

Via E-Mail

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

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.
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- 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 profit 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:

Explanatory Comments	
<ul style="list-style-type: none"> • Chart showing supply chain for material products and services 	<ul style="list-style-type: none"> • “Material” to be defined • No relevance/connection to local entities and their material transactions
<ul style="list-style-type: none"> • Chart showing important service arrangements 	<ul style="list-style-type: none"> • “Important” to be defined • Service arrangements are usually not material in the industrial sector
<ul style="list-style-type: none"> • Written functional analysis describing the principal contributions to value creation by individual entities within the group 	<ul style="list-style-type: none"> • Enormous efforts would be required by large MNEs who operate multiple business lines which have different value chains and operating models in different countries
<ul style="list-style-type: none"> • Description of important business restructuring transactions 	<ul style="list-style-type: none"> • 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
<ul style="list-style-type: none"> • Title and country of the principal office of each of the 25 most highly compensated employees 	<ul style="list-style-type: none"> • 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
<ul style="list-style-type: none"> • List of material intangibles 	<ul style="list-style-type: none"> • 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
<ul style="list-style-type: none"> • List of important related party agreements 	<ul style="list-style-type: none"> • 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
<ul style="list-style-type: none"> • Description of any material transfers of interests in intangibles, including parties, countries, compensation amount 	<ul style="list-style-type: none"> • 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

<ul style="list-style-type: none"> • Description of how the group is financed, including identification of important financing arrangements with unrelated lenders 	<ul style="list-style-type: none"> • Financing arrangement with unrelated lenders is not relevant for TP assessment • May cover confidential and very sensitive information
<ul style="list-style-type: none"> • List and brief description of the MNE group's applicable unilateral and bilateral/multilateral APAs and advance rulings 	<ul style="list-style-type: none"> • Not necessary to review transfer pricing position in a certain country
<ul style="list-style-type: none"> • List and brief description of other relevant tax rulings related to the allocation of income to particular jurisdictions 	<ul style="list-style-type: none"> • Not necessary to review transfer pricing position in a certain country • Draft should clarify that only transfer pricing related rulings are meant
<ul style="list-style-type: none"> • List and brief description of transfer pricing matters pending under treaty MAP or resolved in MAP during the last two years 	<ul style="list-style-type: none"> • 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.

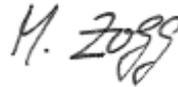
Yours sincerely

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