



1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
202.638.5601
tei.org

2019-2020 OFFICERS

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W. PATRICK EVANS
Chief Tax Counsel

7 November 2019

Platform for Collaboration on Tax
c/o The World Bank Group
1818 H Street, NW
Washington, DC 20433

Via email: taxcollaborationplatform@worldbank.org

RE: Draft transfer pricing documentation toolkit for developing countries

The Platform for Collaboration on Tax is a joint initiative of the International Monetary Fund, Organisation for Economic Co-Operation and Development (OECD), United Nations, and World Bank Group (collectively, the Platform). The Platform published a document entitled "Practical Toolkit to Support the Successful Implementation by Developing Countries of Effective Transfer Pricing Documentation Requirements" (the Draft Toolkit) on 27 September 2019 and requested input from interested stakeholders. I am pleased to respond to the Platform's request for input on behalf of Tax Executives Institute, Inc. (TEI).

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 57 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 individual members represent over 2,800 of the leading companies in the world.¹

TEI Comments

The Platform posed four specific questions to interested stakeholders regarding the Draft Toolkit. TEI's answers to these questions are set forth immediately below.

¹ TEI is a corporation organized in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

Q.1. Does this draft toolkit effectively address all the relevant considerations for the design of an effective transfer pricing documentation regulatory system?

Generally, the Draft Toolkit addresses all the main considerations an effective transfer pricing documentation regulatory system requires. Coherence and coordination of the Draft Toolkit's approach with Action 13 of the OECD's base erosion and profit shifting (BEPS) project's transfer pricing documentation standards is critical, however. The Action 13 model is generally accepted by the vast majority of countries and is a useful method for reporting information about related party transactions and their valuation. Consistency with Action 13 will help balance tax administrative imperatives with the compliance burden on multinational enterprises (MNEs), the latter of which has substantially increased since the final BEPS project reports issued in 2015.

In this regard, TEI recommends developing countries: (i) adopt the master and local file formats recommended by the OECD's Final Action 13 Report; (ii) adopt the OECD country-by-country report XML file format and the related data, without requesting additional taxpayer data; (iii) accept a master file and country-by-country report prepared in English, as translation is expensive for multinational enterprises having a footprint across several countries; and (iv) adopt materiality thresholds to exempt taxpayers from transfer pricing documentation requirements and special reports if their related party transactions are below such thresholds, indicating a low risk.

The Draft Toolkit should acknowledge certain documents and information are not available to all affiliates of an MNE primarily because of their confidential and/or proprietary nature, among other reasons. Examples of such information include detailed cost and expense structures, profits earned by foreign companies of the group in related party transactions, confidential contracts with customers and suppliers of the related party, etc. In situations where the local taxpayer cannot access related party information, tax authorities should use the exchange of information provisions contained in double tax treaties to obtain the relevant information from the other jurisdiction.

Q.2. In terms of enforcement of transfer pricing documentation, are particular approaches (e.g. penalties or compliance incentives) especially beneficial for limited capacity developing countries?

As a general principle, penalties should be in proportion to the objectives of the documentation requirements, the nature and extent of the violation, and whether the taxpayer has made reasonable efforts at compliance.

Table 4 of the Draft Toolkit summarizes approaches to penalties regarding transfer pricing documentation.² It would be beneficial if the Draft Toolkit also provided guidance and/or examples limiting penalties should a taxpayer find itself in a situation where more than one penalty may apply. This would avoid unreasonable "stacking" of penalties resulting from the same error (exceptions could be made in cases of fraud or willfulness).

² Draft Toolkit at p.21-23.

TEI also recommends using a compliance incentive to comply with transfer pricing documentation requirements. For example, tax authorities should have the burden of proving transactions are not arm's length when the taxpayer has substantially complied with all the local authority's transfer pricing documentation requirements.

In addition, the use of reasonable "safe harbours" for low risk transactions would reduce the workload of tax administrators and taxpayers without undermining tax collection. Transactions taking place within the same jurisdiction or within the same tax unit/tax consolidated group should also be considered low risk.

Q.3. Are there other transfer pricing documentation requirements not covered in this toolkit that should be considered?

Some developing countries require local affiliates of MNEs to maintain documentation and information supporting the affiliate's related party pricing. Such documentation may differ from the information local taxpayers typically maintain (e.g., the local affiliate will generally maintain contracts and invoices to which the affiliate is a party but may not have access to an MNE's overall transfer pricing approach, its global purchase agreement). The documentation (e.g., valuations prepared by a third party or by the company itself, third party invoices, etc.) could be difficult for the local taxpayer to obtain. Tax authorities should exercise restraint in such cases and limit any such requests to information or documentation considered vital. The exchange information provisions of the relevant double tax treaty could also be used to obtain the additional information tax authorities consider necessary.

As for the specific transfer pricing returns required by some jurisdictions, because they are usually requested together with regular transfer pricing documentation (i.e., the master file and local file), the information requested should not be duplicative of the information already included in the transfer pricing documentation.³ This would ease taxpayer compliance burdens and not prevent tax authorities from gaining access to the necessary information to conduct risk assessments.

Q.4. What additional considerations and/or tools can be included in this toolkit to assist developing countries to implement effective transfer pricing documentation?

The final toolkit should recommend tax authorities only ask for documentation available to the local taxpayer. Local tax authorities should use the exchange of information mechanisms available under bilateral income tax treaties to obtain information unavailable to local taxpayers, as noted above.

Consistent implementation among jurisdictions regarding the country-by-country report under BEPS Action 13 is essential to avoid information asymmetry and to ensure appropriate use of the information in the report. Thus, protocols to allow for the automatic exchange of country-by-country

³ The quantitative information usually reported in a transfer pricing return is often similar to information included in the local file.

reports should be fully in place so no taxpayer is required to fill out a country-by-country report in more than one jurisdiction.

The Draft Toolkit should also reiterate the confidentiality of taxpayer information in the country-by-country reports. The second phase of the peer review of the minimum standard on Action 13 concluded 41 jurisdictions have received a general recommendation to either put in place or finalize their domestic legal or administrative framework for country-by-country reports, and 17 jurisdictions received one or more recommendations to make improvements to specific areas of their framework. Thus, jurisdictions whose domestic legal or administrative framework has not been finalized or is incomplete at the time they received the country-by-country reports should not be able to use the country-by-country reports or impose any related penalty. Obtaining access to country-by-country reports should be viewed as an incentive for countries to join the OECD Inclusive Framework.

In addition, confidentiality should not be limited to the data contained in the country-by-country report. The master and local files also contain confidential business information and should be subject to the same confidentiality and protection standards with respect to their storage, communication, and usage as the country-by-country reports. The same concerns also apply to other transfer pricing returns and reports requested by tax authorities

Finally, TEI notes the Draft Toolkit could reference the information tax authorities are permitted to request in the negotiation of an Advance Pricing Agreement or during a Mutual Agreement Procedure for purposes of providing guidance on proper transfer pricing documentation.

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TEI appreciates the opportunity to comment on the Draft Toolkit. TEI's comments were prepared under the aegis of its European Direct Tax Committee, whose co-chairs are Kris Bodson and Giles Parsons. Should you have any questions about our comments, please contact Ms. Bodson at +32 2 746 36 01 or kbodson@its.jnj.com, Mr. Parsons at +44 793 921 5554 or gilesparsons55@gmail.com, or Benjamin R. Shreck of TEI's legal staff at +1 202 464 8353 or bshreck@tei.org.

Respectfully submitted,
TAX EXECUTIVES INSTITUTE



Katrina H. Welch
International President