



TRADE UNION ADVISORY COMMITTEE
TO THE ORGANISATION FOR ECONOMIC
COOPERATION AND DEVELOPMENT
COMMISSION SYNDICALE CONSULTATIVE
AUPRÈS DE L'ORGANISATION DE COOPÉRATION
ET DE DÉVELOPPEMENT ÉCONOMIQUES

OECD Public Consultation on
Draft Revised Guidance on Transfer Pricing Documentation
and Country-by-Country Reporting
Comments by the TUAC
Paris, 21 February 2014

1. The TUAC welcomes the opportunity to provide comments on the proposal of revision of Chapter V of the Transfer Pricing Guidelines, including a template for country-by-country reporting to tax administrations for consideration by the OECD Committee on Fiscal Affairs and its Working Party n°6. Country-by-country reporting by multinational enterprises (MNEs) is much needed to hold global business to account for their contribution to development and shared wealth creation in the countries, where they have operations. There is increasing support for MNE country-by-country reporting on (i) profits on income, (ii) taxes paid and other payments to government and (iii) number of employees as shown in recent international and national initiatives:

- The G8 commitment at the Gleneagles Summit in 2013;
- The Dodd-Frank Act (section 1504) in the US covering SEC-listed companies in the extractive industry;
- In the EU, the revised Accounting and Transparency Directives (June 2013) and the Capital Requirement Directive (CRD IV, article 89) applying to extractive industries and banks respectively;
- Legislative measures in the Nordic countries and in Australia.

2. The OECD draft template for consultation is concerned with country-by-country reporting for transfer pricing purpose, including implementation of Action n°13 to “Re-examine transfer pricing documentation” of the G20 endorsed, OECD Action Plan on Base Erosion and Profit Shifting (BEPS). It is however noted in the consultation document that further work needs to be delivered by the OECD to improve the template on other tax aspects than transfer pricing *per se*. Country-by-country reporting should indeed not be restricted to transfer pricing purposes and, for that matter, to the review of the chapter of the OECD Guidelines. This is work in progress and should thus be seen as a first step towards a comprehensive corporate reporting framework.

3. The OECD proposal of revision of chapter V and the template for country-by-country reporting provides for a basis, upon which enhanced reporting on other tax aspects could be built. Based on trade union experience with engaging with MNE management, we submit the following comments with the objective to improve the proposed text. We also note and support the separate contribution by the civil society led BEPS Monitoring Group (BMG) to this current consultation process and call upon other labour and civil society groups to actively participate in future BEPS-related rounds of consultations.

Measuring tax & income

4. Comments are based on the method chosen for measuring country-by-country corporate income: a “bottom-up” approach based on statutory accounts as favoured in the current OECD proposal, or a “top-down” allocation based on the MNE consolidated income statement. The former has the merit of simplicity and reliability – information on statutory accounts can be cross-checked and is objectively verifiable by a third party. However, it would not necessarily help to measure total taxable income on a country basis since statutory accounts do not distinguish between incomes generated domestically and incomes generated abroad. In other words, it is likely to be ineffective in detecting transfer pricing manipulation since these and other forms of aggressive tax planning schemes are *already* factored in the statutory accounts. Top-down allocation is therefore a more superior method to report adequately on the geographical distribution of incomes provided that there are sufficient safeguards for tax authorities and other government administrations to cross-check and verify the reliability of the reporting process.

5. The OECD should favour a top-down allocation approach and provide guidance on how to ensure the highest level of confidence in regard to the reliability of the reporting system by an MNE. We are not concerned, as we argue below, by the supposed additional reporting burden that such method would generate in terms of data collection and accounting retrieval by the MNE management.

Reporting other corporate information

6. Irrespective of the method used for measuring income and tax, the framework should require additional reporting on other corporate items related to location of employment, tangible assets and key decision centres. This is needed for the purpose of transfer pricing of the tax risk assessment and for verifying that the geographic distribution of corporate incomes and their underlying contractual arrangements reflect the economic substance of the MNEs activities. As noted in a previous OECD consultation document “a company based in a high tax country that reports 85 percent of its income in low-tax jurisdictions while maintaining 80 percent of its employees and assets in high tax jurisdictions may warrant more tax administration attention to transfer pricing than one where shares of assets, employment and income are more consistent across countries”.

7. We welcome the requirement in the proposed Master file for a “general written description” of the MNE’s business, including the “important drivers of business profit”, supply chain analysis, and functional analysis describing the principal contributions to “value creation” and the distribution of risks within the MNE structure. Nevertheless, more specific guidance might be warranted on each reporting items:

- Employment: reporting should be broken down geographically (i) by employment type and contractual relationship and (ii) by function (sales and marketing, back office, research, financing, production, etc.). Distinction by employment type would be needed in order to cover both, employees directly employed by the MNE and workers who formally are employed by another party but in practice are acting under the supervision and management of the MNE, such as subcontractors including commissionaires, consultants and private employment agencies. Reporting on employment should also be expressed as full time equivalent. The distinction by economic function would help identifying the geographical distribution of income generation (location of marketing and sales staff) and that of ‘value creation’ (production & back office).
- Business restructuring: there should be more precise guidance on reporting on restructuring, which is considered by the OECD as a key information to help detect

transfer pricing manipulation¹ including any change in the legal and contractual status of entities and the re-organisation, or splitting of a single entity into multiple ones. Trade union experience points to increased opacity of corporate structures – including reduced worker access to information on the company’s business planning².

- Location of key senior management decision centres: the proposition to require reporting on “the geographic location of the 25 or 50 most highly compensated employees of the MNE group” might need to be fine-tuned. Considering the case of a global MNE employing +200.000 employees, it is likely that the top 50-100 compensated employees would be located in one or two jurisdictions and hence not inform on key decision centres. Rather than requiring a nominal figure, the Master file should set a percentage beyond a size threshold, e.g. location of the top 5% or 10% of the highest compensated employees for companies employing above 10.000 workers.

Shifting to a three-tier framework

8. In regard to comments on the reporting mechanism, two options are suggested: (i) the direct local filing in each jurisdiction or (ii) the filing in the MNE headquarters’ jurisdiction and its subsequent sharing subject to treaty information exchange provisions, or (iii) some combination of the two.

9. We would favour the direct reporting of the Master file and template to every single jurisdiction in which the MNE operates – whether directly or through agents or commissionaires – so as to ensure a level playing field between all tax administrations. This would surely help tax administrations in developing countries, who do not necessarily enjoy the same level of access to bilateral tax information treaties as OECD-based administrations do.

10. In the absence of direct local filing, serious consideration should be given to requiring public disclosure of the Master file or of parts of its content, which in turn would shift the framework from a two-tier system (Master file, local file) to a three-tier one (public filing, master file, local file). Public disclosure would resolve a number of outstanding issues, including the above mentioned problem of access to information for developing countries. It would also help inform other stakeholders, who are affected by the activities and operations of MNEs, including workers, local communities, civil society groups and of course citizens at large. The content of the public filing could cover a selected number of reporting items which in our view would not threaten or violate business confidentiality rights. Items could include: (i) organisational structure, (ii) important drivers of business profit, (iii) supply chain for material products and services, (iv) service arrangements between members of the MNE group, (v) business restructuring transactions during the fiscal year, (vi) geographic distribution of the top 5/10% highest compensated employees, (vii) geographic distribution of employees and other supervised workers expressed in number of full-time employments, and (viii) MNE’s important financing arrangements with unrelated lenders.

11. Regarding reporting on tax and incomes, reporting should include (i) consolidated group accounts and (ii) tax due and tax paid in each country. The public filing should at least include reporting on a single ratio between tax charge and declared profits to give some indication on the potential presence of risk for transfer pricing manipulation and other aggressive tax planning schemes.

¹ OECD report on “Dealing Effectively with the Challenges of Transfer Pricing”, 2012.

² TUAC Report on a global unions meeting on corporate tax planning, 20/12/2013, http://www.tuac.org/en/public/e-docs/00/00/0D/FE/document_doc.phtml

Business confidentiality and compliance burdens

12. The main arguments by opponents of country by country reporting and its public disclosure relate to the protection of business confidentiality and to maintaining reasonable levels of compliance burden. The present version of chapter V of the TP Guidelines dwells at length on both concerns. In the current proposal of revision, the concerns are comparatively toned down but are still recognised as important challenges:

- Tax administrations are called upon to “ensure that there is no public disclosure of trade secrets, scientific secrets, or other confidential information” while information sharing between administrations “should be structured in a way that *excludes* delivery of information to countries where adequate provisions do not exist to protect” business confidentiality.
- On the subject of the compliance burden, the OECD text would require balancing “the usefulness of the data to tax administrations for risk assessment” with “any increased compliance burdens” on MNEs (#4), “particular information to be kept for transfer pricing audit purposes” with the “compliance burdens on taxpayers” (#14). MNEs, we are told, “should not be expected to incur disproportionately high costs and burdens in producing documentation” (#26). Materiality thresholds should apply to ensure “MNEs are not so overwhelmed with compliance demands” (#29), etc.

13. In our view these concerns are largely over-estimated. There is little or nothing in the current proposal for a template and tax filing that would suggest that trade secrets and other aspects of business confidentiality could be at threat. Reporting what one owes to the state does not amount to a trade secret. In a similar vein, the claims by business groups and MNEs that country-by-country reporting would create excessive additional burdens should not be taken at face value. To the contrary, trade union experience in engaging with MNEs points to the existence of powerful internal reporting systems and high levels of flexibility in the capacity of the MNEs to engage data retreatment at group-level. In any event, an evidence-based approach should prevail on this issue.

14. Moreover, any potential increase in compliance burdens for business should be balanced against the burden for tax administrations and set into the context of the broader benefits for society of enhanced transfer pricing reporting.