21 February 2014

CBI / 100 Group comments on the OECD Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (BEPS Action 13)

The CBI and the 100 Group are pleased to comment on the OECD's Discussion Draft on Transfer Pricing Documentation (TPD) and Country-by-Country Reporting (CBCR) (the "Discussion Draft") released on 30 January.

Who we are

The 100 Group represents the views of the finance directors of FTSE 100 and several large UK private companies. Our member companies represent almost 90% of the market capitalisation of the FTSE 100, collectively employing over 7% of the UK workforce and, in 2012, paid or generated, taxes equivalent to 14% of total UK Government receipts. Our overall aim is to promote the competitiveness of the UK for UK businesses, particularly in the areas of tax, reporting, pensions, regulation, capital markets and corporate governance.

The CBI is the UK's leading business organisation, speaking for some 240,000 businesses that together employ around a third of the private sector workforce. With offices across the UK as well as representation in Brussels, Washington, Beijing and Delhi the CBI communicates the British business voice around the world.

Structure of our response

We set out below our overall position on both the CBCR and TPD aspects of the Discussion Draft, together with a more detailed commentary on specific aspects of the proposal. Appendix 1 contains comments on the remaining questions posed in the Discussion Draft as well as some further points for consideration that are not otherwise addressed in the Discussion Draft. Appendix 2 is a summary of findings from case study work done to date.

Overall position

We are committed to improved tax transparency and support the principle of disclosure to tax authorities. We have been supportive of the G8 and subsequent G20 calls for a high-level risk assessment tool that provides tax authorities a better view of multinational groups as a whole.

We also commend the OECD for the opportunity to comment on the Discussion Draft. However, we are concerned that the Discussion Draft has moved beyond the original objectives on transparency, with no clear articulation of the benefits the proposals will deliver or methodologies to assess their effectiveness as part of the broader BEPS Action Plan. Furthermore, there is a missed opportunity to include a Cooperative Compliance approach following on from the risk assessment, as a tool to improve relevant information flows.

In our view, the Discussion Draft attempts to bring together two distinct objectives that would be better addressed by two separate outputs:

1. Delivering a breakdown of the global results of multinational enterprises (MNEs) to facilitate a high-level risk assessment (CBCR); and
2. Ensuring taxpayers give appropriate consideration to transfer pricing requirements, and provide tax administrations with information to facilitate an informed transfer pricing risk assessment (the master and local files).

It is not apparent to us that the Discussion Draft allows any opportunity for taxpayers to reduce the already disproportionate compliance burden. This could be achieved by, for example, reducing TPD requirements for low risk taxpayers or low risk transactions, and permitting optionality regarding the reporting source data for preparing the CBCR template.

Country-by-Country Reporting: general comments

In our view, the current draft CBCR template and guidance goes well beyond the original proposal of a high-level risk assessment tool, will produce unwieldy volumes of data, and, as a result, not deliver the intended risk assessment. It will also require disproportionate system changes or manual effort to complete.

We consider that the objective of a high-level risk assessment, based on providing tax authorities information on an MNE's global breakdown of turnover, profitability and taxes paid, can be best achieved by:

- refining the data set; and
- crucially, giving business an option to choose the reporting source of that data.

In addition, the wording of Action 13 is potentially misleading. We wish to clarify that MNEs do not globally 'allocate' income, but rather recognise it in-line with international tax and accounting rules. We expand on definitions and terminology in Appendix 1.

We note that the terms 'top-down' and 'bottom-up' do not imply two fundamentally different approaches. For many MNEs the core source data is the same under either method. Both group consolidation systems and local statutory accounts rely on the same transactional data. It is the reporting source only that is different. Appendix 1 expands on this point.

Taken together, these proposals will produce a more robust CBCR template that satisfies the requirements of tax authorities, whilst also recognising the need to consider compliance costs for business.

It is essential that governments enacting CBCR into local legislation maintain consistency regarding the CBCR template and resist the temptation for additional requirements.

We believe it is reasonable to expect that tax authorities in receipt of the OECD CBCR template information should also commit to observing the OECD transfer pricing guidelines in their entirety. This should include, for example, the arm's length principle and the standard deductibility of recharged management expenses.

We recommend that the OECD issues transition guidelines, including a phased approach to implementation to recognise the additional effort and possible system changes required to satisfy the master file, local file and CBCR requirements.

Country-by-Country Reporting: specific comments

I. <u>Purpose of the template</u>

We understand the purpose of the template to be provision of the breakdown of an MNE's global activity into the countries in which it operates, recognising that this may be new information for tax authorities, thereby enabling a new perspective to performing risk assessment.

The template is in addition to the master and local files and is not intended to replicate information already contained in those files or otherwise easily accessible by tax authorities. There is therefore an opportunity for the CBCR template to be more closely aligned to the original mandate, without imposing a disproportionate compliance burden on business or inadvertently suggesting the use of formulary apportionment. In this respect, the instrument of Cooperative Compliance should be applied in a much wider international context to improve the overall information position of both tax authorities and business, and at the same time avoid excessive documentation compliance burdens.

II. Consistency of data

We consider that the risk assessment is best achieved by ensuring that tax authorities have visibility of how the MNEs' global profits arise in multiple countries they operate in. In order for that to be achieved, there needs to be a degree of consistency taken by each MNE in preparing their template, so that the data is comparable across reporting periods (i.e. an MNE should use the same approach each year, whether that be by entity, by country, or by area of operation). We do not consider it necessary for there to be a comparability across different MNEs, and as a result, there can and should be an optionality regarding the reporting source data for preparing the template.

III. Country vs entity

We note that paragraph 21 of the Discussion Draft states that the CBCR data should not be used as a substitute for a detailed transfer pricing analysis, a full functional analysis or a full comparability analysis, and that the information in the template would not constitute conclusive evidence that prices are, or are not, appropriate.

You will be aware that transfer pricing analysis is performed for each line of business, in each legal entity. There are often multiple lines of business in each legal entity, as there are within each country. Providing data by legal entity is unlikely to provide greater insight into the lines of business beneath, than providing data by country.

We believe that the template should not include line of business information – this would be equivalent to producing a full analysis, and that would clearly contradict the aim of the template.

We note the clear guidance that a permanent establishment should be included in the country it is situated in. A careful review of data will be required by MNEs to ensure this is correctly reflected in the CBCR template.

Some groups will have thousands of entities, leading to a report of hundreds of pages, irrespective of the source data used. In order to prepare useful and manageable information for tax authorities, some level of country aggregation is likely to be required. The level of aggregation should be applied consistently across each MNE.

In our opinion, including a total for each country and including columns for external sales, intercompany sales, profit before tax, cash tax paid, employee numbers and activity code, provides sufficient information for a high-level risk assessment. A check box concept could be used to indicate the type of intercompany activity in each country. We are concerned however, that the inclusion of intercompany sales information without further reassurance and qualification goes beyond the primary objective of the CBCR template as a high-level risk assessment tool. The unintended consequence of this could be opening of the door to a formulary apportionment.

IV. The scope of the data set

Regardless of the reporting source data, the draft template contains data points that we do not consider necessary for the intended high-level risk assessment. Such extensive requirements will lead to an unmanageable volume of information that is not easily available.

The breakdown of intercompany transactions between sales, interest and other could be replaced by a check box to indicate type of activity. A further break down into royalties and service fees would not add an additional insight for a high-level risk assessment. Further, the analysis between income and expense lines is unnecessary.

Disclosure requirements for statutory accounts vary by country and must often be met on the basis of materiality. It is therefore highly likely that, for example, intercompany royalties are not required to be disclosed in country A, are required to be in disclosed in country B, but for the legal entity concerned, are not sufficiently material to merit disclosure. In order to compile the information in the draft template an MNE would either have to request data via manual spreadsheets from finance teams around the world or expand/build systems to collect it. Instead, our recommendation is to use a check box mechanism to indicate the type in intercompany transactions.

V. Accounting book values

We welcome an inclusion of a business activity coding section and the number of employees, as both are comparable across countries. Some countries already require the disclosure of the average number of employees. In those and similar cases, MNEs should be permitted the flexibility to re-use that data for CBCR purposes, rather than starting a second basis of collection. We have concerns, however, regarding the usefulness of the other economic activity measures included in the draft template, namely:

- *Share capital and retained earnings, and tangible assets other than cash and cash equivalents* – we do not believe these book values provide a meaningful data point for assessing risk. The values are historic book values and therefore do not reflect the in-use value of the assets and do not give any insight into economic substance.
- *Employee expense* – it is unclear whether the employee expense is intended to relate to the number of employees disclosed and the result would not be readily comparable across jurisdictions, making high-level risk identification difficult. In our view, the number of employees is sufficient for high-level risk assessment purposes and the inclusion of employee expense only adds complexity, not insight.

There are also concerns regarding employee confidentiality in situations where the number of employees is very small. The description of employee expense (usually taken to mean an accounting charge under the accruals concept) includes 'non cash payments' – clarity over whether the cash or accruals concept would be required if the item were to be included in the final template.

VI. System challenges

Every MNE has different systems in place, and therefore the cost of providing CBCR data will vary by organisation. This is one reason why we believe that the CBCR template should provide a choice on the reporting source of data.

It is important to note that group consolidation systems and local statutory accounts (where prepared) start from the same transactional data.

Proponents of a 'top down' approach (which would start from the group's consolidation system used to prepare the audited consolidated group accounts), generally do not collect information centrally on local statutory accounts (where prepared). They would find collecting, checking and validating such information both time consuming and expensive. Such MNEs typically have relatively large amounts of data in their consolidation system, but not necessarily by country or by region sub-consolidation.

Conversely, an MNE that has a de-centralised reporting system, with sub-consolidations at a functional or operational level rather than by country, would find the consolidation system data is not structured to meet the CBCR requirements, and may find it less costly to build a manual collection process from local statutory sources on a 'bottom-up' basis.

In the absence of optionality, as noted above, the costs of amending existing systems or building new ones will vary by entity, however initial estimates range between £2 million to £10 million, in addition to ongoing costs.

VII. Conflict of Law

Where a country prohibits disclosure of certain data, there is a potential conflict with the requirements of the CBCR template. Consideration should be given as to how such conflicts can be resolved, for example, by excluding the country data, and making it clear why the data was excluded.

Transfer Pricing Documentation

The role of risk assessment in determining the scope of TPD should be further refined. Attention should be given to what information is essential in order to perform risk assessment, and to determine how the information requirements can be varied or phased in order to respond to that risk assessment. The documentation standard should not be a "one size fits all." We believe that the requirement to produce information to enable tax authorities to conduct a thorough audit sets the bar too high and is an unreasonable standard.

Taxpayers already find efficient ways of managing global TPD requirements by employing risk assessment principles. Such practices also work effectively for many tax authorities. The master file and local file seem to extend beyond what is currently applied in many instances, and we do not consider that the case has been made that the incremental information proposed justifies the additional compliance burden and cost. We therefore recommend that the OECD benchmarks the list of information in the master file and local files with examples of modular global documentation already in place in order to focus on whether any potential gaps cause real practical concerns.

Further, a significant compliance cost for taxpayers arises from different TPD requirements around the world. We urge governments to commit that the TPD guidance ultimately agreed at the OECD level will be implemented uniformly in the local laws of all countries.

Finally, we are concerned about how information could create misunderstandings and increase the risk of audits and disputes. We believe that the OECD should provide clearer guidance about how the information should be interpreted and how risk assessment should be performed. We endorse the sharing of risk assessments with taxpayers and with other tax authorities. However, any information should be made available only to countries that have effective arbitration and dispute resolution mechanisms.

Confidentiality

We are concerned that the CBCR and master file documents will contain a significant amount of confidential information, which should be safeguarded. We recommend that Treaty Information Exchange mechanisms or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("Multilateral Convention") should be used. These would provide treaty partners with access to relevant information and also ensure that the requesting country has appropriate rules and practices in place to maintain confidentiality.

As a minimum, countries that do not have access to the information through normal treaty channels should be required to sign up to and comply with the Multilateral Convention.

Sharing master file data directly with every country where an MNE has a group member or a permanent establishment, regardless of information sharing treaty mechanisms, would greatly increase the risk of commercially sensitive and confidential information being shared without restrictions.

Conclusion

We reiterate that the CBCR template should be separate from the TPD guidelines.

We consider that the objective of a high-level risk assessment, based on giving tax authorities information on an MNE's global breakdown of turnover, profitability and taxes paid, can be achieved with the right data set, and the option to choose the source of that data. Taken together, these proposals will produce a more robust CBCR template that will also minimise the compliance costs for business.

We would welcome the opportunity to discuss any points in more detail, and look forward to continued public consultation on this and the remaining BEPS actions.

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- Appendix 1 – Detailed comments on the Discussion Draft questions and further points for consideration
- Appendix 2 – CBCR case study findings

Appendix 1 – Detailed comments on the Discussion Draft questions and further points for consideration

1. Improving the CBCR template

Definitions – the template could be improved by providing clarity on the terminology used, either to conform to IFRS or US GAAP wording. For example, such improvements could include removing the term 'income' and replacing it consistently with either 'accounting profit before tax' or 'accounting earnings before tax'; only using the term 'payments' where a cash paid basis number is required, otherwise using the term 'charge'.

There are specific issues with terms 'turnover', 'revenue', 'sales', which can be interpreted in varying ways and may not be directly applicable in certain industries, such as financial services and hospitality. Some terms such as royalties are defined differently by different countries – in such cases, it is especially important that the template defines exactly what is meant, perhaps by reference to definitions in the existing OECD guidance.

Certification – we note that paragraph 43 of the Discussion Draft does not recommend that risk assessment data be certified by an outside auditor. In our view, companies will nonetheless undertake rigorous checking and validating of data, prior to submitting the CBCR template. We note that using a local statutory accounts approach will include (for countries where no statutory accounts are prepared) potential reliance on unaudited management data. Group consolidation systems data will have been audited, although to group materiality, and therefore further checks by MNEs will be required on this data to ensure its accuracy.

We note that the specific instructions ask for detailed analysis of intercompany payments. We consider that this would be a duplication of information already available to tax authorities. Our recommendation would therefore be to use a check box mechanism to highlight the existence of such flows in and out of a country, which is all that should be necessary for risk assessment purposes.

In paragraph 4 of the Discussion Draft you note that clear and widely adopted documentation rules can reduce compliance costs which could otherwise arise in a transfer pricing dispute. We agree with the theory; however, we have concerns that in practice, tax authorities will continue to approach disputes in a variety of ways, leading to a net increase in compliance costs (arising from MNEs producing all of the new documentation, with some tax authorities continuing to demand significant additional documentation).

Timeframe – paragraph 27of the Discussion Draft notes that for best practice the master file and local file should be prepared no later than the due date for the filing of the tax return for the fiscal year in question. In practice this will be extremely difficult to achieve given the number of countries many MNEs operate in, and the consequent spread of tax return due dates across the calendar year. It will only be practical to update the master and local files periodically (in terms of the consistency between the two). The local file specific financial information should be updated before the filing of the return.

We agree that the completion date for the CBCR template should be one year following the year end date of the parent company. We recommend that transition rules are included to allow taxpayers adequate time to prepare for the first submission.

With regards to paragraph 30 of the Discussion Draft, we agree that SMEs should be obliged to produce information about material intercompany cross border transactions in the course of a tax examination. However, we do not consider that a requirement to prepare the CBCR template or full TPD is proportionate.

2. Improving documentation requirements – master file and local file

Purpose of TPD - the Discussion Draft sets out three objectives for requiring TPD in paragraph 5: the first two are both transfer pricing risk assessment related. One is explicitly stated as being necessary

information for tax authorities to conduct an informed transfer pricing risk assessment, and the second reflects the process that taxpayers are likely to conduct in considering transfer pricing risk assessment, since it focuses on encouraging taxpayers to "give appropriate consideration to transfer pricing requirements". The third objective is to provide information for audit purposes.

We consider that the Discussion Draft does not sufficiently distinguish between the above objectives in determining information requirements. In particular, the Discussion Draft talks about a "two-tier" structure. This is misleading: it splits the required documentation into two parts, which in practice are not phased or stepped, i.e. a taxpayer does not move from one tier to another depending on risk factors. We therefore suggest that the Discussion Draft should develop a phased approach to documentation based on risk assessment. Currently, the Discussion Draft does not indicate what impact a risk assessment might have on documentation. The Discussion Draft therefore needs to be integrated with the OECD's revised Handbook on Transfer Pricing Risk Assessment so that clearer distinctions can be made between the information required for risk assessment purposes, information which would not be routinely required, and information which would be required depending on risk criteria. We also consider that the information required in the master file and local file exceeds what is relevant for initial risk assessment purposes.

In addition, in our view, the third objective, i.e. information to conduct a thorough audit, sets the bar too high. Despite the focus by tax authorities on transfer pricing, it is a fact that the majority of taxpayers are not subject to transfer pricing audits. Therefore, the routine preparation of all the information tax administrations might need if they were to conduct an audit seems excessive. In addition, it is difficult to think of other tax issues where tax authorities require taxpayers to prepare thorough information packs in the event of enquiries. Even if such packs were required, the audit issues are likely to accelerate into far greater detail than what has been prepared. Taxpayers may consider it prudent to prepare transfer pricing information where the risks are high, but under the Discussion Draft, a taxpayer's scope to use discretion in implementing its own risk assessment is restricted by what appears to be a very high standard of TPD required in all situations.

Compliance burden - the need for the Discussion Draft to consider risk assessment and to move away from a "one size fits all"" standard for documentation is underscored by current practices. Taxpayers do currently adopt approaches similar in concept to core and local documentation, but it is done on a risk assessment basis. That risk assessment may take into account the nature of the transaction, its size and country specific matters. Requiring full master file/local file documentation for all transactions and entities on an annual basis would multiply the work required significantly. We therefore believe that the cost of this to businesses and the ability of tax administrations to process the additional information should be carefully considered alongside the expected benefit.

Taxpayers also often adopt modular approaches under which various modules can be assembled as appropriate under risk assessment (e.g. a group overview module and a sales and distribution module). Such pragmatic solutions seem to work well in many cases, but would become insufficient under the proposed approach.

Consistency - a significant compliance cost for taxpayers arises from different TPD requirements around the world; different in terms of timing, scope, and format. Such differences prevent the efficient preparation of global TPD. Businesses recognise that the OECD is not a law-making body, but we urge governments to commit, given the political imperative behind the BEPS project, that the TPD guidance ultimately agreed at the OECD level would be implemented uniformly in local laws of all countries. There should not be a proliferation of increased, and differing, local documentation requirements.

3. Specific questions asked

Q1: 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.

We consider that the template as proposed already contains more data than is necessary. We strongly oppose any additional forms or questionnaires.

BEPS Action 13 focusses on transparency and the compliance burden. Inconsistent requirements imposed by tax authorities increase the compliance burden. Standard forms and questionnaires should only be considered if they facilitate the production of relevant information in a standard format and at the same time dispense with less targeted and less relevant information. The master file will provide greater transparency, and allow tax authorities to see how activities conducted in their territories fit in the wider context. However, the local file remains very detailed and extensive, and may exceed the practical requirements of a tax authority. A standard global format for local information showing the nature and amounts of intra-group arrangements could be considered if it were to replace the local file (also, see further comments on materiality below).

Sharing risk assessments can improve the working relationship between taxpayers and tax authorities and we believe in transparency between the two. In particular, discussion of perceived risks can prevent the opening of wide-ranging enquiries, and target discussion to relevant issues more quickly. Since the consequences of adjustments to transfer pricing are not limited to a taxpayer and its tax authority, but also affect other tax authorities, we believe it may be beneficial for a tax authority to share and discuss its risk assessments with the tax authority that has an interest in the intra-group transaction.

Q2: 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.

Tax administrations should have access to relevant information in order to conduct risk assessments and audits, but an excessive burden should not be placed on taxpayers. Existing information exchange mechanisms should be used where possible. To the extent information from outside the jurisdiction can be requested by tax authorities, there should be no burden placed upon the enterprise to present the information in any other format or language than it was presented/filed/made available to the tax authority in the other jurisdiction, under the laws applicable there.

Q3: 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.

The CBCR template should be prepared to cover the whole group.

For other aspects of the master file, we believe that “line of business” could be interpreted very narrowly, and could impose a significant compliance burden in segregating operations that are managed as one. MNEs should therefore be permitted the flexibility in adopting a ‘global’ or ‘line of business’ approach to TPD and to determine the most effective way to define their own lines of business. Flexibility should be allowed so that businesses can decide whether it is appropriate to provide combined or segregated information.

Q4: 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:

Q4.1: Should the country-by-country report be part of the master file or should it be a completely separate document?

The CBCR template should be a separate document filed with the parent company tax authority only. We draw a distinction between a master file describing the MNE organisational structure, businesses, intangibles and intercompany financing (which would be generally narrative in content, and amended only as the business materially changes) with the CBCR template which is financial in nature, and only a snap shot in time view for the purposes of risk assessment.

Q4.2: 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?

We expand on the comments in the main letter below:

Group consolidation system data comes from the same transactional data as local statutory accounts.

An illustration is set out in the following example:

Scenario: Company A sells to Company B, Company B makes external sales. The bookings as shown below will be made in the local systems, and will appear in the consolidation system. The bookings are made at the best estimate of arm's length price based on forecasts for the year.

Company A

	£'000
Intercompany sales	100
Third party cost of sales	(50)
Profit	50

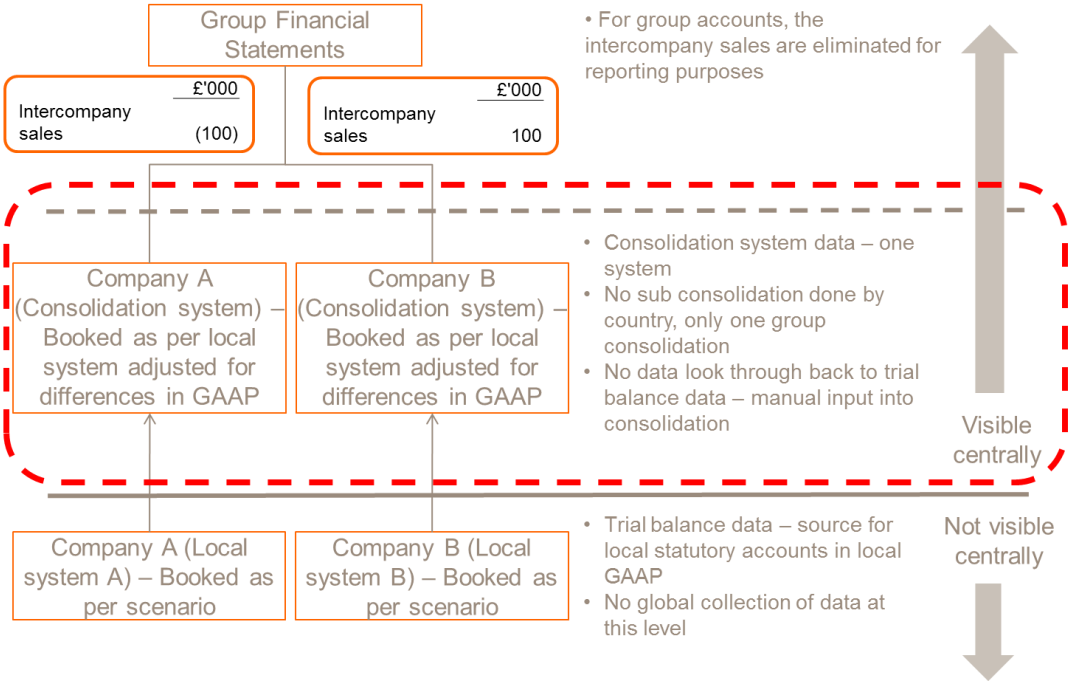
Company B

	£'000
Third party sales	200
Intercompany cost of sales	(100)
Profit	100

Group Financial Statements

	£'000
Sales	200
Cost of sales	(50)
Profit	150

The bookings above appear in both the local statutory accounts AND in the consolidation system, as shown by the circled central section of the diagram overleaf:



The commonality between a group consolidation data approach and a local statutory approach is that the transactional accounting data is the same for both. The difference in output is that the group consolidation data will all be under the MNE group GAAP. The local statutory accounts will be under local GAAP – prepared by taking the same core transactional data, and overlaying GAAP adjustments.

Q4.3: 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?

In addition to the points made in the main letter, we note that in practice under either method of preparation some degree of effort will be required to provide useful information in the template. Consider, for example, that an MNE will likely have a number of holding companies in the UK. Under UK GAAP, the profit before tax will include dividend income receivable, and the net equity will effectively include the investments in other holding companies. If these are simply listed and totalled, the UK total for those columns will likely be many multiples of the MNE consolidated numbers. Another example would be joint ventures – would an MNE include 100% of the joint venture entity, or would it exclude the share not owned?

Accounting book entries are initially made in entities various transactional systems and are then summarised for reporting into the group consolidation system. The same original book entries in the transactional systems are used for preparing the local statutory accounts (adjusted for local GAAP differences). There is no need for additional guidance solely because a group reporting approach is adopted.

Individual country consolidations would impose a significant additional burden on most tax payers, irrespective of whether group consolidation systems or local statutory accounts are used as source data, as there is generally no existing requirement to prepare such consolidations. Even in countries where a fiscal unity tax return is prepared, it can be the tax adjusting entries that are consolidated, not the pre-tax accounting entries.

Q4.4: 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?

It is not clear whether 'due basis' means the profit and loss account charge under the accruals concept, or if it refers to the year end liability shown in the balance sheet? We consider cash paid is the most appropriate measure for inclusion. We believe that an aggregate number for each country is needed. In part, this reflects our overall view that entity by entity is not necessary for a risk assessment, however in addition we note that a number of countries have fiscal unity corporation tax assessments, where the cash tax paid is on behalf of a group of entities, in which case an aggregate number is the only number that exists. We note the proposal that, in these cases, the cash tax paid should be allocated to the entities on the basis of their share of profit. However, we do not consider this will provide useful information and would be wholly arbitrary.

Withholding tax should not be required, however there should be an option to include at the taxpayers discretion. There are some cases where (due to the nature of the business structure) withholding tax is a significant part, or the majority of the corporation tax paid, and an MNE may need to include it to

present a reasonable view. For other entities, withholding tax may be relatively insignificant. Where withholding tax is not currently reported separately, there will be an additional burden in collecting the information.

Q4.5: 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?

In practice, this appears to be implying some form of country sub consolidation or aggregation. The template as drafted requires interest paid to constituent entities, by entity, with a total for each country. Within any one country there will be interest payments between entities within that country. Unless these are removed from the total, the total does not become a cross border number.

We further note that the information appears to duplicate information in the local file documentation and is already available locally to tax authorities.

Reporting of royalties and service fees will likely impose a significant additional burden, as this level of detail is generally not required in local statutory accounts, and not reported through into group consolidation systems. Therefore, in both cases, an MNE is likely to request this data offline.

A check box to identify the type of intercompany transactions occurring in a country would be sufficient for high-level risk assessment purposes.

Q4.6: 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?

We believe that no further indicators of economic activity are required in the CBCR template.

Clarification regarding what constitutes an ‘important’ business activity would be welcomed.

The important business activity codes could be refined, as they do not adequately accommodate specialist sectors, and at present are open to interpretation. Questions have arisen such as:

- Should code E be ticked if the only activity is marketing? Will it be interpreted that Sales and Distribution also happen, when they do not? (We suggest descriptions become ‘OR’ rather than ‘AND’).
- Intellectual property is often exploited, not simply held.
- How does a financial services company respond? Using code G for all activities is not going to add insight?

Q5: Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

We deem it is appropriate to consider materiality separately for each form of TPD. The CBCR template should be prepared considering materiality from the MNE group perspective, and include consideration as to whether operations in a particular country are material to that country even if not material to the group.

The local file should consider a potentially lower level of materiality specific to that country.

It is unclear whether the proposals for master file and local file would provide useful information for a tax authority which has, e.g. simply a sales company in its jurisdiction, particularly where that sales company has less than, say, 10% of the group's sales, assets, or employees.

As well as considering materiality, low risk transactions could be defined, and then excluded from the master and local file requirements.

Q6: 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?

A suggestion in paragraph 34 of the Discussion Draft could be more helpful. It is already the case that the frequency with which benchmarking searches are undertaken is a cost/benefit decision and in many instances the exercise is not performed annually. However, the work involved in refreshing financial data for the same comparable set on an annual basis should not be underestimated. The comparables may no longer be in the data base, or the financial data may look odd and require further analysis. The composition of a comparables set may change significantly from year to year, however the result of the benchmarking is unlikely to change significantly. It would be more helpful if the guidance allowed judgement to be made, building on the 3.69 in the existing OECD transfer pricing guidelines. For example, "…searches should be updated every 3 years rather than annually. Updates of financial data need not be conducted in the interim years unless there is evidence of significant economic or market changes which could affect the results of the search."

Q7: Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

It would be useful if the guidance indicated that long narrative is not required for the master file or local file, and that much of the information could be presented in figures, charts, and tables. Such an approach may also relieve the pressure for translation. The CBCR template is not called out specifically in the Discussion Draft, however we consider it should be in English.

Regarding the master and local files, in order to ensure an alignment between the two, we believe most MNEs will start by preparing in their common language (e.g. English for UK headquartered MNEs), and will then translate the local files where required. The need to ensure consistency between files during the periodic update process and translations will involve time and cost. The frequency of updates (outside of major business change) could be every three years in line with comparables.

Q8: 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.

We are concerned that the CBCR template and master file document will contain a significant amount of confidential and potentially commercially sensitive information. The confidentiality of this information should be safeguarded. Measures to protect the information could include:

- Specific anti-infringement procedures available to taxpayers in order to protect them from unauthorised information disclosure by tax administrations if real damage is demonstrated;
- Specific secure channels/technological means for information exchange between taxpayers and tax administrations in order to prevent information leakage; and
- Reviewing (rather than filing) of sensitive information at taxpayer premises.

Any information received by a tax administration should always be treated as confidential. Such relevant information should only be disclosed to authorities in the jurisdiction of the other tax administration concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes concerned.

Such persons or authorities should use such information only for risk assessments or audits. The information should not be disclosed to any other person or entity or authority in the same jurisdiction or any other jurisdiction without the express written acknowledgement of the taxpayer.

Where a tax authority does request certain information (in particular trade secrets or sensitive information) the tax payer should have the option to request a written explanation as to why the requested information is needed for the tax authorities enquiries if this is not already clear to the tax payer. This would ensure that tax authority requests are reasonable and relevant.

Specific anti-infringement procedures should be included to protect taxpayers from unauthorised information disclosure by tax administrations, or if disclosure is in conflict with existing legal restrictions.

Q9: 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.**

Our preferred option is filing of the CBCR template in the parent company's jurisdiction and sharing under treaty information exchange provisions. We have concerns about confidentiality if the template is filed locally by all member entities. In addition, given the scope for misunderstanding and increased risk of audit and double taxation, we propose that the information is exchanged only where the country providing the information has effective mandatory arbitration provisions with the treaty partner, or is otherwise satisfied that there is commitment in policy and in practice to effective resolution of double taxation through the Mutual Agreement Procedure.

We believe that specific country related information could be shared with the tax administrations of other jurisdictions but only under existing tax treaties or Tax Information Exchange Agreements (TIEAs) or other appropriate multilateral or bilateral agreements, such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the "Multilateral Convention"). We note in this regard that the Multilateral Convention is open to all countries, which may represent an effective solution to ensuring that developing countries are able to join. This may also help to address confidentiality concerns regarding access to information.

At a very minimum, countries that do not have access to information through normal treaty channels should be required to sign up to and comply with the Multilateral Convention. Even where countries do sign up to the Multilateral Convention, clear guidance would be needed to ensure that information demands from tax administrations are relevant, reasonable and proportionate and to clearly reaffirm that confidentiality would be required. The requesting tax administration should only be permitted to obtain relevant country specific information for the transfer pricing transaction(s) they are assessing.

Q10: Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

This requirement also appears in the EUTPD, and is one of the major reasons for the reluctance on the part of taxpayers to comply with those requirements. How an MNE's pricing policy has been implemented through local compliance processes provides no relevant information to other unaffected tax authorities and may deter the use of APAs leading to higher burdens for tax authorities and taxpayers, and therefore we do not believe they should be part of the master file.

Appendix 2 – CBCR case study findings

A group of MNEs have worked on a pilot study to assess the practicalities of compliance with a requirement to produce a CBCR template and to evaluate the usefulness of such a template as a risk assessment tool for tax authorities.

The MNEs are all UK Headquartered with significant global operations. The group span the following sectors: FMCG, pharmaceuticals, energy, hospitality and outsourcing services.

This document summarises our key findings:

- The terms 'top-down' and 'bottom-up' could imply two fundamentally different approaches, whereas for many MNEs the core source data is the same under either method. Both, group consolidation systems and local statutory accounts rely on the same transactional data. It is the reporting source only that is different.
- An entity by entity template contains so much data as to be impracticable as a risk assessment tool [up to 800 entities in one example, with 18 columns in the OECD draft CBCR template, equates to 14,400 items of data, for one MNE].
- A template prepared by country is both effective as a risk assessment tool and poses a lesser compliance burden [180 countries compared to 800 entities].
- Under either a group consolidation data approach or a local statutory approach, there will be additional manual and automation costs [up to £10 million initial estimates for a system based solution].

For this group of MNEs, as the consolidation system data is visible centrally, it will be significantly easier to use that as the basis for completing the template, than to carry out a global manual collection of statutory accounts and other accounting sources. We recognise that for other companies using local statutory accounts will be preferable and it is largely a question of how individual systems are configured. There are still a number of practical issues to be resolved however, some of which are included in the list of learnings below.

Learnings

- MNEs in the pilot have between 300 and 1,200 legal entities – the volume of data included in a by entity CBCR template therefore becomes very hard to use as a risk assessment tool.
- One MNE has so far identified the following variability in local statutory accounts data:

	Accounting periods	**Currencies**	**GAAPs**
UK	12 months to June, 12 months to December	GBP, USD	UK, IFRS
US (no Stats)	12 months to June	USD	US
Netherlands	12 months to June, 12 months to December	GBP, EUR, USD	Dutch, IFRS
Nigeria	12 months to June	NGL	IFRS
Turkey	6 months to June	TRL	Turkish?
Spain	12 months to June	EUR	IFRS?
Russia	12mths to December	RUB	Russian

- One MNE prepared the OECD draft CBCR template using statutory accounts data for the entities in one specific country. No total was shown, unlike the proposed template, as the differences above mean that a total is not meaningful for this MNE.
- Much of the data was not contained in the actual statutory accounts, but had to be sourced from underlying records. Most statutory accounts looked at did not include cash tax paid (because cash flow statements did not form part of the accounts), and many did not include employee

numbers. Very few included royalties or service fees. Most statutory accounts do not distinguish between external and intergroup sales. A number of assumptions/interpretations had to be made regarding what data was being asked for – such as an assumption that interest paid was intended to be interest P&L charge for the period.

- Gathering the information from various countries showed inconsistent interpretation of what was being asked for – the effort to provide guidance and check the output should not be underestimated.
- One off type transactions can easily distort the data – each needs to be understood and checked, and explanations prepared. Examples would be internal refinancing, write downs of investments.
- There are many specific issues arising from GAAP differences – one of the most common is where statutory accounts profit before tax includes dividend income. As dividends flow up a holding company structure, they are included in profit for every entity, leading to a total profit for a country being, in one case, several £ billion larger than the consolidated group profit.
- Group consolidation systems did not generally contain data by legal entity. Most did contain by country.