Comments Received on the Request for Input

Scoping of the future revisions of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines

28 June 2018

OECD
BETTER POLICIES FOR BETTER LIVES

Submitted by email to: transferpricing@oecd.org

20 June 2018

Dear Sir,

Scoping of the future revision of Chapter 4 (administrative approaches) and Chapter 7 (intra-group services) of the Transfer Pricing Guidelines

General comments

AFME[1] and UK Finance[2] welcome the proposal to review the guidance in Chapters 4 and 7 of the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' (the guidelines). The guidelines are an invaluable resource, and, given the ever-changing landscape in which multinational businesses operate (e.g. due to regulatory change, technological development, and developments in tax policy), it is important to continually reassess the relevance of each chapter. Therefore, we will keenly consider all consultations on proposed revisions to the guidelines.

Chapter 4 (Administrative approaches)

Effective dispute resolution mechanisms need to be transparent, predictable, cost efficient and involve time-bound processes for all participants. This is necessary to provide legal certainty for all businesses involved in cross border transactions, as well as for tax authorities. We would also note that this certainty encourages greater cross-border investment and the attendant economic benefits which accrue from this investment.

We would, of course, be particularly interested in any new measures that could help give tax payers greater upfront certainty and reduce the risk of dispute in the first place.

[1] AFME represents a broad range of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks and other financial institutions. AFME advocates stable, competitive and sustainable European financial markets, which support economic growth and benefit society. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

[2] UK Finance is a new trade association which was formed on 1 July 2017 to represent the finance and banking industry operating in the UK. It represents around 300 of the leading firms providing finance, banking, markets and payments-related services in or from the UK. UK Finance has been created by combining most of the activities of the Asset Based Finance Association, the British Bankers' Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association.

Chapter 7 (Intra-group services)

As already acknowledged in Chapter 7 of the guidelines, we believe that it is important that companies can apply an appropriate mark-up to low value-adding intra-group services, and, where this happens, we believe that: (i) all tax authorities should respect the mark-up applied by a given company; and, (ii) companies should obtain a tax deduction for the costs of such services somewhere in the MNE group (in order to prevent double taxation.)

Banks are subject to extensive and coordinated worldwide regulation and this reduces the general risks in the banking sector. We are therefore keen to ensure that any recommendations support, and do not contradict, this regulatory environment. In addition, we would welcome the inclusion of additional examples and practical guidance specific to international banks.

Finally, we strongly believe that any measures taken to address cross border tax challenges must be co-ordinated internationally to avoid double or multiple taxation.

Next steps

Should the OECD choose to proceed with the proposed consultations, we would encourage the OECD to engage large non-OECD member countries (including Brazil, India and China). The pace of economic development in these countries is increasing rapidly and so the volume and complexity of transactions with OECD members will continue to increase.

As noted above, we would like to be part of the discussions as the OECD's work develops. However, if you would like to discuss in the meantime, please let us know.

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Invitation for public comments – Scoping of the future revision of Chapter IV (administrative approaches) and Chapter VII (intra-group services) of the Transfer Pricing Guidelines

AstraZeneca welcomes the opportunity to comment on the proposed future revision of chapters IV and VII of the 2017 OECD Transfer Pricing Guidelines to enable tax authorities and multinationals to have greater clarity as to how to manage administrative issues and intra-group services.

General comments

Multinationals operate across a wide range of jurisdictions with different local direct tax and transfer pricing requirements and often differing interpretations of the OECD Transfer Pricing Guidelines. The differing approaches between tax administrations may result in tax disputes and double taxation for multinationals which is key concern for multinationals operating globally. Transfer Pricing Guidelines that can be clearly interpreted and applied are fundamentally important.

The Guidelines should reflect the economic reality of how multinationals operate, including specific industry characteristics, to allow them to be able to practically apply the Guidelines to their business model. This will enable tax authorities to act more consistently, providing greater certainty and transparency for both multinationals and tax authorities.

Our specific comments are as follows:

Chapter IV (administrative approaches) of the OECD Transfer Pricing Guidelines

Establishing administrative procedures that are consistently applied by tax authorities is important for multinationals to prevent and resolve transfer pricing disputes. In addition to the guidance set out in Chapter IV of the OECD Transfer Pricing Guidelines, we consider that there is scope for additional administrative guidelines.

We would welcome guidance on the International Compliance Assurance Programme ('ICAP') being included as an alternative mechanism for multinationals to minimise the risk of a transfer pricing dispute within Chapter IV of the OECD Transfer Pricing Guidelines.

The current guidance set out in the OECD ICAP Pilot handbook (working document) could be incorporated into Chapter IV once the pilot programme has been completed. Further guidance would be welcome as to how ICAP could be applied as an alternative to transfer pricing risk assessments and audits and how disagreements between tax administrations can be resolved.

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We would also welcome additional guidance in relation to transfer pricing compliance practices. As countries have adopted different approaches to the transfer pricing information that is required to be submitted with the tax return and adopted additional country specific requirements in respect of the local file and the master file, this causes considerable difficulty for a multinational operating globally to keep up to date with all the differing requirements and different deadlines. If there could be agreement as to what each country requires in terms of local file, master file and reporting, this would reduce the compliance burden on multinationals immensely.

Further guidance could be included in Chapter IV on the recommended approaches to prevent and resolve transfer pricing disputes. Currently, tax authorities may adopt differing approaches to assess a taxpayer's transfer pricing arrangements depending on the perceived risk and tax at stake. This often provides taxpayers with uncertainty as to the next steps to seek resolution. For example, guidance could be incorporated to recommend circumstances where a tax audit might be appropriate compared to a transfer pricing risk review or ICAP and to explain the consequences of each process.

The current guidance on APAs contained in Chapter IV of the Transfer Pricing Guidelines is comprehensive. The APA process itself could be strengthened to minimise transfer pricing disputes by the following:

- The APA process is currently a timely and costly process for multinationals. Practical guidance to improve the process to assist tax authorities to reach agreement with taxpayers sooner would be welcome.

- 4.148 of Chapter IV sets out that compliance with APAs will be monitored by most tax authorities over the course of the agreement. Further practical guidance on how taxpayers should document its compliance with an agreement would be helpful as this currently differs greatly from territory to territory.

Chapter VII (intra-group services) of the Transfer Pricing Guidelines

The current Chapter VII Guidelines on intra-group services do not provide clear guidance as to how they should be practically applied. The concern for multinationals is that tax administrations could take differing views on the practical application of the guidance on intra-group services. This causes uncertainty and the risk of double taxation, for example in the case where services are recharged and then denied a tax deduction in the recipient country.

We consider that further guidance on the practical application of Chapter VII would be helpful across the following areas:

- The current guidance on the benefits test in B.1.1 of chapter VII is difficult to apply as it is difficult to determine whether an independent enterprise would be willing to pay for (or perform itself) an intra-group service when compared to inter-group services performed by multinationals. Indeed, it is likely that the benefits test assessment would differ significantly from independent enterprise to independent enterprise as it would be driven by internal policies and economic needs. There is currently little explanation to assist multinationals to make this judgement and for tax authorities to practically assess and gain evidence that this test has been satisfied.

- The examples of shareholder costs in paragraph 7.10 could be expanded to provide a more comprehensive understanding of the intended meaning of the costs referred to in relation to each shareholder activity. The practical application is complex to interpret. For example, in multinationals, it is likely that key members of the leadership team will support both shareholder activities and services. There is no guidance as to what might be a reasonable basis to apportion costs (e.g. time spent).

- Paragraph 7.11 of the Transfer Pricing Guidelines refers to services covering 'many levels of activity' when considering the identification of the duplication of costs. This by itself does not offer multinationals sufficient practical guidance as how to consider and reasonably assess the risk of duplication across a wide range of cost bases and services and further detailed guidance to determine a practical approach would be helpful.

- Paragraph 7.36 of the Transfer Pricing Guidelines suggests that the market value of intra-group services may not be greater than the costs incurred by the service provider. However, in practice this is subjective and difficult to support. Tax authorities are likely to form their own view based as to whether a mark-up is appropriate which may differ to the multinational and so further guidance would be helpful.

- It can be challenging to find an appropriate allocation key for the recharge of services intra-group. In an ideal world, it would be possible to charge all costs directly to the beneficiary. However, this is often not possible and therefore an indirect allocation key needs to be selected. However, indirect allocation keys can be difficult to determine and apply as the allocation might result in an allocation of costs that is disproportionate to the economic and risk profile of the entity. For example, using sales as an allocation key could cause a disproportionate amount of costs being allocated to a low risk distribution entity. A discussion of how to choose allocation keys would be beneficial.

Guidance for low value-adding intra-group services

Additional guidance is needed so that multinationals can make an informed decision as to whether to adopt the low value adding services guidelines.

Multinationals typically operate with a wide range of intercompany services often from global service centres or headquarters. This often will result in a large volume of cross-border transactions with a large cost base recharged from a handful of jurisdictions to a wider range of related party entities for efficiency and to avoid the duplication of services performed.

The services that qualify for the simplified approach are defined in the guidance under section D.1. Whilst the guidance provides examples of qualifying and non-qualifying activities, it is onerous for multinationals to determine the group of costs that qualify for this approach as both qualifying and non-qualifying activities may be are commercially interlinked and financially recorded together. The multinational will need to review the cost base in detail to understand whether the costs fall into the simplified guidance or not.

Whether adopting the approach to low value-added services is an appropriate one for multinationals depends on the extent to which tax administrations implement the guidance. For example, if one tax authority adopts the approach and the corresponding tax authority does not, the other tax authority may not accept an unsupported mark up of 5% and may require a functional and economic analysis to support the transaction is arm's length. This could result in uncertainty and double taxation.

Based on the above, a decision for multinationals to adopt the simplified approach under the current guidance brings with it uncertainty for multinationals. Further clarify on practical application and consensus from tax authorities as to its application is required before it can become a realistic option for multinationals.

We look forward to participating in further discussions on the proposed revision work.

Yours faithfully

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Catherine Harlow
Head of Transfer Pricing

The **BEPS** Monitoring Group

Submission on

Revision of Chapter IV of the Transfer Pricing Guidelines on Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes

These comments have been prepared by the BEPS Monitoring Group (BMG) in response to the call for comments by Working Party 6 of the Committee of Fiscal Affairs of the OECD. The BMG is a network of experts on various aspects of international tax, set up by a number of civil society organisations which research and campaign for tax justice including the Global Alliance for Tax Justice, Red de Justicia Fiscal de America Latina y el Caribe, Tax Justice Network, Christian Aid, Action Aid, Oxfam, and Tax Research UK. These comments have not been approved in advance by these organisations, which do not necessarily accept every detail or specific point made here, but they support the work of the BMG and endorse its general perspectives. They have been drafted by Sol Picciotto, with contributions and comments from Suranjali Tandon, Jeffery Kadet and Alexander Ezenagu.

We appreciate the opportunity to provide these comments, and are happy for them to be published.

June 2018

SUMMARY

In our view, the main efforts of Working Party 6 should be directed at trying to avoid transfer pricing disputes, in particular by introducing simplified transfer pricing methods. This aspect has been sorely neglected, indeed completely ignored during the BEPS project. Instead, disputes are likely to increase substantially, mainly because the BEPS project outputs under Actions 8-10 on transfer pricing have made the OECD Transfer Pricing Guidelines (TPGs) far more complex and obscure.[1] Recognising this, considerable work has been done on improving the mutual agreement procedure (MAP) for resolving disputes, including the introduction of arbitration. However, this will prove a Sisyphean task in the absence of

[1] Probably the most authoritative account of the BEPS project outcomes on transfer pricing is that by J. Andrus and R. Collier, *Transfer Pricing and the Arm's Length Principle After BEPS,* Oxford University Press, 2017. They trace in detail how the TPGs have been made more complex and unclear on the key points: (i) the notion of control of risk ('very complex', para. 6.35; 'most confusing' para. 7.32; imposing 'only limited burdens on MNEs desiring to transfer risk to tax advantaged locations' para. 7.13, and leaving 'clear potential for heated disagreement' para. 7.16); (ii) the returns which can be attributed to a cash-box entity ('quite mysterious' para. 6.46, 'most confusing' para. 7.32, will 'give rise to substantial amounts of controversy' para. 7.31, and leaving 'a rather confused muddle, at least for now' para. 7.42); and (iii) how to allocate the difference between projected and actual returns from an intangible ('far from clear', para. 7.56, 'manifestly inadequate' para. 7.58). They conclude that the result has been to make the transfer pricing process 'far more complex' (para. 7.70), mostly due to the 'level of factual detail' now required for the functional analysis (para. 7.71).

initiatives to prevent disputes from arising in the first place, especially in relation to transfer pricing.

The introduction of simplified transfer pricing methods could both improve the effectiveness of transfer pricing administration and, if well designed, reduce disputes. This is important for all tax administrations, which are increasingly under resource constraints, but especially for those of developing countries.

On the other hand, we consider it inappropriate to continue to rely on the Mutual Agreement Procedure (MAP), especially as currently operated, and with the addition of arbitration, as a means of resolving transfer pricing conflicts. These conflicts have been increasing for the past 20 years, mainly due to the adoption by the OECD in the 1995 Transfer Pricing Guidelines of an extreme version of the arm's length principle. This requires each affiliate of a multinational enterprise (MNE) to be audited individually based on its 'facts and circumstances' and applying a functional analysis, followed by a search for comparable transactions between independent entities. This approach not only requires significant time and resources of specialist staff, it is also ad hoc and inherently subjective, which is the underlying cause of the increasing conflicts.

In our view it is inappropriate to seek to solve this problem by relying on the MAP, which requires further resources, while also relying on individualised solutions, essentially by bargaining between the parties involved, exacerbated by the extreme secrecy of the procedure. Weaker countries are inevitably disadvantaged by the MAP, and have in our view rightly resisted pressures to make it compulsory and binding through the introduction of what is misleadingly described as arbitration. The procedures which have been developed do not provide independent adjudication with publication of a reasoned decision which could provide guidance for similar cases. Instead, the procedure is totally secret: even the existence of a complaint is considered confidential. Furthermore, the preferred procedure is 'baseball' arbitration, which leaves to the arbitrators only a choice between the 'last best offers' of the parties, reducing the process to one of haggling over amounts.

SPECIFIC COMMENTS

1. Simplified Transfer Pricing Arrangements

The 1995 Transfer Pricing Guidelines (TPGs) adopted an extreme version of the arm's length principle (ALP), which entailed treating all transfers between related entities as transactions to be priced as if they were between independent entities. This included the most highly centralised and core functions of a MNE: research and development (R&D), the allocation of capital, and risk management. Under this interpretation of the ALP even these activities should be treated not as involving joint costs to be shared, but transfers to be priced. This entails an individual audit of the 'facts and circumstances' of each taxpayer based on a functional analysis. This creates an enormous administrative burden, both for taxpayers in providing detailed documentation, and even more for tax administrations, which must try to understand the taxpayer's business model, as well as deciding the most appropriate transfer pricing method.

Section E of chapter IV of the TPGs acknowledged the administrative difficulties and uncertainty created by this approach, and discussed whether it could be 'ameliorated', by adopting 'a simple set of rules under which transfer prices would be automatically accepted by the national tax administration', described as 'safe harbours'. However, the conclusion was that they raise 'fundamental problems', and were 'generally not compatible with the enforcement of transfer prices consistent with the arm's length standard' (para. 4.121 of the

1995 Guidelines). In the next 10-15 years, as an increasing number of countries adopted transfer pricing rules based on the 1995 TPGs, the administrative burdens they created were increasingly sharply felt, and a number of countries introduced safe harbours, as shown in a survey conducted by the OECD in 2011-12. Consequently, revisions were agreed in 2013 to chapter IV-E, expressing a somewhat more positive view of such measures.

Nevertheless, since the ALP is interpreted as being based on analysing the facts and circumstances of each taxpayer, the TPGs continue to adopt a very limited view of safe harbours. They are considered as mainly benefiting the taxpayer, and hence must be voluntary. Most such measures are procedural, e.g. providing exemptions from documentation requirements for smaller taxpayers. Furthermore, to avoid potential double taxation, chapter IV urges that safe harbours should be agreed bilaterally with relevant treaty partners. To facilitate this, an Annex was added to chapter 4 providing sample Memorandums of Understanding (MoUs) for negotiating 'bilateral safe harbours' for common categories of transfer pricing cases involving low risk distribution, manufacturing and research and development functions. These also are drafted in such a way that acceptance of the safe harbours they provide is elective for the taxpayer, the alternative being application of the normal transfer pricing rules of both countries concerned.

The experience of countries adopting substantive safe harbours which are purely voluntary for the taxpayer has not been encouraging. Notably, the safe harbour scheme adopted in India in 2013, for software development, contract R&D for generic pharmaceutical drugs, and manufacture and export of auto components,[2] had very low take-up. Evidently, taxpayers considered the specified profit margins too high, and preferred to submit their own calculations and, if necessary, appeal assessments to the tribunals. A revised version introduced in April 2017, with lower margins and an aggregate transaction limit, seems likely also to have low take-up.

A more successful approach seems to have been Mexico's combination of safe harbours and a sectoral Advance Pricing Arrangement (APA) for its maquila sector. This rests on offering an exemption from Mexico's broad definition of a permanent establishment (PE), which could be applied to treat a maquila entity as the PE of its foreign parent.[3] Since the vast majority of these entities have a US parent, Mexico negotiated a bilateral APA with the USA in 1999, providing for taxation of such entities at the higher of either (i) 6.9% of the assets used in the activity or (ii) 6.5% of operating expenses (excluding financing costs).[4] For taxpayers this also had the advantage of clarifying eligibility of Mexican taxes paid for a foreign tax credit. Taxpayers also had the alternative of applying for an advance ruling under Mexican law.[5]

In 2003, following the decline of the maquilas due to the US recession and a strong peso, Mexico dropped the requirement to seek an APA if the safe harbour was not accepted, and instead specified two alternatives, variations of the Cost Plus and TNMM methods, as well as an additional relief which would reduce the profits tax by half.[6] Following the sector's subsequent rapid growth, restrictions were reintroduced in 2014, including limitation of the

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[2] Income-tax (16th Amendment), Rules. Central Board of Direct Taxes.

[3] Morrison PD. (1993) The U.S.-Mexico Tax Treaty: Its Relation to NAFTA and Its Status. *United States-Mexico Law Journal* 1: 311-319; Schatan R. (2002) Régimen tributario de la industria maquiladora, *Comercio Exterior.* Bancomext 52: 916-926.

[4] This is mentioned in Annex I to chapter IV, added in 2013, as a precedent for the model Bilateral Safe Harbour MoUs that it provides.

[5] McLees J, Bennett MC and Gonzalez-Bendiksen J. (1999) Mexico and the United States Reach an Agreement on Maquiladora Taxation. *Tax Notes* 8 November, which provides the text of the agreement.

[6] OECD. (2003) *Peer Review of the Mexican Transfer Pricing Legislation and Practices.*

PE exemption to income deriving wholly from export of products resulting from imported inputs, and ending the additional relief.[7] The tax authority also began closer scrutiny of claims to maquiladora status.[8] The transfer pricing rules were revised to introduce methods based on all five of those in the TPGs, and the only alternative to the safe harbours became applying for an APA, based on these methods. The resulting rapid rise in APA applications produced a backlog reaching 700 by 2016. The Mexican tax administration therefore negotiated with the US IRS a 'framework agreement' establishing an agreed APA methodology. This aims to provide 'fast track' approval for APAs, as an alternative to the safe harbours agreed in 1999, which remain in place.[9] The APAs will be issued and monitored by Mexico, but the US announced that the outcomes will be accepted by the IRS.[10] It seems that the Mexican administration will offer the arrangement to taxpayers it considers eligible, perhaps excluding large firms.

Another example which has been partly publicised is the approach adopted by the Dominican Republic to its all-inclusive or package hotel sector. This was based on revisions made in 2006 to the arm's length provisions in the tax code, empowering the tax administration to assess affiliates and PEs of foreign TNCs on the basis of the proportion of their gross revenues to those of the TNC as a whole, or in relation to their assets, and to adjust transfer prices with related entities by applying the independent entity principle. The 2006 changes also made specific provision for the tax administration to negotiate an Advance Pricing Agreement (APA) for the all-inclusive (package) hotel sector, to be represented by the National Association of Hotels and Restaurants. The sector was selected because of its use of related marketing companies located in low-tax jurisdictions, although local financial statements and tax returns showed continued losses; the guest per night rate declared was often lower than operating costs, while the rates advertised on marketing sites were over 100% higher than these declared rates. The tax administration requested taxpayers in that sector to submit sworn affidavits, which were then subjected to verification. Where the submitted data seemed unreliable, assessments were issued, based on a methodology developed by the administration. Through this process, 73 audits, of 33 taxpayers, were carried out in 2009-11, for fiscal years 2005-10, representing half of all the registered all-inclusive hotels, mainly in zones A and B, and accounting for 83% of the revenues in the sector.[11] Taxpayer objections to these assessments were rejected on administrative review, and they were again upheld on appeal to the Superior Administrative Tribunal.[12] The administration's victory in this case enabled it to put pressure on all taxpayers in the sector to fall into line with the APA. However, it is not clear whether an APA was formally signed with the Association; if so it does not seem to have been published. The Dominican

[7] Leon-Santacruz R and Lujan F. (2014) Implications for maquiladoras of the 2014 Mexican tax reform. *International Tax Review*, April.
[8] UN Manual 2017: 615
[9] Servicio de Administracion Tributaria, Mexico (2016). México y EU acuerdan nuevo mecanismo para evitar doble tributación en industria maquiladora. http://www.sat.gob.mx/sala_prensa/comunicados_nacionales/Paginas/com2016_094.aspx .
[10] US-IRS. (2016) IRS Announces Position on Unilateral APA Applications Involving Maquiladoras. https://www.irs.gov/newsroom/irs-announces-position-on-unilateral-apa-applications-involving-maquiladoras
[11] CIAT. (2013) El Control de la Manipulación de los Precios de Transferencia en América Latina y el Caribe/ The Control of Transfer Pricing Manipulation in Latin America and the Caribbean, p. 62. Dominican Republic. (2012) Transfer Pricing Law and Practice in the Dominican Republic. Direccion General de Impuestos Internos; http://www.dgii.gov.do/publicaciones/estudios/Documents/LegislacionPracticaPreciosTransferencia.pdf
[12] Inversiones Coconut, S. R. L. (Hotel Bahia Principe Punta Cana) v Dirección General de Impuestos Internos. Sentencia nº 175-2012 de Tribunal Superior Administrativo de 5 de Octubre de 2012. Tribunal Superior Administrativo, Republica Dominicana.

legislation also authorises a similar approach to other sectors with significant foreign ownership, such as insurance, energy and pharmaceuticals.

A system which has also been effective is Brazil's fixed margin method, which has operated since 1996. The Brazilian approach clearly has the advantages of simplicity, ease of application, and providing predictability and certainty for the taxpayer. On the other hand, it is a very broad-brush approach, which takes little account of differences between industry sectors or business models,[13] and ignores the actual profitability of the company concerned. However, some leeway is allowed for the taxpayer, since it can choose which method to apply and how to do so,[14] although this choice must be supported by documentation. In addition, the law provides for the Minister to authorise application of a different profit rate, in justified circumstances. These rules must also be understood in the wider context of Brazil's international tax rules, including strict limitations on deductions of royalties and fees, and strong rules on controlled foreign corporations.[15] The system seems to have been highly effective in largely eliminating transfer pricing disputes, while not deterring inward investment.

A good case can be made that the Brazilian methods are compatible with tax treaties, although not with the TPGs. In February 2018 Brazil agreed a 15-month work programme with the OECD to 'assess the potential for Brazil to move closer to the OECD's transfer pricing rules, which are a critical benchmark for OECD member countries'.[16] We would strongly urge that this should be a mutual learning process. Some suggestions for modifications to the Brazilian rules which could make them sufficiently compatible with the approach in the TPGs have been made, and these should be taken seriously.[17] This is especially important since the TPGs now have a practical effect in many countries around the world, far beyond the OECD.

These examples suggest that simplified methods can be appropriate and effective, especially for sectors with many entities operating a similar business model. However, success depends on creating significant inducements or pressures for taxpayers to accept the prescribed methodology: for example, exemption from a strong PE provision and negotiation of a bilateral sectoral APA (Mexico), or the threat of application of a profit apportionment methodology (Dominican Republic).

Chapter IV currently does refer to the possibility of 'other administrative simplification measures that use presumptions to realise some of the benefits discussed in this Section', although it states these may not be fully compatible with its description of safe harbours. It mentions in particular that 'a rebuttable presumption might be established under which a mandatory pricing target would be established by a tax authority' (para. 4.104).

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[13] The 2012 revision introduced three profit margins for different economic sectors (20%, 30% and 40%), on the resale price for imported items subject to processing. For details on application of the rules see UN Practical Manual on Transfer Pricing 2017: Part D1; Valadão MAP and Lopes RM. (2013) Transfer Pricing in Brazil and the Traditional OECD Approach. *International Taxation* 8: 31-41.

[14] The taxpayer's right to choose the applicable statutory method has been upheld by decisions of the Administrative Taxpayers' Council, which ruled inapplicable an administrative regulation attempting to curtail such a choice: see Ilarraz M. (2014) Drawing upon an Alternative Model for the Brazilian Transfer Pricing Experience: The OECD's Arm's Length Standard, Pre-fixed Profit Margins or a Third Way? *British Tax Review*: 218-235, at p. 223.

[15] Rocha SA. (2017) *Brazil's International Tax Policy*: Editora Lumen Juris.

[16] OECD Press Release 28/2/2018 http://www.oecd.org/tax/oecd-and-brazil-launch-project-to-examine-differences-in-cross-border-tax-rules.htm .

[17] See UN Practical Manual on Transfer Pricing 2017, Part D1.9.7, and Schoueri LE. (2015) Arm's Length: Beyond the Guidelines of the OECD. *Bulletin for International Taxation* 69: 690-716.

Adopting methods using a strong presumption establishing a benchmark for the local affiliate's profitability would avoid the need for a detailed audit based on functional analysis and attempting to identify comparable independent firms. One such proposal, put forward by Michael Durst, would require the local affiliate to earn a profit margin in proportion to that of the corporate group as a whole.[18] A merit of this method is that it focuses on the actual profits, or indeed losses, of the specific firm concerned. In this respect it is very different from the Brazilian fixed margin method, which applies a single yardstick to all firms, on a broad sectoral basis. This 'simplified net margin method' (SNMM) is therefore based on the ability to pay principle which many consider foundational. However, its focus is on the profitability of the TNC as a whole, and it does not factor in the contribution of the specific local entity. For that reason, the proposal suggests applying a relatively small fraction of the firm's global profit rate in calculating the local entity's benchmark profit margin (Durst suggests 25%). This is based on experience of attempting to apply the TNMM to a wide range of distributors, manufacturers and service providers. The fraction is chosen to arrive at a profit allocation which could be acceptable to both the revenue authority and the taxpayer. This suggested method would require a minimum level of income, consistent with group-wide profitability, disregarding all intra-firm related party payments such as interest, royalties and fees, which are a major cause of base erosion. It would generally prevent the very low requirements of income that under current practice tend to be ascribed to 'risk-stripped' subsidiaries. This is put forward as a pragmatic solution, aimed mainly to provide developing countries with a method which is easy to administer and could adequately protect their tax base.

We also have recommended, in our previous submissions to the OECD, expanded use of the profit split method (PSM) with standardised concrete allocation keys and weightings for common business models. Such expansion and standardisation of the PSM would allow easy application for tax authorities and taxpayers alike. The principal reason for this is that solely objective factors (e.g. personnel, assets, etc.) are used to apportion profits. This approach would ignore internal group-controlled and tax- motivated arrangements such as intercompany contractual terms. It would also dispense with the need for subjective value judgments, greatly reducing the potential for conflict and uncertainty.[19]

If Working Party 6 chooses not to consider this standardised approach on a multilateral basis, the path is left open for individual countries to take this approach on a unilateral basis. We recommend that Working Party 6 consider adding some guidance within Chapter IV to influence the approach that individual countries might adopt.

The Invitation for Comments states that Working Party 6 considers that there is 'no need at this stage to revise or supplement the current guidance on safe harbours'. This is regrettable, in our view, given the urgency of the need to establish methods for allocating profits which can be easily administered and provide predictability for both taxpayers and tax administrations. As currently drafted, chapter IV seems to discourage such methods, despite the suggestion in paragraph 4.104. In our view it would be very worthwhile for Working Party 6 and the OECD Secretariat to devote significant time and resources to the issue of simplified methods.

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[18] Durst MC. (2016) Developing Country Revenue Mobilisation: A Proposal to Modify the 'Transactional Net Margin' Transfer Pricing Method. International Centre for Tax and Development, Working Paper 44.
[19] See Kadet J. (2015) Expansion of the Profit Shift Method: The Wave of the Future", *Tax Notes International*, 77: 1183,

2. APAs, Dispute Resolution and Arbitration

In our view, without simplification, the dogmatic application of the OECD interpretation of the TPGs will continue to create enormous administrative burdens, many disputes, and serious uncertainty for business and governments alike. Neither individual APAs nor stronger dispute resolution procedures can resolve these problems. This is because these procedures depend on individual consideration of each and every taxpayer, and the application of rules which are, by their nature, ad hoc and subjective.

This can be seen from the experience of India, which revised its transfer pricing rules in 2001 to bring them into line with the OECD TPGs. Over the first seven years of application of these rules, their enforcement resulted in adjustments totalling about $16 billion. Of this amount, the fiscal year 2007-2008 adjustments were about $9 billion.[20] In 2014-15, more than half of the transfer pricing audits conducted in that year resulted in adjustments.[21] Since this approach to transfer pricing is fact-intensive it required specialist staff to audit the calculations submitted by the taxpayer's tax advisers. In 2014-15, there were an estimated 50 to 60 transfer pricing officers across India, auditing more than 70 cases each.[22] The main issues have been the choice of comparables, the use of multiple year data, and the application of economic adjustments to inexact comparables.[23]

This seems an effective result at least for the government, although perhaps less so for taxpayers. Predictably, therefore, the result was also an explosion of tax litigation, resulting in an estimated backlog of 3,000 cases before the Tribunals by 2012, and Indian cases were estimated to account for 70 percent of the world's transfer pricing litigation, by number of cases.[24] A digest of tax court decisions published by an Indian advocate contained 2,000 cases for the year 2017 alone, 1,200 of which concerned transfer pricing.[25] This plethora of transfer pricing litigation is an issue for both taxpayers and the government, with the government making periodic statute changes that attempt to address this increasing problem. As mentioned in the previous section, the introduction of safe harbours has done almost nothing to staunch this, since in compliance with the OECD approach the safe harbours are elective for the taxpayer.

In the light of the rising disputes and their pendency, an alternative dispute resolution mechanism was set up: the Dispute Resolution Panel (DRP).[26] The assessee is given the choice to appeal to the DRP against a draft order issued by the assessing officer (AO), or to appeal to the Commissioner Income Tax (Appeals) against a final order of the AO. Thus, the DRP was an alternative dispute resolution mechanism that was also part of the assessment process. The DRP must complete the hearing and give its final directions within 9 months from the sending of the draft order to the assessee. However, the number of cases referred to the DRP has remained static.[27] In 2012 the Revenue was allowed to appeal against the decision of the DRP, but since this was criticised by

[20] Supekar D and Dhadphale A. (2012) Indian Tax Tribunal Establishes Special Benches for Transfer Pricing Cases. *Tax Notes International* 69: 339-340.
[21] Ministry of Finance, Annual Report 2014-15
[22] Deloitte-Tax Sutra, Transfer Pricing Trends, p. 15.
[23] India Transfer Pricing Survey, PwC, 2015
[24] Supekar and Dhadpale, note 20 above.
[25] Lala SM. (2018) Digest of Important Judgments on Transfer Pricing, International Tax and Domestic Tax. http://smltaxchamber.com/wp-content/uploads/2018/02/Digest-of-2000-Important-judgments-2017.pdf
[26] Comprising of three commissioners income tax not associated with the assessment of the taxpayer
[27] Deloitte-Tax Sutra, Transfer Pricing Trends, p. 12

taxpayers, the earlier provision that the Revenue cannot appeal against the order of the DRP was restored, but the impact of this has yet to be seen.

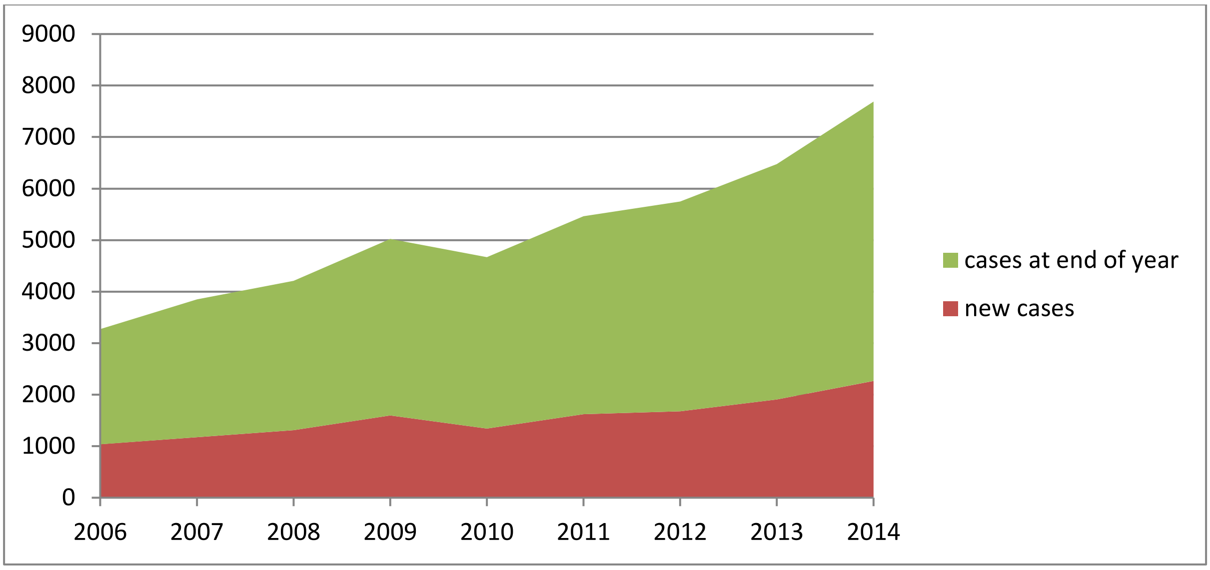
To further remedy the rise in transfer pricing litigation, in 2012 the Central Board of Direct Taxes (CBDT) was given the power to enter into Advance Pricing Agreements (APAs) with taxpayers for a maximum period of 5 years. Further, in 2014, roll-back provisions were announced that were applicable for a maximum of four years prior to the first year of the APA period, thus offering taxpayers certainty for a total of 9 years.

In the 5 years to the end of March 2017, 815 applications had been filed for APAs. Of these, 706 were Unilateral APAs and 109 Bilateral APAs, although only 11 bilateral APAs had been signed.[28] In terms of time taken, India outperforms most countries: For example, processing an APA takes 28.93 months as compared to 34 months taken for UAPAs in the USA.[29]

Such an APA program requires considerable resources: in India there are now two dedicated APA teams, operating in three locations.[30] This has little impact on the administrative burden, since individual agreements must be negotiated, and in addition there must be some checking of compliance with their terms. The main beneficiaries of this type of individual APA program seems to be the large tax advisers which specialise in drafting and negotiating them.

India's experience confirms that of other countries which adopted rules based on the TPGs since the late 1990s. OECD figures show a continuing rise both in the number of disputes and the time taken to resolve them (Figure 1).

Figure 1 Growth of MAP cases between OECD countries



In response, there has been the introduction of mandatory binding arbitration. So far, only 26 signatories of the MLI have indicated their choice to apply arbitration, so it will apply to 178 agreements out of 1,225 matched agreements.[31] Of the 26 only 5

[28] Advance Pricing Agreement of India, Annual Report, CBDT 2016-17. The report observed (p.4) that since the US Competent Authority was not admitting bilateral APA applications into its APA programme, 'Indian subsidiaries of US-based companies (who are present in large numbers in India) were forced to seek certainty on their international transactions through unilateral APAs'.

[29] Advance Pricing Agreement of India, Annual Report, CBDT 2016-17. p. 16.

[30] Delhi, Bangalore and Mumbai. These cities are where maximum Transfer Pricing litigation is reported

[31] http://www.austaxpolicy.com/evaluating-multilateral-legal-instrument-developing-country-perspective/

developing countries have opted for arbitration. These are Andorra, Curacao, Fiji, Mauritius and Singapore, the latter two of which are treaty hubs.

The MAP is essentially an administrative procedure, and is kept completely confidential. Arbitration adds a spurious objectivity, since the procedures are remote from any notion of adjudication or due process. In fact, they are designed to put pressure on tax administrations to reach a compromise within the stated time limit. This will inevitably place further pressures on the weaker and less well-resourced tax authorities.

Thus, we urge Working Party 6 and the members of the Inclusive Framework to reject the pressures of some of the OECD countries to continue along this path that leads only to increased complexity and disputes. It should by now be clear that the TPGs adopted in 1995 involved a wrong turn, and should be re-evaluated. In the meantime the enormous administrative difficulties they create, recognised in chapter 4, call for a serious examination of possibilities for both simplified methods and a standardised profit split method utilising concrete allocation keys and weightings for common business modelsfc.

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Submitted by email: [TransferPricing@oecd.org]

June 20, 2018

SCOPING OF THE FUTURE REVISION OF CHAPTER IV (ADMINISTRATIVE APPROACHES) OF THE TRANSFER PRICING GUIDELINES

Dear Colleagues,

Business at OECD (BIAC) is pleased to have an opportunity to comment on the OECD's public consultation document titled *Scoping of the Future Revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines* ("TPG") ("TPG Ch. IV Scoping Request") issued 09 May 2018. We welcome the opportunity to comment and believe pragmatic administrative approaches will benefit tax authorities in both developed and developing countries through the preservation of scare audit resources by streamlining dispute resolution and avoiding disputes altogether.

Our general comments on scoping potential Chapter IV changes per the parameters of the TPG Ch. IV Scoping Request are as follows:

- The main objective of Chapter IV of the TPG should be increasing prevention of tax disputes (whether upon audit or otherwise), efficient use of resources, and increased transparency for taxpayers and tax administrations. Therefore, the preference should be for countries to adopt cooperative compliance, which in our experience has been very useful. In this space, we view the ICAP programme as a great initial step. Several of our members are currently involved in ICAP and will continue to volunteer for opportunities to increase trust and transparency between taxpayer and tax administration. Further, joint audits – bringing together multiple tax administrations and the taxpayer – represent another, helpful option in this area. When business and governments openly work together, our experience is that all parties benefit by avoiding costly, drawn-out individual audits, which are an inefficient use of government and business resources and often lead to double taxation.
- Administrative simplifications are also very useful in reducing TP tax disputes and saving resources. The aim of the TPG should be multilateral implementation of consistent rules that not only reduce disputes within a country, but also reduce the potential for conflicting rules across jurisdictions.
- Generally, in the interest of avoiding additional TP disputes, we believe an improvement of existing practices and guidelines that commonly work is preferred over the introduction of new mechanisms. Procedures outlined should be as simple as possible with short timelines,

because clear rules and expedited timelines provide efficiency for taxpayer and tax administration as they avoid unnecessary delays in audits and preserve important resources for other work.

- Over the last few years during the Base Erosion and Profit Shifting ("BEPS") project, the OECD released initiatives and guidelines that have increased the compliance burden (e.g., Action 13) while others have increased the potential for double taxation (e.g., Actions 4, 6, 7 etc.). Any revisions to the TPG should take into account both the increased information and data available to tax administrations, while also clarifying procedures to minimize the potential for double taxation. The TPG should provide "best practices" for dealing with additional information gathered, notably the country-by-country report ("CbCR"), to effectively allocate resources – notably risk assessment tools and other helpful approaches. The OECD should encourage proper risk assessment and related tools, as such results in more focused and effective TP audits and potentially less overall disputes.

- As different tax authorities take different approaches regarding transaction comparables, the OECD could reduce the number of cross-border TP disputes by providing clarity and guidelines as to what constitutes an acceptable comparable.

- We fully support the objectives of Action 14 and look forward to the OECD's ongoing peer review of Inclusive Framework ("IF") countries. However, some of our members are concerned that tax administrations may shift resources from existing advanced pricing agreement ("APA") functions to mutual agreement procedure ("MAP"). Considering the circumstances and resources, our members still believe that APAs can be a mutually beneficial option for tax administrations and business by avoiding disputes in the first place with nearly full transparency. In light of implementing certain BEPS measures, e.g., the multilateral instrument, and the related resource constraint, we believe additional resources should be assigned to these measures rather than reallocating resources away from useful existing procedures and programs like APAs. For those jurisdictions that do not have sufficient resources, fee-based or other revenue measures should be considered to fund the program.

- The OECD should ensure access to MAP and prevent measures that discourage the programme (e.g., requiring a taxpayer to forego rights to local appeal processes, pay taxes in full before entering MAP, etc.). Further, to increase participation, certain complex matters that currently involve significant resources and effort should be added to MAP. For example, secondary adjustments are often complicated and result in double taxation, and inclusion in MAP would encourage and further the aims of MAP.

- APA programmes will be more effective if they operate efficiency and quickly. For example, guidelines should be outlined to fast-track the approval process on an APA renewal if certain aspects have not changed. Similarly, if there has been no change to a transaction, APAs should be rolled back to cover years open for audit – increasing their impact per the effort incurred.

- Lastly, we encourage any additional commentary in the TPGs that suggests practicality and consistency in approach by jurisdictions. Often TP disputes are prolonged and represent a significant burden on both the tax administration and taxpayer in defense. As previously mentioned, APAs can be used as a potential option to avoid a dispute, whereas MAP and binding arbitration may reduce time incurred and resources used. As such, we suggest, when scoping best practices related to Action 14, that expedience and regular clearing of cases be recommended (in line with current peer review feedback as part of the Action 14 monitoring).

As the OECD is the pre-eminent standard setting organization for international taxation, we also encourage the OECD to involve other, non-member jurisdictions (e.g., Brazil, India, and China), as a part of the IF in the scoping and drafting process to ensure true multilateral implementation and uniform adoption of the rules. Further, *Business at OECD* would welcome additional involvement in the developing and drafting of such rules once parameters are scoped.

Sincerely,

Will Morris

Will Morris

Chair BIAC Tax Committee

The Business and Industry Advisory Committee to the OECD
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19 June 2018

Tomas Balco
Head of the Transfer Pricing Unit
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development

By email: TransferPricing@oecd.org

Dear Tomas

Future revision of Chapter IV of the Transfer Pricing Guidelines dealing with administrative approaches to avoiding and resolving transfer pricing disputes

Thank you for the opportunity to comment on the scope of the future revision of Chapter IV of the OECD's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* dealing with administrative approaches to avoiding and resolving transfer pricing disputes.

This letter considers the specific points raised in the invitation for public comments issued on 9 May 2018 (the 'Invitation for Comments'). It has been written from the perspective of the UK with input from other countries.

It is important for both businesses and tax authorities that clear guidance is available to prevent and resolve tax disputes. The incorporation of relevant aspects of the G20/OECD Base Erosion and Profit Shifting work in relation to Making Dispute Resolution Mechanisms More Effective is a valuable start. Further improvements could be made in respect of the conduct of transfer pricing audits, risk assessment and transfer pricing adjustments.

For businesses, retention of one clear international framework that prevents or eliminates double taxation is essential, and fragmentation of the approach to taxing cross-border businesses would impose significant barriers to international trade. There is a concern that some countries have been introducing and applying domestic measures (in particular to disallow deductions) with the effect that businesses are discouraged or prevented from claiming relief under mutual agreement procedures ('MAP') in double tax treaties. It would be helpful if the OECD could provide guidance on situations where the result of domestic measures is 'taxation not in accordance with the treaty' such that it is clear to businesses and tax authorities that MAP is available.

Further comments are included in Appendix 1.

If you would like to discuss any of the points raised in this letter, please do not hesitate to contact either me (alobb@deloitte.co.uk) or John Henshall (jhenshall@deloitte.co.uk). We would be happy to speak on this topic at any future Public Consultation meeting if it would be helpful.

Yours sincerely

Alison Lobb

Deloitte LLP

APPENDIX I – Responses to specific issues identified in the Invitation for Comments

What additional aspects or mechanisms to minimise the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment, tax examination practices)?

While input received in the past on some of these issues in the context of the work of the Forum on Tax Administration will be considered, input on business experience with such aspects or mechanisms would be useful, including what have been the advantages and/or challenges?

Cooperative Compliance

As with other complex issues, it is not uncommon for resolution of transfer pricing disputes to take years through traditional written correspondence in a conventional audit by tax authorities. Cooperative compliance encourages both the tax authority and the business to enter into discussions with the aim of preventing or resolving an issue rather than defending an entrenched position.

Fostering an environment of cooperative compliance can take time and it would be helpful if the Guidelines could be updated to include best practice recommendations. Clear protocols are needed to ensure that both businesses and tax authorities engage with the spirit of cooperative compliance. In some cases cooperative compliance proposals have faltered because the process has been used to seek excessive information, or used the information provided as the basis for further audits where risks had already been addressed by the business. It would be helpful if tax authorities were encouraged to set out clearly which risks they are looking to address and information requests should be structured to focus on the key facts. Businesses should not be subject to continuous rounds of information requests with no clear end point.

Cooperative compliance allows tax authorities to use informed risk assessments to allocate resources efficiently to areas where there is the greatest risk. Cooperative compliance works best when it is driven by the relevant tax authority but businesses also need to understand the benefits of investing their resources. Incentives for businesses could include a streamlined tax audit and settlement process.

UK High Risk Corporates Programme

The UK tax authorities have successfully implemented a *High Risk Corporates Programme* which aims to resolve the tax issues of very large businesses and to reduce the scale of risk for the future. A key component of this programme is the emphasis on improving the relationship between HM Revenue and Customs (HMRC) and its large business customers, and improving HMRC's capability to deal with the largest and most complex tax risks.

If a case is selected for the programme, both the business and HMRC commit to rigorous investigation and debate of technical issues through face to face meetings to accelerate the timeframe for resolving issues. Significant investment is made in first establishing the facts so that a common understanding is established before proceeding to technical debate.

The use of case studies can be an effective tool to demonstrate the way in which a business operates e.g. key employees make a presentation to the tax authority detailing the process of how a recent significant decision was taken. This type of programme is very effective for both tax authorities and businesses as it reduces risk and increases certainty in a short timeframe. However, the resource requirements limit the suitability of this approach to the most complex cases. It is important that for transfer pricing cases the programme is not an alternative to MAP and does not preclude a business making a MAP claim.

International Compliance Assurance Programme (ICAP)

The International Compliance Assurance Programme (ICAP) may be helpful in preventing disputes, but at the moment is limited in terms of the pilot countries and businesses. To the extent that it is able to determine a low risk status for groups, it may be effective in limiting the number of cases to be addressed under MAP.

Joint audits

Joint audits, which go beyond simultaneous tax examinations, can be an efficient use of tax authority and business resource for appropriate types of business and fact patterns. To be effective, their outcomes need to include agreements on any adjustments made, including relief under MAP without a separate process being required. Appropriate candidates for joint audits may include some profit splits and cost contribution arrangements which involve multiple parties and can be sensitive to decisions made in the economic analysis. In particular, joint audits can avoids cases where lengthy unilateral audits are subsequently subject to adjustments under MAP, further lengthening the timescale for resolution. It would be helpful if the Guidelines were to include a framework for assessing situations where businesses should have the option of proposing a joint audit.

Variations in domestic time limits pose a challenge when determining the years under joint audit and agreed frameworks are needed to assist tax authorities in the practicalities of undertaking a joint audit.

Consideration should be given as to how to incentivise participation in joint audits. If the relevant facts remain unchanged in future years, the work undertaken during a joint audit may be a useful starting point for negotiation of bilateral APAs.

Relevant aspects of the minimum standards and best practices contained in the Report on BEPS Action 14 related to transfer pricing have been incorporated into Chapter IV in the 2017 edition of the Transfer Pricing Guidelines. Considering this, and based on your experience, is there any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimise the risk of double taxation?

Downward adjustments

Further to a transfer pricing adjustment by one tax authority, businesses suffer double taxation unless a corresponding adjustment is made by the other tax authority. The Guidelines should recommend that, in appropriate (often simpler) cases, downwards adjustments should be permitted under domestic law without the need to tie up resources on mutual agreement procedures. This would not preclude tax authorities from denying the adjustment under audit, in which case MAP would remain available to the business. Appropriate safeguards would include a requirement that the adjustment should comply with the arm's length principle. Downwards adjustments could also be conditional on confirmation that the original, upward adjustment has been included on a tax return or assessment from the tax authority. A formal process could be implemented to notify the relevant tax authorities where this type of adjustment has been made.

The Italian tax authorities have issued documents for public consultation in respect of a new tool to avoid double taxation where transfer pricing adjustments have been made by overseas tax authorities under the arm's length principle. Under the draft proposals, if a decrease in the Italian taxable income is necessary to avoid double taxation deriving from a transfer pricing assessment, a downward adjustment would be possible through a specific request for a "correlative adjustment" to be filed by the Italian taxpayer with the domestic competent authority. It would not be necessary to obtain relief under the mutual agreement procedure, although businesses would retain the right to request this.

Secondary adjustments

Secondary adjustments are neither prevented nor required by Article 9 of the OECD Model Tax Convention on Income and on Capital and its associated commentary. In general, secondary adjustments are a distortive feature that impose a compliance burden on businesses that is disproportionate to the arm's length amount of lost interest and tax thereon (this is particularly the case given current low interest rates). Secondary adjustments can however serve a useful purpose in situations where there is a real loss of tax. An example might be where there is a dividend withholding tax obligation that would have arisen if the unadjusted transfer pricing had not transferred cash to a parent in place of payment of a dividend. The Guidelines should make clear that secondary adjustments should be prohibited for all but cases where a material withholding tax liability under the applicable double tax treaty would have arisen. They should also set out that secondary adjustments made in accordance with the Guidelines and complying with the arm's length principle (ie not being penal in nature) should be subject to MAP procedures.

The EU Joint Transfer Pricing Forum 'Final Report on Secondary Adjustments' (October 2012) recommends, in the context of mutual agreement procedures, that no interest is charged in the interest of simplification and recommends that EU countries should refrain from imposing a penalty with respect to the secondary adjustment.

Element 2.7 of Action 14 minimum standards and the best practices related to Advanced Pricing Agreements contained in the Report on BEPS Action 14 have also been incorporated into Chapter IV in the 2017 edition of the Transfer Pricing Guidelines. Considering this, is there any additional guidance that could be provided on advance pricing arrangements? Based on your experience, are any features of Advanced Pricing Agreements or specific initiatives related to Advanced Pricing Agreements that could strengthen their role in minimising transfer pricing disputes? What are the advantages of such initiatives and the implementation challenges?

Advanced Pricing Agreements (APAs) are mutually beneficial for businesses and tax authorities in providing certainty that the correct level of tax is paid. Although APAs are an effective tool for dispute prevention, they are resource intensive for all parties and the time and costs involved mean that they are not practical in all cases. In addition, the demand for APAs has increased further to the implementation of the various BEPS actions which has caused processes in many countries to slow.

Bilateral APAs have the advantage of providing certainty in respect of both relevant tax authorities. However, unilateral APAs can also play an important role in increasing certainty. In some cases, a unilateral APA may be a first step towards a bilateral APA and the Guidelines should include processes through which a unilateral APA can be used as the basis for a bilateral APA.

Unilateral APAs are also useful in cases where there is no double tax treaty relationship. Additional controls are needed to ensure that the result of a unilateral APA is at arm's length and that this is clearly explained and documented.

Deloitte.

Are there any other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV of the Transfer Pricing Guidelines?

Resources

Tax authorities need sufficient resource to manage mutual agreement procedures, both in terms of staff numbers and individuals with relevant technical and commercial experience to understand industry norms. The use of external experts can provide valuable training and be used for consultation on niche points, but tax authorities need to drive their own strategies.

Settlements and MAP

Despite the work undertaken as part of BEPS to improve MAP cases, there remains evidence that audit case teams in some countries offer to settle disputes with businesses on the condition that the case is not taken to mutual agreement procedures. It may be that these are isolated cases (some are cases where businesses are not represented by advisers and so do not always know that this is not permitted) but tax authorities should ensure that businesses under audit are made aware that they will retain full access to MAP obligations regardless of any settlement. Settlements should not be predicated on any basis that influences a tax authority's obligation or usual practices on sharing information. Peer reviews of the MAP process may help with this process over time.

Circumvention of mutual agreement procedures through domestic measures

It is an essential component of transfer pricing and the international tax framework (including double tax treaties) that businesses can obtain relief from economic double taxation through mutual agreement procedures ('MAP'). There is a concern that some countries have introduced domestic measures (in particular to disallow deductions) with the effect that businesses are discouraged or prevented from claiming relief under double tax treaties. It would be helpful if the OECD could provide guidance on situations where the result is 'taxation not in accordance with the treaty' such that it is clear to businesses and tax authorities that MAP is available. This issue arises most commonly in relation to payments for intra-group services and intangibles. Other tax authorities may require disproportionate administrative procedures in order for a deduction to be allowed e.g. requiring an APA to be obtained as a pre-requisite for a deduction for payments for the right to use intangibles.

Empowerment of case teams

Tax administrations must ensure that internal procedures developed for consistency purposes are not so burdensome to prevent resolution of cases, and that case teams are empowered to make appropriate decisions.

There should be clear distinction between the approach by tax authorities in risk assessment and during an audit e.g. a change in royalty rate may be appropriately flagged as part of a risk assessment to determine cases selected for audit, but should be objectively evaluated in any subsequent audit.

Dutch Banking Association

NVB Response to the OECD Consultation on the scope of the future revision of Chapter IV (administrative approaches) and Chapter VII (intra-group services) of the Transfer Pricing Guidelines

The Dutch Banking Association or Nederlandse Vereniging van Banken (hereafter: NVB) is the representative voice of the Dutch banking community with over 60 member firms, large and small, domestic and international, carrying out business in the Dutch market and abroad. The NVB strives towards a strong, healthy and internationally competitive banking industry in the Netherlands, whilst working towards wider single market aims in Europe.

This memo is in response to the invitation of the OECD, published 9 May 2018, to provide comments on the scope of the future revision of Chapter IV (administrative approaches) and Chapter VII (intra-group services) of the Transfer Pricing Guidelines.

The NVB would like to thank the OECD for this opportunity and welcomes the initiative to revise the guidance in Chapter IV and Chapter VII of the Transfer Pricing Guidelines.

The OECD has asked for comments on a number of issues. If and insofar the NVB has any comments or views we have listed these issues below.

Chapter IV – Disputes Resolution

- Additional guidance that could be provided on advance pricing arrangements;
  NVB: APAs should be more actively encouraged, as a mechanism for dispute prevention. This could be achieved by, for example, fast track procedures for more straightforward areas.

- Any other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance to be developed as part of the revision of Chapter IV of the TPG.
  NVB: Alignment with the EU Council Directive on Tax Dispute Resolution Mechanisms in the EU is preferred.

Chapter VII –Intra-Group Services

- Demonstrating that a service has been rendered and/or that the service rendered provides benefits to the recipient;
  NVB: This will always be difficult in practice. The OECD could consider alternative methods, e.g. group members are permitted to deduct group overheads up to an agreed percentage of Earnings / EBIT and/or Capital.

- Drawing a distinction between: (i) activities which do or do not benefit the local affiliates; (ii) benefits that purely arise from group membership and those that arise from a deliberate concerted action; and (iii) shareholder activities and stewardship activities;
  NVB: It would be useful to elaborate on the influence of group membership on the credit rating of subsidiaries.

- Identifying in practice duplicated activities;
  NVB: Guidance on the role of regional service centers would be useful, as tax authorities often fail to understand that head office may delegate part of its activities to a "regional head office". This means there are for example costs of local HR, regional HR and central

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HR, but this does not necessarily mean there is duplication.

- Finding an appropriate allocation key for charging intra-group services;
  NVB: It would be helpful to have more guidance on the use of single versus multiple allocation keys; some examples of general allocation keys that may be appropriate for specific industries; and an indication of specific allocation keys that would not normally be acceptable.

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EBIT

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Comments on the
Scoping of the future revision of Chapter IV (administrative approaches) of the OECD's Transfer Pricing Guidelines

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EBIT's Members at the time of writing this submission:
AIRBUS GROUP, BP, CATERPILLAR, CONSTELLATION BRANDS, DEUTSCHE LUFTHANSA, DIAGEO, GSK, HUAWEI, INFORMA GROUP, INTERNATIONAL PAPER, JOHNSON & JOHNSON, JTI, NASPERS, PEPSICO, PFIZER, PROCTER & GAMBLE, RELX, SCHRODERS, SHV GROUP, TUPPERWARE, UTC.

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Sent via upload TransferPricing@oecd.org

Brussels, 20 June 2018

Dear Jeff,

EBIT's Members are grateful for the opportunity to provide comments on the OECD's public consultation running from 9 May – 20 June 2018 with regard to the scoping of the future revision of Chapter IV (administrative approaches) of the OECD's Transfer Pricing Guidelines ("TPG").

The comments provided in the present EBIT position paper are in line with the submission by EBIT from January 2015 to the OECD: http://www.ebit-businesstax.com/pdf/pwc-ebit-comments-oecd-beps-action-january-2015.pdf

Comments

Below are a number of issues that EBIT believes are important for Working Party no. 6 of the OECD on the Taxation of Multinational Enterprises to do further work on.

ICAP (International Compliance Assurance Programme)

Early in 2018, the OECD launched the ICAP pilot, which "is a voluntary programme that will use CbC Reports and other information to facilitate open and co-operative multilateral engagements between MNE groups and tax administrations, with a view to providing early tax certainty and assurance." ICAP aims to facilitate multilateral discussions between MNE groups and participating tax administrations and improve the effectiveness of current risk assessment processes.

Further benefits of ICAP for authorities and MNEs are the following:

- A duly informed and targeted use of CbCR information by tax authorities.
- A more efficient use of resources and a co-ordinated approach to engagement by tax authorities.
- A faster, clearer route to multilateral tax certainty for tax authorities and MNEs.
- Fewer disputes entering into MAP as less double taxation given provided multilateral tax certainty.

Due to the fact that ICAP intends to facilitate and improve the effectiveness of co-operative multilateral engagements for the involved stakeholders, which is also a general objective of Chapter IV of the OECD TPG - we suggest that this could also be a part of the revised Chapter IV of the OECD TPG in the future as it could prove particularly useful in the area of transfer pricing.

Co-operative compliance and joint initiatives

Co-operative compliance and similar joint initiatives between business and tax authorities help to increase transparency for all stakeholders involved. They help to reduce the risk of tax evasion and avoidance as well as double or multiple taxation, and they help to ensure tax certainty and to increase efficiency in tax audits for both tax administrations and taxpayers. EBIT considers that the OECD TPG could benefit from introducing a section describing the pros and cons of approaches such as co-operative compliance or similar approaches such as promoting the enhanced relationship.

EBIT recommends that in the area of transfer pricing, because of the immediate cross-border effects of the transactions, guidance be developed that helps streamline the approaches taken in the different countries. This could promote enhanced co-operative relations between tax administrations and taxpayers on the basis of mutual trust in order to prevent tax-related disputes or enhance their effective resolution at an early stage i.e. already at the stage of consideration of an audit, preparation of an audit or actually at the beginning or during an audit. Several countries have already introduced cooperative compliance programmes in order to improve compliance and counter tax avoidance. It could be useful to discuss and reflect the use of such programmes in particular in the area of transfer pricing and develop guidance drawn from the existing experiences.

In this context, early communication can prevent misunderstandings and inefficient allocation of resources from all stakeholders involved by helping to focus on the most critical aspects, which contribute to effective risk management. A cooperative approach should also imply the disclosure and understanding of the facts and circumstances of the case under consideration by the taxpayer. In light of this, the concept of "early notification" could be considered.

Based on our experience, we see that upon the opening of a tax audit, tax administrations tend to ask for information (for e.g. detailed financial information or documentation) that may go beyond what can be reasonably expected to be provided by the taxpayers at that point in time of the audit. In certain cases, taxpayers may also be challenged by information that is neither publicly available nor available to independent parties. EBIT considers that guidance on the type and level of information and cooperation that tax administrations can reasonably expect to receive during a tax audit would be helpful. We also anticipate that the amount of information which may reasonably be expected to provide could be substantially reduced if there is a co-operative compliance type agreement already in place with that tax administration and taxpayer. We recognise that part of the discussion is already covered in Chapter V Documentation, but in this respect a more broad review of international procedures, compliances practise, standardised approaches, etc. could be discussed.

In parallel, since the environment in which tax administrations and taxpayers are operating is undergoing fundamental changes as part of the digital transformation, EBIT considers that the concept of Tax Control Framework (and risk assessment) should be developed and taken further and that additional work on measures of effectiveness should be added.

Safe Harbours

EBIT welcomes the use of safe harbours. Although WP6 has decided that there is no need at this stage to revise or supplement the current guidance, EBIT believes that the guidance could still be improved.

In the 2013 revision of the section on safe harbours, three Draft Memoranda of Understanding ("MoU") were developed on low risk distribution, low risk manufacturing and low risk research and development, respectively, to assist in the conclusion of bilateral of multilateral safe harbours, thus increasing the tax certainty and predictability for all stakeholders (MNEs as well as tax administrations) involved. In our day-to-day experience, however, the use of such bilateral or multilateral safe harbours has been minimal. We therefore request WP6 to urge countries to commit to concluding such bilateral safe harbours, where they may be appropriate.

Furthermore, EBIT considers that the MoU should not be limited to the low risk transactions involving distribution, production and research and development, but rather should be extended to all low risk transactions, including low risk services and low risk financial transactions. Although under BEPS Action 8-10 a safe harbour on low value-adding intra-group services was developed (simplified approach), EBIT notes that not all services transactions that do not qualify as low value-adding are as a result high risk. In particular, the MoU could be beneficial for these kind of transactions. Further, we encourage the use of the safe harbour (simplified approach) on low value-adding intra-group services to be acknowledged and used on a more global scale.

Mutual Agreement Procedure (MAP)

The limited involvement or participation of MNEs in the MAP process was already flagged in the 1995 version of the OECD's TPG. EBIT regrets that up until today, the taxpayer is no more involved or participates more in the process. Although we understand that the MAP procedure is typically a process between tax authorities, we believe that all parties involved would benefit from more access to and participation of the taxpayer in the process.

In EBIT's view, the OECD TPG guidance needs to ensure predictable and timely access to MAP for the taxpayer. From our day-to-day experience, in order to gain access to MAP, in some cases the taxpayer needs to give up his rights to the local appeal process and/or not have certainty as to if/when MAP can be commenced. In some countries there is the expectation that the taxpayer has to pay the taxes assessed before going to MAP. The OECD TPG guidance should emphasize that this is against the outcomes of the BEPS Action 14 Report (for example Best practice 6: countries should take appropriate measures to provide for a suspension of collection procedures during the period a MAP case is pending) and guidance of the Manual on effective Mutual Agreement Procedure (for example best practice 19 on audit settlements and unilateral APAs).

Although the BEPS action 14 standard on MAP should guarantee access to the MAP, there is still no guarantee that the procedure will lead to an outcome that will resolve the taxation not in accordance with the treaty. Therefore we would urge developing guidance encouraging the use of arbitration for transfer pricing cases, or a commitment from the tax authorities 'to resolve the case' instead of 'endeavour to resolve' the case. With regard to arbitration, the possibility to resolve the case through an international dispute panel should be explored.

EBIT welcomes the peer review process to monitor the implementation of BEPS Action 14. We understand from the peer reviews that have been finished already that one issue relates to the resources available to the competent authority function. A lack of tax authority resources in relation to MAPs may lead to the postponement of the cases or preparation of the cases that are not ideal. The same applies to APAs. In our experience, there are cases whereby the tax authorities are currently not staffed to handle all the APA requests. WP6 guidance on MAPs and APAs should provide that sufficient resources (including knowledgeable human resources on transfer pricing) be put at the disposal of the competent authority function. It is encouraged that detailed guidelines for APAs are published and that taxpayers committing substantial resources to assist in the efficient progress through an APA process could be entitled to a 'fast-track' approach, especially for unilateral APAs, where there are fewer relationships that have and interests to be coordinated through the process.

As already indicated, we believe that with the incorporation of some minimum standards and best practises contained in BEPS Action 14 significant improvements were introduced with regard to the efficiency in tax dispute resolution proceedings. However, based on our day-today experiences, EBIT Members consider that it would still be very useful to consider a "fast-track" MAP for simple/low risk dispute cases.

For example, one could define which well-defined MAP cases could be resolved under this fast-track procedure, such as transactions involving the rendering of low value-adding intra-group services, transactions involving low risk manufacturing and distribution or low risk research and development. This simplification would ensure that qualifying MAP cases would be resolved within a relatively short period of time (e.g. we have experiences where such Agreements are obtainable within 1-2 months in some locations, compared to over 2 years in other locations for ostensibly the same issues, so would encourage a framework which could lead to an efficient acceleration of the certainty process). With regard to APAs, the OECD should find ways to speed up the APA renewal process when there have been no material changes to the functions, risks and assets.

When agreeing an APA, there should be an option in all countries for this to be rolled back to cover the years open for audit except where already covered by an existing APA. If available, there is an opportunity to ensure efficient use of tax authority and taxpayer resources if audits addressing the same issues are not raised on a concurrent basis to the APA process.

EBIT believes that the OECD could provide more clarity on acceptable comparables, since different tax authorities have different approaches, e.g. on the ranges for comparables, which results in Transfer Pricing disputes.

EBIT Members consider that secondary adjustments create complexity and likely double taxation, therefore they should be discouraged, and they should be managed as part of the MAP. There should not be a one-sided consequence and double taxation as a result of secondary adjustments.

EBIT's Members trust that the above comments are helpful and hope that they will be taken into account by Working Party 6 of the OECD. EBIT is always ready to discuss with the OECD and any other stakeholders.

Yours sincerely,

European Business Initiative on Taxation – June 2018

For further information on EBIT, please contact EBIT's Secretariat via Bob van der Made, Telephone: + 31 6 130 96 296; Email: bob.vandermade@pwc.com).

Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
By email

SCOPE OF THE FUTURE REVISION OF CHAPTER IV OF THE TRANSFER PRICING GUIDELINES DEALING WITH ADMINISTRATIVE APPROACHES TO AVOIDING AND RESOLVING TRANSFER PRICING DISPUTES

20 June 2018

Dear Sir / Madam,

By means of this letter, EY would like to share its comments on the scoping document relating to the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines (the Ch. IV Scoping Document), as released by the OECD on 9 May 2018.

We appreciate the opportunity to provide comments and to contribute to the public consultation and discussions regarding the upcoming revision of Chapter IV of the Transfer Pricing Guidelines (the TPG). Our comments in this letter are structured as follows:

- Firstly, through our overarching comments, we emphasize the great uncertainty and risk of double taxation created by tax administrations applying the 2017 changes of the TPG in a retrospective fashion, and illustrate the negative impacts of this uncertainty on the adoption of the new rules;
- Secondly, we will outline the need for simplification and certainty, which in the short term should be translated into a stronger global adoption of the simplified approach for low-value adding services and implementation of the work on multilateral safe harbors;
- Finally, we will discuss our comments to the specific issues raised in the Ch. IV Scoping Document.

This letter presents the collective view of EY's global international tax network. If you have comments or questions, please feel free to contact any of the following:

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Yours Sincerely,
On behalf of EY

Ronald van den Brekel

Overarching recommendations aimed at minimizing transfer pricing disputes

While the Ch. IV Scoping Document has requested comments on certain areas and issues with the aim to incorporate such changes in upcoming amendments to the TPG, we feel there are overarching and fundamental issues that need to be addressed by the OECD / Inclusive Framework that are prerequisite to any changes to the TPG. These fundamental issues, which if not addressed, will lead to an increased amount of double taxation, and as a result – an increased amount of mutual agreement procedure (MAP) requests.

We strongly urge the OECD / Inclusive Framework to consider measures to address the following fundamental issues which will give rise to double taxation and transfer pricing disputes:

- The effects of double taxation created by the “dynamic” or “retroactive” interpretation of the TPG when assessing transfer pricing adjustments; and
- The eligibility of permanent establishments (PEs) for access to the mutual agreement procedure (MAP), according to the OECD Model Tax Convention on Income and Capital OECD MTC (the OECD MTC).

The effects of double taxation created by the “dynamic” or “retroactive” interpretation of the TPG when assessing transfer pricing adjustments.

Authority and application of the TPG

The arm’s length principle is a globally accepted standard in the area of international taxation. The arm’s length principle is not only enshrined in Article 9 of the OECD MTC, but it is also maintained and developed in the TPG and employed in Article 9 of the United Nations Model Double Taxation Convention between Developed and Developing Countries (the UN MTC), Article 9 of the United States Model Income Tax Convention (the US MTC), and Article 4(1) of the EU Arbitration Convention.

Through the recommendations by the OECD Council to its member states, and through the Harmful Tax Practices processes of the Inclusive Framework, jurisdictions worldwide are recommended (or even obliged) to include the arm’s length principle in their domestic legislation.

The TPG, in particular as it was broadened through adoption of the principles by the Inclusive Framework resulting from the Base Erosion and Profit Shifting (BEPS) project, need to be viewed against the background of domestic legislation relating to profit adjustments. This contrast to domestic legislation is needed as some countries (directly or indirectly) refer to the TPG in their domestic legislation, and because the TPG provides for a mechanism for relief of double taxation if both countries have levied taxed over the same items of income. The TPG’s adoption of the arm’s length principle is often only expressed in indefinite legal or statutory terms in domestic legislation and the interpretation of tax treaties.

The TPG, when used as an instrument for tax treaty interpretation, is generally considered to have the same or similar weight as the Commentary to the OECD MTC. In this context, the OECD is of the view that a “dynamic interpretation” of newly developed guidance applies, unless the new guidance contradicts old guidance that was applicable until the time of that change.

From a practical perspective, the TPG has had a tremendous and widespread impact on global transfer pricing issues. For example the Commentary to Article 9 of the UN MTC recommends that the TPG *“…should be followed for the application of the arm’s length principle.”*

Issue with the interpretation of the TPG

An existing fundamental issue has become increasingly important given the latest update to the TPG (incorporating output from BEPS Actions 8-10), which relates to countries changing the way they interpret the arm's length principle in their domestic legislation, with retrospective effect, following the adoption of the BEPS Action 8-10 final report.

We believe that it would be greatly beneficial if the TPG would explicitly address the impact of changes of the TPG on both the application of the bilateral tax treaties, and on the implementation of domestic legislation and the interpretation of transfer pricing rules by individual governments.

The problems created can be illustrated by the use of the new interpretations when applying domestic transfer pricing rules in relation to the years prior to 2017. A retrospective interpretation may extend a country's ability to tax, and may therefore give it the authority to make adjustments which would not be possible when compared to the interpretation of the legislation that existed at the time the relevant transaction took place. This leads to great uncertainty and risk for taxpayers.

When commencing the BEPS project, the OECD emphasized (in external communications) that rules had to change due to the fact that the existing TPG could be read as allowing an interpretation that was more based on the allocation of contractual rights, rather than on where economic value was created – while at the same time allowing the more "economical" reading that was adopted in the update of the TPG in 2017. Given this, it was recognized by the OECD that multiple interpretations were indeed possible. Subsequently, the interpretation was narrowed as a result of the BEPS project. Prior to the BEPS project, a limited number of countries had clearly expressed (through their domestic guidance), that they had adopted the more "economical" or "conduct" approach to transfer pricing. For these countries, there is no retroactive effect to the extent their domestic guidance was already aligned with the updated interpretation included in the 2017 version of the TPG.

However, a large majority of the countries had not expressed the same views and this was reflected in the understanding that taxpayers had over their transfer pricing obligations – in particular the concepts of "control over risk", "control over DEMPE functions", and the issue of "synergistic benefits", were not addressed in the pre-2017 version of the TPG and in most cases also not addressed in domestic transfer pricing legislation or rules. Retroactive application of these new concepts is leading to many transfer pricing disputes and will very likely will lead to MAP cases covering years prior to 2017. Moreover, retroactive effect is forcing taxpayers into a position where they need to "defend" their pre-BEPS transfer pricing positions as being in-line with the 2017 version of the TPG, instead of incentivizing them to transition into a transfer pricing policy that is clearly aligned with the new guidance, which in our view is creating uncertainty and is hampering a "spirit of the law" adoption of the new guidance, instead of incentivizing such adoption globally.

Our recommendation

To promote tax certainty and to mitigate an increase in double taxation and influx of MAP requests arising as a result of the update to the TPG and varying interpretations by tax administrations, we strongly recommend that a precise and clear statement be added to the Commentary to Article 9 of the OECD MTC which addresses the issue of the "dynamic" vs "static" interpretation of the 2017 version of the TPG. Such a statement should make a distinction between the interpretation for treaty purposes, and the interpretation for purposes of implementation into domestic legislation and domestic administrative practices regarding transfer pricing. Specifically in the latter case (domestic implementation), we strongly urge for retrospective application to be discouraged. We also strongly believe that for taxpayers who seek to transition their transfer pricing practices to align with the new guidance, that the transition should be encouraged by a process of providing multilateral certainty.

The eligibility of permanent establishments for access to MAP, according to the OECD MTC

Currently, permanent establishments (PEs) are usually not granted full access to protection under tax treaties (see Article 1 and Article 3(1) of the OECD MTC). Given the most recent initiatives in international tax law in the area of PEs, we can expect an increase in the amount of transfer pricing disputes relating to PEs, specifically as a result of the upcoming changes to the application of the Authorized OECD Approach (AoA) when assessing the attribution of profits to PEs, as well as the recently signed Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the MLI) which provides a considerable expansion of the definition of permanent establishments.

Although PEs at this point in time have procedural entitlement to MAPs (to an extent), we suggest that the OECD MTC or its Commentary explicitly provide PEs with procedural authorization regarding the eligibility of PEs for access to MAP under the OECD MTC.

The issue at hand can best be portrayed with a practical example.

Example

Affiliated companies A and B are situated in Contracting States A and B. Company A (the parent company), also has a PE situated in Contracting State C. Company B sells goods to Company A, with the goods transaction being fully attributable to Company A's PE located in Contracting State C. The price in which Company B sells the goods is at a price that is deemed not in accordance with the arm's length principle. There are tax treaties in force between all Contracting States, which are in accordance with the OECD MTC.

The income of the PE in Contracting State C is taxable in Contracting State C. Contracting State B makes a profit adjustment to Company B (based on paragraph 1 of Article 9 of the OECD MTC). Although the conditions for a corresponding adjustment according to paragraph 2 of Article 9 of the OECD MTC are met, Contracting State A rejects the corresponding adjustment because the adjustment relates to the income of its PE situated in Contracting State C, of which those profits are not taxed in Contracting State A (e.g. due to an exemption method being applied in Contracting State A).

As a result, economic double taxation may occur if such profit adjustments are made in Contracting State B, with no appropriate corresponding adjustment in Contracting State A. In this case, the same income is subject to taxation by different persons and is therefore taxed twice. In order to eliminate economic double taxation, paragraph 2 of Article 9 of the MTC refers (amongst others), to a MAP as provided by Article 25 of the OECD MTC to be carried out between two Contracting States, if necessary.

Ultimately, such an example would not be sufficient in itself, because the right of taxation of Contracting State B, and the Contracting State where the PE is situated (i.e. Contracting State C), would be effected equally. Two MAPs would be necessary in order to eliminate economic double taxation, namely one between Contracting States A and B, and one between Contracting States A and C. In the current international tax climate, the number of ongoing MAPs has increased steadily in recent years, while the duration of the proceedings has remained almost unchanged. Considering this, it becomes apparent that examples such as these will lead to a lengthy dispute resolution process, with an outcome that is uncertain due to the triangular nature of the case at hand.

In addition, it is also necessary to question the usefulness of the (double) participation of Contracting State A in the MAPs, as Contracting State A might not have a fiscal interest in a transfer pricing dispute that affects Contracting State C and Contracting State B, but nevertheless would have to face both procedures. Since the core of the matter at hand is the determination of the arm's length price for the sale of goods between Company B and the PE of Company A situated in Contracting State C, it seems obvious that it would be in best interest of all parties for the MAP to be conducted directly between Contracting State B and Contracting State C.

Our recommendation
In order to streamline the dispute resolution process in situations where a PE may be involved in a triangular case (similar to the example displayed above), the Contracting State of where the PE is situated and the Contracting State of where the profit adjustment was made should be encouraged to enter into a direct MAP with each other. Both Contracting States should consult the Contracting State of the company of where the PE's head office is located on whether a direct MAP between the two other states is acceptable, and if so, inform that Contracting State on the final results and conclusion of the MAP.

We recommend that the Commentary in Article 25 of the OECD MTC, specifically paragraph 55, be amended to clarify this.

Simplification and certainty: stronger global adoption of the simplified approach for low-value adding services and the implementation of multilateral safe harbors

Before the BEPS project was initiated, the OECD had started a long needed project on simplification in the area of transfer pricing, which was cut short due to the BEPS project, which as a result leaves the implementation of transfer pricing more complicated and more uncertain in a post-BEPS environment. As the BEPS project has now been finalized and is being implemented globally, we believe the OECD should focus next efforts in transfer pricing simplification and the creation of reliable and sustainable tax certainty processes.

Stronger adoption of the simplified approach for low-value adding services

The current guidance in Chapter VII of the TPG was updated to introduce a simplified approach for low-value adding services.

A survey in our network has shown that charges for low value adding services are one of the top ranking issues leading to double taxation. We believe that the simplified approach for low-value adding services is a step in the right direction in providing tax certainty while at the same time reducing administratively burdensome tasks. In order to continue widespread adoption of the simplified approach, the OECD is strongly encouraged to pick up on its goal of achieving geographic scale on this topic.

To achieve this, we urge the OECD to consider implementing the approach in a multilateral and binding way, for example by having Inclusive Framework Members agree to a Multilateral General Competent Authority Agreement on the issue. Such could, for example, be done in the context of the work of the MAP Forum of the Forum on Tax Administrations. In this way, the simplified approach would become part of the interpretative guidance of the bilateral tax treaties and would therefore find its way into domestic implementation. This would also limit the amount of tax controversy around an area that in itself is not creating high tax risks.

Implementation of multilateral safe harbors

We believe that the OECD should further pursue other avenues to implement the exemplary work already completed by Working Party No. 6 on the Taxation of Multinational Enterprises (WP6) in this area. The Annex to Chapter IV of the TPG provides sample memorandums of understanding to facilitate competent authority implementation of safe harbors. We feel that the annex should include a version tailored to the Chapter VII simplified approach. Moreover, we believe that each of the model multilateral safe harbors included in the existing OECD TPG are worth being translated into applicable Multilateral General Competent Authority Agreements.

Our comments to the specific issues raised in the Ch. IV Scoping Document

What additional aspects or mechanisms to minimize the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)? While input received in the past on some of these issues in the context of the work of the Forum on Tax Administration will be considered, input on business experience with such aspects or mechanisms would be useful, including what have been the advantages and/or challenges?

Based on our experiences and input received from many multinational enterprises (MNEs) relating to transfer pricing disputes, we suggest that Chapter IV is supplemented with additional guidance aimed at increasing transparency around transfer pricing audit selection practices, and specifically risk assessment examination practices. Such guidance would be a helpful step in minimizing transfer pricing related disputes. Guidance developed in this area should focus on best practices applied by tax administrations authorities when performing a risk assessment examination, and the guidance should also include aspects relating to the examination of country-by-country (CbC) reports. We feel that this guidance should at least include the following aspects:

- A clear requirement that tax administrations should not use CbC reports as the sole basis for determining if a taxpayer is selected for a tax audit;
- A recommendation that following the identification of a potential transfer pricing risk, the tax administration should provide an opportunity to the taxpayer to provide more clarifying information and explanations prior to engaging in formal tax audit procedures;
- Provide guidance for tax administrations relating to the usefulness and limitations when using data analytics during risk assessments;
- The desirability for tax administrations to clearly identify and quantify transfer pricing risks, and for this information to be shared with the taxpayer;
- A clear requirement for tax administrations to have processes and practices in place to ensure oversight of tax audits to ensure that transfer pricing examinations or tax audits are only initiated in worthwhile cases (i.e. in cases where the risks are material).

Such a set of best practices, included in Chapter IV of the TPG would only lead to greater consistency amongst tax administrations, and lead to more targeted and well informed transfer pricing audits which focus on real and material risks, reducing the overall costs and resources of both tax administrations and taxpayers.

With respect to the audit itself, the version of Chapter IV as included in the current (2017) TPG does contain useful recommendations. For example, the guidance states that tax administrations should not require a disproportionate amount of information or apply unrealistic standards (e.g. regarding the selection of comparables), while also providing flexibility in the methods applied by taxpayers, is a useful step in reducing transfer pricing disputes by acknowledging that many transfer pricing disputes arise due to the nature of the application of the arm's length principle and in many cases can be solved practically. However, the OECD should consider additional guidance in Chapter IV bringing forward a comprehensive set of best practice and transparent recommendation to tax administrations on the conduct of performing transfer pricing audits. This comprehensive guidance could include the requirement for tax administrations to provide publicly available guidance relating to transfer pricing audits, which may include some or all of the following elements:

- Clarity on the conduct of audits including timing and taxpayers' rights (including the appeals and arbitration processes)
- Communication protocols, including the availability and frequency of meetings;
- Effective channels between taxpayers and tax administrations to address concerns regarding the conduct of audits;
- The need for governance processes to ensure consistency of outcomes for cases with similar fact patterns, and for this information to be made publically available;
- The need for clarity and consistency in the application of penalties in transfer pricing cases, and for this information to made publically available.
- Early access to MAP / Advance Pricing Agreement (APAs) in more/appropriate cases.

Relevant aspects of the minimum standards and best practices contained in the Report on BEPS Action 14 related to transfer pricing have been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, and based on your experience, is there any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimize the risk of double taxation?

Further guidance in Chapter IV should have more concrete recommendations relating to the use and treatment of secondary adjustments. We suggest that the guidance strongly deter the use of secondary adjustments, and only limit secondary adjustments to extreme cases, e.g. in cases where the taxpayer has displayed willful intent to shift profits. The guidance should encourage secondary adjustments to be discussed in the MAP process (if applicable), and encourage countries to adopt domestic legislation to deal with secondary adjustments. In any case, there should be no double taxation arising from secondary adjustments, and governments must endear to resolve double taxation in cases it does arise.

Some countries have domestic legislation which stipulates that a secondary adjustment is to be made subsequent to a primary adjustment. In practice, we have witnessed that there are cases where competent authorities do not discuss the elimination of double taxation due to the secondary adjustment in their MAP negotiations (i.e. it is considered out of scope of the MAP), and therefore the taxpayer ultimately ends up suffering from additional (double) taxation due to the effects of the secondary adjustment, even though the MAP procedure was successful in resolving double taxation which arose from the primary adjustments.

There are two potential causes for such cases of double taxation to arise. The first potential cause is that a secondary adjustment is not treated as one of the issues to be discussed in tax treaties for the purpose of the elimination of double taxation. In fact, the Commentary to paragraph 2 of Article 9 of the MTC (discussing corresponding adjustments) notes that Article 9 does not deal with secondary adjustments, which as a result provides no legal basis or certainty for the elimination of double taxation on secondary adjustments.

The other potential cause is the lack of any domestic regulation in a country requiring secondary adjustments that would give a taxpayer receiving a primary adjustment an option to allow the taxpayer to avoid the secondary adjustment, for example, by way of repatriation by the related party having the excess profits to the taxpayer receiving the primary adjustment.

To address the issue of double taxation arising from secondary adjustments, Article 25 of the OECD MTC would need to be amended to cover secondary adjustments. However, lack of any changes to the OECD MTC, we therefore strongly suggest that the guidance in Chapter IV be amended to (i) deter the use of secondary adjustments and reserve the use for only extreme circumstances, and (ii) encourage countries to adopt domestic legislation to allow taxpayers to avoid secondary adjustments.

Element 2.7 of Action 14 minimum standards and the best practices related to APAs contained in the Report on BEPS Action 14 have also been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, is there any additional guidance that could be provided on advance pricing arrangements? Based on your experience, are any features of APAs or specific initiatives related to APAs that could strengthen their role in minimizing transfer pricing disputes? What are the advantages of such initiatives and the implementation challenges?

There is a lot of support from taxpayers and tax administrations on APAs, and we expect to see an increase of taxpayer interest on APAs going forward. Practically, our experience is that taxpayers would like to have greater and more efficient access to APAs. Additionally, we expect bilateral and multilateral APAs to become more favored as a tool to manage tax uncertainty across many jurisdictions, which is also endorsed in the TPG.

That being said, there is a limited number of countries with formal transfer pricing rules and regulations that also have accessible APA programs. Of the countries with APA programs in place, there is a large variance in the timing, efficiency, and sophistication of the APA programs, which can create uncertainty for taxpayers considering entering into an APA, an obviously unintended result.

Given these practical issues, guidance in Chapter IV should focus on providing a set of best practices for tax administrations in setting up and administering an APA program.

Additionally, while many taxpayers feel that an APA could be beneficial, we have practically observed that some taxpayers are hesitant to enter into an APA process given perceived historical risks of a transaction. Although taxpayers may technically have a correct position regarding the application of the arm's length principle for a transaction considered for an APA, the drawback of entering into an APA for a certain position in the future is sometimes outweighed by the perception that a tax administration may use the opportunity to gather information during the APA process to challenge the past treatment of transactions (see also our comments on the retrospective effect of the TP BEPS changes). As a result, the taxpayer may choose not to enter into an APA process. To counter this, the guidance in Chapter IV should make clear statements that tax administrations should not use information gathered during an APA process as means to propose a past transfer pricing adjustment. In addition, the guidance should continue to recommend the option for retroactive treatment on transactions covered under an APA.

We have also experienced that there are some tax administrations that have adopted practices which deny access to their APA programs, with a view to managing their internal resources. Whilst it is understood that tax administrations are often under resourced, we believe that there should be guidance as to the minimum requirements for a taxpayer to be granted entry into an APA program, and if these minimum requirements are met, then there should be an automatic acceptance procedure to enter into the APA program.

Guidance to Chapter IV should also consider the encouragement of multilateral APA programs. Many MAP programs used thus far are for bilateral APAs, however with the increase and sophistication of global integrated business models, there will be an increased number of transfer pricing issues involving more than two related parties (and two countries). There are many common business models where a mechanism for a multilateral APA would effectively provide more tools to mitigate transfer pricing disputes effectively across multiple jurisdictions.

Given our observations stated above regarding the difficulties of applying for unilateral and bilateral APAs, we strongly feel that any upcoming guidance to Chapter IV should consider methods to facilitate the application of multilateral APAS.

Are there any other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV of the TPG?

It would be useful for the OECD to consider both the efficacy of existing dispute resolution mechanisms and the possibility / desirability of additional mechanisms given the high likelihood that the number of transfer pricing audits, and as a result, MAP applications to increase in the future.

Currently, and despite the current guidance in Chapter IV of the TPG, many taxpayers find that there is often no alternative to transfer pricing disputes other than concluding a single country tax audit, potentially litigation, and followed by a MAP. The MAP is often unsatisfactory due to the factors mentioned in the TPG (costs, time taken, lack of access for the taxpayer, and uncertainty of the outcome). Therefore, we suggest that the guidance in Chapter IV consider additional ways to improve the time taken and outcome of MAPS, and reconsider the position of the inclusion of taxpayers in the MAP process.

In terms of additional transfer pricing dispute resolution mechanisms, we suggest that the OECD build on the role which may be played by formal mediation. This is already mentioned in paragraph 4.40 of the TPG which states that the Commentary to Article 25 of the OECD MTC contains a favorable discussion on the use of supplementary dispute resolution mechanisms in addition to arbitration, including mediation. Mediation has proven to be a very effective dispute resolution mechanism, and in certain countries is legally mandated before a case proceeds to litigation. However, the use of mediation in transfer pricing disputes to date has been very limited. Many countries have no formal mediation process in relation to transfer pricing disputes. Other countries may have a mediation process in place for general tax related disputes, which can be potentially used for transfer pricing related disputes. Mediation involves the use of an independent mediator to help the two sides in a dispute to resolve their issues and has several advantages over other methods such as arbitration and litigation including:

- The parties in dispute retain control over the outcome;
- Proceedings are private and confidential;
- If mediation fails, any position taken in mediation discussions does not bind either party (e.g. in any subsequent litigation); and
- The costs of mediation are typically lower than those incurred in litigation.

Transfer pricing disputes would lend itself as a successful area for mediation, as there is almost always a range of acceptable outcomes under the arm's length principle, which is more consistent with a negotiated solution brokered by a skilled intermediary as opposed to a binary decision between two positions. Obviously, mediation in a domestic context would not eliminate the risk of double taxation, and therefore the possibility to apply mediation in an international context should be analyzed.

Given this, we strongly suggest that the guidance in Chapter IV encourage the use of mediation by tax administrations as a dispute resolution mechanism, and even consider mandating its use prior to a formal arbitration or litigation proceeding.

The OECD may also wish to consider endorsing the use of joint tax audits which can lead to a much quicker resolution of transfer pricing disputes, and also consider expansion of the recently launched international compliance assurance program (ICAP) to other countries.

The OECD recognizes that the burden of proof rules for tax cases differ among OECD member countries (paragraph 4.11 of the TPG), and the divergent rules on burden of proof will present serious problems if the strict legal rights implied by those rules are used as a guide for appropriate behavior (paragraph 4.14 of the TPG).

More unpredictable situations, however, may arise where the relevant jurisdictions have no clear rules concerning the burden of proof, and remain silent on the issue. This gives tax administrations the opportunity to shift all burden of proof to the taxpayer. In the event that a taxpayer fails to cooperate, the tax administration is given the authority to estimate the taxpayer's income and to assume relevant facts based on experience. In these cases, the tax administration would have the tendency to impose a high level of cooperation which is in practice, too difficult for taxpayers to comply with which leaves the taxpayer threatened by a potential single sided assessment.

Clear burden of proof rules are important as a first step for transfer pricing disputes. There should be no uncertainty to taxpayers when it comes to the burden of proof, and tax administrations should not use it as a mechanism to create an unfair advantage over the taxpayer.

According to the OECD, at least one OECD member country has a procedure that may reduce the need for primary adjustments by allowing the taxpayer to report a transfer price for tax purposes that is, in the taxpayer's opinion, an arm's length price for a controlled transaction, even though this price differs from the amount actually charged between the associated enterprises. Compensating adjustments may facilitate the reporting of taxable income by taxpayers in accordance with the arm's length principle, recognizing that information about comparable uncontrolled transactions may not be available at the time associated enterprises establish the prices for their controlled transactions (paragraph 4.38 of the TPG). We recommend the OECD encourage rules to be put in place to allow compensating adjustments.

In a number of countries, taxpayers are not allowed a deduction resulting from a corresponding adjustment unless granted through a MAP. We recommend the OECD encourage countries to accept corresponding adjustments outside MAP, eliminating the need for a MAP.

Finally, as a mechanism to ensure equitable treatment to taxpayers and tax administrations in MAP cases, the OECD should encourage tax administrations to apply the same interest rate on repayments arising out of a MAP, as they do on other tax repayments. It should be considered whether interest due and payable could be covered as part of the MAP conclusions.

FÉDÉRATION
BANCAIRE
FRANÇAISE

FBF/ COMMENTS ON THE SCOPE OF THE FUTURE REVISION OF CHAPTER IV (ADMINISTRATIVE APPROACHES) AND CHAPTER VII (INTRA-GROUP SERVICES) OF THE TRANSFER PRICING GUIDELINES

Submitted by e-mail: TransferPricing@oecd.org

June 18, 2018

Dear Sir,

The FBF, as the voice of the French banking sector representing the interests of over 400 banks operating in France, encompassing large and small, wholesale and retail, local and cross-border financial institutions, is pleased to provide comments on the public discussion on the scope of the future revision of Chapter IV (administrative approaches) and Chapter VII (intra-group services) of the Transfer Pricing Guidelines.

We understand that The OECD is considering starting two new projects to revise the guidance in Chapter IV (administrative approaches) and Chapter VII (intra-group services) of the Transfer Pricing Guidelines. In this context Public comments are invited on:

- the future revision of Chapter IV, "Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes" of the Transfer Pricing Guidelines, and
- the future revision of Chapter VII, "Special Considerations for Intra-Group Services", of the Transfer Pricing Guidelines.

1- As far as future revision of Chapter IV is concerned, French financial institutions (FIs) underline that, from a practical point of view, the administrative approaches intended to avoid and resolve transfer pricing disputes as recommended within the OECD guidelines, are very rarely implemented. In this regards, it is very difficult to make any reservations as to the efficiency of any scheme in force. It should be noted however that in case of tax audit, it is usually not possible for the audited entity to ask for corresponding adjustments from the other tax administration, as a prerequisite from the French tax administration. Another point which does not favour the use of mutual agreement procedure is the fact that engaging in such a procedure does not freeze the payment of the tax adjustments. Also there is a total uncertainty on the delays under which a possible agreement may be reached and the final adjustments which will be due. For all these reasons, this procedure is difficult to use and therefore inefficient.

Irrespective of this remark, French banking sector is of the view that, for purpose of improving the resolution of disputes by the competent authorities, **implementation of an "upstream" mutual agreement procedure which would thus intervene before the occurrence of the disputes, is the only interesting solution to consider.** This procedure could be framed within a delay in order to push the tax administrations to an agreement and reinforce legal security for companies. This could be applied to an ongoing issue concerning the banking sector: the capital dotation of EU branches. As there has never been any agreement between European tax administrations, French banks are facing a double taxation issue for many years.

2- **As far as future revision of Chapter VII is concerned, as preliminary remark,** French banking industry is of the view that, as long as it is proved that the arm's length principle is complied with under the "benefit test analysis", determining whether or not "intra-group services" have been effectively provided must fall under the responsibility of the tax administration i.e. **the burden of proof regarding the existence of intra-group services should be on tax authorities rather than on taxpayers.** This should be the case also regarding "duplicated service's which do not qualify, at first sight, as intra-group services**.**

Regarding **shareholders activities**, it is imperative that a notion of "**expenses of higher interest group"** should be introduced for purpose of treating as "intra-group services" all services performed by a parent company solely because of its ownership interest in one or more group members.

To be more specific, the purpose is to allocate as intra-group services, all expenses engaged by the parent company even though this expense would not have been incurred by an entity on a standalone basis and this only because the expenses is engaged for the "group higher interest". This could be the case, for instance, regarding expenses linked to a litigation involving only the parent company but which may have a major impact on the group as whole. An example can be found in the strategy direction. Also, allocation of exceptional costs by the head of the group should be authorised in certain specific situations.

Another improvement is a more clear definition of direct (which are invoiced as such) and indirect services (which are invoiced with a distribution key).

Best regards,

Grant Thornton International

Scoping of the future revision of Chapter IV (administrative approached) of the OECD Transfer Pricing Guidelines

Grant Thornton International Ltd welcomes the opportunity to provide input on scoping of the future revision of Chapter IV. We appreciate the work that the OECD has undertaken and would like to make the following comments.

Tax Policy and Statistics Division
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
2 rue Andre-Pascal
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By e-mail to: TransferPricing@oecd.org

20 June 2018

Subject: Input on the scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines

Introduction

The current global fiscal climate is creating a great deal of uncertainty for taxpayers. Transparency and anti-tax avoidance measurements are leading towards more uncertainty and an increase of disputes with local tax authorities. Therefore, we are happy that the work of BEPS 14, with minimum standard and best practices in relation to dispute resolution, has been incorporated in the 2017 edition of the TPG. Because transfer pricing is not an exact science, it will not always be possible to determine the single correct arm's length price.

Through the Multilateral Instrument ('MLI')[1], only 28 signatories have declared their commitment to provide for mandatory binding MAP arbitration in their bilateral tax treaties as a mechanism to guarantee disputes will be resolved within a specific timeframe. We hope that more countries will introduce mandatory binding MAP arbitration in the future.

What additional aspects or mechanisms to minimise the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)? While input received in the past on some of these issues in the context of the work of the Forum on Tax Administration will be considered, input on business experience with such aspects or mechanisms would be useful, including what have been the advantages and/or challenges?

- Co-operative compliance
  - Based on our experience, certain local tax authorities allow businesses to apply for horizontal monitoring. This form of co-operative compliance provides a timing benefit and increases certainty. The businesses must be able to demonstrate they are in control of their tax risks. Horizontal monitory is based on mutual trust, understanding and transparency. Tax authorities will then shift their behavior from reactive (tax audits over past years) to proactive (upfront understanding). Businesses are expected to share and explain their tax positions beforehand and discuss decision that will have a local tax impact.

  - Also, we believe that there are general improvement points on how horizontal monitoring is organized. It often depends very much on the individual tax inspector. Some of the tax inspectors do not have transfer pricing knowledge. The concept of horizontal monitoring is not strictly regulated and is often based on an open standard.

  - Additional observations include the compliance costs of being part of co-operative compliance. Entering into and maintaining the status of a co-operative compliance may prove costly for companies in terms of administrative burden. As opposed to only disclosing tax information upon request by the local tax authorities, co-operative compliance companies are expected to disclose their tax position on a continual basis and additionally disclose any new tax schemes they enter into.

  - Being part of co-operative compliance may be costly as companies are expected to abstain from certain controversial tax structures. This increased transparency may put co-operative compliance companies at a disadvantage to their competitors who apply tax structures that may be more controversial.

[1] Countries that have opted in to mandatory arbitration as stipulated in part 6 of the MLI (as op 5th of June 2018): Andorra, Australia, Austria, Barbados, Belgium, Canada, Curacao, Fiji, Finland, France, Germany, Greece, Ireland, Italy, Japan, Liechtenstein, Luxemburg, Malta, Mauritius, the Netherlands, New Zealand, Portugal, Singapore, Slovenia, Spain, Switzerland, Sweden and the United Kingdom.

Relevant aspects of the minimum standards and best practices contained in the Report on BEPS Action 14 related to transfer pricing have been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, and based on your experience, is there any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimise the risk of double taxation?

- Adjustments
  - A secondary adjustment can arise from a secondary transaction, for instance taking into account interest on the debt receivable that has arisen or a subsequent dividend tax assessment on a profit distribution. Not all countries take the same approach as a starting point. This may lead to a situation that the other State involved is not prepared to setoff for instance the dividend tax levied as secondary adjustment because the fictitious dividend payment is not acknowledged. In the Netherlands, if the taxpayer makes it plausible that - considering the difference in tax systems between the respective States - the dividend tax cannot be setoff and there is no question of abuse aimed at avoiding dividend tax, the secondary adjustment is omitted.[2] We prefer stronger guidance from the OECD to the effect that secondary adjustments are not recommended, and that if countries do apply them, they should allow flexibility in treatment in cases where the other state does not accept them.
  - In an ideal situation, a corresponding adjustment made by the tax administration of the second jurisdiction, is consistent with the primary adjustment. In this case, allocation of profits between the two jurisdictions is fair and no double taxation occurs. However, it often occurs that jurisdictions do not reach the same conclusion under article 9 (1), thus refusing to make the adjustment under article 9 (2). In this case, the tax treaty will not eliminate double taxation. Therefore, MAP may be used to consider corresponding adjustment requests.
  - From a practical point of view, it would be useful to decide which jurisdiction has the priority to make a transfer pricing adjustment, for instance the state that receives the intercompany service / goods. In this case, the recipient state should take the initiative to start a MAP procedure simultaneously to minimize double taxation issues.
  - Still unresolved is the issue whether a transfer pricing adjustment should automatically result in a adjustment of the customs value. Even within the EU, views differ regarding this issue.
  - There is also a timing difference between corporate taxes and indirect taxes. Corporate taxes are assessed annually and VAT treatment has to be determined at time of supply. As a result of this, price adjustments could create problems.
- Other observations
  - We would also like to share our observations of certain cases where taxpayers are placed in a difficult position. In these cases taxpayers are requested to waive access to the MAP when settling for an audit as part of the settlement agreement.
  - We have experience in certain cases, where the deductibility of certain expenses are only based on local tax law. These jurisdictions have taken the position that these corrections are not subject to tax treaties, and therefore, can not be resolved via MAP.

Element 2.7 of Action 14 minimum standards and the best practices related to APAs contained in the Report on BEPS Action 14 have also been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, is there any additional guidance that could be provided on advance pricing arrangements? Based on your experience, are any features of APAs or specific initiatives related to APAs that could strengthen their role in minimising transfer pricing disputes? What are the advantages of such initiatives and the implementation challenges?

- From a taxpayer perspective, having a unilateral APA can give more certainty than simply taking a tax position. If a dispute arises, the local tax authorities have already given approval of the transfer pricing position from their perspective.
- However, due to exchange of rulings, state aid cases, increased transparency, etc, unilateral APAs regarding some structures are becoming less popular. Some guidance on unilateral APAs would be helpful.
- By contrast, bilateral APAs (with roll-back in appropriate cases), subject to the applicable time limits where the relevant facts and circumstance in the earlier tax years are the same , are considered in our view the most favorable type of APA.
- The advantages we have experienced are:
  - The bilateral APA reduces the chance of profits escaping tax or being double taxed;
  - The roll-back prevented potential transfer pricing disputes for past periods;
  - More certainty than a unilateral APA; and

[2] Dutch Transfer Pricing Decree State Secretary of Finance, 11 May 2018, nr. 6865, section 4.

- More certainty than a MAP procedure, as bilateral APAs pertain to the future and the outcome is generally more in line with the arm's length principle.

- One of the challenges is the preparation of extensive transfer pricing analysis and documentation. The coordination of such bilateral APAs is very time intensive and costly.

- Another challenge is that bilateral APA procedures are cost prohibitive for smaller taxpayers. Tax administrations may also need to provide the possibilities of adopting a streamlined access and guidance for small taxpayers.

- A promising development we have witnessed is the International Compliance Assurance Program (ICAP) Pilot. This initiative by 8 OECD member states[3] makes it possible for a taxpayer to receive a joint advanced evaluation of tax consequences. After it receives a request, the ICAP strives to have a kick-off meeting within 6 weeks, after which the jurisdiction will coordinate their follow-up questions. Each country will assess which tax assurances they can give concerning specific transactions. In theory, an ICAP procedure could take as little as 17 weeks. The ICAP handbook has specified certain time frame targets, facilitating an expedient process.[4] We wonder however about the scalability of this approach to the majority of businesses.

- Similarly, we are positive about the improved communication and symmetry of treatment that may be achieved by joint audits, and we have the same concerns about scalability.

In order to help the OECD scope this revision of Chapter IV, we would also like to raise the following practical questions:

- Could the OECD give guidance on how to approach multilateral APAs? We appreciate these are in reality bilaterals, but we would be interested in soft guidance which would help demystify multilateral APAs.
- Could the OECD give guidance on how to bundle MAP and the APA processes together to help facilitate access to these processes simultaneously and leverage from the work, time and resources invested into a MAP request, as well as taking advantage of the taxpayer having the attention of the relevant Competent Authorities? In the same vein, it seems unacceptable for taxpayers not to have access to the APA process in all the jurisdictions they have activities. Could the OECD help to support local tax authorities to be able to offer APAs by helping them simplify the process?
- Can the OECD issue a standardised information request for a MAP request and also an APA procedure?
- Could the OECD help promote best practice and a level playing field, taking into consideration the different levels of sophistication, resources, organisation (centralized versus federal/local), aggressiveness and the different communication etiquette of the tax jurisdictions?
- Could the OECD give clear guidance on, for example, the desirability of an SME exemption and/ or the strong recommendation that safe harbours (e.g., for low value adding services) will be widely and consistently applied? These steps could reduce the heavy increase in controversy cases that are already becoming apparent.

Additionally, or alternatively, could the OECD also help promote a simplified access to MAP and APA for SME groups? Indeed, such simplified access could also be considered for larger groups in cases of lower transaction volumes, or less complex transaction types.

Closing remarks

On behalf of the global network of Grant Thornton International Member Firms, with the contribution of our colleagues, we respectfully submit our input on Scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines.
We are grateful for the opportunity to provide our input and would be pleased to discuss or clarify our response. Please contact the undersigned or any of the contacts below.

Yours Faithfully,

Global leader - Tax Services
Grant Thornton International Limited

[3] Australia, Canada, Italy, Japan, The Netherlands, Spain, The United Kingdom and The United States.
[4] http://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-pilot-handbook.pdf Chapter 3 paragraph 13

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Draft ICC Comments on OECD Discussion Draft Chapter IV of the Transfer Pricing Guidelines

The International Chamber of Commerce (ICC) welcomes the opportunity to provide input on the Organisation for Economic Co-operation and Development's (OECD) call for comments concerning a possible updating of Chapter IV of the OECD Transfer Pricing Guidelines (the ***TP Guidelines***). ICC believes that the updating of Chapter IV is an important consideration in the post-BEPS world, where transfer pricing controversy is an increasingly relevant consideration, both for multinationals and tax administrations alike.

ICC duly notes the increase in competent authority caseloads around the world, and the increasing focus on transfer pricing audits by tax administrations globally. In many respects, concerns around transfer pricing practices appear to have been central to the OECD's Base Erosion and Profit Shifting project (the ***BEPS project***), and seem to have driven a number of the Actions proposed as part of that project, including:

- Country-by-country reporting;
- Transfer pricing documentation;
- The concept of special measures in transfer pricing;
- The special rules introduced for the transfer pricing of intangibles, including those on so-called 'hard-to-value' intangibles; and
- Cost contribution agreements.

There is an increasing need for the business community to have additional certainty around the timely resolution of transfer pricing disputes.

ICC recognises the efforts put forward by the OECD in the context of other aspects of the BEPS Project (such as Action 14 on making dispute resolution mechanisms more effective), but holds that more could be done to simplify resolution and believes that the updating of Chapter IV of the TP Guidelines could play an important role in this process.

In this context, ICC notes the benefits not only to taxpayers, but also to resource-constrained tax administrations, which are increasingly under pressure to focus their efforts on situations involving higher levels of transfer pricing risk. ICC believes that the following principles are relevant when considering potential revisions to Chapter IV of the TP Guidelines:

- The guidance on examination practices should be expanded to include guidance on pre-audit procedures;
- Standardisation of examination practices is desirable, and efforts should be made to achieve this wherever possible – suggestions on how this may be facilitated are included further below. ICC members believe that the revisions to Chapter IV of the TP Guidelines should incorporate suggested best practices in this regard;
- Access to mandatory binding arbitration should be available wherever possible, noting in particular the proliferation of transfer pricing audits in recent years;
- Chapter IV should be updated to reflect the introduction of the OECD's 'Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting' (the ***MLI***);
- More detailed guidance should be included on the use of secondary adjustments, along with a clearer statement from the OECD recommending against their use by tax administrations; and
- The revised guidance on Chapter IV of the TP Guidelines should specifically include additional options that are relevant to the administration of transfer pricing and/or to the prevention and resolution of transfer pricing disputes[1].

[1] Experience with the array of programmes created and run by the IRS in the US transfer pricing context may be instructive here, as are other ongoing multilateral initiatives.(see Annex 1 below)

ICC has provided input below on each of the specific areas highlighted in the OECD's call for comments, taking into account and reflecting the foregoing principles. ICC firmly believes that it is critical to consider whether other approaches can be considered beyond those typically employed. A coordinated approach to transfer pricing risk assessment is necessary across all interested tax administrations and jurisdictions.

Additional aspects or mechanisms that could be included in Chapter IV in order to minimise the risk of transfer pricing disputes

ICC strongly believes that Chapter IV of the TP Guidelines can be significantly improved by the introduction of additional guidance on examination practices. The current guidance deals with this area only in passing, and does not address pre-audit scenarios. ICC believes that this needs to be remedied in the revised version of Chapter IV.

ICC believes that the OECD should draft standardised guidance on the conduct of risk assessment in the pre-audit phase. That guidance should include in particular:

- Recognition that there needs to be a balance between the resources required for a risk assessment, and those reserved for audit cases. There should also be a clear recognition that not all cases selected for audit by the risk assessment procedure will actually result in an adjustment;
- Encouragement, promotion and enhancement of simultaneous cooperation mechanisms between tax administrations aimed at establishing more efficient investigations as well as optimizing resources and dedication from both taxpayers and tax authorities;
- Guidance on the length of time that a risk assessment should last (ICC recommends that it should last no longer than 6 months);
- Guidance on how to use formulaic risk assessment procedures (including in relation to the weighting of risk triggers);
- Recognition that complicated taxpayers may not be suited to formulaic risk assessment procedures, and that enhanced taxpayer-tax administration dialogue may actually be preferable for such situations;
- Recognition that the size of a transaction should not automatically indicate high risk *per se*;
- Confirmation that an audit does not necessary need to be wide-ranging: on the contrary, it may be relatively focused in nature and based only on a single issue identified in the risk assessment;
- A recommendation that risk assessment should not be an annual exercise;
- Confirmation that a taxpayer's transfer pricing documentation should be taken as the starting point for tax administrations from which to begin a risk assessment;
- Confirmation that a risk assessment process is a two-way street, and that tax administrations must proactively engage with the process and educate themselves on the taxpayer's business model, industry, operating structure, *etc*;
- Guidance on the categories of transactions where transfer pricing risk is more likely to exist; and
- A recommendation that the risk assessment outcome should be shared with the taxpayer in question.

Moreover, ICC believes that a standardised examination procedure should be drafted by the OECD and enshrined as a recommended form of best practice in the revised Chapter IV. Such a procedure could be drafted on the basis of pre-existing approaches as noted above and could also draw on certain aspects of the guidance in the United Nations Practical Manual on Transfer Pricing for Developing Countries.

A standardised examination procedure would likely include in particular the following matters:

- A confirmation of the principles underpinning transfer pricing risk assessment;
- The levels of certainty required in such assessments;
- The approach to follow in conducting a transfer pricing risk assessment (including the questions to be answered, such as the identification of controlled transactions, whether there are indicia of transfer pricing risk, and what specific issues need to be addressed during the audit);
- Guidance on risk factors for a transfer pricing risk assessment;
- Guidance on how to evaluate the overall transfer pricing risk position;
- Guidance on the appropriate sources of information for a transfer pricing risk assessment; and
- Guidance on the administrative aspects of running a risk assessment, including in relation to the preparation of a risk assessment roadmap, the procedures and steps involved in a risk assessment, the preparation of a risk assessment report and communication procedures.

Additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimise the risk of double taxation

Secondary adjustments

ICC does not support the use of secondary adjustments in the transfer pricing space. As noted by the existing guidance on Chapter IV, secondary adjustments inevitably lead to cash flow problems for taxpayers and significant difficulties in resolving transfer pricing disputes (as they will generally not be relieved under domestic compensating adjustment provisions, and are not explicitly addressed by the OECD Model Tax Convention on Income and on Capital (the ***Model Treaty***)).

ICC would therefore recommend that a clear statement be included in the revised Chapter IV to the effect that the OECD recommends against the use of secondary adjustments. The existing guidance on this topic is non-committal, which is difficult to justify in view of the clear position taken in other parts of Chapter IV on related topics (for example, the guidance on safe harbours).

Moreover, while the number of tax administrations globally that use secondary adjustments continues to be relatively few, it is possible that their use could increase in the coming years as more and more tax administrations build their transfer pricing capabilities and start to look at their tax base defence policies.

A clear statement from the OECD against the use of secondary adjustments would therefore be helpful. In ICC's view, the existing guidance oversimplifies the issues with this topic, as it simply encourages concerned tax administrations to seek to make the necessary adjustments in order to achieve neutrality in the light of a secondary adjustment. This overlooks the fact that a tax administration on the other end of a secondary adjustment may simply not respect the deemed transaction.

In addition to the above, ICC suggests that the OECD considers including some additional guidance around safeguards for the use of secondary adjustments. These could, for example, include some or all of the following areas:

- A recommendation that secondary adjustments are used only in situations involving a tax avoidance motive;
- A recommendation that secondary adjustments should be based either on constructive loans or on constructive dividends/equity contributions. Existing secondary adjustment regimes generally fall into the latter category, so the purpose of this recommendation would be to encourage new rules in other jurisdictions to be aligned so as to limit, as far as possible, the issues that a secondary adjustment will raise for a taxpayer;
- A recommendation that a secondary adjustment should not be a punitive measure, and should instead be an adjustment aimed at relieving the economic effect of a primary transfer pricing adjustment;
- Linked with the point above, the guidance could also potentially include a recommendation that secondary adjustments should be imposed only following central approval within a domestic tax administration (ideally, to make it clear that fieldworkers should not have authority to impose secondary adjustments, and that they should be very much the exception rather than the rule);
- A recommendation on the ability to net off transactions (for example, cross-balances in the context of intra-group cash pooling arrangements); and
- Recommendations on the introduction of thresholds for the application of secondary adjustments – for example, a guideline that secondary adjustments should only be applied in the context of a primary adjustment of US$10m or more.

Additionally, ICC respectfully encourages the OECD to consider taking up the issue of secondary adjustments in Article 9 of the Model Treaty. Specifically, this Article could be amended to provide for dispute resolution mechanisms in relation to situations involving secondary adjustments.

In terms of corresponding adjustments ICC would welcome the OECD considering two points. Firstly, from time to time, M&A activity means that individual taxpayers within a multinational enterprise can become unrelated. We would therefore welcome the OECD clarifying that transfer pricing adjustments (including corresponding adjustments) can be made on the face of the tax return, without corresponding cash movements.

Secondly, it would be welcomed by taxpayers if the guidelines made it clear that it would be best practice to allow taxpayers to reclaim both tax withheld, and irrecoverable indirect tax suffered, on amounts adjusted after a Mutual Agreement Procedure (MAP).

In terms of penalties, criminal proceedings and the burden of proof, the new master file and local file transfer pricing documentation now includes a significant amount of information and requires the taxpayer to explain the pricing selected and support that decision. This requires a not insignificant investment from the taxpayer. Currently Chapter IV of the OECD TP Guidelines (as amended in line with the final report on action 13) suggests that penalties could be waived and the burden of proof moved to the tax authority where documentation meets the requirements and is timely submitted. ICC's view is that the guidelines should make it clear that it is best practice that if the master file and local file (or domestic equivalent) is materially complete that the burden of proof should be on the tax administration to prove that the transfer pricing is non-arm's length before any adjustment. Furthermore, there should be no penalties imposed on tax payers if an adjustment is required in the event that the transfer pricing documentation is prepared reasonably or the adjustment is immaterial in the context of the multinational enterprise as a whole. This would encourage taxpayers to complete the documentation reasonably and therefore reduce the questions a tax authority would need to ask. It would also discourage proposed adjustments to the pricing by tax authorities where there is no evidence to support such an adjustment.

As stated in chapter 1 of the OECD guidelines, transfer pricing is not an exact science. As such, it should be best practice that gross negligence or evasion should be the only grounds for criminal proceedings. This would encourage more participation in the setting of transfer pricing by employees of the taxpayer outside of the tax department.

Other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV

ICC considers there to be merit in exploring the possible introduction of other alternative methods to approaching the administration of transfer pricing and/or the prevention and resolution of transfer pricing disputes. One possible avenue for further exploration in this context would be to consider the possibility of the TP Guidelines being amended to include materials concerning the OECD's 'International Compliance Assurance Programme' (***ICAP***) (should this programme prove to be successful after the initial pilot that began in January this year). While ICC recognises that the ICAP programme is still a pilot programme, ICC believes that the inclusion of information about ICAP would help to facilitate participation by a wider spectrum of tax administrations and taxpayers. For example, a summary of the ICAP process and its key features could be included in Chapter IV, with the ICAP handbook itself either being appended to the TP Guidelines or hosted on the OECD's website as an evolving document that expands on the core principles set down in the revised Chapter IV.

Moreover, it is apparent to ICC that there is a vast array of existing OECD documentation and guidance around various matters relating to or concerning transfer pricing compliance and/or dispute resolution. These include, for example, handbooks and guidance on tax risk assessment in the country-by-country reporting context, as well as the OECD report on 'Dealing Effectively with the Challenges of Transfer Pricing'. ICC suggests that these materials should be either appended to the TP Guidelines, or that comprehensive cross-referencing be included in the TP Guidelines so that all the related practical guidance on compliance and dispute resolution can be accessed through referencing the TP Guidelines (which would function as a single repository of that information).

There are a number of best practices set out in the final report to Action 14, including the commitment to resolve MAP cases within an average timeframe of 24 months and the timely and complete reporting of MAP statistics. It would be extremely helpful if these could be extended to the APA process so that the advantages of APAs, including certainty for both the taxpayer and tax authority, as well the reduction in transfer pricing audits could be enjoyed even more frequently.

Conclusion

ICC welcomes the OECD's decision to revisit the provisions of Chapter IV of the TP Guidelines and believes that significant improvements can be made to that Chapter along the lines of the above considerations. It would be helpful to understand from the OECD exactly how and when the revisions are envisaged to be introduced into the existing TP Guidelines (and when the OECD intends to produce a consolidated version of the updated TP Guidelines). ICC remains available to provide further input and expertise to support the future steps of the process. ICC welcomes and encourages the OECD's continued engagement with the business community in order to address pragmatic and effective approaches.

ANNEX I

ICC considers that some lessons can be drawn from the approach of the IRS, which has (in large part due to the success of the APA programme) often used various non-transfer pricing practices to approach examinations that have a material transfer pricing element. These practices include the following:

Accelerated Issue Resolution
Accelerated Issue Resolution is a procedure by which a settlement for years under audit can be applied to years for which returns have been filed, but that are not under audit. Its purpose is to accelerate the process by which issues currently under examination (and which are also present in later tax periods) can be resolved for all years up until the last year for which a return has been filed.

Delegation Order 236
Under this rule, various grades of IRS staff are provided with certain authority to settle 'rollover' and 'recurring' legal (as opposed to factual) issues, provided the same taxpayer has already obtained a settlement with the IRS Office of Appeals in a previous or subsequent tax period on the same issues.

Simultaneous Appeals and Competent Authority Procedure
In general, it is possible for a taxpayer that files a request for competent authority assistance to also (at the same time or at a later date) request the IRS Office of Appeals to consider the issue that is being addressed at competent authority level. The procedure is optional and taxpayer initiated. It is intended to allow taxpayers to request the transfer of outstanding issues to the IRS Office of Appeals, while at the same time enabling other issues to continue to be developed by the other IRS team (thereby saving time for both the taxpayer and the tax administration by ensuring teams can work simultaneously).

Pre-Filing Agreement Programme
The IRS offers a facility for taxpayers to seek 'pre-filing agreements' on certain factual and legal issues. Initially, the pre-filing agreement programme was limited to factual-related issues, such as asset allocation, valuation of assets, R&D credits, valuation of inventory and similar matters. It was subsequently expanded to include a significantly wider spectrum of issues, including international matters. Its purpose is to secure agreement on technical issues in a cooperative environment, following acceptance into the programme and ahead of the filing of the returns for the years in question.

Industry Issue Resolution Programme
The IRS runs this programme to provide tax dispute resolution on an industry basis. The programme can be applied to taxpayers seeking pre- and post-filing resolution of frequently disputed tax issues, and has been successfully applied across a range of industries.

Compliance Assurance Process
The Compliance Assurance Process is designed to allow large taxpayers to achieve real-time audits of issues before their returns are filed. It is in many respects similar to the Pre-Filing Agreement Programme described above, and operates as an 'invitation only' programme that aims to reduce taxpayer burden and uncertainty while giving the IRS assurance around accuracy of tax returns in real time.

Comprehensive Case Resolution Programme
The IRS runs a comprehensive programme for the resolution of multiple tax issues across various stakeholder groups. The purpose of the programme is to enable taxpayers and the IRS to work together to resolve all open issues for all open tax years (whether currently or previously under examination). The underlying principle of the programme is a cooperative effort between the taxpayer and the tax administration.

Mediation
Mediation can in certain circumstances be requested by the taxpayer vis-à-vis the IRS Office of Appeals. Under a mediation procedure, the IRS and the taxpayer will attempt to reach a negotiated settlement, with the assistance of an objective and neutral third party (acting as a mediator, and not as an arbiter).

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June 18, 2018.

Mr. Jeff VanderWolk.
Head of the Tax Treaties and Transfer Pricing Division
OECD Centre for Tax Policy and Administration.
2, rue André Pascal,
75775 Paris Cedex 16, France.

Dear Mr. VanderWolk:

Reference is made to your communication dated May 9, 2018, in which you requested comments on the future contents of Chapter IV (*"Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes"*) and Chapter VII (*"Special Considerations for Intra-Group Services"*) of the OECD Transfer Pricing Guidelines.

The Mexican Institute of Public Accountants (hereinafter referred to as "IMCP") is the most important professional organization with more than 25,000 Mexican Public Accountants as members across the country and represents the professional interests of Public Accountants in Mexico. In order to fulfill its professional objectives, the IMCP is organized in several Vice-Presidencies and one of them is headed by C.P.C. Mario E. Morales, whom acts as our Vice President of Tax Affairs. Several professional working Commissions report to Mr. Morales, in all areas associated to the analysis of taxation-related issues. The Transfer Pricing Commission (*Comisión de Precios de Transferencia del Instituto Mexicano de Contadores Públicos de México, A.C.*)[1], was formed 14 years ago by recognized professionals with transfer pricing experience and is part of the Vice-Presidency headed by Mr. Morales. The Commission has monthly national meetings for the analysis and discussion on the taxation implications of transfer pricing legislation or doctrine.

In this respect, as part of our June 2018 national meeting the Commission organized a roundtable for the discussion of the information requested by the OECD, taking into account the recent release of the communication requesting public comments on the future of Chapters IV and VII of the OECD Transfer Pricing Guidelines.

Notwithstanding such time constraints for responding to the request of reference, the Transfer Pricing Commission of the IMCP agreed to provide comments which are regarded as necessary areas to be analyzed in the upcoming technical review of the contents of the two chapters before mentioned. It is important to note that our comments were selected based on the practical and real-life experience of our members on issues referred to in both Chapters. Our comments, broken-down per chapter, are the following:

[1] The current members of the Transfer Pricing Commission of the IMCP are the following entities: Deloitte México; EY México; Calderón, González y Asociados; Oliver Consulting; Baker Tilly México; PwC México; Corporación Interamericana de Entretenimiento; KPMG México; Chévez Ruiz Zamarripa y Cía; Salles, Sainz Grant Thornton México; Teléfonos de México; Sánchez Salgado and Natera Consultores.

1.- **Comments on Chapter IV (administrative approaches)**

a.- Legal and operating independence between the APAs, examination and Competent Authority functions for all Tax Administrations.

Even if the content of this Chapter was updated after the original release of the Transfer Pricing Guidelines in 1995 by incorporating useful real-life and practical situations, and even after important peer-review recommendations were released in this regard[2], as practitioners we still encounter situations in which due to legal, budget limitations or other reasons, all relevant functions associated to transfer pricing are still maintained or executed by the same operating organization within the same Tax Administration[3].

This Commission agrees with former OECD's recommendations in the sense that all transfer pricing-related functions within a Tax Administration should be assigned to and managed by separate and different teams in order to increase the confidence of taxpayers as well as to ensure the level of desired objectivity in the resolution process of double tax controversies. In the different sections of Chapter IV, we have not detected a direct and straightforward statement associated to this recommendation, thus, we suggest the insertion of explicit language in this respect, according to the following: *"In all cases, Tax Administrations have to ensure that in their organizational and legal structures, functions associated to tax policy, APAs, MAP APAs, double tax cases, tax enforcement and competent authority, are assigned to separate areas, to increase the desired level of independence and objectivity"*.

b.- Possibility to involve recognized independent professional associations in the technical resolution of complex transfer pricing controversies.

With the objective of avoiding or reducing costly, unexpected, uncertain and burdensome consequences in transfer pricing-related cases, we consider that OECD could contemplate the involvement of independent professional associations as a technical option for the Tax Administration or the affected taxpayer to have a qualified expert opinion on transfer pricing disputes. This Commission considers that the use of an independent expert opinion on transfer pricing in their tax jurisdiction will serve as a valuable element in the local resolution of a complex transfer pricing case. This opinion should be issued by recognized chambers or organizations in the taxpayers' tax jurisdiction, deeply involved in the discussion of transfer pricing and tax legislation, administrative practices of both the taxpayer and the Tax Administration, applicable deadlines, etc.

[2] Paragraph 151 on page 36, and page 71 of the document *"Peer review of Mexican Transfer Pricing Legislation and Practices"*, issued by WP6 of OECD's CFA, 2005.
[3] In the case of Mexico, by the Large Taxpayers' Administration of the Tax Administration Service (AGGC).

The use of such independent element for the resolution of complex cases at the local level could be managed, monitored and formalized by the tax authority, upon request of the one of the parties of the respective audit, with the sole objective of adding the independent expert opinion as additional support in the resolution of the case. The recommended participation of such external organizations may increase the level of confidence in the analysis, and could be useful to save important costs, expenses and limited resources for both parties.

c.- <u>Additional recommendations for Tax Administrations in the resolution of Advanced Pricing Agreements.</u>

Even if it is true that Tax Administrations are legally empowered to process and to analyze APA requests on a case-by-case basis, with the sufficient level of detail applicable to that case, it is also true that in cases involving APA renewals (with no substantial changes in facts and circumstances with respect to a previous filing), it could be questionable that Tax Administrations disregard all or most of all previous technical aspects associated to the settlement of that case, with the objective of adopting a completely new transfer pricing approach. Such position may only generate uncertainty to the filer, and reduce confidence in the effectiveness of the APA program as a whole.

We understand that in all APA-related cases, taxpayers and tax authorities should cooperate and work collaboratively in an effective manner, by developing robust and updated functional analyses and methodological tests. In cases involving APA renewals flexible approaches are recommended to be adopted, specifically with respect to detailed information already contained in previous filings of the same APA, in cases involving compliant taxpayers.

However, we consider that in scenarios involving no substantial change, it would be completely questionable to encounter situations where, as a result of changes in the structure of the technical staff involved in the analysis of APA renewals, the Tax Authority assumes a completely different view with respect to the technical solution proposed by the APA filer, departing from the transfer pricing methodology approved by the same Authority in recent fiscal years. As indicated above, this type of uncertain situations only give rise to tax uncertainty and lack of confidence in the APA program as a whole. We consider that the OECD should include a consistency recommendation for Tax Administrations in this respect, in the Annex dealing with APAs.

2.- **Comments on Chapter VII (intra-group services)**

a.- <u>Concerns on the treatment of services expenses and generation of “benefits”</u>

Aside from the valuation possibilities to quantify the benefits associated to services received by taxpayers in a controlled transaction, we have observed that there is an increasing and ongoing assumption frequently made by Tax Authorities (especially during the course of examinations), in the sense that in all cases (or in the vast majority of them), services provided by related parties always lead to the generation of "benefits" (in their view, taxable profits); while this assumption cannot be regarded as valid in many instances.

Even if it is true that the objective of any rational economic agent when paying for a service is to obtain a benefit in the form of increased income, efficiencies, profits, or alternatively in the form of decreasing costs and expenses, in many cases these objectives cannot be achieved despite of the interest and efforts of the taxpayer funding them (in both, independent and controlled situations). There could be a variety of real-life situations in which taxpayers incur in service expenses, and the end-result is negative for them despite of the initial interest and efforts made to produce a positive profitability scenario. In our view, it is an incorrect assumption to expect that, as a rule, all types of service expenses should necessarily give rise to the generation of benefits or profits, because those results depend on the specific circumstances of the case.

Therefore, for the sake of clarity and tax certainty, we consider it reasonable and necessary to insert some language in Chapter VII of the guidelines providing that it would be an incorrect assumption for Tax Administrations to expect clear benefits in all intercompany services rendered by related parties, because there could be cases in which the expected benefits or profits could not be immediately obtained by any taxpayer, due to valid commercial or market-related reasons.

Our recommended general language for this Chapter would be the following: *"Even if taxpayers may incur in service expenses with the initial objective of increasing income, profits or efficiency levels in their operations, as well as to decrease costs or expenses, there is no guarantee that the results of the taxpayers' operations will necessarily give rise to taxable profits. Tax Administrations should not automatically assume or expect for-granted-profits in controlled operations involving service expenses, since there could be specific cases in which Multinational taxpayers (same as independent entities) may end up reporting adverse results due to commercial or other valid economic situations (e.g. promotional or marketing expenses). In any case, Tax Administrations are encouraged to perform a detailed analysis of the specific facts and circumstances of the case to support its conclusions, before even assuming the existence of clear benefits in a controlled transaction involving intercompany services rendered by a related party."*

b.- <u>Lack of definition of key concepts or principles associated to BEPS and transfer pricing.</u>

The recent results of the Business Erosion and Profit Shifting (BEPS) Initiative completed by OECD's working groups have given rise to important taxation concepts, which are necessary to be fully understood under the new realities of today's international taxation. Such concepts are closely linked and associated, therefore, the tax implications of them may affect key operating, financial, taxation, budget and strategic aspects in the operations of global taxpayers. Important examples of these taxation concepts, associated to intercompany services are the concepts of "value creation" and "DEMPE" activities (involving intangible property, activities related to the development, enhancement, maintenance, protection and exploitation of such property). In the context of a tax examination, clarity and legal certainty are necessary elements for the proper treatment and definition of the economic returns impacting the "value creation" and DEMPE activities of global taxpayers. Thus, it is necessary to preserve reasonable taxation levels along borders, avoiding arbitrary an uncertain tax assessments. However, this latter goal could be hardly achieved in cases in which there are no recognized general principles defining the meaning of those concepts, with the implicit risk that different Tax Authorities involved in a controlled transaction, may have different views or levels of understanding about them.

We consider that it should be regarded as a priority work for the OECD, the development of common definitions for the new taxation concepts of "value creation" and "DEMPE" activities, which have multiple implications and references to international taxation as well as to transfer pricing, as a result of the BEPS work. The absence of such general recognized principles and definitions shall only lead to arbitrary tax assessments, inefficiency of double tax cases work (or MAP work), questionable determinations in terms of tax policy for those countries who undertake the unilateral effort of defining these concepts, tax uncertainty, excessive and complex work transferred to arbitration stages, etc.

At a subsequent stage, and once the desired general definitions are released by OECD, it would be easier for the tax community worldwide to develop and provide some examples illustrating the application and/or interpretations of such concepts.

We sincerely hope you find the previous comments useful in your analysis. Please do not hesitate to contact me in case you have additional comments or questions.

Best regards.

Gabriel Oliver, CPC.
President, Transfer Pricing Commission
Instituto Mexicano de Contadores Públicos de México, A.C.

C.c.: Mr. Mario. E. Morales, CPC. Vice President, Taxation. IMCP.
Mr. Jose Besil, CPC. President, IMCP.
Mr. Tomas Balco. Head of the Transfer Pricing Unit, CTPA, OECD.

Document No.043
20th June 2018

The Tax Treaties, Transfer Pricing and Financial Transaction Division
Centre of Tax Policy and Administration
Organization for Economic Cooperation and Development

Accounting & Tax Committee
Japan Foreign Trade Council, Inc.

Ref : Invitation for Public Comments on "Scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines"

The following are the comments of the Accounting & Tax Committee of the Japan Foreign Trade Council, Inc. ("JFTC") in response to the invitation to public comments by the OECD regarding the Scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines.

JFTC is a trade-industry association with Japanese trading companies and trading organizations as its core members. One of the main activities of the JFTC's Accounting & Tax Committee is to submit policy proposals and requests concerning tax matters. Member companies of the JFTC Accounting & Tax Committee are listed at the end of this document.

Comments

We are grateful for the opportunity to provide comments on the scoping of the future revision of Chapter IV of the Transfer Pricing Guidelines.

We appreciate the fact that member states of the inclusive framework on BEPS have agreed to a "minimum standard" with respect to treaty related disputes and that significant changes have been incorporated accordingly in Chapter IV of the OECD Transfer Pricing Guidelines which was updated in 2017. However, we also believe that there is more to the recommendations of Action Plan 14 that could find place in Chapter IV of the guideline to further improve the dispute resolution mechanisms.

Whilst most of the elements of the minimum standards have been incorporated in the guideline, reference to some of the primary concerns of taxpayers which are presented as "best practices" in Action Plan 14 may be limited if not slightly over-simplistic. (Best practice 6 as an exception already being devoted enough paper in Chapter IV)

It was mentioned that the conclusions of the work on Action Plan 14 reflect agreement that certain responses to the obstacles that prevent the resolution of disputes via MAP are more appropriately presented as best practices, in general because, unlike the elements of the minimum standards, these best practices have a subjective or qualitative character. This may be true, but none the less the best practices addresses some of the true concerns of taxpayers in connection with matters which are related to the three general objectives of the minimum standard. We believe additional integration of these best practices would supplement the guideline even more.

Among those best practices we would like to emphasize the importance of best practice 7 and best practice 8. MAP is said to be an additional mechanism that taxpayers can use in conjunction with the usual dispute resolution mechanisms available under the domestic law of every country, though in reality it is extremely difficult to explore this additional avenue in tandem with the domestic channels for dispute resolution.

In many cases taxpayers are reluctant to relinquish their right to seek remedy through domestic litigation. They normally resort to executing their right to litigate domestically (deadline for which is usually far earlier than the three-year deadline for MAP) and apply for MAP only as a mere supplementary instrument without much prospect. Even if the taxpayer chooses to pursue both routes simultaneously, litigation usually outpaces the MAP procedure, and as soon as a legally binding order comes out at the domestic side, any hopes of reaching a MAP agreement ceases to exist.

To improve the situation, countries should suspend the filing deadline for domestic litigation if a taxpayer chooses to pursue the MAP route. It is probably true to say, that a MAP process may bring a bit of pressure from another tax administration to the attention of the tax authorities with whom the taxpayer is in dispute but there are obstacles still to be tackled.

The introduction of measures to tackle BEPS should not lead to uncertainty for taxpayers and unintended double taxation. We believe Chapter IV of the OECD Transfer Pricing Guidelines would be for the better if it addresses the concern of taxpayers in connection with the complex interaction between domestic law remedies and MAP.

*****

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To: TransferPricing@oecd.org
Date: 20 June 2018
Re: Scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines

Dear Madam, Sir,

Thank you for the invitation to provide input to the above project. My request focusses on simplicity and pragmatism. I believe these are important to reduce disagreement and taxpayers' compliance burden and costs.

The current documentation requirements for routine limited risk manufacturing and distribution are too much:

- Distribution and manufacturing companies constitute the vast majority of companies within most groups. Any reduction on compliance and disputes here, can have great effects.
- For various (often bogus) reasons, taxpayers and consultants prefer external comparables over internal ones.
- There are a few global players providing commercial databases for benchmarking external comparables. These players have virtual monopolies, and the pricing of their products reflect that. This makes it excessively burdensome for many small players outside large global consulting firms and smaller tax administrations to get access to external comparables.

It does not have to be this way:

1. The 2017 TPG contains sample bilateral memoranda of understanding for low risk manufacturing and distribution in Annex I to Chapter IV. To expect countries to implement this bilaterally is highly ineffective, as the OECD itself argued regarding BEPS and the MLI.
   Please, either
   a. adopt fixed percentages for these activities in the TPG, under the conditions contained in the MoUs. This can be safe harbours in the same manner as § 7.61 of the 2017 TPG (5% for LVAS); or
   b. incorporate the MoUs in as an extension of the MLI to speed up the bilateral process of applying these safe harbours.

2. The 2017 UN Practical Manual on Transfer Pricing, paragraph B.2.3.4.42 and 43 underline the fact that the use of commercial databases is not compulsory in identifying external comparables. It lists government sources, trade organisations, chambers of commerce and international organisations as alternative sources to commercial databases.

   I am not aware of any countries identifying a list of such sources either published by themselves (think e.g. Mozambique publishing a list of what it deems acceptable interest rates under its FX regulations), or by others. Tax authorities could make such lists available and deposited those centrally, e.g. with the OECD. They could also indicate which lists they acknowledge as valid external comparables, where appropriate.

Should you wish me to elaborate on any of the above, I would be happy to do so.

Yours sincerely,

Johann H. Müller

Johann Müller ApS

KPMG

To	Tax Treaties, Transfer Pricing and Financial Transactions Division, OECD/CTPA	Date	June 20, 2018
From	KPMG International	Ref	KPMG Comments on Administrative Approaches (Chapter IV)
cc	Matthew Frank, KPMG LLP, United States		

Comments on the scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines

The Global Transfer Pricing and Controversy Professionals of KPMG's Member Firms ("KPMG") welcome the opportunity to respond to the OECD's invitation for public comments on the scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines. We endorse the OECD project and its aim to develop guidance to minimize transfer pricing disputes and speed their resolution.

The challenge of minimizing and speeding the resolution of transfer pricing disputes has been the subject of prior public comments and deliberation. We submitted a 26-page letter in January 2015 with suggestions to make dispute resolution mechanisms more effective. Click here for a copy of that letter. We urge consideration of all the points made therein.

The suggestions in our January 2015 comment letter remain vital. For the sake of emphasis, we will highlight a few of those suggestions as well as a few new ones that strike us as particularly important to the integrity or efficient functioning of the tax system and as readily achievable, and thus as appropriate to include in the Chapter IV scoping exercise.

Safeguarding access to MAP

[1] Access to MAP is essential to minimizing transfer pricing disputes and to the proper resolution of those disputes. There are several administrative obstacles to MAP at present, however. One is the practice in some tax administrations to seek audit settlements that require a taxpayer to waive its right to MAP. Such a practice represents an improper use of influence over taxpayers that harms taxpayer-to-government and government-to-government relationships. Moreover, the practice increases the number of tax disputes by encouraging field examiners to propose adjustments that are not properly supported, knowing that the adjustments will not be subject to scrutiny or accountability through the MAP process. The OECD should strongly discourage this practice and participating governments should implement policies to prevent the practice and to discipline field auditors that violate those policies. Guidance along these lines should be included in the scope of revisions to Chapter IV.

[2] A second impediment to the proper functioning of MAP is the requirement in some countries that taxpayers pay some or all of the disputed amount before the case can be considered at MAP. Allowing countries to treat MAP as a post-payment forum imposes a hardship on taxpayers, changes the negotiation dynamic between the involved countries, and reduces the incentive for the competent authority of the country initiating the adjustment to compromise and resolve cases quickly and fairly. Accordingly, the OECD should encourage tax authorities to permit MAP access without requiring the taxpayer to pay the disputed amount in advance.

[3] A third administrative obstacle to MAP is the ability of a competent authority to deny or delay access to MAP unilaterally, without bilateral consultation. Both competent authorities should have the opportunity to engage on the issue of whether and when a case is appropriate for MAP, with a presumption in favor of MAP access where at least one competent authority supports it.

[4] A final administrative obstacle to MAP is the denial of access to MAP for transfer pricing adjustments made under the authority of a domestic GAAR or similar provision rather than under a transfer pricing statute. Access to MAP should be guided by the substance of the tax authority action and the imperative to relieve double taxation; access should not depend on the particular form of the adjustment chosen by the initiating tax authority.

<u>Strengthening MAP to address multijurisdictional cases</u>

[5] We encourage consideration of guidance that would address MAP processes involving three or more competent authorities. In recent years, it has become increasingly common for MAP cases to implicate operations and entities in three or more jurisdictions, for example, where there is a transaction from A to B to C where B has only a limited role in the transaction, meaning that the real issue, economically, is between A and C. The incidence of multijurisdictional MAP cases is bound to increase further to the extent taxpayers or tax authorities rely on profit split methods to allocate profits among affiliates. With the greater incidence of multilateral treaty-related issues, guidance should be developed to make clear that MAP applies beyond bilateral cases and to develop procedures to address multijurisdictional situations. In the example above, guidance might provide that the two countries with the largest economic interest in the disputed transaction (A and C) would interact directly, copying the third country on correspondence and involving it only if the proposed resolution would impact it. Other mechanisms may be devised for profit split situations. This is a matter requiring attention.

[6] We recommend encouraging tax authorities to implement the guidance in the Commentary to Article 25, which addresses MAP processes for dealings between branches. Consider a company in A which has branches in B and C. The branches in B and C may have dealings with each other subject to adjustment by the B and C tax authorities. The OECD should clarify that taxpayers should have access to MAP and APA under an applicable treaty between B and C (at least where the treaty follows the OECD Model Tax Convention), regardless of whether A has treaties in place with both jurisdictions and whether A has a significant economic interest in the resolution.

<u>Strengthening APA mechanisms to span numerous countries</u>

[7] We encourage consideration of guidance that would make APA mechanisms more effective by outlining an efficient process by which a taxpayer can secure an APA among a large number of countries where common facts and principles apply. Many taxpayers may have a sound, globally consistent transfer pricing policy that is applied broadly. This global policy may involve costs charged for HQ or shared service transactions or for the global licensing of an intangible. Currently taxpayers may consider a multilateral APA or multiple bilateral APAs among four or five countries, but APAs involving a dozen or more countries are regarded as unrealistic due to the time and expense involved. Guidance should explore a mechanism by which, in an appropriate case, a large number of countries may agree that a subgroup among them will take the lead in negotiating the terms of a multilateral APA that all participating countries will then be invited and expected to join.

<u>Strengthening APA availability and reach</u>

[8] We encourage consideration of guidance that encourages tax authorities to eliminate APA barriers to entry for difficult or complex transfer pricing issues. Some countries discourage or reject such cases, but we submit the APA process is the best venue to address such issues, as it allows tax authorities to educate themselves about such issues in a cooperative setting (more conducive to understanding and addressing the issues than an examination setting) and it allows taxpayers to achieve certainty where it is needed most. We also encourage consideration of guidance that encourages tax authorities to extend APA resolutions to past years in appropriate cases, including years under audit. This is important to promote efficient tax administration and consistency, for the benefit of all parties.

Strengthening mandatory arbitration in MAP cases by allowing taxpayer input

[9] Lastly, we applaud the work to date to encourage the adoption of mandatory binding MAP arbitration. Experience with it in the US-Canada context confirms that mandatory binding arbitration with a last-best-offer feature ensures both that virtually all cases of double taxation will be dealt with and that they will be dealt with in a timely fashion – almost all within the time allotted to the competent authorities to resolve the issue through MAP. Anecdotal evidence also shows greater use of the unilateral relief within MAP to reverse unwarranted or unreasonable adjustments. We recognize that the capacity concerns of some countries with respect to the MAP/APA process generally may impact adoption of mandatory binding arbitration and encourage efforts by the OECD to address them. One point on which we encourage further guidance is to allow taxpayers to provide their views as to which of the last-best-offers is the most appropriate, as put forward in the US-France context. This would be a good feature to have for all arbitrations and we encourage its consideration.

About KPMG International

KPMG is a global network of professional services firms providing Audit, Tax and Advisory services. We operate in 154 countries and territories and have 200,000 people working in member firms around the world. The independent member firms of the KPMG network are affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. Each KPMG firm is a legally distinct and separate entity and describes itself as such.

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MACFARLANES

19 June 2018

Dear Sirs/Madams

OECD scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines

These comments are presented by Arendt, Arthur Cox, Chiomenti, Cuatrecasas, Gide Loyrette Nouel A.A.R.P.I., Gleiss Lutz, Homburger, and Macfarlanes LLP following the call for public comments by the OECD on the possible future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines.

The OECD is seeking public comments on how the guidance in Chapter IV of the Transfer Pricing Guidelines could be revised or supplemented in order to reflect current administrative procedures, particularly in relation to transfer pricing compliance practices, corresponding and/or secondary adjustments, and advance pricing arrangements.

Executive summary

A pervasive theme throughout these recommendations is that the introduction of certain minimum standards and clear, published frameworks to the application of transfer pricing rules and administrative approaches in the international arena would be of significant value.

It is our belief that a clear framework for the use of compensating adjustments should be provided in the Transfer Pricing Guidelines. Although such a framework may not be utilised by all OECD member states, it would provide greater certainty in circumstances where the use of compensating adjustments is the most efficient way of complying with the arm's length principle.

The efficiency of mutual agreement proceedings is a common area for discussion, and the need for a clear joint procedure, or even a single panel to address multi-jurisdictional issues, to overcome challenges and reduce the length of proceedings is evident.

Commentary

Compensating adjustments

The use of corresponding adjustments allows tax authorities to have preliminary negotiations with corresponding tax authorities before the final tax assessment with the view of trying to find a quick mutual arrangement.

We note that issues surrounding double taxation are mentioned in paragraph 3.71 (which also introduces paragraphs 4.38 and 4.39 mentioned below). The TPG state that double taxation may arise where one tax administration believes that arm's length prices should be determined on an expected outcome basis,

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whereas a second tax administration believes that they should be determined on an actual outcome basis. This may cause the former tax administration not to accept a taxpayer's price adjustments that were required by the latter tax administration. Tax administrations are asked simply to "use their best efforts to resolve any double taxation issues" in such instances but here (paragraph 3.71) and in paragraphs 4.38-4.39 there is no suggestion of what form such efforts might take. Moreover, paragraph 4.40 notes that the onus is on the taxpayer to request arbitration if their case has not been resolved by a Mutual Agreement Procedure process within two years.

Paragraph 4.38 describes "compensating adjustments" as notional adjustments to a price purely within a tax return. Paragraph 4.39 explains that this can lead to double taxation because the only mechanism for avoiding double taxation is a corresponding income adjustment by the other tax administration, and this can only be triggered where the first tax administration has made a primary income adjustment (which it will not have done if the taxpayer itself has made the adjustment).

We note that the TPG asks taxpayers to adopt the contract which arm's length parties would have adopted in a situation in which there was significant uncertainty about the future level of factors that the parties agreed should bear on the price (for example, in the case of hard-to-value intangibles). Following this advice the TPG empower tax administrations to impute such a contract, where appropriate. Given this existing advice, should any adjustments to related party prices not all be put through as credit notes or final invoices following earlier invoices on account, referring to the relevant clauses in the transfer pricing agreement? We ask why should there be a difference between actual prices and prices used for tax calculations, other than in exceptional circumstances? We therefore note that the TPG should ask all tax administrations to accept this arm's length form of contracting and payment.

The current version of the Transfer Pricing Guidelines does not provide practical procedures to apply compensating adjustments in accordance with the arm's length principle.

We note that compensating adjustments may not be accepted by all OECD member states. However, providing a common framework in the updated version of Chapter IV of the Transfer Pricing Guidelines may provide more certainty to both taxpayers and tax administrations and, therefore, countries could be encouraged to accept compensating adjustments.

For example, in certain industries the cost of goods sold could vary during the year for external factors that the multi-national enterprises ("**MNEs**") cannot control (such as the cost of commodities used in the production process). In order to attain more efficient production planning and to simplify the budgeting process of MNEs, it may be necessary to fix the price for controlled transactions in advance at the beginning of the year. In such cases, compensating adjustments at the end of the year represent the best approach to comply with the arm's length principle.

Moreover, compensating adjustments could be useful to deal with intra-group services where certain economic conditions can only be identified after the service has been performed (for example, the building of a road or a ship on order), rather than when the intercompany agreement is concluded.

In light of this, we suggest that the Transfer Pricing Guidelines include an in-depth analysis of compensating adjustments. This should detail circumstances in which the use of compensating adjustments could be appropriate, and guidelines for the application of such compensating adjustments in order to comply with the arm's length principle.

Published guidance

As transfer pricing is not an exact science and guidelines do not always provide specific answers to commonly encountered operational models, taxpayers and tax authorities find it helpful to have access to published general guidance which covers the application of the rules for those cases.

Several jurisdictions have a tradition of publishing those guidelines for specific cases, which, even if they may not constitute safe harbours, are still useful- for example, in relation to intragroup finance and cash pools, low risk distributors, management of IP and economic ownership. Published guidance should be introduced as a minimum standard for the tax administration to guarantee legal certainty and ensure a consistent application of the transfer pricing rules.

Simultaneous tax examinations

In recent years, domestic examinations into multinational groups usually focus on transfer pricing matters affecting two or more jurisdictions.

In such cases, the taxpayer should be given the opportunity to request simultaneous tax examinations in the relevant jurisdictions at the early phases of the tax audit (eventually, as a separate piece of the examination) as this is likely to anticipate any potential controversies as to the allocation of the profits between the jurisdictions concerned.

This would provide for disputes to be resolved early where possible, avoid the payment of the excess tax and avoid the need for the taxpayer to anticipate the taxes, litigation or the need to start a MAP.

The mutual agreement procedure

Section C.4.3 of the Transfer Pricing Guidelines concerns the duration of mutual agreement proceedings. We note that the physical distance between OECD member states can cause difficulties for competent tax authorities when resolving transfer pricing cases. In addition, differences in language, procedures and legal and accounting systems tend to further increase the duration of the proceedings.

A multilateral agreement could possibly facilitate the resolution of disputes where more than two countries are involved, something that bilateral treaties are not adapted for.

It appears possible for a single dispute panel to, by agreement of all country parties, consider cases where more than one treaty relationship is relevant to the outcome, such as in triangular cases. To resolve such disputes in one procedure rather than in separate ones, or even with the same arbitrator(s) presiding could save a great deal of time and money.

Achieving such a multilateral agreement within the MAP article of the treaties would appear to be far less complex than achieving a multilateral agreement addressing substantive treaty issues, although it would need to take into account and fully respect differences in the MAP article between countries, as shown in country practice.

On the other side, mechanisms to minimize the risk of transfer pricing disputes are very useful but MAPs, APAs (unilateral or bilateral) and arbitration procedures are strictly confidential so this could cause collateral damage. This clearly limits the capacity of MNEs to observe trends and anticipate to these trends adapting their transfer pricing practices. Having this information will reinforce tax certainty to the MNEs, and it will also give more authority and robustness to the arm's length principle showing its effective application through the transfer pricing world. Additionally, this will also force tax authorities to be more transparent and coherent in their negotiations.

In addition to the panel discussed above, it would be useful if OECD countries were to implement a joint procedure, defined in each step from the beginning to the conclusion of the mutual agreement procedure, in order to provide detailed guidance aiming to lead tax administrations to more efficient processes towards the resolution of transfer pricing cross-border issues.

International experts and publicity of cases

For the OECD Tax Committee, introducing an independent and fully representative body of experts that could be accessed by jurisdictions as potential arbitrators (or experts for other alternative dispute mechanisms) for transfer pricing disputes would ensure more coherence and guidance.

An institution supporting such alternative dispute mechanisms could provide a consistent and public record of redacted decisions and notes on the trends of decisions that could reduce disputes in the future and make their resolution more predictable.

The published documents could be a simplified document with no personal details and will contain only main treats of the procedure (country of residence of the parties involved, description of the operation, the functional analysis and the main conclusions and agreements). These documents could be managed by one OECD working party and be published regularly.

We welcome this opportunity to provide comments on important issues that affect so many taxpayers worldwide, and look forward to reviewing the results of this call for public comments.

Yours faithfully

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Milan, 20 June 2018

Via e-mail: TransferPricing@oecd.org

Working Party No. 6 on the Taxation of Multinational Enterprises

Dear Sirs,

we would like to thank you for the opportunity to submit our comments on the OECD Invitation for Public Comments on the scope of the future revision of Chapter IV of the Transfer Pricing Guidelines ("**TPG**") dealing with administrative approaches to avoiding and resolving transfer pricing disputes. In this respect, please find hereinafter some of our observations.

1. **What additional aspects or mechanisms to minimise the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)? While input received in the past on some of these issues in the context of the work of the Forum on Tax administration will be considered, input on business experience with such aspects or mechanisms would be useful, including what have been the advantages and/or challenges?**

Transfer pricing disputes and, more in general, relationships of taxpayers with tax authorities, are a difficult area and are viewed by businesses as a fundamental concern with regard to potential compliance burden and the risk of double taxation in every jurisdiction.

The effectiveness of Chapter IV of the TPG, which provides guidance on the approaches aimed at reducing transfer pricing disputes between taxpayers and tax administrations, is highly dependent on the fast evolution of the behavior of MNEs, on the one hand, and of the attitude of tax authorities (and case law) on the other hand. This is even more true in the light of the BEPS work integrated into the TPG.

In this respect, Maisto e Associati appreciates the OECD's commitment to continue the work on Chapter IV of the TPG and believes that an update or revision of that chapter is still an appreciated initiative.

For this purpose, an important point is paragraph D of Chapter IV of the TPG. In our view, that paragraph should be updated to address not only simultaneous audits but all forms of cooperation between administrations and between administrations and taxpayers, in order to reduce the compliance burden and the risk of double taxation. For example, joint audits (but in the future also the ICAP Programme) begin to be tested. However, there is still no clear framework for the rules that may apply to such types of audits. The lack of sharp rules is one of the problems that may limit the use of this tool, for instance, triggering conflicts between internal procedural rules (e.g. statute of limitations, duration of the audits, validity of documentation acquired outside the borders of the State or with an entity that is not a taxpayer, etc.).

In this respect, it might be also useful to introduce specific rules aimed at facilitating the roll-back or roll-forward (where possible) of the results of the joint/simultaneous audit. With regard to the post-audit phase, in order to ensure legal certainty after a joint/simultaneous audit for the future years, a fast-track bilateral advanced pricing agreement should be recommended. In principle the recommendation should be that the conclusions of the joint audit be considered as applicable also to the future, provided of course that there is no change in the factual circumstances of the case.

Within paragraph D, it would also be useful to have a specific subparagraph regarding cooperative compliance. In fact, in recent years, a number of countries have adopted a co-operative compliance approach.

The form of the approach however can vary significantly: some procedures are based on enhanced relationship with no formalised procedures, whereas some other use formal agreements or rely on specific regulations or legal framework. The taxpayer thus has to deal with regimes that may vary widely from country to country and which are often designed without accurately balancing the needs of the tax authorities with those of the taxpayers. In our opinion, it would be useful to provide general guidance on the principles that should be applied in the context of cooperative compliance regimes adopted by the different countries. In this respect, some of the issues that could be addressed are the following:

a) given the central importance of Tax Control Framework Systems, it would be useful to delineate some principles on how these frameworks can best be assessed (with specific reference to transfer pricing issues) and to establish a standard approach on how to implement that Framework;
b) specific rules governing disclosure and confidentiality should be adopted. Indeed, in our opinion, from a taxpayer perspective, one of the main challenges is the risk connected to the disclosure of confidential information to tax administrations and the possible (mis-)use of such information outside the cooperative compliance program.

In addition to the above, it might be useful if the guidance contained in paragraph D could be extended to the application (or non-application) of penalties where the tax administration ends up disagreeing with the position taken by the taxpayer.

Moving to paragraph B.3. of chapter IV, which relates to the application of penalties, we believe that this paragraph should be further supplemented in order to clarify the requirements for the non-application of penalties. Indeed, the non-application of penalties is often used as a negotiating tool during the discussion between tax administrations and taxpayer, whereas it should be an automatic (and binding) course of action for the tax administration.

A different approach would be contrary to the principles of transparency, good faith, fairness and cooperation on which any penalty-protection regime is based. In addition, the use of penalties as a negotiating tool may constitute a disincentive for taxpayers to pursue a MAP instead of accepting a settlement option on a transfer pricing claim. In this respect the TPG should make it clear that the existence of a minimum standard of documentation and the formal compliance with the disclosure regulations of a country should put the taxpayer under an automatic protection from penalties (in case of claim), thus eliminating any discretional power of the tax administrations.

2. **Relevant aspects of the minimum standards and best practices contained in the Report on BEPS Action 14 related to transfer pricing have been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, and based on your experience, is there any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimise the risk of double taxation?**

Maisto e Associati commends the OECD for its effort on the corresponding adjustment and secondary adjustment guidance. In the course of the review of the relevant paragraphs of Part IV of the TPG it might be useful that the attention be focused on the following topics.

With regard to corresponding adjustments we believe that still many uncertainties derive from the application of corresponding adjustments. Such uncertainties could be mitigated by foreseeing that these adjustments should be done within the context of the MAP's umbrella. This would entail that a number of clarifications already applicable to MAPs (such as the recommendations included in the Manual on effective mutual agreement procedures – MEMAP) may become applicable also for corresponding adjustments.
This would help the resolution of many issues related to corresponding adjustments: for example, the case where one country charges interest on a tax deficiency (or insists on collecting tax from the taxpayer prior to resolution of the dispute) and the other country does not pay interest on tax refunded to the taxpayer upon resolution of the dispute and the result is a notable monetary burden.

Another point to be resolved or clarified is about the relationship between corresponding adjustments and transfer pricing challenges grounded on non-transfer pricing domestic rules. For example, tax administrations can seek the non-recognition or recharacterization of a transaction on the basis of "abuse of law" principles and, for this reason, not enable the taxpayer to obtain a corresponding adjustment in the foreign jurisdiction. Indeed, in such cases, the foreign authority may not grant a corresponding adjustment on the basis that the primary adjustment was not grounded on the transfer pricing rule.

In this respect it might be useful that the recommendations contained in the TPG stimulate (a) tax administrations making the primary adjustments to consider transfer pricing rules as the priority rule for the adjustment, and (b) – in any event – tax administrations of the foreign jurisdictions to accept to apply corresponding adjustments to cases where the primary adjustment is substantially, though not formally (because the applied rule it not a transfer pricing rule), creating a double taxation that is in contrast with Article 9 of the applicable double tax treaty.

With respect to secondary adjustments, we believe that the state of art is still very fragmented as the policy on the application of secondary adjustments varies significantly from country to country or even within the same country. To this end supplementary guidance on this issue would be welcome.

Otherwise, it is left to the discretion of the specific auditor whether or not to make a secondary adjustment. In particular, we believe that para. 4.73 of the TPG, and in particular the statement "*when secondary adjustments are considered necessary",* should be supplemented in order to clarify when the secondary adjustment is considered necessary.

Another point that we believe should be addressed is the application of withholding tax on secondary adjustment qualified as hidden distribution of dividends or hidden contributions. For instance, as already mentioned by the EU Joint Transfer Pricing Forum, most EU Member States where secondary adjustments are applied, treat them as hidden profit distributions/hidden contributions and therefore consider them potentially subject to withholding tax. By contrast, other States might have a different approach and therefore deny creditability of such withholding tax thus triggering a new double taxation.

A last point concerns the possibility to provide guidance on if, and how, to interrupt the effects of secondary adjustments over the years. For example, we experienced cases of secondary adjustments deeming a loan to exist for the portion of the price exceeding the arms' length. In order to avoid a perpetual figurative loan, a repayment of the deemed loan could be necessary. As the deemed loan is not in the books of the related party and since the latter could not have anymore the control of the relevant funds (for example as a dividend distribution took place), the repayment could be in practice impossible. In this respect, guidance on how to address such situations would be desiderable.

3. **Element 2.7 of Action 14 minimum standards and the best practices related to APAs contained in the Report on BEPS Action 14 have also been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, is there any additional guidance that could be provided on advance pricing arrangements? Based on your experience, are any features of APAs or specific initiatives related to APAs that could strengthen their role in minimising transfer pricing disputes? What are the advantages of such initiatives and the implementation challenges?**

Regarding the role of bilateral APAs in minimizing transfer pricing disputes, based on our experience, we suggest to provide further clarifications on the relationship between bilateral APAs and tax audits. In particular, more guidance has to be provided on how to handle the mentioned relationship both during the procedure and after the conclusion of the agreement.

With reference to the procedural phase, the purpose is to avoid that a tax audit, challenging the same controlled transactions with respect to the same fiscal year, may lead to different results compared to those agreed upon in the context of the bilateral APA

For instance, in the case of a pending bilateral APA on a certain controlled transaction, it should be recommended that tax administration have to adequately evaluate the opportunity to start a tax audit on the same transaction (on fiscal years potentially covered by the bilateral APA) or, in cases in which it is necessary to start the mentioned audit, to take into account the conditions that will be agreed upon the APA.

Following the above, a suspension of the bilateral APA in the presence of a tax audit – adopted by some countries – seems, in any case, not to be appropriate. Indeed, a tax audit, if not concluded in such a way that takes into account the bilateral APA results, may lead to a double taxation and, therefore, be in contrast with the nature of the APA itself (reducing double taxation).

Referring to the relationships between bilateral APAs and tax audits after the conclusion of the agreement, it is worth to consider that Annex II to Chapter IV, para. E.2.2, of the TPG states that "*A MAP APA applies only to the parties specified in the agreement and in respect of the specified transactions. The existence of such an agreement would not prevent the participating tax administrations from undertaking audit activity in the future, although any audit of transactions that are covered by the MAP APA would be limited to determining the extent of the taxpayer's compliance with its terms and conditions and whether the circumstances and assumptions necessary for the reliable application of the chosen methodology continue to exist*".

In this respect, more guidance should be provided in relation to the procedure for determining the taxpayer's compliance with the conditions agreed upon the bilateral APA, also taking into account that in most countries the tax officers involved in the APA procedures are not the same of those involved in the tax audit procedures.

As a last remark, we note that the BEPS Action 14 provided for some clarifications on the roll- back of bilateral APAs. However, it is important to further clarify that countries with bilateral APA procedures should provide for the roll- back of APAs also with respect to previous fiscal years not included within the original scope of the APA and within the limits of the statute of limitations, provided that relevant tax and circumstances are the same, so that a real elimination of double taxation can be guaranteed.

***

Please feel free to contact us at TP@maisto.it with any questions or comments concerning this letter.

Sincerely yours,

Maisto e Associati

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20 June 2018

Dear Sir / Madam,

Scoping of the future revision of Chapter IV (administrative approaches) of the OECD Transfer Pricing Guidelines

PricewaterhouseCoopers International Limited on behalf of its network of member firms (PwC) welcomes the opportunity to comment on the Scoping of the future revision of the guidance in Chapter IV of the OECD Transfer Pricing Guidelines 2017 ("TPG"), Administrative Approaches to Avoiding and Resolving Transfer pricing Disputes as per the Invitation for Public Comments dated 9 May 2018.

We appreciate the initiative and efforts from the OECD in discussing the scope of the future update of Chapter IV of the TPG. This should reflect the latest developments on administrative procedures aimed at avoiding, resolving and minimising transfer pricing disputes, increasing tax certainty for taxpayers and preventing double taxation.

The Appendix to this response outlines our views on the different sections of Chapter IV of the TPG that in our view need to be revisedand the issues that should be covered as part of this revision. While we acknowledge that Working Party No. 6. has decided that there is no need at this stage to revise or supplement the current guidance on safe harbours and arbitration, we believe the concepts included could still be improved based on the acquired experience since the publication of the relevant sections in 2009 (arbitration) and 2013 (safe harbours).

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The main issues which should be considered, and which are further elaborated in the Appendix, in discussing the revision of Chapter IV of the TPG are :

- **Transfer pricing compliance practices:** further guidance could be developed with greater emphasis on co-operative compliance / enhanced relationships as well as the use of new technologies (for example blockchain).
- **MAP:** “fast-track” MAP for simple/low risk dispute cases should be considered. Moreover, instead of the current “standard of endeavour” to reach an agreement under MAP, one might consider the competent authorities being obliged to reach an agreement to resolve their dispute, along with the consensus on the corresponding adjustment and the year to which this should be attributed. We understand, however, that this may fall outside the mandate of WP6 and may need to be reverted to WP1.
- **Simultaneous tax examinations:** the existing legal framework and guidance on bilateral or multilateral simultaneous transfer pricing examinations could be further developed and improved.
- **APAs:** the APA process should be carried out expeditiously; the above “fast-track” considerations could also be applied to the APA process; the outcome of a MAP could be automatically rolled forward to the APA process.
- **ICAP** (International Compliance Assurance Programme)**:** ICAP intends to facilitate and improve the effectiveness of co-operative multilateral engagements and thus should also be a part of the revised chapter IV in the future.
- **Other:** resurrect the “early notification” approach; further issues to address may be considerations about the organisation of transfer pricing audit teams, internal processes, guidelines, tools and techniques as well as staffing and resources available (items that should be high on the agenda of the respective tax administrations and beneficial to all stakeholders).

As already mentioned, although Working Party 6 (WP6) has decided not to revisit the guidance on safe harbours and arbitration, we believe there is sufficient reason to do so and supplement the guidance:

- **Safe harbours:** in addition to the three transaction types included in the MoUs, further guidance could be developed (i.e. by way of a separate MoU) on business support services (low-value adding services); possible other fields of application may be related to non-complex or low risk financial transactions (e.g. interest rates for related party loans).
- **Arbitration:** in general, existing practical experiences in this chapter could be included and clearer guidance added on how to resolve issues in this respect, e.g. timelines; further one might consider referring the case under arbitration to an international - instead of a national - court or arbitration panel.

For any clarification on this response, please contact the undersigned or any of the individuals below. We look forward to discussing any questions you might have on the points we raise above or on other specific matters raised by respondents to the Invitation for Public Comments and would welcome the opportunity to contribute to the discussion as part of a public consultation meeting, should such meeting be organised.

Yours faithfully,

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Appendix

A. Introduction

For practical reasons we outline our comments below by following the structure and main sections of Chapter IV of the 2017 version of the OECD Transfer Pricing Guidelines (“TPG”).

B. Transfer pricing compliance practices

Co-operative compliance / enhanced relationships

Further guidance to promote enhanced co-operative relations between tax administrations and taxpayers on the basis of mutual trust could prevent tax-related disputes or enhance their effective resolution at an early stage i.e. when considering an audit, preparing an audit or actually at the beginning of or during an audit. Several countries have already introduced cooperative compliance programmes to improve compliance and counter tax avoidance. It could be useful to discuss and reflect the use of such programmes in particular in the area of transfer pricing, and develop guidance drawn from existing experiences.

In that context early communication can prevent misunderstandings and inefficient allocation of resources from all stakeholders involved by helping to focus on the most critical aspects which contribute to effective risk management. A cooperative approach should also imply the disclosure and understanding of facts and circumstances of the case under consideration by the taxpayer. In light of this, the concept of an “early notification” could be considered. We elaborate on the latter under section I. “Other” below.

In parallel, since the environment in which tax administrations work (and taxpayers are engaged) is undergoing fundamental changes, we feel that the roll of tax control frameworks could be developed and that additional work on measures of effectiveness may be added. We set out further comments on this under the examination practises below.

Examination practises

This topic can be considered as part of the debate as to how to better identify and manage risk in transfer pricing. In this respect, tax administrations and taxpayers struggle with the limited amount of resources available to deal with transfer pricing matters. Hence the need for a proper risk assessment program. Many tax administrations have developed administrative approaches as a result of which they “label” certain related party transactions as “risky” from a compliance perspective. In practice, these transactions are usually classified as risky due to their specific nature, industry, volume, or the transfer pricing method applied by the taxpayer. However, transfer pricing audits are often driven by less strategic considerations, e.g. when tax administrations consider the extent of transfer pricing documentation submitted or take a periodical approach towards the scheduling of audits. Such approaches may often fail to identify the real risk in transfer pricing and should ideally be combined with (or replaced by) more risk-focussed evaluation criteria.

Digitization

Guidance would be welcomed on how new technologies can help with transparency and avoiding or resolving disputes (for example use of blockchain technology in analysing and endorsing transfer pricing policies).

C. Corresponding adjustments and the mutual agreement procedure: Articles 9 and 25 of the OECD Model Tax Convention

We acknowledge and appreciate efforts of the competent authorities to resolve complex matters while working under difficult circumstances, in particular due to the limited amount of resources and skilled / experienced staff available.

The minimum standards and best practises contained in the BEPS Action 14 Report will help improve efficiency in tax dispute resolution proceedings. However, based on our experiences, we believe it would still be useful to consider a "fast-track" mutual agreement procedure ("MAP") for simple/low risk transfer pricing dispute cases. For example, one could define which well-defined MAP cases could be resolved under this fast track procedure, such as transactions involving the rendering of low value-adding intra-group services, transactions involving low risk manufacturing and distribution or low risk research and development. This simplification would help ensure that these qualifying MAP cases would be resolved within a relatively short period of time (e.g. within 6, 9 or 12 months of the initiation of the case).

In addition, as part of the resolution of mutual agreement cases, competent authorities should engage in discussion in a principled, fair, and objective manner, with each case being decided on its own merits instead of by a reference to a balance of results in other cases. Moreover, in order to address lack of efficiency the competent authorities should agree to resolve their dispute, using arbitration if necessary (instead of the currently applicable "standard of best endeavour" to reach an agreement under MAP), along with reaching consensus on the corresponding adjustment and the year to which this should be attributed. We acknowledge that this may fall outside the mandate of WP6 and need to involve discussion within WP1. It is, however, of utmost importance that double taxation is resolved.

Another procedural concern relates to taxpayer's participation. Although the taxpayer has the right to initiate the procedure, in principle the taxpayer still has no specific rights to participate in the process or to receive detailed feedback.

While we acknowledge that some of the proposals may need a more fundamental discussion on the use of MAP, we invite Working Party No. 6. to reflect on some of these approaches that could typically be applied in a transfer pricing context.

D. *Simultaneous tax examinations*

Simultaneous tax examination can alleviate the difficulties experienced by both taxpayers and tax administrations connected with the transfer pricing of MNEs and increase certainty / predictability for involved parties while at the same time improving administrative efficiency.

At a time where the inventory of MAP cases has been increasing, developing and improving the existing legal framework and guidance on bilateral or multilateral simultaneous transfer pricing examinations would be useful. A common approach would help avoid double taxation disputes (and decrease the necessity of MAP cases) or improve MAP resolution, including faster exchange of information. In this context, we feel that revised guidelines should be established (including best practises) for carrying out simultaneous tax audits.

In this regard, we note the work of the EU JTPF in developing practical guidance, in particular addressing the following:

- indicators of suitable cases where simultaneous controls should be considered in transfer pricing (e.g. risk assessment and taxpayer selection process), complexity (e.g. business restructurings, transfer of IP, etc.) and transfer pricing method used (e.g. profit split, etc.)
- how to initiate a simultaneous audit (e.g. template of the request for simultaneous audit)
- the possibility for taxpayers to encourage simultaneous controls
- the importance of active and co-operative participation of the taxpayer in the audit process irrespective of the domestic rules
- the legal value of the facts summarised in a final report
- disagreement between tax administrations and "fast-track" MAP, and
- the relationships between the outcomes of simultaneous audits, APAs and MAP.

Moreover, the guidance should not be limited to simultaneous controls and consideration should also be given to joint audits.

E. *Safe harbours*

We regret that Working Party No. 6 has decided that there is no need at this stage to revise or supplement the current guidance on safe harbours, which are very positively welcomed in practice. However, we would like to express some additional thoughts and suggestions on certain aspects of the current guidance on safe harbours, as included below.

The TPG state that safe harbours can be most appropriate when directed at taxpayers and/or transactions which involve "low transfer pricing risks". Although the respective provisions themselves provide few examples on what kind of taxpayers and/or transactions are regularly assumed to be of a low risk character, guidance is offered through the three sample Memorandums of Understanding ("MoUs") on low risk manufacturing services, low risk distribution services and low risk research and development services. These represent a very useful starting point, but we would encourage Working Party No. 6 to develop a list of example transactions which could normally be considered to be of a low risk character and hence particularly suitable to be the subject of a unilateral or bilateral safe harbour arrangement. Such (non-exhaustive) list would be of further assistance to competent authorities when considering the step of entering into bilateral or multilateral safe harbour agreements.

It would also be beneficial to set out that when sufficient taxpayers or a group of stakeholders show sufficient interest or benefit, they may request competent authorities to enter into a MoU.

Further, since the EU's Directive DAC 6[1], under the specific hallmark concerning transfer pricing, indicates that an arrangement which involves the use of unilateral safe harbour rules needs to be reported, examples should be provided of safe harbours where there is consensus that they cannot be considered as harmful and do not constitute tax avoidance or evasion.

F. Advance pricing arrangements

In general, there are some similarities between the MAP and APA processes with respect to procedure. Hence, most of the above comments under Section *C* above in terms of MAP can also apply to the APA process such as a "fast-track" procedure for simple/low risk cases or the obligation to come to an agreement in the end instead of a "best endeavours" approach. In light of the limited experience of the MoUs for bilateral safe harbours developed for some of the simple / low risk transactions, a fast-track procedure may still be relevant for those transactions.

As stated in the TPG (cf. Annex II to Chapter IV para. 10): "The objectives of an APA process are to facilitate principled, practical and co-operative negotiations, to resolve transfer pricing issues expeditiously and prospectively, to use resources of the taxpayer and the tax administration more efficiently, and to provide a measure of predictability for the taxpayer."

In particular the objective that the APA process shall be carried out "expeditiously" is an issue in current practice, in particular for bilateral or multilateral APAs. According to our experiences the procedures are often not concluded in a timely manner which causes high uncertainty for the taxpayer. In addition, if the process takes too much time the objective of "predictability for the taxpayer" will also not be completely met.

Another approach in this respect would be to strengthen the guidance on rolling forward the outcome of a MAP to the APA process, provided the circumstances have not changed significantly. In other words, the facts and assessments during a MAP could be used for a subsequent APA process.

Overall, the timing aspect is crucial for the whole APA process in order to achieve most of the outlined objectives. Thus, this is something that should be even more clearly addressed in the

[1] Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

TPG. Eventually, some/more incentives could be provided to the involved tax administrations in order to better achieve those objectives.

G. Arbitration

Although there is already some guidance in the MTC commentary (cf. Commentary on Article 25(5), paragraphs 63-85) on how to deal with arbitration, we recommend extending the comments on arbitration in the TPG. Currently this section consists only of three paragraphs. Practical experiences now exist and clearer guidance for the involved parties should be possible.

Furthermore, we suggest that timelines be added to the arbitration process in order to ensure its efficiency.

The objectivity and independence of an arbitration decision could be enhanced by referring arbitration cases to an international court or other international arbitration body.

There are other issues with respect to the application of arbitration which could be usefully addressed in this chapter. For instance, discouraging tax administrations blocking the access to arbitration by extending competent authority procedure beyond the foreseen timeframe, not nominating - respectively postponing the nomination of - arbitration panels, not sending in timely position papers under baseball arbitration, etc.

We believe these are valuable reasons to reconsider the decision not to revisit the guidance on arbitration.

H. ICAP (International Compliance Assurance Programme)

In early 2018 the OECD launched the so-called ICAP (International Compliance Assurance Programme) pilot which "is a voluntary programme that will use CbC Reports and other information to facilitate open and co-operative multilateral engagements between MNE groups and tax administrations, with a view to providing early tax certainty and assurance."[2]

Basically, ICAP facilitates multilateral discussions between MNE groups and participating tax administrations and improves the effectiveness of current risk assessment processes. Further benefits of ICAP are the following:

- A fully-informed and targeted use of CbCR information.
- A more efficient use of resources and a co-ordinated approach to engagement.
- A faster, clearer route to multilateral tax certainty.
- Fewer disputes entering into MAP.

[2]http://www.oecd.org/tax/forum-on-tax-administration/international-compliance-assurance-programme.htm

Due to the fact that ICAP intends to facilitate and improve the effectiveness of co-operative multilateral engagements for the involved stakeholders – which is also a general objective of chapter IV of the TPG – we suggest that this could also be a part of the revised chapter IV in the future as it could prove particularly useful in the area of transfer pricing.

I. Other

Early notification

Another possible approach is to resurrect "early notification"[3]. Under this approach, a tax administration could notify another tax administration automatically once a transfer pricing adjustment is made. This notification would come even before the taxpayer has made a request for MAP under a double tax treaty. It might be helpful for the involved parties in order to enhance the efficiency of the MAP/ APA process. Moreover, the discussion with the involved tax administrations at an early stage might mitigate uncertainty for the taxpayer.

[3] For the definition of "early notification" cf. EU JTPF 20 September 2005 working document.

SwissBanking

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SBA Submission: OECD Request for Public Comments on Scoping of the Future Revision of Chapter IV (Administrative Approaches) of the Transfer Pricing Guidelines

Dear Sir or Madam,

The Swiss Bankers Association ("SBA") would like to thank you for the opportunity to provide its comments on the new project of Working Party No. 6 ("WP6") to revise the guidance in Chapter IV: Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD TPG").

Our views are based on the extensive experience of our members with respect to transfer pricing audits, subsequent adjustments and related dispute resolutions of Multinational Enterprises ("MNE") operating in the business fields of:

- asset management,
- investment banking,
- retail banking and
- wealth management.

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Please find below our comments on the following specific issues:

1. Comments on additional guidance to be done to update Chapter IV in relation to:

a. Examination practices and guidance on risk assessment

The SBA believes that Base Erosion and Profit Shifting ("BEPS") Action Point 13 – with its introduction of the new three-tiered transfer pricing documentation requirements – will substantially change the existing examination and risk assessment practice. In our view, the major driver of the upcoming changes will be the Country-by-Country Reporting ("CbCR") that will provide tax authorities with information about substance and profit allocation within MNEs. So far, such data were not readily available to the tax administrations. The SBA would appreciate, if WP6 would establish a framework for the appropriate use of CbCR data in tax audits in the updated Chapter IV. The SBA would welcome, if the short instruction from Chapter V: Documentation, Art. 5.25 and the related reports[1] would be described in detail in the envisaged update of Chapter IV. The SBA would especially welcome, if there would be a framework introduced for the following CbCR applications:

- high-level risk assessment,
- assessment of other base erosion and profit shifting related risks, and
- economic and statistical analysis.

b. Mechanisms to prevent and resolve tax disputes

The OECD has been recently very active in dealing with tax disputes prevention and resolution, e.g. in:

- the 2017 update of Chapter IV of OECD TPG,
- OECD BEPS Action 13: Transfer Pricing Documentation and Country-by-Country Reporting,
- OECD BEPS Action 14: Making Dispute Resolutions Mechanisms More Effective, and
- OECD BEPS Action 15: Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS.

This work has an impact on transfer pricing related matters in MNEs represented by the SBA. The SBA would therefore welcome, if the envisaged update of Chapter IV would consider the guidance provided by the work of the OECD in this matter.

[1] OECD (2017), BEPS Action 13 on Country-by-Country Reporting: Guidance on the appropriate use of information contained in Country-by-Country Reports, Art. 4.

The SBA recognizes that Art. 9 Para. 2 OECD Model Convention ("OECD MC") results in much faster remedy from economic double taxation than the direct application of Art. 25 OECD MC (Mutual Agreement Procedure). It is therefore important that at least among OECD member countries, these provisions become part of their tax conventions.

The SBA would also welcome, if Chapter IV would define a compulsory order (or at least describe the interaction) between the available instruments for economic double taxation remedy.

The SBA would highly appreciate, if WP6 would provide more guidance on, when a primary adjustment should not be considered justified both in principle and in amount.[2]

2. Views on how the guidance in Chapter IV could be revised or supplemented to reflect the latest developments on administrative procedures aimed at minimizing transfer pricing disputes and to help resolve them, increasing tax certainty for taxpayers and preventing double taxation. The necessity of potential revision or supplement of current guidance on:

a. Safe harbor rules

SBA would welcome, if safe harbor rules would be more common in the transfer pricing area. So far, there is only one internationally accepted application of safe harbor rules, i.e. 5% profit mark-up on costs for low value-adding intra-group services ("LVAIGS")[3]. WP6 might for example consider Singapore practice as a benchmark for the wide application of safe harbor rules. Any entity with gross revenues from their trade or business with less than SGD 10 million does not have to prepare transfer pricing documentation.[4] In addition, related party transactions not exceeding certain volumes do not have to be documented.[5]

b. Arbitration

Reference is made to our comments on 1 b) above.

As arbitration is the step that follows a MAP that did not lead to a consensus, the whole procedure might be considerably lengthened. We believe that the more frequent application of Ar. 9 Para. 2 OECD MC (corresponding adjustment) would bring much faster solutions and would therefore be more efficient for both tax administrations and taxpayers. Nevertheless, we think that it is important that tax conventions contain arbitration clauses.

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[2] OECD TPG, Chapter IV, Art. 4.35.
[3] OECD TPG, Chapter VII, Art. 7.43 et seq.
[4] IRAS, eTax Guide, Transfer Pricing Gudelines, Fifth Edition, Art. 6.10.
[5] IRAS, eTax Guide, Transfer Pricing Gudelines, Fifth Edition, Art. 6.18.

3. What additional aspects or mechanisms to minimize the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)?

a. What have been the advantages and/or challenges of transfer pricing compliance practices (e.g. co-operative compliance and risk assessment tax examination practice)?

Reference is made to our comments on 1 a) above.

4. Relevant aspects of the minimum standards and best practices related to APAs contained in the Report on BEPS Action 14 related to transfer pricing have been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, and based on your experience, is there any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimize the risk of double taxation?

a. Corresponding adjustments

Reference is made to our comments on 1 b) above.

The SBA would further appreciate, if there would be more guidance on when tax authorities could make an adjustment on the basis of the application of another transfer pricing method than the one retained. We believe that cherry-picking of methods in order to make an upward adjustment should not be allowed.

b. Secondary adjustments

We believe that no additional guidance is needed, as Art. 4.68 to 4.78 of OECD TPG are quite comprehensive.

5. Element 2.7 of Action 14 minimum standards and the best practices related to APAs contained in the Report on BEPS Action 14 have also been incorporated into Chapter IV in the 2017 edition of the TPG.

a. Considering this, is there any additional guidance needed that could be provided on advanced pricing arrangements?

The SBA believes that there could be additional guidance provided concerning transition risk that is assumed by the taxpayers for the period before and immediately after the APA applies.

b. Based on your experience, are any features of APAs or specific initiatives related to APAs that could strengthen their role in minimizing transfer pricing disputes?

Reference is made to our comment on 5a) above.

c. What are the advantages of such initiatives and the implementation challenges?

Reference is made to our comment on 5a) above.

6. Are there any other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution or transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV of the TPG?

Reference is made to our comments on 1) and 2) above.

We thank you for taking due consideration of our comments.

Yours sincerely,
Swiss Bankers Association

Petrit Ismajli	Jean Brunisholz
Head of Tax department	Head of Tax Switzerland

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20 June 2018

Comments on the future revision of Chapter IV, "Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes" of the Transfer Pricing Guidelines

Dear Sir / Madam,

Taxand welcomes the opportunity to provide comments on the future revision of Chapter IV of the Transfer Pricing Guidelines (TPG). We would like to share few thoughts based on our experience in advising multinational enterprises on Mutual Agreement Procedures (MAP) and Advance Pricing Arrangements (APA).

Our input will primarily focus on the first and last questions listed in the Invitation for Public Comments issued on the 9th of May 2018.

"What additional aspects or mechanisms to minimise the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)?"

Comment – Promotion of co-operative compliance

The implementation of a co-operative compliance practice would definitely create a closer relationship between the taxpayers and the tax authorities, based on the fact that the taxpayer could choose it if he wants or not to be included on the referred mechanism.

It would stimulate compliance and prevent non-compliance, create an easier communication channel between the taxpayer and tax authorities, giving the parties the possibility to discuss, share and disclose relevant information of the business. On taxpayer side, based on a reasonable administrative burden, the benefits are to have a closer relation with the tax authorities, preventing/minimizing the dispute events. From the tax authorities' side, the advantages are linked with the possibility of monitoring taxpayers on a regular basis and get more expertise and know-how from their operational activity/industry.

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"Are there any other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV of the TPG?"

Comment 1 – Problems concerning MAP and accrual of interest after 2 years from the presentation of the case to the competent authority

In case of transfer pricing adjustments, some countries may impose penalties as a disincentive for non-compliance (TPG 4.18). Some countries' penalty regimes may include also interests for tax underpayments which result in late payments of tax beyond the due date (TPG 4.22). In some countries late payment interest rate applicable to tax underpayments may be significantly higher than the base interest rate (i.e. the interest rate that a central bank charges to lend money to commercial banks) so that such late payment interest may be classified as an "additional penalty".

During the period in which a MAP is pending, generally countries grant a suspension of collection procedures (TPG 4.65). Once the MAP is concluded, tax authorities can ask for underpaid taxes, penalties and late payment interests.

As regards the duration of a MAP, competent authorities should resolve the case in 2 years. Indeed, the minimum standard that was adopted in the context of the work on Action 14 of the BEPS Action Plan (element 1.3) includes a commitment to seek to resolve MAP cases within an average timeframe of 24 months (TPG 4.56). In case of arbitration, if the competent authorities are unable to reach an agreement within two years from the presentation of the case, any unresolved issues arising from the case shall be submitted to arbitration (article 25, paragraph 5, Model Tax Convention).

If the competent authorities do not resolve a MAP case within 2 years, we believe that late payment interests should not apply after 24 months from the presentation of the case because the delay in concluding the procedure is not attributable to the taxpayer. Consequently, late payment interests should apply until 24 months from the presentation of the case, while from that date onwards, just base interest rate should apply.

Such comment is aimed to avoid that no-fault penalties (such as late payment interests accrued after 2 years from the presentation of the case) can be levied when the delay in concluding the MAP case is not attributable to the taxpayer.

Comment 2 – Coherent resolution of MAP and bilateral/multilateral APA related to the same controlled transactions

We dealt with several cases where a MAP and a bilateral/multilateral APA were related to the same controlled transactions and the relevant facts and circumstances in the tax years under discussion were the same. However, the MAP and the bilateral/multilateral APA were managed and concluded separately, and the agreement reached by the competent authorities in relation to the MAP was not in line with the one signed between the competent authorities of the same countries for APA purposes.

In such cases, the retroactive application of a bilateral/multilateral APA ("roll back") would have led to the extension of the methodology agreed upon under the bilateral/multilateral APA to the earlier years covered by the MAP (TPG Annex II to Chapter IV, paragraph 69).

However, if the countries involved do not provide for the "roll back" of APAs, it is recommended that the MAP and the bilateral/multilateral APA related to the same controlled transactions are resolved simultaneously or at least on the basis of the same methodology, if the relevant facts and circumstances in the tax years under discussion are the same.

We are aware that neither the tax administrations nor the taxpayer are obliged to apply the methodology agreed upon as part of the bilateral/multilateral APA to tax years ending prior to the first year of the bilateral/multilateral APA (TPG Annex II to Chapter IV, paragraph 69). However, in the cases described above, we believe that the simultaneous resolution of the MAP and the bilateral/multilateral APA or at least their resolution on the basis of the same methodology, would allow to achieve outcomes more coherent in a more time efficient manner.

Comment 3 – Promotion of a transfer pricing commission to help solving transfer pricing disputes

In most countries, the tax audit procedure is stringed with a series of guarantees granted to the taxpayer, in order to ensure that his position has been duly discussed during the audit. Among them, there are procedures in force in certain countries (it is in particular the case in France) that allow the consultation of a special commission whose goal is to issue an opinion on the fact matters surrounding the dispute and not on the legal issues, when disagreements persist between the administration and the taxpayer following a tax reassessment.

Given the specificity of transfer pricing being in many instances a grey area and most often a factual and economic issues rather than an actual legal issue, a dedicated commission to handle transfer pricing cases would be extremely relevant and would in many instances allow to settle the transfer pricing disputes.
More specifically, such a commission would have an expert voice, not legally binding and could be composed of experts in the field of transfer pricing from both tax authorities and taxpayers in equal numbers and should be led by an impartial head (e.g. judge).

Dedicated commission already exists for specific tax matters (e.g., R&D Tax Credit Advisory Committee in France) and could offer additional guarantees to taxpayers for their transfer pricing disputes with tax authorities.

We hope that these brief remarks will contribute to the further discussion of the topic.

Yours sincerely on behalf of Taxand,

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TAX EXECUTIVES INSTITUTE, INC.

19 June 2018

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Via email: transferpricing@oecd.org

RE: Potential Revisions to Chapters IV and VII of the OECD Transfer Pricing Guidelines

Dear Mr. Vanderwolk:

On 9 May 2018, the OECD issued two invitations for comment regarding potential future revisions to the OECD's Transfer Pricing Guidelines (the Guidelines). One request asks for comment on the scope of revisions to Chapter IV (administrative approaches) of the Guidelines (the Chapter IV Request). The Chapter IV Request seeks input regarding "how the guidance in Chapter IV could be revised or supplemented to reflect the latest developments on administrative procedures aimed at minimizing transfer pricing disputes and to help resolve them . . . ."

The second request asks for comment on the scope of future revisions to Chapter VII of the Guidelines regarding intra-group services (the Chapter VII Request). The Chapter VII Request notes it is concerned with the "practical application" of the guidance in Chapter VII, rather than its underlying principles.

On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the OECD's requests for comments.

<u>TEI Background</u>

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 tax policy, as well as the fair and efficient administration of the tax laws, at all

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levels of government. Our nearly 7,000 individual members represent over 2,800 of the leading companies in the world.[1]

Comments regarding the Chapter IV Request

General Comments

TEI commends the OECD for seeking comments regarding the scoping of potential revisions to Chapter IV of the Guidelines. In general, TEI prefers countries adopt a transparent cooperative approach to tax administration, which would help avoid disputes, including audits and arbitration. In this regard, TEI recommends the OECD improve current practices rather than introduce completely new mechanisms. New mechanisms present new complexities and compliance burdens, when the overall direction of administrative approaches to preventing transfer pricing disputes should be toward simplicity and shorter timelines.

Over the past several years the OECD has introduced several initiatives and new concepts that have increased taxpayers' compliance burden (most notably, country-by-country reporting). These initiatives have increased the incidence of double taxation. The OECD should thus aim to address how double taxation can be avoided or relieved in the new guidance. Finally, we note safe harbor guidelines can be very useful as long they are accepted by all countries/member states, but unilateral measures are not efficient. The OECD should thus aim to facilitate multilateral safe harbor measures.

Comments on Specific Questions

The Chapter IV Request asks "What additional aspects or mechanisms to minimise the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)?" TEI suggests a number of elements should be included in future guidance to improve transfer pricing compliance practices. First, tax authorities should share their risk assessments with taxpayers so taxpayers can improve their compliance processes where appropriate, or engage in a discussion with tax authorities regarding their view of the taxpayer's compliance risk. Second, to avoid transfer pricing disputes, Chapter IV should urge tax authorities to focus audit activity on transactions that are more likely to be tax motivated (i.e., between high and low tax jurisdictions), rather than simple intercompany transactions where the taxpayer makes reasonable efforts to price the transactions and where the possibility of a tax motivation is remote. For example, head office cost allocations between countries with relatively comparable tax rates should be viewed as low risk. Finally, the OECD should encourage countries to consider halting interest and penalties if dispute resolution takes longer than two years and if the country does not have a mandatory arbitration procedure.

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[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).

The Chapter IV Request also asks about relevant aspects of the minimum standards and best practices included in the OECD's final BEPS report on Action 14 regarding effective dispute resolution, including whether "there [is] any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimize the risk of double taxation?" TEI recommends the OECD include information regarding the impact of transfer pricing adjustments on areas other than the corporate income tax, such as indirect taxes, withholding taxes, and customs duties. For example, on 20 December 2017, the Court of Justice of the European Union (CJEU) ruled that a customs transaction value may not be based on a transfer price that was subject to a retroactive adjustment. Customs values are established by the price actually paid or payable for the goods when they are sold for export, the CJEU held.

In addition, the Chapter IV Request asks what additional guidance could be provided regarding advance pricing arrangements. In TEI's view, the OECD should provide guidance on the consequences and potential taxpayer remedies if advance pricing arrangements or other transfer pricing rulings are overturned by a non-tax governmental body that is not a court (e.g., the circumstances present in the current EU state aid tax cases).

Finally, the Chapter IV Request invites comments about "[a]ny other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed . . . ?" The Guidelines should address how taxpayers can attend to tax legislation changes around the world. In many cases, new rules in one country may effectively result in double taxation. For example, the recent U.S. tax reform legislation includes a "base-erosion anti-abuse" tax that may apply to certain payments even if those payments taxable in another country. Such guidance would be particularly helpful where it is uncertain that double taxation relief is available under an applicable tax treaty, such as where the tax imposed may not qualify as a tax on income as defined under the treaty.

Comments regarding the Chapter VII Request

The Chapter VII Request identifies a number of practical challenges regarding the Chapter's application. One challenge is "[d]emonstrating that a service has been rendered and/or that the service rendered provides benefits to the recipient." In this area, multinational enterprises are moving toward using independent companies to provide the enterprise with "software as a service" (e.g., basic software, software infrastructure, unified communication via software, etc.). After contracting with the independent provider, the multinational enterprise shares the software among its affiliates. Under these circumstances, tax authorities often question how to characterize software as a service for tax purposes. Moreover, tax authorities' view of such characterization is inconsistent across jurisdictions. To help alleviate these inconsistent views, the OECD should provide uniform guidance on the characterization of software as a service. Also, guidance would be useful on what documentation is necessary to demonstrate that a service recipient received a benefit.

A second practical challenge identified in the Chapter VII Request is "finding an appropriate allocation key for charging intra-group services." TEI recommends the Guidelines emphasize that a taxpayer should be allowed to select any allocation key that provides a reasonable approximation of relevant benefit for the related parties to the transaction and, to the extent possible, the allocation key selected should be simple and based on easily obtainable and verifiable data. The Guidelines should also recommend, but not require, reasonable allocation keys for defined types of intra-group transactions. Helpful allocation keys would be: (i) allocating human resources cost by relative headcount; (ii) allocating marketing expenses by relative revenue; and (iii) allocating information technology costs, including software licenses, by computer user count. Such guidance would effectively provide safe harbors and reduce potential disputes over head office cost allocations, which are mostly not tax motivated but simply an effort by taxpayers to be compliant and practical. Finally, guidance on what documentation is necessary to demonstrate that a particular allocation key is appropriate would also be helpful.

Conclusion

TEI appreciates the opportunity to comment on the requests regarding the scope of future revisions to Chapters IV and VII of the Guidelines. These comments were prepared under the aegis of TEI's European Direct Tax Committee, whose Chair is Giles Parsons. If you have any questions about the submission, please contact Mr. Parsons at +44 1455 826561, parsons_giles@cat.com, or Benjamin R. Shreck of the Institute's legal staff, at +1 202 464 8353, bshreck@tei.org.

Sincerely yours,
TAX EXECUTIVES INSTITUTE, INC.

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Submitted by e Mail to:

Reutte, 20.06.2018

Dear Sirs,

Transfer Pricing Baumgartner welcomes the opportunity to present comments regarding the future revision of Chapter IV, "Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes" of the Transfer Pricing Guidelines, and the future revision of Chapter VII "Special Considerations for Intra -Group Services", of the Transfer Pricing Guidelines.

In regard to the revision of Chapter IV:

- We welcome the initiative to revise Chapter IV. From our perspective the revised Chapter could include some basic definitions characteristics and differences between joint audits and simultaneous audits. We believe the Chapter and also the attitude of policy makers and tax administrations should be more focus on preventing disputes then solving them. It is understood, with Section D2 that simultaneous audits have a legal framework and that the implementation of simultaneous audits would not represent a conflict with local law. Unfortunately, simultaneous audits not necessarily avoid a future conflict. As referred in par. 4.91 Chapter IV of the OECD Transfer Pricing Guidelines 2017, even if no agreement between the tax administrations can be reached in the course of a simultaneous tax examination with respect to the associated enterprises transfer pricing policies, a Mutual Agreement Procedure can be requested by the associated enterprises. In the case of a Joint Audit the tax

Administrations have to agree on the view they will take regarding associated enterprises transfer pricing. That is the corner stone for avoiding future conflicts. Therefore, even if the simultaneous audits are easier to implement they do not prevent in all cases a future conflict.

- In this order of ideas, we encourage the OECD to talk with the German and Netherland tax administration and ask them to explain how the joint audits have worked in their cases and how they have solved the legal limitations. The presented at the Joint Transfer Pricing Forum and they are quite active and successful with joint audits.
- It would be welcome if the taxpayers would have the opportunity of requesting a joint audit, or simultaneous audit. In both processes the taxpayer should be able to at least (as already mentioned in the actual chapter IV) present its case in front of both tax administrations. The possibility of presenting a case once to both tax administrations would be a great opportunity to clarify doubts, understand the business and avoid uninformed conclusions.
- We would like to see some future efforts to find room for a joint audits legal framework.
- We would be interesting in having some statistics regarding simultaneous audits. In our experience most of the countries are still dealing with budget issues, lack of transfer pricing experienced personnel among other daily issues, that we doubt the simultaneous audits are highly being implemented in audit processes. Therefore, we think that the OECD should be more aggressive and not only provide recommendations or guidelines but provide tools to facilitate the implementation of measures that could (in the case of simultaneous audits) and would (in the case of joint audits) prevent double taxation conflicts.
- The world is getting digitalized, and changing at a very fast pace, therefore the OECD ideally should be adapting itself to the new digital world. Recommendations and guidelines will soon not be enough. Additionally they need to be implemented but if the OECD proactively provides tools for the implementation the process should be much faster. We believe the OECD could provide digital tools for tax administrations to use and apply in preventing transfer pricing conflicts. For example, a platform where the tax payer and the tax administration would be able to exchange information in a secure way, have virtual meetings, access to local law from different countries and have even virtual visits to taxpayers facilities. In this context joint audits and simultaneous audits would be much faster and less expensive for everyone. We understand this requires a legal framework and a lot of work from an implementation and IT and (including security) perspective. It is our view that this job will have to be done sooner or later and countries in developing stages will have it harder in terms of implementation if the support and tools do not come from an organization like the OECD.
- There is already a first step into this direction included in Action 14, the introduction of a platform where member states should describe the MAP process. Soon we will be running and attending audits from a totally different perspective, like the rest of our work, audits will also have to change.

- We encourage to avoid the administrative burden by setting minimum amounts in regard to transfer pricing conflicts. A taxpayer should be able to ask for a joint audit or simultaneous audit, only in the case where the transaction results relevant for the tax administrations involved.
- We admire the work of the OECD Centers outside of the central offices. They do perform a great job by training tax administrations, I know it because I used to work for the OECD Center in Mexico City. Unfortunately, this is not enough. We are constantly challenged with auditors that do not have a certain transfer pricing expertise level. In this, area the OECD could also provide virtual workshops free of charge for tax administrations and encourage the tax administrations to educate their auditors at all levels in at least basic transfer pricing issues. The higher the level of discussion between the tax administration and the taxpayer the less conflicts we will be facing in the future. We recommend the use of new technology to provide trainings and information to more auditors, regardless of where they are or what position they have.
- As a final comment we would like to see a more proactive guideline and not a description of the current state and practices of the tax administration. In a lot of paragraphs of the actual guidelines practices are described and from our perspective a best practice guideline should be developed.

Regarding Chapter VII

- We welcome the inclusion of the low value added markup threshold and would like to see more guidelines and probably thresholds for the services that are not low value services. For example, Intra group services could broadly be classified into low value added, technical services in different areas and core business services. It would be desirable to have like in the JTPF recommendation a range of mark up's on intra group services, a threshold where not only low value added services are included but also technical services with a range of possible mark ups that would make sense depending on the service. This would safe MNE a lot of resources.
- We would like to express our concern regarding administrative burden in the case of documentation. For example in countries in some countries there are special rules for pro-rata expenses (monthly payments abroad), these countries establish a special regime for the acceptability of this deductions, the tax administration uses this rule to ask the tax payer for outrages amount of information that is difficult for the taxpayer to provide in order to deny the deduction.
- Therefore we would like to see included in the guidelines what information the taxpayer should keep in its documentation to proof that the service was provided, that the service represented an economic benefit for the receiver and that the cost basis is adequate. Examples in this regard would be appreciated.

Kind Regards,
Brigitte Baumgartner

Transfer Pricing Committee of the International Fiscal Association - Chapter Mexico

Tax Treaties, Transfer Pricing and Financial Transactions Division

OECD/Inclusive Framework

RE: Comments to "Scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines" by the Transfer Pricing Committee of the International Fiscal Association - Chapter Mexico

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1. <u>What additional aspects or mechanisms to minimize the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)? While input received in the past on some of these issues in the context of the work of the Forum on Tax Administration will be considered, input on business experience with such aspects or mechanisms would be useful, including what have been the advantages or challenges?</u>

We have no additional comments to this point.

2. <u>Relevant aspects of the minimum standards and best practices contained in the Report on BEPS Action 14 related to transfer Pricing have been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, and based on your experience, is there any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimize the risk of double taxation?</u>

We have no additional comments to this point.

3. <u>Element 2.7 of Action 14 minimum standards and the best practices related to APAs contained in the Report on BEPS Action 14 have also been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, is there any additional guidance that could be provided on advance pricing arrangements? Based on your experience, are any features of APAs or specific initiatives related to APAs that could strengthen their role in minimizing transfer pricing disputes? What are the advantages of such initiatives and the implementation challenges?</u>

We have no additional comments to this point.

4. Are there any other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV of the TPG?

Abstract: *The following comments recommend the enhancement of alternative domestic dispute mechanisms to resolve transfer pricing disputes and suggest the development of guidance to avoid the double taxation that may arise as a consequence of these mechanisms. The proposal is built on using domestic dispute resolution mechanisms which, through mediation, resolve disputes by reaching a settlement that is within the arm's length range, so that correlative relief is provided by the foreign tax authority.*

A) Enhancing domestic dispute resolution mechanisms

We affirmatively believe that further guidance should be developed on the advantages of enhancing domestic alternative dispute resolution mechanisms for the prevention and resolution of transfer pricing disputes. An effective domestic dispute resolution mechanism can minimise disputes by resolving controversies at the earliest point in time, as it is most cost effective for both the taxpayer and the tax authority.

Mexico has in place a statutory dispute settlement process independent and parallel to the audit and examination functions, which can only be accessed through a request by the taxpayer. This domestic supplementary dispute mechanism has been remarkably successful in solving transfer pricing controversies that arise during tax audits, therefore minimising the need to pursue appeals or litigation to solve the dispute.

We recognize that double taxation can often be a concern of such settlements, since they may preclude competent authorities from negotiating a different result in a bilateral MAP, and can cause the foreign tax authority to deny partial or total relief for the tax paid to the domestic tax authority as a result of the settlement.

Although there may be concerns with regards to the economic double taxation that may arise as a consequence of domestic settlement processes, we strongly believe that these dispute resolution alternatives should not necessarily be an obstacle for taxpayers to seek a correlative adjustment with the competent tax authority of their respective jurisdiction.

It is important to mention that our comments deal with a different solution to solve transfer pricing disputes from the one contained in Action 14 of the BEPS Plan, which is aimed at strengthening the effectiveness and efficiency of the MAP process. Our proposal is built precisely in developing and reinforcing domestic resolution mechanisms for preventing and resolving transfer pricing disputes previous to resorting to the MAP.

In this regard, we consider that guidance should be developed with respect to the circumstances under which a Contracting State could accept the agreed solution in a domestic dispute settlement process of the other Contracting State. This guidance may be in the form of a (i) safe harbor or (ii) under a reciprocity treatment between the States involved.

If a domestic settlement process resolves a transfer pricing dispute by determining figures that are acceptable for establishing that the conditions of a controlled transaction were set at arm’s length, foreign tax authorities would likely feel comfortable to grant corresponding relief based on the figures reached in the domestic settlement.

Figures that are not within the arm’s length range could be kept out of the scope of the corresponding adjustment to be provided by the foreign tax authority. In this case, even when the corresponding adjustment is not granted with respect to the entirety of the domestic settlement reached, taxpayers may be willing to assume such cost if the alternative allows them to solve the dispute in an efficient and quick manner, rather to having to resort to other resolution mechanisms that will take significant time and economic investment. In other words, the objective is to develop rules to facilitate corresponding adjustments when domestic solutions are reached.

To enable consensus between competent authorities, these supplementary dispute mechanisms should strive to achieve a solution by determining the arm's length conditions that should have applied to the transaction in the first instance. Consensus may also be encouraged if the respective dispute resolution mechanisms are systematically analyzed by the competent authority of the other State.

We feel that a corresponding adjustment derived from a domestic settlement process with a foreign tax authority should depend both, on the capacity of taxpayers to demonstrate to their domestic tax authority that the pricing agreed with the foreign tax authority represents an arm's length amount, and on a set of simplified rules for countries to follow to provide a correlative adjustment, as mentioned before, without resorting to the MAP. In other words, if the negotiated settlements are based on the arm's length approach, the foreign tax authority may be able to grant correlative relief based on a simplified process.

Furthermore, the participation of an autonomous and impartial third party mediator expert in tax matters in the domestic alternative dispute resolution mechanism, would facilitate a technical consensus based on the arm’s length approach reasonable enough for the foreign tax authority to grant the corresponding relief.

We recognize that practical complications may arise considering that tax administrations do not usually grant a corresponding adjustments derived from unilateral requests of taxpayers, especially when such adjustments result in an increase of deductions for payments to associated enterprises arising from a transfer pricing adjustment.

Therefore, we strongly encourage further guidance with respect to the implementation of effective alternative domestic dispute resolution mechanisms, availing taxpayers and revenue authorities of an efficient and expedited alternative to solve tax controversies, since as proven many transfer pricing disputes will likely be prevented; provided, as well, that this alternative revolves around the determination of the pricing of transactions pursuant to the arm's length principle and economic double taxation can be avoided via correlative adjustments.

We note that it is common for revenue administrations to preclude negotiation via MAP with respect to the matters resolved through a domestic statutory settlement process. Actually, one of the reasons that the Mexican domestic alternative statutory dispute settlement process has been so successful, is that the Mexican Tax Ombudsman Agency (Prodecon1), working together with the tax authorities, designed a domestic public rule clarifying the taxpayers the determinative nature of an agreement once it's reached in the settlement process.

The fact that both the taxpayer and the tax authority know in advance that if an agreement is reached the settlement's result will be unmodifiable, provides certainty to the parties. Moreover, as previously mentioned, we firmly believe that effective domestic settlements processes should be seen as an alternative previous to the MAP for solving transfer pricing disputes. Contrary to the MAP, which normally entails a significant deal of time, costs, administrative burdens and lack of participation of the taxpayer, a domestic settlement procedure can be more inclusive and efficient.

We firmly believe, that precluding negotiation through MAP if a domestic settlement process is pursued should not be an obstacle for taxpayers to seek correlative adjustments with their respective tax authority. Jurisdictions may remedy economic double taxation even by making use of provisions in their domestic laws. For example, relief may be provided by granting a foreign tax credit for the tax paid under the domestic settlement of the other Contracting State (provided all legal requirements are met). Other jurisdictions, may choose to apply paragraph 2 of article 9 of the OECD Model Tax Convention, as an independent mechanism from the MAP to provide relief to taxpayers.

Corresponding adjustments resulting from a domestic alternative dispute resolution mechanism should of course only be granted by the foreign tax authority if it considers that the primary adjustment is justified both in principle and in amount. As stated in paragraph 4.35, Chapter IV of the TPG, such corresponding adjustments must be non-mandatory in nature so that no revenue

[1] Spanish acronym of *Procuraduría de la Defensa del Contribuyente*. PRODECON is Mexico's Tax Ombudsman that works as an autonomous and independent governmental organism from the Mexican Tax Authority, with the purpose of safeguarding the rights of taxpayers to receive justice in federal tax matters, without the necessity of an administrative appeal or a court trial.

administration is forced to accept the consequences of an adjustment that departs from the arm's length principle.

Furthermore, the concerns expressed in paragraph 4.42 of Chapter IV of the TPG may be addressed by enhancing domestic alternative dispute resolution mechanisms, since such mechanisms may grant taxpayer participation, be much quicker and efficient.

In this regard, in the following section we make a brief description of the alternative dispute resolution mechanism in force in Mexico, which has proved best practice to solve transfer pricing disputes at a domestic level. The procedure has been implemented since 2014 by Prodecon and has had considerable success on preventing and solving transfer pricing disputes.

B) The Mexican alternative dispute resolution mechanism

As mentioned, Mexico has had successful experiences resolving transfer pricing disputes by providing taxpayers with an amicable alternative to solve disputes without the need of recurring to appeals or litigation. Building on the concern reflected in paragraph 4.40 of the TPG from a domestic perspective, we view the alternative developed by Prodecon as a domestic supplementary dispute mechanism.

This alternative dispute resolution mechanism, known as "Conclusive Agreement" enables Prodecon to act as a third party impartial mediator between the tax authority and taxpayers, providing an amicable forum for the parties to discuss and reach an agreement with respect to any federal tax controversy, including transfer pricing cases, in compliance with current tax law.

The core of the mediation is the tax treatment that the revenue administration is giving to the tax situation detected during an audit and can involve aspects related to the interpretation of the law, formal issues and/or assessment of evidence presented during the audit. No tax debts are negotiated during the mediation, since the procedure can only be initiated during the audit but not after the tax authority has issued a tax assessment.

Through the Conclusive Agreement the taxpayer has the legal possibility to appear before Prodecon to express the reasons of his dissent and to propose the applicable tax treatment that, in his opinion, should be given to his tax situation. It is important to mention that this procedure is optional for the taxpayer and mandatory for the tax authority, but as it is common in most alternative dispute resolution procedures, it is optional for the tax authority to finally accept or refuse the proposals being discussed to reach a solution to the dispute.

Moreover, Conclusive Agreements do not set any kind of legal precedent; this creates an environment of trust between the authority and the taxpayer in which information and proposals seeking to solve the conflict are presented without fear of influencing or compromising future similar cases.

Once the Conclusive Agreement is signed, the tax effects agreed therein apply immediately and the tax audit is definitively closed. The parties are legally unable to challenge the result of a Conclusive Agreement by any domestic mean or pursue negotiation through MAP on the same issue that was discussed and agreed.

The statute of limitations of an audit is suspended with the filing of the Conclusive Agreement, so if no agreement is reached, the suspension is lifted and the audit is continued and concluded (i.e. by the issuance of a tax assessment). In this case, the taxpayer will still be able to file the corresponding legal defense, i.e. administrative appeal or tax litigation against the tax assessment. The taxpayer may even pursue a MAP (provided all legal requirements are met) if the Conclusive Agreement was unsuccessful to solve the dispute.

The Conclusive Agreement provides an alternative to appeals, litigation and MAP, that usually take several years to be resolved. Furthermore, this domestic alternative dispute mechanism supports the guidance of paragraph 4.40 regarding the favourable discussion in the Commentary of article 25 of the OECD Model Tax Convention with respect to the use of supplementary dispute resolution mechanisms in addition to arbitration, including mediation.

Summing up, the Conclusive Agreement: (i) provides an alternative to the parties to resolve the conflict in an amicable, flexible, non-judicial environment, (ii) brings into the controversy an impartial third party, specialized in legal and tax matters, to act as mediator, (iii) assures confidentially of the procedure and does not set a precedent, (iv) suspends audit deadlines and collection procedures, and (v) provides legal certainty to the parties since the agreement is unchallengeable.

Since its implementation in 2014, Prodecon has received more than 8,300 Conclusive Agreement requests, 50% of such procedures are already concluded and 2 out of 3 requests reached total or partial agreements. More than 500 cases correspond to Large Taxpayers (financial sector, international audits and transfer pricing).

There is no doubt that the mediation procedure provided by Prodecon has allowed taxpayers and the tax authority to find common ground in transfer pricing disputes that usually take years in the traditional dispute resolution mechanisms to be solved, and that require the investment of substantial economic and human resources by both taxpayers and tax authorities alike.

C) A real example of a transfer pricing dispute solved with the Conclusive Agreement

During the practice of an audit the Mexican tax authority concluded that a taxpayer wrongly deducted the purchase of a mineral with specific characteristics acquired from a related party. The argument of the authority was based on lack of economic substance, by the fact that according to information obtained from the taxpayer's competitors no one in the industry used that specific mineral in the manufacturing process, since they were using a different and less expensive mineral.

Dissatisfied with the revenue authority's analysis during the audit, the taxpayer sought a Conclusive Agreement before Prodecon. In its request, the taxpayer argued that the acquisition of that specific mineral was necessary for its productive process since its combination with other chemical elements produced the raw material necessary for the manufacture of its products.

The taxpayer also argued that the competitors that used a less expensive mineral with different characteristics sold their products to a completely different segment of the market, and that the tax authority was challenging substantive tax deductions without understanding its business model and industrial/production process. However, in its response to the Conclusive Agreement, the tax authority confirmed its arguments challenging the controlled transaction and refused the taxpayer's proposal.

Prodecon held that the taxpayer's proposal had factual and legal merit, so it convened working tables with both parties. During the working sessions the taxpayer was able to explain its business model, the stages of its production process and the mineral elements needed to perform it. After the working sessions took place and the tax authority understood that there was a substantive reason for the use of a different and more expensive mineral, it recognized that that the mineral was necessary for the taxpayer's business and therefore dropped its observation regarding this purchase for income tax purposes. The Conclusive Agreement was successfully signed by both parties and the tax situation of the taxpayer was clarified.

In this case the Conclusive Agreement procedure provided an ideal environment for the taxpayer to explain its business model to the tax authority. The process relied on the good faith of the parties, the sensitivity of the tax authority and the amicable environment provided by Prodecon to reach consensus. Ultimately the revenue authority understood the business model and recognized on a technical basis that the price of the mineral was set according to the arm's length principle.

In this regard, even when the technicalities of the controversy addressed in the Conclusive Agreement are not described due to the brief nature of this document, the above is a real example in which an effective and efficient domestic alternative dispute mechanism solved a transfer pricing dispute. The domestic mechanism also saved time, economic and human resources to the parties by eliminating the need of resorting to litigation or MAP to solve the dispute.

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June 20, 2018

VIA E-MAIL – TransferPricing@oecd.org

Mr. Pascal Saint-Amans
Director
Centre for Tax Policy and Administration
Organisation for International Co-operation and Development
2 rue André Pascal
75116 Paris
France

Re: Treaty Policy Working Group Comments on Future Amendments to Chapter IV of the OECD Transfer Pricing Guidelines

Dear Mr. Saint-Amans,

We are writing to share the comments of the Treaty Policy Working Group ("TPWG") on the OECD's recent invitation for public comments regarding future revisions to Chapter IV of the Transfer Pricing Guidelines.

The TPWG is an informal association of large global companies that represent a spectrum of industry sectors. [1] The TPWG has been working since 2005 with the OECD and since 2010 with the UN to analyze proposals and provide constructive comments on tax policy and administration concerns regarding transfer pricing and other issues. The development of a broad international consensus that minimizes tax uncertainty, prevents double taxation, avoids interpretive disputes, and reduces compliance burdens is critical to the ability of our member companies to create growth and employment through international trade and investment around the world.

[1] The membership of the Treaty Policy Working Group is currently comprised of the following companies: Amazon.com, Inc.; BP plc; Cisco Systems, Inc.; Microsoft Corporation; Procter & Gamble Co.; Salesforce.com Inc.; and Tupperware Brands Corporation.

Chapter IV (Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes) is a key component of the Transfer Pricing Guidelines, and we are pleased that it is being further updated and expanded. The 2017 updates to Chapter IV, incorporating aspects of the BEPS Action 14 Minimum Standard and Best Practices, were a positive development. As is always the case, however, further improvements could be made. This initiative is particularly timely as the number, magnitude, and geographical scope of transfer pricing controversies continue to grow and thus undermine the certainty that is so important to both business and tax administrations. The Treaty Policy Working Group is pleased to be able to contribute to this project.

We welcome the 2017 updates to Chapter IV, which are all clear improvements that should improve dispute avoidance and dispute resolution. We find it unfortunate, however, that not all elements of the BEPS Action 14 outcomes were reflected. All of the Action 14 elements are important to improve certainty and facilitate the effective and efficient avoidance or resolution of transfer pricing disputes. We urge that the remaining elements be included in the next update to Chapter IV.

We have also noted a few provisions in Chapter IV where the implications of Action 14 have not yet been fully incorporated. We hope these can be addressed in the next revision of the Guidelines.

In addition, we have urged reconsideration of certain aspects of Chapter IV and the expansion of the current text to address several additional issues.

Each of our concerns and recommendations is discussed in more detail below.

<u>Burden of Proof</u>

- One of the key sections of Chapter IV is its discussion of burden of proof, which has been retained without material changes. The discussion in paragraph 4.16 of the concerns presented by the misuse of burden of proof, whether by tax administrations or by taxpayers, remains important to ensuring the appropriate administration of transfer pricing principles.
- However, although these provisions have been included in the Guidelines for many years, the misuse of burden of proof provisions remains a concern in practice in some jurisdictions. We are encountering more frequent situations in which a tax administration requests increasingly more detailed and less relevant information and takes the opportunity of the taxpayer's inability or unwillingness to provide irrelevant information as a pretext for shifting the burden of proof. We believe it would be helpful for this section to address such behavior as an example of the misuse of burden of proof.

<u>Penalties</u>

- The Guidelines have long included a useful and insightful discussion of the appropriate and inappropriate uses of tax penalties in tax administrations, which we appreciate.

- In recent years, we have seen increased use of criminal penalties in what strike us as inappropriate circumstances that are inconsistent with paragraph 4.20 of the Guidelines. Paragraph 4.20 states that criminal penalties are "virtually always reserved for cases of very significant fraud". Although we agree that this should be the case, in our experience, an increasing number of tax administrations are using criminal penalties to force audit concessions in cases that clearly do not involve significant fraud, or perhaps any fraud. We recommend that the statement in paragraph 4.20 be converted to an explicitly normative statement, making clear that the use of criminal penalties *should* be limited in the manner described by para. 4.20 and that such penalties should *not* be deployed in an attempt to obtain concessions on audits in other circumstances.

Corresponding Adjustments

- The general remarks in this section regarding the competent authority procedure should be updated to reflect that endeavoring in good faith to reach mutual agreements has been recognized as a requirement of international law and the BEPS Action 14 Minimum Standard to which all OECD and other Inclusive Framework member countries have committed. This point is acknowledged in new paragraph 4.43, but paragraphs 4.31 and 4.37 still contain language that could be taken as suggesting that the good faith requirement may be a matter of discretion.

- The discussion in paragraphs 4.32 and 4.33 regarding corresponding adjustments is similarly in need of updating to reflect the fact that allowing corresponding adjustments under paragraph 2 of Article 9 (or unilaterally withdrawing adjustments where that is not possible) is part of the Action 14 Minimum Standard.

- Similarly, paragraph 4.35 states that corresponding adjustments are not mandatory unless required by an arbitration decision. We do not believe is correct, given the longstanding Article 25(2) requirement to implement MAP agreements notwithstanding domestic law limitations honored by the great majority of countries and the Action 14 Minimum Standard reiteration of this requirement.

Time Limits

- Paragraphs 4.45 and 4.46 suggest that domestic law deadlines may preclude corresponding adjustments in some jurisdictions. This raises obvious concerns regarding denial of MAP review or failure of MAP implementation. Similar concerns arise where domestic law provisions deny MAP access for closed years or even assert a unilateral deadline for the conclusion of a bilateral MAP agreement. Such provisions raise serious MAP access concerns, both for taxpayers and for those tax administrations that accept closed years in MAP and refrain from attempting to apply unilateral deadlines not reflected in the treaty. Paragraph 4.46 should affirmatively urge the elimination of such provisions, rather than merely reporting them as a practice followed by some countries.

- As paragraph 4.47 recognizes, the obligation under paragraph 2 of Article 25 to implement MAP agreements notwithstanding domestic limitations should apply to such corresponding adjustments where they form part of a MAP agreement; otherwise, much or all of the relief provided in a MAP agreement could be denied in practice, contrary to the clear intent of the treaty. It is unfortunate that paragraph 4.47 goes on to note that some countries have reserved their position that domestic law deadlines may also be applied in this situation and merely encourages them to extend their domestic time limits to the extent possible. It would be more consistent with the text of Article 25(2) and with the intent of the BEPS Action 14 Minimum Standard provisions, acknowledged in paragraphs 4.49 and 4.50, to require such countries to be transparent and include in the texts of their bilateral treaties any specific domestic law time limitations they intend to apply. Absent relevant bilateral treaty text to the contrary, the tax administration should be expected to give effect to the provisions of Article 25(2).

- We recommend that paragraph 4.52 explicitly provide that, where Article 25 does not set a deadline for requesting MAP assistance, it should *not* be presumed that the domestic law statute of limitations or other unilateral deadline applies. At the very least, tax administrations should not seek to impose a domestic deadline of less than three years, as paragraph 4.52 states that three years is the agreed minimum period. This would be more consistent with element 1.1 of the Action 14 Minimum Standard, which requires inclusion of the standard OECD Model provision regarding the three-year request deadline. It is also important for consistency with the Minimum Standard provisions relating to paragraph 2 of Article 25, discussed in paragraphs 4.49 and 4.50, preventing the application of domestic law deadlines to avoid implementing MAP agreements. These safeguards are essential to provide fair warning to both taxpayers and treaty partners of any situation in which a country intends to depart from these standards in a detrimental way.

- Paragraph 4.53 appropriately encourages competent authority discussions of a case at the earliest possible stage, before action has been taken by either administration. However, it concludes that some tax administrations are not willing to engage in such discussions because they may create additional work. In our experience, a number of tax administrations require conclusion of the audit and issuance of a formal proposed adjustment or an assessment in advance of MAP discussions when they are the adjusting country, although they welcome early discussions when a treaty partner is conducting the audit. In addition to being unbalanced in application, we believe that such a requirement also makes it impossible in most cases to avoid a cross-border dispute and likely delays the ultimate resolution of the dispute, as MAP discussions will commence only after one of the administrations has taken a firm position on the matter. This provision of the Guidelines should be updated to reflect the recent positive developments in joint risk assessment and joint audits and to strongly encourage at least informal discussion of potential MAP cases prior to the issuance of a proposed adjustment or an assessment.

<u>Duration of MAP Proceedings</u>

- Paragraph 4.55 regarding the generally lengthy nature of MAP proceedings, the need for face-to-face meetings, and other timing impediments should be deleted, now that element

1.3 of the Action 14 Minimum Standard has adopted a 24-month target timeframe for resolution and other Minimum Standard elements and improved communications technologies now facilitate speedier resolution of cases. Paragraph 4.56 highlights the relevant Minimum Standard elements, and paragraph 4.57 acknowledges the positive timing influence of arbitration provisions where applicable, thus making the text in paragraph 4.55 obsolete.

Denial of MAP Access on Information Grounds

- Paragraph 4.63 helpfully summarizes certain other elements of the Action 14 Minimum Standard. We would note that, in our experience, there are significant departures in practice from element 3.2 in a few jurisdictions. Paragraph 4.63 correctly states that "[p]ursuant to element 3.2, countries should not deny access to the mutual agreement procedure based on the argument that a taxpayer has provided insufficient information where the taxpayer has provided the required information and documentation consistent with such guidance". However, even since the issuance of the Final Action 14 Report, some tax administrations have continued to disregard this requirement routinely, in an apparent attempt to deny or significantly delay the acceptance of MAP requests. If these practices continue, they should be addressed through the BEPS Action 14 MAP Peer Review.

Issues Regarding Collection and Interest

- Issues relating to inconsistent interest rates imposed or paid by the tax administrations involved in a MAP proceeding are usefully highlighted in paragraph 4.66 and Action 14 Best Practice 10. It would be helpful to add a discussion of the difficulties raised by the imposition of penalty-like interest rates. Such rates are inconsistent with the acknowledgement in paragraph 4.22 that tax administrations may impose interest charges on underpayments to recover the real time value of money. However, the imposition of "interest" rates that are much higher than market rates have a penalty-like effect. The very useful limitations suggested by in Chapter IV on the use of penalties should also apply to excessive rates of interest in such situations, even though such "interest" charges are also accompanied by stated penalties. Otherwise, excessive rates may be used as a mechanism to force settlements at the audit stage due to the significant costs they would add to use of a dispute resolution mechanism, particularly in the cross-border context.

- We believe that it would be appropriate for paragraph 4.67 to encourage competent authorities also to permit adjustments agreed in MAP to be reflected in a recent filed year, and not only the year in which the MAP agreement is reached. Competent authorities that have the authority to move adjustments into the current year for reasons of administrative and taxpayer convenience presumably would also have the authority to put the adjustments into a different year if requested by the taxpayer. However, it would be helpful for the Guidelines to encourage this flexibility, as it could address two issues that have arisen in practice. First, the MAP agreement notification and implementation deadline provided to the taxpayer may fall in the year following the conclusion of a MAP agreement, resulting in unfortunate mismatches. Second, where the tax law of a jurisdiction has changed in significant respects since the year or years in which the transactions at issue occurred, allowing adjustments to be made in a recent filed year could avoid distortive effects while preserving administrative simplification benefits for both the taxpayer and the tax administration.

Secondary Adjustments

- The current Guidelines contain a general discussion that ably identifies potential technical issues regarding the tax treatment of "secondary adjustments" that are deemed by some tax administrations to arise when a MAP is implemented in their jurisdictions. However, they then conclude, in paragraph 4.78, that any issues relating to repatriations in this context should be discussed by the competent authorities on a case-by-case basis, because most OECD member countries have limited experience in this area. We respectfully submit that this approach is both unrealistic and unlikely to result in the development of the consistent practices needed to address these issues.

- Our experience indicates that it is unrealistic to expect the competent authorities to reach agreement on a case-by-case basis, because the MAP resolution in any particular case is likely to result in a greater concession of asserted taxing jurisdiction by one of the jurisdictions than the other. Therefore, any relief from double taxation with respect to secondary adjustments will be seen as favoring one of the jurisdictions. To avoid this and ensure reciprocity, a general international consensus should be developed on whether to permit secondary adjustments, and, if so, how to avoid double taxation.

- A broad discussion of issues relating to secondary adjustments and the development of general guidance would also be beneficial, precisely because the issues presented can be complex. In our experience, the deemed repatriation and account receivable approach referred to in paragraphs 4.74 and 4.76, which is used by at least the United States and Canada, tends to work well in practice and should be given consideration, although it may not be the only administrable alternative.

Safe Harbors

- The discussion of safe harbors was significantly expanded in 2017 and made considerably more balanced and practical in focus. We appreciate these improvements and support the further development and operation of voluntary safe harbor regimes.

- While properly designed safe harbor regimes can certainly provide important compliance benefits to taxpayers, we believe, contrary to the suggestion in paragraph 4.99, that they provide at least as much benefit to tax administrations, by enabling administrations to focus inherently limited resources on other transactions. We encourage tax administrations to work to provide additional safe harbor options to enable more efficient compliance and administration.

Arbitration

- Like other businesses, Treaty Policy Working Group member companies strongly favor the inclusion of arbitration provisions in tax treaties.

- It is unfortunate, from a dispute avoidance and resolution perspective, that the inclusion of such provisions in bilateral treaties since their addition to the OECD Model Convention in 2008 has been relatively limited, but we are optimistic that the pace may improve under the MLI.

- We do think it is worth clarifying one statement in the Guidelines regarding the benefits of tax treaty arbitration. Paragraph 4.40 suggests that taxpayer concerns regarding procedural safeguards against double taxation were "mainly addressed" with the addition of mandatory, binding arbitration provisions to the OECD Model in 2008 and the Commentary's references to supplemental dispute resolution mechanisms such as mediation. This is a positive aspiration but clearly a factual overstatement at this point, due to the limited uptake of arbitration, the limited issue scope of some arbitration provisions, and certain continuing MAP access issues that may prevent or delay access to arbitration. It would be helpful for the Guidelines to clarify this point and to urge broader and more effective adoption in practice of tax treaty arbitration provisions.

*****

We appreciate your consideration of this proposal and would be pleased to discuss it further.

Sincerely yours,

For the Treaty Policy Working Group

Carol A. Dunahoo

Holly E. Glenn
Baker & McKenzie Consulting LLC

Gary D. Sprague

Scoping the future revision of Chapter IV of the Transfer Pricing Guidelines dealing with administrative approaches to avoiding and resolving transfer pricing disputes.

With respect to the issues raised in the "Invitation for Public Comments", published on 9 May 2018, Tremonti Romagnoli Piccardi e Associati appreciates the opportunity to submit the following observations and comments on the scope of the future revision of Chapter IV of the Transfer Pricing Guidelines.

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1. What additional aspects or mechanisms to minimise the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)? While input received in the past on some of these issues in the context of the work of the Forum on Tax Administration will be considered, input on business experience with such aspects or mechanisms would be useful, including what have been the advantages and/or challenges?

1.1. It is common knowledge that transfer pricing is not an exact science and the determination of the arm's length price entails a process of evaluation and judgment that could lead to a significant risk of error.

The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter "**TPG**") correctly suggests the introduction of incentives for taxpayers that fulfil transfer pricing documentation requirements or in case of good faith errors.

In particular, Chapter V of the TPG recommends the introduction of the so-called "penalty protection" in order to reward the taxpayer that has set up standardized transfer pricing documentation.

Nevertheless, many States provide for the cancellation of penalties only when the tax authorities have conducted a (positive) analysis of the content of the transfer pricing documentation.

In our opinion, it would be useful to introduce a recommendation aimed at encouraging the automatic cancellation of penalties when the taxpayer acted in good faith by setting up the relevant transfer pricing documentation in compliance with the requirements prescribed by Chapter V of the TPG.

This will allow the introduction of a clear incentive to fulfil the compliance obligations in the transfer pricing field, and should prevent possible disputes which may theoretically arise should the tax authority have to carry out a case by case analysis of the relevant documentation.

From the same perspective, paragraph 4.18 et seq. of the TPG, recommends that if a Mutual Agreement Procedure (hereinafter "**MAP**") results in a withdrawal or reduction of the primary adjustment, the tax authority should cancel or reduce the penalties imposed.

In our opinion, this latter recommendation should be extended in order to provide for the cancellation (and not only for the possible abatement) of penalties (where imposed) if the taxpayer applies to enter into a MAP, regardless of its outcome.

As a matter of fact, in such a case the taxpayer demonstrates the clear intention – not to evade taxes, but – to pursue the arm's length conditions and, consequently, to pay their fair share of tax.

2. Relevant aspects of the minimum standards and best practices contained in the Report on BEPS Action 14

related to transfer pricing have been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, and based on your experience, is there any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimise the risk of double taxation?

2.1. In our opinion, in order to minimize the risk of double taxation, it would be useful to introduce guidance aimed at allowing access to the MAP also with respect to adjustments that have been settled through extra-judicial measures or which the taxpayer has merely agreed upon.

As a matter of fact, and as highlighted in the TPG, the action of the tax authority should be aimed at determining the arm's length price of a transaction in case of error/failure of the taxpayer.

This means that any assessment issued by the tax authority (agreed upon by the taxpayer) or any redetermination of the assessment arising from an extra-judicial measure should be in line with the arm's length principle.

On this basis, it is clear that precluding access to the MAP in such cases will lead to a double taxation.

On the contrary, granting access to the MAP will allow such violation to be easily avoided by granting (at least) a corresponding adjustment.

2.2. As recognized in paragraph 4.65 of the TPG, the tax collection operated by the States involved in a MAP may significantly affect the taxpayer's business.

The recommendation *"that countries should take appropriate measures to provide for a suspension of collection procedure during the period in which a mutual agreement procedure case is pending ... under the same conditions as apply to a person pursuing a* *domestic administrative or judicial remedy"* (see paragraph 4.65) is therefore extremely important to incentivize the access to the MAP, allowing the resolution of transfer pricing disputes without any form of double taxation and eliminating the risk of affecting the business activity of the taxpayer.

In order to make such recommendation more efficient, we would suggest to introduce an exhortation to the States for the introduction of regulations aimed at allowing the taxpayer to file a request for suspension together with (and to the same authority entrusted to evaluate) the application for the MAP.

This would be advantageous in order to discourage the practices – which are currently followed by some States – whereby the request for suspension can only be filed in a second phase, after the MAP has been formally initiated.

In addition to that, we think it would be useful to introduce a recommendation aimed at persuading States to grant the suspension of collection procedures in the context of a MAP, especially in cases where specific solvency indicators are met, as for example in case of highly capitalized companies, listed or regulated companies, companies with a good tax record (i.e. with no pending tax issues).

2.3. With respect to the different practices that States undertake to grant corresponding adjustments, it would be useful to introduce explicit recommendations which encourage efficient and straight-forward remedies in cases involving loss-making or dissolved companies.

Particularly, in such cases, tax authorities may for example grant a refund or similar (rather than any forms of tax credit) which allow the taxpayer to immediately benefit from the elimination of the double taxation.

3. Element 2.7 of Action 14 minimum standards and the best practices related to APAs contained in the Report on BEPS Action 14 have also been incorporated into Chapter IV in the 2017 edition of the TPG. Considering this, is there any additional guidance that could be provided on advance pricing arrangements? Based on your experience, are any features of APAs or specific initiatives related to APAs that could strengthen their role in minimising transfer pricing disputes? What are the advantages of such initiatives and the implementation challenges?

3.1. Based on our experience, in order to strengthen the role of the APA in minimising transfer pricing disputes, the TPG should contain specific recommendations aimed at imposing a time limit for the conclusion of (at least) unilateral agreement procedure.

Indeed, the lack of a binding time limit currently penalizes taxpayers who want to set in advance the criteria to determine the arm’s length conditions.

3.2. Another recommendation that could be more than welcome in order to strengthen the role of the APA in minimizing transfer pricing disputes is to exclude any possible overlap between the APA procedure and a tax audit.

As a matter of fact, APAs require taxpayers to provide detailed information relating to infra-group transactions on (a) given tax-year(s) that could in principle be used by the same tax authorities in the due course of a tax audit.

Should such a situation occur, it is clear that taxpayers could be extremely discouraged from entering into an APA procedure.

Although practical experience generally shows that such situations do not happen, an explicit recommendation in this regard would probably add some additional clarity.

4. Are there any other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV of the TPG?

4.1. With respect to a more efficient and effective resolution of transfer pricing disputes, as part of the revision of Chapter IV of the TPG, the OECD should consider developing guidance in relation to so-called "triangular cases".

As clarified by the European Joint Transfer Pricing Forum (most recently in the "*Final Report on Improving the Functioning of the Arbitration Convention*", dated 12 March 2015), "*a ... triangular case is a case where ... two ... competent authorities cannot fully resolve any double taxation arising in a transfer pricing case when applying the arm's length principle because an associated enterprise situated in (an)other ... State(s) and identified by both ... competent authorities (evidence based on a comparability analysis including a functional analysis and other related factual elements) had a significant influence in contributing to a non-arm's length result in a chain of relevant transactions or commercial/financial relations and is recognized as such by the taxpayer suffering the double taxation*".

Indeed (as recently highlighted by the European Joint Transfer Pricing Forum in the abovementioned "*Final Report on Improving the Functioning of the Arbitration Convention*", dated 12 March 2015), the occurrence of triangular cases is increasing.

In such cases, the contribution to the resolution of the dispute by all the jurisdictions involved could be seen as valuable in order to reach an arm's length result, and thus to effectively eliminate double taxation.

However, as of today, existing dispute resolution mechanisms do not seem to be effective in such cases.

In fact, notwithstanding the amendments made to the Commentary on Article 25 of the OECD Model Convention (see para. 38.1 et seq.), the provisions of bilateral income tax treaties seem to be insufficient in order to resolve triangular cases, given that the involvement – in the due course of the procedure – of other affected States, even if theoretically possible, still appears difficult in practice.

In such a scenario it would be useful if the OECD could consider providing some specific guidance, and possibly corroborate the relevant recommendations with some practical examples.

An additional issue related to triangular cases deals with the interaction between the provisions of the bilateral tax treaties and those of the European Arbitration Convention (Convention 90/436/EEC, signed by the Member States of the European Communities on 23 July 1990).

In particular, it would be extremely welcome if tax administrations and taxpayers could benefit from specific instructions to manage in the most efficient manner transfer pricing triangular cases involving European and non-European States (i.e. cases that, ideally, may be covered in part by the European Arbitration Convention and in part by bilateral income tax treaties).

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If you have any questions or you would like further clarification regarding any of the points discussed above, please contact milano@virtax.it.

Respectfully submitted,

Yours sincerely,

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WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

Mr. Jefferson VanderWolk
Head of the Tax Treaty, Transfer Pricing & Financial Transactions Division
Centre for Tax Policy and Administration
OECD

By email to: TransferPricing@oecd.org

Vienna, June 18, 2018

Subject: Comments on the Scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines

Dear Mr. VanderWolk,

The WU Global Tax Policy Center and the WU Transfer Pricing Center at the Institute for Austrian and International Tax Law at WU (Vienna University of Economics and Business) would like to thank the OECD for the opportunity to provide comments on the new Chapter IV of the Transfer Pricing Guidelines on "Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes", released in July 2017.

We are pleased to elaborate on our comments on the issues raised.

A. What additional aspects or mechanisms to minimize the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices?

A.1. Cooperative compliance

The Transfer Pricing Guidelines leave out cooperative compliance as a mechanism of dispute avoidance. We understand, however, that this is an excellent way to improve the relationship between large business taxpayers and tax authorities, increasing the trust in the tax environment of the country applying cooperative compliance programs[1].

There are many benefits both for the taxpayer and for the tax authorities participating in a cooperative compliance program. The taxpayer benefits by having a greater tax certainty, lower compliance costs, less tax disputes, better dialogue with the tax authorities and better tax risk management. Therefore, it may be an advantage for the taxpayer to invest in a jurisdiction with cooperative compliance, because of a greater certainty on the tax treatment of their investments.

There are also advantages for the tax authorities and the overall economic growth of the jurisdiction offering cooperative compliance. That is, the improved tax environment may

[1] OECD (2016), Co-operative Tax Compliance: Building Better Tax Control Frameworks, OECD Publishing, Paris, https://doi.org/10.1787/9789264253384-en.

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attract more direct foreign investments.

Cooperative compliance also improves tax compliance, securing the tax revenue base of the tax authorities, and it can be particularly beneficial for tax authorities with limited resources, as it promotes better tax risk management, allowing the tax authorities to focus on high risk cases and taxpayers, as well as limit the scope of tax audits to the more specific issues. Furthermore, the better dialogue with the taxpayers can improve the capabilities and commercial awareness of the tax authorities, as they can learn from the taxpayers how their business works and what their tax strategies are.

For this program to work, transparency from both parties is required[2]. The tax authorities need to be transparent in their treatment of tax risks and, in return, the taxpayers are expected to provide full disclosure of their tax positions.

Some examples of jurisdictions applying cooperative compliance are the Dutch horizontal monitoring program, the Italian cooperative compliance regime (i.e. Regime di adempimento collaborativo) and the UK framework for cooperative compliance.

A.2. International Compliance Assurance Program (ICAP)

The International Compliance Assurance Program (ICAP), although new and still being tested, can be a valuable mechanism to avoid transfer pricing disputes. With the changes brought by BEPS on both the amount and the exchange of information (in particular, with Country-by-Country Reporting (CbCR) on Action 13), taxpayers are still figuring out how to gather and present the information in the CbCR and tax authorities have to learn how to process the immense amount of information at their disposal.

With that in mind, it is expected that dispute resolution will increase in the upcoming years. ICAP can provide for a uniform understanding of the taxpayers' CbCR information (and other documents provided in the documentation package of the ICAP) among the participating tax authorities. This can avoid, for example, tax authorities having different interpretations of the taxpayers' data or misusing the information, thereby increasing tax risks in the taxpayers' global operations. Furthermore, the taxpayer may have the opportunity to clarify any concerns related to its documentation package.

The earlier identification of tax risks among the participating jurisdictions would provide an international tax certainty to the taxpayer. It would be one step further to cooperative compliance, as it would produce a better dialogue, trust and transparency, not only between the taxpayer and the tax authority where the taxpayer is located, but would allow for a global view and better tax risk assessment in all participating jurisdictions, where the taxpayer is located and where it has related transactions.

With the increasing complexity of international business and the amount of data required to be collected, it is crucial that tax authorities cooperate worldwide. In this respect, we believe that ICAP should be included in the Chapter IV of the Transfer Pricing Guidelines as a dispute avoidance mechanism. Further guidance could be given upon completion of the pilot project on ICAP launched by the OECD in January 2018[3].

A.3. Publication of guidelines for legislations and tailored technical assistance

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[2] G.M. Luchena Mozo, A Collaborative Relationship in the Resolution of International Tax Disputes and Alternative Measures for Dispute Resolution in a Post-BEPS Era, 58 Eur. Taxn. 1 (2018), Journals IBFD.
[3] OECD (2018), International Compliance Assurance Programme Pilot Handbook, OECD, Paris. www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-pilot-handbook.pdf

Paragraph 4.62 mentions the publication of guidance on mutual agreement procedure as a way to optimize dispute resolution. However, we are of the opinion that publication of guidelines for legislations and tax authorities' understandings and procedures may be used as a mechanism to avoid disputes.

A clear and broad publication of guidelines on such aspects (e.g. in official journals, newspapers, tax authorities' websites) could enhance certainty for taxpayers and minimize disputes. An example of this practice is the one observed by the Australian Tax Office (ATO). The ATO publishes in their website various guidelines on their understandings and procedures. Such guidelines are easily located by the taxpayers, creating an environment where the taxpayer can use the guidelines to base its tax policies accordingly.

Where questions still arise despite the publication of guidelines, the tax authorities may offer tailored technical assistance for smaller taxpayers, giving them the chance to get the tax authorities opinion on a matter in a non-audit, non-litigation environment. This would help to increase compliance and may be an effective method to avoid disputes, in particular for smaller taxpayers that do not have access to other mechanisms of dispute avoidance (e.g. cooperative compliance).

B. Is there any additional guidance that would be useful in relation to corresponding and / or secondary adjustments to minimize the risk of double taxation?

B.1. Corresponding adjustment

Paragraph 4.41 mentions that the taxpayer, when requesting a corresponding adjustment, may fear retaliation from the tax authority from which the corresponding adjustment has been requested.

While this is intrinsically related to the culture of trust between the taxpayer and the tax authorities in a given country, which is far more complex to resolve, the OECD may include a suggestion in the Guidelines that, in order to encourage minimal double taxation, countries that feel that there is such lack of trust in their territories should include in their domestic legislations a clause prohibiting abusive and retaliatory corresponding adjustments. In other words, the taxpayer should not be left in a worse position than it was prior to the adjustment (considering the facts and circumstances remain the same).

B.2. Secondary adjustment

When providing the tax authorities with the opportunity to make secondary adjustments, the taxpayers should also be given the same opportunity (when beneficial to the taxpayer).

C. Is there any additional guidance that could be provided on advance pricing arrangements? Based on experience, are any features of APAs or specific initiatives related to APAs that could strengthen their role in minimizing transfer pricing disputes? What are the advantages of such initiatives and the implementation challenges?

Paragraph 4.155 of Chapter IV mentions that it may be difficult to monitor the application of the APA, however it fails to give suggestions on how to overcome such an issue. We believe that one way to improve the monitoring of APAs is by establishing annual or biannual checks, depending on the time limit of the APA (e.g. annual check if the APA is valid for three years and a biannual check if its expiration is within five years). This could be done by a simplified compliance mechanism, the goal being to make sure that the facts and circumstances of the

APA are still valid, and that the APA is being applied. Moreover, in order to secure the tax certainty given to the taxpayer via the APA, the tax authority should not have the right to modify the APA if the facts and circumstances remain the same.

Further, the APA is only binding on the tax authority that negotiated it with the taxpayer. Thus, in cases where the taxpayer applies a certain margin that is accepted in the APA jurisdiction but is seen as not arm's length by the related jurisdiction, the non-APA jurisdiction may make an adjustment that can result in double taxation. As the purpose of the APA is to create tax certainty, countries should be encouraged to negotiate bilateral APAs with their treaty partners.

Countries should therefore be open for such negotiations, bearing in mind that this is not always the case in particular in transfer pricing situations, where one country may feel that it has less experience in complex issues than the related country. This can be facilitated, e.g., by using expert advice on bilateral APA negotiations.

D. Are there any other mechanisms or issues relevant to the administration of transfer pricing and / or to the prevention and resolution of transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV of the TPG?

D.1. Safe harbours

Similarly to APAs, countries should as far as possible give preference to bilateral safe harbours. This would avoid situations where the taxpayer applies a safe harbour in one jurisdiction and the same is not accepted in the other jurisdiction, causing an adjustment to be made at the risk of double taxation.

In this respect, where countries realize that they have some standardized less complex type of transactions between them, they could negotiate bilateral safe harbours. This would create greater certainty for taxpayers in both jurisdictions and less compliance issues, benefitting especially smaller taxpayers.

Safe harbours should also be flexible (in particular unilateral safe harbours). Taxpayers should be given a choice to opt for the safe harbour or to use a different margin supported by a transfer pricing documentation based on the arm's length principle. By doing so, the taxpayer may assess its position in other countries and consider whether the use of the safe harbour would result in adjustments in other jurisdictions and complicated transfer pricing disputes.

Finally, while safe harbours can be beneficial in, e.g., reducing compliance and promoting certainty in one jurisdiction (unilateral safe harbour) or more (bilateral safe harbour), it can also give rise to some tax risks, such as facilitation of tax planning that could potentially cause a reduction in the tax base of the country offering the safe harbour. In this respect, the use of a safe harbour should be carefully analyzed and discussed prior to making the decision for its application.

D.2. Non-binding dispute resolutions

Chapter IV of the Transfer Pricing Guidelines is silent on the use of non-binding dispute resolutions mechanisms. However, we are of the opinion that these could also be relevant for transfer pricing disputes serving in a supportive manner to MAP.

In particular, the following mechanisms could facilitate MAP in transfer pricing cases:

- ***Expert advice.*** This could be particularly relevant when the relevant tax authorities do not have much experience with transfer pricing cases and thus lack expertise.

Moreover, it could also support cases where a specific industry is being discussed.

- ***Mediation.*** This could support transfer pricing MAP cases by facilitating the resolution of some specific issue that the tax authorities cannot agree on, e.g. the choice of the tested party in a complex transaction. The role of the mediator is not to make the decision, but to facilitate the discussions putting the parties in a "problem-solving mode".

The two mechanisms above could be used separately or in conjunction to support MAP, as needed[4].

We understand that there are costs involved with non-binding dispute resolutions; however, such mechanisms can help to improve MAP and avoid arbitration in cases where there is such a clause in the tax treaty or simply ensure a solution to resolve the double taxation or taxation not in accordance with the Convention. As an example of a mediation procedure, the UK has implemented the advance dispute resolution (ADR), where a mediator is appointed to facilitate negotiations. The tax authorities still maintain the responsibility for the resolution, however they found that the use of the mediator has reduced the time for arriving at a solution and the costs related to the dispute.

D.3. MAP

Given the complexity of transfer pricing cases and the lack of expertise of tax authorities in some countries, there should be a separate procedure for transfer pricing cases. Further, the tax authorities should be advised to dedicate part of their personnel to transfer pricing topics (when possible), in order to create a more effective MAP. This is also in line with Action 14 minimum standards to commit to provide access to MAP in transfer pricing cases, as a dedicated transfer pricing tax authorities team would be more inclined to accept the case.

Moreover, the taxpayer may feel less encouraged to apply for MAP when there is a transfer pricing element in their claim. In such cases, i.e. where both transfer pricing and other issues are being discussed, we believe that there should be a separate procedure for the transfer pricing part. Such a procedure should be efficient to both minimize the time of the solution (as it would not hold up resolving the remaining bit of the claim) and to the quality of the decision (as the transfer pricing part may be assigned to a different tax authority with expertise dedicated to transfer pricing cases).

D.4. Arbitration

While arbitration is briefly mentioned in the Guidelines and part of the MLI, Chapter IV should encourage countries to opt for the inclusion of the mandatory arbitration clause to their tax treaties[5] (in line with BEPS Action 14). Considering the implementation of BEPS and the rapid changes in business and tax laws around the world, tax disputes are expected to arise globally, with transfer pricing disputes counting for a substantial part of such an increase.

Without the arbitration clause, there is a higher risk that MAP would take longer (as the demand would be higher) or even be left unresolved. This creates a great uncertainty for the taxpayer as an ineffective MAP can result in unrelieved cases of double taxation.

Moreover, taken from the experience of the US-Canada double tax treaty, with the inclusion of a mandatory arbitration clause, those countries experienced a higher efficiency in their

[4] S.P. Govind & L. Turcan, Cross-Border Tax Dispute Resolution in the 21st century: A Comparative Study of Existing Bilateral and Multilateral Remedies, 19 Derivs. & Fin. Instrums. 5 (2017), Journals IBFD.
[5] E. Snodgrass, Tax Controversies and Dispute Resolution under Tax Treaties: Insights from the Arbitration Sphere, 19 Derivs. & Fin. Instrums. 5 (2017), Journals IBFD.

MAPs as well as a low number of actual arbitrations. Meaning that, by fearing that their decision power would get at the hands of an arbitrator, countries were encouraged to resolve their issues via MAP, without the need to actually invoke the arbitration clause.

Yours faithfully,

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