



Attn Mr Gerassimos Thomas  
Director General  
DG TAXUD  
European Commission  
1049 Bruxelles  
Belgium

22 December 2023

**Re: Have Your Say - Proposal for a Council Directive on transfer pricing – Feedback period 19 September 2023 - 3 January 2024**

Dear Mr Thomas,

PwC International Ltd, on behalf of its network of member firms (PwC), welcomes the opportunity to share its views on the Proposal for a Council Directive on transfer pricing, published on 12 September 2023 ("Proposal for Directive").

We embrace the policy objective of integrating key transfer pricing principles into EU law with the aim of crafting common approaches for Member States. We consider the Proposal for Directive has the potential of aligned application of mainstream TP guidance as laid down in the OECD Transfer Pricing Guidelines (TPG), the authoritative source in which transfer pricing has been rooted for decades. We applaud the efforts made by the European Commission in that respect. If well designed, this Proposal for Directive offers an opportunity to ensure non-duplicative documentation, reduce controversy on complex (and definitely on less complex) topics, enhance consistency in interpretation and create efficiencies for both tax authorities and taxpayers.

More details can be found in the Appendix. We are of the opinion, however, that the Proposal for a Directive:

- Could be considerably shortened as there is no need to have an elaborate discussion on the same principles (for example transfer pricing methods, comparability analysis, arm's length range, cost contribution arrangements, etc) already addressed in the OECD TPG which will be joined as an annex to the Directive. If a more elaborate Directive is needed, care should be taken that the language and principles used in the Directive are harmonized with the OECD TPG. A subset of transfer pricing guidance at the EU level is undesirable;
- Newly established principles or concepts developed under the OECD TPG should only apply for the future to mitigate the risk of double or multiple standards, to serve as guardrails.

---

*PricewaterhouseCoopers International Limited*  
1 Embankment Place  
London WC2N 6RH  
T: +44 (0)20 7583 5000 / F: +44 (0)20 7822 46520

PricewaterhouseCoopers International Limited is registered in England number 3590073.  
Registered Office: 1 Embankment Place, London WC2N 6RH.

PwC IL is registered under number 60402754518-05 in the EU Transparency Register



- Should contain a definition of associated enterprises that is neither too broad or too narrow and simple to apply. The proposed threshold of 25% with all its nuances is at the (too) low end of the spectrum;
- Should not treat a permanent establishment (PE) the same as an associated enterprise in view of the legal and economic differences between a PE and legally independent enterprises. Given the fact that the Authorized OECD Approach is not universally included in Double Tax Treaties, we believe this Proposal offers the opportunity for a separate expert group, as suggested in our detailed comments, to undertake further work on PEs. We trust our contribution is helpful. We look forward to exchanging views and engaging in dialogue on this important subject.

Yours sincerely,

A handwritten signature in black ink that reads "William H. Morris".

Will Morris  
Global Tax Policy Leader  
[william.h.morris@pwc.com](mailto:william.h.morris@pwc.com)  
T: +1 202-213-2372

**PwC Contacts:**

Edwin Visser	<a href="mailto:edwin.visser@pwc.com">edwin.visser@pwc.com</a>
Isabel Verlinden	<a href="mailto:isabel.verlinden@pwc.com">isabel.verlinden@pwc.com</a>
Stefaan De Baets	<a href="mailto:stefaan.de.baets@pwc.com">stefaan.de.baets@pwc.com</a>

## Appendix I

### ***Context and background***

The aim is to introduce the internationally recognised arm's length principle (ALP) in European Law. For decades, most governments have relied on an articulation of the ALP and profit attribution to identify the circumstances in which corporate profits are recognized in one jurisdiction versus another. Its widespread use is the result of being an agreed, concrete economic principle which ties the allocation of profit to the economic activity in a jurisdiction. While criticized for various perceived deficiencies, it has been an animating principle that has helped preserve a measure of certainty in the international tax arena for a substantial period of time. That governments have been able to use the ALP to review and risk assess millions of intercompany transactions, which have largely been found satisfactory, demonstrates how much of a cornerstone it has become in the cross-border trade in goods and services. Indeed, the legal and economic rationales behind the ALP are known and shaped by multilateral consensus, providing reasonable certainty and administrative grounding<sup>1</sup>. Consistency in the application of the ALP reduces controversy, uncertainty and double taxation.

The OECD transfer pricing Guidelines (OECD TPG) have been developed as a non-binding instrument helping tax authorities and MNEs to find solutions to minimize conflicts and limit litigation.

The Proposal for Directive aims to make the OECD TPG - as they may be amended from time to time - binding. We welcome the objective of unambiguity in setting the rules of the game but question why the European Commission wants to create the possibility to establish further binding rules by way of implementing acts where consensus already exists through the OECD. As the text sets out, OECD Member States are committed to follow OECD principles and recommendations. Moreover, EU Member States that are not members of the OECD tend to adhere to the OECD TPG<sup>2</sup>. The proposal to introduce binding rules should not deviate from the general approach under the OECD TPG. It should not reduce the possibilities of competent authorities of Member States via MAP to reach an agreement if the other state (in particular a non EU Member State) does not agree with the positions taken under those implementing acts.

You will find our relatively brief but constructive comments in bullet form on the Proposal for Directive below.

- In line with the aim of the Proposal for Directive (i.e., introduction of the ALP and application of the OECD TPG), the Proposal for Directive could be considerably shortened. If it is the

---

<sup>1</sup> PwC's comments in relation to the Reports on the Pillar One and Pillar Two Blueprints in light of the consultation document of 12 October 2020, 14 December 2020, 2.

<sup>2</sup> See our table provided in Appendix II

intention that the OECD TPG are meant to be inserted as an annex, there is no need to have an elaborate discussion of the same principles already addressed in a granular way in the OECD TPG. Non-limitative examples are the narrative on (most appropriate) TP methods, comparability analysis, arm's length range (see also *infra*), cost contribution arrangements (see *infra*), etc.

- Should it be decided that a more elaborate directive is needed, the language of the Proposal for Directive should be harmonized and consistent with the OECD TPG. For example, the definition of the ALP should contain the wording as used in the definition of the ALP under Article 9 of the OECD Model Convention and as explained in the OECD TPG. Differences in wording may lead to differences in interpretation and ultimately end up in controversy and uncertainty.
- The Council may lay down further rules, consistent with the OECD TPG, on how the ALP and the other provisions are to be applied in specific transactions to ensure more tax certainty and mitigate the risk of double taxation. The Proposal for Directive lists intangibles (and hard-to-value intangibles), services, cost contribution arrangements, business restructurings, financial transactions and dealings between a head office and its permanent establishment (PE)(s). Notwithstanding the fact that such further rules can be helpful, care should be taken that no conflict arises between the EU position and newly developed future guidance or insights discussed or inserted in the OECD TPG. The OECD TPG should remain the yardstick for transfer pricing to avoid distortion between EU transfer pricing and rest of the world transfer pricing.
- In the definition of associated enterprises, reference is made to exercising a significant influence. It is unclear what is meant under significant influence. Should a quantitative threshold be considered, the 25% as mentioned in the Proposal for Directive is too low. It is, in any event, hard to marry with the notion of significant influence.
- The Proposal for Directive focuses on the mandatory primary adjustment if a downward adjustment is performed. As a corollary, in case of a(n upward) primary adjustment, a mandatory downward adjustment along the lines of Art 9 (2) OECD Model should also be provided.
- Safe harbors are described in the Proposal for Directive in a way that is akin to a rebuttable presumption (with a reversal of proof for the taxpayer). The use of safe harbors should be optional for taxpayers (see also *infra*).
- In general, a dynamic approach of the OECD TPG is appreciated. We understand that pure clarifications under a dynamic approach of the OECD TPG can be applied immediately. Care should be taken, however, that newly established principles or concepts developed under the OECD TPG only apply for the future to mitigate the risk of double or multiple standards, to become the guardrails.
- For purposes of simplification and the reduction of the administrative burden, the documentation requirements should be based on and limited to Chapter V OECD TPG (Master File, Local File and CbCR). This Proposal for Directive is an excellent opportunity to considerably streamline documentation requirements. It should not lead, however, to a compilation of multiple layers of documentation requirements that are currently in use in the different EU Member States. Member States have the right to request additional information if

need be, but a proliferation of different sets of documentation and the variation in content to be delivered should be avoided.

- The Proposal for Directive mentions only the use of the interquartile range to determine the ALP. Although it is acknowledged that the interquartile range is used in many cases, this is a derogation of the guidance under the OECD TPG which also allows the use of the full range if the comparables are equally qualitative.
- The reference that a PE is treated the same as an associated enterprise raises peculiar technical challenges given the design and application of Article 7 OECD Model Convention and more precisely, the application of para 1 (hypothesizing as a separate entity) and subsequently para 2 (allocation of arm's length result). The Proposal for Directive is silent on relevant procedures on how to equalize a PE with an associated enterprise as there are legal and economic differences that may impact the profit allocation (for example, the funding of a PE and its 'free capital'; credit rating issues, assumption of risk and identification of significant people functions, rights and obligations to be directly allocated to the PE, etc.). Moreover, one may need to look wider as to the relationship between head office and PE should this be interpreted in an overly restricted way. In other words, it is unclear whether any approach showing a preponderance of attributes laid down in the Authorized OECD Approach or some other approach should be adopted or accepted. In light of the divergence of views of countries on the AOA (and particularly in the absence of this being adopted consistently (yet) in Double Tax Treaties), we are of the opinion that adding the PE complexity in the Proposal for Directive would slow down the adoption process. However, these PE issues could be separately considered by the expert group that we recommend below.
- The idea of a fast track resolution mechanism is highly welcomed and will make tasks easier for both competent authorities and taxpayers. The Proposal for Directive sets the deadline for unilateral relief, without going into the mutual agreement procedure, at 180 days from the receipt of the taxpayer's request with a reasoned act of acceptance or rejection. It is unclear whether this framework creates a new specific procedure, or should be embedded in the existing domestic (for example under domestic appeal) and international (MAP request where one state is able to arrive at a satisfactory solution without consulting the other state) procedures. Further, it would be useful to install (bi- or multi-lateral) fast track procedures for low risk activities such as low risk distribution, low risk manufacturing or research and development.

We noted that in the Proposal for Directive several references are made to the work of the EU Joint Transfer Pricing Forum (EU JTPF). It comes across as somewhat premature to already go into such a level of granularity in the Proposal for Directive. The aim of the EU JTPF was to assist and advise the European Commission on transfer pricing tax matters by establishing (non-legislative) best practices and pragmatic solutions. Its members were representatives of the Member States, the business community, consultancy and civil society. The Proposal for Directive only refers to a 'Committee' to assist the Commission, which seems not equivalent to the EU JTPF in terms of composition and authority: only the Member States take part in the deliberations. We are convinced that such assistance and advice would be best delivered by a multi- stakeholder Committee or expert-group working under appropriate governance rules.

Finally, where the Proposal for Directive could distinguish itself is indeed in creating the possibility to develop safe harbors for low risk activities (see above), which should be designed as optional for the taxpayer and binding for the tax authorities when the conditions of the safe harbor are met. The EU-guidance on low value adding intra-group services was groundbreaking and ultimately accepted for insertion in the OECD TPG. Positive approaches on transfer pricing (through a range of simplifications) developed in the EU can make a difference.

## Appendix II

<b>Country (not an OECD Member)</b>	<b>Approach with respect to the TPG</b>
<b>Bulgaria</b>	Bulgaria generally follows OECD TPG. The domestic legislation is based on the arm's length principle and is in line with OECD TPG.
<b>Croatia</b>	In Croatia prices must be set at fair market value (the arm's-length principle). The domestic legislation is based on the arm's length principle and is in line with OECD TPG.
<b>Cyprus</b>	Cypriot Circular closely follows the arm's length principle of the OECD TPG. The domestic legislation is based on the arm's length principle and is in line with OECD TPG.
<b>Malta</b>	Transfer pricing rules will enter into effect in Malta from 1 January 2024. The domestic legislation is based on the arm's length principle and is in line with OECD TPG.
<b>Romania</b>	Romania generally follows the arm's length principle. The domestic legislation is based on the arm's length principle and is in line with OECD TPG.