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Brussels, 21 February 2014

Subject: EBF Comments on BEPS Action Plan – Action 13: Discussion Draft on Transfer Pricing Documentation and Country By Country Reporting

Dear Sirs,

The European Banking Federation (EBF)¹ welcomes the opportunity to comment on the OECD's current work on transfer pricing documentation and country by country reporting as part of the Base Erosion and Profit Shifting (BEPS) project.

The EBF is however concerned about the very short time frame for public comments. We consider that the given short time frame is not consistent with the magnitude of the discussion and objectives, and forces respondents, particularly those such as the EBF with a diverse membership, to limit their responses to specific points and refrain from expanding on technical details.

The Federation notes that BEPS action 13 articulates the challenging dual purpose of (i) enhancing transparency for tax administrations and (ii) considers the compliance burden for taxpayers. We welcome the OECD's attempt to use the update of chapter V to establish a common framework and the proposed two-tier (standardized) documentation package. We encourage the OECD to continue this particular work.

You will find below our responses to the requests for comments raised in the discussion draft. There are, however, two particular points we would like to highlight, which have not been included in our responses.

¹ Launched in 1960, the European Banking Federation is the voice of the European banking sector from the European Union and European Free Trade Association countries. The EBF represents the interest of some 4,500 banks, large and small, wholesale and retails, local and cross-border financial institutions. Together, these banks account for over 80% of the total assets and deposits and some 80% of all bank loans in the EU alone.

First, is that banks are subject to banking regulations in every jurisdiction in which they operate, and that these regulations can have a material impact on transfer pricing application but are developed independently or in isolation from the tax environment. It is important that the OECD ensures that the BEPS regime aligns with the regulatory regime in a manner that is mutually reinforcing wherever possible.

Second, is that according to paragraph 25 (D.1. Contemporaneous documentation) a taxpayer *ordinarily should give consideration to whether its transfer pricing is appropriate for tax purposes before the pricing is established*. The EBF urges against devising a regime in which transfer pricing legislation inhibits sound and reasonable business decisions.

We appreciate your consideration of our comments and suggestions and remain at your disposal to contribute further as the work develops.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Guido Ravoet", is written over a faint, light blue circular watermark or stamp.

Guido Ravoet

EBF RESPONSES TO THE REQUESTS FOR COMMENTS LISTED IN THE OECD DISCUSSION DRAFT ON TRANSFER PRICING DOCUMENTATION AND COUNTRY BY COUNTRY REPORTING

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.

- Any additional standard form or template will require taxpayers to develop new interfaces to their own systems, increasing the compliance burden and possibly duplicating the required information captured in the Master file or local file.

We believe that priority should be given to the standardization (content and structure) of a Master File and Country Files ahead of country by country reporting. We urge against the creation of new reporting requirements that simply duplicate information already contained in the Master file or in the Country specific documentation prepared according to the known and widely used documentation guidelines.

We consider that instead of inventing templates, chapter V could instead provide detailed guidance about what, if any, additional documentation requirement is really necessary to enhance transparency. If there should be any additional reporting, the amount of data requested should be limited to that which is necessary i.e. missing information in the Master file or local file.

- We consider that each tax authority should be carrying out its own risk assessment i.e. its assessment of the risk in its own jurisdiction, and the risk assessment should be shared with taxpayers to allow an informed and constructive dialogue to take place.

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.

- We consider that it should be left to the taxpayer to decide the right approach for the Master file. Conglomerates may, for example, select the option of lines of business, whilst multinational banks with few business lines may choose the entity wide basis.

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.

b. 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?

- MNEs should be given the choice of whether a top down or bottom up approach is adopted. As long as it is used consistently it achieves both objectives of allowing risk assessment and minimizing the compliance burden imposed on firms.

d. 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?

- The discussion draft advocates for disclosure of tax on a cash basis. It could as well be current basis or even a total of current & deferred tax (tax on profit and loss). None of which, however, would tell the full story in relation to transfer pricing.

Financial MNEs (within the EU at least) are generally subject to the CRD IV Directive. For financial institutions subject to CRD IV it would minimise the compliance burden to use the same tax figure (and indeed the same basis of disclosure for all other items). Article 89 sets out disclosure rules for country-by-country reporting which are not dissimilar to the proposed OECD template.

From 1 January 2015 Member States shall require each institution to disclose annually, specifying, by Member State and by third country in which it has an establishment, the following information on a consolidated basis for the financial year:

- a) name(s), nature of activities and geographical location*
- b) turnover;*
- c) number of employees on a full time equivalent basis;*
- d) profit or loss before tax;*
- e) tax on profit or loss;*
- f) public subsidies received.*

We would urge that financial institutions be allowed to use this reporting format for transfer pricing purposes – bearing in mind that some branch entities may not be shown separately for CRD IV purposes but would have to be disclosed in the TP template.

We would urge that the position of branches (which are a common feature of banking groups) need to be given further consideration.

Information about controlled transactions (royalties, interest and service fees) will already have to be specified in the documentation files. To include it here would duplicate compliance work.

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

- Both the Master File and the Country specific files should be filed in English. Each country specific file is often based on a copy of a parent company information and tends thus to be drafted in English. Translation into several languages will be costly, time demanding and may jeopardize the idea of a reduced compliance burden resulted by the two-tier concept.

As to the Master file, it should be acceptable with, for example, English and translation on demand. Translation should in any case be done by people with transfer pricing knowledge to avoid mistaken messages.

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.

- Master files may well contain sensitive information which would need to be protected.
- If necessary a tax administration could be given access to read but not to copy sensitive material.
- As regards confidentiality of information in the financial services field, we would urge certain measures to be considered, such as acceptance by tax authorities of e.g. CUP references with blackened out names of clients or suppliers. In our view, a CUP reference should rather be tested on its contractual terms than on the specific name of the client.
- Confidentiality would be enhanced if the master file is filed with the Tax Authority of the jurisdiction in which the top parent company is based. Information could then be exchanged with Tax Authorities of other jurisdictions, under existing agreements or the BEPS suggested multilateral agreement. This agreement could prescribe the use to which the information may be put and shared and additionally could require signatory countries to submit to binding mutual arbitration. Please also see following question and response.

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

- The EBF favours disclosure to the parent tax authority and for any information sharing to be through treaty provisions.

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