

Position Paper



# Transfer Payments Directive

FEBRUARY 2024



## **Introduction**

The Transfer Pricing Directive was unveiled by the European Commission together with the BEFIT Directive in September 2023. It seeks to harmonize transfer pricing rules across the EU by ensuring a uniform approach to transfer pricing transactions by codifying the arm's-length principle into EU law based on the OECD Transfer Pricing Guidelines. This is intended to combatting tax abuse and to alleviate double taxation or double non-taxation for multinational corporations (MNEs). The Directive proposal reaffirms key aspects of the OECD Transfer Pricing Guidelines analysis, including defining actual transactions, conducting a comparability study, and employing the five recognized OECD TP methods.

## **General Comments**

The MBB welcomes EU initiatives aimed at simplifying certain aspects of transfer pricing and to enhance tax certainty. The Transfer Pricing Directive intends to introduce harmonized transfer pricing (TP) rules as a means of combating tax abuse, however, TP rules constitute components of a general tax system and do not in themselves address situations of abuse.

The MBB is concerned that the TP Directive will result in additional burdens for SME MNEs due to additional documentation requirements and compliance costs, without offering safe harbour rules or provide effective solutions for double taxation disputes. It does not correspond to the proportionality principle, which is a stated aim of the Directive. The Directive should therefore carve out SMEs and be limited to companies falling within the scope of the "Business in Europe: Framework for Income Taxation" (BEFIT) proposal. There should also be a de minimis exemption for transactions below a specified amount; and an increase in the percentage criterion used to define Associated Enterprises from 25% to 50%.

The MBB is very concerned that the proposed TP Directive appears to attempt circumventing the voting rules of a special legislative procedure derived by the legal basis for tax legislation defined under TFEU Article 115 by proposing to adopt supplementary rules via Council implementing acts that would require a qualified majority instead of unanimous support (reference to Article 14(2)). The MBB is strongly opposed to this.

## **Other comments:**

### **Alignment with OECD TP Guidelines**

Member States need to have the flexibility to consider alternative pricing frameworks for transactions taking place domestically or in relation to third countries as long as those frameworks are consistent with the arm's length principle. This would streamline compliance and ease taxpayer burdens.

Furthermore, the MBB notes that codifying OECD guidelines into EU law present substantial challenges and can result in ambiguity and divergence from the established international standards, particularly the provisions from Article 8 to 12.

### **TP framework within the EU**

The MBB is concerned that the TP Directive could inadvertently expose Member States to investigations on the basis of EU State aid rules when attempting to attract third-country investment. Keeping in mind that the OECD guidelines provide for a degree of interpretation unlike prescribed provisions as is the case in a legal framework, the Directive should provide guidance on the practical application of the said guidelines and address any state aid concerns.

### **Resolving TP disputes**

The TP Directive goes beyond the OECD guidelines by strictly endorsing an interquartile range. While it can be argued that narrowing down to what can be considered acceptable as positive, it is important to point out that often TP disputes relate to points within the interquartile range, and therefore it is doubted as to how far codifying the range will in fact reduce disputes. This could prove particularly problematic in resolving disputes involving TP with third countries.

### **Double Taxation Mitigation**

The TP Directive does not sufficiently address the issue of double taxation. It is therefore proposed that there is a clear route to mandatory Mutual Agreement Procedures (MAPS) and obligatory arbitration, coupled with more stringent timelines and binding commitments on Member States. There should also be a stronger reference in the TP Directive to dispute resolution under the Dispute Resolution Directive.

Specifically in Article 6(3) the Directive should incorporate a simplified mandatory corresponding adjustment mechanism and a requirement for Member States to

expedite the resolution of any cases of double taxation within a defined and reasonable timeframe, without the possibility of rejection.

These proposed amendments would help to ensure that taxpayers are adequately protected from the potential ramifications of double taxation.

## Conclusion

Despite the overall good intentions of the TP Directive to address tax abuse, the MBB is concerned that ultimately the proposed rules bring more complexity and therefore higher compliance costs to businesses. In our view, the Commission should focus on harmonising and strengthening certain procedural and governance aspects of TP through a more robust and efficient dispute resolution framework, streamlining of TP documentation requirements, promoting more use of Advances Pricing Agreements, strengthen the Mutual Agreement Procedure in the Arbitration Convention and reinstating the EU Joint Transfer Pricing Forum.

**Links to more information:** [https://taxation-customs.ec.europa.eu/transfer-pricing-eu-context\\_en](https://taxation-customs.ec.europa.eu/transfer-pricing-eu-context_en)

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