ICC comments on the OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting

1. Introduction

1.1. The International Chamber of Commerce (ICC) is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization.

1.2. ICC is a longstanding proponent of corporate transparency—dating back to work on the conduct of multinational enterprises in the 1920s. ICC members are fully committed to improved tax transparency and have welcomed key developments in many countries such as the introduction of horizontal monitoring, individual risk assessments and/or enhanced relationships between tax payers and authorities. The OECD is to be commended for its role in furthering this agenda over the past decade.

1.3. In this context, ICC has broadly welcomed the G8 commitment to "create a common template for multinationals to report to tax authorities where they make their profits and pay their taxes across the world". We are grateful for the opportunity to comment on the OECD's Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting (CbCR).

1.4. The comments set out below are based on broad consultations with member companies throughout the ICC network in over 130 countries.

2. General comments

2.1. ICC is concerned that the draft CbCR template goes significantly beyond the stated aim to develop a high-level risk assessment tool to provide tax authorities with a better view of multinational groups' global activity and taxes paid. As a result, the draft instrument, if introduced, would likely entail highly disproportionate compliance costs—estimated by several ICC members at tens of millions USD, both in terms of transitional and ongoing costs.

2.2. We note that there is no indication within the commentary to suggest that the OECD working group has factored in likely compliance burdens for business—an issue which is specifically referenced in the BEPS action plan on these proposals. Further clarity on cost considerations would be appreciated in due course.

2.3. We also have significant concerns that the proposed content of the report could encourage the application of formulary apportionment-type calculations by tax authorities to propose transfer pricing adjustments. We welcome several public comments made by the OECD that formulary apportionment should not be pursued as an option to replace the arm's length principle; but there is nevertheless significant concern amongst ICC members that the level of detail in the

draft CbCR template risks undermining this approach. This may have significant implications for global trade – an issue that we would encourage the Working Group to consider carefully as it further develops the CbCR template.

2.4. In this context, ICC considers it essential that the draft CbCR template is further refined in order to: (a) enhance the proposed instrument as a risk assessment tool; (b) eliminate unnecessary compliance costs; and (c) avoid any inadvertent move towards formulary apportionment. This can be best achieved by: (i) refining the data set; and (ii) ensuring an appropriate degree of flexibility for businesses in choosing the source of that data.

2.5. Detailed comments on each of the questions set out in the Consultation Document are provided below.

3. Master file and Implementation Approach

Should the country-by-country report be part of the master file or should it be a completely separate document, what is the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations?

3.1. In line with the original G8 mandate, the CbCR template should be limited to high-level data which is required to establish the footprint of a multinational company—and by extension determine which countries within its footprint give cause for concern and identify where further questions should be raised. In our view, the information requested in the draft instrument far exceeds what is necessary for this purpose and, moreover, includes information which could fall under business secrecy rules in certain countries.

3.2. As such, it is our view that data fields should be limited to where profits are earned, taxes are paid, and assets, people and functions located. Given that the template already contains more data than is necessary, we are—as a general principle—concerned by the possible introduction of additional forms or questionnaires.

3.3. If it is to be used as a risk management tool, the CbCR template should not be part of the Master File but should be a separate document that is completed and filed with the tax authority dealing with the parent company. The CbCR template addresses information that is independent from transfer pricing and has no connection with arms-length pricing—for instance, the inclusion of taxes paid in each country. It is of some concern that the Discussion Draft appears to conflate these separate objectives in some places.

3.4. Once filed with the parent company tax authority, the template should be shared between tax authorities using the network of treaty and exchange agreements. These contain safeguards to ensure that data remains confidential. The CbCR template should not be required to be filed by each company within the group.

3.5. Such an approach would bring a number of important benefits. First, with regard to cost-benefit considerations, it should be noted that a lot of companies and permanent establishments within a multinational group constitute only a very small part of the group activities. Requiring the same set of data from each single entity would create a disproportionate compliance cost without any tangible gain in terms of enhanced transparency. These costs would be largely negated by requiring only the parent company file data with its home tax authority.

3.6. Second, this approach would ensure that the information will only be used for its intended purpose under the tax confidentiality rules applicable under existing exchange agreements. There is significant concern amongst ICC members that if the country-by-country report is part of the master file—and as a result information for hundreds of legal entities has to be provided to all the tax authorities around the world—the information will find its way to the public where it will be subject to misinterpretation and abuse for public campaigns.

3.7. ICC considers that standard forms and questionnaires should only be developed if they facilitate the production of relevant information in a standard format—and in doing so obviate the need to produce less targeted and immaterial information. 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. We are nevertheless concerned that despite the OECD's best intentions, it may prove very difficult to reduce existing local country requirements. As such, any new OECD templates and questionnaires would add to, rather than replace separate country reporting requirements. This would be of significant concern to business.

4. Design of the template

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?

4.1. Every multinational company will differ in its internal systems and therefore the cost of providing CbCR data will vary from one organisation to another. This is an important reason why the CbCR template should include a choice on source of data.

4.2. From our consultations within the ICC network it is apparent that some companies will prefer a top down approach; others (such as those that have decentralised reporting systems) the bottom up approach. A degree of flexibility is therefore required to avoid the risk of arbitrarily imposing costs on some groups.

4.3. A more important consideration, in our view, is that whichever method is used it needs to be applied consistently so that tax authorities have a comparable picture year on year from which to identify trends in and changes to a particular company's business model. It is important to reiterate that the intention of CbCR is not to allow for comparison across multinationals, but within these companies. Therefore, so long as the template is completed using consistent principles by each MNE, the data should allow tax authorities to see directional information in order to undertake a high-level risk assessment.

4.4. In this connection, flexibility should be allowed, subject to tax authorities being able to ask why the taxpayer has used a particular route and confirmation by taxpayer that no material divisions or activities are left out.

4.5. The OECD draft assumes that the use of a top down approach will require an allocation of profit across countries. It should be noted that this is not the case. No allocation is required: what is capable of being reported are the actual results from the group consolidation system.

4.6. The complexity of these issues means that any new CbCR regime should be accompanied by an appropriate phase-in period, to provide businesses with sufficient time to pull data together across legal entities and present such information accurately and consistently.

5. Entity or Country Level Reporting

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?

5.1. The CbCR template should be compiled on a country basis. In our opinion, including a total for each country—together with columns for external sales, intercompany sales, profit before tax, cash tax paid, employee numbers and activity code—should provide sufficient information for tax authorities to conduct a robust risk assessment.

5.2. To include entity level information will impose an onerous compliance cost on multinational companies. Some groups will have thousands of entities, leading to reports running to hundreds of pages. It is unclear to us what specific purpose such additional information will serve. Do tax authorities have the time and resources to review the data in such detail? Moreover, why would a tax authority in "Country A" be interested in the detail of every company within "Country B" where there is no connection between the two jurisdictions? In this connection, we believe that an excess of (largely irrelevant) data is likely to diminish the utility of the CbCR template as a risk assessment tool.

6. Taxes Incurred Methodology

Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?

6.1. The template should require one number for cash taxes paid per county as this is the basis on which multinationals pay their taxes worldwide. Apportionment of a group payment across entities based on the pre-tax profit of each is artificial and does not reflect the actual taxable profit that can be significantly different—e.g. due to the availability of tax depreciation.

6.2. The tax charge in the accounts should not be used as this will include both current and deferred taxes, plus prior year adjustments and true ups. The tax charge will not enable the user of the data to see clearly and quickly what has been paid in each country in any one year.

7. Disclosure of Specific Types of Intra-Group Transaction

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

7.1. We consider cash paid to be the most appropriate measure for inclusion in the template. Does "due basis" mean the profit and loss account charge under the accruals concept or does it refer to the year-end liability shown in the balance sheet? We believe that an aggregate number for each country is needed.

7.2. The CbCR template should not include information that is already proposed to be included in transfer pricing documentation such as the Master and Local file—arguably intra group royalties, interest and service fees are included in these. The issue is that local files will show the figures but just for one jurisdiction; the proposed template shows all countries together. Such data is also potentially included in APAs and other rulings, but again disclosure of this information may be limited to the countries party to specific agreements.

7.3. If the CbCR template is to include royalties, interest and service fees there could be significant additional work required with the associated compliance costs. This is because the underlying accounting policies within groups can be different for different types of payment and charges. Where an item is not consistently recorded in any system, the template may potentially require a change to the financial accounting policies and practices of a group globally. This will impose a disproportionate compliance cost compared to the benefit to be gained if a multinational group is to satisfy the Master and Local file requirements.

7.4. Withholding tax should be included. There are some cases where (due to the nature of the business structure) withholding tax is a significant part of corporation tax paid. There will be an additional burden.

8. Materiality

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

8.1. The country-by-country template should be prepared to take account of materiality considerations from a MNE perspective—including 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.

8.2. What could pose a challenge to materiality is the occurrence of free-of-cost transactions (e.g. guarantee fees), or transactions such as advertising and marketing expenses that exceed, for instance, the bright-line test. These transactions will not ordinarily be reported because they are below materiality level and therefore, deserve special treatment for disclosure purposes.

9. Documentation process

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?

9.1. Paragraph 23 of the Discussion Draft appears to suggest that a comparables analysis would be required in each local file for each year for each transaction. This would entail significant cost for limited benefit. Accordingly, ICC recommends that the suggestion in paragraph 34 be formally adopted to require comparables analysis only every three years for all transactions.

10. Confidentiality

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.

10.1. ICC members consider it imperative that further consideration is given to the measures in place to safeguard the confidentiality of data provided under the CbCR. This is particularly important where disclosures may contain sensitive commercial information.

10.2. Measures to protect the information could include:

- anti-infringement procedures available to taxpayers in order to protect them from unauthorised information disclosure by tax administrations if real damage is demonstrated;

- secure channels/technological means for information exchange between taxpayers and tax administrations in order to prevent information leakage;
- limiting sharing of data between tax authorities to entities within those particular jurisdictions and their intercompany activities (i.e. rather than disclosing the full master file); and
- reviewing (rather than filing) of sensitive information at taxpayer premises.