



Centre for Tax Policy and Administration  
**OECD**  
2 rue André Pascal  
75775 Paris Cedex 16

30 September 2013

[Via e-mail TransferPricing@oecd.org](mailto:TransferPricing@oecd.org)

Dear Sirs,

On 30 July 2013, Working Party No. 6 of the Committee on Fiscal Affairs of the OECD released a **White Paper on Transfer Pricing Documentation**, for interested parties to provide written comments.

**A3F** is pleased to respond to the OECD's request for comments on this discussion draft.

#### **A3F background**

**A3F** (French Women Tax Experts Association - Association Française des Femmes Fiscalistes) was founded in 2005. **A3F** is a French-based network of professional women from diverse horizons representing most players of the French and international tax system (experienced tax executives and expert tax advisors from a wide range of French and foreign companies and law firms, University professors, etc). The ever changing and rapidly evolving corporate and individual tax policies in France and around the world are a major concern for businesses. **A3F** provides its members with opportunities to exchange ideas and best practices, and to contribute to the shaping of tax policy through participation in public debates. **A3F** currently counts 100 members, all with a recognized work experience.

The president of **A3F** is Ms Eva Memran, Tax Director for a large French MNC. Ms Memran can be reached at +33 6 77 76 90 76 or [evamemran@gmail.com](mailto:evamemran@gmail.com).

#### **Conclusion**

**A3F** appreciates this opportunity to provide its views on OECD White Paper on Transfer Pricing Documentation (outlined in the following pages). These comments were prepared by an ad-hoc **A3F** working group chaired by Ms Laurence Delorme. We will welcome an opportunity to participate in the subsequent public consultations and related discussions.

Respectfully submitted,

**For Association Française des Femmes Fiscalistes**

**Laurence Delorme**

For clarification of any aspects of this response, please contact:

<b>Ms. Laurence Delorme</b>	<a href="mailto:laurence.delorme@transferpricing-avocat.com">laurence.delorme@transferpricing-avocat.com</a>	+33 1 45 61 19 04
<b>Ms. Catherine Damelin-court</b>	<a href="mailto:catherine.damelin-court@chq.alstom.com">catherine.damelin-court@chq.alstom.com</a>	+33 1 47 09 09 83

## OECD WHITE PAPER ON TRANSFER PRICING DOCUMENTATION

### GENERAL COMMENTS

The survey of the current state of affairs regarding transfer pricing documentation provides a fairly realistic diagnosis of the situation, which is satisfactory neither for tax administrations nor for taxpayers.

Raising the question of the purposes and objectives of transfer pricing documentation is very useful given the widely different approaches by tax authorities across the world, leading to a very heavy and ever increasing administrative burden for taxpayers.

However:

The basic assumption in the White Paper seems to be that all MNC's (i) operate with a centralised business model, and (ii) have implemented aggressive or optimized transfer pricing structures, hence the need to document "the Big picture" in a pretty extensive manner, whereas it may not be needed or relevant in a lot of cases of "simple" and "straight-forward" transfer pricing structures.

The White Paper "*suggests a two tiered approach through which both the "big picture" information is made available for risk assessment purposes and detailed information on the related party transactions can be required when the arm's length character of specific transactions needs to be assessed*".

It is unclear how the proposed Coordinated Documentation Approach is going to really make compliance with transfer pricing documentation rules simpler and more efficient for taxpayers. Indeed, the White Paper rightly acknowledges the three different purposes for documentation, however the proposed two-tier structure (Masterfile and local file) seems to indicate that the Masterfile would serve the first two purposes (risk assessment and start of an audit by tax administration). If this is the case, then we have doubts on the potential for the proposed "Coordinated Documentation Approach" to really make compliance simpler and more efficient, as opposed to just adding one additional layer of administrative burden for taxpayers by making the Masterfile even more detailed than under the EUTPD approach.

In any event, it would seem that closer coordination and consistency should be sought between transfer pricing documentation required for risk assessment purposes, and work on Action 13<sup>1</sup> of the BEPS Action Plan which introduces the requirement for country-by-country reporting.

---

<sup>1</sup> BEPS Action Plan Action 13 Re-examine transfer pricing documentation

*"Develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNE's provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template"*.

The key guiding criteria should be: (i) relevance of information provided (ii) materiality, (iii) cost of preparing transfer pricing documentation, in relation to the value of intercompany transactions under review (relative to the size of the audited entity).

## II. Overview of existing guidance and initiatives on transfer pricing documentation

### A. Local country documentation regimes

#### Para. 9 and footnote 3

Footnote 3 states: *"It should be noted that the term transfer pricing documentation is not always used in a consistent fashion. ...These differing notions of the term "documentation" can lead to misunderstandings when issues related to transfer pricing documentation are discussed in international fora"*.

Indeed, this is a major source of administrative burden and costs for MNEs, and we suggest the OECD White Paper should take a more specific attempt at providing an harmonized definition, consistent with the three objectives of preparing transfer pricing documentation. As noted under para. 78 and 79 below, the current drafting is very ambiguous on the type of documentation that should address each objective, and does not address the lack of certainty faced by taxpayers about the minimum standards that must be satisfied in each jurisdiction in order to comply with local rules and avoid penalties.

#### Para. 12

The relevance of a one-sided analysis is highly dependent on the functional analysis and characterization of the tested party leading to selection of the appropriate TPM.

It should not be assumed that attributing a routine profit to the tested party (one-sided approach) is never relevant. Only in cases where significant and complex intangible issues arise.

### B. Documentation Guidance Provided by International Organisations

#### Para. 36 & 37

For the ICC, the issue of harmonising transfer pricing documentation is intrinsically linked to the **administration of the burden of proof, to penalties, and to the process for eliminating double taxation**. These three issues are major concerns for business, together with the administrative burden and cost of preparing transfer pricing documentation, without certainty that the minimum standards will be satisfied in each jurisdiction.

While it is noted that recommendations in the December 2003 ICC policy statement on "Transfer Pricing Documentation" have not developed into a widely developed standard, it seems to us that the OECD work on TP documentation would greatly benefit from the ideas developed in this paper.

In particular, **three key principles should guide the definition of a single uniform package of documentation** (whatever its form, i.e. Masterfile and local file, or else) : "(i) *the documentation package should be based upon information that is readily available in the bookkeeping and management reports of the MNE concerned; (ii) common documentation rules should be a reasonable and balanced reflection of the various national approaches; and (iii) once an MNE fulfils the proposed documentation requirements, it should be relieved of any liability for penalties and from having any special burden of proof*".

### **C. Discussions with Selected Business Representatives**

#### **Para. 40**

One should also mention the recent practice in France with detailed questionnaires sent to major French MNCs about their TP methodologies and practices, by a special "Senate Committee on migration of capital and assets outside France and related tax consequences".

### **IV. A Tiered Approach to Transfer Pricing Documentation**

#### **Para. 68**

What is the link between A (information required for transfer pricing risk assessment) and B (Structure of Global Documentation Package)?

The developments in this section IV are ambiguous and require clarifications.

#### **A. Information Required for a Transfer Pricing Risk Assessment**

**Para. 70** describes the type of information that should be made available to tax authorities in order to enable them to perform a risk assessment, focusing on the "big picture".

- *Identification of material cross border transactions between associated enterprises, including material payments for goods, services, intangibles, and interest flows.*
- *Identification of recent business restructuring transactions and transfers of intangibles.*
- *Information regarding the levels of corporate debt and interest expense in relevant countries.*
- *Information regarding the MNE's global transfer pricing policies and the financial results of applying those transfer pricing policies. It would especially include a description of where in the group important intangibles are held. It would also include the identification of the MNE Group's existing APA and ruling arrangements related to income allocation with various countries.*
- *The taxpayer's explanation of how its material transfer pricing arrangements comply with the arm's length principle and local transfer pricing rules.*

However, the scope and purpose of the above-listed information is not clear to us:

- Is it intended that this information be prepared in a standard, unique report at group level, and made available to all tax authorities where the MNE has subsidiaries involved in intra-group transactions? Unless materiality thresholds are set properly, preparing such information for the whole group (with sometimes hundreds or thousands of subsidiaries in the world) would generate significant administrative burden and cost for business, disproportionate to tax administration's needs in a number of cases.
- Or is this information meant to be prepared by each entity of the MNE, and submitted to the local tax authorities at the same time as the annual tax return? This approach would seem to be more practical, again assuming that some materiality criteria is set in relation to the size of the entity under review and to the nature and amount of transactions with associated enterprises.
- What is the link between the above list of information, and the content of the Masterfile below?

**Para. 72** further states: *"It seems possible for businesses to provide without undue burden individual country data based on either management accounts, consolidating income statements and balance sheets, and/or tax returns that would provide tax administrators with a general sense as to how their global income is allocated and where pressure points in the transfer pricing arrangements might lie. [...]in a risk assessment setting, an observation that, for example, 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. As long as all involved in preparing and reviewing such data understand that risk assessment is a first step and that precision may not be necessary, greater overall reporting might productively be required for risk assessment purposes"*

Despite the comments in the last sentence, we are very concerned that the above statement may lead tax administrations in some countries to take the simplistic view that the above-described individual company data (assets, headcount, ...) would set a proper basis (individually or combined) for allocating income (formula-based income allocation system). Such an approach completely ignores the impact of intangibles, in particular, and is in any case not supported by the BEPS Action Plan <sup>2</sup>.

Further, the statement that such individual country data could be provided by business "without undue burden", in order to "provide tax administrators with a general sense as to how their global income is allocated" is not realistic and does not take into account the complexities of the consolidated systems and their specificities for each business unit.

In any event, it would seem that closer coordination and consistency should be sought between transfer pricing documentation required for risk assessment purposes, and work on Action 13<sup>3</sup> of the BEPS Action Plan which introduces the requirement for country-by-country reporting.

---

<sup>2</sup> BEPS Action Plan page 20 "*Alternative income allocation systems, including formula based systems...*"

<sup>3</sup> See footnote 1 above

**Para. 73** is somewhat reassuring as it reminds the basics: *"It is important that the heart of transfer pricing documentation continue to be the taxpayer's description of the transfer pricing methods and analysis it uses to demonstrate its compliance with the arm's length principle. These should be built on a robust comparability analysis, analysing the functions, assets and risks relevant to the transfer pricing analysis for transactions that are material in the context of the jurisdiction receiving and reviewing the documentation package."*

However, the developments in section V below (Coordinated Documentation Approach) seem to get away from these fundamentals, by adding another layer of complexity, namely an expanded Masterfile used for risk assessment purposes.

## V. Development of a Coordinated Approach to Documentation

**Para. 78** reads as follows: *"In an attempt to move towards a simpler and more efficient compliance with transfer pricing documentation rules, this paper sets out a possible coordinated approach to transfer pricing documentation ("Coordinated Documentation Approach"). This approach follows a two-tier structure consisting of a Masterfile and a local file".*

**Para. 79** further states: *"As conceived, the **Coordinated Documentation Approach** is intended to serve the **purposes for documentation** discussed earlier in the paper. **First**, it ought to provide to tax authorities sufficient, relevant and reliable information to perform an efficient and robust risk assessment analysis. **Second**, it should provide a platform on which the information necessary for an audit can be developed. **Third** it should provide taxpayers with a means and incentive to meaningfully consider and describe their compliance with arm's length pricing in material transactions".*

It is not clear to us how the proposed Coordinated Documentation Approach is going to really make compliance with transfer pricing documentation rules simpler and more efficient for taxpayers. Indeed, the White Paper rightly acknowledges the three different purposes for documentation, however the proposed two-tier structure (Masterfile and local file) seems to indicate that the Masterfile (enhanced with 'big picture' and country-by-country reporting) should serve the first two purposes (risk assessment and start of an audit by tax administration).

### Table 1: Masterfile

- A schedule showing for each country in which the MNE does business the total number of employees in the country.

Again, this request is not consistent with BEPS action plan (Action 13)<sup>4</sup> calling for much more detailed country-by-country reporting.

It would seem that closer coordination and consistency should be sought between transfer pricing documentation required for risk assessment purposes in this White Paper, and Action 13 of the BEPS Action Plan which introduces the requirement for country-by-country reporting.

---

<sup>4</sup> Footnote 1 above.