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By e-mail: TransferPricing@oecd.org

Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Dear Mr. Saint-Amans:

EY appreciates the opportunity to submit these comments to the OECD on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting ("the Discussion Draft") dated 30 January 2014.

Our view is that the purpose of the OECD Transfer Pricing Guidelines should be to assist taxpayers and tax administrations in determining transfer prices within the framework set by the arm's length principle and to help prevent and resolve instances of double taxation. In reviewing the Discussion Draft, we have focused on the potential business and commercial implications of the proposals with respect to documentation and reporting.

We appreciate that the OECD is seeking to develop rules "to enhance transparency for tax administrations, taking into account the compliance costs for business." We are concerned that the proposals in the Discussion Draft would lead to a considerable increase in the administrative burden for business. In particular, we believe that the proposed template for country-by-country reporting is significantly over broad and that such over-breadth not only would mean major new burdens on companies but also would detract from the usefulness of the template to tax authorities in providing the intended global view of a MNC group. In our view, substantial changes in the Discussion Draft are needed in order to achieve an appropriate balance between the burdens on taxpayers and the benefits to tax administrations.

In our submission of 1 October 2013, we provided detailed comments on key aspects of the OECD's White Paper on Transfer Pricing Documentation ("the White Paper") dated 30 July 2013. We are pleased that some of those points have been reflected in the Discussion Draft. However, several of our earlier comments have not been addressed in the Discussion Draft. We believe they remain valid points and have incorporated them in this submission.

This submission begins with an executive summary of our comments and recommendations. The detailed discussion is divided into two sections, with the first section focused on the proposed country-by-country reporting template and the second section focused on the other aspects of the transfer pricing documentation proposals.

If you have any questions or would like further elaboration of any of these comments, please contact any of the following:

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Yours sincerely
On behalf of EY

Alex Postma

Comments and Recommendations with respect to the OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Executive Summary

Our key comments and recommendations with respect to the Discussion Draft, as further elaborated on in the Detailed Discussion sections below, are summarized as follows:

1. The Discussion Draft in its current form does not reflect an appropriate balance between the provision of relevant information to tax authorities and the burdens for businesses.

2. The country-by-country reporting template should be used for high-level transfer pricing risk assessment purposes and should not be considered to be a substitute for detailed transfer pricing analysis.

3. The country-by-country reporting template should be a separate document and should not be included in the transfer pricing documentation master file. This would be consistent with the template's use as a high-level risk assessment tool only.

4. The country-by-country reporting template should provide flexibility as to the data sources to be used to populate it so that MNC groups can use the data that is most readily available under their own systems.

5. The country-by-country reporting template should not require that information be reported on an entity-by-entity basis as such granular reporting would not serve the high-level risk assessment purpose of the template.

6. The scope of the country-by-country reporting template should be narrowed and modified to focus on its intended objective of transfer pricing risk assessment. The template should not be used as information-gathering instrument for other BEPS action points.

7. The country-by-country reporting template should be required to be delivered only to the parent company's home country and should be shared with other countries under tax information exchange relationships.

8. The master file should only contain information that is relevant for all entities. Information that is only relevant for a single entity or a group of entities can either be included in the local (country) file, or can be shared through the treaty mechanism. This applies for example to information on APAs and MAP matters.

9. We believe that clarity and transparency regarding the risk assessment policies applied by tax authorities could assist taxpayers in the preparation of relevant documentation and would help reduce administrative burdens for both taxpayers and tax authorities. In this regard, tax administrations should share at least their general risk assessment policies with taxpayers.

10. We support the further development of the concepts of “materiality” and “important transactions” to achieve the goal of relevant documentation and relief or reduction of the administrative burden for taxpayers. We recommend that the OECD further consider the use of safe harbors.

11. The guidance on transfer pricing documentation should allow the taxpayer flexibility to adapt to specific facts and circumstances, with the taxpayer providing an explanation regarding the particular adaptation.

12. Given the significant effort that companies would have to expend to prepare the documentation in the format and detail proposed by the OECD, clear rules with regard to the timing of implementation should be established. Companies should be provided sufficient lead time in order to be able to develop the new systems and processes needed in order to comply with the new rules.

13. Finally, we urge the OECD to encourage all countries to actively participate in the global conversation on how transfer pricing documentation rules can be improved, standardized, and simplified.

Detailed Discussion – Country-by Country Template

Our detailed comments are focused on several key areas with respect to the design and implementation of the proposed template for country-by-country reporting, including the areas on which comments were specifically requested in the Discussion Draft.

As an overall theme, we believe the scope and delivery of this new template should be consistent with the intended purpose of the template as an initial-step high-level risk assessment tool for tax authorities. Therefore, we believe the template should be kept as simple as possible and should be structured to leverage information that businesses produce for other purposes to the greatest extent possible. The template also should not be overly prescriptive and should accommodate the differences in data sources and other relevant factors that exist across industries and from company to company. Moreover, the template should not include information that is better provided in more detailed form through a different mechanism. In addition, the manner in which the template is to be provided to tax authorities should be structured so as not to exacerbate the burdens on business.

In addition, we would note that many stakeholders are concerned that the country-by-country reporting template in the form proposed could be a first step toward formulary apportionment. It could be useful for the OECD to clarify that this should not be the outcome and reiterate the long-standing commitment to the arm’s length principle

Template should be separate from master file

We believe that the country-by-country reporting template should not be made part of the transfer pricing master file. Contrary to the approach reflected in the Discussion Draft, the template should be a standalone document.

The country-by-country template is to be used by tax authorities for purposes of a first-step high-level risk assessment aimed at determining whether and where to devote resources to conduct a detailed examination. The form and content of the template is similarly high-level. The template should be used only for this risk

assessment purpose and tax authorities should have no further need for the template after they have completed the risk assessment. Once the tax authorities have made a determination to focus attention in a particular area, they should conduct their examination using the more detailed information contained in the taxpayer's transfer pricing documentation together with any additional information provided by the taxpayer in response to their requests.

Therefore, we recommend that the Discussion Draft be revised to separate the country-by-country reporting template from the master file. This could be viewed effectively as a three-tier documentation approach: (1) the country-by-country reporting template used for initial risk assessment purposes only, (2) the transfer pricing documentation master file containing detailed global information, and (3) the transfer pricing local files containing detailed information relevant to the particular country.

Template should provide for flexibility in data sources

We believe that it is essential that flexibility is provided regarding the data sources to be used to compile the information requested in the template. The information the OECD is seeking with this template generally is not information that is collected by MNC groups in such form for any other purpose. There is no single optimal data source that could be required to be used to populate the template. There are differences in relevant regulatory regimes and financial reporting systems from industry to industry and from company to company that mean that the data source that would require the least adjustment for template purposes and that would result in the most meaningful information in the template will differ. Accordingly, the instructions should not be overly prescriptive as to precisely how companies are to source the information that is to be used to satisfy the template parameters.

Together with this needed flexibility, the template could require that MNC groups identify the particular data source that they are using. The template further could require that MNC groups use such data source consistently across the group and from year to year. In this regard, it should be noted that the potential for different MNC groups to use different data sources would not have any adverse implications for tax authorities as their risk assessments are focused on getting sight of a MNC group's profile across countries and not on any comparison from one group to another.

With respect to financial information such as revenue and net income, the template should allow use of data sourced from consolidated financial statement reporting and also should allow data sourced from statutory accounts as is reflected in the Discussion Draft. The template should provide MNC groups with flexibility to use the data source that is most reliable and readily available under their own circumstances, with the MNC group identifying the source and using it consistently.

The label "top down" which has been attached to the approach of sourcing data from consolidated financial statement reporting is an inaccurate description of this approach. MNC groups using this approach typically would start not from the final consolidated numbers but rather from the separate reporting unit packages that are the building blocks to such consolidated numbers. A reporting unit may be an entity, a business segment, or a local group of entities. During the process of developing the consolidated financial statements, various adjustments are made at the group level and are "pushed down" to the reporting unit level to the extent they relate to a particular unit. For purposes of the template, it would be appropriate to use these reporting unit numbers before the elimination of all intercompany transactions that is done in consolidation. However, intercompany dividends should be eliminated in order to avoid double counting.

It should be noted that these numbers would not sum to the consolidated financial statement numbers because of the inclusion of intercompany transactions and potential group adjustments that do not relate to any particular unit. Reconciliation to consolidated financial statement numbers would not be practical, but such reconciliation should not be needed given the intended use of the template for a high-level risk assessment.

MNC groups should be allowed alternatively to source the financial data from their statutory accounts (or where statutory accounts are not required for local regulatory purposes, from locally audited financial statements produced for other purposes or from internal management accounts) as is reflected in the draft template. Statutory accounts are produced later than the consolidated financial statements and so may reflect additional information not available earlier. Statutory accounts typically are prepared locally and there may well be little group-level involvement. As in the case of data sourced from consolidated financial statement reporting, some adjustments would need to be made in order to use this data in the template. For example, intercompany dividends would need to be eliminated in order to avoid double counting. Although statutory accounts generally are used in producing local tax returns, the country numbers may not tie to the tax returns. Similar to the consolidated financial statement reporting approach, country numbers under this approach would not sum to consolidated financial statement numbers. Here too a reconciliation would not be practical and should not be needed.

As the Discussion Draft notes, the local due dates for statutory accounts in some cases are well after the end of the year. Therefore, this would need to be factored into the determination of the due date for compilation of the country-by-country template. The Discussion Draft's recommendation of using a due date that is one year after the close of the fiscal year is a reasonable approach for addressing this timing issue.

Template should provide for country-by-country reporting

The proposed template included in the Discussion Draft would require entity-by-entity reporting rather than country-by-country reporting. However, we believe that country-by-country reporting, with entities aggregated by country, is more consistent with the high-level risk assessment purpose of the template.

Reporting that segregates entities within the same country would not provide information that is more useful to tax authorities than aggregated country information. Information provided at that level of granularity would not provide the kind of broad view of an MNC group's global profile that is the intended purpose of the template. In addition to the sheer magnitude of the information that would be involved for a group that has hundreds or thousands of entities, which is not uncommon, there are a variety of complexities and anomalies that would arise in any entity-based reporting. Groups often operate their separate entities within a country together as if they were one entity. For example, there may be a single employment entity for all the group's employees within a country. As another example, the local entities within a group often file on a combined basis for local tax purposes so that there is only one taxpaying entity in the country. Any allocation of activity or taxes across entities would be an artificial exercise that would be required only for purposes of the template if entity-based reporting were to be required.

Country-based reporting would avoid these complications and would provide tax authorities with the desired information regarding a company's global footprint across countries. Such country-based reporting should involve a simple aggregation of the entities resident in each country. The template should not require a formal consolidation of entities that report separately in the country. If a group does have a consolidation in a country for other purposes, that should be used for purposes of country-by-country reporting on the template. Where

there is no consolidation in a country or where there are entities in that country that are not included in a consolidation, little value would be gained from requiring a new accounting consolidation simply for purposes of the template. Moreover, where a group has entities within a country that are in different ownership chains within the group, a formal consolidation would be meaningless. Therefore, the aggregation for country-by-country reporting purposes should be a simple summation of the results with respect to the separate entities in the country.

For purposes of the country-by-country reporting approach, consistent with the materiality concept that is reflected in the Discussion Draft, the template should provide exceptions for entities and countries that are not material to the MNC group's total global profile. With respect to entities, the template should require reporting only with respect to entities that are included as consolidated in the MNC group's consolidated financial statements. Using a different grouping for purposes of the template would create unnecessary complexity. Moreover, the more subjective definition that the Discussion Draft would use as the basis for determining the entities included in the template reporting is not practical for this purpose. Limiting template reporting to fully consolidated entities would be consistent with a reasonable approach to materiality.

The provision of a de minimis rule in connection with the country-by-country reporting template also would be helpful in reducing the burden on companies without adversely affecting the quality of the information provided to tax authorities in the template. Where a MNC group's presence in a particular country is very limited, it should not be required to apply the full reporting requirements of the template to such country as such information with respect to the country would be of very limited value. In this regard, it should be noted that a de minimis rule could be crafted in a way that does not mean that the de minimis countries do not have access to information. For example, the template could include a listing of the de minimis countries so that those countries would have access to the template in the same manner as other countries reported on the template (i.e., from the tax authority of the headquarters country pursuant to a tax information exchange relationship, as discussed in more detail below), thus ensuring that even de minimis countries could obtain the global profile information the template is intended to provide.

The scope of template should be modified and narrowed

The seventeen columns contained in the proposed template include more information than is necessary for its intended use as a high-level risk assessment tool. The information requested seems to be aimed at satisfying information "wants" for (and perhaps even beyond) the other BEPS action points. We believe that the scope of the template should be modified and narrowed significantly, eliminating reporting of information proposed to be required that would be very difficult to produce in the form specified, information that could be highly misleading in the form specified, and information that would be duplicative of information that would be included in more useful form in the transfer pricing documentation master file.

Taxes

Consistent with the discussion above regarding the need for flexibility in how data is sourced and presented, we believe MNC groups should be allowed flexibility to report taxes either on the basis of cash payments during the year, as is reflected on the proposed template, or on the basis of the current tax provision reported for financial statement purposes. Each of these approaches has merit for different reasons, neither approach would provide tax information that would be completely aligned with the other financial information required to

be reported on the template, and the approach that would involve data that is most readily available would differ from company to company.

Use of cash taxes as the measure would provide tax authorities with information regarding the tax amounts paid in each country during the particular year and so would correspond to government receipts from the company during the year. For companies that have a cash statement that separately identifies taxes paid, using data sourced from this statement likely would be the most efficient approach to providing template information on taxes. As noted above, however, cash tax amounts would not relate precisely to the income amounts that are reported on the template and so could be misleading if this disconnect is not recognized.

Use of the current tax provision as the measure would provide tax authorities with information regarding tax liability that has greater connection to the income for the particular year. Financial statements, both consolidated financial statements and statutory accounts, include the current tax provision which reflects the current taxes that relate to the income for the year (although it may also reflect some prior year adjustments). For companies that may not have an existing statement that separately identifies taxes paid on a cash basis, using data sourced from the current tax provision on their financial statements would be the most efficient approach for providing template information on taxes.

For both data sources, and indeed for any annual reporting approach, situations involving losses that are carried over between years and other post-year adjustments would make meaningful comparisons of the income and tax numbers on the template challenging at best. Moreover, taking into account deferred tax liabilities and assets, which reflect taxes to be paid in a future period with respect to the income for the year or tax attributes such as losses for the year to be used with respect to a future period, together with the current tax provision would provide a more accurate picture over time of the total income tax liability associated with the country-based income amounts included in the template.

Stated capital and accumulated earnings

It is not clear how, if at all, information on stated capital and accumulated earnings would be used for purposes of a high-level risk assessment. We believe that this column should be eliminated from the proposed template.

Total employee expense

Employee compensation information often is not maintained by all entities in a MNC group in the same manner, valuation of non-cash compensation would be difficult, and compensation information could be quite sensitive in situations involving only a relatively small number of employees in a particular country so that the total could reveal personal information. Moreover, information regarding employee compensation is proposed to be included in the transfer pricing documentation master file which would make inclusion of this information in the template duplicative. We believe that the column for information on employee compensation expense should be eliminated from the proposed template.

Tangible assets

Inclusion of a number for tangible assets other than cash or cash equivalents, intangible assets, and financial assets would provide a highly inaccurate profile of a MNC group's assets, particularly a group that is in the financial services industry or that has an intangibles driven business. Use of a book value number would not

provide a useful view even of the group's tangible assets. Moreover, information regarding assets is proposed to be included in the transfer pricing documentation master file which would make inclusion of this information in the template duplicative. We believe the column for information on tangible assets should be eliminated from the proposed template.

Intercompany payments

For most MNC groups, these columns would require the aggregation of myriad intercompany transactions and inclusion of these columns would not provide information that would be useful for risk assessment purposes. Moreover, more detailed information regarding intercompany transactions is included in transfer pricing documentation which would make inclusion of this information in the template duplicative. We believe the six columns for information on intercompany payments and receipts of royalties, interest, and service fees should be eliminated from the proposed template.

Template should be delivered to parent jurisdiction

We believe that MNC groups should deliver the country-by-country reporting template to their headquarters country tax authority, which typically is the tax authority with which the company has the most extensive dealings. The headquarters country tax authority should have sole responsibility for considering and addressing whether or not the global company has reasonably satisfied the template reporting requirement. The template would then be shared by the headquarters country tax authority with other relevant tax authorities pursuant to an appropriate relationship with such authorities.

It would be unreasonably burdensome for MNC groups to be required to deliver a template to each country where the group has entities. Such an approach could require the taxpayer to fill out multiple different versions of the template if countries implement their own versions of the template. It also could require parallel discussions with multiple tax authorities regarding compliance with the template requirements.

Sharing of the template by the headquarters country tax authority pursuant to an information exchange relationship would provide the sensitive information on the template with confidentiality protections provided under such relationships. The sharing of the template could be done pursuant to an existing bilateral exchange of information relationship or through a new relationship established for this purpose, including pursuant to a multilateral instrument such as is contemplated under Action 15 of the BEPS Action Plan.

In this regard, the OECD could develop an approach to address the possible situation of a headquarters country that does not require reporting pursuant to the template. In such a case, a group that is headquartered in a country that does not require template reporting could be required to deliver the template directly to each country in which the group has an entity or alternatively the group could elect to treat a country in which it has an entity and which requires the reporting pursuant to the template as its headquarters country for this purpose.

Detailed Discussion – Transfer Pricing Documentation More Generally

Our detailed comments below are organized based on the structure of the Discussion Draft and the proposed replacement of the Documentation chapter of the OECD Transfer Pricing Guidelines.

Section A. Introduction

As a general remark, we are pleased with the OECD's effort to provide further guidance on transfer pricing documentation and with the progress that has been made compared to the guidance that was presented in the White Paper. In particular we welcome the fact that the guidance included in the Discussion Draft is more detailed and more specific. Nevertheless there are still certain points for which in our view even more specific and concrete guidance is needed in order to achieve the goals of simplification and streamlining of documentation requirements and to reduce the costs of compliance. Our comments in this respect are presented in the sections below.

As stated in paragraph 4 of the Discussion Draft "[a] n important overarching consideration in developing such [transfer pricing] rules is to balance the usefulness of the data to tax administrations for risk assessment and other purposes with any increased compliance burdens placed on taxpayers. In this respect it is noted that clear and widely adopted documentation rules can reduce compliance costs which could otherwise arise in a transfer pricing dispute." Based on the guidance currently presented in the Discussion Draft, we believe that the OECD has not yet achieved an appropriate balance. In this regard, as further described below, we recommend that the OECD introduce certain safeguards with respect to the relevance of information that taxpayers are required to produce.

Section B. Objectives of transfer pricing documentation requirements

The Discussion Draft identifies three reasons for requiring transfer pricing documentation. The third objective (i.e. "to provide tax administrations with the information that they require in order to conduct an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction") implies that transfer pricing documentation should contain sufficient information for a tax administration to conduct a transfer pricing audit. Requiring taxpayers to include all information in their transfer pricing documentation that would be required to conduct a transfer pricing audit would in our view impose a disproportionate administrative burden on taxpayers and is in any case clearly impractical, since taxpayers cannot know in advance what information a tax authority might wish to review in order to progress any possible transfer pricing audit. In our view stronger wording is needed that clearly indicates that there is a difference between the amount of information that is required for transfer pricing documentation purposes and the amount of information that may be needed for purposes of conducting a transfer pricing audit.

B.1. Transfer pricing risk assessment

The Discussion Draft raises the question whether work on BEPS action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. We would like to reiterate our comments made in respect of the OECD Risk Assessment Handbook and the White Paper. Currently the information that tax authorities require from taxpayers for their risk assessment purposes varies

across countries. Certain countries require very detailed tax return disclosures. Some countries have introduced very detailed transfer pricing information forms. Completion of such forms is a very time-consuming exercise which often requires extraction of significant data from the ERP systems of taxpayers, analysis of these data, and then presenting such data in the format required. For some taxpayers it is in practice often not reasonably possible to disclose the details of all intercompany transactions in certain countries. This also involves costs which for large taxpayers can be material and in some cases can even exceed the amount of potential tax at stake from transfer pricing risks. At the same time, there is no clear understanding as to whether all information required on that form would be relevant and useful for transfer pricing risk assessment purposes by the tax authorities. For example, it is questionable to what extent pricing information about each product sold in an inter-company transaction may be relevant in cases where the profit-based methods are used by taxpayers.

No additional forms should be developed and requested from taxpayers. If additional forms are to be developed and requested, we would urge the OECD to include specific guidance with a view to harmonizing the information that needs to be provided to tax authorities across countries for their risk assessment purposes or for documentation purposes. There also should be a focus on proportionality: the magnitude of information to be provided to tax authorities should be proportionate to the magnitude of the business of a taxpayer in the specific country.

As regards OECD's question on the sharing of information regarding the risk assessment, we believe that clarity and transparency regarding risk assessment policies could improve taxpayers' ability to engage constructively and cooperatively during a risk assessment or audit as they would have a better understanding of the possible concerns a tax administration may have. Furthermore, sharing such information could contribute to the efficiency of a risk assessment as it would enable taxpayers to better direct their efforts with regard to transfer pricing documentation and to present information in a manner that suits the tax administration's need. In addition, clarity regarding risk assessment policies would allow taxpayers to better plan and manage the resources required (e.g., staff and/or advisors). To a certain extent, introducing materiality thresholds and safe harbors also will contribute to an efficient allocation of resources. In practice, even with materiality standards in place, taxpayers will still have to make decisions regarding the extent and depth of the transfer pricing documentation needed. Insight into the general risk assessment would be helpful, would allow taxpayers to prepare <u>relevant</u> documentation, and would help reduce the administrative burden. We therefore believe the OECD should clearly state that tax administrations should share at least their general risk assessment policies with taxpayers. The OECD could consider also providing examples of particular circumstances in which such information should not be shared.

B.2. Taxpayer's assessment of its compliance with the arm's length principle

In general, we concur with the statement in paragraph 12 which says that "[w]hile ideally taxpayers will use transfer pricing documentation as an opportunity to articulate a well thought out basis for their transfer pricing policies, thereby meeting an important objective of such requirements, issues such as costs, time constraints, and competing demands for the attention of relevant personnel can sometimes undermine these objectives. It is therefore important for countries to keep documentation requirements reasonable and focused on material transactions in order to ensure mindful compliance on the most important matters." However, we believe this statement would be more useful for taxpayers and tax administrations if more guidance and definitions were provided for terms such as "reasonable" and "material". Furthermore, it should be clear for taxpayers what the consequence is of a certain transaction being material or not: for instance, whether safe harbor rules or

exemption from transfer pricing documentation requirements exist for non-material transactions. For more detailed comments, we refer to our section "D.3. Materiality" below.

Section C. A two-tiered approach to transfer pricing documentation

C.1. Master file

Paragraph 18 states that "The master file should contain common standardized information relevant for all MNE group members" and that "[i]ts purpose is to elicit a reasonably complete picture of the global business, financial reporting, debt structure, tax situation and the allocation of the MNE's income, economic activity and tax payments so as to assist tax administrations in evaluating the presence of significant transfer pricing risks." We believe that not all information mentioned in this sentence is actually relevant for all MNE group members.

Information that is only relevant for one entity or a group of entities should not be included in the master file and should be shared through another mechanism: in our view, that should be exchange of information under tax treaty mechanisms. The OECD tax treaty mechanism includes safeguards to maintain confidentiality and to avoid fishing expeditions. The fact that some countries do not have an extensive treaty network can be addressed through the multilateral instrument to be developed under BEPS action 15. Therefore, in our view it would be best practice for one tax administration to be responsible for enforcing compliance with respect to the master file, in particular the country in which the ultimate parent company of the MNE group resides, and to share the information upon request through tax information exchange mechanisms. Note also our similar comments above regarding delivery of the country-by-country reporting template to the parent jurisdiction.

This is particularly relevant in respect of information regarding MAP matters and APAs. We appreciate that such information may be of relevance with respect to certain entities. Including information on MAPs and APAs in the master file would not contribute to the bigger picture view or to the risk assessment in the countries outside this limited circle. At the same time, inclusion of information on MAPs and APAs could well lead to – unwarranted – audit activities and positions. Therefore, inclusion would be a perverse incentive for taxpayers *not* to enter into APAs and MAPs. This is clearly contrary to the general objectives of the OECD and in particular the objectives of action 14 of the BEPS Action Plan. Information on MAPs and APAs therefore should only be included in the relevant country files, or, if they are to be included in the master file, should only be exchanged through the tax treaty mechanism.

One of our concerns with respect to the master file is that it is not clear which tax administration should be formally responsible for reviewing and enforcing a MNE's compliance with transfer pricing documentation rules regarding the master file. It seems that an MNE may be legally required to have such documents available in all countries in which it has taxable presence. This raises issues regarding the potential for confidentiality of the information to be breached. Without further guidance, this could also mean that a MNE is potentially exposed to penalties for non-compliance in all of these countries. Therefore, even a small, inadvertent mistake effectively may lead to great consequences. In our view it would be best practice for one tax administration to be responsible for enforcing compliance and reviewing quality with respect to the master file requirements, in particular the country in which the ultimate parent company of the MNE group resides.

We welcome the statement in paragraph 21 that the country-by-country reporting template should not be a substitute for detailed transfer pricing analysis. At the same time, we are concerned that the last sentence of paragraph 21 could be interpreted as the template providing evidence, albeit not conclusive evidence,

regarding transfer pricing. We recommend that the OECD clarify that the template information should not constitute evidence at all, and that only a detailed transfer pricing analysis can be used to prove whether transfer prices are correct or not.

The master file introduces a new concept: "important" in relation to service arrangements, risks, assets etc. The Discussion Draft does not define important, neither does it delineate it from 'material'. We recommend that the OECD either clarify that this is for companies to explain what concept of importance has been used or provides a definition of the concept.

Section D. Compliance issues

D.1. Contemporaneous documentation

Paragraph 25 suggests that taxpayers should be required to set actual prices at arm's length before entering into a transaction, and then also confirm an arm's length outcome. The timing issue was raised before by the OECD in the June 2012 request for input on administrative practices. We refer to our contribution dated 12 September 2012. The statement in the Discussion Draft is confusing, as it seems to require taxpayers to follow both the price setting and the outcome testing approach. The two approaches are difficult to reconcile.

In our view taxpayers should have a choice between price setting and outcome testing. We are of the opinion that in principle the tax administration should follow the approach applied by the taxpayer. So if the taxpayer applies an ex-ante approach on a reasonable basis and the application of such an approach is allowed in that country, the tax administration should respect this method and should be very restrained in applying post-transaction date developments given the risk of hindsight. We recommend that the OECD clarify that both price setting and outcome testing are acceptable as an approach.

The Discussion Draft refers to the financial results at the time of filing its tax return. However, we would like to note that in practice taxpayers also may perform outcome testing at an earlier point in time than the preparation of their tax return. The OECD may consider replacing "at the time the tax return is prepared" by something like "at the time the ex-post approach is applied".

D.2. Time frame

We believe taxpayers should be granted a reasonable period to prepare the documentation in its suggested form. We refer to our comments on implementation of the changes below in section E.

D.3. Materiality

We recommend introducing specific guidance or definitions for "materiality". Such guidance or definitions should take into consideration the significance of the transaction and certain features of the transaction. The significance of the transaction depends on the amounts involved (absolute or relative) and the potential tax impact. In this regard, the possible aggregation of transactions should be taken into account. Features of a transaction that may be relevant for determining its materiality could be its frequency (e.g. recurring or one-off), the complexity of the transaction or the functionality with respect to this transaction and the type of transaction (e.g. a routine service or a transaction involving intangibles).

In addition to providing further guidance with respect to “materiality” we believe it should be clear for tax administrations and taxpayers what the consequences are: for instance (partial) relief from transfer pricing documentation requirements (e.g. no economic analysis required) or penalty protection.

In our view the proposed requirement in paragraph 30 for SMEs to complete and file the country-by-country reporting template would likely be an unacceptable compliance burden for SMEs and most particularly for enterprises at the smaller end of the SME spectrum. We recommend that the country-by-country template should be required from SMEs only upon request from tax authorities, in the same way suggested with respect to other information and documents about cross-border transactions.

D.6. Language

We welcome the view that the master file should be in one common language, i.e. English. The Discussion Draft states that the local file should likely be prepared in the relevant local language. This requirement would unnecessarily increase the compliance burden. As we expressed in our comments on the White Paper, translation of documentation may be required in certain situations, but due to the cost of translating documents a judicious approach needs to be taken. Therefore, documentation should only be required to be translated if the tax authorities affirmatively request a translation; in the case of such a request, the taxpayer should be allowed a reasonable period of time to produce it.

D.7. Penalties

We reiterate our above comment that penalties for the master file should not be duplicative. The headquarters country tax authority should have sole responsibility for considering and addressing whether or not the MNC group has reasonably satisfied the master file requirements. No duplicate penalties at the local level should be levied.

D.8 Confidentiality

As indicated above, the master file should be limited to information that is relevant for all entities and all tax authorities. Sharing information that is relevant to some countries only should be done under tax information exchange procedures so as to safeguard confidentiality and to prevent “fishing expeditions”.

D.9. Other issues

We strongly disagree with the suggestion in paragraph 42 that merely because local comparables might be reasonably available, a regional comparable set would fall short of the requirement to use the most reliable information. In our view, unless there are clear economic differences between markets from which regional data are drawn, there is no reason to suppose that a regional comparables set would give less reliable information than a local comparables set. Indeed, in many cases we believe that using a wider regional set is likely to give a more reliable answer than using a single-country set, because with a larger potential pool of comparables, it should be easier to find comparables that are economically closer to the tested transaction, and the impact of random variation will also be diluted. The country from which a comparable is drawn is, after all, just one comparability factor, and in our view is often not an important one.

We are concerned that paragraph 42 may encourage tax authorities to disregard by default documentation studies that do not use local comparables (which is a commonly used approach by MNEs), impose penalties for not attempting to obtain local comparables, or both. Such an approach will simply drive up compliance costs for taxpayers with no apparent benefit in terms of better adherence to arm's length prices. We also note that this approach appears to be contrary to the approach promoted by the EU JTPF in relation to the use of pan-European comparables.

Section E. Implementation

Given the significant efforts companies will have to make to prepare the documentation in the format and detail as suggested by the OECD, clear rules with regard to the timing of implementation should be set. If the OECD should decide to require the master file to be obtained by local taxing authorities directly from local affiliates, this would mean that the requirement to prepare the master file would start with the first country that introduces the master file obligation in domestic law. We strongly urge the OECD to ensure that MNC groups would be allowed sufficient time to prepare for any such future changes.