due to the various types of MNEs operating in different industries, and with very different sizes, business models and value chains, flexibility should be provided to taxpayers to prepare their master file either on a group or business line basis. The reasons for the selected basis of documentation should be explained by the taxpayer as part of the documentation. It should also be noted that MNEs operate with different business lines in different countries with various activities and different volumes of business. For example, it is often the case that a group operates in one country with multiple business lines, multiple activity types and several billion EUR/USD in revenues and in another country with multiple business lines, but one activity type and a few million EUR/USD revenues. In such situations the documentation requirements and needs of tax authorities are likely different. For tax authorities in the first country a master file on business line basis would most probably be suitable whereas for tax authorities in the second country a master file on business line basis may not be appropriate given the size of the taxpayer and available resources.
[Par 20], Comment Request 4.1: SwissHoldings supports the preparation of the CbC report as a separate document.

[Par 20], Comment Request 4.2: SwissHoldings supports that MNEs have flexibility for selecting either the “top-down” or “bottom-up” approach. Both approaches should be permitted due to the following reasons:

- For larger MNEs with several billion EUR/USD revenues and several hundreds or thousands of legal entities the implementation of the “bottom-up” approach will not be possible or would require enormous effort. Large MNEs usually have no reporting system to collect information from the local statutory financial accounts. Forcing MNEs to create complex manual data collection processes and/or invest in expensive reporting systems should be avoided.

- The local statutory financial accounts are closed at different times and sometimes with significant delays. The collection of such data in large MNEs may only be completed after a long time period of more than 1 year. Delays in submitting the CbC reporting and completing the required transfer pricing documentation will be the result.

- The collection and monitoring of the data collection will be a burden for the MNEs’ organization.

- Group GAAP data (applicable for the “top-down” approach) is audited by the statutory financial auditor, is produced in a consistent manner for the specific MNE based on internal accounting and reporting guidelines and is available in the same currency. Thus, the “top-down” approach fulfills the purpose of the CbC reporting which is to enable tax authorities to perform a high-level risk assessment.

- Differences between “top-down” and “bottom-up” approaches should reduce in the future due to the increasing introduction of IFRS accounting principles in local and group GAAPs.

[Par 20], Comment Request 4.3: Flexibility should be provided to either prepare the CbC reporting per country or per entity due to the following reasons:

- Country level information is sufficient for a high-level risk assessment.

- Entity level information will not provide the required transparency as it does not illustrate how the different activities entities in a country are connected.

- Entity financial information may be too sensitive especially for some large multinationals operating under a decentralized business model. In such decentralized groups where transfer pricing directly affects the performance measurement of local management, and related bonus schemes, some of the required information, e.g., profitability of entities, may distort internal competition and business relations.

- Legal entity data is often not available for group GAAP purposes. MNEs report local results in so-called “reporting units” which may not be same as the legal entity. A legal entity may consist of different reporting units.

Data on a country level should eliminate transactions between group entities within the same country. However, it is usually not possible to show revenues and earnings attributable to intercompany cross-border transactions separately, i.e., country level data includes transactions with third parties as well as with related parties.

[Par 20], Comment Request 4.4: A clear and uniform guidance is not possible due to the complexity of the topic (e.g., due to diverse organizational structures, complexity and in particular available/used (tax) reporting systems of MNEs). Hence flexibility should be provided.

[Par 20], Comment Request 4.5: Reporting all intercompany transactions would impose a significant additional compliance burden for MNEs. All (material) intercompany transactions are provided in the local file and should not be provided in the CbC reporting in addition for the following reasons:

- The duplication of data significantly increases the volume and complexity of the data to be provided, as well as the burden on MNEs.
- Intercompany volumes per transaction type, such as services, royalties, interests etc. are often not available on a central level and there may be no group wide consistent guidelines to report such information locally.
- The master file will describe the MNE’s intangibles and services business model which should be sufficient for tax authorities to perform a risk assessment.
- Moreover, without additional (functional and economic) analysis we doubt whether a (global) list of all intercompany transactions would be useful for a risk assessment with/between other group entities.

Financial data provided in the CbC reporting should be limited to revenues, profits, taxes and potentially headcount.

[Par 20], Comment Request 4.6: All additional information mentioned in this question (nature of business, other economic measure of activity) is not useful and would again lead to an unbalanced additional compliance burden for MNEs.

[Par 21]: We appreciate the clarification that the CbC reporting does not replace a full TP analysis. However, there is a high risk that in practice the functional/transactional based analysis of the legal entity under audit is lost. There is a high risk that in future tax audits significantly more time will need to be spent in explaining to tax authorities why the lower/higher profits (or APA terms) in country X cannot be compared with the lower/higher profit in country Y. There is a high risk that the local audits are expanded to a detailed global value chain analysis and hence a global TP audit. Hence, future tax audits will significantly increase the need for more resources on both sides (taxpayer and tax administration) and significantly increase the compliance burden for MNEs. It should therefore be clarified that additional information requests from other entities should be limited to ensure an efficient and focused audit process.

[Par 24]: SwissHoldings recommends that the guidelines specifically mention that taxpayers are free to decide in what form and in which order the documentation as requested in the master file, local file or CbC reporting is provided (substance over form).

[Par 26]: SwissHoldings appreciates the efforts to reduce the administration burden and costs for MNEs.

[Par 27-28]: Master and local file shall be submitted to tax authorities upon request within a reasonable time frame (minimum 60 days) and not together with the tax return. Depending on the final scope of the new documentation requirements, MNEs should be given sufficient time to implement the new standards (minimum three years, no retroactive application).

[Par 29], Comment Request 5: SwissHoldings considers the introduction of materiality thresholds as important. This needs to be considered for all three documents (master & local file and CbC reporting). It is not possible for MNEs to document every transaction in detail, and tax authorities also want to focus on material transactions. However, due to the various types of MNEs (different sizes, industries, business models, reporting systems, etc.) flexibility should be given to MNEs to set reasonable thresholds and provide their reasons in their transfer pricing documentation. Also, for the CbC reporting, a materiality threshold is recommended (for example list of top revenue generating countries which cover 80% of MNE’s revenues). The materiality threshold might be different for master file, local file and CbC reporting.

[Par 32]: Even when MNEs prepare documentation on a contemporaneous basis they may not be able to provide the documentation “promptly” as stated in Par 32. Especially, for large MNEs with complex business models and a large number of different intercompany transactions which are documented on different levels of the MNEs organization, time is required to collect the documentation for a specific tax authority request. It should also be noted that transfer pricing documentation may include thousands of pages. It is therefore recommended to say “in a given timeframe” instead of “promptly”.

[Par 34], Comment Request 6: The suggestion is helpful as it clarifies the expectations. However, in order to limit the compliance burden, MNEs should have flexibility to decide whether they update the comparables on a yearly basis. Based on experience, in most cases the range does not change materially within a three years’ time period for routine activities. Moreover, in APAs the benchmarks/range is generally also fixed between three and five years (without updating the financials). Why should we apply a higher compliance requirement for the local files?

[Par 35], Comment Request 7: SwissHoldings appreciates that the master file can be prepared in English. In addition, it should be noted that in practice local files need to be prepared in English due to central documentation concepts or templates and international teams within MNEs preparing and reviewing the documentation. It should be allowed to also prepare the local file in English and prepare translations only upon request. English language local files should protect from penalties (reference is made to the EU Master File concept).

[Par 41]: SwissHoldings suggests that the restrictions on the use of the data contained in the master file/CbC report by the tax authorities can be mentioned in the guidelines. For example, any transaction information or financial data of the MNEs in the master file/local file/CbC report cannot be referred to or taken as a benchmark in case of tax assessment for other MNEs.

[Par 43]: SwissHoldings appreciates the statements clarifying that documentation does not need to be prepared or certified by external consultants. This may help somewhat reduce the compliance burden of MNEs.

[Par 44]: Flexibility in form and structure is appreciated (substance over form).

[Par 45], Comment Request 8: The master file with the extensive content requirements as currently presented in the Draft should be filed in the parent company’s jurisdiction and shared under treaty information exchange provisions. Central filing will help to protect and prevent the misuse of this confidential and sensitive information.

Annex I, master file content:

SwissHoldings generally supports the two-tier approach for transfer pricing documentation. A two-tier approach often reduces compliance burden and ensures a consistent transfer pricing documentation approach for MNEs.

However, the required documentation should take into account that MNEs operate within different industries and have different sizes, business models and value chains, sometimes covering more than 50 different business lines. In addition, as already noted above, some MNEs operate with different business lines in different countries with various activities and different pof business volumes. For example, it is often the case that a group operates in one country with multiple business lines, multiple activity types and several billions EUR/USD revenues and in another country with multiple business lines, but one activity type and only a few million EUR/USD revenues.

Already today many MNEs apply the master file concept, for example by following the guidance of the EU Master File Concept, but always tailored to the specific needs of the MNE. The master file for example includes an overview of the business and industry in which the MNE is operating, the main intercompany transactions, the MNE’s transfer pricing policy as well as the business models applied. The master file should focus on information relevant for all countries and should not cover detailed information which is not necessary to review the transfer pricing position in a certain country or between two countries.
The following table includes documentation requirements listed in the Draft which are not necessary to review the transfer pricing position in a certain country or between two countries. These requirements include confidential or sensitive information and/or, if collected centrally in large MNEs, will require enormous efforts and costs, in terms of internal resources, IT or reporting systems as well as external advisors. Where appropriate further explanatory comments are added:

<table>
<thead>
<tr>
<th>Explanatory Comments</th>
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| • Chart showing supply chain for material products and services | • “Material” to be defined  
| | • No relevance/connection to local entities and their material transactions  
| • Chart showing important service arrangements | • “Important” to be defined  
| | • Service arrangements are usually not material in the industrial sector  
| • Written functional analysis describing the principal contributions to value creation by individual entities within the group | • Enormous efforts would be required by large MNEs who operate multiple business lines which have different value chains and operating models in different countries  
| | • Should be limited to transactions and information which are covered in group accounts (e.g., 20 f filling)  
| | • Material local restructurings are covered in the local files  
| • Description of important business restructuring transactions | • Enormous efforts would be required by large MNEs where restructurings are part of normal/daily business activities  
| | • Should be limited to transactions and information which are covered in group accounts (e.g., 20 f filling)  
| | • Material local restructurings are covered in the local files  
| • Title and country of the principal office of each of the 25 most highly compensated employees | • Salary related information is highly sensitive and changes from year to year  
| | • Enormous efforts would be required by large MNEs  
| | • “Compensation” would need to be further defined (fixed salaries, bonus, shares, other benefits)  
| | • Organizational charts should be sufficient to fulfill purpose of this request  
| • List of material intangibles | • May cover confidential and very sensitive information  
| | • “Material” to be defined  
| | • High-level description of material intangibles and mentioning the intangible owner(s) within the group should be sufficient  
| | • “Intangibles” needs to be defined  
| • List of important related party agreements | • Not necessary to review transfer pricing position in a certain country; related party agreements are part of the local file  
| | • For large MNEs enormous efforts are required  
| | • “Important” to be further defined  
| • Description of any material transfers of interests in intangibles, including parties, countries, compensation amount | • Not necessary to review transfer pricing position in a certain country  
| | • High level description of material intangibles and mentioning the intangibles owner(s) within the group should be sufficient  

- **Description of how the group is financed, including identification of important financing arrangements with unrelated lenders**
  - Financing arrangement with unrelated lenders is not relevant for TP assessment
  - May cover confidential and very sensitive information

- **List and brief description of the MNE group’s applicable unilateral and bilateral/multilateral APAs and advance rulings**
  - Not necessary to review transfer pricing position in a certain country

- **List and brief description of other relevant tax rulings related to the allocation of income to particular jurisdictions**
  - Not necessary to review transfer pricing position in a certain country
  - Draft should clarify that only transfer pricing related rulings are meant

- **List and brief description of transfer pricing matters pending under treaty MAP or resolved in MAP during the last two years**
  - Not necessary to review transfer pricing position in a certain country

Flexibility should be provided for taxpayers to be able to decide on how to allocate some of the content to either the master or the local file (substance over form).

Since for large MNEs it may not be possible to prepare a “chart” of the legal organization, but information may for example be provided in a table, wording should be slightly adjusted to “chart or overview”.

**Annex II, local file content:**

The description of the individuals to whom local management reports would be a challenging task considering complex, large, multi-business MNEs.

The OECD should specifically allow for the preparation of functional analyses in checklist or table format, when appropriate. This may help somewhat reduce the compliance burden of MNEs.

**Annex III, CbC reporting:**

See specific comments made above.

**Other comments:**

The current OECD TP Guidelines (2010) Chapter V which is now to be fully replaced by the new version in the Draft, contains the following paragraph:

> “5.27 Documents also may be helpful for showing the process of negotiations for determining or revising prices in controlled transactions. When taxpayers negotiate to establish or to revise a price with associated enterprises, documents may be helpful that forecast profit and administrative and selling expenses to be incurred by foreign subsidiaries such as personnel, depreciation, marketing, distribution, or transportation expenses, and that explain how transfer prices are determined; for example, by deducting gross margins for subsidiaries from the estimated sales prices to end-users.”

This text or any similar text regarding internal negotiations and their value seems now to have disappeared from the Draft. The possibility to use documentation of internal negotiations to demonstrate adherence to the arm’s length principle makes sense for several MNEs having a decentralized business model with local subsidiaries being measured on local profit, including intercompany transaction results. Such documentation also reduces the compliance burden for
such MNEs (e.g., through conducting extensive and expensive benchmark studies). Thus, a reference to the value of internal negotiations should be kept in Chapter V.

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

Yours sincerely

**SwissHoldings**
Federation of Industrial and Service Groups in Switzerland

Christian Stiefel  
Chair Executive Committee

Dr. Martin Zogg  
Member Executive Committee

cc - SwissHoldings Board  
- William Morris, Chair of the BIAC Tax Committee  
- Nicole Primmer, Senior Policy Manager, BIAC

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February 21, 2014

Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
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(By email TransferPricing@ocead.org)

Ladies and gentlemen:

TD appreciates the opportunity to submit comments on the OECD’s Discussion Draft on Transfer Pricing Documentation and CbC Reporting issued on January 30, 2014.

Transparency and access to information for tax authorities are essential to the operation of countries’ tax systems. It is in the interests of tax authorities and taxpayers alike that the tax authorities have a full understanding of the taxpayer’s business. The OECD has a history of leadership on initiatives supporting these objectives on a global basis, including both its long-standing work on broadening the global endorsement of effective overall exchange of information for tax purposes and its release earlier this month of the Standard for Automatic Exchange of Financial Account Information. The work of the OECD’s Forum on Tax Administration on cooperative compliance further supports the important objective of greater understanding between tax authorities and taxpayers.

With the OECD’s history and experience in this area, we welcome the central role the OECD is playing in the dialogue about country-by-country reporting of tax information. The OECD’s focus on country-by-country reporting to tax authorities rather than public disclosure is an essential starting point. This form of reporting gets the information directly into the hands of the tax authorities, which is where it is needed.
Also important is the OECD’s recognition of the role of country-by-country reporting as just one tool to be used by tax authorities. As the OECD made clear in its July 2014 White Paper on Transfer Pricing Documentation, such information should be used in a first-step high level risk assessment, in order to determine whether and where to focus more resources and further attention. Country-by-country reporting is not a substitute for detailed transfer pricing information and such reporting should not be relied on as a substitute for a thorough analysis of transactional transfer pricing.

Our comments on the Discussion Draft are focused in particular on the draft of the country-by-country reporting template. The design of a system of country-based reporting involves a combination of policy, technical, mechanical, and practical issues. Input from stakeholders in all of these areas is needed in order to ensure a workable and balanced approach. Thus, we appreciate the OECD’s seeking input early in the process by releasing its initial draft for comment.

The central theme that runs through our comments is the first-step high-level risk assessment purpose of the country-by-country reporting template. The scope and content of the template should be suited to this purpose, the information required to be reported on the template should not be duplicative of the more detailed information provided as part of the proposed two-tier approach to transfer pricing documentation, and the burdens imposed on taxpayers in producing the information for the template should be aligned with the intended use by tax authorities.

I. Template Should be Delivered to Parent Country Tax Authorities

The Discussion Draft requests comments on the most appropriate mechanism for making the country-by-country reporting template available to tax authorities.

We believe this is a crucial matter. The information required to be reported in the template is competitively sensitive information about a company’s entire global profile. Full transparency by taxpayers must go hand in hand with robust safeguards for taxpayers aimed at ensuring that such information is protected and is not at risk for any inappropriate use. With information regarding the company’s whole global footprint contained in a single template to be made available to the tax authorities in each country in which there is subsidiary or branch, the stakes are incredibly high with respect to the protection of confidentiality of taxpayer information.

We believe the mechanism that should be used for the template is delivery to the tax authorities in the company’s headquarters jurisdiction. The company should not be required to deliver the template directly to the tax authorities in every country where it has a subsidiary or branch. Rather, the tax authorities in those countries should obtain the template information from the tax authorities in the headquarters country under applicable information exchange relationships.
This approach to delivery provides the best protection for the information contained in the template because it brings the template within the confidentiality protections that are built into the tax information exchange relationships between the governments. These relationships exist through bilateral tax treaties and bilateral tax information exchange agreements as well as through the multilateral convention on exchange of information. Moreover, the multilateral instrument that is the focus of Action 15 of the BEPS Action Plan could be used as a mechanism for further supplementing the broad network of existing relationships.

This approach to delivery of the template will also operate as a control mechanism with respect to the template. Companies will produce one template which will be shared with multiple jurisdictions. They will not need to contend with the potential for multiple versions of the template adopted by different countries, one slightly different than the next. If companies were required to deliver the template directly to all the countries where they operate, they could face the daunting prospect of having to deal with each country’s own version of the template, which would increase exponentially the compliance burden associated with the template. Moreover, multiple different versions of the template would not seem consistent with the goal of getting the same information into the hands of tax authorities so that each can do a high-level risk assessment.

II. Template Should Require Country-by-Country Reporting

The Discussion Draft requests comments on whether the template should require entity-by-entity reporting, as is reflected in the draft template, or whether entities should be aggregated by country so that the template requires country-by-country reporting.

We believe that the template should require country-by-country reporting. Reporting in this manner would be most consistent with the use of the template by the tax authorities in a country as a tool for a high-level risk assessment. What is relevant is the combined profile of all the company’s activities in the country, not the individual activities of any particular entity. Requiring reporting on an entity basis would not add meaningfully to the information provided to tax authorities for this high-level risk assessment purpose. Moreover, the granular information on an entity basis could detract from the bigger picture view that the country-by-country reporting template is intended to provide.

Companies often have multiple entities in a country. These entities may be operated together as if they were a single unit for business purposes. A company may have one entity in a country that has all of the employees for all the entities in that country. A company may have another entity that handles various administrative functions for all the entities in the country. Separate entity reporting would create misimpressions both regarding the entities that perform these country-wide functions and regarding the other entities that benefit from such functions.
As the Discussion Draft acknowledges, many countries provide for combined reporting of affiliated entities in the country for tax purposes. Separate entity reporting would require that the combined group be artificially divided among the entities that are part of the combined group. The Discussion Draft proposes that this be done based on each entity’s relative amounts of earnings before income tax. However, because such earnings measure is a financial statement amount, in many cases such an allocation of combined taxes would yield results that could be quite distorted. Country-by-country reporting rather than entity-by-entity reporting would eliminate the potential misimpressions and inappropriate results that would arise from entity-based reporting.

For purposes of the template, the country-based reporting should be a simple aggregation of the data for the entities in such country. Where a company prepares a consolidation of its entities in a country for other purposes, that country consolidation should be used in the country-based reporting. However, companies should not be required to prepare a consolidation simply for purposes of the country-by-country reporting template.

III. Template Should Allow Flexibility in Data Sources

The Discussion Draft requests comments on whether the template should be compiled using data from local financial statements, as is reflected in the draft template, or whether use of consolidated financial statement data instead should be required or permitted.

We believe that the template should provide companies with flexibility regarding the data sources to be used. Most of the information required on the template is not maintained by companies in this form for any other purpose. Therefore, there is no single “perfect” data source that could be mandated.

The data source that will be most readily available to a company will be dependent on a variety of factors. These factors include its industry, the applicable accounting standards, and how its financial reporting systems and processes have developed over time.

The Discussion Draft recognizes the need for flexibility in terms of the currency and accounting standards used in the information reported on the template. Companies may use functional currencies and applicable accounting standards which differ from country to country. Alternatively companies may choose to report in a consistent currency and accounting standard.

The template similarly should allow flexibility as to the financial reporting documents that are used to source the data. For some companies, local statutory accounts will be the most readily available data source. For other companies, the reporting packages used in producing the consolidated financial statements may be the most readily available data source. There is no reason for the template to favor one source over another.
In providing flexibility regarding data sources, the template could require that companies identify the data source used and use that source consistently. It should be noted that this would represent less flexibility than is provided with respect to currency and accounting standards, where differences within a group of companies is permitted.

With respect to the measure of income taxes, we believe that further flexibility should be provided. The draft template requires reporting of income taxes paid on a cash basis during the year. We recommend that reporting of income taxes based on the current tax provision be allowed as an alternative.

Cash taxes paid during the year will not align with the annual earnings measure reported on the template, as such taxes will include amounts for the prior year paid after year end and may well also include adjustments in taxes for other years. Moreover, companies may not collect information on cash taxes paid in this manner for any other purpose. The current tax provision is included in a company’s financial statements so it is an amount that will be readily available. Such amount would better align with an annual income measure than would taxes paid on a cash basis (although the current tax provision also may include adjustments in taxes for other years). The template should provide flexibility to report information on taxes that reflects cash taxes paid during the year or that reflects the current tax provision for the year. Here too the template could require that companies identify the approach used and use that approach consistently.

IV. Template Scope Should Align with High-Level Risk Assessment Purpose

The Discussion Draft requests comments on several of the data elements included in the template.

We believe that the scope of the template, with seventeen separate data elements required, is overly broad. The breadth of the template means increased burdens on companies in compiling and reporting such information. Some of the data elements required would seem to provide little additional information to tax authorities and indeed could involve increased costs for tax authorities in sorting through such data to determine that it does not represent useful additional information.

In considering the balance of burdens and benefits in the scope of the country-by-country reporting template, it is important not to lose sight of the purpose of the template, which is intended only to be used for a first-step high-level risk assessment. In this regard, the two-tier transfer pricing documentation approach provides much more granular and detailed information. Therefore, the template should be kept as streamlined as possible and it should not duplicate information that is meaningful only in the greater detail provided in the master file transfer pricing documentation.
The importance of keeping the template limited in scope and high-level in content is particularly acute in the case of industries like ours that have fairly extensive operations structured in branch form. The template requires that most branches be treated as if they were separate entities. However, many of the data elements required on the draft template are not maintained at the branch level in the same way. Therefore, either companies would not be able to provide that information for their branches or they would have to come up with some special allocation to the branch for purposes of the template. Eliminating some of the data elements from the template would reduce the need for companies to resort to one or the other of these unpalatable options.

We recommend that the following columns be eliminated from the template as such information would not meaningfully contribute to the high-level risk assessment and could in fact result in misimpressions or misunderstanding regarding companies’ profiles:

- Stated capital and accumulated earnings – it is not clear how this information would be relevant to a high-level risk assessment.

- Total employee expense – this information would be difficult to collect in this form, could be extremely sensitive, and would be duplicative of more detailed information included in the master file.

- Tangible assets – it is not clear how the book value of tangible assets excluding cash, cash equivalents, intangibles, and financial assets would be relevant to a high-level risk assessment and indeed such information with respect to a financial services company would present a highly misleading picture of the company’s assets.

- Intercompany royalties, interest, and service fees – this information would be duplicative of the more detailed information included in the master file.

V. Closing

We appreciate the opportunity to provide these comments on key issues with respect to the draft template for country-by-country reporting. We understand that the OECD is planning discussions on March 25, 2014. As we plan to be in Paris at this time, we would be happy to participate in any dialogue the OECD is planning and provide further information and commentary as the OECD continues its work on the template.

Sincerely,

Peter van Dijk
Senior Vice President, Tax
TD Bank
Centre for Tax Policy and Administration  
Organisation for Economic Co-Operation and Development  
Paris, France

Via Email: TransferPricing@oecd.org

RE: Comments of Tax Executives Institute Regarding the OECD’s Discussion Draft on Transfer Pricing Documentation and CbC Reporting

To Whom It May Concern:

On 19 July 2013, the OECD published an Action Plan on Base Erosion and Profit Shifting (the Action Plan or the Plan) setting forth 15 actions the OECD will undertake to address a series of issues that contribute to the perception that individual countries’ tax bases are being eroded or profits shifted improperly. Pursuant to Action 13 of the Plan, “Re-examine transfer pricing documentation,” on 30 January 2014, the OECD issued a Discussion Draft on Transfer Pricing Documentation and CbC Reporting (Discussion Draft or Draft). The Discussion Draft sets forth a proposal to revise Chapter V – Documentation of the OECD Transfer Pricing Guidelines (Guidelines). The proposed revision includes a model template for country-by-country (CbC) reporting of certain information the OECD deems relevant to an analysis of transfer prices.

On behalf of TEI, I am pleased to submit this letter outlining the Institute’s core points on the Discussion Draft, as well as an Annex with detailed comments from TEI members on the Draft, including responses to the OECD’s specific requests for comments.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organisation has 55 chapters in Europe, North America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws, at
Core TEI Points Regarding the Discussion Draft

TEI welcomes the opportunity to comment on the extremely important subject matter of the Discussion Draft, especially the newly created CbC reporting template. These topics, more than any others, constitute the portion of the OECD’s Base Erosion and Profit Shifting (BEPS) project that touches the daily lives and operations of TEI’s members and their employers. We recognise that the OECD has been tasked to provide guidance and recommendations on a wide variety of issues under Action 13 within a very short timeframe and generally outside of its normal stakeholder consultation process. Immediately below we set forth our core points regarding the Discussion Draft and closely related issues. Following our core points, the Annex provides detailed comments on the Discussion Draft, including the Institute’s responses to the OECD’s specific requests for comments.

1. It is regrettable that the OECD is rushing to finalise the CbC reporting template on the shortest possible deadline in the Action Plan – September 2014 – giving stakeholders a mere 25 days to comment on the template (and the Discussion Draft generally). Indeed, the Draft itself notes that “it reflects limited consideration of the issues in the short time since the publication of the Action Plan . . . .”1 Because the template, and transfer pricing documentation generally, is about gathering information, a better approach would be to first complete the other Action Plan items. Then the OECD could determine, based on the output of those other items, what information is necessary to implement them and devise the documentation and CbC reporting standards at the end of the BEPS project. Instead, the OECD has done the reverse. By proceeding in this manner, the OECD introduces the significant possibility that the CbC reporting template will become obsolete after the OECD completes the other BEPS action items and countries begin to implement the OECD’s recommended changes to the international tax system. At that point, after expending a substantial amount of resources to make the necessary systems, operational, and other changes to gather the information necessary to populate the original CbC reporting template, MNEs will be faced with making a second round (or more) of systems and other changes as the international tax rules evolve in response to the BEPS project.

For these reasons and others, the CbC reporting template is a critical issue for business. TEI strongly recommends the OECD sever the template from the Discussion Draft and delay the deadline for a final template to December 2015. This would allow both the OECD and stakeholders to give the template full consideration in a more realistic timeframe.

2. The Discussion Draft reflects the OECD’s regrettable recent trend of minimising the importance of contracts between related parties for transfer pricing purposes and thus continues to undermine the arm’s length principle. Parties doing business at arm’s length

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1 Discussion Draft, p.1.
operate by adherence to contract, but it appears that the OECD views this as insufficient for associated enterprises in many cases. Thus, the OECD continues to move toward giving tax authorities’ the OECD’s blessing to recharacterise many legitimate commercial transactions and developing mechanisms that may be used for formulary apportionment purposes, such as the CbC reporting template.

3. The Discussion Draft imposes additional layers of complex and multi-jurisdictional transfer pricing documentation guidelines on top of the already costly and time consuming guidelines currently in place. This added complexity will only increase once countries integrate the final revisions to Chapter V into domestic law. The country-specific information proposed to be shared across jurisdictions is particularly problematic. It has been the experience of TEI’s members that once tax authorities receive such information, particularly in regard to in-country profitability, they tend to focus on it to the exclusion of all else, such as obvious cross-jurisdictional market differences. Taxpayers are thus reluctant to turn over such information. All told, the information required by the Discussion Draft will result in increased compliance costs and tax controversy, with little additional revenue for governments. TEI recommends that instead the OECD adopt a “less is more” approach, limiting transfer pricing documentation requirements to information that is useful for risk assessment purposes, putting the emphasis on substance rather than form to ensure compliance. Local authorities could then request more detailed and exhaustive information (if necessary) on audit.

4. Much of the information to be disclosed under the Discussion Draft likely runs afoul of privacy and other information protection legislation in many countries and the European Union (e.g., the EU Data Protection Directive). This is particularly true of the CbC reporting template. Companies will therefore refuse to provide protected information and courts will refuse to enforce the requested disclosure unless there is an accompanying change in local law. There is little indication that the OECD recognises this as an obstacle to its revisions to Chapter V, particularly the approach of mandating certain documentation and information. The OECD should therefore revise the Discussion Draft with these legal concerns in mind.

5. The Discussion Draft lacks the flexibility provided in current Chapter V by mandating certain information and documentation formats. Flexibility is critical for multinational enterprises (MNEs) to collect and present transfer pricing documentation in a manner that best fits the MNE’s reporting systems at a reasonable cost, and best meets tax authorities’ requirements for relevant information. Thus, in TEI’s view, standardised forms or guidelines are too rigid an approach to transfer pricing documentation, given the vast diversity in MNE operations and organisational structures. A more flexible approach is crucial.

6. The Discussion Draft states in paragraph 12 that countries should keep “documentation requirements reasonable and focused on material transactions in order to ensure mindful compliance on the most important matters.” Unfortunately, the Draft does not provide detail on what constitutes a “material” transaction nor on what are the “most
important” matters, although it does request input from stakeholders on those items. In combination with the detail required by the Draft discussed above, this is likely to lead to mindless (and costly) compliance by MNEs and other businesses, and provides the opportunity for disputes between tax authorities and MNEs about the completeness of the documentation and compliance with local law. In TEI’s view it is crucial that the OECD set clear transactional materiality thresholds to reduce the compliance burden on all businesses and ensure that tax administrations are not buried under a mass of irrelevant information. In addition, the OECD should establish a threshold to exclude small and medium sized enterprises (SMEs) from the Discussion Draft’s most onerous requirements.

7. It is difficult to overstate the confidentiality concerns of TEI’s members with respect to the highly sensitive information their employers are required to report under the Discussion Draft. For example, the Draft proposes sharing the master file with each country in which an MNE has an affiliate subject to tax. Given the wide variance in the ability and willingness of tax authorities to keep confidential information secret, the master file will inevitably make its way into the hands of an MNE’s competitors. Such sharing is an unnecessary risk as most of the information in the master file will be irrelevant to a country conducting an audit of a local affiliate. Thus, TEI strongly recommends that the master file be prepared and filed in the parent company’s jurisdiction and only shared under treaty information exchange provisions where the providing jurisdiction can ensure that the requesting jurisdiction has the necessary confidentiality safeguards in place and only relevant information is disclosed. Further, because of the disclosure risk, TEI recommends that MNEs be authorised to produce “high-level” descriptions of proprietary features of their operations.

8. The time and expense necessary to prepare the documentation required by the Discussion Draft is considerable. In recognition of this, and to give taxpayers an additional incentive to produce proper documentation in a timely fashion, we recommend that if taxpayers produce timely and complete transfer pricing documentation that satisfies the final requirements of Chapter V, then (i) the burden of proof should shift to tax authorities for any proposed adjustments to transactions covered by the documentation, and (ii) taxpayers should receive automatic protection from penalties if an adjustment is sustained.

9. The CbC reporting template requires both too much and too little information. TEI opposes the development of a CbC reporting template as part of a transfer pricing documentation standard due to its inherent complexity and notably because certain tax authorities will undoubtedly use it to improperly apply a formulary apportionment approach. Given that the OECD is under a mandate to develop a CbC reporting template, TEI recommends that the OECD limit the information required to three to five key metrics (in addition to severing the template from the master file as recommended above). The present level of detail gives the impression that the information could well be used for proposing adjustments based on formulary apportionment as a substitute for a detailed audit of individual transactions that applies the arm’s length principle. In this respect, the template requires “too
little” information. At the same time, the Discussion Draft states that the template may be useful for risk assessment purposes, a goal that TEI can support. However, to provide an indication of an MNE’s risk profile, only a few key metrics are necessary. Thus, in this sense, the template requires “too much information.” The template should be revised accordingly.

10. The CbC reporting template also presents potentially intractable comparison issues across entities, jurisdictions, and time periods. These include different financial accounting methods (U.S. GAAP, IFRS, and special industry rules), tax reporting and accounting differences (cash versus accrual), differing tax timing issues (e.g., depreciation methods, allowable versus capitalised deductions, elections, etc.), net taxable profits versus net book profits, etc. Other local law differences will impair the comparability of information, group relief versus consolidation, R&D credits (refundable or not), patent box regimes, book and tax year end differences, currency differences, statute of limitations issues, different rules on place of business (managed and controlled versus place of incorporation), etc. The list of comparability difficulties is practically endless. Even seemingly manageable and comparable information such as “Total Employee Expense,” raises difficult issues. These issues would be minimised, but not eliminated, if the OECD were to adopt our recommendation above and limit the template to a few key metrics. As devised, taxpayers will expend a substantial amount of effort explaining variances in the template that are due to differing tax rules, standards, methods, and deadlines, rather than economics.

11. To promote transparency and efficiency, tax authorities should be required to share and discuss their transfer pricing risk assessment with the affected taxpayer. This should occur before the risk assessment is final to give taxpayers the opportunity to correct misconceptions and miscommunications, which should save tax authorities and taxpayers substantial time and effort on audit.

12. The Discussion Draft should include a definition(s) of a “line of business.” Possible definitions include: (i) a business unit as defined for financial reporting purposes (broadest definition); (ii) a unit under common management (a broad definition, but not as broad as for financial reporting purposes); and (iii) a unit working as a separate, integrated business (a flexible definition). Depending on an MNE’s organisational structure, providing the required information under one definition rather than another definition may be much more practical and cost effective, and the information would be more relevant to tax authorities. TEI therefore recommends that the OECD define line of business in the alternative and permit a taxpayer to select the definition that best fits its organisation for purposes of preparing the master file, as long as the taxpayer does so on a consistent basis.

13. Annex II to the Discussion Draft sets forth the information and documentation to be included in the local file. It is unclear why the OECD does not include all elements of a comparability analysis in this proposed file. For example, the contractual terms, economic circumstances, and specific business strategy are not listed, which is methodologically
inconsistent with the Guidelines. This regrettably tends to confirm that the OECD is giving more weight to the functional analysis/people functions approach along the lines of the approach set forth in new Chapter VI, and less to a full comparability analysis. TEI requests that the OECD explain why certain elements of a full comparability analysis have been omitted from Annex II.

14. The Discussion Draft does not address when the new documentation and reporting requirements of the master and local files, including the CbC reporting template, should take effect. Further, the Draft lacks critical transition rules as taxpayers move from one standard to another. The OECD should clearly delineate a timeline for implementation of a revised Chapter V and should give taxpayers ample time to make the necessary changes (e.g., to systems, reporting standards, operations, etc.) to comply. For example, implementation should only commence after all, or a certain number, of the Member States and G20 have agreed to the revised documentation and reporting standards. Even in such a case, taxpayers should be given one to two years to come into full compliance before authorities may apply penalties.

As noted, the attached Annex sets forth TEI’s responses to the OECD’s specific requests for comments, along with our additional comments on the Discussion Draft.

TEI appreciates the opportunity to comment on the OECD’s Discussion Draft on Transfer Pricing Documentation and CbC Reporting. If the OECD believes our participation in the announced public consultation in May 2014 is warranted, we would be pleased to do so.2 These comments were prepared under the aegis of TEI’s European Direct Tax Committee, whose Chair is Nick Hasenoehrl. If you have any questions about the submission, please contact Mr. Hasenoehrl at +352 26 20 77 46, nickha@herbalife.com, or Benjamin R. Shreck of the Institute’s legal staff, at +1 202 638 5601, bshreck@tei.org.

Sincerely yours,

TAX EXECUTIVES INSTITUTE, INC.

Terilea J. Wielenga
International President

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ANNEX to TEI’s Comments on the OECD’s Discussion Draft on Transfer Pricing Documentation and CbC Reporting

This Annex sets forth TEI’s additional comments and recommendations on the Discussion Draft, including: (i) responses to the OECD’s specific requests for comment; (ii) comments on Annexes I-III of the Draft regarding the master file, local file, and CbC reporting template; and (iii) additional overall comments on the Draft and its text.

I. TEI Responses to Requests for Comments from the OECD

A. Discussion Draft 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.

The OECD should not include additional standard forms and questionnaires in its work on BEPS Action 13. TEI might support a common, standardised OECD framework for transfer pricing documentation, but only if that framework were consistently enacted and applied across jurisdictions. Such an approach would eliminate local documentation differences and significantly reduce the compliance burden on taxpayers. Correctly applied, the master/local file approach has the potential to comprise a common framework, which could facilitate the presentation of standardised information for tax authorities and assist with the authorities’ risk assessments.

However, it seems clear that the tiered, master/local file framework will increase the compliance burden for many MNE’s, while reducing the relevance and usefulness of their transfer pricing documentation to tax authorities. The compliance burden will only increase as it is unlikely that the necessary legislative changes to achieve consistency across the Member States and other participants in the BEPS project will be achieved in practice. Indeed, the Draft itself states that it “does not necessarily reflect consensus views of either” the Committee on Fiscal Affairs (CFA) or of Working Party Number 6.

In addition, while the idea of “standard” or quantitative disclosures may be appealing in theory, the diversity of MNE organisation and global operations will make standard form development and understanding difficult for taxpayers and tax authorities alike. For example, a bank will have a completely different profile than a large, integrated consumer products company, which will in turn differ from an industrial conglomerate. Further, additional standardised forms or templates raise the significant risk that they will be used by tax authorities in place of a thorough audit, or misused by taxpayers who might withhold important information because a specific question has not been asked. Standardised forms also

3 Discussion Draft, p.1.
raise difficult questions with respect to differing accounting methods, year ends, timing of tax deductions, other domestic tax statutes, currencies, etc., that affect the relevance and comparability of the information provided, which then necessitates substantial additional explanations to provide context.

Overall, while the inclusion of more focused and standardised information within the master file and local file should be encouraged, TEI submits that transfer pricing documentation requirements should remain principled-based rather than formalistic.

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

TEI is very concerned that a request regarding when it “might” be appropriate for tax authorities to share their risk assessment demonstrates a belief among tax authorities that sharing the assessment should be the exception rather than the rule. On the contrary, TEI would recommend that tax authorities be required to share their risk assessments with taxpayers except in rare and unusual circumstances. A “best practice” would be to share the risk assessment before it is finalised to give taxpayers an opportunity to correct misperceptions or miscommunications. This is essential to avoid wasted time and effort by both tax authorities and taxpayers, especially on audit. Taxpayers should also have an opportunity to challenge an adverse risk assessment to indicate why it may be incorrect and document their view.

An additional “best practice” would be to make the risk assessment criteria publicly available in advance. Taxpayers could then assess whether they may be rated as “high risk” and, if so, they could more properly prepare for the inevitable examination in advance. It would also permit taxpayers to improve and properly target their front-end, transfer pricing documentation compliance practices and avoid audits and controversy. Open publication of risk assessment criteria also would help address the need for consistent risk assessments across jurisdictions. This, in turn, would mitigate taxpayer compliance costs and help prevent tax authorities from taking inconsistent views of risk with respect different sides of the same transaction.

In sum, eliminating information asymmetry between tax authorities and taxpayers is a key element for successfully addressing base erosion and profit shifting. The OECD and the CFA have been working on “Cooperative Compliance,” which improves mutual trust between tax authorities and business. The concept enables both parties to reduce uncertainties over a company’s tax position more efficiently and effectively. Sharing tax risk assessments with business should be a standard part of Cooperative Compliance and would demonstrate to taxpayers that transparency is a “two-way street.”
B. Discussion Draft Section 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.

Tax authorities should use existing information-exchange mechanisms to obtain information in the possession of associated enterprises located outside their jurisdictions. In general, questions related to group-wide issues should be directed by local tax authorities to the tax authority of the country of the MNE’s parent company through the official exchange of information protocol. The tax authority of the parent company could then liaise with an appropriately high-level employee of the parent to obtain and disclose the relevant information (such as the MNE’s overall tax director or CFO). TEI agrees that tax authorities should have access to relevant information to conduct a transfer pricing risk assessment and audit. In many cases, however, local taxpayers will not (and, notably for the protection of certain trade secrets and arm’s length negotiation between business units of the same MNE, should not) have direct access to certain information requested by tax authorities. While taxpayers should make reasonable efforts to provide relevant documentation, there should be no change to the principle that an entity cannot be required to provide information or documents to which it has no access.

Practical difficulties also arise when requesting extra-jurisdictional information from associated enterprises, including timing issues. Should the information be produced at the time of the transaction (or shortly thereafter) or by the time the return is filed, or some other deadline? Further complicating these questions is that year ends differ amongst countries and entities, as do filing deadlines. Thus, a single transaction may have two (or more) differing deadlines depending upon the countries involved. The rules for producing such information should account for these difficulties.

Finally, cross-jurisdictional information requests require consideration of laws outside the transfer pricing and tax areas. Privacy laws are a major obstacle to disclosure of information from a parent company to an associated enterprise located in a separate jurisdiction. In many cases, individuals that disclose information in contravention of privacy laws expose themselves to criminal penalties, and thus will not disclose the information no matter the severity of the penalties imposed on the local affiliated enterprise for non-compliance with local transfer pricing documentation rules. These prohibitions on cross-border information disclosure need to be considered when developing rules for extra-jurisdictional information requests.

For example, the Intergovernmental Agreements that have accompanied the U.S. government’s implementation of its Foreign Account Tax Compliance Act (FATCA) regime were necessary because of the strict privacy laws in place in many jurisdictions that are generally not tax related.
### C. Discussion Draft Section 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.

Taxpayers should be given the option of preparing the master file on a line of business or entity wide basis. This would be in line with the ability of taxpayers to select the most appropriate transfer pricing method and documentation methodology, depending on the facts and circumstances of the transaction, under revised Chapters I–III of the Guidelines.

It is inappropriate for the OECD to mandate a business line or entity or transactional approach, given the multitude of ways in which MNEs organise their global operations. For example, MNEs often operate across both different industries and business lines. In those cases, the preparation of global information on a group-wide basis will be extremely difficult and would likely result in a master file document that is too voluminous and complex for taxpayers to prepare and tax authorities to effectively process and review. Even preparation of this information on a business line basis will be a difficult process for these MNEs. For MNEs that choose to prepare the master file on a line of business basis, the individual business line master file should only be available to jurisdictions in which that line conducts business.

A difficulty here is that the Discussion Draft does not define a “line of business.” As noted above, TEI recommends that the OECD define “line of business” in the alternative and permit taxpayers to select the definition that best fits their organisation for purposes of preparing the master file, as long as the taxpayer does so on a consistent basis. The Draft also states that certain information is only necessary for “major” business lines. Clear guidance on what constitutes a major business line is essential.

TEI also urges, for the reasons detailed below, that the OECD separate the CbC reporting template from the master file. To highlight just one difficulty of including the

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5 Take, for example, a company that prepares transfer pricing documentation on a transactional basis. Even if the OECD followed TEI’s recommendations with respect to business line preparation of the master file, preparing such documentation would in many cases triple the size of such a company’s transfer pricing reports because: (i) the transaction in question will have to be included in two reports (master and local file); (ii) global transactions, such as management fees and cash pooling arrangements, will be included in multiple reports instead of being enshrined in one; and (iii) the business unit information will appear in reports where the business unit has no intercompany transactions with the local entity being scrutinised. In other words, as applied to such a company, the master file concept is a confusing and misleading exercise that will severely delay the production of documentation until all reports are ready for the entire MNE, which may expose the local entity to significant penalties.
template with the master file, paragraph 28 of the Discussion Draft states that “best practice would extend the date for completion of the [CbC reporting] template to one year following the last day of the fiscal year of the ultimate parent entity of the MNE group.” And yet paragraph 27 states that “best practice is to require that both the master file and local file be prepared no later than the due date for the filing of the tax return for the fiscal year in question.” These dates are incompatible.

Finally, tax authorities currently have access to detailed information (e.g., a company’s annual report and corporate income tax return) to ensure that all of an MNE’s income and activities taking place within their jurisdiction are known and reported. Indeed, much of the information requested in the master file is already reported in the publicly available financial statements of publicly traded companies. TEI submits that in certain cases, these public filings could take the place of the master file or a substantial portion of the master file, saving taxpayers substantial time and effort.

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?

TEI urges the OECD to completely separate the CbC reporting template from the master file. Once separated, the template should be used solely for risk assessment purposes and not for proposing transfer pricing adjustments.\(^6\) The Discussion Draft notes that the purposes of the transfer pricing documentation requirements in Chapter V are risk assessment, taxpayer awareness and compliance, and audit. The CbC reporting template is not relevant to the latter two purposes. Some tax authorities, however, will find it difficult to resist using the information in the template to propose formulary apportionment-type transfer pricing adjustments, without going through an appropriately thorough, transactionally based audit.

TEI notes that the information in the CbC reporting template goes well beyond what is necessary for a high-level risk assessment. Reporting revenues, earnings before tax, cash tax

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\(^6\) Paragraph 21 of the Discussion Draft states that “information [from the CbC report] 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” and that “the information in the country-by-country reporting template would not constitute conclusive evidence that transfer prices are or are not appropriate.” These statements are welcome, but in TEI’s view and, based on the practical experience of its members, will be ignored by many tax authorities if the CbC reporting template is implemented as currently proposed.
paid, employee numbers and a useful and relevant activity code is sufficient for such an assessment.

Another complication with including the CbC reporting template in the master file is that many countries have imported the OECD transfer pricing documentation principles into their laws, and would therefore bring the master file and local file concepts, including the CbC reporting template, into domestic law once the changes are made part of the Guidelines. By proposing the deletion of the text of Chapter V in its entirety and replacing it with the version in the Discussion Draft, the OECD would effect immediate implementation of the template in the countries that have incorporated into their laws the Guidelines by reference. However, the CbC reporting template is not transfer pricing documentation in the traditional sense, but more akin to information reporting. In many cases, information reporting is a different area of the local tax code that does not generally reference guidance from the OECD. Thus, a wholesale change to Chapter V that included an information reporting component would come without harmonisation with the existing, in-country reporting requirements and likely without the proper technical or human resources to ensure adequate use of the template as a transfer pricing risk assessment tool. This could be avoided by introducing the CbC reporting template as a separate document, which would allow harmonisation upon the adoption of this tool through legislation in countries that currently require reporting in different forms.

In addition, as noted above, it is unlikely that the CbC reporting template can be completed to meet the transfer pricing reporting deadlines in many countries (e.g., by the time the tax return is filed). Including the template would thus delay the completion of the master file, potentially subjecting taxpayers to significant penalties for failing to meet documentation deadlines or providing incomplete documentation.

Further, the OECD notes that the CbC reporting template may be used for purposes other than transfer pricing administration, including general tax administration and addressing other BEPS action items. Including it in Chapter V would therefore be inconsistent with a future expansion of its role. The template also lends itself to digitalised reporting, which may facilitate the review of its voluminous data by tax authorities. This would not be possible if the template is part of the master file.

Finally, the OECD should exempt MNEs from preparing a CbC reporting template if the MNE is subject to a separate CbC reporting requirement, such as in the case of extractive industries pursuant to the 2010 “Dodd-Frank” financial reform legislation in the United States, or under the European Union Capital Requirements Directive. In that case, tax authorities could refer to the report prepared under the other requirement. Another way to limit the number of MNEs required to complete the template would be by excusing MNEs whose

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7 Discussion Draft, p.1.
worldwide effective tax rate is above a certain threshold (e.g., above 20% or an MNE with a worldwide effective tax rate that is not more than 25% lower than the OECD’s average).

- 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 OECD should permit taxpayers the flexibility to compile the information in the CbC reporting template through either a “top-down” or “bottom-up” approach. As a threshold matter, it should be remembered that the template’s purpose is not to provide a comparison across MNEs, but within the individual MNE’s operations. Therefore, so long as the template is completed using consistent principles by each MNE, the data should allow tax authorities to see directional information to undertake a high-level risk assessment.

International business includes a broad range of MNEs, which are organised differently and use different systems to report financial information, both internally and externally. The CbC reporting template should be designed to permit an MNE to populate the template with minimal additional cost and, where possible, based on information it already reports, or at least collects in some form. For example, it is unlikely that most entities currently report to their parent company earnings before income tax by country based on the country’s corporate income tax law. Instead, they likely report book income and book tax expense. For an MNE with hundreds or thousands of legal entities, the compilation of such information in the CbC reporting template would be nearly impossible. The requirement to prepare or analyse new data should be kept to a minimum.

Systems changes to provide the requested information will require significant investment in both time and expense. For some organisations, the necessary systems changes will be minimised by adopting a top-down approach; for others, it will be a bottom-up approach. Any cost and burden associated with the preparation of the CbC reporting template should be commensurate with its purpose as a high-level risk assessment tool, and significant systems updates should not be required. Mandating only one approach would unnecessarily impose substantial compliance costs on a significant portion of the business community.

Both approaches present difficulties, however, which makes permitting taxpayers the flexibility to choose either approach crucial. A top-down approach would require methods to allocate an MNE’s consolidated income across countries in which the MNE has a taxable presence (which itself may change as a result of the OECD’s work on Action 7, “Prevent the artificial avoidance of PE status”). It also presents difficulties where the MNE is operating at a loss in one country and a profit in another – is the former country nevertheless entitled to tax a share of the MNE’s consolidated income?
Under a bottom-up approach, on the other hand, consolidation may neither be feasible nor meaningful, depending on the circumstances, as: (i) separate reporting guidelines, such as revenue recognition, are used by separate entities even in the same country, depending on the business model, and (ii) statutory accounts are prepared under very different rules (e.g. revenue recognition is often based on percentage of completion rather than delivery, certain taxes are sometimes above the line in statutory accounts and below the line in IFRS/U.S. GAAP, etc.). These differences compromise the comparability of the data.

- 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?

TEI again recommends that the OECD give taxpayers the choice of consistently preparing the CbC reporting template on either an entity or country basis. Some MNEs may have hundreds or thousands of entities and reporting each one on the template would run to hundreds of pages. For those groups, some level of country consolidation may be required to ensure that the data is manageable and the information collected is useful for high level risk assessment purposes. For smaller groups, preparing the information on an entity basis may be more practical.

Mandating separate individual country consolidations and the accompanying necessary adjustments would impose a substantial administrative burden on a significant number of taxpayers. Part of the difficulty is the inability to leverage information the MNE compiles for accounting and financial reporting purposes. Instead, an MNE’s in-house tax department must gather and compile a substantial amount of such information from scratch, or hire outside advisors and consultants to do so. Unfortunately, automating the production of this information would require reporting systems reprogramming that could span many years. The OECD should recognise that MNEs do not have unlimited resources to devote to tax reporting; they are just as subject to budgetary constraints and resource allocation issues as tax authorities.

Country-level consolidations could be prepared in a number of ways, for example, by simply aggregating entity level data (e.g., from statutory accounts) or by using country consolidations prepared for other purposes. If the former approach is used, it should be accepted that differences in accounting methods or the presence of some double double counting will
result in irreconcilable differences. Nevertheless, this data should be useful for high-level risk assessment purposes and guidance could be developed for any such double-counting that may render the data unusable (e.g., due to holding company structures).

A separate challenge with a country-level consolidation for taxpayers with multiple entities in a single jurisdiction arises when those entities conduct unrelated businesses. Combining such entities would inappropriately reflect net country returns by blending differing business risks and functions. Similar issues (and others) arise in acquisitions and dispositions. It is also unclear, for example, how revenue eliminations across entities apply to cost centers. Further, revenue elimination might cause a fully-fledged manufacturing site with only intercompany sales to appear solely as a cost center, which we believe cannot be the aim of this exercise.

A separate misleading aspect of the CbC reporting template is the column for income tax paid (on a cash basis) “To All Other Countries.” There is no information requested about the amounts and countries to which these taxes are paid. Thus, there is no way for a particular country tax authority to know the total amount of taxes it receives from a particular MNE based upon the CbC reporting template because of the taxes paid by the MNE’s Constituent Entities organised outside that country.

Finally, the format currently proposed by the OECD would produce sales made from that country, and not sales made in that country. The OECD may wish to clarify what its objective is in this regard.

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

TEI strongly recommends that the OECD give taxpayers the flexibility to decide whether to report corporate income tax paid on a cash or accrued basis based on information that is readily available to the taxpayer, provided that the taxpayer reports the information consistently from year to year.

We also note that significant timing and comparison challenges arise with respect to tax payments across various countries. For example, some countries have an estimated tax system based solely on prior year results; others have minimum taxes that must be paid. In addition, in most countries, final tax payments are not normally made in the tax year to which they relate, but in the following year. Similarly, taxes paid as result of audits and litigation complicate matters as they always relate to prior years, sometimes in the distant past (e.g., ten years ago or more). If a company settles a large adjustment and pays the tax four years later, then on a cash basis tax is understated in the year it is due and overstated in the year of payment. The reverse is true for refunds.
More broadly, yet another shortcoming of the CbC reporting template is that taxes paid will reflect the effect of preferential regimes and rates promoted by many Member States, such as those associated with a patent box, R&D credits, bonus depreciation, etc. Thus, the amount of tax paid (on a cash or accrued basis) for companies that take advantage of these benefits and the resulting lower effective tax rate will flow from specifically enacted tax policy choices, and not the result of base erosion or profit shifting. Nevertheless, companies in this situation will attract undue attention from tax authorities who may consider a taxpayer high risk solely because of a low tax payment, when in fact the taxpayer has behaved in accordance with the country’s tax policy.

| 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? |
| Reporting aggregate withholding tax payments is not generally currently required, so this requirement would be an additional burden on businesses. TEI recommends that MNEs be given the option of reporting such taxes as in certain cases it may give a more accurate picture of total taxes paid. |

If the OECD requires such reporting, it will be necessary to clarify exactly which payments should be disclosed. Large groups often collect hundreds of thousands of pieces of withholding tax payment data across a significant number of categories. Sorting through this data without a clear understanding of what must be reported will be an impossible task. Further, income tax paid often includes withholding taxes paid. If withholding tax is to be reported, the OECD should clarify what is to be included in income tax paid to avoid confusion and double reporting.

The OECD should also clarify how to report withholding taxes that are credited against income taxes. These may be material amounts (e.g., withholding on royalties, dividends, etc.) or very immaterial (e.g., interest on bank accounts).

| 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? |

This information should already be documented in the master and local files under Annex I and II. BEPS Action 13 calls for a template that sets out “the global allocation of the income, economic activity and taxes paid.” It is not clear how the inclusion of cross-border payments between associated enterprises will significantly contribute to achieving this aim, especially if similar information is provided to tax authorities in the master and local files. Requiring this information also increases the administrative burden of preparing the CbC reporting template; the level of detail proposed by the local file should be considered sufficient. As noted above, reporting revenues, earnings before tax, cash tax paid, employee numbers and
a relevant activity code (or codes) should provide tax authorities with sufficient information to conduct a high-level risk assessment, which is the proper purpose of the template. For these reasons, information regarding cross-border payments between associated enterprises should not be included in the CbC reporting template.

If the OECD decides to include this information in the CbC reporting template, then a materiality threshold should be applied to avoid overwhelming taxpayers with the administrative burden of collecting and reporting the information and the tax authorities who must process and review it. Many companies will not have the necessary systems in place to capture the payments at the level of detail required in the proposed template. In addition, we note that U.S.-based MNEs report a portion of this information on Schedule M of U.S. Internal Revenue Service Form 5471. The OECD should permit those MNEs to use the information reported on Form 5471 to populate the relevant sections of the CbC reporting template.

• 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 type of information should already be included in the master and/or local file, and much of it is also available in the financial statements of publicly traded companies. It is therefore unclear what purpose is served by repeating the information in the CbC reporting template.

Activity codes may prove useful to tax authorities in certain circumstances, but it should be recognised that their use may often be limited when conducting a high level risk assessment depending on the organisation of an MNE and the other information used on conjunction with the codes. Many entities conduct a range of different activities, so the activity code or codes may not be useful in the risk assessment process if the purpose is to determine whether the other information in the CbC reporting template is comparable to the typical “profile” of a business engaged in those activities.

D. Discussion Draft Section 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 incorporating a reasonable level of materiality is critical to avoid creating an excessive burden on taxpayers and allowing tax authorities to focus on higher risk transactions. Excess documentation burdens for transfer pricing purposes
discourage international commerce, especially with respect to SMEs with fewer resources. Guidance should take into account materiality from a group’s perspective, but also from the perspectives of the countries in which the group operates. Further, differing levels of materiality are needed for the CbC reporting template, master and local files, and SMEs.

A materiality standard could take many forms. It could focus on the amount of the transaction, either in absolute terms (e.g., a specific monetary threshold) or in relative terms (e.g., as a percentage of turnover, assets, or income generated by a specific activity). A combination of the two could also be used. In addition, the OECD may need to give separate consideration to particular types of income or payments to account for their special nature (e.g., interest, royalties, payments for services, etc.).

A materiality threshold could also be used to exempt SMEs from the transfer pricing documentation burden altogether, or from certain aspects of it. The threshold could be based on the amount of intercompany sales compared to unrelated party sales, the gross revenue of the group, the number of countries the group has a presence in, or some combination of the three (or some other measure).

More broadly, numerous questions will need to be addressed when developing a materiality standard. How should an MNE determine or define company size or size of transaction for purposes of materiality? Should it look to the entire multinational, the local subsidiary, or an aggregation of all the subsidiaries in one country? Should it look to the size of the transaction compared to the operations of the entire group, country, or local entity? How should it document and prove that either no comparables exist or that the costs of conducting a study would be prohibitive without incurring costs, at some level, to make this assessment? Essentially, the MNE will need to undertake some type of review and documentation to show that transfer pricing documentation is not worth the effort. Regrettably, the analysis becomes more difficult, and the outcome will not be clear, when tax authorities have differing views on what is “cost prohibitive.”

Another materiality threshold could be implemented for large MNEs, which could be allowed to exclude all countries from the CbC reporting template or master file reporting where (a) intercompany revenues in that country are less than the lesser of (i) $10 million, or (ii) 10% of the enterprises’ total consolidated revenue; or (b) the country is not an OECD or G20 member and has not agreed to use the common OECD framework.

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8 For example, extensive documentation and reporting requirements may thwart highly innovative, new, immediately global businesses, which are possible today because of technology and lower barriers to accessing global markets. A substantial, tax-based transfer pricing documentation burden that prices these enterprises out of the international market does not promote economic cooperation and development.
E. Discussion Draft Section 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?

TEI welcomes the statement in paragraph 34 that database searches for comparables supporting the local file only need to be conducted every three years. Of course, taxpayers should have the option to update its comparables search more often if there are material changes to its business or market conditions.

To significantly ease the compliance and documentation burden on taxpayers, one approach would be to have MNEs prepare the master file and local file in their entirety every three years rather than annually, so long as there is no material change in operating conditions and the MNE has not been required to make material transfer pricing adjustments in the latest audit cycle (i.e., not required to pay the transfer pricing adjustment penalty). Where there is a change in only a segment of the business (e.g., where there had been an acquisition or new product line introduced) but where all other businesses remain materially unchanged, then the MNE should only be required to prepare supplemental information regarding that business segment.

While paragraph 34 recommends a once in three years update cycle, paragraph 23 seems to suggest that a comparables analysis is required every year for each transaction in a local file. A requirement for an annual analysis of all transactions would be incredibly burdensome and nearly impossible to comply with on a timely basis. Indeed, paragraph 26 notes specifically that taxpayers should not be asked to search for comparables if such work would create an undue burden where the “cost of locating the comparable data would be disproportionately high relative to the amounts at issues . . . .”9 TEI submits that this principle of proportionality should apply across all master file and local file requirements.

TEI also urges that the OECD provide clearer guidance on the permissible use of regional (e.g., pan-European, Asian, Latin American) benchmarks as opposed to local comparables. Reliable information can only be found in a limited number of countries and is almost entirely absent in emerging countries (e.g., generally only in Japan in Asia). While paragraph 42 notes that local comparables are preferred to regional ones when the local comparables are “reasonably available,” views on reasonableness often differ between taxpayers and tax authorities, and between tax authorities themselves. Because of these difficulties and potential differences of opinion, tax authorities should also bear the burden of proof when challenging the geographical scope of the comparables selected by the taxpayer.

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9 Discussion Draft, p.7.
Paragraph 27 states that a timing “best-practice” for preparing the master and local file would be no later than the due date for the filing of the tax return for the fiscal year in question, while recognising that countries have different filing deadlines. Regrettably, what appears to go unrecognised is that if the documentation is due on the tax return filing deadline, the differences in dates (including extensions) around the world would force MNEs to complete the transfer pricing documentation by its earliest tax return filing due date (e.g., March 31 for a calendar year taxpayer). Given that many MNEs only report their consolidated financial statements four to eight weeks after year end, the requirement to have transfer pricing documentation complete by the earliest tax return filing due date would be almost impossible to satisfy. In this regard, TEI recommends that the OECD use this opportunity to further encourage consistency across its Member States with respect to when an analysis should be performed, when it should be documented, and how penalties should be structured. We recommend that the countries adopt a consistent, reasonable time frame, such as one year after the fiscal year end for final documentation (i.e., the master and local files).

Finally, the OECD should strongly recommend that countries who adopt the OECD’s proposed tiered approach in a revised Chapter V reduce or eliminate their existing transfer pricing documentation requirements. Otherwise, the OECD approach is simply an additional burden on taxpayers without any simplification or standardisation benefits.

F. Discussion Draft Section D.6. “Language”

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

TEI strongly supports the OECD recommendation that the master file generally be prepared and submitted to tax authorities in English. TEI also appreciates the statement that sufficient time should be granted for translation of relevant parts of the master file if deemed necessary by local tax authorities.

TEI also recommends that English be the language of the CbC reporting template (if it is separated from the master file) and the local file. Summaries could then be prepared for local tax authorities in their native language in the course of tax examinations, either by the tax administration translation services or by the taxpayer. Translation of transfer pricing documentation is not generally advisable, not only because it is extremely time consuming and comes at a significant cost, but also because practice shows that a translation often does not reflect the nuances of the original documentation. For the same reasons, transfer pricing specialists at tax authorities should want to develop a familiarity with English (and many have already done so) to understand the original documentation properly.\(^{10}\) Translation generates

\(^{10}\) Tax authorities also familiarise themselves with English to have a clear understanding of international regulation, such as, *inter alia*, the OECD Transfer Pricing Guidelines.
unnecessary tax risks due to the complexity of the original analysis. These risks can only be minimised, but not eliminated, by hiring transfer pricing experts to do the translation, which only further increases the cost incurred and time spent.

G. Discussion Draft Section 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.

TEI endorses the statement in the Discussion Draft that “Tax administrations should ensure that there is no public disclosure of trade secrets, scientific secrets, or other confidential information.” This principle should apply to all information received by tax authorities. Measures that could be taken to safeguard confidentiality include:

- Limiting information disclosure within a tax administration to “need to know” personnel only;
- Civil, and even criminal, penalties for tax administrators who improperly disclose taxpayer information (broadly defined);
- Specific secure means for information exchange between taxpayers and tax authorities; and
- Reviewing sensitive information at taxpayer premises, rather than filing it with tax authorities.

For disclosures between tax authorities (sensitive or not), only relevant information concerning the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes concerned should be provided. The tax authority making the disclosure should also be required to notify the affected taxpayer of the disclosure.

Further, information exchanges should only take place between tax authorities whose countries have entered into formal information exchange agreements, either via a treaty, a tax information exchange agreement, or some other bi-lateral or multi-lateral agreement. Regrettably, it appears that the overall information sharing aspect of the Discussion Draft assumes that these formal agreements will be in place to facilitate information exchange, when in fact they are generally absent from many important areas of the world (e.g., the BRICS, Latin America, Asia-Pacific, etc.). The lack of formal agreements results in a concomitant lack of confidentiality mechanisms, which makes taxpayers reluctant to share information in the first place. The Discussion Draft does not address how information would be confidentially shared in these circumstances, other than by requiring a parent company to share the master file with

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11 Discussion Draft, p.9.
its local associated enterprise, which itself creates confidentiality issues and disclosure risks (as noted).

H. Discussion Draft Section 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.

TEI strongly recommends that taxpayers file the CbC reporting template and master file solely with the jurisdiction of the taxpayer’s parent company. That jurisdiction can then share the information under treaty information exchange provisions or similar formal bi-lateral or multi-lateral agreements. Disclosure of the master file and CbC reporting template to local affiliates to turn over to local tax authorities would result in countries receiving information about the taxpayer’s global business operations that is not relevant to the transactions under review. For large groups, a substantial amount of the master file and CbC reporting template information would not be relevant for local risk assessment purposes or for facilitating the tax authorities’ understanding of how local functions and risks fit into the group’s activities. The more circumspect information sharing that takes place through official channels would help ensure that only relevant information is disclosed to the requesting jurisdiction.

Further, in TEI’s view the disclosing tax authority should act as a gatekeeper to ensure that the information requested is relevant and necessary for the requesting tax authority in conducting its tax collection function. Indeed, it should be stated clearly that information requested by tax authorities must be relevant to the risk assessment or audit in question. TEI would welcome clear guidance in a revised Chapter V on that point. This approach would also facilitate maintaining information confidentiality.

Finally, making master file information available only through official exchange of information channels would encourage countries to enter into formal information exchange agreements. This would increase the information available to tax authorities for tax administration purposes other than transfer pricing.
I. **Discussion Draft “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.

TEI recommends that the master file not include a reporting of APAs, other rulings, and MAP cases. Routine disclosure of these items will only lead to unnecessary additional transfer pricing controversy, especially when they have no relevance or direct link to transactions in the local jurisdiction and are therefore irrelevant. In many cases, tax authorities have a regrettable tendency to focus on certain terms and conditions of these documents, such as prices and markup percentages, and to argue for higher local results without recognising that the local market or the affiliate’s specific situation may not be comparable to the facts in the APAs and rulings.

If a local country feels it necessary to obtain an APA, ruling, or details of a MAP case, it can do so through its existing information exchange network.

II. **TEI Comments on Annexes I-III to Chapter V**

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

Annex I to the Discussion Draft sets forth the information and documentation to be included in the master file. A significant portion of the information in the master file is available for publicly traded entities in their quarterly and annual financial statements. TEI therefore recommends that publicly traded MNEs, and other businesses that prepare financial statements on the same basis, be permitted to provide such financial statements as part of the master file. The MNEs could then supplement the master file with any necessary additional material.

In addition, TEI notes that the information requested in the master file, and in fact much of revised Chapter V as proposed in the Discussion Draft, is extremely difficult to apply to certain industries. For example, information regarding a supply chain and much of the CbC reporting template makes little sense as applied to a bank. As noted above, flexibility in transfer pricing documentation is crucial to the ability of MNEs to comply in a cost effective manner, and for the information supplied to be useful to tax authorities. Thus, the OECD should consider whether alternatives should be developed for differing sectors, especially if it continues the use of standardised forms or templates.

Below we comment on specific sections of Annex I (heading references are to those in Annex I).

“**Organisational structure.**” Large or even medium-sized MNEs often do not have an easily accessible, complete organisation chart for all companies of the group due to the
The organisation structure of the MNE, size, complexity, sheer number of entities, and in certain cases for government required security purposes. Indeed, a full chart would be difficult to produce in a useful or manageable manner. Moreover, a full organisation chart for an MNE of any significant size would be unhelpful to tax authorities for transfer pricing purposes, as most of the information would be irrelevant. An organisational chart by business line that is comprised solely of operating entities would be easier to provide, but it is unclear whether this is what the master file requires (i.e., does “operating entities” at the end of the organisational structure request limit “legal and ownership structure”?). TEI suggests that OECD permit MNEs to provide organisational charts relevant for transfer pricing purposes on a business line by business line basis and that exclude dormant entities and entities with immaterial activity.

“Description of the MNE’s business(es)”

“Important drivers of business profit.” This is competitively sensitive information that should not be required to be disclosed. The information supplied in the functional analysis is sufficient to determine key functions and risks, which are key drivers of profitability.

“Chart showing supply chain for material products and services.” TEI recommends that the OECD only require this information for MNEs that have a fully integrated supply chain. In other cases, such a chart would be overwhelming, would not provide useful information (if it made sense at all) and change significantly from year to year.

“Chart showing important service arrangements between members of the MNE group other than R&D services.” The OECD should make clear that this chart is only for recurring services and not for one-time contracts as part of a tender. In addition, the OECD should make clear that transactions reported on this chart should not appear on the chart showing the supply chain for material products and services.

“A description of the main geographic markets for material products and services.” The OECD should permit MNEs that do not have stable markets (such as tender based businesses) to include this information as part of the local file.

“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.” The OECD should require only MNEs that have a fully integrated supply chain to include this information. In certain other cases, this information would be a book length document describing the functions of integrated, independent companies within an MNE with no intercompany transactions, and would be useless for transfer pricing purposes.

“The title and country of the principal office of each of the 25 most highly compensated employees in the business line.” TEI urges the OECD to drop this requirement from the master file as it does not appear to have, prima facie, any connection to transfer pricing. While the Discussion Draft does not require disclosure of the names of these individuals, their identity
will be impossible to preserve. This will jeopardise their safety in certain jurisdictions. In addition, as noted above, the disclosure of such information in the manner suggested almost certainly violates the privacy protection legislation of many countries and the European Union (see, e.g., the EU Data Protection Directive).

Aside from these considerations, a definition of compensation needs to be developed, which raises difficult issues. While base salary may be simple to determine, other components of compensation are often much larger and more important, but also more difficult to measure. For example, how would options and shares be valued and when (grant, vesting, exercise)? How would bonuses be included? What other types of compensation would be included and how would they be valued (e.g., company cars, housing allowances, tuition, pension fund contributions, health and life insurance, etc.)? Other issues abound, such as turnover, secondments, contractors, etc. Thus, at a certain point, a fully inclusive definition of compensation becomes unworkable and yet reporting based on salary alone is potentially misleading.

In place of reporting the top 25 most highly compensated individuals, TEI notes that a simplified organogram is available as part of a company’s published financial statements. This shows the first level of company directors/managers reporting functionally to the business line CEO without indicating the principal office of the individuals and should be sufficient for risk assessment purposes. A similar organogram could be developed for private entities. Any further information can be gathered as part of an audit by local tax authorities.

“MNE’s intangibles.” The information requested in this section would only be useful, if at all, for master files for fully integrated MNEs or business units. Companies that do not utilise an integrated supply chain will not have a centrally organised “overall strategy for the development, ownership and exploitation of intangibles” or a principal location of R&D facilities and management.

Even for those MNEs with integrated supply chains, describing the “overall strategy for the development, ownership and exploitation of intangibles” goes well beyond the information normally supplied as part of transfer pricing documentation and the information needed for risk assessment. Regular transfer pricing documentation includes a functional analysis that must include who owns and uses intangibles as that is a critical component of determining the tested party. Such a functional analysis, with information about intangibles, is included in a separate part of the master file. Therefore, it is unnecessary to require information about the MNE’s “overall strategy” with respect to intangibles as part of the master file.

More broadly, the inclusion of the section “MNE’s intangibles” in the master file combined with the newly developed guidance under Chapter VI of the Guidelines (which can and will be interpreted differently by different jurisdictions) will greatly increase the compliance burden. Tax authorities will wish to discuss intangibles with taxpayers, even when
the intangibles do not relate to the transaction under review, which will ultimately lead to additional unnecessary adjustment attempts. This would not be the result of improved tax assessments, but rather different interpretations of the same rules and the inclusion of intangibles in the master file, which will be shared with tax authorities on a potentially global basis.

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

Annex II to the Discussion Draft sets forth the information and documentation to be included in the local file. It is unclear why the OECD does not include all elements of a comparability analysis in its proposed local file. For example, the contractual terms, economic circumstances, and specific business strategy are not listed, which is methodologically inconsistent with the Guidelines. This regrettably confirms that the OECD is giving more weight to the functional analysis/people functions approach along the lines of the approach set forth in new Chapter VI, and less to a full comparability analysis. TEI requests that the OECD explain why certain elements of a full comparability analysis have been omitted from Annex II.

Below we comment on specific sections of Annex II (heading references are to those in Annex II).

“Local entity.” The Discussion Draft should clearly define the terms local entity and entity. Is the latter the same as Constituent Entity for purposes of Annex III?

“Controlled transactions.”

“A detailed functional analysis of the taxpayer and relevant associated enterprises with respect to each documented category of controlled transactions, i.e. functions performed, assets used and/or contributed (including intangibles) and risks borne, including any changes compared to prior years.” TEI notes that the requirement to include any changes compared to prior years is new, extremely cumbersome, and would make the entire local file voluminous and difficult to analyse with little added value. Details on changes from prior periods are generally irrelevant for fixing transfer prices. Moreover, the master file already includes a section on major restructurings. If the OECD intends to keep the requirement to document changes, then at a minimum the word “material” should be inserted between “any” and “changes” at the end of the sentence.

“Identification and description of other controlled transactions of the taxpayer that can directly or indirectly affect the pricing of the controlled transaction being documented.” It is unclear what this requirement is asking for, particularly the scope of “directly or indirectly.” Thus, additional detail from the OECD would be helpful in assisting taxpayers in complying with this new requirement of Annex II.
C. **Annex III to Chapter V: A Model Template of Country-by-Country Reporting**

Annex III to the Discussion Draft provides the OECD’s proposed CbC reporting template. Many of TEI’s comments on the template are set forth above in our core points and responses to the specific requests for comment by the OECD. Below we provide additional comments on the template.

To a certain extent, the CbC reporting template proposed in the Discussion Draft is premature. What is needed is guidance and consensus from the OECD on the other open issues in the Discussion Draft and in the Action Plan generally, before developing a CbC reporting template, especially if it is not severed from the master file. In addition, part of the development process should include identifying the template’s purpose and its proper use. Presently, the Discussion Draft states that the template is to be used for risk assessment purposes, but as noted the proposed template requires a great deal more information than necessary for such an assessment, whereas much of the information is useful for a formulary apportionment approach to transfer pricing.

Further, the functions performed and risks assumed by an MNE in each country in which it operates are generally not comparable and, in any event, are not reflected in the proposed CbC reporting template. Local tax authorities are only permitted to tax profit attributable to what is earned in their jurisdiction, and tangible assets and employee information do not give proper recognition to the importance of intangibles such as technology ownership, R&D, and new product funding, which are often far more important than routine sales and marketing activity in the local jurisdiction. Thus, even for purposes of a high-level risk assessment, the CbC reporting template is potentially very misleading regarding the value drivers of an MNE’s operations.

The CbC reporting template also presents potentially intractable comparison issues across entities, jurisdictions and time periods. As discussed in our outline of core points above, the list of differences that would compromise the comparability of the information in the proposed CbC reporting template is potentially endless. Even seemingly manageable and comparable information such as “Total Employee Expense,” raises difficult issues, as discussed above.

For these reasons, TEI urges the OECD to clearly delineate the purpose or purposes behind the CbC reporting template and conduct a detailed assessment of what the template should be used for, before enshrining the template in Chapter V or anywhere in official OECD guidance. As currently proposed, the risk that many tax authorities will use the information in the current template to propose transfer pricing adjustments that are inconsistent with the arm’s length principle is palpable. Thus, TEI strongly recommends that the OECD sever the CbC reporting template from Chapter V and change the deadline for its completion to the end of the
BEPS project (i.e., December 2015) to allow for proper development of the template with considered stakeholder input.

Finally, to the extent that the CbC reporting template is an attempt to quantify the economic contribution of an MNE to a particular country for purposes of assessing whether it is doing its part in supporting the country’s government, the amount of income tax paid on a cash basis (plus some amount of withholding taxes) is a poor measure taken alone. It ignores other benefits an MNE provides to the jurisdictions in which it operates, such as employment, capital expenditures, charitable contributions, etc., not to mention taxes other than income taxes.

Below we comment on specific sections of the CbC reporting template (heading references are to those in the template).

“General Instructions”

“Reporting MNE.” The term “Reporting MNE” is confusing in this context. As the Discussion Draft proposes including the CbC reporting template in transfer pricing documentation, one would expect the OECD to follow the definition of control in the relevant transfer pricing regulations (perhaps of the jurisdiction of the MNE’s parent?). However, the OECD’s aim seems to make this the level of a publicly traded enterprise or the top holding company of a private MNE. This would exclude many entities from the CbC reporting template, including: (i) entities in which the MNE holds a minority interest, yet with sufficient common ownership to trigger a transfer pricing documentation requirement; (ii) entities that are controlled under transfer pricing regulations because the MNE is the sole customer of such entities; and (iii) entities that have a common main shareholder, yet different management and are separately quoted on the stock exchange. We recommend that the OECD clarify at which level the CbC reporting template should be prepared.

“Constituent Entity.” The Discuss Draft provides that a Constituent Entity “is any separate business unit of the MNE group that is an associated enterprise to the reporting MNE. . . .” The term “business unit” seems to be misplaced, unless the OECD is using it in a specific manner. If so, then a definition of business unit should be provided, as recommended above.

According to the OECD’s definition of “Constituent Entity,” a permanent establishment that does not prepare a separate income statement for regulatory, financial reporting, internal management, or tax purposes, is not separately reported. The OECD should consider supplementing this definition for representative offices that pay taxes under local legislation.

“Specific Instructions”

“Important business activity code(s).” The activity codes appear to be based on a typical large consumer products company and thus are irrelevant to many industries. TEI therefore recommends that the OECD revise the activity codes to take into account a wider swath of
multi-national business activity. For example, a revised Chapter V could reference the codes under the Standard Industry Classification (SIC) system or the North American Industry Classification System (NAICS). In addition, Sales, Marketing and Distribution should be listed as separate activities with their own code.

“Earnings Before Income Tax.” It is unclear why revenues may be translated (on a consistent basis) to a single currency while earnings before income tax need to be reported in the Constituent Entity’s functional currency. Translation should be permitted for reporting earnings before income tax.

“Income Tax Paid (on Cash Basis).” The Discussion Draft states income taxes paid on a cash basis should be grouped based on the amounts paid during the “relevant” year. If this is the financial year for which the reporting is done it will often be irrelevant. An approach that required reporting of taxes incurred by the entity based on its profit and loss statement would likely be more representative of the contributions of the Constituent Entity to its country’s fisc.

The OECD should also clarify whether it considers certain taxes, such as the French CVAE or the Italian IRAP, as income taxes and thus includible in the CbC reporting template. This could be done by developing a definition of income taxes for purposes of the template or by importing one from elsewhere.

“Stated capital and accumulated earnings.” The OECD should clarify whether and how taxpayers should report amounts such as surplus, paid in capital, goodwill, accumulated other comprehensive income, and legal reserves.

“Number of Employees.” Determining the exact number of employees employed by each Constituent Entity as of the end of the entity’s fiscal year would be a difficult and cumbersome process. The definition of a Constituent Entity includes permanent establishments, which do not have employees as a legal matter. Further, use of secondment arrangements is widespread in MNEs, with varying degrees of formality. Thus, a better approach would be to permit Constituent Entities to report the number of employees within a range (e.g., less than 10, 10 to 25, 25 to 50, more than 50). The OECD should also clarify whether MNEs should report employees on a full time equivalent (FTE) basis and whether independent contractors should be included as well (i.e., a definition of “employee” may be necessary as who is considered an employee varies from jurisdiction to jurisdiction). Finally, there should be an exception for reporting this information when it poses an unacceptable risk to the safety of an MNE’s employees in a particular jurisdiction.

“Intercompany Payments.” In general, MNEs do not have information regarding intercompany payments readily available as it would involve reporting transactions between hundreds or thousands of entities. In addition, it is not clear how this information is relevant to the purported reason for the CbC reporting template: a disconnect between taxes paid and where income is earned. Action Plan item 13 states “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.” This notably does not include reporting of intercompany payments.

Further, it is unclear why these items are reported on a paid basis rather than an accrual basis, since the effect on income taxes is upon accrual in the vast majority of cases. In addition, it is unclear why royalties are listed, but not outright sales of intellectual property (i.e., why report only related party payments for the use of intellectual property over time but not up-front, lump sum payments for the intellectual property itself?). Clarification of these points would be helpful to taxpayers.

III. Additional Overall and Specific Comments on Other Sections of the Discussion Draft

A. Additional Overall TEI Comments on the Discussion Draft

1. Balancing the Need for Information Against the Compliance Burden

The Discussion Draft repeats the OECD’s previous message from its White Paper on Transfer Pricing Documentation (White Paper) that there should be a balance between the information needs of tax authorities and the compliance burden on taxpayers. However, as in the White Paper, the burden on taxpayers tends to be forgotten as the Discussion Draft progresses. This is perhaps understandable as the OECD does not appear to have a thorough understanding of the overall cost of producing transfer pricing documentation to MNEs. A detailed study or survey of such cost is necessary for the OECD and tax authorities to properly balance their need for transfer pricing information against the compliance burden on taxpayers. TEI recommends that the OECD conduct a study regarding the burden of transfer pricing documentation in the present environment, which should include an assessment of the potential impact of the revised Chapter V on such a burden.

2. Need for Consensus

The OECD notes at the beginning of the Discussion Draft that “This document does not necessarily reflect consensus views of either the Committee on Fiscal Affairs (CFA) or of Working Party n°6 (WP6) regarding the issues it addresses. Rather, it reflects limited consideration of the issues in the short time since the publication of the Action Plan and seeks to identify issues for public comment.” TEI believes that consensus is essential to the success of Action 13 of the Plan. Without consensus, the already exceptionally varied transfer pricing documentation requirements across jurisdictions will continue to multiply until both taxpayers and tax authorities are overwhelmed and the system collapses under its own weight. In the end, if a consensus cannot be reached on a revised Chapter V of the Guidelines, then in TEI’s view it would be preferable to keep Chapter V in its current form.
3. **Consistent Application of the Draft’s Principles to Losses**

The Discussion Draft, like the Action Plan and other OECD work product from the BEPS project, situates the discussion of the effort to combat perceived base erosion and profit shifting by MNEs in the context of profitable enterprises. This is unsurprising as without profits there would be little reason to erode and nothing to shift. Nevertheless, MNEs do, on occasion and regrettably, operate at a loss. Thus, there should be explicit recognition by the OECD in the Discussion Draft, and in other output of the BEPS project, that jurisdictions who reach out to assess their “proper” share of an MNE’s global profits in good times should be prepared to accept their share of an MNE’s losses in bad times. In other words, the OECD Member States and other G20 nations should acknowledge that this endeavour is a two-way street and be prepared to act consistently when the shoe is on the other foot.

4. **Burden of Proof Issues**

The Discussion Draft also raises burden of proof issues. Paragraph 40 notes the possibility of shifting the burden of proof in the taxpayer’s favor if the taxpayer provides adequate and timely transfer pricing documentation. TEI agrees that the burden of proof should shift to the tax authority to show that the taxpayer’s transfer price is incorrect once the taxpayer provides the required documentation. In addition, ancillary burden of proof issues arise with respect to transfer pricing documentation. For example, who is required to show that a transaction did or did not need documentation due to cost and/or materiality? Will taxpayers be required to undertake extensive work to document cost and/or materiality? What if one country agrees with the taxpayer’s view that cost and materiality does not warrant the work of producing transfer pricing documentation for a particular transaction and the other country takes a different view? The Discussion Draft should address these and similar questions regarding the burden of proof.

**B. Additional TEI Comments on Specific Sections of the Discussion Draft**

1. **Discussion Draft Section B. “Objectives of transfer pricing documentation requirements”**

Paragraph 5.1 notes that the two-tiered approach to transfer pricing documentation should satisfy the objectives of a transfer pricing risk assessment. If that is the case, and if all transfer pricing documentation components must be available at the same time, then there will be an extremely limited opportunity to reduce the compliance burden for low risk businesses. For such businesses, the OECD should align its approach to transfer pricing documentation closely with the development of its Draft Handbook on Transfer Pricing Risk Assessment to ensure that the documentation requirements proposed meet the objectives of reducing the burden on businesses and tax authorities, each of whom operate with scarce resources.
If businesses provide useful information for risk assessment purposes and the tax authorities identify the taxpayer as low risk, then there should be some mechanism through which the subsequent documentation compliance burden can be reduced. This could include a reduced level of detail required for completing the master and local files. Regrettably, the Discussion Draft is silent on how this might be accomplished for businesses identified as low risk through the contemplated risk assessment process.

2. **Discussion Draft Section B.2. “Taxpayer’s assessment of its compliance with the arm’s length principle”**

   In paragraph 10, the sentence “Moreover, contemporaneous documentation requirements can restrain taxpayers from developing justifications for their positions after the fact” should be changed to read “Moreover, contemporaneous documentation requirements can restrain taxpayers and tax authorities from developing justifications for their positions after the fact.” As stated, the Discussion Draft gives the impression that it is permissible for tax authorities to use hindsight in developing their transfer pricing positions, which should not be the case.

3. **Discussion Draft Section C. “A two-tiered approach to transfer pricing documentation”**

   Paragraph 19 of the Discussion Draft refers to the (i) “MNE group’s organisational structure”; (ii) the “MNE’s intercompany financial activities; and (iii) the “MNE’s financial and tax positions.” It is unclear what these terms refer to, and thus taxpayers would benefit if the OECD provided more detail with respect to each.

4. **Discussion Draft Section D.1. “Contemporaneous documentation”**

   Paragraph 25 states 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.” This should instead read “a taxpayer ordinarily should give consideration to whether its transfer pricing is appropriate for tax purposes before the pricing is established and/or should confirm the arm’s length nature of its financial results at the time of filing its tax return.” Many taxpayers let their business units negotiate prices between themselves and document the arm’s length result. Requiring them to further confirm the arm’s length nature of the financial results at the time of filing its tax returns would place an additional documentation burden on such taxpayers.

   Paragraph 26 states that “tax administrations should balance requests for documentation against the expected cost and administrative burden to the taxpayer of creating it. Where a taxpayer reasonably demonstrates . . . that either no comparable data exists . . . .” This should instead read “tax administrations should balance requests for documentation against the
expected cost and administrative burden to the taxpayer of creating it. *E.g., where a taxpayer reasonably demonstrates . . . that either no comparable data exists . . . .”* As currently phrased, the second sentence significantly curtails the scope of the first sentence, which appears to be unintentional. That is, tax authorities should balance documentation requests against the expected costs and administrative burden to taxpayers in all circumstances, not just where a taxpayer makes a demonstration of the type described in the second sentence.

5. **Discussion Draft Section D.9 “Other issues”**

TEI agrees that certification of transfer pricing documentation by external auditors or other third parties, as mandated in some countries, should not be required and should be abandoned where it is currently mandated. Documentation prepared by external tax consultants should not be given more credence than that prepared by an MNE’s employees with comparable expertise.
Working party 6
OECD, Committee of fiscal affairs
2, rue André Pascal
75775 Paris Cedex 16
France

Date: 19 February 2014

Subject: Comments on the discussion draft on Transfer Pricing documentation and CbC reporting

Dear Sir/Madame,

TPA is pleased to contribute through this representation to the valuable work performed by the OECD on the “discussion draft on transfer pricing documentation and CbC reporting”, published on 30 January 2014.

TPA has structured the following letter by providing comments on the required items as specified in the presented discussion draft, and as well as on general aspects deemed necessary.

Yours sincerely,

Sjef Huibregtse
On behalf of Transfer Pricing Associates
Transfer Pricing Associates’ Comments on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting

B. Objectives of transfer pricing documentation requirements

TPA considers that it is important for BEPS purposes to provide the tax authorities with necessary information to perform transfer pricing risk assessments since there is a need for leveling the playing field. Nevertheless, the latter should not move more work and compliance costs to the multinational’s (“MNEs”) side, and we consider that CbC crosses the line on the objectives set in item B.

B.1 Transfer pricing risk assessment

_Should Work on BEPS Action 13 include development of additional standard forms and questionnaires beyond the country-by-country reporting template?_

The Anex III already exceeds the level of documentation that can be required from MNEs, since some of the information is available to tax authorities already through other forms/channels. Adding additional forms would require significant time and other resources from the MNEs. Functional analyses ought to provide sufficient information regarding the value chain.

B.3. Transfer pricing audit

_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 jurisdictions requesting the information?_

TPA considers the statement and question to be wrong in focus. A global master file in each country should allow all tax authorities to have an easy access to all major facts relevant to the position of the local tax payer, where country files could elaborate on specific local facts and data in addition to it.

Information and/or documents possessed by related group entities should be supplied only in proportion to their ability to clarify open questions relevant to the entity being audited. Otherwise such requests would boil down to a fishing expedition by the relevant tax authorities. Moreover the requests involved must be motivated by the tax administration.

C.1. Master File

_Should preparation of the master file be undertaken on a line of business or entity wide basis?_
We believe that both options should be open to MNEs. Any decision of preparation for a master file would be dependent on the way the business model is organized. If strategic business units or geographical concepts are the prevailing business configuration, the Master File could be drawn up along the same lines.

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

Both situations combined provide stakeholders with a clear picture on the business model.

*Should the CbC 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 believe a top-down approach is far more cost and time efficient for MNEs. Both options should be available for MNEs.

Moreover, we envisage two different models for this approach:

1. Start with the global Master File, and extracting specific country information from data, which is locally available, to be absorbed by the global file concerned. A CbC file will be drawn up only when needed.
2. Master File and CbC file will be drawn up simultaneously operating a “define and allocate the pie” basis. The local data will be provided through the local file and included into the Master File to the extent required.

*Should the CbC template be prepared on an entity-by-entity basis 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?*

We consider that both options should be available for MNEs.

*Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers?*

Yes, it will place a disproportionate burden on the taxpayers unless the MNEs’ processes and extraction of detailed financials are fully automated. Moreover part of the information is already covered by the local existing country files.

*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?*

In all cases, a proper allocation of SG&A to one transaction or line of business is very difficult to make.
Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?

We believe both options should be available to the taxpayer.

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

We do not consider this to be relevant for article 9 OECD Model Tax Treaty purposes.

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

Yes, it does create a significant compliance burden.

D.3. Materiality

Could more specific guidelines on materiality be provided and what form such materiality standards could take?

TPA suggests: not to confuse the qualitative criteria of “significance” with the audit term of “materiality” (of quantitative nature).

Materiality should be addressed in terms of qualitative/quantitative thresholds and/or frequency of pertaining transactions. A more accurate definition concerning significance of intercompany transactions is needed.

Additionally, quantitative materiality can only be relative to the size of the corporate. In practice, materiality set for the entire MNE would not be the same as for a local entity with lower levels of transactions, and therefore impossible to apply consistently.

D.5. Frequency of documentation updates

Are the suggestions in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

Although a 3 years update of comparable sets as a general rule is reasonable, there is a host of measures which could simplify the exercise of TP documents to be prepared by MNEs. Given the wide and broad approach sought by tax authorities now there does not seem to be any space for measures to simplify the MNEs obligations.

D.6. Language

What is the most appropriate approach to translation requirements, considering the need of both taxpayers and governments?
An English version is leading, only relevant parts of the country file could be useful in translation. Lots of translation errors are being made with increased risks for both tax authorities and MNEs leading to more than one version of the facts.

Furthermore, due notice must be given to translations risks and costs incurred by both sides.

D.8. Confidentiality

What are measures that can be taken to safeguard the confidentiality of sensitive information without limiting the tax administration access to relevant information?

Confidentiality is core to a competitive fair play open market system. It must be stated anyway that full guarantee of confidentiality by tax authorities is not to be expected.

Therefore, tax authorities should sign – either under the investment or tax treaties – Non Disclosure Agreements if/insofar MNEs' information is exchanged with tax authorities abroad.

E. Implementation

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

We consider that all options mentioned in the box should be left open for MNEs.

Comments to the annexes

- Title and country of 25 most highly compensated individuals does not always reflect the value chain reality.

- Mandatory reporting of APAs etc. should be made dependent on topics audited following a risk assessment.

- The CbC-template items are going beyond addressing article 9 of the Model Tax Convention topics, i.e. possible reflect effective fishing expedition instead of collecting relevant data for transfer pricing purposes.
Stowarzyszenie Centrum Cen Transferowych  
(Transfer Pricing Centre Association) 
ul. Foksal 10, 
00-366 Warsaw, Poland 
e-mail: kontakt@cct.org.pl 

Warsaw, 21 February 2014

Working Party No. 6 of the Committee on Fiscal Affairs 
TransferPricing@oecd.org 
sent by e-mail

Subject: COMMENTS ON THE DISCUSSION DRAFT ON TRANSFER PRICING DOCUMENTATION AND CbC REPORTING (of 30th January 2014)

Dear Sirs and Madams,

Transfer Pricing Centre Association (“TPCA”) welcomes the opportunity to provide comments on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting.

Transfer Pricing Centre Association is a non-profit organization aimed at promoting transfer pricing knowledge in Poland, founded by specialists working for capital groups in Poland, mainly in energy and industry sector. Hence we hereby present the comments as representatives of business.

We would like to confirm that have no objections with posting our comments on the OECD website.

We appreciate the intention imbedded in the Discussion Draft to launch a global conversation on how transfer pricing documentation rules can be improved, standardised and simplified. On forthcoming pages, we present our comments on the Draft.

We wish to thank the Transfer Pricing Unit and the Working Party No 6 of the OECD for the work pursued within the programme to streamline and simplify the transfer pricing documentation requirements and for the opportunity to express our views on the developed ideas. We are at your disposal to discuss any aspect of our comments. We look forward to developments and further discussions on the topic.

Yours faithfully,

Sylwia Rzymkowska 
Chairman of TPCA

sylwia.rzymkowska@cct.org.pl
A. Comments on the issues raised in the Draft

Section B.1 - whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template.

We believe that CbC reporting template fulfils the goal set in BEPS Action 13 (stating 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”). Therefore, in our opinion no other forms or questionnaires should be developed under BEPS Action 13.

Section B.1 – comments on the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

We believe that it should be best practice to share the risk assessment with taxpayers to enable them voluntary adjustment of their tax positions. Such practice would be welcome to minimise uncertainty relating to transfer pricing and hopefully eliminate disputes between countries.

Section B.3 - comments 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

Rules relating to obtaining information from foreign associated entity may only apply to the tax administrations. We believe that such rules exist under exchange of information provisions and require better cooperation of tax administrations. In our opinion, it may be very difficult to develop such rules for associated enterprises.

Section C.1 – Master file

Comments 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.

As we understand the master file should contain information for all MNE group members. Therefore, it cannot be presented on an entity wide basis but rather from the group perspective. It should lie with taxpayer’s discretion to decide whether master file should be undertaken on a line of business basis, however covering all activities. In the situation such approach enhances TP documentation it should be accepted by the tax administration. We believe that current wording of point 18 is sufficient.

Below we present comments on technical questions raised in section C.1

We believe that to achieve transparency and equal access to information for the tax administrations, CbC report should be included in the master file. This would facilitate the flow of information to all relevant governments according to the BEPS Action 13.

“Bottom-up” reporting from local statutory accounts would provide more accurate information from the perspective of the local tax administration. However, it would require local entities to be involved
in preparation of CfC report. In our opinion “top-down” allocation of MNE group’s consolidated income among countries should also be permitted. However, one must remember that there might be entities that are not consolidated but still are qualified as related entities in the meaning of local tax law.

We believe that country consolidations might create additional burden on taxpayers in the situations they are not performed for any other reasons. We are afraid that individual country consolidations would lead to global formulary apportionment what is not in line with the TPG.

In our opinion CfC reporting should require disclosure of corporate income tax paid on cash basis.

We don’t see any reasons to include in CfC report withholding tax paid. Some countries impose withholding tax and some don’t (or provide for various exemptions). We understand that it is important that adequate information about the relevant functions performed by other members of the MNE group in respect of intra-group services and other transactions is made available to the tax administration. However, information about withholding tax paid will not shed any more light on functions within the group.

Information on intra-group payment of royalties, interest and service fees might give some information on allocation of functions in the group. From practical perspective we believe, however, that such requirement would impose additional burdens on taxpayers. Information of functions within a group should be included in the master file.

Section D.3 - Comments as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

We would welcome more guidance on materiality of transactions for the purpose of documenting transfer prices (mentioned in points 12, 16, 23, 29, 30 in the Draft). Without the standardised thresholds, in our opinion, the goal for reducing tax burdens would not be achieved, since there will be differences in the approach of various tax administrations.

Practical issue relating to materiality is the issue of categorising transactions (as provided for in annex II – local file). The Draft presents several broad categories of transactions (e.g. procurement of manufacturing services, purchase of goods, provision of services, loans, licences of intangibles). However, the categories are vague and there might be situations when within one category there will be material and immaterial transactions taking place. We believe that transactions resulting from one factual agreement should be analysed jointly. However, transactions resulting from various factual agreements (even belonging to one category of transactions) should be looked at separately. Therefore, we would welcome not only more guidance on materiality but also on categories of transactions.

Section D.5 Comments 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?

In our opinion, not all transactions require searches in databases to be done. Therefore, we would suggest that the language in point 34 does not imply that searches are required for all transactions. For the transactions the taxpayer chooses to perform searches the suggestion to update them every
3 years is very helpful and much welcome. We opted for such a recommendation in our comments to the White Paper on Transfer Pricing Documentation and appreciate including it in the Draft. We would like to underline that the requirement to update the financial data for the comparables every year makes simplification a fiction. Such requirement would impose additional financial burden for taxpayers adding little or no value for businesses. We would welcome to delete last sentence of point 34. As long as the operating conditions remain the same, we see no reasons to update annually financials of comparables. With stabile operating conditions, no one verifies its transfer pricing policies annually.

Not all administrations require taxpayers to provide data regarding comparables, although taxpayers are free to present such data. Obligatory provision on comparable data to be included in the local file may constitute huge financial and compliance burden for both small and medium enterprises and also for big MNEs in the case of their auxiliary transactional flows (which- when analysed jointly – may involve material values).

We are concerned by the fact that the local file may be used to shift the burden of proof from the tax administration on to the local taxpayers, taking into account that the local file should include evidence that the local transactions are conducted on an arm’s length basis.

Section D.6 – comments regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments
We believe that the current wording of point 35 reflects both need of taxpayers and governments relating to translations.

Section E - comments regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations
In our opinion, the master file of MNE group should not be subject to automatic filing. It should be made available for the tax administration in the parent company’s jurisdiction as well as in local entity jurisdiction upon request.

CbC reporting, however, may be subject to yearly filing. Most reasonable approach would be to file CbC report in the parent company’s jurisdiction and automatically share it by the tax administration in that jurisdiction with tax administrations of MNE’s group members under treaty information exchange provision. Such approach would ensure cooperation between tax administrations and transparency.

Annex I - comments as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file
We believe that information on APAs, relevant rulings and MAP cases would improve transparency of group’s operations and its economic activity to all tax administrations involved.

B. Comments on proposed content of master file

We recognize that the general overview of the MNE may provide a perfect background and comprehensive map useful for the MNE’s transfer pricing analysis. Having gone through the outline of proposed content of the masterfile we are afraid, however, that in many cases the information
expected within the section of the master file might be too excessive while not always necessary and relevant in the analysis of the intercompany transactions concluded by a single local entity.

We fear at the same time that, if such complete list of elements is required under OECD recommendations – while the strictness of such requirement would depend on local implementation process, any mismatch in the transfer pricing file with the model list could result in adverse consequences for a given taxpayer, even if bringing just a little or not even that much to the analysis of transfer prices of such entity. Furthermore, taking into account the imbalanced position of many local entities within MNEs to effectively demand certain information available only on group headquarter level, it seems a bit unfair to impose the obligation on local entity to present such information and to bear penalties in the case of non-compliance with such an obligation, subject to local regulations.

We are afraid that the master file may add to the number of documents that need to be prepared nowadays. We would encourage that official information of MNEs that is reported to the market (e.g. financial statements, group reports) are used during tax audits.

Below we try to comment on several points of the content of the masterfile, trying to better illustrate the abovementioned concerns.

• *Chart illustrating the MNE’s legal and ownership structure and geographical location of principal operating entities*

While it can be understood that the network of relationships of a given entity and the group of related parties is necessary to list all the related party transactions concluded by such entity, we believe in some cases it might be a demanding task to develop a chart illustrating the complete legal and ownership structure and geographical location of all principal operating entities.

There may be several practical points that make such task complicated:

- Date, for which such a chart would be up-to-date and complete – in large MNEs legal and ownership structure may vary significantly over the time, while there may be a timing difference between a change and a related information diffused within the MNEs.
- In large MNEs a mere list or group companies may count dozens of pages, while drafting a chart may be a challenging task itself.

Notwithstanding the above, irrespectively from the size of a given MNE, a group entity may be involved in a very limited number of transactions with related parties. In such a case, the task to prepare the group structure chart might be disproportionally burdensome.

We believe that in large MNEs this is really often the case that a single local entity is involved in transactions with a small fraction of group entities, while there are practically no interactions with the rest of the group. In all such cases the chart of group structure would only be a time-consuming element but of little value for the examination of arm’s length nature of transactions concluded by such entity. Consequently, we rather see it as not always necessary and in some cases even not appropriate.
An exception are maybe holding companies, interacting with the majority of its group member companies and where the chart of the group structure might be a nice orientation map useful for investigation of intercompany transactions. It seems, however, that it is too demanding to require that from any group entity. We fear at the same time that if, such a group chart is an obligatory element (while the strictness of requirements would depend on local implementation model), any mismatch in the group chart with the current status for a desired date could result in adverse consequences, even if bringing really a little to the analysis of transfer prices.

- The title and country of the principal office of the 25 most highly compensated employees in the business line

We see no reason to require having included in the master file information on 25 most highly compensated employees. Therefore, we would opt for removing that from the master file content.

***

Warsaw, February 21st, 2014
February 23, 2014

VIA E-MAIL

Mr. Joseph L. Andrus
Head of Transfer Pricing Unit
Organisation for Economic Co-operation and Development
2, rue André-Pascal
75016 Paris
France

Re: Treaty Policy Working Group Comments on Discussion Draft of Transfer Pricing Documentation and Country-by-Country Reporting

Dear Mr. Andrus,

We are writing to share the comments and recommendations of the Treaty Policy Working Group on the Discussion Draft on Transfer Pricing Documentation and ChC Reporting, released for comment on January 30, 2014. As you know, the Treaty Policy Working Group (TPWG) is an informal association of large global companies based throughout the world, which represent a broad spectrum of industry sectors. TPWG members have been working since 2005 with the OECD, and more recently with the UN, to analyze and address tax policy and administration concerns regarding transfer pricing, profit attribution, permanent establishment, and related issues that are critical to our ability to avoid double taxation and conduct cross-border trade and investment.

The TPWG commented last year on both the July 2013 White Paper on Transfer Pricing Documentation and the transfer pricing documentation and country-by-country reporting aspects of the Action Plan on Base Erosion and Profit Shifting. However, the Discussion Draft raises or reiterates many issues of interest to TPWG members. While we appreciate that the Discussion Draft does not yet reflect a consensus proposal, our member companies have identified some concerns and recommendations regarding its provisions that we would like to share at this time. TPWG members would also welcome the opportunity to provide additional input as Working Party 6 and the CFA continue to develop proposals on these issues.

General Comments

We understand that the Discussion Draft is intended to address Action 13 of the Action Plan on Base Erosion and Profit Shifting, which provides as follows:

**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.
Action 13 thus contemplates new transfer pricing documentation rules that provide enhanced transparency for tax administrations while bearing in mind the compliance costs for businesses. As described by the Discussion Draft, “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.” The Discussion Draft also seeks to ensure that “transfer pricing compliance is more straight-forward and more consistent among countries” and that tax administrations are provided with “more focused and useful information.”

TPWG members support all of these goals and agree that it should be possible to improve transfer pricing documentation practices in ways that materially benefit both tax administrations and businesses. We respectfully submit, however, that many of the approaches suggested in the Discussion Draft would fail to achieve its goals. If applied, we believe that they would very substantially increase compliance costs without any corresponding material benefit to tax administrations. We are especially concerned that the Discussion Draft appears to devote less attention to finding an appropriate balance that minimizes the compliance burdens on taxpayers than either the White Paper or the parameters of Action 13 do.

TPWG members have similar concerns regarding the proposed country-by-country (CbC) reporting template. This was added to the OECD’s work on transfer pricing documentation in response to the mandates from the G8 and, subsequently, the G20. However, the proposed CbC information requests go substantially beyond those of either the G8 mandate (which called only for “a common template for multinationals to report to tax authorities where they make their profits and pay their taxes across the world”) or the G20 mandate (which asked for “companies’ … worldwide allocation of profits and tax”). (Emphasis added.) In a number of respects, the draft CbC template exceeds even the information contemplated by Action 13 (the “global allocation of the income, economic activity and taxes paid among countries”), and the Discussion Draft indicates that the OECD is considering the addition of still more, unrelated information requests. (Emphasis added.) We respectfully submit that the goals of CbC reporting could be better accomplished, and the new compliance burdens imposed on business reduced, with requests that are more targeted to advancing its own high-level risk assessment goal.

We are concerned, as a general matter, that the information requested in the Discussion Draft represents, at this point, an amalgam of “wish lists” from countries participating in the BEPS project. As is frequently observed, this was the process used by the Pacific Association of Tax Administrators (PATA) in its much criticized attempt more than a decade ago to produce a transfer pricing documentation package acceptable to its four member countries. As in the PATA initiative, the design of the proposed master file, local file, and CbC template reflect little apparent balancing of the utility and efficiency of the information requested with the compliance costs for business, and the current OECD proposals do not even offer the penalty protection afforded by the PATA package. The current OECD proposals also compare unfavorably in many respects to the master file / local file approach developed by the EU Joint Transfer Pricing Forum as well as the transfer pricing documentation recommendations of the United Nations Practical Manual on Transfer Pricing for Developing Countries.

We remain optimistic, however, that the goals of Action 13 can be realized in a manner that is mutually beneficial to tax administrations and businesses if the proposed master file, local file, and CbC templates are refocused and rebalanced with these goals in mind.
Our specific comments on the Discussion Draft are provided below.

**Transfer Pricing Documentation Aspects of Discussion Draft**

**Objectives**

We believe that the master file and local file, as well as the CbC reporting template, could be best refocused by clarifying the objectives of transfer pricing documentation and the role of each document in achieving those objectives. The first two objectives noted by the Discussion Draft—providing tax administrations with the information needed to conduct an informed transfer pricing risk assessment and encouraging taxpayers to give appropriate consideration to transfer pricing requirements in establishing their prices and reporting their income—seem reasonable and are consistent with the purposes of the transfer pricing documentation provisions adopted by many countries over the last two decades.

However, the third objective identified by the Discussion Draft—providing the information that tax administrations would need to conduct an “appropriately thorough” transfer pricing audit—is novel and would create very substantial new burdens and inefficiencies for both taxpayers and tax administrations. Not all taxpayers will be subjected to a transfer pricing audit in every year in every country where they are subject to tax. Where a transfer pricing audit is conducted, it typically takes a year or more and requires the production and analysis of many thousands of items of information. It would create huge inefficiencies to require all taxpayers to produce this information in advance for every year and every country in which they are subject to tax. The receipt of such large amounts of information would likely also have the “needle in the haystack” effect that tax administrations typically encounter when they apply voluminous information reporting requirements, and actually make it more difficult for tax administrations to identify relevant transfer pricing risk assessment information. More focused requirements should also enhance the ability of tax administrations to give fuller consideration to the documentation that is provided.

The broad manner in which the third, audit-focused objective is stated is in tension with other statements in the Discussion Draft acknowledging that the taxpayer may need to provide additional information in the course of an audit. Those latter statements seem reasonable and would be a more appropriate means of addressing the legitimate audit needs of tax administrations in relevant cases. We suggest that the text proposed by the Discussion Draft clearly endorse this approach and state only the first two objectives as the purpose of transfer pricing documentation.

**Flexibility**

TPWG members agree that there needs to be flexibility in the reporting format for transfer pricing documents, as MNEs manage their operations and maintain their financial and other information in a wide variety of ways: by business line or unit, entity, country, or combinations of these. Allowing for flexibility on the reporting format would avoid imposing new systems and other requirements that would cost many companies millions of additional tax compliance dollars. Appropriate consistency requirements could be applied within each MNE group.
Materiality

TPWG members believe that the documentation guidance should establish a consistent position on the need to apply materiality considerations at both the master file and local file levels. The Discussion Draft currently sends mixed messages on this issue. TPWG members believe that materiality must be judged from the perspective of the MNE, but paragraph 29 of the Discussion Draft seems to indicate that materiality considerations for at least the local file should be evaluated primarily from the perspective of the “local economy.” Leaving this issue solely to the subjective judgment of each tax administration would create an inefficient patchwork of standards and effectively eliminate a meaningful materiality threshold in many countries. It would be much more efficient to have consistent materiality thresholds or de minimis thresholds established in advance at an international level.

Relevance

TPWG members believe that the master file and the relevant local file should be made available through appropriate channels to any jurisdiction that has a tax interest in the information it provides. However, those files should not provide information to a jurisdiction on structures or transactions that would not be subject to tax in that jurisdiction or have an indirect effect on the local tax liability. Ensuring the relevance of the information provided to each jurisdiction will improve the utility of the transfer pricing documentation and reduce the tax administration resources required to analyze it and identify any relevant issues.

If the master file is to be generally relevant for all jurisdictions where the MNE has an entity or branch subject to tax, the information that it requests needs to be better targeted to this purpose than is the current proposed master file. To accomplish this, some items of information requested in the master file need to be moved to the local file instead. In addition, items that relate to other aspects of the BEPS project or to other tax issues not pertaining to transfer pricing, should not be swept into the transfer pricing documentation. This is important to avoid creating confusion about what factors are relevant to an arm’s length transfer pricing analysis. In the annex to this letter, we have annotated the proposed master file and local file to identify additional changes that we believe would need to be made to produce files that are appropriately focused for their respective purposes.

We are particularly concerned that the broad content of the master file as it now stands would include items of information that would go well beyond what is subject to the taxing rights of the great majority of jurisdictions. This troubles us because, in our experience, the tax administrations most eager to receive company information on a global basis tend to be those that have the most expansive and unprincipled views of their own taxing rights. The proposed master file approach would likely inspire competition among multiple jurisdictions to assert new taxing rights over any income they may see as too lightly taxed. Given the current lack of consensus on either the existence or the relative priority of any such new rights, we fear that the result of the proposed master file approach would be an increase in double or multiple taxation, creating a level of uncertainty and controversy that impedes cross-border trade and investment. These concerns are further heightened by the lack of adequate confidentiality safeguards in many jurisdictions.
Part of the difficulty may lie in the fact that the transfer pricing documentation proposals are viewed in part as a vehicle for addressing other policy issues currently under discussion, such as interest deductibility, double non-taxation, and harmful tax practices. We respectfully submit that transfer pricing documentation will be more effective as such if it continues to focus on issues directly relevant to transfer pricing and allows other issues to be addressed as separate components of the BEPS project. We therefore urge the OECD to take a more considered view of the relevance of the information it proposes for transfer pricing documentation and to eliminate any items that do not bear on transfer pricing.

**Comparables**

The Discussion Draft signals a significant tilt toward requiring that local comparables be produced. We believe that this would significantly add to burden and costs and would not likely improve reliability. Such an approach seems likely to further encourage the use of profit split methodologies where no local comparables are available to taxpayers in a particular market, although regional comparables can usually be adjusted with an adequate degree of reliability. We urge the Working Party to take a more balanced and practical approach on this issue. We believe that it would also be useful for the Working Party to develop more uniform standards with respect to comparables requirements, such as the Discussion Draft’s three-year update proposal, to ensure that such requirements are balanced and consistent with the comparability analysis required by the arm’s length principle and do not impose unreasonable levels of compliance burden.

**Benefit to Compliant Taxpayers**

The transfer pricing documentation requirements developed in response to Action 13 will inevitably impose at least some new compliance burdens on MNEs. In fairness and to create effective incentives, the documentation guidance should also provide some benefit to taxpayers who comply with those requirements, in the form of relief from penalties where the company has made a good faith effort. To avoid inappropriate use of penalties or penalty threats, the burden of proof of noncompliance for this purpose should be on the tax administration.

**Confidentiality**

It is essential that the disclosure and use of transfer pricing documentation continue to be appropriately limited. Much of the requested information is not public and is extremely sensitive for business reasons unrelated to tax. We therefore very much appreciate the OECD’s acknowledgment that this information should be provided only to the governments of the relevant countries.

However, this alone would not ensure that the information provided to relevant governments remains confidential and is used only for appropriate purposes. Domestic law provisions vary considerably in the level of protection that they provide against disclosure and misuse of taxpayer information. We, therefore, fully agree with the Discussion Draft’s proposal that the requested information in question be provided to the home country tax administration of the group parent company is resident, and then by that tax administration to other relevant governments.
It is critical that the subsequent provision of the information by the home country tax administration to other governments occur only through the exchange of information provisions of an applicable tax convention or tax information exchange agreement (TIEA), so that the protections provided by those agreements will apply. In situations in which no such agreement is in place, any government that wishes to receive information should be required first either to conclude one or to accede to the multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Multilateral Convention), which is open for accession and has already been signed by over 60 countries.

**CbC Template**

For the reasons discussed below, TPWG members strongly agree that the CbC report should be separate from, and not included as part of, the master file.

**CbC Reporting Template**

Many of the above concerns, including those regarding relevance, flexibility on reporting format, and confidentiality, are equally important to the proposed CbC reporting template appended to the Discussion Draft. The TPWG would also like to offer some additional comments on the proposed CbC reporting template.

As an initial matter, we believe that it is critical to recognize that, although the CbC template is included under Action 13, its purpose is very different from that of transfer pricing documentation as such. The purpose of transfer pricing is to provide initial insight into and support for the taxpayer’s transfer pricing methodology under the arm’s length principle, to facilitate risk assessment and compliance. By contrast, CbC reporting was endorsed by G8 and G20 leaders as a tool to permit an initial high-level comparison of the geographical locations in which MNE groups pay taxes and earn profits (with Action 13 adding “economic activity”). The purpose of CbC reporting has been consistently described throughout by both the G8 / G20 and OECD leadership as the flagging of any material geographical discrepancies for further evaluation. CbC reporting explicitly focuses on factors that are not sufficient, or even relevant, to evaluate the appropriateness of a taxpayer’s transfer pricing practices.

If it is to be used as intended, the CbC template must be carefully tailored to achieve its limited purpose. Information relevant to transfer pricing compliance with the arm’s length principle should be requested in transfer pricing documentation or on audit, as appropriate. Other potential BEPS concerns should be addressed separately in an appropriately targeted manner. However, as it currently stands, the proposed CbC template also requests much information (such as employee expense and tangible asset value) that is commonly used in formulary apportionment systems but is not relevant to a transfer pricing determination under the arm’s length principle. It requests other information (such as place of effective management of each constituent entity, stated capital and accumulated earnings, and royalty, interest, and service fee payments and receipts) that may be of interest to tax authorities for other reasons but bear no apparent relationship to the high-level geographical information requested by the G8 and G20.

The inclusion of extraneous information in the CbC template concerns TPWG members because of the very significant increase in compliance burden and tax controversies that it would create. We are also particularly concerned by the inclusion of formulary apportionment factors in the template, which we
believe is inconsistent with the continuing endorsement by the OECD and the G20 in the BEPS project of the arm’s length principle, rather than formulary apportionment methods. The provision and wide circulation of information irrelevant to the arm’s length principle would risk its use in unintended ways, to justify conclusions inconsistent with applicable international rules and principles.

The information requested in the CbC template should be adjusted to address these concerns and to avoid unintended consequences contrary to the shared policy goals of the OECD / G20 BEPS project. In view of these many significant risks and limitations, and consistent with the mandates for CbC reporting, TPWG members respectfully request that the data requested by the CbC template be limited to the following:

- **Revenues**

- Income tax paid to country of organization and to all other countries—*with the ability for the taxpayer to provide relevant context, such as information on net operating losses, timing or other accounting differences, or other factors materially impacting these figures in a particular year*

- Withholding taxes paid and / or other tax contributions—*at the taxpayer’s option, depending on availability and materiality*

- **Number of employees**—*within general ranges and with additional guidance on relevant determination date*

As for the level of reporting, most of the information requested on the CbC template is, unfortunately, not currently maintained in the requested form or even currently available on a group-wide basis. The information maintained by MNE groups varies substantially across industry sectors and even from group to group. TPWG members spent considerable time and effort trying to identify a common format for such reporting that all could satisfy without material new compliance burdens, but were unable to do so, even within our limited membership. Some groups maintain their financial information on an entity level, while others do so only on a business line basis. However, neither entity data nor business line data is currently maintained on a country level. There are often multiple entities with a taxable presence in a country and sometimes multiple lines of business conducted by an entity. Even local statutory accounts are not prepared for all countries, and they are not ordinarily gathered on a group-wide basis, as they are prepared in accordance with local GAAP in local currencies. Existing systems are, with very rare exceptions, simply not capable of producing the country-specific financial information that would be required to construct net income figures relevant to the desired country-by-country reporting, so any such requirement would almost invariably require both manual compliance efforts and costly systems changes. For these reasons, it is essential that flexibility be permitted in the choice between top-down and bottom-up data for the CbC template. Not all companies will be able to respond on a single basis, without making very substantial financial and time investments in financial and other systems and compliance personnel.

It should also be recognized that it would not be meaningful and would be very burdensome and costly for businesses to reconcile CbC data with their local tax returns or transfer pricing documentation, which
are prepared using different sources of information, so that tax administrations do not seek to require this on audit.

Finally, consistent with its very different purpose, the CbC template should be prepared and circulated independently of the transfer pricing documentation master file and local file. For the same reasons, it is also important to have a statement that clearly precludes the use of CbC data as a basis for transfer pricing or other tax assessments, so that tax administrations are not tempted to use the data in unintended ways.

It will be important to clarify which countries will be entitled to receive the CbC template. Action 13 indicates that the information is to be provided to “all relevant governments.” We agree that the information should be available only to relevant governments. This should mean that it is made available only to those countries in which the group has a legal entity or a presence such as a permanent establishment that gives the country potential taxing jurisdiction over one or more members of the group (on a basis other than source taxation of income from transactions with unrelated parties there). This is consistent with the high-level risk assessment purpose of the reporting. To avoid unintended use of the information, it will be important to clarify this point to avoid requests from countries with no potential tax interest in the information. As discussed above with respect to transfer pricing documentation, it will also be critical for any CbC information to be exchanged under an applicable tax convention (including the Multilateral Convention) or TIEA, and subject to its limitations on disclosure and use.

* * *

The Treaty Policy Working Group hopes that these comments will be helpful to the OECD and G20 as they continue their deliberations on these important issues. We would welcome the opportunity for further dialogue and additional input as the work on these important issues proceeds.

Sincerely yours,

Carol A. Dunahoo
Baker & McKenzie LLP

Holly E. Glenn
Baker & McKenzie Consulting LLC

On behalf of the Treaty Policy Working Group
### Proposed contents of the Master File

<table>
<thead>
<tr>
<th>Organisational structure</th>
<th>TPWG Recommendations</th>
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<tbody>
<tr>
<td>• Chart illustrating the MNE’s legal and ownership structure and geographical location of operating entities.</td>
<td>It is not uncommon for a multinational group to have hundreds or even thousands of legal entities, in at least dozens or even more than a hundred countries, especially if it has multiple business lines. However, for reasons of efficiency, large groups are not always managed on a legal entity basis. Therefore, some MNEs do not prepare a legal and ownership structure chart on an entity basis. To provide tax administrations with relevant documentation and to avoid creating new compliance burdens, each MNE should be allowed flexibility to provide the relevant structure information in the form that it maintains in the ordinary course of its business. For example, some MNEs may maintain a list of group entities instead of a chart.</td>
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</table>

### Description of MNE’s business(es)

For each of the MNE’s major business lines:

• General written description of the MNE’s business including:
  
  o Important drivers of business profit
  
  o Chart showing supply chain for material products and services

  Supply chains change frequently, and may vary by region, particularly for the many companies that have regional operating models. For these reasons, we recommend that this item be moved to the local file, and that it be prepared with regard to the supply chain(s) as they relate to the local country operations.

  o Chart showing important service arrangements between members of the MNE group other than R&D services

  o A description of the main geographic markets for material products and services

  o 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

Because large MNEs may have hundreds or even thousands of legal entities, we recommend replacing the word “entities” with “operations” to allow companies to provide a functional analysis that is both meaningful and sufficiently well-focused on providing the important outlines of the business.
<table>
<thead>
<tr>
<th>assets used</th>
<th>Because restructuring transactions often only touch a very few local operations, we believe the description of these transactions should be located in the local file. When viewed from the perspective of the entire group, such transactions may not be material, and therefore would not properly qualify for the master file. They are more likely to be material at the level of the local operations.</th>
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<tbody>
<tr>
<td>o A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year.</td>
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<tr>
<td>o 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)</td>
<td>The purpose and relevance of this item is not clear. Since the OECD has come out against formulary apportionment, we assume this cannot be related to a “people” or “compensation” profit apportionment factor. If not, it is not clear what the relevance of this item is to understanding the broad outlines of the business, which is the purpose of the master file. In MNEs’ collective experience, this kind of information is not something they or their advisors use in transfer pricing analysis. Further, this item raises substantial concerns on the part of MNEs, for several important reasons. The first concern relates to individual privacy and security. Even though the item as stated does not request individual employee names, the disclosure of professional titles may allow cross-referencing of this information to other corporate disclosures made for other reasons, and thereby allow names to be associated with the compensation amounts. Second, compensation is not defined and its determination varies considerably from country to country. Third, MNEs do not believe this item is particularly informative. Ordinarily, the leaders of the principal functional areas within the business are the most highly compensated, so the description of the business and the functional analysis should be sufficiently informative as to the responsible functional areas. Thus, this item simply imposes an additional reporting burden without providing useful information that is not disclosed elsewhere in the documentation.</td>
</tr>
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</table>
### MNE’s intangibles

**General TPWG recommendations:**

We agree that a description of the “overall strategy for the development, ownership and exploitation of intangibles” is not inappropriate for the master file. In addition, we also agree that “a description of the group’s transfer pricing policies related to R&D and intangibles” is not inappropriate for in the master file.

However, we believe the other items requested in this section all belong in the local files, namely:

- location of principal R&D facilities and location of R&D management
- list of material intangibles or groups of intangibles of the MNE group and which entities own them.
- list of important related party agreements related to intangibles, including cost contribution arrangements, principal research service agreements and license agreements.
- description of any material transfers of interests in intangibles among associated enterprises during the fiscal year concerned, including the entities, countries, and compensation involved.

The reasons why this information is more appropriately located in the local files are that there may be entire business lines or units that have no R&D or other material intangibles, as well as entire regions and countries that have neither R&D or other material intangibles, nor any transactions with affiliates related to intangibles (for example, routine distributors). Consequently, this information is most appropriate for inclusion in the local file where relevant.

| • 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. |
| • A list of material intangibles or groups of intangibles of the MNE group and which entities own them. |
| • 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 important related party agreements related to intangibles, including cost contribution arrangements, principal research service agreements and license agreements. |
policies related to R&D and intangibles.

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<th>Item</th>
<th>Details</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>We do not believe this item is related to the application of the arm’s length principle, and question its inclusion in transfer pricing documentation. If the MNE has arm’s length financial transactions that could be used as comparable transactions to inform pricing of intercompany transactions, then the relevant information about those arm’s length transactions should be included in the economic analysis in the local file. We recommend deleting this item from the master file.</td>
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<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>We see this item as highly ambiguous, particularly as it relates to the notion of the “place of effective management,” because this concept is applied differently by different countries. We further believe that because many MNEs have regional treasury and financing operations (rather than global operations), information regarding the entire global structure may not be relevant or particularly informative. Instead, we advocate moving the information identifying the group members providing financing functions to the local files and providing this information for the entities relevant to financial transactions with that local affiliate.</td>
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<tr>
<td>• A description of the MNE’s general transfer pricing policies related to financing arrangements between associated enterprises.</td>
<td>We agree this item is appropriately included in the master file.</td>
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<tr>
<td>• MNE’s annual consolidated financial statement for the fiscal year concerned.</td>
<td>We do not believe this information should be required in the master file, as it is vulnerable to inappropriate, results-based benchmarking exercises in situations that may involve very different facts or legal provisions. Some of this information may be relevant for the local file, although we believe that bilateral or multilateral APAs and advance rulings should be excluded from this requirement because the relevant tax authorities have already defended.</td>
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<tr>
<td>• A list and brief description of the MNE group’s applicable unilateral and bilateral/multilateral APAs and Advance rulings.</td>
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<tr>
<td><strong>Annex</strong></td>
<td><strong>Treaty Policy Working Group Comment Letter</strong></td>
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<tr>
<td>• A list and brief description of other relevant tax rulings related to the allocation of income to particular jurisdictions.</td>
<td><strong>It is the experience of many MNEs that tax authorities are not interested in rulings provided by other jurisdictions, assigning them no precedential value. Consequently, we do not believe this information should be required as part of documentation. If the decision is made to retain it as part of the documentation package, then we recommend that it be provided in the local file, and disclosure should be limited to the rulings directly related to the local operations and/or the parties with which it transacts.</strong></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><strong>We do not believe this item is likely to have any utility from a documentation perspective. First, the time lag involved in audits and MAPs ensures that any MAP resolutions reached will relate to years long past. Further, MAP resolutions may represent compromise settlements not based on either country's interpretation of applicable legal principles, and thus would have no relevance for transfer pricing documentation or analyses. We recommend deleting this item.</strong></td>
</tr>
<tr>
<td>• Country-by-country reporting template according to Annex III.</td>
<td><strong>As explained in the attached comment letter, we do not see the CbC template as relevant to transfer pricing documentation as such. Rather we see the CbC template as an entirely separate document to be used solely for risk assessment. We believe that if the CbC template is included as part of documentation, it will then be seen by tax authorities as a relevant part of the transfer pricing file, and further, that it will be used as a short-cut substitute for the more involved task of absorbing and evaluating the arm's length transfer pricing documented in the master file and local files. We believe this is a realistic concern based on many MNEs’ experience that the transfer pricing documentation they currently produce is not always carefully reviewed by all tax administrations today. Therefore, we are concerned that, in some countries, the CbC report will, in effect, undermine the OECD’s position that transfer pricing should be based on the arm’s length principle. If the CbC template remains as it is currently drafted, including the many items that appear only to have relevance to a formulary apportionment exercise, we believe some tax administrations will simply rely on the data in the CbC report to propose transfer pricing adjustments. In this event, the OECD’s stated goal of continuing to</strong></td>
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emphasize the primacy of the arm’s length standard will have been foiled, and MNEs’ substantial efforts and investments in preparing meaningful documentation will have been wasted.

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

*(Annotated with key Treaty Policy Working Group recommendations)*

<table>
<thead>
<tr>
<th>Proposed contents of the Local File</th>
<th>TPWG Recommendations</th>
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<tr>
<td><strong>Local entity</strong></td>
<td><strong>We recommend refining this item to request a description of the important business decisions that can be made locally. As currently phrased, the request related to the reporting structure is almost certain to yield an extremely complex document, and one that may make little sense from a transfer pricing perspective. Many MNEs have matrix reporting structures (for example, with reporting to the country or the region as well as reporting to the business line) that are difficult to describe, change frequently, and risk confusing the issues rather than illuminating them. Moreover, at the local level, many MNEs have a structure in which several different business units may operate through the same legal entity in-country. This adds substantial complexity from a reporting relationship perspective. Thus, focusing this item on the decisions that can be made locally is more likely to result in an intelligible and relevant documentation package.</strong></td>
</tr>
<tr>
<td>• A description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices.</td>
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<tr>
<td>• An indication whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and an explanation of those aspects of such transactions affecting the local entity.</td>
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</tr>
<tr>
<td><strong>Controlled Transactions</strong></td>
<td><strong>For the reasons discussed in the attached letter, we recommend clarifying that materiality is determined from the MNE’s perspective and providing agreed objective measures for the determination.</strong></td>
</tr>
<tr>
<td>For each material category of controlled transactions in which the entity is involved, provide the following information:</td>
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<tr>
<td>• Description of the controlled transactions (e.g.</td>
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procurement of manufacturing services, purchase of goods, provision of services, loans, licenses of intangibles, etc.) and the context in which it takes place (e.g. business activity, financial activities of the MNE group, cost contribution arrangement).

- Aggregate amount of intercompany charges for each category of transactions.
- Identification of associated enterprises involved in each category of controlled transactions, and the relationship amongst them.
- A detailed functional analysis of the taxpayer and relevant associated enterprises with respect to each documented category of controlled transactions, i.e. functions performed, assets used and/or contributed (including intangibles) and risks borne, including any changes compared to prior years.

We see the tone of this item as conflicting with the broader mandate to focus on the “material categories of controlled transactions.” We recommend rephrasing this item to request “A functional analysis,” and “including any important changes compared to prior years.”

- Identification and description of other controlled transactions of the taxpayer that can directly or indirectly affect the pricing of the controlled transaction being documented.

If this item is intended to address material intercompany transactions, then it is redundant, because all material intercompany transactions are already required to be addressed in the documentation. If this item is intended to capture something else, the intention should be clarified so that it is well enough articulated for MNEs to understand what is being requested and why it is relevant to transfer pricing.

- Indicate the most appropriate transfer pricing method with regard to the category of transaction and the reasons for selecting that method.
- Indicate which associated enterprise is selected as the tested party, if applicable, and explain why.
- Summarise the important assumptions made in applying the transfer pricing methodology. It is not clear what kinds of assumptions are envisaged. We recommend deleting this item.
- If relevant, explain the reasons for performing a multi-year analysis.

- List and description of selected comparable uncontrolled transactions (internal or external), if any, and information on relevant financial indicators for independent enterprises relied on in the transfer pricing analysis, including a description of the comparable search methodology and the source of such information.
- Describe any comparability adjustments performed, and indicate whether adjustments have
been made to the results of the tested party, the comparable uncontrolled transactions, or both.

- Describe the reasons for concluding that relevant transactions were conducted on an arm’s length basis based on the application of the selected transfer pricing method

- A summary of financial information used in applying the transfer pricing methodology.

**Financial Information**

- 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.

- Information and allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements.

As currently written, this item could impose a substantial burden on MNEs to prepare detailed subconsolidation schedules that otherwise do not exist, because the financial segmentations that may be required for transfer pricing purposes are not typically required for any other financial reporting purpose. This would impose a substantial burden. Moreover, the stated intent of the documentation is to focus on the material intercompany transactions, but there may be immaterial intercompany transactions and portions of the business with no intercompany transactions that would not require documentation. As the item currently reads, all of these activities would have to be fully accounted for to ensure that the financial data used for transfer pricing “tie” to the annual financial statements, which would be quite burdensome and inconsistent with the basic notion of focusing on material transactions. We recommend rephrasing this item to replace the words “may be tied” with “relates.”

- Summary schedules of relevant financial data for comparables used in the analysis and the sources from which that data was obtained.
OECD Public Consultation on
Draft Revised Guidance on Transfer Pricing Documentation
and Country-by-Country Reporting

Comments by the TUAC
Paris, 21 February 2014

1. The TUAC welcomes the opportunity to provide comments on the proposal of revision of Chapter V of the Transfer Pricing Guidelines, including a template for country-by-country reporting to tax administrations for consideration by the OECD Committee on Fiscal Affairs and its Working Party n°6. Country-by-country reporting by multinational enterprises (MNEs) is much needed to hold global business to account for their contribution to development and shared wealth creation in the countries, where they have operations. There is increasing support for MNE country-by-country reporting on (i) profits on income, (ii) taxes paid and other payments to government and (iii) number of employees as shown in recent international and national initiatives:

- The G8 commitment at the Gleneagles Summit in 2013;
- The Dodd-Frank Act (section 1504) in the US covering SEC-listed companies in the extractive industry;
- In the EU, the revised Accounting and Transparency Directives (June 2013) and the Capital Requirement Directive (CRD IV, article 89) applying to extractive industries and banks respectively;
- Legislative measures in the Nordic countries and in Australia.

2. The OECD draft template for consultation is concerned with country-by-country reporting for transfer pricing purpose, including implementation of Action n°13 to “Re-examine transfer pricing documentation” of the G20 endorsed, OECD Action Plan on Bare Erosion and Profit Shifting (BEPS). It is however noted in the consultation document that further work needs to be delivered by the OECD to improve the template on other tax aspects than transfer pricing per se. Country-by-country reporting should indeed not be restricted to transfer pricing purposes and, for that matter, to the review of the chapter of the OECD Guidelines. This is work in progress and should thus be seen as a first step towards a comprehensive corporate reporting framework.

3. The OECD proposal of revision of chapter V and the template for country-by-country reporting provides for a basis, upon which enhanced reporting on other tax aspects could be built. Based on trade union experience with engaging with MNE management, we submit the following comments with the objective to improve the proposed text. We also note and support the separate contribution by the civil society led BEPS Monitoring Group (BMG) to this current consultation process and call upon other labour and civil society groups to actively participate in future BEPS-related rounds of consultations.
Measuring tax & income

4. Comments are based on the method chosen for measuring country-by-country corporate income: a “bottom-up” approach based on statutory accounts as favoured in the current OECD proposal, or a “top-down” allocation based on the MNE consolidated income statement. The former has the merit of simplicity and reliability – information on statutory accounts can be cross-checked and is objectively verifiable by a third party. However, it would not necessarily help to measure total taxable income on a country basis since statutory accounts do not distinguish between incomes generated domestically and incomes generated abroad. In other words, it is likely to be ineffective in detecting transfer pricing manipulation since these and other forms of aggressive tax planning schemes are already factored in the statutory accounts. Top-down allocation is therefore a more superior method to report adequately on the geographical distribution of incomes provided that there are sufficient safeguards for tax authorities and other government administrations to cross-check and verify the reliability of the reporting process.

5. The OECD should favour a top-down allocation approach and provide guidance on how to ensure the highest level of confidence in regard to the reliability of the reporting system by an MNE. We are not concerned, as we argue below, by the supposed additional reporting burden that such method would generate in terms of data collection and accounting retrieval by the MNE management.

Reporting other corporate information

6. Irrespective of the method used for measuring income and tax, the framework should require additional reporting on other corporate items related to location of employment, tangible assets and key decision centres. This is needed for the purpose of transfer pricing of the tax risk assessment and for verifying that the geographic distribution of corporate incomes and their underlying contractual arrangements reflect the economic substance of the MNEs activities. As noted in a previous OECD consultation document “a company based in a high tax country that reports 85 percent of its income in low-tax jurisdictions while maintaining 80 percent of its employees and assets in high tax jurisdictions may warrant more tax administration attention to transfer pricing than one where shares of assets, employment and income are more consistent across countries”.

7. We welcome the requirement in the proposed Master file for a “general written description” of the MNE’s business, including the “important drivers of business profit”, supply chain analysis, and functional analysis describing the principal contributions to “value creation” and the distribution of risks within the MNE structure. Nevertheless, more specific guidance might be warranted on each reporting items:

- Employment: reporting should be broken down geographically (i) by employment type and contractual relationship and (ii) by function (sales and marketing, back office, research, financing, production, etc.). Distinction by employment type would be needed in order to cover both, employees directly employed by the MNE and workers who formally are employed by another party but in practice are acting under the supervision and management of the MNE, such as subcontractors including commissionaires, consultants and private employment agencies. Reporting on employment should also be expressed as full time equivalent. The distinction by economic function would help identifying the geographical distribution of income generation (location of marketing and sales staff) and that of ‘value creation’ (production & back office).

- Business restructuring: there should be more precise guidance on reporting on restructuring, which is considered by the OECD as a key information to help detect
transfer pricing manipulation\(^1\) including any change in the legal and contractual status of entities and the re-organisation, or splitting of a single entity into multiple ones. Trade union experience points to increased opacity of corporate structures – including reduced worker access to information on the company’s business planning\(^2\).

- Location of key senior management decision centres: the proposition to require reporting on “the geographic location of the 25 or 50 most highly compensated employees of the MNE group” might need to be fine-tuned. Considering the case of a global MNE employing +200,000 employees, it is likely that the top 50-100 compensated employees would be located in one or two jurisdictions and hence not inform on key decision centres. Rather than requiring a nominal figure, the Master file should set a percentage beyond a size threshold, e.g. location of the top 5% or 10% of the highest compensated employees for companies employing above 10,000 workers.

*Shifting to a three-tier framework*

8. In regard to comments on the reporting mechanism, two options are suggested: (i) the direct local filing in each jurisdiction or (ii) the filing in the MNE headquarters’ jurisdiction and its subsequent sharing subject to treaty information exchange provisions, or (iii) some combination of the two.

9. We would favour the direct reporting of the Master file and template to every single jurisdiction in which the MNE operates – whether directly or through agents or commissionaires – so as to ensure a level playing field between all tax administrations. This would surely help tax administrations in developing countries, who do not necessarily enjoy the same level of access to bilateral tax information treaties as OECD-based administrations do.

10. In the absence of direct local filing, serious consideration should be given to requiring public disclosure of the Master file or of parts of its content, which in turn would shift the framework from a two-tier system (Master file, local file) to a three-tier one (public filing, master file, local file). Public disclosure would resolve a number of outstanding issues, including the above mentioned problem of access to information for developing countries. It would also help inform other stakeholders, who are affected by the activities and operations of MNEs, including workers, local communities, civil society groups and of course citizens at large. The content of the public filing could cover a selected number of reporting items which in our view would not threaten or violate business confidentiality rights. Items could include: (i) organisational structure, (ii) important drivers of business profit, (iii) supply chain for material products and services, (iv) service arrangements between members of the MNE group, (v) business restructuring transactions during the fiscal year, (vi) geographic distribution of the top 5/10% highest compensated employees, (vii) geographic distribution of employees and other supervised workers expressed in number of full-time employments, and (viii) MNE’s important financing arrangements with unrelated lenders.

11. Regarding reporting on tax and incomes, reporting should include (i) consolidated group accounts and (ii) tax due and tax paid in each country. The public filing should at least include reporting on a single ratio between tax charge and declared profits to give some indication on the potential presence of risk for transfer pricing manipulation and other aggressive tax planning schemes.

\(^1\) OECD report on “Dealing Effectively with the Challenges of Transfer Pricing”, 2012.

12. The main arguments by opponents of country-by-country reporting and its public disclosure relate to the protection of business confidentiality and to maintaining reasonable levels of compliance burden. The present version of chapter V of the TP Guidelines dwells at length on both concerns. In the current proposal of revision, the concerns are comparatively toned down but are still recognised as important challenges:

- Tax administrations are called upon to “ensure that there is no public disclosure of trade secrets, scientific secrets, or other confidential information” while information sharing between administrations “should be structured in a way that excludes delivery of information to countries where adequate provisions do not exist to protect” business confidentiality.

- On the subject of the compliance burden, the OECD text would require balancing “the usefulness of the data to tax administrations for risk assessment” with “any increased compliance burdens” on MNEs (#4), “particular information to be kept for transfer pricing audit purposes” with the “compliance burdens on taxpayers” (#14). MNEs, we are told, “should not be expected to incur disproportionately high costs and burdens in producing documentation” (#26). Materiality thresholds should apply to ensure “MNEs are not so overwhelmed with compliance demands” (#29), etc.

13. In our view these concerns are largely over-estimated. There is little or nothing in the current proposal for a template and tax filing that would suggest that trade secrets and other aspects of business confidentiality could be at threat. Reporting what one owes to the state does not amount to a trade secret. In a similar vein, the claims by business groups and MNEs that country-by-country reporting would create excessive additional burdens should not be taken at face value. To the contrary, trade union experience in engaging with MNEs points to the existence of powerful internal reporting systems and high levels of flexibility in the capacity of the MNEs to engage data retreatment at group-level. In any event, an evidence-based approach should prevail on this issue.

14. Moreover, any potential increase in compliance burdens for business should be balanced against the burden for tax administrations and set into the context of the broader benefits for society of enhanced transfer pricing reporting.
21st February 2014

Transfer Pricing Unit
Organisation for Economic Co-operation and Development

By email: transferpricing@oecd.org

Re: Consultation on Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Dear Sirs

Thank you for the opportunity to comment on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting issued by you on 30th January 2014 (“the OECD Document”).

Background and Public Consultation Time Limits

The OECD Document proposes to replace (in its entirety) Chapter V of the Transfer Pricing Guidelines issued by the organisation with the revised language in the OECD Document. It is a wholesale change of one of the cornerstones of the Transfer Pricing Guidelines since that Chapter was adopted in 1995 (nearly twenty years ago) and one of our first comments would be that a 23 day public consultation period for such a major proposal is inadequate to allow business and taxpayers time to digest the content and intentions of the proposal and respond back in a thoroughly thought out and considered manner. That we have attempted to do so reflects the real concerns we have about a number of the details in the OECD Document.

Objectives of the new Chapter V Requirements

The OECD Document states at Paragraph 5 that “the three objects 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.”
We strongly agree with these three objectives.

**Transfer Pricing Risk Assessment**

You have specifically asked for comments “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 have observed in the past that in practice tax administrations have been unable to resist the temptation to make alterations and add additional items to standard forms and questionnaires. Therefore while we can see some real benefit to having standard forms if they can truly remain ‘standard’, we are concerned that they may be used merely as the launching point for larger and more onerous individual requirements, and if so, this approach will not achieve its desired ends.

More importantly, with regard to the issue of sharing risk assessments with taxpayers, we are very strongly in favor of such an approach. The new guidelines make clear why the ability to “accurately evaluate, at the very outset of a possible audit, whether a taxpayer’s transfer pricing arrangements warrant in-depth review” is important “to tax administrations operating with limited resources”, the paper fails to identify that a clear understanding of the reasons why a taxpayer is being evaluated as a high risk audit subject is also of supreme benefit to the taxpayer, with equal (or even more) limited resources.

In our view, where a taxpayer is genuinely seeking to comply fully with the plethora of global transfer pricing regulations, and is making every effort to be compliant, it is crucial that it is able to understand what criteria the tax authority is using to assess its risk profile. This knowledge will enable the taxpayer to organize the information contained in its transfer pricing documentation and its response to tax authority enquiries in a manner which will properly and cost effectively demonstrate to the tax authority its compliance.

Much of the original content of both the Action Plan on Base Erosion and Profit Shifting (“the Action Plan”) and the White Paper on Transfer Pricing Documentation issued by the OECD on 30th July 2013 (“the White Paper”) is concerned with the issue of ‘transparency’. Unfortunately, the emphasis is almost always placed on the need for tax authorities to be able to pierce through the transfer pricing arrangements of the taxpayer, but we would suggest that it is equally important for the taxpayer to be able to pierce through the transfer pricing position of the tax authority, in order to be able to get to the heart of the tax authority’s concerns quickly and cost effectively.

If the aim of the documentation requirements truly is to “accurately evaluate, at the very outset of a possible audit, whether a taxpayer’s transfer pricing arrangements warrant in-depth review” then the need for transparency on both sides is clear. So, we strongly believe that it is appropriate for tax authorities to share their risk assessment with taxpayers.
**Taxpayer’s assessment of its compliance with the arm’s length principle**

Your comments in Section B.2 of the OECD Document imply that taxpayers must always be forced to attain a high level of compliance on tax issues. In fact, the vast majority of taxpayers strive, at considerable cost, to be fully compliant with the requirements of the tax regulations under which they operate. Nevertheless, we recognize that in the real world there are taxpayers, a minority perhaps but unfortunately all too many, who do not have the same level of integrity and honesty as the majority, and we further recognize that tax legislation must be directed in such a manner as to cater for this minority of taxpayers.

From that perspective, your comments in Section B.2 make sense. However, we would encourage the OECD and tax authorities to consider that not all taxpayers are guilty of not wishing to make “articulate solid, consistent and cogent transfer pricing positions” without having to be cajoled into doing so. We strongly support your closing comment in this section: “[i]t 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”.

**Transfer Pricing Audit**

You have asked for comments “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”.

This is an extremely important area, and marks a divergence from previously accepted limitations to a tax authority’s powers to obtain information from parties outside their jurisdiction and not operating within their economy. Of course, transfer pricing, by its very nature requires that parties that may be operating on the edge of a country’s borders, and which are engaged in transactions with associated enterprises within those borders, should be required to disclose information relevant to determining the arm’s length nature of those transactions. It is clear that tax authorities must have the ability to obtain documents and explanations relevant to those transactions from both parties.

What is not clear is how far a tax authority should be able, under its own authority and direction, to reach out beyond those parties that are directly involved in the transaction. Where an abusive structure has been put in place to deliberately obtain a tax advantage vis-à-vis the tested transaction, then there is a clear case for the tax authority to be able to obtain information from any party to that structure. However, where a dispute arises between a taxpayer and a tax authority over a normal commercial transaction, where the nature of the dispute is based on genuine differences of opinion on what is or is not an Arm’s Length Price (“ALP”), providing tax authorities with the power to demand ever growing list of data from the widest level of associated enterprises in the taxpayers worldwide group would be a disproportionate response.
It seems to us that the only fair and equitable way to ‘square this circle’, is for the onus of proof for the need to draw on evidence from the wider group outside the tax authority’s jurisdiction, should fall with the tax authority. It further appears to us that the only way to implement this in a manner which would reasonably curtail the tax authority’s resort to demanding excessive documentation in unmerited cases would be to ensure that the mechanism used to obtain this data is through information sharing, such as exchange of information mechanisms between tax authorities. The taxpayer outside the borders of the requesting tax authority would only need to provide the data if their own tax authority is involved, and supports the request.

**A two-tiered approach to transfer pricing documentation**

The recommendation for a two-tiered approach to transfer pricing documentation has significant merit, and in general we support the approach.

**Master File**

In Section C.1 you state: “The master file should contain common standardised information relevant for all MNE group members. Its 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. Taxpayers 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.”

We entirely agree with this opening position. We see significant benefits to MNEs if they are able to provide this high level of documentation and be reasonably assured that in the majority of cases the completion of a reasonable risk assessment, based on a competently prepared master file, would lead to no further enquiries by local tax authorities. Unfortunately, we are extremely skeptical that this element of the OECD Document would translate into reality. Indeed, as you will see from our further comments below, even the OECD itself appears to immediately contradict the suggested way in which a master file would be used.

You specifically ask for comments “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 believe that a flexible approach, on a taxpayer-by-taxpayer basis would make most sense. Clearly, for many taxpayers, preparing the master file on an entity wide basis would make most sense, and would be the easiest way to populate the data for the file based on the way in which the MNE’s internal accounting, HR and other systems are organized. However, it is equally clear, that in other cases where an MNE’s business is very much operated on a business-line basis, it would make far more sense and have much more practical use to tax authorities if the master file is organized on that basis.

Our own business is very much divisionalized, but in practice, our Divisions frequently work together and engage in cross-divisional transactions, and are also supported by ‘corporate’ entities which also supply services which might impact a division’s transfer pricing structure. As a result, we would probably choose to prepare a master file on an entity wide basis, in order to minimize duplication of effort in preparing multiple overlapping files on a line of business basis. However, we see no harm in allowing taxpayers to make this decision based on what is best for their particular structure and organization.

Clearly, if taxpayers determined to use a line of business approach, and a tax authority had reasons to believe that only viewing the master file for one particular line of business would not provide them with all the information relevant to the income and activities of the business in their jurisdiction, they would be entitled to request the master files for other elements of the MNE’s business. The issue would be how to stop an overzealous tax authority from merely routinely requesting all master files, whether or not there was a true need for them? Perhaps this would be one of the issues that would be covered by a need to obtain the data through information sharing, such as exchange of information mechanisms between tax authorities, as discussed above.

In Paragraph 19 you suggest that “[t]he information required in the master file provides a “blueprint” of the MNE group and contains relevant information that can be grouped in five categories: a) the MNE group’s organisational structure; b) a description of the MNE’s business or businesses; c) the MNE’s intangibles; d) the MNE’s intercompany financial activities; and (e) the MNE’s financial and tax positions.” We agree that this is a reasonable range of items for a master file to contain.

In Paragraph 20 you expand on this by indicating “[t]he section of the master file on financial and tax positions includes country-by-country reporting of certain information relating to the global allocation of profits, the taxes paid, and certain indicators of the location of economic activity (tangible assets, number of employees and total employee expense) among countries in which the MNE group operates. It also requires reporting of the capital and accumulated earnings as well as aggregate amounts of certain categories of payments and receipts between associated enterprises.” Again, in general, we do not believe that the creation of a Country-by-Country Report (“CbC Report”) would be an unreasonable requirement, indeed, it makes sense as a method of providing enough local data to enable a tax authority to make a reasonable risk assessment based on the taxpayer’s activities in their country. Issues will arise on what content should be included in the CbC Report, but the general approach is, we believe, sound.
You go on to ask for comments on very specific parts of the CbC Report, and we supply our answers in the following paragraphs after reproducing your questions:

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

**URS Response:** The CbC Reports should not be part of the master file, and should be completely separate documents. Indeed, each separate country report should be separate from the other country reports. For the purposes of audit risk assessment, the master file should be supplied to the relevant tax authority along with the individual country report for that authority’s jurisdiction. We can see no compelling reason why a compliant taxpayer should be required to furnish a particular tax authority with data on the taxpayer’s worldwide operations.

**OECD Question:** “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?”

**URS Response:** As with the ‘line of business vs entity wide’ question discussed above, we believe that this is an area best left flexible and at the discretion of the taxpayer (with safeguards discussed below for the tax authority). No two taxpayers prepare their consolidated accounting records in the same manner. A small taxpayer, with limited international operations, and where those operations are heavily supported from the parent company, might well have all the accounting information for all entities on a centralized accounting system already consolidated into its own local GAAP.

In contrast, a large MNE with a vast network of international operations, perhaps acquired over a number of years through multiple acquisitions of smaller sub-groups, might find it much easier to provide the data for CbC Report from local accounting records based on local country GAAP.

As the central point of transfer pricing regulations is to determine whether an ALP has been set for a controlled transaction, the currency in which the transaction is reviewed, and in most cases the GAAP used, should not have a material impact on the ALP. Clearly, where major differences exist in GAAP rules, for example on revenue recognition or the valuation of intangibles, the situation might require more examination and we would expect tax authorities in transactions where such distinctions were material to a transfer pricing audit to request that the CbC Report be prepared on a ‘bottom up basis’. While addressing such individual requests adds to the compliance burden of dealing with transfer pricing, it is difficult to see how such exceptions can be avoided until the universal adoption of International Financial Reporting Standards.
In all cases, even where the GAAP issues addressed above are not in point, it would always be possible for a tax authority to request locally generated data if they genuinely felt that a top down approach used for a CbC Report was not providing them with data that they could understand or rely on in the context of their own risk review – although it is to be hoped that if tax authorities accept that flexibility for the taxpayer is desirable, they would not then abuse their powers to routinely and unnecessarily require restated CbC Report data.

OECD Question: “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?”

URS Response: We believe that an entity by entity basis would be most beneficial for the majority of taxpayers. We think it would be potentially more difficult to prepare a CbC Report which includes international transactions with associated entities, but which eliminates such transactions where the associated companies are within the same country, and the risk of innocent error in the unusual consolidation and elimination process would be that much larger.

However, we would hope that non-material entities could be excluded from the CbC Report. The level of materiality would need to be clearly communicated, but there would be no benefit to having dozens of lines on a CbC Report dealing with entities that had few employees, low revenue, zero or low levels of associated entity transactions etc. (See below for our further comments on the ‘materiality’ issue).

OECD Question: “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?”

URS Response: Where a country’s tax system operates on a consolidated basis, there would be no option but to disclose one aggregate number for corporate income tax paid per country. Given that this would be the de facto position for many countries, there does not appear to be a technical reason why an aggregate number would not be suitable for all jurisdictions, including those that do not consolidate for tax purposes.
In addition, the corporation tax system of many countries allow for effective ‘tax consolidation’ through forms of group loss transfer, or capital profit contributions or other means aimed at achieving neutrality of taxation between an enterprise conducting its business operations through multiple companies and one using just a single entity. As a result, there appears to be little benefit in detailing tax payments on an entity by entity basis, as the amount of tax may quite legitimately not be equated with the profits it has realized.

It is difficult to see how the amount of Withholding Tax (“WHT”) suffered would be useful in gauging the transfer pricing risk profile of an enterprise except in the most limited of circumstances. Why then include the reporting of WHT as a standard requirement on a CbC Report if it would only be relevant in limited cases? While the compliance cost of reporting the WHT might not be substantial (most Tax Departments would be collecting that data in any case), the inclusion of that data on a form when there is no strong necessity to do so would merely add compliance costs for no good reason and run the risk of causing delay in compiling the CbC Reports simply because obtaining WHT data might take additional time and effort.

OECD Question: “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?”

URS Response: It is difficult to see how a tax authority could complete a transfer pricing risk assessment of a taxpayer without having some idea of the aggregate cross-border payments between associated enterprises. We believe that aggregate numbers should suffice (rather than individual transaction detail which would be more appropriate for the local file). We would see aggregate numbers for each type of transaction (service fees, transfer of goods, transfer of intangibles, royalties, financial transactions, etc) as the appropriate level of detail. A simple aggregate of all transactions would not provide sufficient information for the tax authority to form a judgment on the transfer pricing risk profile, but numbers in any more detail (and certainly at the transaction-by-transaction level) would defeat the purposes of the master file/local file approach.

OECD Question: “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?”

For the master file we do not believe that any form of detailed reporting of the nature of the business carried out in a jurisdiction would be of additional benefit to a simple industry type code for the broad type of business activity being carried out. There may, however, be features of specialist sectors that would need to be established in more detail, but we have no additional insight to add on what those might be.
In terms of other economic activity which should be reported, as indicated above, we believe it is not unreasonable for reports to list the types of controlled transactions that have taken place during the period. However, we do not believe that the master file should contain detailed analysis of each country’s economic activities as to do so would eliminate the advantage and purpose of the master file/local file approach. As indicated in your own Paragraph 21 “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.”

Annex I

Looking at Annex I to Chapter V, which contains a list of the documents and information which should be contained in the master file, we would comments as follows:

Charts

The suggestion that charts should be created for supply chains for material products and services and for important service arrangements presents more difficulties than might be imagined. Such charts would only need to be created for transfer pricing purposes and so would be an additional burden on business resulting purely from transfer pricing compliance requirements. The amount of time and effort that has to be invested in order to create and maintain such charts is far greater than is often assumed. In the services sector within which URS operates, even a relatively small MNE can be in a constant state of change in relation to its structure and transaction flows. Creating a readily understandable chart of supply chains for material products and services and important service arrangements is fraught with difficulty:

- Legal entities are incorporated, registered, liquidated and deregistered for a multitude of business reasons and the ‘chart’ of a MNE is in a constant state of flux;
- A minor number of changes to the legal entities or to their locations within the group organization structure can be onerous and difficult to physically adjust for in a ‘chart’ format;
- Day-to-day management decisions can change the nature of supply chains and service arrangements without the tax function being made aware of those changes and keeping such charts up to date requires a disproportionate amount of time and effort by the tax function and heightens the danger of innocent error creeping in during the preparation of such illustrations;
- The question as to what is a material project and service is open to great interpretation – is the service material to the Corporation, or to the individual local subsidiary company? What level of materiality should be charted?
- A chart prepared in good faith with the utmost attention to detail can be rendered obsolete by changes made many times in the course of a year.
It is difficult enough to maintain an up to date and accurate organizational group chart, the ability to provide reliable, easy to understand charts on supply chains and service arrangements would be extraordinarily difficult and would put the NME at risk of appearing to misinform tax authorities if it should subsequently transpire that the chart was in error.

**Functional Analysis**

Annex I suggests the master file should contain 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”. Why is it felt appropriate that the master file should contain such detailed analysis at an “individual entity” level? In our view, the master file should contain a more general functional analysis describing the contributions to value creation by individual entities within the group, but not going down to the level of detail implied by the Annex, which would, we submit, be more appropriate to the local file.

**Employees**

The Annex suggests the need to supply 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)”. We take this to mean within the corporation as a whole and not within the business line of each country. Nevertheless, even at this level this could be an exceedingly burdensome request that could be very difficult to comply with.

For very obvious reasons, the details of the remuneration package of an individual (especially senior employees) are held very confidentially by the HR and Payroll functions of most enterprises. Obtaining a list would be difficult for most reasonably sized MNEs, especially those for whom HR records are maintained on a line of business basis.

Our own HR function is separated out both divisionally and geographically. Obtaining a list of the 25 most highly compensated employees in each business line would take considerable effort each year. If the definition of ‘remuneration’ includes all benefits, including stock compensation, bonuses, company cars, telephones, etc, the process would be near impossible without investing significant more resources into the process just to comply with the documentation requirements of the master file.
It would not be sufficient merely to assume that the list would arise from the head office location of each business line. While that might work for the top five or so employees, any reasonably sized MNE with significant international operations might have highly paid individuals working in a great number of locations, any one of which might fall within the top ‘25’ in terms of emoluments. All (and there might be several hundred in each business unit) would have to be considered, their remuneration data gathered, currency rates taking into account, before the top 25 could be categorically identified. With 50,000+ employees in four divisions and our Corporate Head Office functions, the identifying of the top 125 people from these five ‘business lines’ would be a very onerous task.

Of course, during the course of each year staff numbers and the mix of staff change; people are promoted or re-assigned to different posts; old projects close and new ones are commenced with corresponding personnel changes; so this would truly be an extremely burdensome and costly process to have to follow for most reasonably sized MNEs on an annual basis.

The question has to be asked, why does this information play any role in a transfer pricing risk assessment? While we can see that knowing something about the caliber and authority of some of the employees might help in assessing the risk profile, an arbitrary list based on compensation appears wholly unrelated to the needs of a risk assessment. Many of our highest paid professionals might well not be within our management structure – a fully qualified nuclear engineer might be highly paid, but would have little bearing on the intercompany pricing of connected party transactions. While knowing that such an engineer is engaged by the enterprise might suggest something about the level of activity of the entity, we suggest that an enterprise with nuclear engineers is likely already to have been identified by a tax authority as having a material function in any event without recourse to the salary level of individual employees.

Put simply, it appears to us that this is a very crude measurement that would add little to aid in the risk assessment process for the vast majority of entities in specific jurisdictions. It appears to be an entirely inappropriate item of data for the purposes of a transfer pricing master file. **We are strongly against this requirement.**

Other Items

The other items listed at Annex I, including those on intangibles and financing appear reasonable, understandable and acceptable from the view point of a taxpayer.

**Local File and Annex II**

We have no difficulty with or observations on any of the items listed in Annex II to Chapter 4 and intended for inclusion in the local file.
Compliance Issues

Contemporaneous documentation

We have no difficulty with or observations on the contents of Section D1 of the OECD Document with regard to contemporaneous documentation.

Time Frame

In an ideal world it would be possible to amass all of the information necessary for the master and local files by the time that the local tax return is due. However, in practice this is not always possible. A number of tax authorities have a very short timeframe for the submission of tax returns and the growing complexity of the items required for robust transfer pricing documentation, including functional analyses, collection of information on a transaction-by-transaction basis, details of restructuring transactions, acquisitions and divestitures etc mean that increasingly local staff are neither qualified nor physically able to complete the documentation alongside their normal duties. In some cases, for reasons of confidentiality or sensitivity, they may not be privy to the information, for example, on restructuring or acquisitions.

While conducting this work centrally has its own challenges, it is becoming more common for MNEs to do so, as this is the only way to ensure, amongst other things:

- A systematic and comprehensive approach in every jurisdiction;
- The application of specialist expertise to ensure that the documentation meets the rigorous standards required;
- The cost effective preparation of comparables by knowledgeable advisors or in-house specialists;
- All transactions are correctly captured and that both ends of a transaction are recorded consistently and accurately by both parties;
- That corporate arm’s length pricing policies are applied correctly and uniformly throughout the global business of the enterprise.

While there can be time savings by conducting this work centrally, there can also be hold ups and delays when using such an approach. The nature of centralizing and coordinating the creation of transfer pricing documentation means that a hold up created by a missing piece of data from just one jurisdiction can delay the next stage of the documentation process for all jurisdictions.

In addition, if an enterprise is to complete a local comparable, it is necessary to have databases that are up to date with statutory financial statements, which may not be submitted and catalogued on the local company registrars’ databases until after the typical tax filing deadlines.
While MNEs strive to create comprehensive, contemporaneous documentation by the due date for the submission of tax returns, a more reasonable and less burdensome requirement would be for all transfer pricing documents to be available and in place within twelve months of the end of the accounting period.

For this reason, we very much support the comment in Paragraph 28 that “Accordingly, 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.” While we recognize that the quoted text is carved out as an exception to the general requirement to have all information by the due date for filing the tax return, and is aimed at very specific elements of the data required by Annex III, we would suggest that with the great increase in the data now being considered necessary for transfer pricing documentation process, it would not be unreasonable for tax authorities to allow a maximum of one year from the end of the accounting period for the final creation of all transfer pricing documentation.

Materiality

We strongly support the wording in Paragraph 29 on the issue of Materiality. You have asked specifically for comments on “whether any more specific guideline on materiality could be provided and what form such materiality standards could take.” We believe it is imperative that the OECD address this issue further and that it does include more specific guidelines on materiality in the final guidelines. This is an area fraught with pitfalls, and the lack of certainty over what may or may not be regarded by a specific tax authority as a ‘material’ matter creates a significant issue and difficulty for taxpayers.

Paragraph 30 regarding the benefit of restricting the amount of effort and information that small and medium-sized enterprises should have to provide for transfer pricing purposes appears to be effectively contradicted by the final sentence in that Paragraph suggesting that the full impact of CbC reporting, as detailed in the template contained within Annex III, should apply to those enterprises.

Retention of documents

We have no difficulty with or observations on the contents of Section D4 of the OECD Document with regard to retention of documents so long as tax authorities do not incorrectly construe the wording of Paragraph 31 as an indication that documents forming part of a transfer pricing master or local files should be treated as governed by a different statute of limitations from that applying to other documents which a taxpayer is required to retain for tax purposes.
Frequency of documentation updates

You have asked for comments “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 believe that the comments in Paragraph 34 are extremely helpful and are in line with the reasonable custom and practice that has developed around comparable searches. We do not believe that other than in the most exceptional and material of cases such a ‘three year’ approach would impact the consistent application of the most appropriate transfer pricing method.

Language

We very strongly support the wording in Paragraph 35, which is both practical and reasonable. You have specifically asked for comments “regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.” We believe the approach you have suggested in Paragraph 35 to be the most appropriate approach.

In many cases, it has been our experience that numerous volumes of transfer pricing documents are prepared and then stored, but never actually called for by any tax authority. To annually translate all of those documents into the local language (and we operate in roughly 40 jurisdictions), only to have them never requested, would be a needless waste of taxpayer and natural resources. A reasonable approach is to allow enterprises to prepare the documents in whichever language is most sensible and suitable for the enterprise and then, as you suggest, for the tax authority to be entitled to “make specific requests for translation and provide sufficient time to make such translation as comfortable a burden as possible [our emphasis]”. The key point here is that enterprises should not be penalized, nor held to have failed to comply with their contemporaneous transfer pricing obligations, simply because it takes a small amount of additional time for the final documents to be translated (at the taxpayers own cost) when requested by the tax authority.

Penalties

We have no difficulty with or observations on the contents of Section D7 of the OECD Document with regard to penalties.

Confidentiality

We have no difficulty with or observations on the contents of Section D8 of the OECD Document with regard to confidentiality. You have asked for specific comments with regard “to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.” Unfortunately, we have no additional comments or thoughts to add on that score. However, we would note in passing that in general we have not experienced any issues around confidentiality of sensitive information when dealing with tax authorities.
Other issues

The issue of requiring taxpayers to make use of local rather than regional comparables in transfer pricing documentation is not a new area of contention. Tax authorities have access to local comparables due to their unique role within their local economy, taxpayers are not so fortunate. It is already expensive (exceedingly so) to purchase multiple databases for regional comparables rather than using the same ‘home location’ database on a global basis. To have to pay for access to local databases on a country by country basis, possibly just to document one or two controlled transactions is an unnecessary and frivolous additional burden to place on taxpayers.

Frequently even if a taxpayer can locate such a database, it may be poorly constructed, not comprehensive (so that there is no guarantee that the use of the few samples that the database might throw up will, in fact, provide robust evidence of arm’s length pricing matrices). Even where the database is reasonably comprehensive in its coverage of local enterprises, that still does not mean that it will have sources that are sufficiently comparable to the transactions and business activities which the local subsidiaries of a multinational organization might be conducting in that location. We build some of the largest dams, nuclear power stations, bridges, tunnels and other infrastructure in the world, how is a local subsidiary incorporated by us in order to conduct such a project going to find local financials that are truly comparable in a developing country with few entities capable of such endeavours?

In our experience, the differences created by using regional rather than local databases for the vast majority of transactions is limited and immaterial, and certainly does not merit making this a formal requirement for general transfer pricing purposes. Perhaps, unique factors in a particular industry for a particular country might make local databases preferable, but this should be the exception, which a tax authority should be entitled to require of a particular taxpayer or sector, rather than the general requirement for all taxpayers.

Where regional databases are robust and there are no clear reasons when the local market should be materially different from the results obtained from such databases, the insistence on trying to utilize local databases should be dropped as unhelpful and unnecessarily burdensome.

Implementation

We have no difficulty with or observations on the contents of Section E of the OECD Document with regard to implementation. You have asked for specific comments “regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations” and have suggested that “[p]ossibilities 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 our view the master and local files should be available to the tax authority by direct submission of those documents by the MNE group members subject to tax in the jurisdiction. The CbC file for that country should also be available in the same manner. Information not directly connected to the transaction being undertaken in the country and CbC files for other jurisdictions should only be available to the local tax authority through a formal request under treaty information exchange procedures.

Annex III to Chapter 4 – A Model Template of Country-by-Country Reporting

We have no difficulty with or observations on the contents of the model template contained in Annex III to Chapter 4 so long as the information which is to be entered into that template will be taken from the book entries (consolidated or local depending on the decision on ‘top-down vs bottom-up’ compliance discussed above) and do not require significant adjustment. Also, it will be important that as many global tax authorities as possible are prepared to agree a consistent and standard format for the CbC template.

As indicated above, we do not believe that WHT information is particularly relevant to the transfer pricing process, and should be removed from the required list. We also anticipate that a good case can be made for limiting further the range of items requested, but we have not had time during the short consultation process to address the impact of each individually request item. We expect, and have already seen, other parties will have concerns about the content, we therefore reserve the right to modify our view as it becomes clearer the exact nature of the data being requested. We just wanted to ensure that our cautious acceptance of the model is not mistakenly seen as a ringing endorsement of the template on behalf of the business community.

The biggest issue for us in relation to the template would be a situation where countries use its introduction as a starting point to ask for more and more data that they deem relevant to their own risk assessment process. We are greatly concerned that a ratcheting impact, where countries add several additional information requests to the template, then other countries decide to incorporate that additional information, plus some more of their own requests, until in the end the template becomes a major, burdensome and complicated additional filing requirement.

Important business activity code(s)

With respect to the important business activity code(s) attached as part of the instructions for the completion of Annex III, it is clear that the codes are not so much ‘business’ codes, but rather are ‘transfer pricing activity’ codes. It surprises us that the codes have very limited options, and that many industry sectors (eg service sector, utility sector, transportation sector, entertainment sector, IT sector, etc, etc) would all be opting for ‘Code J – other’ as the option for pretty much all of their active subsidiaries. Perhaps this is just what the OECD expect and wish to see, but when the predicted selection for the vast majority of entries in a list will be for the ‘Other’ category, it makes one wonder whether the code is really serving any significant purpose?
In addition, if a holding company carries out some financing operations for its subsidiaries, or some administrative and support services, would it be a ‘Holding Company’ or a ‘Finance’ company or an ‘Administrative and Support Service’? What if it were to provide financing and administrative support in equal measure? If a company providing commercial services to the wider business community, also provides some R&D for the group, or financial services to the group, which category would it fall in – presumably ‘Other’ as this is still its principal role? Is this what the code is hoped to reveal? Indeed, for what purpose is the code intended? Knowing that might help taxpayers to complete the template more accurately.

We understand that in a significant number of cases, the choice between these categories would be obvious due to the scope and scale of the activities, however we can also foresee many cases where it won’t be clear to the taxpayer which category an entity might fall within – we therefore believe additional guidance is needed on how to complete this code selection.

**Conclusion**

We appreciate having been granted the opportunity to comment on this next stage of the transfer pricing documentation process and look forward to hearing the outcome of your consultation process.

Sincerely,

**URS Corporation**

Joy L Harris
VP & Head of Tax

Christopher J J Lynch
International Tax Director
February 19, 2014

VIA EMAIL

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Re: USCIB Comments on the OECD Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting

Dear Mr. Saint-Amans,

The United States Council for International Business is pleased to provide comments on the OECD’s Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting. We appreciate that the OECD is seeking early input on these important topics. USCIB supports the BIAC consensus comments. We will not repeat those comments here, but rather would like to emphasize some key points that we believe are critical to successful implementation of improved transfer pricing documentation and country-by-country reporting.

Taxpayer burden must be reduced. Multinational enterprises already provide an enormous amount of information to tax authorities to explain their operations and, in particular, justify their transfer prices. The goal of the TP documentation revision is to improve the quality of the information while at the same time reducing taxpayer burden. It seems that the burden reduction aspects have been given short shrift. As USCIB pointed out in our comments on the OECD’s Draft Handbook on Risk Assessment:

It is critical that the risk assessment begin with a good understanding of the big picture aspects of the business, including the taxpayer’s attitude towards compliance, disclosure, and cooperation, before proceeding to a narrower assessment of transfer pricing risk.

USCIB believes that up-front dialogue is essential to achieve this understanding. The draft transfer pricing documentation rules and country-by-country report rely on the production of written materials. This is unlikely to produce useful information because the sheer volume of information will make it difficult for tax authorities to separate the important from the unimportant. USCIB believes that at least some of this reliance on documentation stems from distrust of taxpayers, that governments feel they need to spell out everything they might need in order to ensure that a document will be available if needed. There must, however, be some recognition that taxpayer’s must have discretion to identify what is important and what is not. Without such discretion, taxpayers will waste significant resources producing documentation that is not useful to governments.

The lack of burden reduction may be, least in part, due to the nature of the OECD guidelines. As "soft law" the guidelines are in large part aspirational. The potential benefit to taxpayers of these guidelines will only be achieved if countries use the information provided in the master file, local country file and
country-by-country report in lieu of requiring other documentation (recognizing that additional information can be requested during an audit). If burden reduction is not achieved these rules will be a substantial detriment to taxpayers because they will represent an explosion of required information. Thus, the OECD must go beyond aspirations and must create some incentives for countries to adopt the guidelines in substitution for local country transfer pricing documentation rules. One possible method might be to deny access to the master file and country-by-country file if the country requires additional transfer pricing documentation prior to the determination that a more detailed audit is necessary. Another possibility would be to adopt the transfer pricing documentation as part of a multi-lateral agreement that limits the collection of other information, provides confidentiality protections and is peer reviewed. If countries do not sign onto and comply with the agreement, then they cannot get access to the master file and country-by-country report.

Excess information is detrimental to both taxpayer and governments. Nuggets of useful information can be buried in piles of irrelevant material. So, governments as well as taxpayers have an interest in limiting the amount of information provided. Business is concerned that much effort will be required to produce extensive documentation that will infrequently be reviewed.

Another element to burden reduction is reducing the burden on medium and low-risk taxpayers. The OECD should work to identify these taxpayers in some standardized way and their burden should be reduced by, for example, requiring less frequent updates. We would be willing to work with the OECD to define medium and low-risk taxpayers.

Similarly, there should be ways to limit the burden for large MNE groups by eliminating or relaxing the need for TPD for smaller business lines or smaller members of the MNE group; or have lesser requirements for lower-risk transactions.

**Flexibility is critical to successful implementation of these proposals.** No one system will work for all businesses. Throughout the Discussion Draft the OECD poses questions concerning whether one option is preferable to another. In USCIB’s view, in these cases both or multiple options may be reasonable and the choice among reasonable options ought to be left to the taxpayer. As long as taxpayers are consistent in their approach, then the information provided should permit tax authorities to perform a high-level risk assessment to help inform allocation of audit resources. If the guidance does not permit flexibility, then burden will be significantly increased. If the OECD is concerned about burden minimization, then in cases where there are choices to be made, the OECD should leave the choice to the taxpayer.

**Confidentiality must be preserved.** These documents will contain extremely sensitive information that tax authorities must protect from disclosure. Protection requires, at a minimum, that the master file and the country-by-country report be maintained by the home country of the ultimate parent and be available only under exchange of information provisions of tax treaties (or other exchange of information provisions in other agreements). There also need to be consequences for jurisdictions that do not respect confidentiality. Relevance is an important part of confidentiality. The more widely dispersed information is, the more likely is that the information will be disclosed, whether intentionally or unintentionally. It is therefore critical that there be a requirement of relevance before information is made available to any particular country.
Transition rules that recognize the scope of the purposed changes are essential. Taxpayers cannot be expected immediately to be able to comply with the requirements of a new system. A new system may require new hardware, software, procedures and people, as well as significant changes to data collection and analysis. This requires budgeting and hiring. This process takes time. IT and personnel budgets are done in advance and planning must occur. These time constraints must be accommodated. One possibility would be for an extended phase-in of the requirements starting with the country-by-country report, moving to the local country requirements and finally to the master file. This would also allow “debugging” as implementation moves forward and also for the OECD to assess whether more limited information can successfully be used for risk assessment purposes.

Tax administrations should recognize taxpayer initiated transfer pricing adjustments. Taxpayers need to be able to "keep their TP books open" while they prepare TP documentation. Taxpayers will routinely need to adjust their transfer prices after fiscal year-end based on the outcome of their TP studies. Tax administrations on both sides of the transaction should be required to accept these adjustments (both upward and downward) in order to achieve arm’s length pricing consistent with these studies.

Dispute resolution must be improved. Business is very concerned that the BEPS changes, including increasing the information available to tax authorities, will lead to increased transfer pricing disputes. Dispute resolution must be improved to deal with this increase, including especially a greater emphasis on mandatory, binding, “baseball-style” arbitration.

Finally, USCIB understands the OECD’s need to move quickly on these documents. We are putting together additional comments on the annexes and will forward those as soon as possible, hopefully within the next week.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business
March 3, 2014

VIA EMAIL

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Re: USCIB Comments on the Annexes of the OECD Discussion Draft on Transfer Pricing
Documentation and Country-by Country Reporting

Dear Mr. Saint-Amans,

This letter supplements our earlier letter which provided general comments on taxpayer burden reduction, flexibility, confidentiality, transition rules, recognition of transfer pricing adjustments, and dispute resolution. We stand by those earlier comments and will not repeat them here. We have additional comments on the annexes.

General comments on the annexes

USCIB has some general comments on the annexes. First, as we understand the concept, the master file should contain only information that is relevant to the transfer pricing of the entire MNE group. So we believe that much of the information that is contained in the master file would more properly be in a local country file or files because it relates to some, but not all of the group members. Companies should have substantial discretion to determine whether information is properly in the master file or the local file based on its relevance to either the group as a whole or only to individual entities within the group. Second, to the extent that definitions are important, definitions need to be clear. For example, what is the standard for determining whether an entity should be included with the MNE group? Business needs consistency on these definitions or they will not be able to provide the required information. Third, many of the items are not readily available and will take significant effort to prepare, even such seemingly simply items as total revenues. This is more of an issue if simplifying changes, as suggested below, are not made to the country-by-country report.

Master file comments

- The chart indicating the legal ownership structure and geographical location of operating entities should largely be duplicated by the country-by-country report and is therefore unnecessary.
• Chart showing supply chain for material products and services should be provided in the local file to the countries that participate in or are affected by the supply chain.

• A description of important business restructuring transactions occurring during the fiscal year. This information is required to be provided in the local file to the extent that a company is affected by the restructuring and is not otherwise relevant. There is a separate question whether acquisitions and divestures ought to be reported at all since these are third-party transactions and should not raise transfer pricing issues.

• The title and principal office of the most highly compensated individuals raises personal security issues. This information is of questionable relevance to transfer pricing and ought to be deleted.

• 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 is some of the most sensitive commercial information in any corporate structure. Requiring this information for the entire corporate group to be available to any country in which a company does business no matter how minor those investments, may very well discourage trade and investment and therefore ought to be excluded from the master file. To the extent the information is relevant to a jurisdiction it ought to be included in the local file.

• A list of important related party agreements related to intangibles, cost contribution arrangements, principal research service agreements and license agreements. Countries have been insistent that even regional comparables are not comparable, so it is hard to see how either the taxpayer or a country could argue that information on the worldwide structure is relevant to every entity. If, for example, a company licenses an intangible to an unrelated party in Country X, which is not in the same region as Country Y, would Country Y consider that transaction relevant in determining the arm's length royalty between related parties of the same intangible? If not, the risk of the information being disclosed and harming the company's ability to negotiate transactions is significant and the information ought not to be disclosed. Further some intangibles may not raise any transfer pricing issues. If, for example, an associated enterprise locally creates and exploits intangibles, there may be no transfer pricing issues because there are no cross border transactions relating to the intangible.

• A description of the group's transfer pricing policies relating to R&D and intangibles. Transfer pricing policies will differ depending on the nature of the intangible. Certain intangibles will be relevant to some jurisdictions, but not others. Information that is relevant to a jurisdiction ought to be available in the local file, but irrelevant information ought not to be made available whether through the master file or otherwise.

• A description of the MNE's general transfer pricing policies related to financing arrangements between associated enterprises. Again, if a policy relates to the transfer pricing within a jurisdiction, then that information ought to be available in the local file, if not, it ought not to be made available.

• 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.
This is obviously relevant to the entities and countries involved, but seems irrelevant to others and therefore ought to be excluded from the master file.

- A list and brief description of the MNE group's applicable unilateral and bilateral/multilateral APAs and advance rulings. These items will be known to and in the possession of all the parties involved. A list and brief description of the rulings seems likely to generate a request from the local countries that are not involved in the agreement/ruling to see the ruling. The rulings should not be made available to other jurisdictions because the details of the particular agreement could represent concessions that will not necessarily be made in other circumstances. Further, the IRS took a long look at publication of redacted APAs and ultimately concluded publication would kill the program. The OECD needs to be very careful concerning this information or it may reduce the utility of APAs and rulings.

**Country-by-Country Template**

The purpose of the country-by-country report is high-level risk assessment. In other words, are there companies with lots of income that are paying very little tax or companies with lots of activity and very little income. Thus, the key elements are revenues, pre-tax profits, taxes, and activities. Everything else is surplus and ought to be eliminated from the report.

- It seems the information in the first three columns could be simplified down to place of tax residence. It may be that the OECD required all three columns to identify both entities with no tax residence or entities with dual residence. It would seem to be much easier to simply ask for this information, rather than making every entity provide both place of organization and place of effective management, which may not always be straightforward.
- It should be made clearer that unaudited and unreconciled numbers are acceptable for this purpose. If reconciliation is required, then companies will likely have to manually collate information that is not readily available from the primary accounting system used by the parent entity.
- Income tax paid. As explained in our earlier comments, companies should be able to use cash taxes or financial statement taxes, at the company's option. In addition, however, it is not clear why taxes paid to the country of organization are the default category. As we in the US are constantly reminded, most jurisdictions do not use place of organization to determine tax residence. So, place of organization is not necessarily the better default criteria. It seems that the place of tax residence ought to be the default criteria. It is also not clear why it is necessary to identify taxes paid to other countries. The relevant information ought to the total income tax number regardless of where taxes are paid.
- Total withholding taxes paid is not information that companies necessarily keep track of as it is not generally relevant whether a tax is withholding tax. It is also what relevant for high-level risk assessment purposes. Determining this information may require substantial additional work with no risk assessment benefit.
- Total employee compensation ought to be deleted. USCIB is very concerned that, despite the OECD's continued support for the arm's length standard, that some countries will
inappropriately use this information to apply a form of global formulary apportionment. In our view, the only way to prevent this is to eliminate this number for the country-by-country report. Employee compensation is also not relevant for high-level risk assessment, as long as the report contains, revenues, pre-tax profit and total taxes there is no need for employment expenses. A tax authority looking at this could see whether there is significant revenue, pre-tax profit and taxes (or low-taxes) and that is all they need to know for high-level risk assessment. Further the number of employees will give a significant indication of the level of activity within a jurisdiction.

- Everything to the right of total employee expenses ought to be eliminated. The book value of tangible assets is not particularly relevant for high-level risk assessment determination since the book value of assets will not necessarily reflect the return to those assets. Also, as discussed above, in order to avoid the improper use of the country-by-country report, the book value of tangible property should be deleted. The other categories should all be deleted because they are not relevant to high-level risk assessment and are reflected in more detail in the local country report. Duplicative reporting is burdensome and providing this information in the country-by-country report may result in countries being buried with information that is irrelevant detail to countries that are not affected by the transaction.

USCIB understands the urgency of this project and is willing to assist the OECD in meeting with interested members if that is appropriate.

Sincerely,

William J. Sample  
Chair, Taxation Committee  
United States Council for International Business

cc: Joseph Andrus, Head of Transfer Pricing Unit, CTPA, OECD  
Marlies de Ruiter, Head of the Tax Treaty, Transfer Pricing and Financial Transactions Division, CTPA, OECD  
Robert Stack, Deputy Assistant Secretary (International Tax Affairs), U.S. Treasury  
Michael McDonald, Financial Economist, U.S. Treasury
The Comments on the Discussion Draft on Transfer Pricing Documentation

On January 30, 2014 the OECD released for public consultation the draft of revised guidance on transfer pricing documentation, which is proposed to replace the text of Chapter V of the Transfer Pricing Guidelines. The OECD invited all the interested parties to submit written comments on the draft no later than February 23, 2014 to TransferPricing@oecd.org.

The backbone of new documentation requirements is a two-tier structure that consists of a master file containing standardised information relevant for all MNE group members, and a local file referring specifically to material transactions of the local taxpayer. This documentation concept was previously tried out in the EU, after the Council of the EU adopted in 2006 a Code of Conduct on Transfer Pricing Documentation (EU TPD). Being optional the EU TPD has not become a popular model among the majority of corporate taxpayers. The main reason for this is the absence of uniformity of local country transfer pricing documentation requirements, which together with the two-tier structure impose an overwhelming compliance burden on MNEs. Moreover, MNEs have to comply with several sets of documentation requirements in case they have members operating also outside the EU.

Consequently, at the heart of the current reform in the first place should be the standardization of local transfer pricing documentation requirements. However, it is highly dependent on the implementation of the proposed changes in each separate country. In this regard, the countries willing to adopt the new standard should undertake an obligation to facilitate this process.

The draft sets the main objectives for requiring transfer pricing documentation, which are the fundamental principles defining the nature and structure of the new documentation model. Pursuant to the draft the risk assessment is the first objective for requiring documentation. An introduction of the two-tier system while increasing transparency of transfer pricing between associated enterprises imposes significant compliance burden on taxpayers. In this respect, the risk assessment except for identifying enterprises that require more scrupulous attention should also serve as a means to reduce the overall burden on taxpayers. For this purpose, it is proposed to structure the information that taxpayers are required to provide according to the draft by establishing the Multistage Risk Assessment System (MRAS) with transparent and well-elaborated guidelines on the operation of the system.

The MRAS is an available way to reduce (structure) the transfer pricing burden and compliance costs, both for taxpayers and tax administrations, without losing an access to information that is needed to exercise a due transfer pricing control. According to the MRAS a taxpayer is not obliged to provide all information at once, but only the information necessary to estimate the risks and situation of a taxpayer on the current stage of the assessment. If the assessment on the first stage shows the necessity to proceed further, then the scope of the information required on the next stages increases thereby moving to a more detailed analysis of the taxpayer’s situation. At the same time, if the results of the assessment on any stage indicate the absence of the necessity to go on with the examination, tax administrations can save their limited capacity by shifting their attention to where it is really needed. The information required on each stage should be relevant and valuable to ascertain a taxpayer’s situation.

First of all, the MRAS will eliminate cases when a taxpayer has to provide information for the purposes of transfer pricing control that is not relevant and goes beyond the taxpayer’s situation, as the documentation requirements are tailored to a taxpayer’s real situation by means of multistage system. In this regard, the MRAS will also solve the problem of materiality thresholds, because according to the System taxpayers do not need to provide vast information unless their situations imply the risks. At the end of the day, the MRAS will operate fairly, in
particular the highest compliance burden will bear those taxpayers that have the most complicated situations from the point of view of underlying risks. Moreover, the MRAS can be used to promote the culture of compliance, for instance, by lessening to some extent the documentation requirements for a taxpayer that proved to be law-abiding during the defined period, if the structure of his business has not changed significantly. Finally, the System will be transparent allowing taxpayers to participate in the assessment process stage by stage, rather than to face the results after the assessment is completed by tax authorities.

The draft indeed strengthens the ability of tax administrations to exercise transfer pricing control, but it asks for much more information than companies collect and have readily available now. The compliance burden should be balanced against the needs of tax authorities. Moreover, except for not being proved as an effective documentation model according to the EU experience, the concept in general has many serious flaws for normal functioning. In this respect, the MRAS could provide appropriate solutions.

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Comments provided below are personal views expressed by the writer of the document and does not in any way reflect the views of the company which employs the individual. All comments made are from experience encountered by the writer in working over many years with businesses operating in the global market.

B.1 Additional standard forms and questionnaires would only increase the volume and work load of businesses with an increasingly larger Finance and tax team. This will be seen as an unwelcome burden on businesses focused in their goal to be in business to make a profit. The forms can be later developed at a later stage when the first TP documentation is in place operating successfully.

The UK tax authorities do now share their risk assessment with taxpayers and the Customer Relationship Managers (“CRM”) have got a good rapport built with taxpayers. This should be embraced by other tax authorities in the view of open transparency and dialogue in agreeing matters with businesses on tax. Tax is not the real reason for businesses to be in business so if matters on tax are to be agreed upfront for example like the Switzerland tax authorities do, then so should tax authorities worldwide. The majority of businesses would like to comply with the local tax requirements in order to be in business and thrive from this business activity.

B.3 Information requested by tax authorities outside the jurisdiction should be centrally controlled by the parent business or corporate or through agreed mechanism with local affiliates. In no situation should affiliates be called to be accountable for the queries raised by jurisdictions. There is dangers that as different tax jurisdictions have different ways in dealing with tax matters and compliance there will be matters that they may be operating outside their legal scope. This is particularly so in developing countries compared to developed countries but can be encountered in developing countries now due to pressures on rectifying the deficits in govt. or public budgets. If there is a dispute, then the home jurisdiction should have the information for onward submission.

C.1 The basis for reporting on a line of business or entity wide basis would be dependent on the type of corporate reporting. For example, a line of business would be suitable for large corporations where there are multiple lines of products whilst entity wide would be quiet sufficient for a single product or service business. There should be flexibility on this and each corporation should decide their basis based on facts which would not burden them with unnecessary tax compliance.

D.3 By setting materiality standards, MNE may get round this or tax authorities may take a different view or approach in arriving at the guidelines set. Therefore, the practical basis should be for MNE to provide the level of price under discussion with the cost of agreeing to a different price and the quantum of tax under dispute or risk. This would enable the tax authorities to determine whether the pricing adjustment is likely to result in additional tax revenues for that jurisdiction. The matter should be dealt with on a case by case basis and the level of activities in that jurisdiction the corporate has. At the end of the day businesses should not be suffocated by unwarranted rules and regulations or meeting the target standard or threshold basis.

D.5 Para 34 is helpful. Again the basis for documentation update should be long so as to reduce the compliance burden and should be agreed on a group by group basis. Some groups may operate in markets where there is little movement from one year to next whilst some operate in a very fast moving market where there is constant change e.g technology, gadgets, computer software, computer hardware etc.
D.6 The translation in local language should be provided by local tax authorities as it is an unnecessary cost for companies to comply with local language requirements. The local jurisdiction should be supporting the corporate and the value the business operation is contributing to its economy. There should also be an option for sharing if businesses wish to do so as often there will be individuals working within the organisation who can provide this service with the added benefit of the knowledge of the corporate.

E The option should be to first file with the parent company’s jurisdiction with an option of exchange where there is an existence of treaty between the two countries. Where there is a lack of treaty between the two countries, the option should be left for the corporate to exchange directly the information with the jurisdiction when requested.

Again there should be flexibility on this sharing of information as in most cases, corporates would likely wish to co-operate with the foreign jurisdiction if there is a business presence in that other jurisdiction. No businesses wish to have their good reputation and name tainted as it would affect their business in the short and probably long term.

Master file – It would be good to have the agreed APA and other rulings in the master file as the jurisdiction can see the agreed basis with other jurisdictions. This would avoid unnecessary questions flowing thus limiting to areas which are not agreed. It provides focus to the investigation.

Comments provided by Varsha Patel (FCCA, CTA)
Submitted by email: TransferPricing@oecd.org

Subject
VNO-NCW comments on the OECD Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting

The Hague
February 21, 2014

Reference number
14/10.311/Jla

Dear Marlies, Dear Joe,

In the annex you will find the VNO-NCW comments on the OECD Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting.

The Confederation of Netherlands Industry and Employers (known as VNO-NCW) is the largest employers’ organisation in the Netherlands. VNO-NCW represents the common interests of Dutch business, both at home and abroad. Over 160 (branch) associations are members, representing more than 115,000 enterprises. They cover almost all sectors of the economy, including more than 80% of all medium-sized companies in the Netherlands and nearly all of the larger, corporate institutions.

We hope that you will take our comments into consideration in further developing Action Point 13. Of course, we are more than willing to discuss these comments should that be useful and we look forward to the public consultation on this important issue.

Sincerely,

Jeroen Lammers
Manager Fiscal Affairs

VNO-NCW welcomes the initiatives by the G20, G8 and OECD to improve the international tax system, strengthen the integrity of the tax system and further develop a global level playing field. Public trust in the tax system is a vital part of any flourishing society and growing economy. At the same time, for international business investments it is imperative that double taxation does not occur, that there is certainty in the way cross border investments are taxed and compliance costs are reasonable.

The Action Plan on Base Erosion and Profit Shifting (BEPS) makes the point that a key issue in the administration of transfer pricing rules is the asymmetry of information between taxpayers and tax authorities and that this potentially undermines the administration of the arm’s length principle and enhances opportunities for BEPS. According to OECD, in many countries, tax authorities have little capability of developing a “big picture” view of a taxpayer’s global value chain. In addition, diverging approaches to transfer pricing documentation lead to significant administrative costs for business. In this respect, it is important to develop effective guidance to ensure that adequate and relevant information about the MNE group, its members, their functions, risks and assets and inter-company transactions, is made available to the tax authorities charged with assessing their compliance with the arm’s length principle in their particular jurisdiction.

This therefore is the basis for Action Point 13 in the BEPS Action Plan:

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.*

1. General comments

VNO-NCW supports the goal to solve the perceived information deficit on the side of the tax authorities. If the claim is correct that in most countries the tax authorities have little capability to develop the ‘big picture’ of the value chain, there is a warranted need for a targeted approach to improve this. At the same time VNO-NCW emphasizes that also MNEs have limited capabilities and resources and that it needs to be ensured that the related compliance costs and efforts are minimized.
This means that disclosing extra information exclusively to tax authorities can be acceptable, insofar the lack of the capability to develop the 'big picture' in fact lies in an absence of information, insufficient means to access that information and/or that the information could not be made available to the relevant tax authorities through (automatic) international exchange of information. The instrument of co-operative compliance should be applied in a much wider international context to improve the overall information position of both tax authorities and business and at the same time avoid excessive documentation compliance burdens by having discussions in real time. In addition, co-operative compliance takes into consideration and adjusts the administrative burden according to lower and higher risk MNEs whereas the OECD Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (hereafter: the Discussion Draft) does not make this distinction.

In this respect VNO-NCW would like to emphasize that the tax policies of most MNEs are continually evolving as a result of developments regarding, for example corporate governance, corporate responsibility and co-operative compliance. We feel that such developments are not taken enough into consideration in the Discussion Draft.

Furthermore, disclosing additional information on the value chain to individual tax authorities could place MNEs at an unfair disadvantage if the automatic information exchange between tax authorities and the consequent safeguarding of the confidentiality of that information is not properly arranged.

Additionally, should a situation of double taxation arise from the risk assessment based on the additional information provided, there have to also be mechanisms put in place to directly countermand this effect. In this sense Action Point 13 cannot and must not be seen or implemented in isolation from the other BEPS Action Points, especially Action Point 14 to make dispute resolutions more effective. The Discussion Draft however does not address this.

The Discussion Draft states that all three objectives\(^1\) put forward in the document have to be considered in designing appropriate transfer pricing documentation requirements. While VNO-NCW supports this notion, it should be clear that the documentation requirements are also strictly limited to achieving these objectives. Only information directly necessary for tax authorities to conduct an informed risk assessment for tax

\(^1\) 1. to provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment; and

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.
purposes, or inquiry with regard to inter-company transactions involving entities in their jurisdiction, may be included in any form of mandatory information disclosure.

Specifically objective no. 3 seems to open the door to requiring more and more information from business without regard to the compliance burden and/or the relevance of that information. VNO-NCW feels this is not appropriate. In connection with this point we note that to the extent requests for information from other jurisdictions are permitted, they should be clearly defined and limited. The requesting tax authority should only be permitted to use it for intra group transaction(s) they are assessing. Action point 13 of the Action Plan should lead to further streamlining of the information requirements and where possible also to limit superfluous reporting and thus making the information presented more accessible to tax authorities.

VNO-NCW feels that the transfer pricing documentation and CbC reporting template in the Discussion Draft go far beyond the information needed to ensure appropriate tax assessments and/or needed for tax authorities to conduct an informed risk assessment relevant for tax purposes. This concerns both the amount of information that has to be provided as well as the manner in which it has to be made available. Under the specific comments these issues will be addressed in more detail.

2. Comments relating to the CbC reporting template

With regard to the CbC reporting template, VNO-NCW is of the opinion that business should be able to rely on a so-called Single-Window approach. This means that businesses should only be required to provide the information to the tax authorities at the parent level (in the jurisdiction where the parent company resides). All other relevant jurisdictions can then access this information through (automatic) exchange of information arrangements between governments. This will protect business from having to supply the same information multiple times, from having to provide the same information in different formats and from commercially sensitive information becoming available to third party partners, such as minority shareholders in joint-venture companies.

Moreover, this will be a strong incentive for governments to adopt the OECD guidance in this Discussion Draft thus promoting one global standard in the sense that at an MNE (group) level all the information worldwide can be provided in the same manner.

This approach also makes it possible to provide for robust means of protection of the confidentiality of the information that is being exchanged and effective management of conflict of law issues with respect to the disclosure of data. The exchange of information would be governed by the internationally agreed upon rules as set forth in (i) the exchange of information provision of a double taxation convention based on Article 26 of the OECD or UN Model Convention, (ii) Article 6 of the Convention on Mutual Administrative Assistance in Tax Matters, or (iii) for EU member countries, domestic laws implementing EU directives which provide for automatic exchange. A
clear legal framework defining what the safeguards for confidentiality are and how they are applied is crucial, so that taxpayers have recourse in case the confidentiality is breached, as such breach of confidentiality can have severe economic consequences.

As disclosing some of the requested information could also pose a conflict of law, reporting exemptions should be available for any cases where there are legal restrictions on the disclosure of the data requested.

**Consistency of information**
In the Discussion Draft the question is raised if the CbC reporting template should be compiled using a bottom-up or top-down approach. MNEs are organised in different ways, and have different system set ups. It is therefore crucial for MNEs to have the flexibility to use the approach that fits their systems to provide the required information. Requiring either a bottom-up or top-down approach would create a substantial increase in administrative burden, without any additional benefits to tax authorities. Since the risks should be assessed within MNEs itself, and not across MNEs, allowing flexibility will not lead to less useful information for tax authorities as long as the reporting is consistency applied across the MNE.

VNO-NCW feels that the absolute worst-case scenario would be that an MNE would be forced to apply both approaches within the group because one jurisdiction requires one approach and another jurisdiction the other. However, this could not be the outcome if the principles as set out above were to be adopted by the OECD. This means that the MNE at a parent level would provide the consolidated data and all other jurisdictions would be able to access that information through the (automatic) exchange of information. However, even if at the MNE group level the same approach is adopted, a prescribed bottom-up or top-down approach could still present MNEs with significant administrative burdens and/or high additional compliance costs. This would therefore also not be preferable.

The best solution would therefore be that the MNE (parent) would be engaged in cooperative compliance, so that the most appropriate and least burdensome approach could be selected for the MNE at the parent level in consultation with the tax authorities of that jurisdiction. In any event, as mentioned, VNO-NCW stresses that, in order to minimize additional compliance costs, flexibility for compiling the CbC reporting information is imperative.

**Country-by-country vs Entity-by-entity information**
Calling to mind the objectives of the Discussion Draft there seems no convincing reason to resort to an entity-by-entity approach for providing the information in the CbC reporting template. The CbC reporting template seeks to increase overall transparency with regard to the tax paid by MNEs in the countries where they operate and facilitate risk assessments by tax authorities. In this context paragraph 21 of the Discussion Draft expressly stipulates that the CbC reporting template should not substitute detailed and proper transfer pricing analysis of individual transactions and prices. Reasons to follow a country-by-country format include the following:
- By providing data on the separate entity level there would be a greater risk of the information being of a sensitive nature, therefore strongly increasing the need of safeguarding that the confidentiality of that information is maintained in all circumstances after it has been provided.
- Entity-by-entity information would moreover be very dependent on the local GAAP, meaning that it is not clear that all data would be easily comparable or readily available.
- Overall, providing the data at entity-by-entity level would most probably confuse the issue more than it would provide useful information to be able to conduct an informed risk assessment for tax purposes.
- Correspondingly, it would impose an intensive and disproportionate administrative burden on MNEs, especially those that would choose to provide the CbC information through the top-down approach.

VNO-NCW is therefore of the opinion that the cons of providing the information on an entity-by-entity level far outweigh the pros. To maintain confidentiality and limit the compliance burden, the CbC reporting template should in principle be based on some aggregated level and MNEs should be able to report consistently but without significantly added reporting requirements on the parent level following the Single Window approach. Whether this happens on the basis of fiscal consolidation, business line, country or other should not be prescribed. Providing the information on an entity-by-entity level should be possible as an option, but it should not be made mandatory given the arguments above.

**Scope of the required information**
The CbC reporting template is intended solely as a (high level) instrument to identify and assess tax risks. The information requested should not go beyond what is required for this purpose. This would mean that it should be sufficient to provide yearly information per country on:

1. Revenues
2. Earnings Before Income Tax
3. Corporate income tax: at the discretion of the reporting MNE this should be either cash tax, current accrued tax (due basis) or ‘tax cost’ (including current and deferred tax), as long as the data is presented consistently for the entire group and the method selected is clearly stated.
4. Number of employees

Any and all other information is superfluous for the purpose of conducting an informed risk assessment for tax purposes as referred to in the Discussion Draft.

Specifically, VNO-NCW would like to stress that OECD should remove the requirement to report withholding tax paid. This will be an intensive, manual process for many MNEs while this information in no way benefits risk assessments for tax purposes. The withholding tax burden can be included on a voluntary basis if the MNE believes it gives a better view on the overall tax burden of the MNE in the jurisdictions
in which it is active. The same applies to non income tax payments or total tax contribution overviews. In practice we see that a number of MNEs is already providing such overviews voluntarily.

**Materiality of the information to be disclosed**

VNO-NCW is of the opinion that materiality thresholds should be implemented as they will minimize the administrative burden for MNE’s while at the same time not affecting the ability for tax authorities to conduct an informed risk assessment for tax purposes. The materiality threshold should be established at the parent level (following the Single-Window approach as explained above).

3. **Comments related to the guidance on transfer pricing documentation requirements**

The starting point for transfer pricing documentation should be the inter-company transactions that have taken place (e.g. functions, assets, risks). While providing the context to the inter-company transactions is important (i.e. background on the company and its activities worldwide), the OECD should be wary of providing tax authorities with tools that may prompt a formulary apportionment of profits between countries. In this regard, since both the nature and the goal of CbC data is different from that of transfer pricing documentation we advise that the CbC reporting is not an integral part of the Master file. This will not aid tax authorities in the evaluation of inter-company transactions’ compliance with the arm’s length principle and therefore belies the objectives of transfer pricing documentation as stated in the Discussion Draft. Keeping the CbC Reporting separate, should provide more protection for confidential information (given the fact that the data in the CbC Reporting is used for different purposes then the Master file and Local file).

**Two-tiered approach**

A two-tiered approach to transfer pricing documentation is not necessarily the most effective approach in every instance and therefore should not be prescribed as the standard but as an optional approach. As an example, much of what is included in Annex I under Master file, would not be relevant to an entity providing shared service centre activities to group companies in the area of accounts payable and accounts receivable – for example the information on the MNE’s intangibles, its financial activities etc. It would therefore not be efficient use of either the tax authorities’ or the taxpayer’s (scarce) resources, to submit a transfer pricing documentation file with tens or even hundreds of pages of very detailed information around the group’s operational business activities, intangibles etc.. The same is valid for sharing similar information of different business lines. Rather than prescribing the contents of a Master file and Local file, the revised Chapter V should provide guidance on the contents of transfer pricing documentation to be provided to a tax administration as a whole and leave room for the taxpayer to determine how it can leverage common elements to develop an efficient transfer pricing documentation compliance approach. This approach should provide exemptions or less detailed documentation requirements for low risk transactions.
The Master file can consequently be made available to the tax authorities in the home country of the MNE parent (following the Single-Window approach) where other tax authorities can then access this information via the existing regulations for exchange of information. Any information from the master file that is explicitly relevant to a certain country, can be included in the local file and should be excluded from the Master file. In doing so, confidential and sensitive business information is not needlessly shared and taxpayers have recourse to a clear legal framework safeguarding that confidentiality.

**Leveraging documentation available**
In the interest of efficiency, the OECD should support that taxpayers utilize documents readily available within their company, where appropriate, without having to re-edit these documents for the sole purpose of transfer pricing documentation. An example might include the general description of the business which can be found in a company’s annual report, other investor information etc.

**Encouraging operational transfer pricing**
The OECD should advocate an approach to transfer pricing documentation that, rather than requires taxpayers to compile more and more data, encourages taxpayers to take a holistic approach to transfer pricing by embedding it into their business processes (operational transfer pricing). Once a taxpayer is truly in control of their transfer pricing through implementation in their system and monitoring throughout the year, tax authorities will obtain better assurance that transfer pricing regulations are being complied with. The very extensive documentation requirements set out in Annex I, result in companies focusing their efforts on preparing “inert” documents rather than improving “living” systems.

**Comments on Annex I**
As noted in the previous paragraphs, Annex I with respect to the contents of Master file and Local file is too detailed and too prescriptive. This is more information than is currently required by most tax authorities and actually represents a significant increase in compliance burden. Furthermore, many MNEs are active in diverse industries through business units that operate on a relatively standalone basis. The Master file should only include information that is relevant to all countries. It would constitute overkill to provide a tax administration with detailed business information (such as that alluded to in draft Annex I to Chapter V under Master file) on business units that have no activities in that country. Moreover the irrelevant transfer pricing information would make it more difficult to digest the Master file and is not conducive to getting efficient insights in line with objectives of the Discussion Draft.

Besides, sharing of confidential business information should be done if strictly relevant, which is clearly not the case in the current set-up. Taxpayers should therefore have the possibility to prepare the Master file by business and not for the MNE group as a whole.
VNO-NCW believes the following points should be excluded as they do not fulfill the criteria mentioned above:

- A chart showing supply chain for material products and services.
- A chart showing important related party service arrangements other than R&D services.
- A list of the main markets for material products and services.
- 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 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.
- A list of material intangibles or groups of intangibles of the MNE group and which entities own them.
- 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 how the group is financed, including identification of important financing arrangements with unrelated lenders.
- 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 list of all APAS and tax ruling or MAPs.
- 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)
- A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year.
AB Volvo’s position on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting (Action 13)

About the Volvo Group

The Volvo Group is one of the world’s leading manufacturers of trucks, buses, construction equipment and drive systems for marine and industrial applications. The Group employs about 115 000 people, has production facilities in 18 countries and sale of products in more than 190 markets. The annual net sales amounts to some 300 BSEK. AB Volvo is the ultimate parent of the Volvo Group which consists of more than 300 legal entities.

General comments

Volvo welcomes the ambition to prevent Base Erosion and Profit Shifting (BEPS) conducted through aggressive tax planning and tax avoidance practices. Appropriately designed and executed, this project has the potential to create a more level playing field for companies of different sizes and in different countries to compete at.

One of the key challenges for the OECD is to ensure that the new rules and guidelines are designed to specifically target the kind of practices that are believed to create BEPS without impacting compliant businesses or real business activities. It is particularly important that the new rules do not drive further administration or increases the risk for disputes and double taxation.

Volvo is very concerned that the new documentation requirements will not sufficiently meet these objectives. In our view, the new requirements as envisaged in the Discussion Draft on Transfer Pricing Documentation and CbC-reporting from January 30, 2014 will lead to a significantly increased administrative burden and compliance costs. Although it is reasonable to expect that companies are transparent and cooperative, we do not think the draft strikes a reasonable balance between limiting the compliance burden of taxpayers and the objective of preventing BEPS.

The requirements on documentation and administrative systems in the tax area are already very high. On top of this, our experience is that tax authorities often pay insufficient attention to the very costly and time consuming documentation already provided. Instead of introducing new requirements, more focus should therefore be on improving the utilization of the very extensive information already provided by taxpayers. Improved tools for automatic exchange of information is one example which should be further explored. Also, we believe that the new standards should be more closely adapted to provide tax administrations with information necessary to conduct qualitative and well informed risk assessments. This will allow both taxpayers and tax authorities to use their scarce resources in a better way than today. For taxpayers, instead of spending time and money on preparing contemporaneous documentation that is rarely used, more efforts could be spend on...
providing tax authorities with qualitative and timely information where needed and when requested. For tax authorities, the risk of “information overload” will be reduced and time could be spent on reviewing documentation that will help identifying the areas which require further scrutiny.

In the light of this, we strongly question the objective mentioned in the report that the revised documentation requirements shall also provide tax administration with the information they need to conduct thorough audits. Indeed, TP-documentation has and probably will have merits in providing tax authorities with a starting point for audit purposes. However, given the facts and circumstance based analysis that is always required in any TP-audit, designing documentation rules to provide tax authorities with the information needed to conduct thorough audits will without any doubt significantly drive further administration and compliance costs, while at the same time add little value from a BEPS perspective.

If countries are genuinely concerned about the compliance burden of taxpayers, we believe they should put considerable more effort into determining precisely what information is required to be documented on a concurrent basis to allow for proper risk assessment and to prevent BEPS. By way of example, rather than to provide the CbC-information on a global basis it should be closely considered whether such reporting could be limited to low tax jurisdictions or to countries where a taxpayer otherwise have significant incentives to shift its profits. In our view, this would clearly be sufficient from a BEPS-perspective. We encourage the OECD to closely consider these kinds of limitations further. It is imperative that these new documentation requirements are not inflated by the temptation from countries and its tax authorities to effortlessly obtain additional information which may be “nice to have”. Instead every effort must be made to limit the efficiency losses imposed by additional compliance by only requiring information that will prevent BEPS.

In addition, we believe that the revised documentation requirements, in particular the CbC-reporting, will significantly increase the risk for disputes and double taxation between countries. As the template is currently drafted, it sets to compare taxes paid with factors like number of employees and tangible assets. Anyone that deals with international tax issues on a daily basis knows that the correlation between these factors says very little about a MNEs compliance with the arm’s length principle, in particular when presented as a snap shot in time. Thus, rather than to provide for a good foundation for an arm’s length analysis, the new CbC-reporting will in our view encourage formula apportionment based risk assessments and transfer pricing audits.

Experience shows that tax administrations tend to use any information available to best suit their purposes and allow for an increase in the amount of tax to be received. The new CbC-reporting will in our view impose a clear risk of one sided audits and adjustments in countries which believe they do not get their fair share of a group’s taxable profits (rather than their rightful share). We fear that the CbC-information will encourage tax authorities in low revenue making countries to challenge taxpayers on TP-issues without a fair ambition to actually understand why the profits and losses have been allocated the way they have. This would undoubtedly result in an increased number of disputes and double taxation.

In addition, even where a solid attempt is made to understand the data, it will be extremely difficult to analyse. Apart from requiring a very good understanding of the company’s transfer pricing model, there is an apparent risk that the data will be significantly distorted by temporary items such as restructurings, acquisitions or demergers; exchange rate
fluctuations; differences in IFRS, local GAAP and tax reporting; inconsistencies in comparability between reported income and taxes paid (see further below); local tax incentives or rules on minimum taxation etc. etc. etc.

Based on these concerns, we believe that the guidelines must include further instructions on how tax authorities should (or should not) use this information, what conclusions can be drawn from it and how it should be interpreted in the light of the arm’s length principle. Also, the report should further emphasise that tax authorities should take great care in using the CbC-information as a tool to evaluate a correct arm’s length pricing.

Finally, we firmly believe that these new requirements and burdens imposed on taxpayers must be fully balanced by measures which will provide fairness to those taxpayers which try to be compliant. For the vast majority of MNEs which are not involved in BEPS, a one sided increase of compliance burden and dispute risk is simply not just. Clearly, reasonable taxpayers making their best efforts to comply should not bear the burdens imposed by disputes between countries on how to allocate the taxing rights between them. The current situation with very long dispute times and frequent lack of ambition to find timely solutions in MAP and arbitration cases as well as in APAs is not satisfactory.

To install renewed confidence in the area of international taxation and thereby foster compliance, countries need to step up to their obligations by fully endorsing the objectives outlined under action item 14 of the Action Plan on Base Erosion and Profit Shifting. In our view, these new reporting requirements should not be adopted without a formal and binding commitment from all countries involved in the BEPS-work to provide timely and binding dispute resolution mechanisms which will fully safeguard sound taxpayers from double taxation. Also, we believe that compliance shall be further incentivised by precluding countries from imposing penalties on taxpayers which have made a reasonable effort to comply with these new documentation requirements and the arm’s length principle.

Specific comments on the discussion draft

A. Introduction

Volvo agrees with the observation that the proliferation of local documentation requirements has resulted in a significant increase in compliance burden for taxpayers. We therefore support the objective of having a more coherent framework for TP-documentation across countries.

At the same time, we repeatedly experience that the very extensive documentation we are providing at great costs often is not used or appropriately taken note of in tax audits. In our experience, this is not due to the fact that the information is not sufficiently informative and adequate as suggested in para. 3. This is evidenced by the fact that we often get questions in audits which are already answered in the documentation provided. Instead, this suggests that audit processes are not structured in a way to first digest all info available in the documentation before making further requests. One potential reason is that audit processes are very fact and circumstance driven which simplifies for tax authorities to tailor questions and requests rather than to fully digest the information from the TP-documentation provided. For this reason we believe that any new TP-documentation standard shall be more closely adapted to help tax authorities making appropriate risk assessments rather than to
requires comprehensive information needed to make in-depth tax audits. This will have the potential of reducing compliance burdens for taxpayers while at the same time helping tax authorities to better utilize their resources.

**B. Objectives of transfer pricing documentation requirements**

**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."

Volvo agrees on the potential benefits of having a more coherent framework for TP-documentation across countries. The master-file and country-file concept, which is already adopted by the Volvo Group, is widely recognised and has the potential to reduce compliance burden if it was more widely accepted. In quite contrast to this objective, the level of detail proposed in the current draft shows every potential of increasing the compliance burden for taxpayers. This is worrying and need to be more closely considered.

Unless appropriately implemented, we see a risk that these new guidelines will add another layer to the local documentation requirements in many countries. These guidelines should therefore be adopted with full commitment from all countries that has signed up for the BEPS-agenda that the OECD standard shall be respected as fulfilling their respective local standards. In the light of this, we oppose the development of additional standard forms and questionnaires since it will in all likelihood add to the already heavy compliance burden. Also, although some level of standardization will be helpful in streamlining documentation requirements across borders, any standard needs to recognise that the facts and circumstances of each taxpayer are unique. This can be with respect to the organizational structure, tax position, type of industry etc., but it very much also relate to the system support available to readily extract information without imposing additional compliance burdens. Therefore, a reasonable level of flexibility should be allowed for taxpayers to adapt the documentation after their specific circumstances. From a compliance and risk assessment perspective, the most important thing ought to be that the documentation provided allows for a reasonable comparability within an MNE, not between different MNEs.

We agree that efficient risk assessment is key to better utilize the scarce resources of both taxpayers and tax authorities. Appropriately designed TP-documentation can be a useful tool in this respect. As noted above, we think that any revised TP-documentation requirements shall be developed with this as the primary objective. In this respect, we do not think that the paper sufficiently try to zoom in on information that could be helpful to identify particularly risky transactions, activities or industries. Instead, much of the information requested is very broad and generic providing limited assistance in this respect.

To meet the concern of increasing compliance, more efforts are required to analyse and reach consensus on what is perceived as being of high risks for creating BEPS. The new limit documentation requirements shall be strictly limited to those areas. By way of example, if the genuine objective of Action 13 is to prevent BEPS, country-by-country reporting could in major parts be limited to low tax jurisdictions or countries where the taxpayers otherwise have clear incentives of shifting their profits.
Another area which is not sufficiently explored is the differentiation in reporting requirements based on the risk assessment profile of the taxpayer. The current approach requires the same high level of compliance to all taxpayers whether they are viewed as being high or low risk. Also, there is no differentiation between e.g. various functions performed within an MNE or the type of transaction. Certainly, very unique or highly complex transactions, such as buyouts and restructurings should be substantially documented and motivated. Similarly, the requirements should be lower for simpler and for low risk functions. Also, as a mean to allow for a high level review of a MNEs risk profile, it could be considered to add to the CbC-report the group’s overall tax costs (or similar macro level measures). If the tax cost is reasonable (e.g. in relation to the income tax level in the countries of operation), this should be a low risk indication and possibly warrant a lower documentation requirement.

Allowing for leaner documentation requirements for taxpayers and/or activities being regarded as low risk will clearly incentivise good tax behaviour. For this purpose, it’s important that clear guidelines and instructions are developed for how such characterization shall be made.

Finally, we strongly believe that tax authorities shall share risk assessments with taxpayers. This will allow for a very useful dialog between the taxpayer and the tax authority on how the taxpayer can improve its routines and approaches. In combination with differentiated reporting requirements it will also incentivise tax compliance.

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

We think that the paper overestimates the importance of transfer pricing documentation as a mean to foster tax compliance. In today’s world with lightning fast information exchange combined with conscious and highly mobile customers, companies are furiously trying to protect their brand images from bad publicity. Tax policies and compliance demands are much more driven by factors like these than by documentation requirements, in particular in large and well-known MNEs with high value brand names and presumably more high risk transactions. Moreover, taxpayers that do not share these concerns and are willing to take aggressive or even criminal tax positions will in our view not be intimidated by increased documentation requirements. For this reason, we do not think that documentation standards shall be designed based on objective to foster compliance. This will in our view only drive administration for those taxpayers trying to be compliant.

We are greatly concerned about the statements in paragraph 11 about contemporaneous documentation at the time of the transaction and penalties as they demonstrate a lack of understanding about the practical challenges of documentation as well as the drivers behind compliance. By way of example, our Group produces some 3 million internal invoices annually. On top of this, there are constant restructurings, reorganizations, new flows and products being added. Although every effort is made to monitor and document these transactions and activities as timely as possible, providing contemporaneous TP-documentation on a transactional basis is simply not feasible. In the light of this, we are very concerned about the statements made in this paragraph. Also, as will be further explained below, we do not see penalties as a good way to foster documentation compliance.
B.3. Transfer pricing audits

As mentioned above, we strongly oppose the view stated in para 13. that the “objective for transfer pricing documentation is to provide tax administrations with information they need to conduct a thorough transfer pricing audit” [emphasis added]. Given the fact intensity of every audit, this objective would clearly drive documentation and compliance burden far beyond the requirements we see today. Also, since the documentation shall be readily available at the time of an audit, this would require taxpayers to document a large amount of information which in the end will be useless or of no interest to the auditors. This would be a huge waste of resources and clearly contradict the objective of allowing the tax authorities to use the TP-documentation as an efficient risk assessment tool.

Furthermore, we do not understand the message in para. 14 as it seems to imply that tax authorities currently do not have access to sufficient information in audits. In contrast, tax authorities can typically request any information which they find relevant for the audit in question.

We believe that these paragraphs will only drive countries to further expand their documentation requirements beyond what is reasonable from a compliance perspective. Instead, we think that the new documentation requirements shall be closely tailored to allow proper risk assessment. The information requested in the TP-documentation shall only serve as a starting point for more in depth analysis and information request where a risk area is identified.

“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.”

Volvo believes that the rules and guidance for exchange of information should be sufficient to address this issue. By no means should a separate standard be developed for the purpose of information exchange in this particular context.

C. A two tiered approach to transfer pricing documentation

Volvo agrees with the merits of a two-tiered documentation approach. As mentioned above, the master-file and country-file concept is widely recognised and has the potential to reduce compliance burden if more widely accepted.

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.”

As a general position, we believe that the master file should be prepared on a business line basis. However, to accommodate the fact that companies and business areas within companies looks very differently (e.g. with respect to the level of coherence between the legal and operational set up), the guidelines should allow for flexibility in this respect. We do
not see that such flexibility would infringe on the objective of providing a good risk assessment tool as long as it allows for comparability within a MNE (rather than between MNEs).

As for the CbC-reporting we think is should be provided at a group level. However, as mentioned above we do think that it shall be limited to low tax jurisdictions or to countries where the taxpayer otherwise have a significant incentive to shift profits.

“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?”

One of our key concerns with the CbC-reporting is that it encourages formula apportionment based risk assessments of whether an MNE has paid its “fair share of taxes” in the relevant jurisdictions. As the template is currently drafted, it sets to compare taxes paid with factors like number of employees and tangible assets. This is clearly not a good foundation for a correct arm’s length analysis and will undoubtedly increase the risk of disputes since the data provided will be very hard to analyse and most likely be used by local tax authorities to support the best interest of each individual country.

To underscore that the CbC-report shall not be viewed as a tool for an arm’s length analysis, we think it should be presented as a separate document. Also, we think the guidelines should include further instructions on how tax authorities should use (or not use) this information, what conclusions can be drawn from it and how it should be interpreted in the light of the arm’s length principle. In addition, the report should further emphasise that tax authorities should take great care in using the CbC-information as a tool to evaluate a correct arm’s length pricing. The statement in para. 21 that the CbC-information will not be “conclusive evidence” is clearly not sufficient.

- 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?

In our view, as long as the requested information is provided, the way this is done should not matter. Thus flexibility as to whether a “bottom-up” or a “top-down” approach is used should be allowed. This will facilitate the differences in reporting systems and organizational structure that may affect the choice of method from a compliance burden perspective.

In this context, we would like to note that the local legislation determining the timing for accounting and reporting very much will dictate when the CbC-reporting can be completed. These rules vary considerably between countries and in several cases it will take significant time before the books are closed and the relevant information is available. In practice this means that the CbC-reporting cannot be completed before the books in the country with the
longest reporting time are closed. Regardless of whether a top-down or a bottom-up approach is used, this need to be fully recognised and respected.

On a related matter, the costs and time involved in securing system support to compile the information required cannot be overestimated. The Volvo Group has grown rapidly largely by way of acquisitions. This means that the system supports vary considerably between the different parts of the operations. While some information will be available in some business areas, the same info may not be readily available in others. There may be differences in data availability between countries due to local variances in reporting requirements and system support. The costs for changing system support are enormous. Simple changes such as to the parameters of an invoicing system to allow for rerouting of invoices due to changes in business flows, etc., can cost millions of Euros and take significant time to implement. Although it may look simple on the surface, such changes require significant work to ensure that e.g. tax, VAT, and customs obligations are duly fulfilled. Larger changes such as imposing coherent reporting systems on a global basis can cost tens or even hundreds of millions of Euros. As the availability of information differs between companies and also within groups, it is very hard to evaluate what additional system support will be needed. This is yet another reason why any information request must be closely scrutinized in the light of the value it will add from a BEPS perspective.

- “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?”

Following the same rationale as above, we think it should be left to the taxpayer to decide whether the reporting should be made on an entity-by-entity basis or on an individual country basis. Again, whatever method is used should be sufficient for the purposes of making a useful risk assessment analysis of a particular MNE. Such flexibility would allow taxpayers to use the method imposing the least administrative burden in the given case.

- “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?”

We find it highly inappropriate that the paper suggests that the reporting shall be made based on income tax paid (whether on a cash or due basis). The income tax system and all reporting is based on the periodic income and costs of a company and not on tax payments. Comparing tax payments with income before tax as suggested in the template does not give a fair or
comprehensible view of a company’s tax position in any given country. Many multinationals, in particular those which like Volvo operate in a highly volatile industries, suffer from losses from time to time which means that the tax paid in relation to the Group’s income is often disproportionate and irrelevant. Using the tax paid when measuring the tax burden of a company could lead to extremely low figures when profits are returning to countries where loss carry-forwards have been accumulated. Vice versa, the paid tax can be very high when profits are low or when losses are made since taxes have to be paid in countries where profits are made even if the Group, on an overall basis, is loss making. In addition, tax paid will be heavily impacted by e.g. rules limiting full utilization of loss carry forwards (such as in France and Germany). This will further distort the comparability of the tax liability compared to income on a CbC-basis.

Instead, we firmly believe that the CbC-reporting shall be based on the tax cost per country (i.e. income tax). Tax cost includes two elements:

- **Current tax**: amount of income tax payable/refundable based on taxable profit/loss for the current period or past periods
- **Deferred tax**: tax payable/recoverable in the future period as a result of past transactions

We see no reason why the reporting should exclude deferred taxes. The underlying income is not based on the cash principle but includes also receivables and liabilities. To be comparable, the tax element should not be treated or reported differently than the underlying income. This would result in mismatches and add to confusion. Comparing income before income tax with tax costs is the only way to compare “apples with apples”.

In addition, reporting is today based on the income and cost (not the cash) concept and relevant figures should be easy to present since each company’s tax cost should already be available. Income before tax and tax cost are reported in accordance with the International Financial Reporting Standards (IFRS). Thus, the tax cost is typically available as the tax element in each company’s official Annual report. It is presented together with the information of income before tax (IBT) thereby creating the tax rate and the “net income” in the P&L statement of the Annual report. Hence, this info is already official, mandatory and readily available on a per company basis which is not the case with “tax paid”.

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

Although any reporting requirement will add compliance, we do not see that reporting withholding taxes should impose a significant additional burden. In any case, the CbC-reporting clearly needs to include WHT if the data shall provide any reasonableness in how a MNE’s taxation is distributed on a CbC-basis. If not, there will be a structural error in the tax reporting showing too low level of taxation in traditional source countries. This would further add to the difficulties of analysing the information in an appropriate way.


Reporting of cross-border payments as outlined in the CbC-template will create significant additional administrative burdens for us. For the Volvo Group, reporting of royalties, interest and service fees will amount to close to two thousand tentative reporting entries alone. Each reporting entry will in turn require monitoring and collection of multiple transactions. In particular, we oppose the requirement to include service fees. Each legal entity can have thousands of invoices sent to and from the entity for services received or provided. Compiling this information will generate significant administration. At the same time we cannot see that a gross reporting of these flows will provide much guidance for tax authorities in their risk assessment work. Instead, we think that any major high risk transactions shall be provided in the normal TP-documentation.

Equally we do not see how reporting of royalties and interest will add much value. Taking royalties as an example, these flows are often distorted by sublicenses required for commercial, legal or system support reasons. Thus reporting all these flows will often not provide a good understanding of who the ultimate royalty recipient is. Instead there is a clear risk that the figures will be very hard to make any sense out of. Also, whereas the operations in some countries may trigger royalty payments this may not be the case in others depending on how the Transfer Pricing Model is viewed and implemented in each country. This will also add to distorting the picture. Again, we think IP-holdings and attributable royalty payments are better documented in the normal TP-documentation.

As will be further commented on below, we also think that the concepts of royalties, interest and service fees need to be more clearly defined.

“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 will already be included in the Master file and the Local file and we do not see how double reporting will add any value. Also, as income and tax will be reported on an aggregate level in the CbC-template, functional reporting will potentially be confusing, in particular since the report will not provide any information on the risk profile of the respective entities and/or functions. To include functions performed may also prompt questionable attempts by tax administrations to calculate profitability per function etc. In order to make any such calculations, significantly more detailed information is required.

C.2. Local file

We think that the draft shall clarify that the local file shall only be submitted to the relevant country in question. A requirement to “file everything everywhere” will significantly drive administration and potentially overflow local authorities with information they do not need for their analyses. Also, given that the local file might include sensitive information, such an approach would increase the risk of breaches in confidentiality. If a local tax authority would request information from the local file submitted in another country, this should be done within the exchange of information framework.
D. Compliance issues

D.1. Contemporaneous documentation
We agree that taxpayers should make reasonable efforts to consider whether transfer pricing is appropriate before pricing is established. However, given the sheer amount of internal transactions taken place annually, this cannot be done on a transaction-by-transaction basis. Instead prices need to be set based on principles for larger flows and for certain time horizons. Equally, in the vast majority of our transactions it is simply not possible to find comparable data on a transactional level. Therefore, documentation cannot be expected to be prepared contemporaneously with the transactions.

To impose such requirements would in our view lead to disproportionally high costs and compliance burdens (if at all possible to comply with). We therefore agree that tax authorities must carefully balance the need for documentation against the cost and administrative burden it will take to create it.

D.2. Time Frame
What is a reasonable time frame will very much depend on the information that will finally be requested as a consequence of this work. As a general reflection, however, documentation must clearly be in-line with the availability of data and information. Subsequently, taxpayers must have a reasonable chance to prepare the documentation taking into account the significant challenges this imposes. For MNEs like ours with several hundreds of associated companies, the preparation of the TP-documentation translates into a very large effort and takes significant time. Often, there seem to be a misconception that the information is readily available at central level where much of the documentation work needs to be done for coordination and verification purposes. In practice, however, huge efforts go into identifying and tracking the information from local sources, a process which is significantly burdened by factors like language barriers, mobility of personnel, differences in system support, skill levels of local employees etc. etc. Also, significant time is spent on communicating with local business people (which often have very little understanding about transfer pricing and documentation requirements) to confirm accuracy of the documentation. These challenges need to be fully understood and respected when setting time lines.

In this respect, we note that the proposed best practice of having the master file and local file prepared no later than the due date for the filing of the tax return will be very challenging (if at all manageable). To reduce the compliance burden, avoid the duplication of work and information and to increase the quality and relevance of the content for tax authorities, current practice is typically to benefit from the information prepared for the annual report when preparing the documentation. Depending on local rules, the window between the annual report and due date for filing the tax return is often too short for it to be reasonably possible to finalize a qualitative TP-documentation package. Also, the time before the deadline for the annual report up until the filing of the tax return is a period where local resources often are heavily occupied leaving very little resources for TP-documentation work.

Although consensus among countries on timing would be welcome to simplify planning and coordination of the documentation, we do not think it is appropriate to set a best practice based on the time of the tax filing. Instead, we believe that any recommendation shall be based on a maximum time after a documentation request has been made by a local tax
authority but not sooner than 6 months after filing the tax return. This will better allow taxpayers to conclude a qualitative TP-documentation taking the individual facts and circumstances of taxpayers and local rules into account.

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.

As indicated above, Volvo strongly believes that significantly further work is required to identify specific guidelines for materiality. This will be of great importance to limit the compliance burden for taxpayers while at the same time allow for appropriate risk assessments.

We think that a multiple of materiality standards should be contemplated such as type of transaction, type of activity, type of business area etc. Also, any such standard should in our view include a materiality threshold for transaction amounts to avoid cluttering the documentation with transactions that are not relevant for a reasonable risk assessment. One alternative could be a percentage of the overall income or turnover relative to the Group’s total operation or operation in the relevant country. We also think that transactions with group entities which do not have any significant activity in comparison to the total turnover of the overall MNE shall be excluded (e.g. as a percentage of the total turnover with a caveat for transactions over a certain absolute amount or an amount in relation to the turnover of the local entity, e.g. 30%). This would go a long way in limiting compliance burdens while at the same time allow for an appropriate risk assessment.

It is important that the documentation requirements are appropriately set to target what is perceived as high risk and only require a minimum level of information for what is not. Having a high general standard with an even higher requirement for high-risk areas is clearly not acceptable.

D.4. Retention of documents

We have no comments to the paper in this respect.

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 agree that better guidance on the frequency of updates would be useful. In our view, it is reasonable to assume that taxpayers review their documentation on an annual basis. The requirement for updates, however, should be limited to cases where there has been a material change in the operation that will be of relevance for the risk analysis. We think the guidelines should be clearer on this point.

As for the benchmarks we think the proposed 3 year cycle is reasonable, although nothing should of course prevent taxpayers to prepare such studies more frequently.
D. Language

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

Volvo strongly believes that English should be generally accepted both for the Master File, Local File and CbC-report. This will go a long way to limit compliance costs since documentation anyway must be prepared in a common language (English) at a central level for coordination and verification purposes. Also, the purpose of this documentation is in the end to verify whether the pricing between two states are correct. Thus, documentation in a commonly understood language should put both states on an equal footing and act to avoid the risk of misunderstandings and mistrust between tax authorities. Also, apart from driving compliance costs, local language requirements often complicates central coordination work for the taxpayer. Clearly one could expect local tax authorities specializing in international cross-border tax matters to sufficiently comprehend documentation prepared in English.

D.7. Penalties

We strongly agree that countries shall not impose penalties on taxpayers that have made a reasonable effort to provide reliable and timely documentation. This holds particularly true where availability of data is limited. We think the paper could be stronger in preventing countries, in particular those which routinely impose penalties to get leverage in future audit negotiations or to prevent bilateral dispute resolutions, to impose any kind of penalties where the taxpayer has made a reasonable effort to comply with the transfer pricing regulations and documentation requirements.

In this context, we very much welcome the suggestion made in para. 40 as a tool to encourage compliance but also as a measure of fairness. The new reporting requirements will without a doubt generate substantial additional administrative work and compliance costs. For the vast majority of MNEs which are not involved in such tax base erosion that is the reason behind the tightening of the documentation requirements, a one sided increase of compliance burden is simply not just. Moreover, the increased amount of information provided to the various tax administrations will, as noted above, most likely generate additional disputes in the TP area.

These additional burdens and related costs from the proposed extension of documentation requirements are solely levied on the MNEs while no or very small additional requirements are put on tax administrations. In order to obtain a better acceptance and understanding for the proposed measures as well as provide fairness to those taxpayers trying to be compliant, it is important that measures are taken which will counter the additional compliance burdens levied on the taxpayers. We therefore propose that the new international standards clearly prescribe:

A) that no penalties shall be levied on taxpayers making a reasonable effort to fulfill the new documentation requirements unless there is a fraudulent situation. Such penalty protection would clearly encourage taxpayers to provide timely and accurate documentation to the tax administrations.

B) a mandatory quick resolution process to solve any double tax issue within a certain time period (cf. EU arbitration). The states involved should be given a certain amount of time (e.g. 12 months) to solve the issue and there should be no option for the states to reject an
application. The application to avoid double taxation should be made by the state claiming additional tax which is different from present EU arbitration process. The state claiming additional tax should not be entitled to any tax until the dispute has been solved between the states to, even temporarily, avoid double payments by the taxpayer.

It is Volvo’s strong view that a fair and just standard shall protect taxpayers which conform to the imposed requirements from both double taxation and penalties. It is not acceptable that reasonable taxpayers making their best efforts to comply shall bear the burdens imposed by disputes between countries on how to allocate the taxing rights between them.

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.”

The revised documentation requirements will in several parts include potential sensitive information. What information will be sensitive and when is very much dependent on the facts and circumstances of the individual taxpayer. Unlike what is implied in the current para 41. we therefore believe that any information provided to tax authorities under these renewed documentation standards (as well as under any existing standard) must be regarded as sensitive and treated as strictly confidential. Any breaches to this will significantly damage the trust between taxpayers and tax authorities. Also, our group operates through a number of Joint Ventures and the leakage of sensitive information can significantly harm the commercial relation between us and our partners.

We would encourage the new standards to include a common confidentiality framework which shall be respected at least as “soft law”. To further encourage the adoption of such a framework, a special provision could be included in art. 9 of the Model Tax Convention. Other measures such as legally binding confidentiality agreements to be signed between the taxpayer and tax authority could also be contemplated.

Another way to limit the risk of information leakage is to limit the distribution of detailed and/or country specific information to the extent possible. As mentioned above, we therefore think that the local files shall only be provided to the country in question. Likewise, we think that TP-documentation shall not be required to be submitted routinely, but only upon request. The taxpayer could also be recommended to identify particularly sensitive information and only allow such information to be reviewed (but not submitted) in a “data room”-like environment together with legally binding agreements on how to access and use such information.

D.9. Other issues

Although we agree that taxpayers shall strive to use the most reliable information available when making comparable searches, we think that para 42. incorrectly assumes that local comparables are more reliable than regional ones. Typically, also in large markets, it is very difficult to find sufficiently comparable companies, making the selection too small to give a reliable result. Thus, in many cases it is often more reasonable to benchmark a larger region to get a larger statistical base for the comparison.

We agree that it would not be useful to require transfer pricing documentation to be certified by an outside auditor or certified third party. Often, this documentation is prepared with assistance from consultants, typically one of the large audit firms. If this shall be
reviewed by another audit firm, it will without a doubt drive compliance costs, particularly since you could expect the other firms to advise that some other way of reporting would be more appropriate. It would also significantly prolong the time it will take to finalize the documentation.

We furthermore think that the paper lacks sufficiently clear definitions of the various reporting elements. By way of example, it is not clear how the term “intangibles” as requested in appendix 1 shall be interpreted. Although one could expect that it should be understood according to the new ch. 6, this need to be clarified. Also, if this were to be the case, another significant issue arises, namely how to identify and list such vague intangibles such as unreported goodwill, workforce in place, know-how and other unrealized “over-values”.

The same lack of clarity applies to the meaning of income taxes and WHT. By way of example, shall taxes like the Brazilian CIDE (which unlike a normal WHT are levied on the payor and not the recipient) be classified as a WHT. If the reporting items like these are not clearly defined, there will be a significant risk that the ambiguity will add to the difficulties of analysing the data.

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 master file should be strictly limited to such information that is relevant for all countries. This holds particularly true if the master file and/or the CbC-report is to be submitted to a multiple of jurisdictions. In that perspective, we think that many of the items suggested in Annex 1 are questionable, such as:

- Chart showing supply chain for material products and services
- Chart showing important service arrangements between members of the MNE group other than R&D 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.
• A list of material intangibles or groups of intangibles of the MNE group and which entities own them.
• A list of important related party agreements related to intangibles, including cost contribution arrangements, principal research service agreements and license agreements.
• 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 how the group is financed, including identification of important financing arrangements with unrelated lenders.
• 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.

Alternatively, if a majority of the information suggested in Annex 1 will remain as part of the Master File, we strongly believe that filing shall be made upon request of the parent company’s tax authority only and that sharing shall be made under treaty information exchange provisions.
Comments on the OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting

21 February 2014

We appreciate the opportunity to comment to the OECD on the January 30th Discussion Draft on Transfer Pricing Documentation and CbC Reporting. Our comments focus on the proposed template for country-by-country reporting that is included in the Discussion Draft.

We welcome the active involvement of the OECD in the ongoing global debate regarding the international tax matters that have been the subject of headlines around the world. It is critically important that government concerns about the taxation of multinational businesses and the potential for base erosion and profit shifting be addressed in a manner that reflects sound tax policy, that provides certainty, and that is globally coordinated. Unilateral country action in this area could lead to double or multiple taxation of income from cross-border activity, a result that would serve as a barrier to global trade and investment.

The OECD Action Plan on Base Erosion and Profit Shifting (BEPS) describes government concerns about BEPS as relating to situations involving double non taxation or less than single taxation, including arrangements that achieve no or low taxation by shifting profits away from the country where the economic activity occurs. Thus, as the Action Plan explains, low taxation is considered an indicator of potential BEPS activity, but is a cause for concern only if it arises from an artificial separation of income from economic activities:

No or low taxation is not *per se* a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it. In other words, what creates policy concerns is that, due to gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed.

An overall theme of the Action Plan is ensuring that tax authorities have access to information needed to address BEPS concerns. The Discussion Draft contains the OECD’s broad proposals for increased documentation and reporting. The proposed country-by-country reporting template is intended as a tool for tax authorities to use for a first-step high-level risk assessment. Its purpose is to help tax authorities to manage their resources by identifying areas where further scrutiny may be appropriate.
The OECD acknowledges the need to take into account the compliance burden that would be imposed on businesses, as noted in the Discussion Draft:

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.

Clearly, the proposed country-by-country reporting template would impose significant burdens on multinational companies. It includes seventeen columns of data to be reported. Such data would have to be reported for each entity in a multinational group. For some multinational groups, this would mean reporting for hundreds or thousands of separate entities. The information that is required to be reported generally is not produced by multinational companies in this form for any other purpose, so its production would be a significant new burden. Moreover, information reported in this template form could require substantial further explanation lest it be misunderstood or misinterpreted. This would increase disputes, which would be a significant new burden both on businesses and on tax authorities.

More broadly, this new reporting requirement would involve a fundamental alteration of the traditional relationship between taxpayers and tax authorities, with taxpayers required to provide detailed information about all their lines of business even though a particular business may have no connection to a particular country. This delivery of irrelevant information to a tax authority could trigger “fishing expeditions” that would be burdensome to taxpayers and would distract and detract from the tax authority’s focus on what is relevant in its jurisdiction. Furthermore, the information included on the proposed country-by-country reporting template is competitively sensitive, which raises real concerns about the need to ensure confidentiality protections for the information.

We share the view of many in the global business community that the OECD should significantly scale back the volume of data that would be required to be reported on the template, including eliminating the entity-by-entity approach that is reflected in the proposed draft and returning to a broader country-by-country approach. The template is intended to be used as a high-level risk assessment tool only and its scope should be consistent with this purpose. In addition, given the burdens that producing the data for the country-by-country reporting template would impose on multinational businesses, we believe that the OECD should use the template to target situations that raise concerns about base erosion and profit shifting activity. The new country-by-country reporting requirement should not sweep in companies that do not exhibit the basic characteristics of potential BEPS activity.
Therefore, we recommend that an exception to the requirement to prepare and produce the country-by-country reporting template be provided for multinational companies that have a normalized sustained overall effective tax rate that is at or above the OECD average corporate income tax rate.

Such an exception would be consistent with the OECD’s stated aim of balancing the burdens for businesses with the benefits for tax authorities. Moreover, such an exception would narrow the use of the template in a way that would serve to enhance its effectiveness as a risk assessment tool. By limiting production of the template in this way, tax authorities would be better able to identify those situations that reflect low taxation that arises because of BEPS activity.

We would be happy to answer questions or further elaborate on these comments. Thank you for the opportunity to provide our perspectives on this important matter.

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INTRODUCTION

I appreciate the opportunity to comment on the OECD’s Discussion Draft on Transfer Pricing Documentation and CbC Reporting issued on January 30, 2014. I am commenting in my personal capacity as a tax lawyer with more than 25 years of international tax experience which includes transfer pricing projects (from conception to implementation, to documentation and to audit defense) in Asia, Australia, Europe and North America.

IS THERE A CONSENSUS?

The preface to the Draft provides that the “document does not necessarily reflect consensus views of either the Committee on Fiscal Affairs (CFA) or of Working Party n#6 (WP6) regarding the issues that it addresses”. This startling disclosure could give a reader reason to pause. Consensus on this project is critical if the project is to proceed. A failure of OECD to arrive at a consensus could be enormously damaging to multinational businesses. A failure to arrive at a consensus could easily lead to a discordant world where a taxpayer would have to comply with numerous versions of master files and country by country files separately customized and tailored by diverse tax authorities seeking information each tax authority believes is relevant. In short a failure to reach a consensus could result in a Pandora’s Box.

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

Paragraph 4 indicates that the purpose of the Draft is “the development of such rules so that transfer pricing compliance is more straight-forward”. From a taxpayer’s perspective, it appears that the actual consequence of the Draft would be to create transfer pricing documentation rules that are more burdensome, costly, onerous and time consuming than the current transfer pricing documentation rules. From a taxpayer’s perspective, there does not appear to be any indication of a meaningful attempt in the Draft to balance the increased compliance burden that will be placed on taxpayers.

B. Objectives of transfer pricing documentation requirements

As previously stated in my comments on the White Paper on Transfer Pricing Documentation, transfer pricing documentation will seldom be sufficient to “conduct an appropriately thorough audit of transfer pricing practices.” The Draft itself recognizes this fact when it allows tax authorities to request additional information. Some of the information requested in the Draft is better left to the dynamic process of a thorough transfer pricing audit rather than a mandatory requirement that all taxpayers must provide in up front documentation. Such a need for additional documentation during an audit is reflected in paragraph 14 of the Draft.
B.1. **Transfer pricing risk assessment**

In paragraph 7 the draft states that tax administrations operate with limited resources. The Draft appears to imply that taxpayers have deep pockets and can easily and readily provide the long, detailed list of information that the Draft mandates. This is certainly not the case. It would be appreciated if the OECD would acknowledge that taxpayers also are constrained by limited resources. If so that the Draft could be amended and revised to reflect a true balance between the OECD’s desire for disclosure of information and taxpayer’s limited resources. For example, some of the information requested in the Draft is not needed by a multinational in order to manage and operate its business. A multinational may need to create documentation, procedures and systems whose only purpose would be to prepare documentation requested in the Draft.

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

In paragraph 12, the Draft states that it is “important for countries to keep documentation requirements reasonable and focused on material transactions.” From a taxpayer's perspective it is difficult to readily accept that the long detailed list of documentation mandated in the Draft is either reasonable or focused. The breath and scope of information is much broader and deeper than that is currently contained in transfer pricing documentation. Rather than being “focused”, the long detailed list of documentation required in the Draft appears to be more of a fishing expedition for any information that could conceivably in any possible circumstance be potentially useful rather than reflecting a sincere concentrate attempt to identify only reasonably focused documentation.

B.1. **Transfer pricing audit**

Paragraph 15 addresses the issue of how a tax authority proceeds when information is in possession of a member of the MNE group other than the local affiliate. The current Draft would impose the burden on the local affiliate. A truly balanced approach would require a tax authority to request the information through the exchange of information provision of tax treaties or exchange of information agreements. Requiring a local affiliate to obtain information from a foreign member of the group would place an unfair burden on the local affiliate. Placing the burden on the tax authorities would help ensure the expansion of tax treaties or exchange of information agreements and encourage cooperation between tax authorities. Such a procedure would also help ensure the confidentiality of sensitive information mandated by the documentation requirements.

C. **A two-tier approach to transfer pricing documentation**

The Draft refers to a two-tiered approach to transfer pricing documentation. There is concern that the draft will result in a multiple-tier approach to transfer pricing documentation. Specifically, there is a risk that a tax authority might simply add the two-tiered approach on top of its existing local documentation rules. The Draft should make clear that in no circumstance can there be more than two-tiers of documentation. This would require a strengthening of the wording of paragraph 44.
C.1. Master file

Paragraph 20 takes the position that the master file should include country-by-country reporting. The country-by-country documentation should be a document separate and apart from the master file.

The country by country information requested in the master file creates a risk that a tax authority could easily apply a formulary apportionment approach to make an assessment on a local affiliate. There has been experience where a tax authority has taken such a position by relying on the global financial statements of a multinational company to make an assessment on a local affiliate. The requirement to disclose country by country information in the master file significantly increases the risks of other tax authorities taking a similar approach. Such action could easily result in increased controversies that would place a burden on both tax authorities and taxpayers.

Paragraph 21 states the need for a tax authority to conduct a detailed transfer pricing analysis based upon a full functional analysis or a full comparability analysis. This paragraph as currently worded is not sufficiently strong to overcome the potential temptation by a tax authority to choose the easy option of issuing a proposed assessment based upon a formula apportionment methodology. The paragraph should be revised to provide that if the information in the country-by-country document is the basis of the issuance of an assessment based upon a formula apportionment method, that the burden of proof to support the formula apportionment method falls solely upon the tax authority.

Paragraph 24 refers to Annex II to Chapter V that sets forth the information that is to be requested in the local file. The paragraph should be expanded by including a written explanation of why the OCED believes that each requested document is needed and the appropriate use that can be made of such documentation. Such a written explanation would better enable taxpayers to engage in a meaningful dialog with the OECD as to whether the information would actually meet the needs of the tax authorities in the most reasonably focused manner.

D.3. Materially

The description of materiality in Paragraph 29 is insufficient. Materially should be determined from the perspective of the parent of the MNE. What may appear to be material from a local perspective may be immaterial from the perspective of the parent of the MNE.

D.6. Language

A minimum of 60 days should be given to provide translation for simple documents. Longer, more complex documents may require additional time for translation.

D.7. Penalties

This provision of the Draft takes an unbalanced, one sided approach. That is, penalties and sanctions are only imposed upon taxpayers. In a truly balanced situation, penalties and
sanctions should be imposed upon tax authorities who misuse documentation requested in the Draft (by proposing an adjustment based upon a formula apportionment method) or results in disclosure (whether intentional or unintentional) of sensitive confidential information that a taxpayer supplies.

D.9. Other issues

Paragraph 42 is another example of the Draft taking an unbalanced approach. Paragraph 42 gives excessive preference to local comparables. Paragraph 42 should be revised to give more flexibility to taxpayers, in appropriate cases, to use regional comparable or even global comparables. There are instances where regional comparable may be appropriate (e.g., such as the European Union). Further excessive dependence on local comparable is inconsistent with the proliferation of free trade agreements which are eliminating or minimizing differences between comparable in various countries.

D.9. Transparency is one of the fundamental concepts underlying the White Paper and the Draft. Article D.9 “Other Issues” should be amended to address the use of “secret comparable” by tax authorities. In a balanced situation, the tax authorities should also bear responsibility for being transparent. This means that tax authorities should be under an enforceable obligation to disclose the identity of any comparable that it uses to propose an adjustment during an audit. If the privacy laws of a country forbid or prohibit the disclosure of the identity of a comparable, the tax authority should be prohibited from using it as a comparable.

E. Implementation

Paragraph 45 would require that the master file be shared with every country in which a MNE has an affiliate that is subject to tax. The most appropriate mechanism would be for the parent of the MNE to provide a copy to the tax authorities in its home country. Other tax authorities could then obtain the information under the exchange of information provision of the appropriate treaty or exchange of information agreement. Such a process would maintain the confidentiality of sensitive information contained in the master file while ensuring disclosure to tax authorities who demonstrate a need for the master file.

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

Organisational structure

A chart illustrating the ownership structure and geographical location of all MNE affiliates may resemble a book rather than a chart. It may be better to limit organisational structure to material operating affiliates. The term “material” should be defined.

Description of MNE’s business(es)

A chart showing supply chain for material, products and services for an MNE may resemble a book rather than a chart. It may be better to limit it to principal supply chains. A definition or standard of materiality would be required.
The need for the job titles of the 25 most highly compensated individuals is not clear. Simply put, why is the information relevant? Why 25 and not 5? For example, the Securities and Exchange Commission in the United States only requires information on the top 5 most highly compensated individuals. More importantly, most tax departments do not have access to information concerning the 25 most highly compensated employees since it is not relevant to its job function and the information is highly sensitive.

**MNE’s financial and tax position**

Under this heading, the master file should contain a list and brief description of (i) all APA’s and advance rulings, (ii) other relevant tax rulings and (iii) matters pending or resolved in MAP. This information should not be included in the master file. The inclusion of such information could lead a tax authority to mimic an approach that other tax authorities have taken. Such a development could inevitably lead to an increase in tax controversies. An increase in controversies could overwhelm local controversy procedures and local MAP capabilities.

If a decision is made to include this information in the master file, the parent of the MNE should only be required to share the master file with tax authority in its home country. Other tax authorities should only be able to obtain the master file through the exchange of information provision of the relevant treaty or exchange of information agreements.

As said previously, the country-by-country reporting should be a document separate and apart from the master file. The parent of the MNE should provide the country-by-country reporting to tax authority in its home country. Other tax authorities of other should only be able to obtain the country-by-country document through the exchange of information provision of the relevant treaty or exchange of information agreement. (Consideration should also be giving to changing the name of the template since the information is not submitted on a country by country basis but an entity by entity basis. As the project has evolved, the current name has become misleading and does not reflect how a taxpayer must gather the information.)

**Annex II to Chapter V: Transfer pricing documentation – Local file**

**Local entity**

Requires a local organization chart and a description of the individuals to whom local management reports. Many MNE’s utilize matrix management structures which often blur management reporting lines. Further, it is not clear what relevant reporting lines have to determining whether transfer prices are arm’s length.

**Controlled transaction**

Under this heading a local affiliate must provide “Identification and description of other controlled transactions of the taxpayer that can directly or indirectly affect the pricing of the controlled transaction being documented.” It is unclear what type of information is sought under this nebulous and vague requirement. This “catch-all” language has the feel of a fishing expedition rather than being “reasonably focused.”
**Financial information**

The Draft requires “Information and allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements.” Many taxpayers do not prepare or maintain this type of reconciliation in establishing its transfer prices. Such a requirement would necessitate a taxpayer to prepare a reconciliation that is not needed to manage or operate its business but is prepared and maintained solely for purposes of the local documentation file. The requirement should be deleted. If on audit such reconciliation is needed, the tax authorities can make a specific request for the reconciliation.

**Annex III to Chapter V: A Model Template of Country-by-Country Reporting (more aptly entity by entity reporting)**

The tax disclosed should be on the accrual basis not the cash basis. Most taxpayers prepare and maintain their financials on an accrual basis, not a cash basis. For example, this is a fundamental requirement of U.S. GAAP. A requirement for a taxpayer to prepare and provide the tax information on a cash basis may require the preparation and maintenance of information that a taxpayer does not need to manage and operate its business.

Annex III requires the disclosure of withholding tax. It is not clear why the OECD believes that this information would be useful. Information on the withholding tax on a MNE’s affiliates is not often available to the parent of the MNE. This information could also be duplicative of tax information provided in the preceding column. How should a taxpayer avoid the duplication of tax in the two columns?

Annex III requires additional information. It is unclear what type of information is sought under this vague, nebulous requirement. This “catch-all” language has the feel of a fishing expedition rather than being “reasonably focused”.

**SPECIFIC INSTRUCTIONS**

The instructions request a confusing mix of information some of which may be best addressed by a “top down” approach and others by a “bottom up” approach. The instructions should clarify which approach that a taxpayer should take or give a taxpayer the flexibility to choose either approach. A “top down” approach may be easier of a multinational that operates on a centralized basis.

Regardless of which approach is taken, the instructions mandate submission of information that may not be readily available to the parent of an MNE. Further, there are doubts concerning whether the instructions contained in the Annex would result in information that would be truly helpful to tax authorities in making a high level tax risk assessment. The exhausted list of information requested in the template should be reviewed to ensure that the information requested is “reasonably focused”.

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Revenues

As currently worded, this instruction would make it impractical to use a “top down approach”. This is because the revenue contained in the parent’s financial statements would be after intercompany eliminations. The requirement that the revenue be taken from the Constituent Entity’s statutory financial would require a “bottom up approach”. The instructions also require that the revenue be in the Constituent Entity’s functional currency and that the currency be identified in the statement. This would also appear to require a “bottom up” approach. Further, the current draft country-by-country report does not contain a column to disclose currency. The final sentence of the second paragraph provides that a taxpayer may elect to report in a single currency. Such an election would seem to be consistent with a “top down” approach.

Earnings Before Income Tax

This requirement indicates that the income should be in the functional currency of the Constituent Entity. This is consistent with a “bottom up” approach. However, if a taxpayer elects to report revenue of all the MNE’s in a single currency, does the MNE need to report the earnings before income tax in the functional currency of the Constituent Entity?

Income Tax Paid (on Cash Basis)

Neither the Draft nor the instructions provide a reason or rationale for the submission of tax paid on a cash basis. Most MNE’s prepare and maintain their books on an accrual basis. U.S. GAAP requires that U.S. multinationals prepare their books on the accrual basis. The submission of tax information on a cash basis may require financial data which is not needed for a MNE to manage and operate its business.

Total withholding Tax Paid

Neither the Draft nor the instructions provide a reason or rationale for the submission of total withholding tax paid. Further, the information may duplicate tax paid in the column income tax paid.

Number of Employees

Does the number of employees include all employees (e.g., part time employees and full time employees) or only full time employees? Many firms make extensive use of independent contractors. Are independent contractors included in the scope of employees?

CLOSING

The White Paper on Transfer Pricing Documentation issued by the OECD in July 2013 stated as its objective to make transfer pricing documentation simpler and more straightforward. If that is the objective against which the Draft Discussion Document on Transfer Pricing and Country by Country reporting is to be measured, the OECD has failed to accomplish its objective.

The current Draft in almost every instance suggests increased documentation and selects fairly difficult data options to obtain that documentation. While the White Paper suggested that tax
authorities should balance their needs for information with the additional compliance burden on taxpayer, in the Draft, the tax authorities’ needs seem to outweigh any concern for a taxpayer’s burden.

It might not only be multinationals which could be overwhelmed by the quantity of information requested in the Draft. The “limited resources” of tax authorities could also be easily overwhelmed as they struggle to absorb and digest the immense quantity of documentation that is requested.

Further, much of the language describing the requested documentation leaves significant room for interpretation and potential difference of views between tax authorities and taxpayers. For example, the Draft contains no definition or explanation of materiality. This gives rise to the risk that a transaction that represents 0.5% of a multinational’s transaction could be considered material from a tax authority’s perspective while clearly being immaterial from the perspective of a multinational enterprise. The burden would fall on the multinational.

In closing, I would again like to thank the OECD for providing the opportunity to comment on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting. My hope is that the OECD will now offer a meaningful opportunity for business to engage in a debate and discussion that will lead to true simplification of transfer pricing documentation.

Respectfully submitted,

William Ramirez

Attachment
Additional Comments

1. It would not be appropriate at this time for work on BEPS Action 13 to include development of additional standard forms and questionnaires beyond the country-by-country reporting template. There is a saying that “one should not run before they can walk”. Implementation of the Draft would materially increase the compliance burden on taxpayers. There will also be an additional burden on tax authorities as they learn how to properly use the information that has been provided to them. Experience has proven that tax authorities often take several years to integrate their procedures and systems to accommodate new information. It may be prudent to wait 3 to 5 years before the issuance of any additional standard forms or questionnaires.

2. The purpose of the Draft is to require more transparency from taxpayers. If this is the case, a truly balanced approach would require more transparency from tax administration. Transparency from tax administrations would include a requirement that the tax authorities disclose and discuss their tax risk assessment with taxpayers. A truly balanced approach would require tax authorities to discontinue the use of secret comparables.

3. If during an audit of a local company information is needed concerning a foreign member of the group, the appropriate response would be for the tax authority to utilize the exchange of information provisions of the relevant treaty or exchange of information agreements. Such an approach would (1) not result in the tax authorities placing an unfair burden on the local affiliate, (2) ensure that the tax authority would only seek information critical to an audit (e.g., not engage in a fishing expedition), (3) put pressure on governments to expand the treaty network or exchange of information agreements, (4) encourage cooperation between tax authorities and (5) help ensure that the confidentiality of sensitive information is maintained.

4. The country-by-country document should be a document separate and apart from the master file. The country-by-country document contains information that many companies find sensitive and do not provide to even members of the own group. The country-by-country documentation should be prepared and maintained by the parent company in the group and submitted to the tax authority in its home country. The country by country file should be accessible by other tax authorities only though the exchange of information provisions of the relevant treaty or exchange of information agreements. Such a process would help maintain the confidentiality of the sensitive information and minimize the accidental disclosure or misuse of the sensitive information.
5. The country-by-country document should be prepared on a top down basis based upon the accounting method used by the parent of the group. It might be difficult for many MNE groups to use a bottom up approach since many MNE do not centrally collect local statutory financials. That is, local statutory financials are not used in managing and operating a business. The individuals at the parent corporation may not be familiar with the local accounting rules that are used in the numerous countries in which the MNE operates.

6. The taxes reported in a country-by-country document should be based on an accrual and not the cash basis. Most MNE are required to prepare their financial statements on an accrual basis. Preparation of a country-by-country basis might require a MNE to obtain information that it does not need to manage its business and could lead to requests for reconciliation between taxes on an accrual basis versus tax due on a cash basis. If during audit a tax authority found it necessary to obtain information for the local affiliate on a cash basis, the tax authorities could make a specific request to the local affiliate.
February 22, 2014

The Organisation for Economic Cooperation and Development
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Via email to TransferPricing@oecd.org

The OECD on 30 January 2014 released the Discussion Draft on Transfer Pricing Documentation and CbC Reporting.

The Discussion Draft has put forward proposals in draft form, in accordance with the OECD Base Erosion and Profit Shifting (BEPS) Action Plan, which was issued by the OECD on 19 July 2013. The OECD has requested comments from stakeholders.

The Discussion Draft includes two principal proposals that would alter the existing OECD Transfer Pricing Guidelines. The first proposal involves a two-tier approach to transfer pricing reporting, using a global “master file” in addition to local country files. The second proposal involves the use of country-by-country reporting templates that would require multinational companies to provide information and statistics regarding the different legal entities in the group.

WTP Advisors is pleased to provide herein our comments and reactions to the Discussion Draft, in the spirit of providing constructive and creative feedback to the OECD. These reflect the experiences of our international firm as global transfer pricing advisors to multinational companies, as well as comments and reactions garnered from conversations with interested taxpayers. We hope that the OECD will take these comments and reactions into consideration in the drafting of future proposals with respect to the OECD Transfer Pricing Guidelines. We have arranged our comments according to the specific requests for comments as stated in the Discussion Draft. This document reflects the views of the authors below as well as input from WTP Affiliates in Asia, Europe and Latin America.

Stéphane Dupuis, Managing Director, WTP Advisors, Montreal, Canada
Michael Flaherty, Partner, WTP Advisors, New York, USA
Fuad Saba, Managing Director, WTP Advisors, Chicago, USA
Guy Sanschagrin, Managing Director, WTP Advisors, Minneapolis, USA
“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.”

Summary:

- Forms and questionnaires should be targeted carefully for risk assessment and examination purposes;
- Undue reliance on high-level / summary statistics can lead to inappropriate conclusions;
- Tax authorities and taxpayers can have constructive discussions around relative TP risks.

Detailed Comments:

1) The use of additional forms and / or questionnaires by tax administrations may be aimed at (1) achieving greater efficiency in the risk assessment of a taxpayer’s controlled transactions, or (2) obtaining additional information to support the transfer pricing examination process.

2) With respect to the risk assessment process, tax administrations and taxpayers alike will benefit from a focus on material and significant controlled transactions, rather than an examination of every controlled transaction. Therefore, it may be possible to develop forms or questionnaires that focus on identifying and segregating out the material, significant controlled transactions for review. While in some cases the value of a controlled transaction, and thus its effect on local taxable income, can be derived from numerical information (sales volume, units produced, value of assets employed etc.,) in other cases the value of a controlled transaction may be derived from intangibles that have been developed by the local country operation, or have been licensed in from a related party. (These may include technology, know-how, marketing or other intangibles.) In these cases, forms or questionnaires that focus only on numerical information probably would not further the cause of an efficient risk assessment process. For these reasons, it will be necessary to craft the forms or questionnaires in a manner that considers all material drivers of economic activity, whether on or off the balance sheet. This should be achievable to the extent that the underlying principles of a Functional Analysis are kept in mind.

3) We believe it would be appropriate in most cases for the tax administration examination team to share the results of their transfer pricing risk assessment with the taxpayer for the following reasons:
   a) One of the fundamental obligations of a tax system is to give certainty to taxpayers regarding the legal framework and the administration of this system. As such, taxpayers will benefit from understanding the point of view of the tax authority with respect to which intercompany transactions are “risky” and how they will evaluate such
transactions. This information should be shared via formal channels rather than as informal positions.

b) A common understanding of relative risk (and relative materiality) will encourage a discussion between the tax administration and the taxpayer on the controlled transactions that will be examined. This will allow the taxpayer to focus its documentation and evidentiary efforts on these transactions and accelerate the pace of the tax examination.

c) If the tax administration has assessed incorrectly the relative risk (and relative materiality) of a controlled transaction, sharing this conclusion with the taxpayer enables a constructive and corrective discussion before the controlled transaction is slated for examination.

4) With respect to forms or questionnaires to support the transfer pricing examination process, it is our belief that any additional information that may be sought by tax administrations, particularly with respect to controlled transactions that are driven by intangible values, the “cloud” environment or other challenging factual contexts, should be requested as part of the Functional Analysis process that the taxpayer must prepare. This can be done after the risk assessment stage has been completed so that only material controlled transactions are covered.

a) More than two-thirds of the OECD member countries require some form of documentation regarding transfer pricing. In most of these countries, the information disclosed in the documentation is fully adequate as a country file. One potential approach would be to standardize the documentation requirements for all OECD members without imposing additional forms.

b) It is unlikely that any forms or questionnaires, standing on their own, can create the comprehensive picture of the controlled transactions that can be achieved in a Functional Analysis;

c) The focus on individual financial data points, ratios or similar numerical information instead of a thorough Functional Analysis may lead to preliminary and incorrect conclusions regarding the economic impact of a controlled transaction, and also to unrealistic expectations on the part of the tax administration regarding the amount of tax payable with respect to the controlled transaction. This can only lead to disputes with the taxpayer and affect negatively the relationship with the tax administration.
“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.”

**Summary:**

- Sharing of Master File information should be kept to a minimum.

**Detailed Comments:**

If the master file is properly constituted and the local transfer pricing documentation contains all relevant and appropriate information, requests for the production of other information and documents in the possession of associated enterprises outside of the jurisdiction should be kept at a minimum. Having said that, the possible rules relating to obtaining additional information and documents should be left to the domestic laws of the different OECD countries, lest they end up following the most stringent forms among all jurisdictions involved, which we think would be suboptimal.

For example, the courts in Canada have strongly supported the tax authority in its sometimes unquenchable thirst for information (cf. the decisions in the Saipem Luxembourg case, the eBay case and more recently the Soft-Moc case\(^1\)). Essentially, the only test applied by Canadian courts is whether the requirement for information and documents is issued for a purpose related to the administration of the Income Tax Act. It is unlikely that countries like Canada would accept at this point to follow any rules suggesting a diminished scope and weaker powers for obtaining information than those presently applied. Given the abuse and taxpayer costs that this legal ambit for obtaining information may potentially entail, we do not think that its generalization would be advisable in any circumstances.

\(^1\) In Saipem Luxembourg SA v. Canada (Customs and Revenue Agency), the court ordered, in the context of a request for foreign-based information, an examination of worldwide documentation even though the Canadian permanent establishment represented but a small fraction of the taxpayer’s entire business operation. In eBay Canada Ltd. v. Canada (National Revenue), the court authorized the disclosure of information stored electronically on US servers. The same approach regarding broad access to foreign-based information was reconfirmed in Soft-Moc Inc. v. M.N.R.
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.

For large MNEs with multiple lines of business ("LOBs") that track their operations by LOB in the ordinary course of business, it would likely be less burdensome for the taxpayer and clearer for the tax authorities if the master file is prepared by LOB. Large and sophisticated MNE’s commonly report through line of business consolidation channels. It is not uncommon to find little in the way of communication or cooperation between subsidiaries of an MNE in a particular jurisdiction, such that all reporting flows through a LOB channel and final consolidation is done either regionally (Europe, Asia, etc) or at the highest level. This is because businesses may have very different operations in their various segments, and therefore different transfer pricing policies may be used for different LOBs. If however an MNE does not track activity by LOB to manage the business, then LOB reporting should not be required for transfer pricing purposes as this requirement would force MNEs to create data of questionable value solely for tax purposes.

However, it should be noted also that less complex or smaller MNE’s consolidate in the local jurisdiction, the country-wide activity, prior reporting to the next level.

As such an optional approach would be the best way to allow flexibility to the taxpayer and would lessen the administrative burden. Potentially, this option would apply to taxpayers with a relatively low level of intercompany transaction activity, e.g. no more than $50 million in gross intercompany transactions.

As a general comment, information that is used in the ordinary course of business will be more meaningful than information that is created strictly for transfer pricing compliance.

Regarding “the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries:”

As stated in the previous section, if segment data is collected and reviewed in the ordinary course of business, it would be reasonable to expect that this data will be validated and accurate, and therefore could be shared across and between relevant countries if necessary. If the data is not collected in the ordinary course of business, it is more likely that requiring this data will be burdensome for the taxpayer to create, collect and organize, and as a corollary will be more likely to have inconsistencies that may cause issues between countries.
Regarding “how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted:”

As a simple check, a high-level consolidated summary of the MNE’s financial statements could be prepared from the separate LOB’s, and tied to publicly available data. Requirements of this high-level information should be as straightforward as possible to minimize additional administrative burdens on the taxpayer.
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 separate document, so that it can be provided on an “as needed” basis. This would enable the MNE to minimize risks associated with sharing of potentially sensitive information.

  Taxpayers are aware that transfer pricing reports often contain highly confidential information regarding strategic decisions and product and production changes. Including local country information within the master file could lead to unnecessary disclosures of confidential or proprietary information that could harm the taxpayer. Furthermore, the inclusion of local information with the master file may cause taxpayers to omit information that might otherwise be included in a local country file. As such, local country tax authorities would have reduced access to information that could clarify and support the transfer pricing at the local level.”

- **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 country-by-country template should be compiled using “bottom-up” reporting from local statutory accounts. A bottom-up approach will be built based on actual accounts and transactions, whereas a top-down approach will necessarily involve assumptions about the effects of local economic factors, operating advantages, industry impacts, and accounting methods which may not be easily interpreted. A bottom-up approach is less burdensome to the taxpayer, as it is based on data that likely already exists. This data will be more accurate and reliable for tax authorities as they will reduce reliance on assumptions, allocations and potentially misleading “economic activity factors.” Information included in the country file must be reconciled with statutory financial records, thus increasing the reliability of the data used to perform any analysis or risk assessment.

  The OECD may consider encouraging (but not compelling) MNEs to prepare a top-down analysis using the residual profit split method. Unlike the economic activity factors included in the template, the residual profit split method would take into account the company’s global and
local intangibles, risks and value drivers to explain the split of profits across the MNE’s supply chains.

- **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?

Consolidated reporting does not make sense

- A proper transaction would have intercompany transactions eliminated.
- Companies form multiple legal entities in countries for business reasons. Usually, they comprise different business units.

MNEs form multiple entities within a country because these entities often comprise different business units. Thus, a consolidation will focus attention on a presentation of data that is economically irrelevant. In addition, if a tax authority questions the consolidated results of a group of entities within its jurisdiction, it will be necessary to “unwrap” the country-consolidated transactions to the entity level. The taxpayer’s burden will thus be increased two-fold, by the need to consolidate by country entities for reporting purposes and then to unbundle the transactions under audit scrutiny. Different subsidiaries of an MNE might not employ a country coordinator overseeing the compliance of all entities on a country-wide basis. In a complex MNE, subsidiaries typically report independently to business line leadership.

A top-down model approach inherently will provide inaccurate and unreliable results of intercompany transactions, as stated above. In fact, the top down approach will potentially be misleading to tax authorities, potentially creating unnecessary controversy and inefficiency in the process.
• **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?**

Tax expense as reported on a cash basis or accrual basis is not a reliable indicator of any transfer pricing position and certainly cannot be used independently or superficially to assess any risk. Tax expense is normally driven and affected by several factors: local regulations and reforms to such regulations (tax breaks, consolidation regimes), non-recurring and unusual transactions, mergers and acquisitions, adjustments due to tax audits and several other circumstances that are commonplace in MNE situations.

As described above, reporting consolidated legal entity financial data such as taxes paid by country is irrelevant for most MNEs who operate multiple entities that house separate and different business units. The different business units typically entail significantly different products or services and likely contain different functions, risks and assets. Requiring MNEs to report such information would likely increase their reporting burden by forcing them to explain meaningless numbers.

• **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?**

  - This requirement will not likely improve administration.
  - Some countries, such as the US and Canada, already require reporting intragroup royalties, interest and service fees. Others do not.
  - Depending on the jurisdiction, this requirement can represent a significant burden.

This information could be useful to tax authorities and taxpayers in performing the risk analysis to prioritize the transactions that have the greatest impact on local operating income. However, this requirement should not be compulsory since many countries do not require this information and many MNEs would not have this data readily available. Reporting aggregate cross-border payments between associated enterprises may create additional burdens for taxpayers that operate in countries that do not require this data. Similarly, requirements for reporting intra-group payments of royalties, interest and services fees will also increase burdens.
for taxpayers unless this information already is required as a matter of existing reporting obligations.

- **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 raw template information, without context, would likely create situations in which data is misinterpreted and create unnecessary conflicts.
  - Taxpayers should be encouraged to provide more explanation in the functional analysis.
  - MNEs should consider greater utilization of intercompany agreements and/or memorandums of understanding.

A simple explanation (i.e. a paragraph or two, similar to a summary in a transfer pricing documentation report) describing the nature of the business activities carried out in a jurisdiction is reasonable, and will provide context to the tax authority reviewer and therefore provide clarity. The raw template economic activity factor data, without context, would likely create situations in which data is misinterpreted and create unnecessary controversy. Taxpayers should be encouraged to provide a comprehensive functional analysis describing the functions, risks and assets associated with certain intercompany transactions. In their functional analyses, taxpayers should be encouraged to provide an introductory statement that describes the role of the functional analysis. In particular, taxpayers should provide details regarding the risks and valuable intangibles they use in the business. For transactions involving valuable intangibles, the functional analysis should identify each intangible, describe how the intangibles create value, indicate the entities that own the intangibles and identify the entities that develop them and utilize them.

Features of specialist sectors could likely be accommodated / addressed in the simple explanation described above.

As described above, the key measures of economic activity would place attention on risks and intangibles. As such, depending on the industry and nature of the MNE’s business, economic activity factors that potentially would be more relevant than those in the template include research & development expenses and marketing expenses. However, overreliance on data such as these expenses without appropriate context can be misleading and misinterpreted.
Intercompany agreements can be a useful tool for tax authorities and taxpayers to distinguish economic activity factors. We note that certain countries such as Brazil and China follow a legalistic approach. These jurisdictions are known for disallowing local deductions associated with services provided by foreign entities that are not covered by agreements. Thus, MNEs should consider greater utilization of intercompany agreements to provide clarity on the roles and responsibilities of the MNE’s different entities with respect to functions and risks and the ownership of intangibles.

- General comments on the country-by-country template:

  We believe the proposed template requests information that is potentially misleading to tax authorities and burdensome to collect for taxpayers. While the administrative burden could be streamlined via automated data collection tools, we are concerned that the potential misuse or misinterpretation of template data by the tax authorities will subject taxpayers to unnecessary controversy. As provided, data that purport to be “indicators of the location of economic activity” without significant additional guidance and context would likely create confusion.

  Furthermore, the purpose and definition of several of the metrics in this template require clarification.

  - For instance, the number of employees does not consider the relative importance of roles and responsibilities of personnel within the value chain.
  - It is not clear what is meant by “Earnings before Tax.” Is this Taxable Income? Operating Income? Normally we exclude non-operating items from our analyses. As such, the template should specify “Operating Income.”
  - The book value of tangible assets is subject to a number of issues that renders this number virtually useless as a benchmark or reference for economic analysis (e.g., varying accounting based depreciation rate schemes are typically not strictly based on economic use, differences from market value, differences from economic value, etc.).
“Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.”

Summary:

- Materiality Thresholds Would Undermine Reporting, Lead to More Disputes
- Documentation Aids and Encourages Tax Planning and Compliance

Detailed Comments:

The Discussion Draft suggests that transfer pricing documentation requirements should take into consideration external materiality thresholds, apparently assessing the relative importance of the enterprise to the local economy. This type of assessment has sometimes been employed by taxpayers to assess their visibility and likelihood of audit by tax authorities. When a low-visibility taxpayer exists side-by-side with high-visibility taxpayers, this approach suggests that the low-visibility taxpayer is less likely to be targeted for audit and may therefore have less to fear from aggressive tax planning or compliance failures. In addition, the Discussion Draft adopts a stance similar to that adopted in some jurisdictions, excusing small and medium-sized taxpayers (SMEs) from documentation requirements applied to large taxpayers.

The dangers posed by these materiality thresholds exist for both taxpayers and tax administrations. First, while some SMEs may indeed have less exposure to assessment, this materiality standard outlined in the Discussion Draft does not free taxpayers from the requirement to establish arm’s length pricing, nor does it provide a safe harbor from audits or penalties for their failures to meet and confirm that they have acted according to this standard. A taxpayer that relies on a materiality standard and fails to actively manage their pricing arrangements risks both assessments and penalties, since the materiality standard does not provide a safe harbor. Second, and perhaps more importantly, a taxpayer who chooses not to prepare documentation will also likely be failing to consider tax planning and tax policies that will reduce tax risks and/or tax liabilities. In short, no good and plenty of ill can come from ignoring the preparation of reasonable transfer pricing documentation since preparing such documentation is often the first step in achieving a workable tax policy for a multinational enterprise.
In terms of policy, freeing taxpayers from responsibility for preparing documentation will place tax administrators in the position that they occupied before the OECD Guidelines provided taxpayers and tax administrators guidance in documentation. By that we mean that audits will take longer owing to the absence of documentation, and that there will be more disputes between taxpayers and tax administrators and between tax administrations. Truly a step backward, not an advance in tax administration. The putative near term benefit for taxpayers will lead to poor results for all parties.
“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?”

Summary:

- Requiring Comparables Data Searches Every Third Year is Reasonable, Not New
- Financial Data Searches Every Third Year Would Make Sense Too

Detailed Comments:

The Discussion Draft suggests that the master file and local file be updated annually, but that the comparable database searches need be undertaken only every three years instead of annually. However, the Discussion Draft also suggests that the financial data for the comparables be updated each year. The more limited approach for comparables searches would be available only where business descriptions, functional analyses and comparables remain relatively static.

Updating the business description, legal structure, functional analysis and comparables annually is typically a simple process, where facts have not changed, since the “heavy lifting” has usually occurred during the initial transfer pricing study. This approach is already widely used by taxpayers and advisors to streamline their compliance efforts, and insofar as that is the case, represents no real change. However, tax examiners may be inclined to argue whether facts have remained static, and will still be forced to review the detailed functional analyses and compare these analyses year-by-year to determine whether the taxpayer activities have remained static. Taxpayer efforts need to focus on year-to-year comparisons of the facts and tax administrators, and taxpayers will benefit if the OECD provides a template that can be used so that the taxpayer can easily demonstrate that the business facts are static and tax administrators can efficiently confirm that the necessary facts have been confirmed. It would be reasonable for the OECD to limit the financial update for comparables to every three years too, provided the taxpayer is able to demonstrate that there have not been significant industry changes and/or significant changes to the make-up of the list of comparables.
“Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.”

Summary:

- English for Large MNEs and Flexibility for SMEs Would be Appropriate
- Requiring Translations Will Limit and Slow Taxpayer Disclosures/Reporting

Detailed Comments:

The Discussion Draft suggests that the master file can be in English but that local country files might be required to be in the local language. As a rule, large multinationals and sophisticated administrations tend to use English or at least are not over-burdened by it. Translation of local country files into a second language would represent a hugely unwelcome and costly additional burden for SMEs, and would be completely uneconomic and unjustifiable for many. Beyond the costs associated with such a requirement would be the certainty that such a requirement would make it more difficult to provide contemporaneous documentation and that it would increase the opportunity for awkward translations of complex terminology, leading to misunderstandings and misinterpretations of the narrative information typically included in the documents. Ultimately, owing to these burdens and foreseeable problems, we anticipate that most taxpayers, large and SMEs alike, would look for every opportunity to minimize the information provided in their documentation if they are required to translate the documentation into a second language.

All of this notwithstanding, we would not suggest that local language skills have no place in local audits. When local audits occur, taxpayers must be prepared to explain their documentation to local examiners and may need the services of internal or external advisors who can deal with the tax examiners in the local language. Translation needs with respect to the local country file information can also be reduced through use of financial information and data presented in charts, graphs and diagrams to replace some aspects of the narrative in the report, although care must be exercised to ensure that the graphic illustrations do not over-simplify or confuse complex factual presentations.
On the other hand, if country files are to be accepted as a substitute for local transfer pricing documentation, it is understandable that local language country files would be mandatory. Master files can be summoned by a local tax authority in the context of an audit, with enough lead time to allow for an appropriate translation of the Master file into the local language.
“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.”

Summary:

- Confidentiality of sensitive information can be safeguarded so long as tax authorities cooperate with taxpayers;
- Some information may be shared with the “head office” tax authority but not with local teams.

Detailed Comments:

By its very nature, the information contained in a Functional Analysis, or in transfer pricing documentation, is sensitive and often confidential. MNEs are right to be concerned that access to these documents, unless tightly controlled, can lead to the loss of economic value if confidential business information falls into the hands of adverse or competitive parties. For this reason, we believe that tight safeguards should be imposed on the sharing of such information:

a) Under certain circumstances, it may be necessary for the taxpayer to disclose certain information to the tax administration on an “eyes only” basis, meaning that the tax administration may review a printed document but may not make or retain copies of that document beyond the period allotted for that review. It may be appropriate for a representative of the taxpayer to remain present with the tax examiner during such review. A similar approach would be to provide the taxing authority with limited access to a secure data room, where documents may be viewed but not copied.

b) In other cases, it may be necessary for taxpayer’s legal counsel (for example, IP counsel,) to be present during examination discussions with the taxpayer, and for counsel to limit, based on her informed discretion, the nature of the information that is shared with the tax administration.

c) In some cases it may be necessary to limit the nature of information available to a “local country” tax authority, for example if the MNE is contemplating a strategic transaction with respect to its operations in that country. In such cases, while the tax authority in the “home country” may have access to such information, it would not be appropriate for it to be shared with the local country tax authority.

d) In cases where, under a Tax Exchange of Information agreement, the tax administrations of two countries have agreed to share taxpayer information, for example as part of a
joint audit proceeding, it may be appropriate for the to control the electronic sharing of documents through the use of passwords or access keys, or for the taxpayer to make information available on the secure networks of the controlled entities on an “eyes only” basis, as suggested above.

e) In all of these cases it would behoove the tax administration(s) to respect the sensitivity and importance of confidential information, and to explore avenues in which access to this information does not compromise it. Since there cannot be a single answer that fits all cases, the OECD CBC guidelines should encourage tax administrations to be flexible and creative and work with the taxpayer in a cooperative manner so that sensitive information can be shared without adverse effect.
“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.”

Summary:

- Care should be taken to preserve confidentiality when sharing information.

Detailed Comments:

In many jurisdictions including Canada for example, the jurisprudence established by the Courts has clearly recognized the broad powers of the tax administration to obtain foreign-based information as long as a minimal justification exists to obtaining the information in question. Accordingly, to the extent it is made clear that those documents have to be available upon request to all tax administrations concerned in a reasonable timeframe, the form of the mechanism for making the master file and the country-by-country reporting template available is ultimately relatively unimportant.

Having said that, given that some portions of the master file would be requested as part of any typical transfer pricing examination (e.g., general description of the business, etc.), for practical purposes while ensuring optimal confidentiality, some combination of direct local filing and filing of information in the parent company’s jurisdiction should be implemented. In particular, in the cases where the parent company of a multinational group of companies would not want its foreign affiliates to have access to portions of the country-by-country reporting template, this specific information should indeed be filed in the parent company’s jurisdiction and be shared only between tax authorities and under treaty information exchange provisions.
“Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.”

It is warranted for the sake of transparency that lists and brief descriptions of all the APAs, other rulings and MAP cases are required and therefore included in the master file. That said, it would not be justified or justifiable that significant portions of those APAs, rulings and MAP cases be included or quasi automatically asked for by the tax administrations.
Dear all,

WTS is pleased to provide you with comments regarding the OECD Draft on Transfer Pricing (TP) Documentation and country-by-country (CbC) Reporting. We appreciate the effort to provide guidance on this important topic on an international, cross-border basis, and assess the provided discussion draft as a first step in the right direction.

However, our overall impression is that the discussion draft seems to be very focused on providing tax authorities with more detailed information which leads to significantly higher administrative efforts on the side of taxpayers. Many countries already have well established regulations in place regarding the documentation of transfer prices which over the last years have well proved to be sufficient to satisfy the tax authorities by simultaneously not overloading the taxpayers. Hence, a further tightening and extension should be introduced with sound judgment, especially considering the added value of the additional information compared to the additional effort and expenses to be borne by the taxpayers. This should especially be considered when intending to introduce a mandatory CbC reporting for all internationally active groups. In addition, it would be very helpful to provide the taxpayer with a standardized documentation approach for all OECD countries as this could tremendously reduce compliance efforts whereas at the same time information consistency would be guaranteed for the taxpayer and all international tax authorities involved.

With our comments, we would like to emphasize several subjects which seem to be most important to us. Regarding these subjects we want to ask the OECD to rethink its opinions and amend the draft as may be appropriate. The following subjects are from our perspective the most important ones to be considered respectively revised:

To
OECD

Subject
Comments on the OECD "Discussion Draft on Transfer Pricing Documentation and CbC Reporting"

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• **Extent of information requested**
The information requested according to the proposed two-tired TP documentation approach is substantially more extensive than the documentation requirements in place within most OECD member countries. To a certain extent the proposed additional information to be provided by the taxpayer may contradict legal obligations of the taxpayer, e.g. personnel rights of the employees. Accordingly, protection of data privacy also needs to be considered for TP documentation purposes.

• **Time frame**
The proposed time frame represents a tremendous tightening of the time frame for the preparation of TP documentation according to the rules in place within most OECD member countries.

• **Material thresholds**
Material thresholds are highly welcome but it is absolutely necessary to introduce common materiality standards to avoid a deviating implementation within each OECD member country.

• **CbC reporting**
The expected added value of a CbC reporting does not justify the additional effort for the taxpayer and its introduction should be denied. Furthermore, WTS suggests that the OECD makes a strong statement in support of the opinion considering the comparable profit method respectively a formulary apportionment as being not acceptable.

In the following, we have clustered our comments according to the provided discussion draft and commented on the specified issues:

**B. Objectives of transfer pricing documentation requirements**

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

From our perspective, the proposed two-tired master and local file approach for TP documentation includes all relevant information necessary for the tax administration to perform a comprehensive TP audit. Hence, to avoid disproportional additional effort for the taxpayer no additional standard forms and questionnaires should be introduced to be additionally prepared besides the TP documentation.

Also a TP risk assessment or even audit on the basis of a CbC reporting does not seem possible in practice as the data to be included will not be representative nor comparable (further outlined in section C.1.).

However, we welcome the idea of sharing the results of the risk assessment of the tax authorities with the taxpayers. We follow the approach of a partner-like cooperation with the tax authorities including an open exchange of all relevant
information. Additionally, informing the taxpayer on any risks identified from the tax authorities on an early stage gives the taxpayer the opportunity to respond to the risks accordingly and should reduce additional efforts on both sides also for the following years.

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

We appreciate the emphasis on issues such as costs, time constraints and competing demands for the attention of the relevant personnel in section 12 and would like to ask to consider these issues in all discussed requirements. Thus, we would welcome the introduction of a material threshold for transactions to be documented in detail (further outlined in section D.3.).

B.3. **Transfer pricing audit**

We assume the currently applied rules, especially applied in double tax treaties, for the exchange of information to be sufficient to produce and share the relevant information needed for a local tax audit and also for a risk assessment. The intended scope of the master file and the CbC reporting could not be conform with current national regulations in place forcing the taxpayers to make a decision to either be compliant with national regulations or with the OECD documentation requirements.

Furthermore, non-disclosure is especially for MNE groups an important issue. It could not be in the interest of MNE groups that every single associated entity has to be provided with the same, confidential (tax) information as the parent company. This also seems to contradict the arm’s length principle as e.g. no 3rd party would provide information to each of its customers regarding the transactions with all other customers. Especially from this perspective, a CbC reporting does not seem reasonable.

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

C.1. **Master file**

*First comment box - preparation of master file on a line of business basis:*

First of all, as there is no common definition of "line of business" and to ensure that the master file covers all relevant information of a MNE group, the master file should generally be prepared on an entity wide basis. However, in the case that MNE groups are clearly separated in several business lines, we would recommend a two step approach in preparing the master file. The first part of the master file should contain all information on an overall group level relevant for all business lines. The second part of the master file should contain all relevant information of the respective business line and should be in combination with the first part the master file of the respective business line. Due to the lack of a clear
definition of "line of business" we would recommend to pass the decision to apply this approach to the taxpayer and its defined internal business organization.

Second comment box - CbC reporting:

According to the specially outlined issues we comment as follows:

- If against all concerns introduced, we would recommend to handle the CbC report completely separate. Especially due to time constraints collecting all the local data intended to be included in the CbC report and the corresponding efforts for the taxpayer, we would assume the preparation of a CbC report could hardly be performed within the same time frame as planned for the preparation of the master and local file (see section 28 of the discussion draft).

- To assess the question regarding the preference of a "bottom up" vs. a "top down" approach it is necessary to define allocation keys for the application of the "top down" approach respectively the allocation of the MNE group's consolidated income among countries. However, as we do not have knowledge of an allocation key which would ensure an appropriate allocation of consolidated income appropriately considering the specifics of every local entity, especially regarding IP, the "bottom up" approach should be preferred.

- As any facilitation for the taxpayer is welcome, we would prefer a separate individual country consolidations reporting instead of a preparation on entity by entity basis. However, this could create a conflict if a "line of business" approach is implemented.

- As for comparability purposes only an aggregate number for corporate income tax paid per country seems reasonable, only one aggregated number should be shown. However, to ensure comparability the taxes of each OECD member country being defined as "corporate income tax" should clearly be defined. Furthermore only taking into consideration the income tax will not lead to a full scope picture.

- Any reporting of aggregated numbers would be preferred, also for cross border payments, especially as these data is already included in detail in the local TP documentation and there seems to be no need to include it again in the CbC reporting. The numbers should be aggregated for each category of controlled transactions on a country by country basis.

- A clear classification of the nature of business activities carried out in a jurisdiction / by an entity only seems applicable for pure routine entities performing one business activity. Especially classifying entrepreneurial entities seems critical as they are usually performing several different business activities with significantly differing contributions to the respective value chains.

Altogether, we assume that a CbC reporting based on financial figures does not produce comparable and appropriate data for a TP risk assessment and audit and would give an incomplete and distorted view on a MNE group. As a conclusion it can be summarized that there is no appropriate rational and justification for
the introduction of a CbC reporting. In section 21 of the discussion draft it is mentioned that the CbC data should neither be used as a substitute for a detailed TP analysis nor to constitute conclusive evidence regarding the appropriateness of the applied transfer prices. Hence, we cannot see the added value of the additional information justifying the significant additional effort for the taxpayers. As already mentioned in section B.3., we again assume extensive legal and confidential issues in disclosing the proposed data on a group wide basis.

Also the respective local accounting standards are not reflected. Respectively no definition is provided how differences in local accounting standards should be considered.

Hence, we would strongly advise to not introduce such a CbC reporting as a regular part of the TP documentation as all data relevant for judging the adequacy of transfer prices are already included in the master and local file. Additionally, we would ask the OECD to make a strong statement that the arm's length principle to be applied on a transaction by transaction basis is the only acceptable approach for handling the taxation of intercompany transactions. The OECD should formulate a clear rejection regarding the so called formulary apportionment or any methodology based on the comparison of overall profits of legal entities. Especially the intention to introduce a CbC reporting combined with the discussion of a "top down" approach gives the impression that a change of the well established methodologies could be intended. A clear rejection within the guidelines would ensure the taxpayers that the draft does not lead to massive problems and an even more complicated regulatory environment in this regard.

Comments on Annex I:

Generally, we would recommend defining the content of the annex rather on a guideline basis than to have a mandatory list of which every component has to be reflected within the documentation of each taxpayer.

In addition, it should be considered if optionally general information regarding the description of (each category of) transactions, the corresponding application of the most appropriate TP method etc. could on a case by case basis also be included in the master file instead of each local file.

Furthermore, the following information seems problematic for a master file:

- "The title and country of the principal office of each of the 25 most highly compensated employees in the business line."
  The disclosure of this information could trigger major issues within the multinational groups especially considering personnel rights of the affected employees.

- "MNE's annual consolidated financial statement for the fiscal year concerned."
  Following the same argumentation as for rejecting the CbC reporting, this data is irrelevant for the local TP documentation of individual entities of
the multinational groups as - under the arm's length principle - they have to be treated on a stand alone basis.

- "Country-by-country reporting template according to Annex III."
  See above for CbC reporting.

Additionally, as some of the used wordings are not clear and leave room for individual interpretation and definition, a definition especially for terms such as "important", "material" and "relevant" should be provided so that there will no major differences created through the implementation of the different tax authorities.

Finally, reporting of APAs, other rulings and MAP should only be required, if relevant for the documentation of the appropriateness of the applied transfer prices and hence be optional.

C.2. Local file

Comments on Annex III:

Generally, the same comments as for Annex I are valid for Annex III.

Furthermore, the following information seems problematic for a local file:

- "… and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices."
  There could be differing views regarding this issue.

- "Information and allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements."
  Following the same argumentation as for rejecting the CbC reporting, this data is irrelevant for local TP documentation. Furthermore, already the used wording "may be tied" shows that it is unclear if respectively how taxpayers can provide such data without having to face unpredictable and disproportionate additional compliance efforts.

Additionally, a definition for the term "category of controlled transactions" should be provided respectively the possibility of summarizing transactions should be outlined.

D. Compliance issues

D.2. Time frame
D.5. Frequency of documentation updates

From our perspective it is not reasonable to have a master and local file being prepared no later than the due date for the filling of the tax return. If the arm's length principle is already considered on a contemporaneous basis, it is sufficient to prepare the master and local file the latest on request by a tax audit.
Especially as the local file is based on the master file, the taxpayer should be given sufficient time to first collect the relevant data on a centralized basis before rolling out the master file to the respective local entities for preparation of the local file. It also has to be considered that the filing of a tax return generally does need significantly less and almost only local information. Furthermore, the date that a "tax return is filed" is absolutely unclear and differing between the OECD member countries. Also it is possible in some countries to file the tax return earlier than legally required, e.g. if a tax refund is expected, which would almost be unconvertible if the TP documentation is mandatory for the filling of the tax return.

Commenting on section D.5. of the discussion draft, it should also be sufficient to prepare the TP documentation for multiple years, e.g. according to the number of years of the next tax audit. However, in this case it would also be necessary to give a guideline regarding the number of years a normal tax audit should cover to ensure comparable application within all OECD countries.

Hence, we would recommend to request a multiple year TP documentation, in general for the time covered by one tax audit, that would be required by the taxpayers no earlier than one year following the last day of the fiscal years of the audited entity and giving the taxpayer sufficient time to prepare the relevant data after the request, e.g. at least 2 months. The corresponding searches in databases should cover the same multiple year period.

**D.3. Materiality**

As described in section B.2. above, the introduction of a materiality threshold would be highly appreciated.

In some countries, such as Germany, material thresholds are already in place regarding the obligation for SMEs to prepare a written TP documentation, if the total transaction volumes are below a certain material threshold. Hence, we would recommend that also single transactions between two related parties below a material threshold should e.g. only be listed instead of being documented in detail.

We would recommend to introduce such materiality standards differentiating between transactions regarding the delivery of goods and other transactions (such as services, interests etc.). We would prefer setting such materiality standards as total numbers, however to reflect the materiality of a transaction in comparison to the total business of an entity relative numbers would also be an option. Furthermore, materiality standards for SMEs as mentioned in section 30 should be defined as well as the corresponding lower documentation requirements.
D.6. Language

We highly appreciate the approach to prepare and submit the master file in English. Furthermore, we would also recommend giving taxpayers the possibility to also prepare the local file in English as in most MNEs information and (cross-border) communication also is in English. A translation in local language should only be prepared upon request within a tax audit and be limited to the unclear respectively most important sections of the local file.

D.9. Other issues

According to section 42, the most reliable information will usually require the use of local comparables over the use of regional comparables. However, to our experience the comparability of some markets does not differ between the regional and the local level. This argumentation is supported by a report of the EU Joint Transfer Pricing Forum defining Europe as one comparable market. Furthermore, comparables which are from different countries but fulfill the comparability criteria in a better way should be preferred against those being in the same country but fulfilling the comparability criteria less. Thus, we would recommend not preferring a local comparability analysis over a regional comparability analysis in general but giving the responsibility to determine the most appropriate analysis to the taxpayer on a case by case basis.

E. Implementation

As every local entity is a separate taxpayer, the direct local filing of information by each local entity seems the most appropriate approach.

Overall we would like to ask the OECD to revise the discussion draft and keep the focus on more standardization and facilitation resulting in lower compliance costs and efforts for the taxpayers regarding TP documentation. The current discussion draft with its additional issues will make the documentation process more complicated and extensive than it is already.

Please do not hesitate to contact us in case of any questions.

Kind regards,

WTS Steuerberatungsgesellschaft mbH

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