



Joseph L. Andrus
Head of Transfer Pricing Unit
OECD Centre for Tax Policy and Administration
2, rue André Pascal
75775 Paris Cedex 16
France

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Comments on the OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting 30 January 2014

BUSINESSEUROPE is pleased to provide comments prepared by the members of its Tax Policy Group, chaired by Krister Andersson, on the OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting dated 30 January, 2014 (hereafter referred to as “the Draft”).

The OECD has proposed to replace Chapter V of the Transfer Pricing Guidelines with new language and annexes. The Draft includes a two-tiered approach to Transfer Pricing Documentation, where taxpayers would provide the tax administrations with a master file with standardised information relevant for all MNE group members, and a local file containing data on material transfer pricing positions affecting a jurisdiction. As part of the master file, taxpayers are obliged to report details of the MNE group’s activities on a country-by-country basis (CbC).

BUSINESSEUROPE welcomes the effort by the OECD to create a global standard for Transfer Pricing Documentation and supports the initiative to increase transparency towards tax administrations. More targeted and consistent documentation requirements among countries would certainly reduce the compliance cost for businesses in a global market and could also, if appropriately designed, create a more level playing field for companies.

The proposed two-tiered approach seems to be based on the EU TPD. However, there are significant differences. The Draft contains a mandatory two-tiered approach, while the EU TPD is optional. Furthermore, the Draft obliges taxpayers to submit the files annually in conjunction with the tax return while the EU TPD is only submitted on request in case of an audit. The general acceptance from business for the EU TPD should thus not be understood as a general acceptance for any two-tiered approach to



Transfer Pricing Documentation. The specific requirements in the Draft must be analysed carefully in order to understand the compliance burden that is imposed on businesses.

A key focus in the BEPS project should be to design guidelines and rules to target BEPS without impacting genuine business activities by adding compliance burden. The aim of action point 13 of the BEPS project is to provide tax administrations with a high level risk assessment tool in order to develop a broad picture. However, the Draft seems to indicate that the CbC template can be used as a transfer pricing tool for transfer pricing risk assessment and audit purposes. This would give the CbC template a much wider scope than was originally intended. In BUSINESSEUROPE's view, that would clearly not be acceptable.

Considering the level of detailed information requested in the proposed two-tier documentation framework, the result will be a significant increase in the compliance burden for businesses. We also fear that the detailed CbC template might overwhelm tax administrations with data not relevant for the purpose of transfer pricing, which may lead to an increased number of transfer pricing audits.

A major concern with the CbC reporting is that it encourages a formula apportionment based risk assessment 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 the 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.

In addition, business is concerned that the increase in general business data requested may be difficult for tax administrations to analyse, and as a result, will be used and interpreted differently by each individual country. Such a scenario would undoubtedly also increase the risk for disputes and, consequently, double taxation. Further guidelines are needed with respect to how the information should be interpreted and what it should be used for by tax administrations. The development of the OECD Handbook on Transfer Pricing Risk Assessment could be very instrumental in this respect and it would be a missed opportunity for streamlining if there was no alignment between the handbook on risk assessment and the tools proposed.

Measures also need to be taken to avoid double taxation. The additional documentation requirements and increased dispute risks must be fully balanced by measures which will provide fairness to those taxpayers making an effort to be compliant. Therefore, the 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.

It should be recognized that the two-tiered approach as proposed adds an additional documentation requirement on taxpayers. The master file and the local file are added to the existing obligation to provide tax administration with documentation in case of an audit. We recognize that a prudent risk assessment may reduce the overall compliance burden for business. However, in order to reach an overall reduction in administrative burden, the documentation requirements must not go beyond what is needed for a transfer pricing risk assessment. It is of utmost importance to strike a balance between a tax administration's need for information and the potential compliance burden for taxpayers. Unfortunately, we do not think such a balance is reflected in the current Draft proposal.

Considering the purpose of the two-tiered approach, the documentation requirements in the Draft are too far-reaching. The proposed requirements will provide tax administrations with information that is too detailed and not generally needed for a proper risk assessment for transfer pricing purposes. BUSINESSEUROPE is concerned that, however honourable the purpose of the OECD and the member countries may be, it might be difficult to ensure confidentiality. Laws and procedure on confidentiality varies among countries. The master file will most likely be circulated among tax administrations in a number of countries where an MNE operates. This undoubtedly increases the risk for a leakage. The master file and the local file as proposed, contain very detailed information that would harm the enterprise in question, if made available to competitors. As a general rule, documentation requirements should be kept at a minimum in order to minimize the potential damage of a leak. Unfortunately, this is not the case in the Draft. The proposed documentation requirement includes data that do not have any bearing in a transfer pricing risk assessment.

By way of example, information on the 25 most highly compensated employees in the business line and a list of material intangibles is sensitive information and should be excluded from the master file. Furthermore, a list of related party agreements, a description of material transfer of interests in intangibles, a description of how the group is financed including identification of important financing arrangements with unrelated lenders and a list of APA's, other rulings and MAP cases are not relevant for a risk assessment and should also be excluded. Furthermore, little room should be left for arbitrary assessment, such as whether a related party agreement is *important*. All such excessive documentation requirements, as well as requirement of data that "may be helpful" should be excluded. In any case, disclosing some of the requested information can pose a conflict of law and reporting exemptions should be available for any cases where there are legal restrictions on the disclosure of the data required.



In order to further facilitate confidentiality, the master file and the separate CbC template should only be submitted to the tax administration of the ultimate parent company. It can then be shared with other tax administrations through existing exchange of information channels with the necessary confidentiality requirements.

As stated above, we believe that the documentation requirements in the CbC template is not needed for transfer pricing purposes, and object that it is proposed as a part of Chapter V of the Transfer Pricing Guidelines. Action point 13 of the BEPS Action Plan requires an overview of the MNE's global allocation of income, economic activity and taxes paid. This being the case, we suggest to separate a CbC template from the master file. The CbC template should be proposed on a stand-alone basis and should be revised so that it constitutes what it originally was aimed to be, namely a high level risk assessment tool for tax administrations.

In particular, the requirement to document certain aggregate cross-border payments between associated enterprises (royalties, interest and service fees) should be deleted. This information is generally not available at a central level. This requirement is burdensome and would add little value for tax administrations.

Flexibility is essential to ensure that businesses are able to comply given the variety of reporting structures. Every MNE is unique. Accordingly, MNEs will prepare the master file and the local file in different ways and the Transfer Pricing Documentation cannot be a tool for comparing different MNEs. This being the case, each MNE should be allowed to prepare the files in a manner that is best suitable for that particular MNE. Different structures, business lines, IT systems, etc. call for different needs. MNEs should be allowed to decide whether a top-down or bottom-up approach would be most appropriate for the particular business, whether the CbC template should be prepared on a country wide or entity wide basis, or whether the master file should be undertaken on a line of business or entity wide basis.

We urge the OECD to revise the Draft and to better take into account the compliance burden that the Transfer Pricing Documentation imposes on business. The documentation requirements as proposed are too far-reaching and would unduly increase the compliance burden for taxpayers. To ensure effective risk assessment and auditing without increasing the burden on businesses and tax authorities, we request the OECD to give more structure to the risk assessment approach before finalising the tools. That would allow the OECD to capitalise on some of its other work like the development of the OECD Handbook on Transfer Pricing Risk Assessment and work with and through the FTA on cooperative compliance. We believe that the proposal as it stands would provide tax administrations with little help in carrying out a high level risk assessment. The amount of documentation required is overwhelming. Tax administrations and taxpayers both operate with scarce resources. An effective



risk assessment tool is key to better utilizing the scarce resources of both taxpayers and tax administrations. Furthermore, the very detailed CbC template might, instead of strengthening the arm's length principle, encourage a formulary apportionment approach. The controversy about the content and implementation of CbC reporting in Europe and the likely review towards the end of the decade calls for a tax oriented high level risk assessment tool as the appropriate response to action point 13 from a European perspective.

BUSINESSEUROPE is happy to continue a constructive dialogue with the OECD on this topic.

Sincerely yours

James Watson
Director
Economics Department