SwissBanking

OECD Secretariat
Per e-mail:
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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.

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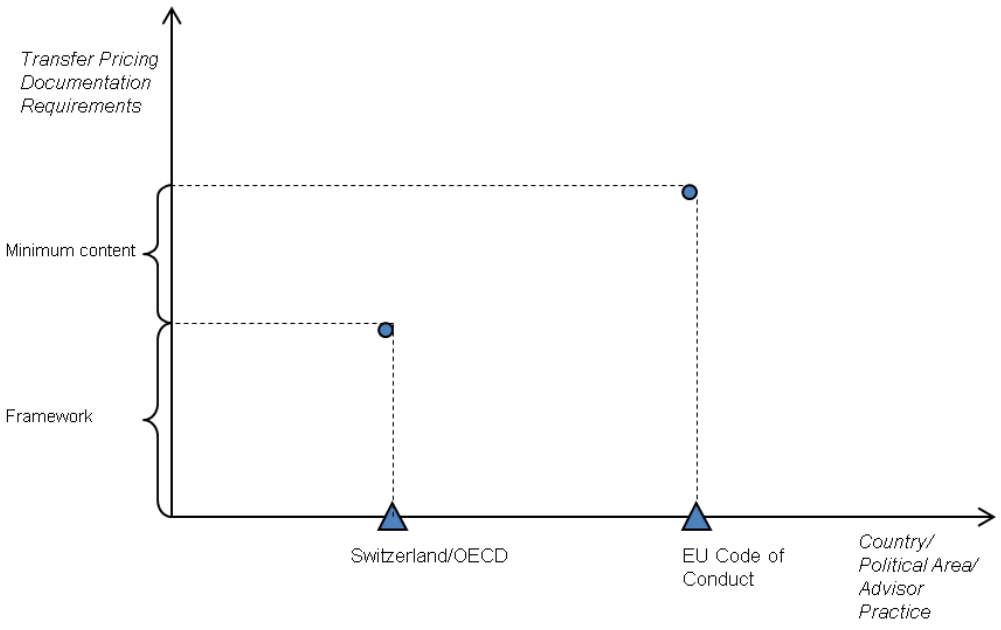
In our view, “Annex I to Chapter V: Transfer pricing documentation – Master file” only gives examples of what a Master file should contain, though, such a form of guidance cannot guarantee that all (at least OECD) countries, where a MNE has its taxable presence, will consider the same Master file as 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 Documentation[1] (“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



[1]Reference 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[2] 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.

[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 operates 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.[4] There is 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)[5] should already be mentioned both in the Master file and in the Country specific documentation.

[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

[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.[8] 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.

[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

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