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**CFE Opinion Statement FC 16/2014 (Follow-up to Opinion
Statement FC 2/2014):
Comments on the OECD 2014 Guidance on Transfer Pricing
Documentation and Country-by Country Reporting (BEPS Action 13),**

Prepared by the CFE Fiscal Committee

Submitted to the OECD

in December 2014

CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 32 professional organisations from 25 European countries with 180,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

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Introduction

The following comments relate to the OECD document “Guidance on Transfer Pricing Documentation and Country-by-Country Reporting¹” (hereinafter: OECD Report), published on 16 September 2014, which is a follow-up to the OECD Discussion Draft of 30 January 2014², relating to Action 13 of the OECD/G20 BEPS (base erosion and profit shifting) Action Plan. The CFE has commented on that Discussion Draft in its Opinion Statement FC 2/2014³ of March 2014. The following comments are thus to be considered a follow-up to the CFE Opinion Statement FC 2/2014.

We will be pleased to answer any questions you may have concerning CFE’s comments. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

1. General comments

The CFE welcomes the decision reached in order to prevent the Country by Country Report (hereinafter, “CbCR”) from going public, as well as the balanced commitment reached on the specific content of the document on “(...) *tax administration information needs, concerns about inappropriate use of the information, and the compliance costs and burdens imposed on business.*” (OECD Report, p.10).

The CFE is mostly pleased with the commitment expressed by all of the 44 countries on the crucial importance of ensuring an effective implementation of the new reporting standards and reporting rules among countries, in order to avoid discrepancies and further disputes.

Moreover, the CFE is pleased to conclude that some of the comments and recommendations made by the CFE to the Discussion Draft on Action 13 were included in the new Report. In particular, the CFE welcomes the significant changes that have been included into this Report, which are in line with some businesses and other stakeholders’ concerns (such as the significant reduction of the number of elements to be reported in the Country by Country Report’s template/form).

As far as the exchange of the Country by Country Report among jurisdictions is concerned, the CFE supports the OECD efforts to identify the most appropriate means of filling in the required information as well as to identify the correct channel/procedure to exchange the same among jurisdictions (ensuring the required level of confidentiality).

Any initiative aimed at improving consistency in the development of transfer pricing documentation guidance is generally welcomed by the CFE. As we already mentioned, the desired approach should point at standardisation, in order to favour consistency, transparency and reduce compliance costs connected to the collection and organisation of transfer pricing documentation in the different countries in which the multinational enterprise (MNE) operates. Simplified and consolidated compliance obligations by

¹ <http://www.oecd.org/tax/guidance-on-transfer-pricing-documentation-and-country-by-country-reporting-9789264219236-en.htm>

² <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf>

³ <http://www.cfe-eutax.org/node/3571>

businesses, if achieved, would provide the balance which is currently lacking in the approach to transfer pricing documentation.

Finally, the CFE stresses how important transparency is for tax administrations and tax compliance by taxpayers. Any action in the field of CbCR should be carried out by taking into account the right balance between the usefulness of data to the tax administrations for risk assessment purposes, and the compliance burden on taxpayers, while ensuring that specific information be kept confidential.

2. Specific Comments to the issues outlined in the September 2014 Report

B.2. Transfer pricing risk assessment

As previously mentioned in the comments submitted by the CFE to the Discussion Draft on Action 13, common standards/guidelines (such as the EU TPD Code of Conduct) and common information sources (such as commercial databases) already exist and, if constructively combined with the proposed content of the Master File and Local File contained in Appendix I and II of the *Discussion Draft on Transfer Pricing Documentation and CbC Reporting*, they will provide tax authorities and taxpayers with the necessary tools in order to identify and evaluate transfer pricing policies and relative risks.

In the CFE's view, what is mainly needed is a common (mandatory) OECD framework among countries that will eliminate local divergences and ease the compliance burden on taxpayers and allow tax authorities to have information submitted in a standard format by all countries.

Dialogue and sharing of information between tax administrations and taxpayers should be encouraged, including the disclosure of risk assessment measures and results to taxpayers.

B.3. Transfer pricing audit

The CFE welcomes and supports the recommendation that *"where a jurisdiction requires particular information to be kept for transfer pricing audit purposes, such requirements should balance the tax administration's need for information and the compliance burdens on taxpayers"* (OECD Report, p. 17).

While it is appreciated that tax administrations should be in the position of having all the relevant documentation in order to conduct an audit/risk assessment, excessive burdens should not be imposed on taxpayers. By the same token, whereas taxpayers should make reasonable efforts to provide complete and adequate documentation, tax administrations should not exploit existing instruments, such as information exchange mechanisms, in order to obtain information in the possession of associated enterprises located outside their jurisdictions.

The CFE is, however, disappointed in realizing that the OECD Report does not provide much input on standards and smoother processes which, in the CFE's opinion, should be developed/enhanced in order to improve existing mechanisms that impose excessive/unnecessary burdens on taxpayers.

C. A Three-tiered approach to transfer pricing documentation

The CFE welcomes and supports the decision of a three-tiered approach to transfer pricing documentation (consisting of a Master File, a Local File and a Country-by-Country Report) rather than the two-tiered approach suggested within the first draft circulated for discussion.

The CFE is pleased to conclude that the suggestion expressed in its Opinion Statement FC 2/2014 to include the CbCR as a separate document, rather than as an annex to the Master File, were taken into account.

C.1. Master File

The CFE welcomes the decision to grant maximum flexibility on how to consolidate information (as long as consistency is guaranteed). As a matter of fact, the decision of the OECD to favour the preparation of a Master File on an entity basis, rather than on a line of business approach, is in line with the CFE comments submitted to the First OECD Discussion Draft on Action 13.

The CFE welcomes the recognition that taxpayers should be allowed the flexibility to choose the option that best suits their business and company structure.

C. 3 Country-by-Country Report

The CFE welcomes and supports the recommendation that *“the information in the country-by-country report should not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis”* (OECD Report, p. 19).

D. Compliance issues

D.1. Contemporaneous documentation

The CFE welcomes and is pleased to understand that the OECD agrees with CFE comments that further guidance should be provided on the most straightforward approach in order not to impose an excessive burden on taxpayers that may find themselves in the position of preparing/amending/updating the documentation several times during the year.

The CFE agrees that *“each taxpayer should endeavour to determine transfer prices for tax purposes in accordance with the arm’s length principle, based upon information reasonably available at the time of the transaction. Thus, a taxpayer ordinarily should give consideration to whether its transfer pricing is appropriate for tax purposes before the pricing is established and should confirm the arm’s length nature of its financial results at the time of filing its tax return”* (OECD Report, p. 20).

D.3. Materiality

As the CFE has already stated in its Opinion Statement FC 2/2014, a specific guideline and definition of materiality is paramount in order to avoid creating an excessive burden on taxpayers and allowing tax authorities to focus on important transactions. Therefore, the CFE welcomes the recommendation that *“Individual countries should establish their own materiality standards for local file purposes, based on local conditions. The materiality standards should be objective standards that are commonly understood and accepted in commercial practice”* (OECD Report, p.21).

Moreover, the CFE welcomes and supports the conclusion reached that *“not all transactions that occur between associated enterprises are sufficiently material to require full documentation in the local file”* (OECD Report, p.21), as well as the resolution that *“individual country transfer pricing documentation requirements based on Annex II to Chapter V of these Guidelines should include specific materiality thresholds that take into account the size and the nature of the local economy, the importance of the MNE group in that economy, and the size and nature of local operating entities, in addition to the overall size and nature of the MNE group. Measures of materiality may be considered in relative terms (e.g. transactions not exceeding a percentage of revenue or a percentage of cost measure) or in absolute amount terms (e.g. transactions not exceeding a certain fixed amount). Individual countries should establish their own materiality standards for local file purposes, based on local conditions. The materiality standards should be objective standards that are commonly understood and accepted in commercial practice”* (OECD Report, p.21).

Furthermore, the CFE also welcomes the recommendation to refrain from requiring small and medium sized enterprises (SMEs) to produce the same amount of documentation that is expected to be prepared by larger enterprises. In the CFE’s opinion, the obligation of mandatorily preparing a Transfer Pricing Documentation should not be imposed on SMEs with relatively simple ownership structures and operations envisaging, instead, a risk-differentiated approach whereby smaller taxpayers, or taxpayers with relatively small or low-risk transactions can align the effort required to prepare documentation with their risk.

D.5. Frequency of documentation updates

The CFE welcomes and supports the proposal in paragraph 38 of the OECD Report which provides that *“in order to simplify compliance burdens on taxpayers, tax administrations may determine, as long as the operating conditions remain unchanged, that the searches in databases for comparables supporting part of the local file be updated every 3 years rather than annually. Financial data for the comparables should nonetheless be updated every year in order to apply the arm’s length principle reliably”*.

However, the CFE acknowledges that, as already mentioned within the comments submitted by the CFE on the first Discussion Draft, no reference is made to the selection process of comparables. Specific wording discouraging *cherry picking* from both, taxpayers and tax administrations, could also have been taken into consideration.

D.6. Language

Although the proposal agreed upon in connection with *“language”* issues does not entirely meet with CFE expectations (the CFE favoured that Master Files be prepared in the language of the parent company or in

a common language, such as English, to simplify taxpayers' compliance), the CFE welcomes the proposal that countries be encouraged to allow taxpayers' completion of transfer pricing documentation in commonly used languages, provided that this does not cause any prejudice to the usefulness and the comprehension of such documents. In addition, the CFE supports the proposal that any request by tax administrations to translate documentation (whenever deemed necessary), should include specific translation requests and provide sufficient time to allow such documents to be duly translated (stringent timelines imposed on taxpayers for translations are not acceptable, as this would represent an extra burden).

D.7. Penalties

The CFE was expecting further guidance on the subject matter of penalties. Regrettably, the OECD Report did not provide much improvement on this field.

D.8 Confidentiality

The CFE welcomes and supports the commitment included in the OECD Report vis-à-vis confidentiality *"Tax administrations should take all reasonable steps to ensure that there is no public disclosure of confidential information (trade secrets, scientific secrets, etc.) and other commercially sensitive information contained in the documentation package (master file, local file and country-by-country report). Tax administrations should also assure taxpayers that the information presented in transfer pricing documentation will remain confidential"* (paragraph 44 of the OECD Report, p. 24).

The CFE on this matter refers back to the detailed suggestions included in the CFE Opinion Statement FC 2/2014 on the Discussion Draft.

D.9. Other issues

The CFE was expecting the OECD to shed some light on the use of pan-European, Asian/American benchmarks vs. local comparables, in particular, one would think of cases such as transactions with African countries, where no local comparables (nor databases) exist as of yet.

As pointed out by the CFE within the Comments submitted on the first Discussion Draft, further clarity and guidance should be provided on the use of pan-European, Asian/American benchmarks vs. local comparables. Unfortunately the Report does not provide much input to improve this issue.

The CFE welcomes the recommendation setting forth that it is not advisable for tax administrations to require certification by an external auditor or any other third party for transfer pricing documentation, nor is it recommended to establish a mandatory requirement to use consulting firms for the preparation of transfer pricing documentation.

E. Implementation

The CFE is disappointed to observe that to date no consensus has been reached on this matter. However, the CFE welcomes the agreed commitment to ensure an effective and consistent implementation of the guidance provided in this Chapter of the Guidelines and particularly on the new country-by-country reporting among countries.

Moreover, the CFE welcomes and supports the decision to set phase-in rules for implementation so as to ensure a successful transition for the new documentation regime. This phase-in period will allow businesses to prepare the tools and systems to adjust to the new CbCR requirements and for tax administrations to be technically prepared to apply the new guidelines.

Although the CFE deems that to ensure confidentiality, CbCR should be exchanged through the treaty network (under the exchange-of-information articles in tax treaties or tax information exchange agreements), the CFE recognises the reservations made by developing countries which, at the moment, do not have a wide treaty network.

In addition, the CFE welcomes and supports the commitment expressed by the OECD on considering potential filing and disseminating of CbCR that span from *“(i) treaty information exchange provisions, (ii) coordinated technological platforms, and (iii) the development of model local law provisions, may make to achieving the objectives of effective transfer pricing risk assessment in all relevant countries”* (OECD Report, p. 26). As an alternative, CbCR exchange might also be carried out through a multilateral instrument (as the one suggested under Action 15 of the BEPS Action Plan), as long as necessary safeguards are ensured (confidentiality, reasonableness of the CbCR request, appropriate usage, etc.).

The CFE further deems that it is most essential to decide on a global timeline for implementation, in order to avoid differences on the implementation timeline among jurisdictions. The suggested global timeline would avoid competitive disadvantages. In addition, implementation should guarantee that jurisdictions establish the necessary changes to their local framework before requiring any CbCR implementation.

Annex I to Chapter V: Transfer Pricing Documentation - Master File

The CFE welcomes the recommendation to include in the Master File *“a list and brief description of the MNE group’s existing unilateral advance pricing agreements (APAs) and other tax rulings relating to the allocation of income among countries”* (OECD Report, p. 29). As the CFE has already pointed out within the comments submitted in the previous Discussion Draft, the inclusion of this information in the Master File will allow tax administrations to effectively assess the risk of MNEs transfer pricing policies. Some jurisdictions (e.g., Italy) already provide in their documentation requirements the need to disclose any APAs, rulings or MAPs.

Annex III to Chapter V: A Model Template of Country-by-Country Reporting

The CFE welcomes the decision to reduce the number of elements to be reported in CbCR (by jurisdiction: revenues (related/unrelated party)); profit/loss before income tax; income tax paid (cash basis) and accrued; stated capital and accumulated earnings; number of employees; tangible assets other than cash/cash equivalents; and by constituent entity: country of organisation/incorporation (if it differs); main business activity.

4. Conclusion

To conclude, the CFE supports that *“the country-by-country report will be helpful for high-level transfer pricing risk assessment purposes. It may also be used by tax administrations in evaluating other BEPS related risks and where appropriate for economic and statistical analysis. However, the information in the country-by-country report should not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis. The information in the country-by-country report on its own does not constitute conclusive evidence that*

transfer prices are or are not appropriate. It should not be used by tax administrations to propose transfer pricing adjustments based on a global formulary apportionment of income”. (OECD Report, p. 19 – 20).

The CFE welcomes the commitment expressed by the OECD to ensure the right balance between the usefulness of data to tax administrations for risk assessment purposes and compliance burdens on taxpayers. As the CFE already expressed in the comments to the previous Discussion Draft, it is essential to take a measured approach towards materiality and proportionality in identifying contents and the timeframe for information to be provided by taxpayers to tax authorities, clearly identifying what is intended by *“documentation that would be most helpful in showing that (taxpayers’) transactions satisfy the arm’s length principle”*.

Effective and consistent implementation of CbCR is crucial, and the CFE is looking forward to better understanding which will be the recommended solutions for CbCR exchange, while safeguarding the confidentiality issues that concern taxpayers.