

European Business Initiative on Taxation (EBIT)

**Comments on the OECD's Discussion Draft on
Transfer Pricing Documentation and Country-by-Country
Reporting of 30 January 2014**

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

Pascal Saint-Amans
Director Centre for Tax Policy and Administration
OECD
2, rue André Pascal
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FRANCE

Brussels, 21 February 2014

Dear Pascal,

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

General Comments

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

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

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

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

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

In our view the OECD have missed the mark with these very detailed proposals in the Discussion Draft: rather than create something that supports a proportionate and pragmatic assessment of tax risk related to Transfer Pricing with a simpler set of compliance requirements, the OECD appear to be proposing something which is significantly broader in scope thereby creating a burdensome new set of compliance requirements. This in our view also seems to go against the spirit of the OECD's work on Cooperative Compliance.

EBIT wants to remind the OECD in this respect of the wording of BEPS Action 13, of which the CBCR template forms an integral part:

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

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

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

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

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

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

B.1. Transfer pricing risk assessment

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

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

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

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

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

B.3. Transfer pricing audit

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

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

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

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

C. A two-tiered approach to transfer pricing documentation

C.1. Master file

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

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

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

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

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

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

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

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

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

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

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

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

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

EBIT considers that the bottom-line for the CBCR-template is that it should provide tax administrations with a meaningful set of data which is comparable. We reiterate that the CBCR-template is only intended to allow for a comparison within MNEs as a function of the big picture transfer pricing risk assessment.

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

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

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

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

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

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

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

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

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

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

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

According to EBIT, this type of information on cross-border payments between associated enterprises for tax administrations should according to Annex I and Annex II already be documented in the Master file and the local file, which in EBIT's view means an undesirable duplication of data, which does not add anything substantial to the risk assessment itself but would considerably increase the administrative burden of populating the CBCR-template. The level of detail proposed for the local file should be considered sufficient. EBIT reiterates that BEPS Action 13 calls for a CBCR-template that sets out "*the global allocation of the income, economic activity and taxes paid*".

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

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

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

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

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

C.2. Local file

D. Compliance issues

D.2. Time frame

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

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

EBIT is concerned that the proposed end of the year and a day after the end of the relevant accounting period of the ultimate parent company of the Group as deadline for the CBCR template mentioned in paragraph 28 of the Discussion Draft might be too tight for some

African, Asian and Middle Eastern countries with no Transfer Pricing Documentation requirements, or e.g. in case of acquisitions or other special circumstances, and some degree of flexibility may be needed.

D.3. Materiality

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

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

D.5. Frequency of documentation updates

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

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

D.6. Language

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

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

D.8 Confidentiality

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

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

D.9. Other issues

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

E. Implementation

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

Possibilities include:

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

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

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

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

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

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

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

Yours sincerely,

The European Business Initiative on Taxation – February 2014

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