PLATFORM FOR COLLABORATION ON TAX

OECD WORLD BANK GROUP

The Platform for Collaboration on Tax

Comments received on public discussion draft:

Practical Toolkit to Support the Successful Implementation by Developing Countries of Effective Transfer Pricing Documentation Requirements

November 2019

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OECD WORLD BANK GROUP

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From:	Blough, Corrie
To:	Platform for Collaboration on Tax
Subject:	Platform for Collaboration on Tax - Comments
Date:	Friday, November 8, 2019 8:37:27 AM
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PRACTICAL TOOLKIT TO SUPPORT THE SUCCESSFUL IMPLEMENTATION BY DEVELOPING COUNTRIES OF EFFECTIVE TRANSFER PRICING DOCUMENTATION REQUIREMENTS

I reviewed the toolkit referenced above. It was very comprehensive and addressed many areas that I would have hoped/expected. There was one area that popped out to me that seemed missing or that would seem useful/beneficial to include. This relates to benchmarking, which is an important component of the transfer pricing documentation effort. As more and more countries seem to be requiring or highly encouraging local benchmarks as opposed to regional benchmarks, it would be nice to have something that suggests regional benchmarks are sufficient and preferred. The TP documentation requirements globally are substantial and costly, so as more and more countries require local benchmarks, the costs for benchmarking continue to go up, and if one of the goals is to mitigate the burden on taxpayers, this would support that objective.

Thank you.
Corrie

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The **BEPS** Monitoring Group

Submission to the Platform for Collaboration on Tax Public Consultation

on

THE DRAFT PRACITAL TOOLKIT TO SUPPORT THE SUCCESSFUL IMPLEMENTATION BY DEVELOPING COUNTRIES OF EFFECTIVE TRANSFER PRICING DOCUMENTATION REQUIREMENTS

These comments have been prepared by the BEPS Monitoring Group (BMG). The BMG is a network of experts on various aspects of international tax, set up by a number of civil society organisations which research and campaign for tax justice, including the Global Alliance for Tax Justice, Red de Justicia Fiscal de America Latina y el Caribe, Tax Justice Network, Christian Aid, Action Aid, Oxfam, and Tax Research UK. These comments have not been approved in advance by these organisations, which do not necessarily accept every detail or specific point made here, but they support the work of the BMG and endorse its general perspectives. They have been drafted by Joy Ndubai, with contributions and comments from Jeffrey Kadet, Sol Picciotto and Attiya Waris.

We appreciate the opportunity to provide these comments, and we are happy for them to be published.

8 November 2019

GENERAL COMMENTS

The Platform for Collaboration on Tax (PCT) draft transfer pricing toolkit aims to provide a practical overview of country approaches to transfer pricing (TP) documentation. Whilst this toolkit is welcomed as an opportunity to evaluate the difference in documentation requirements and emphasize the need for consistency in standard setting, it is difficult to establish its relevance given the current lack of consensus and continuing global debate over the effectiveness of the current transfer pricing rules. Most recently, the OECD secretariat has been working to produce a unified approach as a framework for a proposed 'new taxing right'.[1] On the agenda is the reform of the rules for allocation of income and tax paid by multinational enterprises (MNEs), which will begin from their global consolidated accounts.[2] It proposes a hybrid system, combining elements of formulary apportionment with retention of current transfer pricing rules. At the same time, the OECD has acknowledged the need for simplified

[1] BEPS Monitoring Group (2019), International Corporate Tax Reform and The 'New Taxing Right', BMG [online]. Available at: https://www.bepsmonitoringgroup.org/news/2019/9/10/international-corporate-tax-reform-and-the-new-taxing-right-b4ajr, pg. 1

[2] See our *Comments on the OECD Secretariat Proposals for a Unified Approach under Pillar 1*, 12 November 2019.

approaches to the allocation of MNE income especially for developing countries, and this has been stressed by bodies such as the African Tax Administration Forum.

Hence, significant changes are likely to these rules, which can be expected to require additional guidance and higher standards of transparency for purposes of effective administration. For instance, and emphasized below, publication of Country by Country reports (CBCRs) will become increasingly important, especially where companies with no physical presence but a digital or sales presence above an ascertained threshold, need to be evaluated for purposes of determining the profits arising in a market jurisdiction.

In addition, it is notable that no or minimal guidance has been provided for countries considering safe harbours, formulary apportionment and any other alternative approaches that simplify the allocation of income between related parties forming part of a MNE group. Such information would have been exceptionally useful considering the global debate. Some examples could be taken from Brazil, India, Mexico and the Dominican Republic.[3]

This draft toolkit could also further enhance its contribution to TP administration in developing countries if more information were required to be provided to enable auditing of the reliability of the TP study, which is where the divergence in treatment and assessment arises most frequently. The toolkit seems to be limited to establishing standardization of all TP documentation requirements, which has already been covered by the OECD TP Guidelines and the UN Manual on TP.

This toolkit could be a key opportunity to document and address the specific challenges being faced during audits, especially in developing countries, by taxpayers and revenue administrations of the reliability of the TP study. Some of the issues that could be documented include the most commonly contested transactions, the common challenges faced in identifying and allocating risks, the most difficult methods to evaluate, the frequency in differences of comparable search outcomes and how these are commonly resolved. This type of data would provide an opportunity to critically evaluate the actual operation of the ALP and, likely, evidence the practical difficulty of arriving at collective consensus on suitable comparables.

In addition to these general comments, we provide our specific comments below:

SPECIFIC COMMENTS

Options for countries to implement transfer pricing documentation

The consideration of who bears the burden of proof (who has to prove that the pricing is in accordance with the applicable rules) between the revenue administration and the taxpayer is important[4] and the initial burden should lie with the taxpayer as a standard. However, once the taxpayer has submitted accounts based on the methodology on which it has decided, the burden de facto shifts to the tax administration if it considers an adjustment is appropriate. The draft toolkit rightly recognizes that there is an information asymmetry, and in the absence of

[3] For more see: Sol Picciotto (2018), Problems of Transfer Pricing and Possibilities for Simplification, ICTD Working Paper 86 [online]. Available at: https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/14117/ICTD_WP86.pdf?sequence=1&isAllowed=y

[4] Platform for Collaboration on Tax (2019), Practical Toolkit to Support the Successful Implementation by Developing Countries of Effective Transfer Pricing Documentation, Platform for Collaboration on Tax [online]. Available at: http://www.oecd.org/tax/transfer-pricing-documentation-requirements-toolkit-platform-for-collaboration-on-tax.htm, pg. 16 - 17

adequate requirements for taxpayers to provide information, perverse incentives can arise.[5] Where the tax administration needs to request more information from taxpayers, they are often in the position to frustrate the process by withholding relevant information.

It should be noted that if an audit has been carried out and it is found that an adjustment is necessary, it has not been proven that the price is in line with the ALP and, there is a need to then address the standard of the burden of proof and who is required to fulfil it. How taxpayers can satisfy the documentation requirements is also often highly dependent on the information that their parent or related entities are willing or able to provide and this may often be used as a way to block any further scrutiny. This issue is particularly important for developing countries. One solution to address both challenges may be for revenue administrations opting to tax the adjusted profit until the taxpayer can prove that this creates double taxation.

Accessing documents or data held outside the local jurisdiction is a significant problem for both local companies and revenue administrations seeking information from foreign parents or related companies. The draft toolkit[6] does not address situations where exchange of information cannot take place due to no existing Double Taxation Agreement (DTA) and one or both countries are not parties to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. This limitation is especially important where large or dominant digital companies and market jurisdictions are concerned, and the draft toolkit should at least suggest some mechanism for dealing with this.

In addition, the penalties applied to failing to provide required documentation may not always pose a significant risk for certain large MNEs considering the amount of global profits earned. The draft toolkit should take this into consideration when making recommendations. However, complying with the TP documentation requirements is the minimum requirement and that is not often at issue. The information contained in that document and the extent to which it actually takes steps to provide reliable data should be subjected to greater regulation through penalties and compliance incentives.

We believe that section 2.5, 'Accessing documents held outside the jurisdiction', should be made much stronger. It is of course very good that the section advises that contentions that a local group member cannot obtain information from its affiliates should be resisted. However, the section should suggest the strongest possible measures and should be aligned with the right to access of information as set out in article 19 of the International Covenant on Civil and Political Rights. For example, in the absence of obtaining requested documentation, the local tax authority should have discretion to impose a transfer pricing adjustment with the burden of proof being on the taxpayer to dispute it.

The draft toolkit correctly recognizes that the cost of compliance with TP rules can be significant for taxpayers[7], but does not identify the major challenges it raises for administrators too. Some concerns include no usable comparables which would require constructing the comparable or formula to fit the specific taxpayer case, access to expensive comparable databases, the technical capacity required, the review of considerable information, and more often than not insufficient resources. Normally, administrations are dealing with much smaller budgets than large MNEs. Whilst taking measures to ensure that unnecessary or disproportional compliance costs do not arise when designing a TP study is important, how this may affect administration costs should also be considered.

Specific documentation elements

[5] *Ibid*
[6] Note 4, pg. 23
[7] Note 4, pg. 24

It is not entirely clear how it would be possible for transfer pricing returns to promote positive MNE behavioural changes[8] particularly considering that MNEs are not incentivized to comply where a TP return is unlikely to provide sufficient information to evaluate the reliability of the TP outcome[9]. Whether or not the MNE complies with ALP is generally difficult to ascertain since consensus on the acceptable set of comparables is not always easily arrived at and this could incentivize companies to be somewhat dishonest.

The recommendation[10] that the TP return should not request burdensome information from taxpayers is somewhat ambiguous since what could be considered burdensome would be a subjective matter. In addition, different countries are likely to require differing amounts of information depending on their administrative needs and constraints.

We support the recommendation that TP disclosure forms could follow a consistent regional format and likely address the prevention of tax competition and cooperation between countries.[11] TP returns should provide consistent information across the globe with some room for adjustments based on local administrative needs.

Transfer pricing studies

The draft toolkit rightly recognizes the importance of testing the reliability of the conclusions recorded in a transfer pricing study, but concludes that a detailed discussion would be outside of the scope of the toolkit.[12] This is often the most challenging area for developing countries, for instance in Kenya given the unreliability of the ALP, the resulting impossibility of sound technical analysis using comparables, TP issues are really being resolved more through political negotiation rather than by objective application of rules and regulations.[13] This can only encourage some MNEs to aggressively price transactions since they expect a negotiated agreement rather than one based on objective rules and the actual facts. Some unresolved technical obstacles faced by the Kenya Revenue Authority include the lack of additional data to inform and guide the selection of one of the TP methods and the failure of comparables databases to take into account the differences in quality of products or services.[14] It is unfortunate that the draft toolkit did not take this opportunity to address this complex area and therefore evaluate the effectiveness of the ALP.

The section addressing simplifications or exemptions for Small and Medium sized taxpayers considers parameters for exemption thresholds including the total turnover, revenue or gross operating income, assets and/or the number of employees. The number of employees may often be deceptive as companies can outsource certain services whilst earning a significant amount of revenue, whilst assets may be a difficult indicator since ownership is transferrable and leased assets may be used. The draft toolkit should consider these limitations and introduce additional factors such as amounts paid for and the nature of independent contractors and other service providers, the nature of and amounts paid for leased fixed assets, and unit and monetary volume of sales.

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[8] Note 4, pg. 28
[9] Note 4, pg. 27
[10] Note 4, pg. 28
[11] Note 4, pg. 28
[12] Note 4, pg. 37
[13] Attiya Waris (2017), How Kenya has Implemented and Adjusted to the Changes in International Transfer Pricing Regulations: 1920 - 2016, ICTD Working Paper 69 [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120551, pg. 33.

[14] Note 13, pg. 36

Country by Country Reporting

In March 2019, Vodafone published its CBCR[15] including information on their total tax contribution by country, the number of employees, total profits before tax, and all legal entities and their jurisdiction. The publication of this data demonstrated that the CBCR does not need to be a highly confidential document.

The draft toolkit should consider the potential advantages of public CBCR, particularly since some countries may not have concluded DTAs, entered into Tax Information Exchange Agreements or joined multilateral agreements that would permit the sharing of information. The draft toolkit should also consider whether subsidiaries may be required to submit the CBCR in their local jurisdiction together with the local file and master file. This would greatly facilitate access to this important documentation by countries that lack the resources to engage in the complex arrangements for exchange of this information. Determining the options for providing greater access to CBCR data will have implications for the proposals being developed in the current work of the OECD for the Inclusive Framework. The CBCR would be an important source of the information likely to be needed to exercise the 'new taxing right' that is under development.

Currently, revenue administrations are discouraged from introducing an adjustment based solely on the information provided within the CBCR. The condition on appropriate use contained in BEPS Action 13 indicates that jurisdictions should not propose adjustments to the income of any taxpayer on the bases of an income allocation formula based on the data from the CBCR. The draft toolkit should take steps to evaluate the implications of this limitation for market jurisdictions exercising their taxing rights since their decision to tax profits should be informed and guided by the CBCR. A review and assessment of how the transformation of the tax landscape could and should motivate some amendments on the guidelines for the use of CBCR should be included in this toolkit as it would likely be helpful for determining the most simplified way of executing the proposed 'new taxing right'.

Presently, there is no requirement that CBCRs be reconcilable with an MNE's consolidated financial statements. Guidance to developing countries could be useful on when and how to ask for reconciling information between the CBCR and group consolidated financial results and other information.

In considering the guidance on appropriate use of CBCR data, the draft toolkit highlights the need to control and monitor usage of the data.[16] It would be particularly useful for this section to provide recommendations on who would be expected to monitor and control use and how this would be executed. Care should be taken to ensure that companies are not vested with the duty to monitor and control use and that, where foreign revenue administrations are tasked with sharing the information, do not impede upon the sovereignty of the local jurisdiction by monitoring appropriate use. For this reason, further comments regarding the parameters of appropriate use, especially considering the 'new taxing right', should be included.

The Unified Approach includes an Amount B for certain activities that are 'baseline' or otherwise routine in nature. There are many activities, whether related to marketing and distribution or not, that will go beyond the 'baseline' or routine activities to which there will be established fixed returns. In theory, a local country can pursue additional taxable revenue

[15] For more see: Vodafone (2019), Taxation and our total economic contribution to public finances 2018, Vodafone [online]. Available at: https://www.vodafone.com/content/dam/vodcom/sustainability/pdfs/vodafone_2018_tax.pdf

[16] Note 4, pg. 64

as an Amount C. However, it is inevitable that there will be a lower level of audit activity due to the defined fixed returns for these 'baseline' or routine activities. As such, local tax administrations will seldom conduct the work necessary to identify Amount C situations.

Hence, the toolkit should provide guidance for mandatory taxpayer disclosure requirements that will highlight activities that go beyond the defined 'baseline' or routine activities. Only in this way will tax authorities be alerted to situations that legitimately warrant an Amount C.

Section 3.2.7, which concerns 'Confidentiality', includes just a simple blanket statement that "information contained in a transfer pricing return should be treated as confidential in the same way as information provided in a tax return."

Given the political momentum that may eventually result in public CBC reporting, perhaps the Toolkit should acknowledge this potentiality and provide that primary law, secondary law, and/or supplementary guidance, as appropriate, be made flexible to treat such CBCR information as non-confidential if this change does occur internationally. A specific provision that could be considered is that if any other country makes an MNE's CBCR public under its law, then that would trigger non-confidential treatment for that MNE's CBCR.

William Morris
Chair, *Business at OECD* Tax Committee
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France

The Platform for Collaboration on Tax

Submitted by email: TaxCollaborationPlatform@worldbank.org

November 8, 2019

Ref: DRAFT TOOLKIT DESIGNED TO HELP DEVELOPING COUNTRIES WITH THE IMPLEMENTATION OF TRANSFER PRICING DOCUMENTATION REQUIREMENTS

Dear Members of the Platform for Collaboration on Tax,

Business at OECD (BIAC) is pleased to have an opportunity to comment on the draft version of the practical toolkit issued on 27 September 2019 (the "Draft Toolkit") to support the successful implementation by developing countries of effective transfer pricing documentation requirements. We welcome the compilation of this Draft Toolkit and the effort made by the Platform for Collaboration on Tax (the "Platform") to provide clarification and guidance to developing countries.

We commend the Platform for assembling a comprehensive draft toolkit that covers most considerations for TP documentation. It is important to re-emphasize consistency with the OECD post-BEPS approach to TP documentation, as this is the generally accepted model used by the vast majority of countries, and has already proven sufficient and appropriate for information reporting about related party transactions and their valuation.

We also reaffirm our strong belief in best practices[1] that businesses should follow in engaging with developing country tax authorities and offering cooperative compliance. In our understanding, both taxpayers and tax administrations should ideally be collaboratively working together to ensure that TP documentation rules and guidance are appropriately followed by taxpayers, and at the same time that tax administrations use the information submitted in good faith. This will ensure that tax administrations fully utilize TP documentation with an attitude not disposed to unnecessary follow up information requests that cause inefficient and disproportional use of resources and unnecessarily delays closure of reviews and audits.

Again, we thank you for the opportunity to comment on the Draft Toolkit, reiterate our welcome for many of its elements and look forward to the opportunity to engage further before the document is finalised, especially on adding some more detail. More extensive comments on the Draft Toolkit are attached.

Sincerely,

Will Morris
Chair, Taxation and Fiscal Policy Committee,
Business at OECD (BIAC)

[1] See www.biac.org/wp-content/uploads/2017/06/Statement-of-Tax-Best-Practices-for-Engaging-with-Tax-Authorities-in-Developing-Countries-2016-format-update1.pdf

General Comments

While we support the objectives of the toolkit and generally believe that it makes good progress in helping developing countries in meeting them, we have a particular concern that the phrasing is unnecessarily strong at times, giving the reader the sense that it is enforcement-minded with a presumption that taxpayers will be non-compliant. For example, the opening executive summary uses the word 'enforce' several times. We therefore recommend that the Platform consider using more neutral and collaborative language throughout the toolkit.

Additional clarifications that could improve the guidelines

As outlined above, we think the draft toolkit is comprehensive, however we have the following additional observations:

- On page 25, table 5 and in section 3.3.7: An additional potential exemption or simplification measure could be exclusions for low risk transactions, which has been adopted in some jurisdictions -- for example, low value services charged at cost plus a low mark-up. We note that the OECD has recognized such administrative approaches, such as a mark-up of 5% recommended to apply to low value-added services. The toolkit would benefit from including research into practices adopted across the globe such that developing countries can consider which ones might be appropriate in their circumstances.

- In section 3.2.4: Details are provided regarding the relevant frameworks and we recommend additional wording should be added to encourage all countries to ensure any secondary guidance is representative of the OECD transfer pricing guidelines and best practices to maintain global consistency as much as possible in law and in practice by tax administrations.

- In section 3.3 at box 4, it would also be beneficial to include legal agreements for the transactions under review in the list of documents to include in the transfer pricing analysis.

- In section 3.2.1 at para 2 (b), care should be taken by the OECD to not suggest that an MNE's compliance behavior in a particular jurisdiction will be linked to the level of compliance requirements, or broader fiscal regime in that country. A regime that has lighter compliance requirements for certain transactions, e.g. incentive regimes, should not be an indicator directly of non-compliance risk.

- In Section 3.3.2, the format and content should as much as possible align with the OECD guidance.

Specific Comments per Questions Outlined

1. Does this draft toolkit effectively address all the relevant considerations for the design of an effective transfer pricing documentation regulatory system?

In general terms the toolkit covers the main issues necessary for an effective transfer pricing documentation regulatory system. A strong message of coherence with the OECD's post-BEPS approach to TP documentation is critical, as it is a broad model generally accepted by the vast majority of countries, which has already proven sufficient and appropriate to report

information about related party transactions and their valuation.

Nevertheless, additional clarifications and alternatives would be appreciated regarding:

- 2.2 Confidentiality: We want to reinforce the confidentiality needs for commercially sensitive information (e.g. related to intellectual property, competitors or business strategies). Companies need countries to implement and follow reliable confidentiality measures for this type of information.
- 2.5 Accessing documents held outside the jurisdiction: In order to disclose certain information (e.g. details of cost and expense structure, profit of foreign group companies, confidential contracts with clients or suppliers), the taxpayer may require consent from third parties or be legally prohibited from providing the necessary information. In such cases, approval is generally only granted in the event the taxpayer is legally obligated to furnish information or documentation. Therefore, additional commentary would be helpful that recommends having local laws contain relevant provisions in regard to requesting confidential information. Further, it should be reinforced that foreign data should be requested by a tax administration through formal information exchange mechanisms wherever possible, before asking taxpayers to provide it.
- 3.3 Transfer pricing studies: Point 1 proposes separate studies for each of the entities within the scope of the transfer pricing rules. Practically, a transfer pricing study may apply to multiple entities and countries within the MNE group to avoid duplication, keep consistency, and minimise compliance costs. We would recommend the PCT support preparation of global or regional product group reports to the extent appropriate.

2. In terms of enforcement of transfer pricing documentation, are particular approaches (e.g. penalties or compliance incentives) especially beneficial for limited capacity developing countries?

When dealing with scarce resources, the legal framework should focus on “simplification and exemptions” measures. Examples are to consider low-risk transactions, such as those taking place within the same jurisdiction or within the same tax unit/ tax consolidation group, and focus on those with higher risk. Similarly, reasonable materiality thresholds are key in order to balance the administrative burden on taxpayers with tax authorities’ need. For instance, small branches/affiliates of MNEs or start-up companies, which are probably not risky in transfer pricing terms because of their activities and amount of transactions, could fall below this threshold.

The use of “safe harbor” rules on low risk transactions could also reduce both the workload of tax administration and taxpayers, without undermining proper levels of control and tax collection.

In this regard, standardized approaches should also be seen as an appropriate tool for developing countries with limited capacity. The more standardized the practice is, the easier it will be to follow-up and comply, which will result in benefits for both tax authorities and taxpayers. To this end, full alignment with the outcome of BEPS Action 13 would be advisable, in particular regarding the structure of the local file and master file.

In relation to this, it should be taken into account when imposing penalties whether the

taxpayer has made reasonable efforts to gather and prepare the relevant documentation based on the available information. If it is not clear what exactly is needed for documentation purposes, companies might feel compelled to unnecessary over-disclosure in order to avoid penalties for deemed incomplete submissions.

Taking another approach, incentives for compliance tend to be a more effective tool to encourage co-operative compliance. For example, in some jurisdictions such as Australia, MNEs are incentivised through administrative arrangements to fully disclose all transfer pricing documentation for material transactions at the time of the income tax return submission. In return, the MNE will receive reduced interest and penalties in the event of a future audit and adjustment.

In considering paragraph 2.4, MNE groups tend to set minimum group policies around tax compliance and therefore penalties for non-filing would rarely be incurred; therefore, we support having the burden of proof shift to the tax administration on the basis that sufficient analysis and documentation has been provided to support the positions taken. The imposition of penalties based on any underpaid taxes can be effective, which will ensure taxpayers do not adopt aggressive positions.

3. Are there other transfer pricing documentation requirements not covered in this toolkit that should be considered?

There could be additional commentary defining a related entity, particularly for joint venture arrangements and where group ownership is less than 100%. This can be important where definitions of 'related party' differ across jurisdictions (e.g. it may be where ownership is greater than 50%, but may be in instances where control is viewed as significant, such as holdings greater than 25%). It is recommended that the definitions are consistent with those for country-by-country ("CbC") reporting.

In general, the toolkit should also recognize a preference for avoiding redundant information requests. For instance, if countries demand supporting documentation for transfer pricing returns, companies shouldn't be required to deliver data that countries already have from other sources (e.g. exchange of CbC data).

4. What additional considerations and/or tools can be included in this toolkit to assist developing countries to implement effective transfer pricing documentation?

While we understand that preparation of the documentation in local language is the standard case, there could be reflections of complications arising from this position. For instance, MNEs normally prepare their transfer pricing documentation in the company's corporate language (typically English), and specific terms have been formed which are either hard to translate, or could create issues when local resources (either by the tax authority or the taxpayer) cannot relate them back to the situation they were created for. Further, the MNE's transfer pricing specialist might not be able to verify whether the translation matches the intended meaning. For the benefit of all, it might therefore be useful if at least in the discussions of the documentation, the original language could be used – for better understanding, but also to facilitate potential further discussions with other parties (e.g. other tax authorities).

It could further be very helpful if the toolkit include some suggestions on the kind of documentation or support that a tax administration could ask from the taxpayer, because there are some cases where authorities in their tax audits request documentation that does not belong to the taxpayers themselves, but affiliate companies. In these cases, it would be reasonable that the tax administration ask for the support from the company which owns the document, using the exchange of Information (in case it would be a foreign company) or just a specific requirement (in case it would be a local company).

Regarding the CbC report, consistent implementation among countries that follows the Action 13 standards becomes essential to avoid asymmetries of information and appropriate use of the information. This means that protocols to allow for automatic exchange of CbC reports need to be fully in place before imposing the taxpayers any duties connected to the CbC report. No taxpayer should be required to fill its CbC report in more than one jurisdiction.

In addition, guarantees of confidentiality among the countries that currently require the filing of the CbC reports should be reviewed before the filing of the CbC reports in those jurisdictions is in force. The conclusion from the second phase of the peer review of the minimum standard on Action 13 was that 41 jurisdictions have received a general recommendation to either put in place or finalize their domestic legal or administrative framework, and 17 jurisdictions received one or more recommendations to make improvements to specific areas of their framework. Taking these conclusions into account, jurisdictions in which its domestic legal or administrative framework is not finalized or is incomplete at the time they received the CbC reports should not have access or the right to use the information contained in the CbC report and /or the possibility of imposing any related penalty.

As CbC reports contain very sensitive information, sufficient safeguards and tax certainty on their appropriate use should be provided to taxpayers before requiring the filling/exchanging of the CbC reports. Accordingly, getting access to the CbC report could be seen as an incentive for countries to join the OECD Inclusive Framework.

Finally, as a suggestion, the toolkit could be completed with reference to the information that tax authorities could request the taxpayers in the negotiation of an Advance Pricing Agreement (APA) or a Mutual Agreement Procedure (MAP), in order to provide further expertise and to avoid potentially inefficient or unnecessary information requests.

COMMENTS ON DRAFT TOOLKIT DESIGNED TO HELP DEVELOPING COUNTRIES WITH THE IMPLEMENTATION OF TRANSFER PRICING DOCUMENTATION REQUIREMENTS

In our opinion, the draft toolkit is very complete and addresses all the general considerations. It is definitely effective, clear and complete, and we think it can only be further developed with the sharing of specific limitations and solutions encountered in practice. Below we share some of the issues we encountered in our experience in the Panamanian and Venezuelan tax administrations, and now as independent transfer pricing consultants, for the sections we had the opportunity to revise which we think can be helpful to other countries.

2.3 Timing Issues

When establishing the timing for each type of documentation, policymakers should take into account the statute of limitations regarding their transfer pricing audit processes. Some countries have less time to review transfer pricing documentation, perform risk analysis, open and close audit processes, and therefore they have a greater need for information to be provided in a timely manner, and maybe, a need for a shorter period to receive information upon request.

2.4 Penalties and compliance incentives

Penalties and compliance incentives, in our own personal experience, have definitely proved to be useful for countries with limited capacity and experience in transfer pricing, as was our case at the beginning. Additionally, they are necessary for the tax administration to obtain quality information that can later be used for risk analysis purposes. This is why we think it is important to take into account the following:

When evaluating the appropriate penalty for each type of documentation, some of the issues to consider are:

- Any penalty should cover omission as well as any kind of misinformation. The quality of the information presented is as important as complying with the obligation to file.
- Penalties should be set in a middle ground: they should be high enough to dissuade taxpayers from not complying with their obligations but low enough that they do not affect the taxpayer business.
- The amount of the penalty should consider the purpose of each kind of documentation. The more useful, complex and/or sensitive a document is, the more valuable it is to the tax administration for analytic purposes. Therefore, the penalty regime should de revised as a whole at some point to ensure it makes relative sense.
- When considering relative measures to establish penalties (such as the amount of transactions with related parties) policymakers should be careful about the possibility that these transactions are under/over valued and, as a result, might not reflect the relative economic reality of the taxpayer.
- When considering relative measures, tax administrations should ensure they have access to the necessary and correct information to establish the proper amount at the moment the penalty must be imposed.

2.6 Simplifications and Exemptions

When using taxpayer size-related measures to establish exemptions, policymakers should be careful to ensure that the measure selected really reflects “low-risk” or “smaller” taxpayers in their specific market.

Additional considerations:

We believe it would be very useful for tax administrations to have a guidance on risk analysis/modelling for developing countries to completely understand the value and use of the transfer pricing documentation.

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Knowledge Hub on Trade and Investment

Commission on Taxation

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, welcomes the opportunity to comment on the Platform for Collaboration on Tax draft toolkit designed to help developing countries in the implementation of effective transfer pricing documentation requirements.

ICC appreciates the work of the Platform to collectively produce "toolkits" for developing countries for appropriate implementation of responses to international tax issues under the G20/OECD Base Erosion and Profit Shifting (BEPS) project, as well as additional issues of particular relevance to developing countries that the project does not address. ICC recognizes the efforts of the Platform to develop toolkits to help developing countries implement international tax best practices.

Firstly, we would like to welcome the outcome of the Platform particularly as any additional guidance for developing countries in connection with the transfer pricing documentation framework could be very useful to reach the common goal of standardisation; the more coherent the internal systems are, the lower the costs of compliance for the taxpayer will be as will be the costs of control by tax authorities.

1. **Does this draft toolkit effectively address all the relevant considerations for the design of an effective transfer pricing documentation regulatory system?**

    - In general terms the toolkit covers the main issues that an effective transfer pricing documentation regulatory system requires. A strong message of coherence with the OECD post-BEPS approach to transfer pricing (TP) documentation is critical, as it is a broad model generally accepted by the vast majority of countries, which has already been proved as sufficient and appropriate to report information on related party transactions and their valuation.

    - Three key aspects relating to tax compliance are relevant for any foreign investment in another country:

        - Procedural rights and duties of the taxpayer in such country, including the burden of proof;
        - Tax compliance costs; and
        - Confidentiality.

    - In light of these key considerations, ICC would like to take the opportunity to suggest the following clarifications and alternative representations:

        - **2.1.2) Burden of proof**: ICC appreciates the assessment that it is pivotal to any transfer pricing regime to clearly define the burden of proof. It is undisputed that different jurisdictions follow different definitions of the procedural burden of proof. Still, a clear and reliable definition of the burden of proof is at the heart of any transfer pricing dispute and, therefore, of particular significance for any regulatory system. This being said, the toolkit itself uses language which implies that, as a general rule, the burden of proof was on the taxpayer. For example, in chapter 1.6. *Policy principles* the text reads "*[…] a taypayer on how to* ***demonstrate to*** *the tax administration that its transfer pricing is consistent with the arm's length principle*" (emphasis added). In chapter 3.3.1 *Functions of transfer pricing studies* it reads as first bullet "***evidence*** *that taxpayer has complied with the transfer pricing rules*" (emphasis added). This choice of language implies that at least *de*

facto the burden of proof was on the taxpayer irrespective of the definition applied by the respective jurisdiction. In order to rule out any misunderstanding, the toolkit should (i) define the different duties covered by the report more clearly from the outset (as done in more detail in Part III. of the toolkit) and (ii) refrain from biased language in Part I. and II. of the toolkit. Procedurally, the toolkit should differentiate clearly between the duty to prepare a transfer price documentation, the duty to provide relevant information and (substantiating) documents, the duty to accumulate and keep relevant documents, (if applicable) the duty to file a transfer pricing return and other duties to cooperate (e.g. answering a transfer pricing questionnaire).

The toolkit should make clear that the duty to prepare a transfer pricing documentation report (Master or Local File) may be interpreted to merely require the taxpayer to prepare documentation of facts, including the methodology and reasoning applied by the MNE in determining the transfer prices. In this case, the taxpayer should not be required to prepare, for example, a benchmark study or other means of evidence.

Also, in some jurisdictions (e.g. Germany) the burden of proof is on the tax administration at any time; the burden of proof does not shift to the taxpayer in case of insufficient transfer pricing documentation. Rather, the legal standard of proof is reduced (e.g. a lower degree of probability that the transfer price does not comply with the arm's length standard). This differentiation is particularly important in transfer pricing disputes which rely heavily on the interpretation of the facts and the burden of proof. A more open definition of the burden of proof should lead to a higher degree of legal certainty for the taxpayer and, thus, foster investments in such jurisdiction. This alternative definition of the burden of proof could be added to chapter 3.3.5 *Enforcement*.

- **2.2) Confidentiality**: As regards to the provision of public disclosure of certain tax return data in relation to (large) corporations, it is important to balance the information that can be requested from the taxpayer and the commercial sensitivity of such information (IP, competitors, business strategies). There is a need to reinforce mechanisms to avoid public disclosure of confidential information so that the tax system can be considered as reliable by taxpayers and thus investments are secured.

  ICC appreciates the confidentiality conditions laid out on page 59 under chapter 3.4.1.1 *Country by Country Reporting and developing countries* of the toolkit. This level of domestic and international safeguards to the business, trade and tax secrets of multinational enterprises should be applied to any transfer pricing measure outlined in the toolkit as well as any other tax measure.

- **2.4) Penalties and compliance incentives**: Table 4 includes penalty conditions for the TP Annual Returns or Schedules, like: "*b) Submission of an incomplete return*" and "*c) Making an incorrect return*". It would be very useful if the toolkit also provided guidance on how to treat cases where a taxpayer incurs in both conditions. We believe it is important to provide guidance on this aspect because most of the developing countries are likely to apply both penalties, which would be an unreasonable solution because the failure to comply is related to the same legal duty.

  It should also be made clear that the level of penalties applied in case the taxpayer fails to provide a Master File (at all or in part) or a country by country (CbC) report should be limited compared to the failure to provide a Local File. The former serve as a basis for a mere high-level risk assessment based on consolidated information and data whereas the latter provides the basis for in-depth investigations of the relevant IC transactions of the local taxpayer and thus, the domestic tax base. The failure to provide sufficient documentation should, therefore, be treated differently, both with respect to the definition of the burden of proof and the applicable penalties.

- As indicated on page 47 of the toolkit, a significant condition to imposing penalties should always be that the taxpayer has failed to take reasonable efforts to gather and prepare the relevant documentation based on the available information. In light of this, the following chapter should be revised.

    - **2.5) Accessing documents held outside the jurisdiction**: Despite other representations in this chapter, it is not uncommon – because of internal procedures, confidentiality policies, or other internal or external restrictions – that multinational enterprises refrain from sharing specific information, like for example: details of a particular costs and expenses structure; the profit earned by foreign group companies in related party transactions; confidential contracts with the customers/clients or suppliers of the related party, etc. So, in this case, the toolkit could suggest that the local tax administration files for an information request with the other country's tax administration (international exchange of information, EOI) due to the taxpayer's (legal or *de facto*) inability to access related party information. Apart from implementing double tax treaty, MCAA or TIEA EOI mechanisms, developing countries may in some cases also request such information based on the general rule of reciprocity in international law.

    - ICC would appreciate it if the Platform for Collaboration on Tax considered amending its wording on page 24 according to which it is unlikely that local management will be denied access to information concering wider (group) operations. In practice, it is, rather, likely that relevant information on group operations are not shared with the management of routine group entities, in particular, in case of doubts on the local confidentiality standards (see above).

    - In light of this, the wording on page 24 should also be changed where it is implied that local management had failed its fiduciary duties if a tax return is filed without safeguarding access to the requested information and documents. In many jurisdictions this statement should be inaccurate as the fiduciary duty of the local management should be to verify whether the declared income and expenses and, therefore, the declared profit is substantiated by proper invoices. The local manager should, however, be unable to verify whether the transfer prices (which in most cases are determined on a global level) comply with the arm's length principle. Also, as outlined above, such management should not have access to all relevant information. Holding such management responsible for such lack of information is clearly unfair.

- Also, requesting transfer pricing returns, documentation reports or questionnaires should never be a self-serving purpose. On page 45 of the toolkit the Platform for Collaboration on Tax outlines that some tax administrations may be unable to prepare yearly or periodic risk assessments. In this case, it should be ensured that appropriate limits are established by the local jurisdiction for the tax administration to make transfer pricing adjustments after a certain deadline. It is important to provide for a system of mutual compliance, both on part of the taxpayer and on part of the local tax administration. At the same time, as indicated on page 77 of the toolkit, the use of transfer pricing questionnaires should be limited to *ad hoc* requests (e.g. during tax audit). To minimise **compliance costs** and foster foreign investments, it should be recommendable to avoid any form of fishing expedition on the part of the local tax administration.

2. In terms of enforcement of transfer pricing documentation, are particular approaches (e.g. penalties or compliance incentives) especially beneficial for limited capacity developing countries?

- Clear rules and measures on investigating the facts of the case are preferable to a legal system where the inability to comply with requests by the tax administration are sanctioned

by penalties and/or result in a shift of the burden of proof.

- When dealing with scarce resources, the legal framework should focus on "simplification and exemption" measures:

  - Little consideration should be given to low-risk transactions, such as those taking place within the same jurisdiction (e.g. approach followed by Canada, Germany) or within the same tax unit/ tax consolidation group (e.g. Spain, US).
  - Reasonable materiality thresholds are key in order to balance the administrative burden of taxpayers and tax authorities. MNEs usually have branches/affiliates in developing countries that are comparatively small, in a start-up phase and/or conduct mere routine functions, so the transfer pricing risks should be limited considering the limited level of value-adding activities and a low amount of IC transactions. Therefore, tax authorities' efforts should be focused on those companies which pose a higher transfer pricing risk.
  - The use of "safe harbours" to low risk transactions is recommendable. This would reduce both the workload of tax administrations and taxpayers, without undermining proper levels of control and tax collection.

- In this regard, seeking for standardised approaches should also be seen as an appropriate tool for developing countries with limited capacity. The more standardised the practice is the easier it will be to follow-up and comply, which will revert in benefits for both tax authorities and taxpayers. To this end, full alignment with the outcome of BEPS Action 13 would be advisable, in particular regarding the content of the Local File and Master File.

3. Are there other transfer pricing documentation requirements not covered in this toolkit that should be considered?

- Some developing countries include in their domestic tax law regime a duty related to the provision of additional documents and information. This set of documents may differ from the regular supporting documents to be kept by all taxpayers, like contracts and invoices (e.g. the referred additional supporting documents may include valuation reports prepared either by a third party service provider or by the company itself or third party invoices and other external or internal means of evidence, which could be difficult to access for the local taxpayer).

  In this case, legal limitations should be introduced on the local tax administration's right to request and to evaluate information and/or documents which the tax administration deems relevant to the case. In cases where the local taxpayer shows (with reasonable effort) its inability to provide requested information/documents it should be more reasonable for the tax administration to request an exchange of information with the other country or (if applicable) to request the information directly from another company.

- As for transfer pricing returns, as they are usually requested together with the standard transfer pricing documentation report (i.e. Master File & Local File), the information to be included should not be redundant. Duplications of the transfer pricing documentation report should be avoided. This should reduce tax compliance costs while providing local tax administrations with access to necessary information for conducting risk assessments and verifying the appropriateness of set transfer prices. In fact, the quantitative information which is usually reported in a transfer pricing return is similar to that included in the Local File.

- The same approach should be taken in connection with transfer pricing questionnaires and any other additional documentation requirement. The preparation of proper transfer pricing documentation is a burdensome task for taxpayers. Therefore, the request for documentation beyond BEPS Action 13 should be carefully justified, in terms of risk assessment, in order to avoid duplicities and inefficiencies.

4. What additional considerations and/or tools can be included in this toolkit to assist developing countries to implement effective transfer pricing documentation?

- As a general rule, countries should balance the level of exigence in terms of transfer pricing documentation with their capacity to control compliance.

- It could be very helpful if the toolkit included more detailed suggestions and examples on the kind of documentation or level of supporting documents that a local tax administration could request from the taxpayer. As indicated above, there are cases where the local tax authorities request documents to which the local taxpayer has no access as they are in the exclusive possession of an affiliated entity. In these cases, it would be reasonable that the tax administration asks for support from the company which possesses the document, uses the exchange of information mechanism (in case of a foreign entity) or issues a direct request note (in case of a local entity).

- With regards to the CbC report, consistent implementation among countries, following the BEPS Action 13 standards, are essential to avoid asymmetries of information and appropriate use of the information. This means that protocols to allow for automatic exchange of CbC reports need to be fully in place before imposing any respective duties on the taxpayer. Also, taxpayers should not be required to file its CbC report in more than one jurisdiction.

- In addition, guarantees of confidentiality among the countries that intend to require the filing of the CbC report should be reviewed by an independent body like the OECD before the introduction of the filing requirements in those jurisdictions. The work of the Global Forum on Transparency is very much appreciated in this respect. The conclusion from the second phase of the peer review of the minimum standard on BEPS Action 13 was that 41 jurisdictions have received a general recommendation to either put in place or finalise their domestic legal or administrative framework, and 17 jurisdictions received one or more recommendations to make improvements to specific areas of their framework. Taking these conclusions into account, jurisdictions in which its domestic legal or administrative framework is not finalised or is incomplete at the time they received the CbC reports should not have access or the right to use the information contained in the CbC report and /or the faculty of imposing any related penalty.

- As CbC reports contain very sensitive information, sufficient safeguards and tax certainty on their appropriate use should be provided to taxpayers before requiring the filing/exchange of CbC reports. Accordingly, getting access to the CbC report could be seen as an incentive for countries to join the OECD Inclusive Framework.

- Finally, as a suggestion, the Toolkit could be completed with reference to the information that the tax authorities could request from taxpayers in the process of an Advance Pricing Agreement (APA) or a Mutual Agreement Procedure (MAP), as it is not unusual that tax administrations in developing countries do not have broad expertise in these fields and may tend to request information which is irrelevant and to an extent which is ineffecient.

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About The International Chamber of Commerce (ICC)

The International Chamber of Commerce (ICC) is the world's largest business organization representing more than 45 million companies in over 100 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce

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International Tax and Investment Center Oil & Gas Regulatory Dialogue Comments on DRAFT Version -- Practical Toolkit to Support the Successful implementation by Developing Countries of Effective Transfer Pricing Documentation Requirements

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1. Does this draft toolkit effectively address all the relevant considerations for the design of an effective transfer pricing documentation regulatory system?

Yes. The paper is quite comprehensive and well-balanced.

2. In terms of enforcement of transfer pricing documentation, are approaches (e.g. penalties or compliance incentives) especially beneficial for limited capacity developing countries?

The penalty provisions described in the Toolkit do not address exceptions for mitigating factors (i.e., reasonable cause for failure to timely comply). Given the potential for misapplication, positive incentives (vs. penalties) are a more effective means of encouraging compliance with reporting requirements in this context. Such encouragement might entail conversion to bi-annual compliance when threshold requirements have been successfully met for a specified number of reporting periods. Additionally, incentives to fulfill reporting requirements could include lessening of those requirements for taxpayers able to demonstrate minimal risk in transactions or activities involved (in those instances where general reporting requirements do not contain specifically identified exceptions).

Several times the Toolkit implies that the burden of proof in transfer pricing cases generally rests with the taxpayer. (See chapter 2.4, page 23, "In this case the initial burden of proof on a taxpayer may be shifted to the tax authority if...". See also chapter 3.31, page 36 "evidence that taxpayer has complied with the transfer pricing rules".) This is not always the case, as in Italy and Germany. The Toolkit should make this point clear and also stress the importance of clear legislative guidance on this topic.

3. Are there other transfer pricing documentation requirements not covered in this toolkit that should be considered?

The Toolkit is almost silent on what documentation is required to support an APA, which is of interest to many investors.

There is also hardly any reference to the role of the mutual agreement procedure and associated documentation requirements in avoiding double taxation arising from transfer pricing disputes.

There is no reference to databases of comparables, secret and otherwise. This would be beneficial to governments trying to test the reasonableness of prices.

4. What additional considerations and/or tools can be included in this toolkit to assist developing countries to implement effective transfer pricing documentation?

Further to the response to No. 1, above, more guidance should be included on the APA and MAP processes. Additionally, further explanation is warranted for low risk activities/transactions for which less stringent documentation requirements are applicable (see comments, below).

General Comments:

Members of ITIC's Oil and Gas Regulatory Dialogue applaud the Platform on the overall balanced tone of the Toolkit, presenting fairly the viewpoints of both the government and taxpayer. We believe this position could be enhanced by the recognition in the document of the fact that excessive documentation and/or documentation of low risk transactions can be as much of a waste of government time working through the information as it is for the taxpayer developing it. This strikes directly at the importance of efficient documentation as one of the stated purposes of the Toolkit in Part 1.2 on page 10 of the Toolkit.

There is too much coverage on Country by Country Reporting (CbCR), which is more aimed at fighting corruption than helping countries identify and resolve transfer pricing disputes. Of the 108 pages, 54-76 and 99-106 are devoted exclusively to CbCR, which should only be of marginal interest given the objective of the paper. This strong emphasis on CbCR makes the paper appear as an advocacy paper for CbCR.

Specific Line by Line Comments:

P. 7 (Executive Summary; 3rd par.) - It should also be noted that requiring standardized comprehensive documentation in cases where there is little if any risk of tax loss from transfer pricing can create as much unnecessary effort on the part of the government working through all the documents as it does on the part of the taxpayer creating those documents.

P. 12 (Table 2) - The choice of countries is odd. Need investor countries Germany, Japan, UK as well as US and Canada. Ireland would be interesting too. Not clear why Finland is included.

p.14 (Objectives) - Based on the stated objectives it is difficult to see that a master file and CbCR would be relevant in all, or even most cases. In fact, it appears more likely to result in the

government spending excessive time studying documents that are not relevant to the related party transactions taking place in the country. If efficiency is a goal of the documentation requirements it would seem reasonable that the generalized documents, such as a master file and CbCR would only be provided in relevant cases. For example, if the local country affiliate of a multinational enterprise is producing and selling one type of commodity to one affiliate throughout the year and the related party sales prices on those sales is set based on a publicly available index, it is difficult to imagine how a review of a master file and CbCR covering all 1,000 entities in the multinational group, engaged in hundreds of different activities, in 100 different countries would provide the government any benefit what so ever. Perhaps it would be more effective to provide a requirement for the submission of generalized documents (such as master files and CbCR) if relevant to the determination of the intercompany prices. As an alternative, perhaps this could be covered through the simplification and exemptions provisions in Part 2.6 on page 24 of the Toolkit.

P. 15 (Policy principles; 3rd arrow) – Recommend inserting "lower risk" before "transactions" in the last sentence to clarify that such exemptions or simplified documentation requirements can be provided for transactions of minimal risk regardless of size.

pp. 23 (Penalties) – Blanket penalties for failure to provide requested information appear harsh. There should be some mention of mitigation due to reasonable cause (e.g., complexity, etc.). In those cases where the taxpayer has the initial burden of proof, it is a good idea to provide for burden of proof to be shifted, in cases where the taxpayer is compliant, as an incentive for meeting the documentation requirements. No reference to cost sharing or verification of compliance by using an external audit firm.

pp. 25-26 (Exemptions; 1st item) – "Low risk taxpayers" is not defined except by example and then only for small transactions or small taxpayers. A reference to low risk industries/transactions (e.g., posted/reference/index prices, or other special circumstances) as an additional example on p. 26 is appropriate here. There can be a number of circumstances that make certain intercompany transactions at low or no risk of transfer pricing issues, irrespective of the volume of transactions or size of the company involved. In such cases, a simplification of the reporting requirements on such transactions will provide a benefit to both the government and the taxpayer. For example, in the extractive industry it is not uncommon for intercompany sales of oil to be taxed at a government stipulated price, resulting in no tax risk from transfer pricing. However, if the government has transfer pricing documentation requirements in place with penalties for noncompliance, the taxpayer will still be required to comply, unless an exemption or simplification provision is in place.

p. 27 (TP returns) – Suggest a reference to the earlier chart (p. 12) for representative countries requiring returns. Also, fn 20 refers to "tax evasion". Suggest substituting "avoidance" as a less hostile and more realistic inference.

p. 28 (2nd par.) – Again as stated in the comments for page 14 above, the format should start with specific information only, and expand to more generalized information only when necessary, or the simplification and exemption provisions should be expanded to include low risk transactions, irrespective of the amounts, or size of the taxpayer. Additionally (under format and content, second par.) – Argentina is not identified as a country requiring TP returns in the chart on p. 12 and (final par.) – Czech Republic is not identified in the same chart in col. 5.

p. 30 (Regulatory framework) – As the reader may focus on areas of interest (rather than reading the document from the Introduction onward), suggest cross reference here to explanation of this at p. 16

P31-32 The translation is unintelligible in some areas.

pp. 32-34 (Timing/Enforcement/Confidentiality/Exemptions) – Same comment as preceding one.

p. 36 (TP Studies; last bullet on page) – Suggest substituting "generally" for "nearly always".

p. 38 (1st complete sentence) – Suggest inserting "by the taxpayer" after "method", for clarity.

p. 43 (Language, 1st par.) – Suggest footnote or parenthetical definition of "functional analysis" as this appears to be the first time this term in used in the paper.

p. 43 (3rd par.) The text of this paragraph reads fine, but the heading suggests countries "generally" require reporting in local language not allowing preparation in a common language. If this is true, suggest a recommendation that reporting in a common language should be allowed. If not true, suggest changing the heading.

p. 45 (1st par after Box 8) – The explanation does not state what the general timeframes are (e.g., by year end; etc.)

p. 47 (Shift in Burden of Proof) – Perhaps again reference explanation on p. 21. Also, please see comment on Burden of Proof under #2, above.

p.54 (CbCR) As stated above we believe there is too much emphasis on CbCR and suggest this part be significantly reduced to provide only the detail information need to support the rest of the Toolkit.

p. 54 (CbCR, 1st par.) – There are negative implications for the petroleum industry in reference to EITI requirements following "tax avoidance/evasion and corruption." The paragraph should

perhaps note that the EITI requirements are voluntary and developed in full cooperation with industry leaders.

p. 55 (par 1) – The NGOs position is given full explanation here. For balance, suggest that "business community" rationale be included as well.

p. 56 (1st and last pars.) The "Inclusive Framework" is introduced. Suggest a fn explanation of what this is.

p. 61 (fn 50; 53) – Suggest merging the latter fn with the former.

p. 62 (3rd complete par.) – Suggest continuing boldface to end of sentence (i.e., . . . "concerning taxes covered by the agreement. . .") as this is an important element.

p. 73 (1st par.) – Suggest deletion of "spontaneously" as potentially confusing (vis "automatically").

p. 79 (Conclusions) – As stated previously, there is too much emphasis placed on CbCR (cited in almost every paragraph of the Conclusion. In the third par. suggest including "lower risk" before "transactions" to read: "...simplification for smaller taxpayers and low risk transactions", as the implication otherwise is that only "smaller" transactions should escape more intense reporting. Also, there is no mention of "efficient" reporting. To the contrary with all the emphasis on CbCR. The bold type of the last paragraph ignores that in many cases CbCR information will be of zero value with respect to the arm's length pricing of intercompany transactions, resulting in a waste of effort for the tax authorities.

From: Alexandre Mercier (CA)
To: Platform for Collaboration on Tax
Subject: OECD Toolkit Implementation of Transfer Pricing Documentation
Date: Monday, September 30, 2019 10:38:31 AM

[External]
Hi,

I believe that there is a mistake/typo in table 8, page 35 in the PDF toolkit PRACTICAL TOOLKIT TO SUPPORT THE SUCCESSFUL IMPLEMENTATION BY DEVELOPING COUNTRIES OF EFFECTIVE TRANSFER PRICING DOCUMENTATION REQUIREMENTS

CAD1,000,000 translates into EUR668,500 and not EUR66,850.

Regards,

Alexandre

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Platform for Collaboration on Tax

By email to: taxcollaborationplatform@worldbank.org

8 November 2019

PwC's Comments on the Draft Toolkit designed to help developing countries with the implementation of transfer pricing documentation requirements

PricewaterhouseCoopers International Limited, on behalf of the Network Member Firms of PwC (PwC), thanks the Platform for Collaboration on Tax (PCT) for the opportunity to provide comments on the draft toolkit designed to help developing countries with the implementation of transfer pricing documentation requirements.

We appreciate the initiative and efforts from the PCT in developing this practical toolkit aimed at assisting developing economies in approaching transfer pricing documentation in a practical way, while at the same time leading to increased tax certainty for taxpayers and tax administrations.

We address our remarks below in relation to the questions raised by the Platform. We also offer some comments on other questions to be considered and on how to support the successful implementation of effective transfer pricing documentation requirements by developing countries.

The main issues which should be considered, and which are further elaborated below, are:

- a stronger recommendation for the international consistency of documentation, in particular based on less divergent interpretation of the outcome of BEPS Action 13 - Transfer Pricing Documentation and Country-by-Country (CbC) Reporting, and
- a reduced emphasis on local filing of CbC reports, focusing instead on the adherence to legal instruments such as the Multilateral Convention on Administrative Assistance in Tax Matters and the signature of the Multilateral

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Competent Authority Agreement on the Exchange of CbC Reports or bilateral exchange agreements.

It would also reduce potential ambiguity if reference were removed to what is described in the document as "the EU's current proposal for a directive on corporate tax transparency includes making CbC Reports publicly available". That is transitory and still the subject of considerable debate.

Q1 Does this draft toolkit effectively address all the relevant considerations for the design of an effective transfer pricing documentation regulatory system?

The efficiency of producing and reviewing documentation would be enhanced if the philosophy behind CbC reporting and the master file were followed in considering the need for information locally. Where possible, this would mean a single filing 'vetted' and then shared as widely as is appropriate. A specific local filing would be secondary and should relate only to matters necessary to address local variations or legislative requirements. The toolkit could, in relation to CbC reporting, stress the importance of the conclusion of instruments (signing of the multilateral convention on mutual assistance in tax matters for example) and the necessary qualifying competent authority agreements that allow for the exchange of the report.

Even among developing countries we have experienced difficulties with the consistency of application of the recommendations of BEPS Action 13. This applies partly to CbC reporting, despite this being a minimum standard. It applies even more in relation to the master file and local file best practice/ harmonisation wording. It is questionable at present whether the level of documentation within a global group has actually been reduced post-BEPS. This toolkit could be used to help align these issues and this might be something to raise in the Executive Summary.

The draft toolkit recognises, in particular, the advantages of adopting a common approach to "transfer pricing studies", but we would expect definitions and descriptions that position such a study as part of a local file rather than replacing it.

The draft toolkit refers to the PATA documentation requirements. We would suggest that they are not really a good example: they were simply a compilation (or rather piling up) of the documentation requirements of the different countries participating in the PATA documentation project.

The toolkit warns about the risk of undervaluation of transactions if comprehensive documentation requirements are not enforced. However, simplification might dictate that some transactions could be excluded from documentation requirements based upon their effective or proportional value. As this should concern small(er) transactions which should pose no or limited tax risk, the undervaluation should not become an issue.

Confidentiality of the information included in all transfer pricing documentation should always be considered critical rather than just "normal". Perhaps that is merely a matter of more emphasis in wording. There may be exceptions where regulations require public disclosure or a taxpayer has chosen to make public disclosure, and at the moment that might be "abnormal", but there should be a presumed assumption of confidentiality.

The draft toolkit refers to the fact that MNEs exceptionally contend that they do not have access to sufficient information to be able to submit complete transfer pricing return schedules or transfer pricing studies. It then suggests that these contentions should be resisted. That does not take account of the variety of requests we have seen and the organisation of some MNEs. It does not automatically follow that that entity has not been able to establish that it has made a correct tax return in accordance with the domestic rules. Nor are all MNEs organisations integrated in a limited number of ways, all with open access for local entities to information concerning wider operations.

Q2 In terms of enforcement of transfer pricing documentation, are particular approaches (e.g. penalties or compliance incentives) especially beneficial for limited capacity developing countries?

There needs to be a balanced approach to the burden of proof. Consistent and reasonable documentation requirements with appropriate penalties have been widely accepted as part of a taxpayer's compliance standard. The draft toolkit suggests that if the burden is placed on the tax administration that is a disincentive for the taxpayer to produce information. However, where a taxpayer has produced appropriate information, tax administrations may be encouraged to pursue more aggressive assessments if the burden of [dis]proof lies with the taxpayer.

In our experience questionnaires are not "usually" informal: in many cases not responding in a timely manner may indeed lead to penalties, reversal of burden of proof, or other tax related sanctions. Often this may be appropriate and proportionate but guidance might be helpful.

The toolkit perhaps provides the opportunity to address in relation to CbC reporting who should impose penalties. Is it the tax administration of the ultimate parent entity, the tax administration of the surrogate parent entity, the local tax administration in case of local filing, or any local tax administration? Usually, if one were adhering to the standard, it would seem to us that only the tax administration of the parent or surrogate should levy a penalty as the other tax administration will receive through an exchange of information. It would further be unjust if a taxpayer were to get a penalty because another tax administration had not exchanged the CbC report that the MNE Group sent in on a timely basis with its tax administration.

There needs to be a clear distinction between transfer pricing related penalties and documentation related penalties. For example, the toolkit refers to a penalty arising as a result of a potential adjustment for which a transfer pricing study may be offered as mitigation – it would

seem that if the penalty were enforced in those circumstances it would be a transfer pricing related penalty (unless there were then separate contentions about the study having been wrong).

Q3 Are there other transfer pricing documentation requirements not covered in this toolkit that should be considered?

As noted above in relation to consistency, the variety in approaches to master file documentation that countries have adopted is actually contrary to the concept of a standardised documentation package (BEPS action 13) leading to issues for both taxpayers and tax authorities. The contents of the master file could then be more specifically agreed in the toolkit. The result in relation to the master file sometimes includes:

- tax payers needing to consider and prepare different documentation packages;
- tax administrations not receiving information considered relevant by a counterparty country because it is not requested in that country's interpretation of the master file requirements, and
- a lack of transparency in the 'blueprint' of the MNE.

We think there is room for local forms, provided these are specific, relevant and proportionate. In Belgium, the local form (which deviates substantially from the local file as described in BEPS Action 13) is an appropriate supplement to the tax return (which we think the draft toolkit intended to point out). However, the regulatory framework should prohibit sending general or phishing questionnaires, i.e. questionnaires should be targeted.

Q4 What additional considerations and/or tools can be included in this toolkit to assist developing countries to implement effective transfer pricing documentation?

The PCT might consider the potential benefit of including a recommendation to align domestic transfer pricing requirements to the greatest extent possible. Although documentation requirement will remain an issue of domestic law, such recommendations may lead to more uniformity in the requirements, leading to a lesser burden for MNEs and greater transparency for tax administrations.

Tax authority approaches to certain activities can result in deduction for the costs being denied, for example with management expenses both where they are incurred and where they are passed on to group members. One jurisdiction might consider them to be services while another treats them as shareholder costs. OECD recommendations on low value adding services may deal with these but documentation requirements could be used to reduce the chances of challenge or provide the local fisc with information to risk assess.

CbC reports arguably don't best serve the purpose of a risk assessment based approach to reviewing transfer pricing. A standard questionnaire or other request for information might

better enable tax authorities to identify those who have made a concerted effort to establish robust transfer pricing (even though it may not be state of the art). On the basis of that information, tax authorities might decide to take a deeper look and legislation might be framed to shift the burden of proof from the tax administration to the taxpayer in specific, clearly defined circumstances. It might incentivise taxpayers to address transfer pricing in all countries while simultaneously establishing the basis for enhanced cooperation in a further stage.

Additional guidance could also be given for countries with high inflation rates where pricing of any sort gives rise to additional difficulties.

Other comments

As noted above, there are examples in the draft toolkit where references to MNE behaviour, business models or tax administration practices are unsubstantiated. For example, this includes reference to regional/ global supply chains and management structures. Citations for studies that sets out these matters in particular countries or regionally or globally, as appropriate, would help readers who wanted to consider these matters further.

We look forward to the opportunity to engage further in the process of trying to reach greater consensus on the analysis that might be included in any final toolkit.

If you would like to discuss any element of this response in more detail please do not hesitate to contact me (or any of those listed below).

Yours faithfully,

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Mexico City, November 7th 2019

Platform for Collaboration on Tax

IMF-OECD-UN-World Bank Group

Gentlemen,

On regards of your invitation to comment on the draft toolkit to help developing countries with the implementation of transfer pricing documentation requirements, following you will find our reply:

1. ***Does this draft toolkit effectively address all the relevant considerations for the design of an effective transfer pricing documentation regulatory system?*** **No**. **In our opinion it is necessary to suggest an independence rule**. Frequently, the adequacy of the transfer pricing documentary support is affected by the relationship between the tax and transfer pricing advisors. More and more frequently, the transfer pricing documentary support follows a very aggressive tax strategy, giving room to **transfer mispricing**, in which the methods are used not to evaluate the intercompany transactions but to justify a taxpayer´s tax objective. In economies like Mexico, in which the presence of multinational companies is significant, this situation leads to the loss of significant amounts of the gross internal product given the number of multinationals operating within the country. Some estimations are provided by Jansky & Palansky[1] calculating the loss for Mexico in 0.43% of the gross internal product (2016) or by the ECLAC[2] who calculated 19,941 USD millions, for the period 2005-2007 and only considering trading of durable goods with European and North American companies.

2. ***In terms of enforcement of transfer pricing documentation, are particular approaches (e.g. penalties or compliance incentives) especially beneficial for limited capacity developing countries?*** Yes, because at least establish the obligation for multinational companies to substantiate its transfer pricing policies even in emerging economies.

[1] Petr Janský & Miroslav Palanský, 2019. "**Estimating the scale of profit shifting and tax revenue losses related to foreign direct investment**," International Tax and Public Finance, Springer;International Institute of Public Finance, vol. 26(5), pages 1048-1103, October.
[2] https://www.cepal.org/es/publicaciones/39902-evasion-tributaria-america-latina-nuevos-antiguos-desafios-la-cuantificacion

3. ***Are there other transfer pricing documentation requirements not covered in this toolkit that should be considered?*** We suggest a rule requesting the taxpayers a technical explanation about changes in its transfer pricing methodology or even transfer pricing advisors. In our experience, very aggressive multinational companies have even threatened or dismissed its advisors looking for a more positive opinion or in the worst case scenario to bend the applicable rules.

4. ***What additional considerations and/or tools can be included in this toolkit to assist developing countries to implement effective transfer pricing documentation?*** In our view, a transfer pricing certification process is needed to properly and consistently apply the regime. In Mexico, the National Federation of Economist started a certification process – not mandatory- requesting at least 10 years of experience and the approval of a certification exam (see the following link: https://www.youtube.com/watch?v=uPNR29lqu1U). The approval ratio is 20%. This percentage indicates the existence of service offerings unaware of the regime complexities, situation which could lead voluntary or involuntarily to profit shifting scenarios.

We appreciate the opportunity to share our experiences, and please let us know if we can provide additional assistance to this initiative.

Jesús Aldrin Rojas M.
Managing Partner
QCG Transfer Pricing Practice
www.qcgpreciosdetransferencia.com

From:	Roberto Enrique Ramos Obando
To:	Platform for Collaboration on Tax
Cc:	Cesar Yanuario Hernandez Cantarero; Monica Gabriela Andino Caceres
Subject:	Comentarios sobre Guía Práctica de Documentación de Precios de Transferencia - Honduras
Date:	Friday, November 8, 2019 11:34:13 AM

[External]
Estimada Plataforma de Colaboración en materia Tributaria,

Por la presente, le proporcionamos comentarios sobre el "borrador de la guía práctica para contribuir al éxito de la aplicación de obligaciones documentales eficaces en materia de precios de transferencia por parte de los países en desarrollo". Nuestros principales comentarios hacen referencia a las dificultades prácticas de validación de la documentación presentada ante la Administración Tributaria y sugerencias respecto al contenido de esta documentación.

1. **Medidas de cumplimiento de la documentación.**

Sanciones

Respecto a la aplicación de medidas de cumplimiento, las sanciones cuantiosas generan una percepción de riesgo importante frente a los contribuyentes que no desean cumplir con sus obligaciones formales.

No obstante, la baja capacidad operativa de un Departamento o Dirección de Precios de Transferencia en un país en desarrollo impide la aplicación de sanciones sobre declaraciones falsas u omisiones. En texto, se promueve el miedo al Obligado Tributario en que un “paso en falso” ocasionará grandes consecuencias pecuniarias. Por otra parte, también existen los Obligados Tributarios que conocen las deficiencias en capital humano de las Administraciones Tributarias y llenan sus declaraciones o informes bajo el conocimiento que puede ser que nunca sean revisadas.

En virtud de lo anterior, se deben desarrollar herramientas prácticas que contrarresten estos comportamientos. Optar por controles masivos de percepción de riesgo puede ser una solución siempre y cuando estos tengan como efecto hacer efectiva una sanción.

De igual manera, hay criterios para la aplicación de sanciones que se deben aclarar ya que implican cierta subjetividad por parte de la Administración Tributaria. Por ejemplo, si se aplica una multa cuando la información presentada es falsa o inexacta, el contribuyente puede impugnar al alegar que fue un error humano involuntario. En este caso, ¿la Administración Tributaria tendría que comprobar el dolo del contribuyente o aceptar lo alegado? Todo depende de la rigidez de cada Administración.

Falta de Entrega de Información del Exterior

Respecto a las alegaciones de Obligados Tributarios sobre no presentar la información de sus partes relacionadas del exterior por no tener acceso suficiente a ella (página 27 del documento), este es un comportamiento usual de las multinacionales en Honduras. Se considera que un argumento fuerte para desmotivar este comportamiento en un proceso de auditoría es incorporar una regla en la legislación nacional en que este tipo de alegaciones no solamente tendrá una sanción, sino que se entenderá implícitamente que el Obligado Tributario no dispone de información fiable para la valoración de sus operaciones vinculadas, en conformidad con las Directrices de la OCDE. Por tanto, el Obligado Tributario no habrá cumplido con la carga de la prueba y la Administración Tributaria tendrá que valorar nuevamente esta transacción.

2. **Mejora de la Documentación de Precios de Transferencia y Nuevas Herramientas a Implementar**

Estandarización de *Safe Harbors* o Umbrales

Las exenciones u obligaciones documentales simplificadas para los contribuyentes u operaciones más pequeñas que establezcan los países en materia de preparación y mantenimiento de la documentación sobre precios de transferencia no están estandarizadas en los países. Esto puede provocar gastos excesivos en los grupos empresariales y buscar la uniformidad de la documentación a nivel regional.

Aclaración de Términos

Dentro de los términos utilizados en los documentos de precios de transferencia, se hace mención de las palabras “significativos” y “relevantes”. Por ejemplo, en el Archivo Maestro se solicitan listas y descripciones de acuerdos significativos y de transmisiones relevantes. Estas palabras pueden tener diferentes connotaciones según la economía de cada jurisdicción por lo que sería importante intentar estandarizar estas definiciones de alguna manera.

Segmentación de Información

Para la determinación del beneficio bruto o neto, los contribuyentes deben de disponer de un cierto grado de segmentación de sus datos financieros y excluir los ingresos y las deducciones no relacionados con la operación vinculada objeto de revisión cuando afecten significativamente a la comparabilidad con las operaciones no vinculadas; en la mayoría de los casos los contribuyentes calculan los indicadores de beneficio a nivel global, sin la segmentación debida, aduciendo que no tienen las herramientas financieras y/o contables para hacerla.

Tomando en cuenta que un error en la segmentación de la información afectaría el resultado del análisis de precios de transferencia y como consecuencia el archivo local se presentaría de forma errónea ante la Administración Tributaria, dando lugar a sanciones por este concepto, se recomienda agregar, dentro de estas herramientas, pautas para realizar una correcta segmentación de la información financiera.

Contar con lineamientos estandarizados disminuye la probabilidad de controversias entre las Administraciones Tributarias y los contribuyentes especialmente en los procesos de fiscalización.

Base de Datos Referencial

En virtud de la importancia del uso de bolsas de valores, organismos de comunicación de precios o estadísticas y otros entes reguladores de precios para la determinación de precios de transferencia en la compraventa de ciertos productos, cuando proceda, el archivo local debería contener el procedimiento detallado de determinación de precios, incluyendo los ajustes o descuentos en la transacción, efectuado por la entidad local así como la lista de sitios web o herramientas utilizadas para este efecto. De igual manera, sería importante contar con una base de datos sobre las herramientas o sitios web más utilizados por diferentes sectores económicos para determinar precios de cotización. Esto podría reducir el costo en la preparación de documentos de precios de transferencia y dar mayor claridad a las Administraciones Tributarias en los procesos de control.

Esperamos que estos comentarios sean de utilidad para usted.

Saludos cordiales,

Roberto Enrique Ramos Obando

Jefe del Departamento de Fiscalidad Internacional y Precios de Transferencia

Dirección Grandes Contribuyentes Tegucigalpa

Servicio Administración de Rentas (SAR)

TAX EXECUTIVES INSTITUTE

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7 November 2019

Platform for Collaboration on Tax
c/o The World Bank Group
1818 H Street, NW
Washington, DC 20433

Via email: taxcollaborationplatform@worldbank.org

RE: Draft transfer pricing documentation toolkit for developing countries

The Platform for Collaboration on Tax is a joint initiative of the International Monetary Fund, Organisation for Economic Co-Operation and Development (OECD), United Nations, and World Bank Group (collectively, the Platform). The Platform published a document entitled "Practical Toolkit to Support the Successful Implementation by Developing Countries of Effective Transfer Pricing Documentation Requirements" (the Draft Toolkit) on 27 September 2019 and requested input from interested stakeholders. I am pleased to respond to the Platform's request for input on behalf of Tax Executives Institute, Inc. (TEI).

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 57 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 individual members represent over 2,800 of the leading companies in the world.[1]

TEI Comments

The Platform posed four specific questions to interested stakeholders regarding the Draft Toolkit. TEI's answers to these questions are set forth immediately below.

[1] TEI is a corporation organized in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

Q.1. Does this draft toolkit effectively address all the relevant considerations for the design of an effective transfer pricing documentation regulatory system?

Generally, the Draft Toolkit addresses all the main considerations an effective transfer pricing documentation regulatory system requires. Coherence and coordination of the Draft Toolkit's approach with Action 13 of the OECD's base erosion and profit shifting (BEPS) project's transfer pricing documentation standards is critical, however. The Action 13 model is generally accepted by the vast majority of countries and is a useful method for reporting information about related party transactions and their valuation. Consistency with Action 13 will help balance tax administrative imperatives with the compliance burden on multinational enterprises (MNEs), the latter of which has substantially increased since the final BEPS project reports issued in 2015.

In this regard, TEI recommends developing countries: (i) adopt the master and local file formats recommended by the OECD's Final Action 13 Report; (ii) adopt the OECD country-by-country report XML file format and the related data, without requesting additional taxpayer data; (iii) accept a master file and country-by-country report prepared in English, as translation is expensive for multinational enterprises having a footprint across several countries; and (iv) adopt materiality thresholds to exempt taxpayers from transfer pricing documentation requirements and special reports if their related party transactions are below such thresholds, indicating a low risk.

The Draft Toolkit should acknowledge certain documents and information are not available to all affiliates of an MNE primarily because of their confidential and/or proprietary nature, among other reasons. Examples of such information include detailed cost and expense structures, profits earned by foreign companies of the group in related party transactions, confidential contracts with customers and suppliers of the related party, etc. In situations where the local taxpayer cannot access related party information, tax authorities should use the exchange of information provisions contained in double tax treaties to obtain the relevant information from the other jurisdiction.

Q.2. In terms of enforcement of transfer pricing documentation, are particular approaches (e.g. penalties or compliance incentives) especially beneficial for limited capacity developing countries?

As a general principle, penalties should be in proportion to the objectives of the documentation requirements, the nature and extent of the violation, and whether the taxpayer has made reasonable efforts at compliance.

Table 4 of the Draft Toolkit summarizes approaches to penalties regarding transfer pricing documentation.[2] It would be beneficial if the Draft Toolkit also provided guidance and/or examples limiting penalties should a taxpayer find itself in a situation where more than one penalty may apply. This would avoid unreasonable "stacking" of penalties resulting from the same error (exceptions could be made in cases of fraud or willfulness).

[2] Draft Toolkit at p.21-23.

TEI also recommends using a compliance incentive to comply with transfer pricing documentation requirements. For example, tax authorities should have the burden of proving transactions are not arm's length when the taxpayer has substantially complied with all the local authority's transfer pricing documentation requirements.

In addition, the use of reasonable "safe harbours" for low risk transactions would reduce the workload of tax administrators and taxpayers without undermining tax collection. Transactions taking place within the same jurisdiction or within the same tax unit/tax consolidated group should also be considered low risk.

Q.3. Are there other transfer pricing documentation requirements not covered in this toolkit that should be considered?

Some developing countries require local affiliates of MNEs to maintain documentation and information supporting the affiliate's related party pricing. Such documentation may differ from the information local taxpayers typically maintain (e.g., the local affiliate will generally maintain contracts and invoices to which the affiliate is a party but may not have access to an MNE's overall transfer pricing approach, its global purchase agreement). The documentation (e.g., valuations prepared by a third party or by the company itself, third party invoices, etc.) could be difficult for the local taxpayer to obtain. Tax authorities should exercise restraint in such cases and limit any such requests to information or documentation considered vital. The exchange information provisions of the relevant double tax treaty could also be used to obtain the additional information tax authorities consider necessary.

As for the specific transfer pricing returns required by some jurisdictions, because they are usually requested together with regular transfer pricing documentation (i.e., the master file and local file), the information requested should not be duplicative of the information already included in the transfer pricing documentation.[3] This would ease taxpayer compliance burdens and not prevent tax authorities from gaining access to the necessary information to conduct risk assessments.

Q.4. What additional considerations and/or tools can be included in this toolkit to assist developing countries to implement effective transfer pricing documentation?

The final toolkit should recommend tax authorities only ask for documentation available to the local taxpayer. Local tax authorities should use the exchange of information mechanisms available under bilateral income tax treaties to obtain information unavailable to local taxpayers, as noted above.

Consistent implementation among jurisdictions regarding the country-by-country report under BEPS Action 13 is essential to avoid information asymmetry and to ensure appropriate use of the information in the report. Thus, protocols to allow for the automatic exchange of country-by-country

[3] The quantitative information usually reported in a transfer pricing return is often similar to information included in the local file.

reports should be fully in place so no taxpayer is required to fill out a country-by-country report in more than one jurisdiction.

The Draft Toolkit should also reiterate the confidentiality of taxpayer information in the country-by-country reports. The second phase of the peer review of the minimum standard on Action 13 concluded 41 jurisdictions have received a general recommendation to either put in place or finalize their domestic legal or administrative framework for country-by-country reports, and 17 jurisdictions received one or more recommendations to make improvements to specific areas of their framework. Thus, jurisdictions whose domestic legal or administrative framework has not been finalized or is incomplete at the time they received the country-by-country reports should not be able to use the country-by-country reports or impose any related penalty. Obtaining access to country-by-country reports should be viewed as an incentive for countries to join the OECD Inclusive Framework.

In addition, confidentiality should not be limited to the data contained in the country-by-country report. The master and local files also contain confidential business information and should be subject to the same confidentiality and protection standards with respect to their storage, communication, and usage as the country-by-country reports. The same concerns also apply to other transfer pricing returns and reports requested by tax authorities

Finally, TEI notes the Draft Toolkit could reference the information tax authorities are permitted to request in the negotiation of an Advance Pricing Agreement or during a Mutual Agreement Procedure for purposes of providing guidance on proper transfer pricing documentation.

• • •

TEI appreciates the opportunity to comment on the Draft Toolkit. TEI's comments were prepared under the aegis of its European Direct Tax Committee, whose co-chairs are Kris Bodson and Giles Parsons. Should you have any questions about our comments, please contact Ms. Bodson at +32 2 746 36 01 or kbodson@its.jnj.com, Mr. Parsons at +44 793 921 5554 or gilesparsons55@gmail.com, or Benjamin R. Shreck of TEI's legal staff at +1 202 464 8353 or bshreck@tei.org.

Respectfully submitted,
TAX EXECUTIVES INSTITUTE

Katrina H. Welch
International President

UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

November 8, 2019

VIA EMAIL
Global Tax Platform
GlobalTaxPlatform@worldbank.org

Re: USCIB Comment Platform for Collaboration on Tax Toolkit on Transfer Pricing Documentation

For the attention of the members of the Global Tax Platform,

USCIB[1] appreciates the opportunity to comment on the draft toolkit (hereinafter "toolkit" or "discussion draft"). In our view, an open comment process is an important part of developing helpful guidance that will meet the needs of both tax administrators and taxpayers.

General Comments

USCIB believes the toolkit provides a useful framework for developing countries to develop appropriate transfer pricing documentation rules. The structure of the draft recognizes that one size does not fit all and that different countries, at different stages of development, may appropriately choose different approaches. For more advanced economies, the current stage of development of the arm's length pricing rules represents a decades long journey and countries at an earlier stage of development may need a different approach. However, we see this as an opportunity to standardize transfer pricing documentation/information provided across geographies. A lack of standardization adds costs to the system without any perceived benefit.

We note that more guidance in making these decisions might be appropriate. The toolkit contains a great deal of information and many options. We believe it would be useful to offer recommendations, along with explanations of why a particular approach would be recommended. For example, there are open options with no guidance in the section on local language versus foreign language. The toolkit states that "generally, countries require transfer pricing documentation in local languages" and then gives options for foreign language. It would be beneficial to state more directly what is the best practice. Another example is the discussion on materiality. The toolkit does not provide specific recommendations. It also might be useful to recommend that developing countries consult with the Platform partners in deciding how to implement transfer pricing documentation in particular circumstances.

[1] USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide and works to facilitate international trade and investment.

In this context, we also suggest that the toolkit should note the importance of pairing the creation of the appropriate structure for transfer pricing documentation with an emphasize on capacity building. Proper enforcement of transfer pricing rules requires both access to necessary information and a tax administration that is properly trained and has the necessary internal resources to handle the information that has been provided. In addition to the toolkit on documentation, the Platform partners should focus on the training necessary to permit tax administrations to make appropriate use of the information that has been provided. For example, in Section 3.3.1: Functions of transfer pricing studies, there is not enough emphasis on understanding contributions to value. The ability of tax authorities to have a thorough understanding of assets and functions contributing to value is crucial to the identification and selection of reliable comparables.

Timing

The OECD Secretariat has issued a proposal that, if adopted, would have a profound impact on transfer pricing. New substantive rules might result in changes to what is considered appropriate transfer pricing documentation. Therefore, countries considering adopting or substantially revising their transfer pricing documentation requirements might consider waiting until any new substantive rules are finalized.

Primary Law vs. Secondary Law

USCIB believes that the more appropriate approach to deciding whether guidance should be provided in primary law or secondary law is to provide broad outlines in the primary law and leave the details to secondary law. Secondary law is usually easier to amend, so necessary adjustments would be easier to make if the detailed provisions are part of secondary law.

Burden of Proof

USCIB found the discussion on burden of proof confusing. This is an area where clear recommendations might be appropriate. USCIB has assumed that this discussion is taking place in the context of a country that has decided to adopt transfer pricing documentation rules.[2] USCIB believes that the following principles should be adhered to in determining the burden of proof:

- Taxpayer's should prepare, maintain and submit the transfer pricing documentation required to support their transfer prices. If they do, they should be considered to meet their burden of proof with respect to the prices for those transactions.

[2] Burden of proof might be different if there are no transfer pricing documentation rules in place.

- If the tax administration seeks to make any adjustment under such circumstances, the tax administration would have the burden of proving that its adjustment is correct.[3]

The Platform acknowledges that good transfer pricing documentation requires taxpayers to think carefully about their transactions and improves compliance. When taxpayers have performed this careful analysis, this ought to be acknowledged by a shift in the burden of proof to the tax administrations. It also makes sense for a party asserting an outcome to have the burden of proof on that issue. In addition, if it is not linked to mandatory binding arbitration it would be impractical. Many times, in developing countries there is no clear regulations to apply Mutual Agreement Procedures (MAP), and the process in local courts will support the local tax administration, leaving taxpayers with no options for relieving double taxation. Finally, disproving something is always difficult, taxpayers should not be obligated to disprove the tax administration's position if contrary to the proper transfer pricing documentation prepared by the taxpayer.

TPIR and Customs

The toolkit is silent on linking TPIRs with customs databases, a practice in some developing countries (China, India, Indonesia, Argentina). This should be discouraged as it many times drives confusion during audit.

Country-by-Country Reporting

USCIB is concerned that the discussion of country-by-country reporting may be misleading. The toolkit describes the country-by-country report as part of the group level transfer pricing documentation.[4] The lengthy discussion of country-by-country reporting describes the appropriate use standard, but the initial discussion describing the country-by-country report as transfer pricing documentation may encourage tax administrations to believe the report could be used to justify an adjustment, which of course is not permitted. This point should be clarified in the scope paragraph. Also, the Conclusions section mentions that country-by-country reporting will provide valuable information, but it is still not clear how this is being used in practice.

Transfer Pricing Questionnaires

The UN Manual recommends that tax payers fill out questionnaires in addition to Action Plan 13 and the TPIR. It would be good to have a clear explanation on why the UN recommended the questionnaire in addition to Action Plan 13. For example, what types of beneficial information are included in questionnaires and why is this information not included in local files. This could be mentioned at the beginning of the document and in section 3.5.1

[3] Burden of proof may be determined under generally applicable legal principles. If that is the case, then it should be clear that special burden of proof rules provided for under the tax legislation take precedence over contrary generally applicable rules.
[4] Toolkit, para. 1.3, page 10.

Privacy of Tax Return Information

The toolkit does address privacy of tax return information. USCIB believes, however, that this should be further emphasized. Transfer pricing studies may provide detailed information on some of the most valuable corporate assets. Publicizing this information may cause substantial financial harm. It should be emphasized, that confidentiality rules restrict all government access to confidential information. That is, this information cannot be made public, but also within government access is restricted in order to prevent the substantial harm that might result from inappropriate disclosure.

Simplified Methods and Materiality

The toolkit recommends simplified methods, which USCIB supports, but seems to limit the application of simplified methods to SMEs. USCIB believes that simplified methods should also be available to MNEs at least in some cases. MNEs may have many transactions with related parties and full-blown transfer pricing analysis will not be appropriate in every case. Both taxpayers and tax administrations benefit from the availability of simplified methods, especially if combined with materiality thresholds. This is an area that might be affected by the work that the OECD is currently doing on its Unified Approach.

Industry Specific Guidance

The Platform should consider industry specific guidance of documentation. The Platform has provided guidance on comparability and in particular on mineral pricing. It might be helpful to coordinate the substantive guidance with the guidance on documentation.

Penalties

Annex 6 contains sample primary legislation for transfer pricing documentation. A significant part of this sample legislation is devoted to penalties. The penalties are too onerous and penalize behavior that ought not to be penalized. Generally, penalties should be a reasonable fixed amount or a percentage of any sustained adjustment. There should generally be a reasonable cause exception. If taxpayers are engaging in fraud or willful disregard of rules, then penalties may be more onerous, however, even in those cases, there should be some limits that relate to the behavior. Penalties should never relate to the gross value of the transactions. Using gross value could result in multi-billion dollar fines that bear no relationship to the tax, if any, that might be due. USCIB believes these penalties are, in some cases so onerous, the risk they would create is so extreme, that they would negatively impact foreign direct investment.

These penalties should be substantially modified:

- Paragraph 5(1) provides for a penalty for failing to maintain documentation equal to 2% of the gross value of controlled transactions. This penalty should be a rational fixed

amount or a percentage of any sustained adjustment – with a reasonable cause exception.

- Paragraph 6(1) provides a penalty for failure to submit documentation or a CbyC report. These penalties are fixed dollar amounts (although there are no recommended dollar amounts). A reasonable cause exception should be included here. Paragraph 7(a)(1) penalizes "inappropriate" statements to tax officers. It is not clear what an inappropriate statement is and how it differs from an "incorrect" statement. Inappropriate statements should not be subject to tax penalties.[5]

An incorrect or inappropriate statement may be an oral statement.[6] USCIB believes that penalties should only be imposed when the factual predicate is clear. Relying on oral statements may devolve into "he said/she said" disputes, which should be avoided. If the tax authorities believe an oral statement is incorrect, then they should follow-up and ask for confirmation in writing. This would give the taxpayer the opportunity to correct any misstatement or clarify any misunderstanding. If the writing confirms the oral statement and establishes grounds for a penalty, then the factual predicate for any penalty would be clear.

Paragraphs 7(a)(2) and (3) provide methods for determining the amount of the penalties. Depending on the circumstances, penalties may be equal to 4% and 3% of the total value of controlled transactions. These are extremely high; these already highly extreme penalties would be doubled in the case of an MNE group. Penalties such as these may in many cases exceed expected return on investment and create real reluctance to invest in jurisdictions.

Paragraph 7(5) provides an exemption from the penalty imposed under subsection (2) if the taxpayer has a "reasonably arguable position" for its determination of the transfer price. First, it should be made clear that this exemption applies for both penalties under subsection (2) and (3). As drafted, this could be read to apply only to subsection (2), although the better reading should be if there would be no penalty under subsection (2), there is nothing to be doubled under subsection (3).

The definition of reasonably arguable position should be clearer; it should also take into the materiality of the transaction. Not every transaction should require the same level of due diligence. If the taxpayer has taken appropriate steps to determine the transfer price and provided the required documentation supporting the transfer price, then the burden should be on the tax administration to demonstrate that the taxpayer's position is not reasonably arguable.

[5] USCIB thinks this may be intended to reach bribes offered by the taxpayer to the tax authority. We understand that bribery is a highly sensitive subject. Nevertheless, if this is intended to reach bribery, we think that should be clearly stated and penalties that the generally applicable penalties applicable to bribery should apply in these cases. If there are specific tax bribery offenses, they should be clearly set forth in a separate section, such that ordinary disputes about the adequacy of information are not conflated with bribery.

[6] Again, looking at oral statements may be a way of getting at bribery; bribes are very unlikely to be in writing. As stated above, any rules relating to bribery should be either be the generally applicable rules or broken out and treated separately. The concerns with bribery are very different than with ordinary disputes concerning documenting transfer prices.

The entire incorrect disclosure penalty paragraph 8 should be deleted. This penalty only applies if there is no tax liability or loss adjustment in respect of the statement or omission. It is debatable whether any penalty at all should apply in these circumstances let alone one as onerous as this. The draft language also fails to acknowledge that the CbyC report is supposed to be filed by the parent of the MNE Group and exchanged pursuant to treaty exchange of information provisions. Presumably if the MNE files with its home country, then the MNE will rely on that home country to exchange the CbyC report and should not be subject to this penalty. If a country is asking for local filing of the CbyC report is not entitled to it under the relevant treaty because of failure to comply with confidentiality or appropriate use standards, would they be able to ask for independently and impose substantial penalties if the taxpayer fails to file it locally because of concerns about appropriate use or lack of confidentiality?

The amount of penalty is incredibly high. If the taxpayer knowingly or recklessly fails to file a CbyC report, then the penalty could be 1% of the consolidated revenue of the MNE Group in the preceding year (or 10 million dollars for every billion in MNE Group revenue). If the local jurisdiction is not entitled to the report under the treaty exchange provisions, they should not be entitled to circumvent those provisions and use onerous penalties to force compliance.

Conclusions

The conclusions could emphasize how each element of the transfer pricing documentation meets the objectives: risk assessment, audit, encourage voluntary compliance. The conclusions could also emphasize how tax authorities can track the effectiveness of transfer pricing documentation to achieve the three objectives.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)