



TAXREP 15/14
(ICAEW REP 35/14)

ICAEW TAX REPRESENTATION

TRANSFER PRICING DOCUMENTATION AND CbC REPORTING

Comments submitted on 23 February 2014 by ICAEW Tax Faculty in response to OECD discussion draft *OECD Transfer Pricing Documentation and CbC Reporting* published on 30 January 2014

Contents

	Paragraph
Introduction	1-3
Who we are	4-6
Major points	7-15
Responses to consultation questions	16-37
Ten Tenets for a Better Tax System	Appendix 1

INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the discussion draft *Transfer pricing documentation and CbC Reporting* <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf> , the discussion draft, published by OECD on 30 January 2014.
2. We should be happy to discuss any aspect of our comments and we would welcome the opportunity to take part in the public consultation which is to take place on 19 May 2014.
3. Information about the Tax Faculty and ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's Ten Tenets for a Better Tax System by which we benchmark proposals to change the tax system.

WHO WE ARE

4. ICAEW is a world leading professional membership organisation that promotes, develops and supports over 142,000 chartered accountants worldwide. We provide qualifications and professional development, share our knowledge, insight and technical expertise, and protect the quality and integrity of the accountancy and finance profession.
5. As leaders in accountancy, finance and business our members have the knowledge, skills and commitment to maintain the highest professional standards and integrity. Together we contribute to the success of individuals, organisations, communities and economies around the world.
6. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

MAJOR POINTS

7. The two main objectives of Action 13 are clearly set out in the discussion draft as follows: one is to provide more relevant information to tax administrations so that they can carry out better informed transfer pricing risk assessments and the second is to keep any increased compliance costs for business to an absolute minimum
8. The three objectives for transfer pricing documentation are set out in paragraph 5 of the discussion draft:
 - to provide sufficient information for tax administrations to conduct an informed transfer pricing risk assessment;
 - to ensure taxpayers properly consider transfer pricing when setting prices and other arrangements between associated companies and when completing tax returns; and
 - to provide tax administrations with sufficient information to conduct an appropriately thorough audit of transfer pricing practices of entities which are subject to tax in their jurisdiction.
9. In the light of these objectives we are concerned that the model template of country by country (CbC) reporting is, at the moment, too detailed and, as set out in the next section, it could potentially be used for other purposes which is not as set out in the published version of Action 13 which has been agreed by all the participating countries in this G20/OECD initiative.

10. In terms of the amount of information required, and the number of columns currently in the model template, we believe that a number of them could be dispensed with without detracting from the value of the package of information provided.

Model template of CbC reporting – and its potential uses

11. We are concerned that the amount of information that is likely to be required, if the Model Template of CbC reporting is adopted as currently set out in the discussion draft, will pose burdens on business which are not commensurate with the overall objective of this Action which is

“to enable tax authorities to more effectively assess transfer pricing risk” and

“to make transfer pricing compliance simpler and more streamlined”

for business as was set out in the *White Paper on Transfer Pricing Documentation*¹ published on 30 July 2013.

12. This statement captured the essence of Action 13, published earlier in July 2013, which is to

“Develop rules regarding transfer pricing documentation to enhance transparency for tax administration taking into consideration the compliance costs for business.”

13. But in the third paragraph in the opening statement of the discussion draft there is an indication that CbC data is to have a wider purpose than merely to act as an aid to risk assessment:

“As the call to develop a common template for country-by-country reporting to tax authorities did not specifically limit the application of country-by-country reporting to transfer pricing administration, the OECD will be giving further consideration to whether information relevant to other aspects of tax administration and the BEPS Action Plan should also be included in the common template.”

14. We would ask OECD to provide us with a clear indication as to where and when the G20 and OECD have agreed that CbC Reporting is going to be used for more than just transfer pricing risk assessment.

15. It is not stated in the Action Plan itself and recent comments by the UK delegate to Working Party 6 indicate that in his view the Discussion Draft goes beyond what governments need for transfer pricing risk assessment.

16. We are extremely concerned that this amounts to “mission creep” and would put an administrative burden on business that is not in keeping with what was the objective of Action 13 when it was agreed in July 2013.

RESPONSES TO CONSULTATION QUESTIONS

Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

17. We have dealt above with our concern that the CbC model template could be used for other purposes other than the transfer pricing risk assessment. We don't think it should be.

¹ See <http://www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf>

18. This question asks whether there should be other standard forms and questionnaires beyond the CbC reporting template and we do not believe that there should be.
19. It does seem entirely appropriate for the tax authority to share its risk assessment with the taxpayer which is being risk assessed. This is very much in line with the OECD collaborative cooperation model and we believe will lead to more constructive working practices between tax administrations and taxpayers and their advisers.

Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

20. As there are an increasing number of signatories, currently 64, to the Convention on Mutual Administrative Assistance in Tax Matters there is widespread concern about the confidentiality of information that is provided to tax authorities. We believe there may be reluctance to provide some of the information required under the CbC model template unless business is required to do so as a result of specific domestic legal requirements to make the production of such information mandatory. If providing information were to become mandatory then, as an absolute quid pro quo, this needs to be combined with stricter safeguards to guarantee that the information provided will remain confidential.

Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

21. We believe OECD should take advantage of existing best practice such as the EU's (optional) Joint Transfer Pricing Forum (JTPF) Master file approach (Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union) in setting out the standards on what should be included in the master file.
22. We do not believe the master file should be undertaken on a line of business basis as that will almost certainly require a disaggregation of entity level data.
23. We are aware that some multinational businesses have very large purely domestic businesses in some single jurisdiction markets, such as the United States, and the data requirements should be such that that local US business does not have to submit lots of information which is not relevant for transfer pricing risk assessment. Data requests for such businesses should be restricted to high level overviews of the global business.

A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

- **Should the country-by-country report be part of the master file or should it be a completely separate document?**
- **Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?**
- **Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations**

reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterization of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

- Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?
- Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?
- Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

24. We think there needs to be a specific CbC template for high-level risk assessment.
25. We think there are arguments for and against the CbC report being part of the master file. If it is part of the master file then the risk is reduced of the report being “hijacked” for other purposes beyond transfer pricing risk assessment. But there are also timing considerations because the CbC report is going to be produced sometime after the accounting year end whereas the transfer pricing master file should be current or prospective. We have not reached a firm conclusion as to which of these contrary arguments should prevail.
26. We believe that business should be given the option as to whether the CbC report is prepared on a top down or bottom up basis as it is clear from our, ICAEW, discussions with business and tax advisers that no single method is going to be equally feasible, or appropriate, for all businesses.
27. If the method chosen is bottom up then there should not be a supplementary requirement for there to be extensive reconciliation to the published group account numbers.
28. In relation to corporate income tax figures we have some sympathy for reporting the amount as shown in the accounts. For the sake of clarity the relevant column should be headed up “corporate income tax” and not “income tax” as in the current version of the discussion draft as the latter would be potentially misleading in countries such as the UK.

Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

29. The concept of materiality needs to be carefully defined and provide clear rules as to how it is to be determined in particular circumstances. Materiality needs to take into account the global size of the operations. We do, however, appreciate that there may have to be some leeway for developing countries where too high a materiality level would prevent meaningful reporting of

data relevant to that particular country if a group materiality is used without some flexibility built in to it.

Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

30. The proposals seem sensible.

Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

31. We think it is right that the master file should be in English and we presume that will cover the CbC template as well.

Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

32. We are concerned that confidentiality, which is an enormously important issue for business, is not given sufficient weight in the current version of the discussion draft and is, at the moment, covered in a single, short, paragraph, numbered 41.

33. The OECD Forum on Transparency and Exchange of Information for Tax Purposes published in 2012 a guide on the protection of confidentiality of information *Keeping it Safe*² which contains a number of recommendations in Part III. The report and recommendations need to be reviewed and updated as necessary to reflect the fact that the current era is now one of automatic exchange of information.

34. The importance of confidentiality was also reflected in the OECD report *A Step Change in Tax Transparency*³ presented to the G8 meeting in June 2013. That report noted at paragraph 12:

“Before entering into an agreement to exchange information automatically with another country, it is essential that the receiving country has the legal framework and administrative capacity and processes in place to ensure the confidentiality of the information received and that such information is only used for the purposes specified in the instrument.”

35. We recommend that the discussion draft should be amended to refer to the report *Keeping it Safe*.

36. We also recommend that the Global Forum should be instructed, as a matter of urgency, to review the existing report and update it to reflect the significant changes in the world of information exchange that have taken place despite the relative short period since it was published.

Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations.

Possibilities include:

- The direct local filing of the information by MNE group members subject to tax in the jurisdiction;
- Filing of information in the parent company’s jurisdiction and sharing it under treaty information exchange provisions;
- Some combination of the above.

² Joint OECD/Global Forum Guide on the protection of confidentiality of information exchanged for tax purposes (available for download at

<http://www.oecd.org/tax/transparency/final%20Keeping%20it%20Safe%20with%20cover.pdf>)

³ http://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf

37. We favour the filing of CbC template information solely with the tax authority in the parent company's jurisdiction and that tax authority should share the information, as necessary, under the relevant and applicable treaty and EU exchange of information provisions.

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APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. **Constant:** Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see [icaew.com/en/technical/tax/tax-faculty/~media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx](https://www.icaew.com/en/technical/tax/tax-faculty/~media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx))