

**ICC comments in response to EU Commission public consultation:**

**Proposal for a Council Directive on transfer pricing**

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, appreciates the opportunity to provide input in the context of the [European Commission Transfer Pricing Directive proposal public consultation](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13463-Transfer-Pricing-Directive-Head-Office-Tax-system-for-SMEs-Business-in-Europe-Framework-for-Income-Taxation_en).

**General Comment**

ICC members fully support the underlying aim of the proposal which is to improve dispute resolution as well as harmonizing and simplifying Transfer Pricing Rules. However, based on the text of the proposal, we remain doubtful whether the directive will effectively achieve these goals.

One of the main concerns expressed by ICC members is that the proposal will create additional administrative work, especially considering the 25% threshold as well as the deviations from the OECD guidelines which would still be applicable in different countries around the world outside the European Union (EU).

**Tax Certainty, double taxation and deviations from OECD’S Transfer Pricing Guidelines**

Tax-certainty is key for the business community and thus, we support consistent interpretation of the arm’s length principle and application of the OECD’s Transfer Pricing Guidelines (TPG) throughout the EU, both within and at its periphery.

While we welcome the proposed dispute resolution process, notably the 180 day fast-track dispute resolution mechanism (Article 6), as it appears from the current text of the proposal – in the initial stage, at least – the TPG will only be partially, and imperfectly, incorporated into the Directive, creating the potential for inconsistency and confusion, not to mention double taxation.

* Chapters 1 to 3, covering the basic transfer pricing methodology and process, are largely transposed, Chapter 5, covering documentation is partially transposed, while Chapters 6 to 10 (intangibles, services, cost contribution agreements, business restructurings and financial transactions) are relegated to future implementing acts.
* An associated entity is defined by reference to certain 25% ownership criteria, which differs from the definition in the TPG and Article 9 of the OECD Model Tax Convention (MTC), as well as being inconsistent with the definition of a group in the BEFIT Directive (and in Pillar 2), which may lead to conflicts of interpretation.
* The application of the five specified transfer pricing methods in Chapter 2 is rather more rigorously defined than in the TPG, as is the restriction of acceptable results to those within the interquartile range.
* The vagueness of the documentation requirements, i.e. no mandatory requirement for the OECD’s 3-tiered approach, as defined in Chapter 5 of the TPG, is a missed opportunity to impose consistency from the outset, particularly given the EU JTPF’s leadership in originally setting out the master file and local file templates later taken up and developed by the OECD.

To avoid variations of interpretation and uncertainty, we would advocate inclusion of the whole TPG within the scope of the Directive at this stage, such that EU transfer pricing rules are to be consistent with and interpreted in accordance with the principles set out in, the TPG.

The fact that member countries will be obligated to implement the OECD TPC into domestic law, is also not a real game changer in order to fulfill the overall goal of the directive proposal. Based on the experience of ICC members, EU member states have already either implemented these or apply the OECD guidelines as basis for legal interpretation of domestic law.

As mentioned above, we welcome the proposal in relation to the **fast-track dispute resolution mechanism** as we recognize that Transfer Pricing is often a subject of controversies among countries. Nonetheless, we are concerned that the measures in the proposal will not be sufficient. As an alternative, we would encourage initiatives for more use of Advanced Pricing Agreements (APAs) and the existing procedure in the Arbitration Convention for resolving disputes.

**Simplification**

We welcome a simplification of the current global TP compliance requirements but suggest that efforts are focused on enforcement of standardized Transfer Pricing Documentation requirements - preferably in line with the applicable OECD TP documentation guidelines to ensure global standardization, and introduction of safe harbours for outcome testing, e.g. for TNMM benchmarks for Sales, Distribution, Procurement, Production, etc. and similarly for interest on loans and cash pools.

To really succeed in simplifying the TP administration it should be ensured that companies don´t have to comply with EU MS specific requirements for content of TP documentation. That way the EU would ensure standardized EU-wide penalty protecting Transfer Pricing documentation standards. However, as we read the proposed wording of the Directive, there is still opportunity for the MS in practice to add country specific requirements to the TP documentation.

**Risks on the scope**

The Scope embraces Permanent Establishments (PEs) (Article 2), by defining them as “associated enterprises”, although the deferral to the future of an implementing act on PEs leaves it open to what extent these will be covered. While this may be seen as an opportunity to harmonize approaches to the attribution of profit to a PE, a PE (under Article 7 of the OECD MTC) is certainly not considered an associated enterprise under the rules of most jurisdictions and double tax conventions (Article 9 of the OECD MTC). The attempt to shoehorn PEs into the transfer pricing directive risks fundamental divergence of interpretation and therefore grounds for objection by Member States.

**Type of measure and need for further guidance**

Clarification would be welcomed from the outset on whether the transfer pricing directive is intended just to be a temporary measure.  If BEFIT is introduced and the proposal for formulary apportionment is adopted at some point in the future, it appears that there will be no operation of the arm’s length principle (or, at least, much less) within the EU.  Guidance is encouraged on whether the Directive will continue to apply to transactions across the boundary of the EU.

**About the International Chamber of Commerce**

The International Chamber of Commerce (ICC) is the institutional representative of more than
45 million companies in over 170 countries. ICC’s core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach
 to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world’s leading companies, SMEs, business associations and local chambers of commerce.

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