

European Business Initiative on Taxation (EBIT)

**Comments on the OECD's Memorandum on Transfer Pricing
Documentation and Country-by-Country Reporting of 3 October 2013**

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

EBIT Comments on the OECD's Memorandum on Transfer Pricing Documentation and Country-by-Country Reporting of 3 October 2013

Pascal Saint-Amans
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FRANCE

Brussels, 31 October 2013

Dear Pascal,

EBIT welcomes the opportunity for dialogue offered by the OECD in respect of the issues raised in the OECD's Memorandum on Transfer Pricing Documentation and Country-by-Country Reporting dated 3 October 2013.

EBIT recognises the compliance challenges faced by tax authorities in respect of transfer pricing in an increasingly complex environment and fully endorses the principles set out in the OECD's White Paper of 30 July 2013, specifically:

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

General comments in respect of the content of the Memorandum

EBIT offers the following general comments in respect of the content of the Memorandum:

- It would be appreciated if the OECD would clarify what is intended by the phrase "for risk assessment and **other purposes**". Our expectation is that the primary purpose of country-by-country reporting (CBCR) is to assess transfer pricing risk in the context of a wider assessment of other local compliance risks and the comments that follow have been prepared from this perspective. However, our Members are uncertain about the "other purposes" for which this data would be used and concerned about the risk of the scope of CBCR being extended beyond that originally intended.
- If there is to be any requirement for information that is not readily available to most MNEs without significant additional effort and cost, then there should be a very clear indication of what the expected benefit of that information is. The purpose of the documentation and the uses to which it will be put need to be clearly specified and any guidance should make it clear that it is not to be used for other purposes. The country-by-country data should be for risk assessment only and no other purpose, and is not to be used as a template for any future formulary apportionment calculation either.
- It is essential that any solution is proportionate to the policy objective. Absent careful design, EBIT is concerned that the CBCR requirements will result in a significant additional compliance burden on businesses and hence materially add to existing compliance costs. EBIT therefore welcomes the recognition that "a balance needs to be sought between the usefulness of the data to tax administrations for risk assessment and other purposes, and the compliance burdens placed on taxpayers". At the same time, we believe it is difficult to make this balance assessment without more clarity on what tax administrations will use any information for, if they will use it at all and how they will analyse and compare it. Secondly, we believe that it will be very difficult, if not impossible, to arrive at a solution where "one size fits all" and therefore strongly encourage the OECD

to leave room for a pragmatic approach recognising that may create a degree of uncertainty.

- EBIT has concerns that a voluminous requirement for additional data could place an undue burden on tax administrations as well as taxpayers. As such it may not meet its intended purpose since without a targeted data set, the ability to effectively assess risk may be little enhanced compared to what it is now.
- The analysis of the data should be accompanied by a mechanism to differentiate between low risk and/or compliant taxpayers and others, such that the future burden might be reduced in respect of those taxpayers who can demonstrate a strong compliance record and/or fall within a low risk category.
- There should be safeguards to protect taxpayers from unreasonable additional general information requests. Ideally the data should enable a constructive process of pre-audit dialogue between tax payer and tax administration whereby a taxpayer can achieve certainty in respect of some areas of its transfer pricing arrangements, whilst agreeing those areas where further enquiry is required.
- Similarly there is a risk that the incidence of double taxation could significantly increase as a result of a potential increase in the level of transfer pricing enquiries. It is essential that the OECD and tax administrations give due regard to ensuring effective and efficient mechanisms for resolving any potential disputes on an efficient, timely and equitable basis. We believe that this should go hand in hand with the development of proposals for CBCR.
- The OECD should give some consideration to materiality and the possibility of recognising de minimis thresholds in the data which is required to be reported.
- We are concerned that there is a "level playing field" for all compliant taxpayers and one group is not disadvantaged compared to another as a result of these requirements. It is therefore essential that the introduction of these rules is harmonised and the requirements across participating countries are the same.
- 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. On distribution of data, workable options would include submission annually with tax returns to the parent company jurisdiction with automatic 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. We believe there should also be some restriction on sharing with every tax jurisdiction where there are no material local subsidiaries or activities.
- The concept of CBCR has been the subject of a significant amount of analysis in the context of the Dodd Frank Act and recent EU initiatives. We would expect that there should be a significant amount of understanding and experience that could be applied from those initiatives to inform this current debate. However, there is also a risk of the introduction of multiple differing CBCR requirements. We strongly urge the OECD to consider the purpose of providing this information and to make strenuous efforts to eliminate the scope for duplication / inconsistency.

Additional comments in response to the questions posed in the Memorandum

EBIT offers the following additional comments in response to the questions posed in the Memorandum:

Which approaches to the reporting of income would be most useful to governments and most readily available from existing accounting records?

- EBIT recognises that the reporting of income could be a factor in assessing transfer pricing risk and believes that a net income measure rather than a "sales" or gross income measure would be most useful to governments in the first instance. It may be useful to split this down into two components; Earnings Before Interest and Tax, and Earnings Before Tax.
- There are some potential questions about what should be included in income, e.g. uncontrolled Joint Ventures?
- We suggest not using taxable income as a reference point since this could vary between taxpayers for reasons unrelated to transfer pricing, and therefore may make an initial risk assessment more difficult.
- The Memorandum contains a high level analysis of the relative merits of different potential data sources which clearly highlight the challenges of identifying a single source. EBIT therefore encourages the OECD to be as pragmatic as possible in its approach, recognising that the fundamental objective is about risk assessment rather than perfecting the data. It may therefore be preferable to specify the key requirements, leaving taxpayers with a degree of flexibility in how they meet those requirements, rather than being overly prescriptive about the data sources.
- EBIT's preference would be for the OECD to follow their own analysis in the Memorandum in which the conclusion appears to be drawn that the most widely available information is legal entity accounts information by country of incorporation and/or residence.
- Reporting unconsolidated information for each legal entity, with an organisation chart is feasible; preparing in-country consolidations for all countries is not feasible without significant additional work for MNEs. The Memorandum also mentions and dismisses reporting based on internal consolidation of data as being of little use for transfer pricing. We would agree with that conclusion: the data is not readily available and would not be helpful.
- Providing summary information on tax returns and taxes by territory should also be achievable, but the Memorandum itself recognises that this information may not be very useful and that a reconciliation to accounts information may be problematic. EBIT is concerned that reconciliation of tax returns to accounts provision is complex and for most companies would be significant additional work on a company by company basis.
- The Memorandum mentions reporting on a segmented basis, then correctly points out the compliance burden that this would provide. We would strongly support that conclusion. Many MNEs do not report or analyse results on this basis and to do so would require significant additional effort.

Which taxes?

- The taxes reported should be those that are relevant to the assessment of potential transfer pricing risk. Therefore EBIT is of the view that 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. Other taxes are reported elsewhere and may not be easily identifiable in financial records. VAT is also a misleading indicator: would this be VAT incurred on purchases or accounted for on sales? How would exporters with VAT refunds be treated?

- With regard to the discussion on whether taxes should be reported on a cash or accrual basis, EBIT believes that either is possible but 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.

Measures of economic activity other than income and taxes

- EBIT recognises that merely reporting income and tax data may be insufficient for a reasonable assessment of sources of potential transfer pricing risk and that therefore some form of supplementary data relating to economic activity may be required.
- However, for the purposes of assessing risk, EBIT would make a distinction between the additional data that may be required at the point of the risk assessment and data which may be provided at a later stage in the compliance cycle, for example, in the form of a Master File or Local File. The ability of a taxpayer to comply and the costs of compliance are again critical factors in this context.
- We suggest the possibility of taxpayers responding to a relatively simple short form questionnaire which could be targeted at identifying key risk indicators. For example, the questionnaire could include reference to whether the taxpayer conducts its business through a so called commissionaire arrangement or maintains an international financing company in a recognised low tax jurisdiction. If these activities are present, a taxpayer should also indicate which countries are affected. This would enable some initial high level profiling without placing a potentially significant burden on all taxpayers regardless of how they have chosen to organise their activities.
- There could also be a "free form" component enabling a taxpayer to voluntarily provide any additional information that it considers appropriate to its circumstances.
- There is a discussion on other economic data, with the Memorandum not appearing to strongly support any of them. Reporting revenue by customer location is not easy or reliable, so we believe has little value. Reporting revenue by tangible assets by company is feasible but by physical location is more difficult. Employment by company or by location is feasible, but there should be a materiality threshold. We believe that reporting R&D, marketing and intangibles by country is not feasible as data is not kept on this basis.
- It would be appreciated if the OECD would clarify what the benefit is of reporting highest paid employees by location: how are different payrolls and currencies dealt with?

What mechanisms should be developed for reporting and sharing country-by-country data?

- We anticipate that any reporting requirement based on a common template would be harmonised and implemented through domestic legislation.
- EBIT believes that the EU's (optional) EUJTPF Masterfile approach (Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union - EUTPD) is particularly suitable to act as a best practice example and starting point for the OECD in developing the common global template further.
- It is essential that the data is only required to be prepared once. The most logical choice would be preparation of the template by the parent company as proposed in the Memorandum. It would seem that the simplest basis of sharing would be for MNEs to provide the same document on request to all countries in which it has a taxable presence (i.e. a subsidiary or PE) and where there is an entitlement to such information.
- Guarantees concerning confidentiality of information are essential. The expectation is that the need for taxpayer confidentiality would be recognised in domestic legislation as a condition of making a request as described above.
- The filing deadline by which a completed template will be required is also a critical factor and will need to be considered in the context of other statutory filing requirements and the purpose for which the data is being provided.

EBIT trusts that the above comments are helpful and will be taken into account in the 12-13 November 2013 OECD public consultation meeting on these issues. EBIT is happy to discuss its collective views with the OECD at all times and remains committed to a constructive dialogue with the OECD and any other stakeholders.

Yours sincerely,

The European Business Initiative on Taxation – October 2013

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