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(Information)

COUNCIL

Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD)

(2006/C 176/01)

THE COUNCIL OF THE EUROPEAN UNION AND THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES, MEETING WITHIN THE COUNCIL,

Having regard to the Commission's study entitled 'Company Taxation in the Internal Market' ⁽¹⁾,

Having regard to the proposal made by the Commission, in its Communication of 23 October 2001 entitled 'Towards an internal market without obstacles — A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities' ⁽²⁾, for the establishment of an EU Joint Transfer Pricing Forum,

Having regard to the Council conclusions of 11 March 2002 welcoming this move and the establishment of the Joint Transfer Pricing Forum in June 2002,

Considering that the internal market comprises an area without frontiers in which the free movement of goods, persons, services and capital is guaranteed,

Considering that in an internal market having the characteristics of a domestic market, transactions between associated enterprises from different Member States should not be subject to conditions less favourable than those applicable to the same transactions carried out between associated enterprises from the same Member State,

Considering that in the interest of the proper functioning of the internal market, it is of major importance to reduce the compliance costs as regards transfer pricing documentation for associated enterprises,

Considering that the Code of Conduct contained in this Resolution provides Member States and taxpayers with a valuable

instrument for the implementation of standardised and partially centralised transfer pricing documentation in the European Union, with the aim of simplifying transfer pricing requirements for cross-border activities,

Considering that acceptance by Member States of standardised and partially centralised transfer pricing documentation to support transfer pricing on an arm's length basis could help businesses to benefit more from the internal market,

Considering that transfer pricing documentation in the European Union needs to be viewed in the framework of the OECD Transfer Pricing Guidelines,

Considering that standardised and partially centralised documentation should be implemented flexibly and should recognise the particular circumstances of the business concerned,

Considering that a Member State may decide not to have transfer pricing documentation rules at all or to require less transfer pricing documentation than that referred to in the Code of Conduct contained in this Resolution,

Acknowledging that a common approach in the European Union with respect to documentation requirements is beneficial both for taxpayers, in particular in terms of reducing compliance costs and exposure to documentation-related penalties, and for tax administrations owing to enhanced transparency and consistency,

Welcoming the Commission Communication of 7 November 2005 ⁽³⁾ on the work of the EU Joint Transfer Pricing Forum in the field of business taxation and on a Code of Conduct on transfer pricing documentation for associated enterprises in the European Union,

⁽¹⁾ SEC(2001) 1681, 23.10.2001.

⁽²⁾ COM(2001) 582 final, 23.10.2001.

⁽³⁾ COM(2005) 543 final, 7.11.2005.

Emphasising that the Code of Conduct is a political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Community resulting from the Treaty establishing the European Community,

Acknowledging that the implementation of the Code of Conduct contained in this Resolution should not hamper solutions at a more global level,

HEREBY AGREE TO THE FOLLOWING CODE OF CONDUCT:

Code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD)

Without prejudice to the respective spheres of competence of the Member States and the Community, this Code of Conduct concerns the implementation of standardised and partially centralised transfer pricing documentation for associated enterprises in the European Union. It is addressed to Member States but is also intended to encourage multinational enterprises to apply the EU TPD approach.

1. Member States will accept standardised and partially centralised transfer pricing documentation for associated enterprises in the European Union (EU TPD), as set out in the Annex, and consider it as a basic set of information for the assessment of a multinational enterprise group's transfer prices.
2. The use of the EU TPD will be optional for a multinational enterprise group.
3. Member States will apply similar considerations to documentation requirements for the attribution of profits to a

permanent establishment as apply to transfer pricing documentation.

4. Member States will, wherever necessary, take duly into account and be guided by the general principles and requirements referred to in the Annex.
5. Member States undertake not to require smaller and less complex enterprises (including small and medium-sized enterprises) to produce the amount or complexity of documentation that might be expected from larger and more complex enterprises.
6. Member States should:
 - (a) not impose unreasonable compliance costs or administrative burden on enterprises in requesting documentation to be created or obtained;
 - (b) not request documentation that has no bearing on transactions under review;
 - (c) ensure that there is no public disclosure of confidential information contained in documentation.
7. Member States should not impose a documentation-related penalty where taxpayers comply in good faith, in a reasonable manner and within a reasonable time with standardised and consistent documentation as described in the Annex or with a Member State's domestic documentation requirements, and apply their documentation properly to determine their arm's length transfer prices.
8. In order to ensure the even and effective application of this Code, Member States should report annually to the Commission on any measures they have taken further to this Code and its practical functioning.

ANNEX

TO THE CODE OF CONDUCT ON TRANSFER PRICING DOCUMENTATION FOR ASSOCIATED ENTERPRISES IN THE EUROPEAN UNION (EU TPD)

SECTION 1

CONTENT OF THE EU TPD

1. A multinational enterprise (MNE) group's standardised and consistent EU TPD consists of two main parts:
 - (i) one set of documentation containing common standardised information relevant for all EU group members (the 'masterfile'), and
 - (ii) several sets of standardised documentation each containing country-specific information ('country-specific documentation').

The EU TPD should contain enough details to allow the tax administration to make a risk assessment for case selection purposes or at the beginning of a tax audit, ask relevant and precise questions regarding the MNE's transfer pricing and assess the transfer prices of the inter-company transactions. Subject to paragraph 31, the company would produce one single file for each Member State concerned, i.e. one common masterfile to be used in all Member States concerned and a different set of country-specific documentation for each Member State.

2. Each of the items of the EU TPD listed below should be completed, taking into account the complexity of the enterprise and the transactions. As far as possible, information should be used that is already in existence within the group (e.g. for management purposes). However, an MNE might be required to produce documentation for this purpose that otherwise would not have been in existence.
3. The EU TPD covers all group entities resident in the EU including controlled transactions between enterprises resident outside the EU and group entities resident in the EU.

4. The masterfile

- 4.1. The masterfile should follow the economic reality of the business and provide a 'blueprint' of the MNE group and its transfer pricing system that would be relevant and available to all EU Member States concerned.
- 4.2. The masterfile should contain the following items:
 - (a) a general description of the business and business strategy, including changes in the business strategy compared to the previous tax year;
 - (b) a general description of the MNE group's organisational, legal and operational structure (including an organisation chart, a list of group members and a description of the participation of the parent company in the subsidiaries);
 - (c) the general identification of the associated enterprises engaged in controlled transactions involving enterprises in the EU;
 - (d) a general description of the controlled transactions involving associated enterprises in the EU, i.e. a general description of:
 - (i) flows of transactions (tangible and intangible assets, services, financial),
 - (ii) invoice flows, and
 - (iii) amounts of transaction flows;
 - (e) a general description of functions performed, risks assumed and a description of changes in functions and risks compared to the previous tax year, e.g. change from a fully fledged distributor to a commissionaire;
 - (f) the ownership of intangibles (patents, trademarks, brand names, know-how, etc.) and royalties paid or received;

- (g) the MNE group's inter-company transfer pricing policy or a description of the group's transfer pricing system that explains the arm's length nature of the company's transfer prices;
- (h) a list of cost contribution agreements, Advance Pricing Agreements and rulings covering transfer pricing aspects as far as group members in the EU are affected; and
- (i) an undertaking by each domestic taxpayer to provide supplementary information upon request and within a reasonable time frame in accordance with national rules.

5. Country-specific documentation

- 5.1. The content of the country-specific documentation supplements the masterfile. Together the two constitute the documentation file for the relevant EU Member State. The country-specific documentation would be available to those tax administrations with a legitimate interest in the appropriate tax treatment of the transactions covered by the documentation.
- 5.2. Country-specific documentation should contain, in addition to the content of the masterfile, the following items:
 - (a) a detailed description of the business and business strategy, including changes in the business strategy compared to the previous tax year;
 - (b) information, i.e. description and explanation, on country-specific controlled transactions, including:
 - (i) flows of transactions (tangible and intangible assets, services, financial),
 - (ii) invoice flows, and
 - (iii) amounts of transaction flows;
 - (c) a comparability analysis, i.e.:
 - (i) characteristics of property and services,
 - (ii) functional analysis (functions performed, assets used, risks assumed),
 - (iii) contractual terms,
 - (iv) economic circumstances, and
 - (v) specific business strategies;
 - (d) an explanation of the selection and application of the transfer pricing method(s), i.e. why a specific transfer pricing method was selected and how it was applied;
 - (e) relevant information on internal and/or external comparables if available; and
 - (f) a description of the implementation and application of the group's inter-company transfer pricing policy.
- 6. An MNE should have the possibility of including items in the masterfile instead of the country-specific documentation, keeping, however, the same level of detail as in the country-specific documentation. The country-specific documentation should be prepared in a language prescribed by the Member State concerned, even if the MNE has opted to keep the country-specific documentation in the masterfile.
- 7. Any country-specific information and documents that relate to a controlled transaction involving one or more Member States must be contained either in the country-specific documentation of all the Member States concerned or in the common masterfile.
- 8. MNEs should be allowed to prepare the country-specific documentation in one set of documentation (containing information about all businesses in that country) or in separate files for each business or group of activities in that country.
- 9. The country-specific documentation should be prepared in a language prescribed by the Member State concerned.

SECTION 2

GENERAL APPLICATION RULES AND REQUIREMENTS FOR MNEs

10. Use of the EU TPD is optional for MNE groups. However, an MNE group should not arbitrarily opt in and out of the EU Transfer Pricing Documentation approach for its documentation purposes but should apply the EU TPD in a way that is consistent throughout the EU and from year to year.
11. An MNE group that opts for the EU TPD should generally apply this approach collectively to all associated enterprises engaged in controlled transactions involving enterprises in the EU to which transfer pricing rules apply. Subject to paragraph 31, an MNE group opting for the EU TPD would, therefore, need to keep the documentation specified in Section 1 in respect of all its enterprises in the Member State concerned, including permanent establishments.
12. Where an MNE group has opted for the EU TPD for a given fiscal year, each member of the MNE group should inform its tax administration accordingly.
13. MNEs should undertake to prepare the masterfile in time to comply with any legitimate request originating from one of the tax administrations involved.
14. The taxpayer in a given Member State should make its EU TPD available, upon request by a tax administration, within a reasonable time depending on the complexity of the transactions.
15. The taxpayer responsible for making documentation available to the tax administration is the taxpayer that would be required to make the tax return and that would be liable to a penalty if adequate documentation were not made available. This is the case even if the documentation is prepared and stored by one enterprise within a group on behalf of another. The decision of an MNE group to apply the EU TPD implies a commitment towards all associated enterprises in the EU to make the masterfile and the respective country-specific documentation available to its national tax administration.
16. Where in its tax return, a taxpayer makes an adjustment to its accounts profit resulting from the application of the arm's length principle, documentation demonstrating how the adjustment was calculated should be available.
17. The aggregation of transactions must be applied consistently, be transparent to the tax administration and be in accordance with paragraph 1.42 of the OECD Transfer Pricing Guidelines (which allow aggregation of transactions that are so closely linked or continuous that they cannot be evaluated adequately on a separate basis). These rules should be applied in a reasonable manner, taking into account in particular the number and complexity of the transactions.

SECTION 3

GENERAL APPLICATION RULES AND REQUIREMENTS FOR MEMBER STATES

18. Since the EU TPD is a basic set of information for the assessment of the MNE group's transfer prices a Member State would be entitled in its domestic law to require more and different information and documents, by specific request or during a tax audit, than would be contained in the EU TPD.
19. The period for providing additional information and documents upon specific request referred to in paragraph 18 should be determined on a case-by-case basis taking into account the amount and detail of the information and documents requested. Depending on specific local regulations, the timing should give the taxpayer a reasonable time (which can vary depending on the complexity of the transaction) to prepare the additional information.
20. Taxpayers avoid cooperation-related penalties where they have agreed to adopt the EU TPD approach and provide, upon specific request or during a tax audit, in a reasonable manner and within a reasonable time, additional information and documents going beyond the EU TPD referred to in paragraph 18.

21. Taxpayers should be required to submit their EU TPD, i.e. the masterfile and the country-specific documentation, to the tax administration only at the beginning of a tax audit or upon specific request.
22. Where a Member State requires a taxpayer to submit information about transfer pricing with its tax return, that information should be no more than a short questionnaire or an appropriate risk assessment form.
23. It may not always be necessary for documents to be translated into a local language. In order to minimise costs and delays caused by translation, Member States should accept documents in a foreign language as far as possible. As far as the EU Transfer Pricing Documentation is concerned, tax administrations should be prepared to accept the masterfile in a commonly understood language in the Member States concerned. Translations of the masterfile should be made available only if strictly necessary and upon specific request.
24. Member States should not oblige taxpayers to retain documentation beyond a reasonable period consistent with the requirements of the domestic laws where the taxpayer is liable to tax regardless of where the documentation, or any part of it, is situated.
25. Member States should evaluate domestic or non-domestic comparables with respect to the specific facts and circumstances of the case. For example, comparables found in pan-European databases should not be rejected automatically. The use of non-domestic comparables by itself should not subject the taxpayer to penalties for non-compliance.

SECTION 4

GENERAL APPLICATION RULES AND REQUIREMENTS APPLICABLE TO MNEs AND MEMBER STATES

26. Where documentation produced for one period remains relevant for subsequent periods and continues to provide evidence of arm's length pricing, it may be appropriate for the documentation for subsequent periods to refer to earlier documentation rather than to repeat it.
27. Documentation does not need to replicate the documentation that might be found in negotiations between enterprises acting at arm's length (for example, in agreeing to a borrowing facility or a large contract) as long as it includes adequate information to assess whether arm's length pricing has been applied.
28. The sort of documentation that needs to be produced by an enterprise that is a subsidiary enterprise in a group may be different from that needed to be produced by a parent company, i.e. a subsidiary company would not need to produce information about all of the cross-border relationships and transactions between associated enterprises within the MNE group but only about relationships and transactions relevant to the subsidiary in question.
29. It should be irrelevant for tax administrations where a taxpayer prepares and stores its documentation as long as the documentation is sufficient and made available in a timely manner to the tax administrations involved upon request. Taxpayers should, therefore, be free to keep their documentation, including their EU TPD, either in a centralised or in a decentralised manner.
30. The way that documentation is stored — whether on paper, in electronic form or in any other way — should be at the discretion of the taxpayer, provided that it can be made available to the tax administration in a reasonable way.
31. In well justified cases, e.g. where an MNE group has a decentralised organisational, legal or operational structure or consists of several large divisions with completely different product lines and transfer pricing policies or no inter-company transactions, and in the case of a recently acquired enterprise, an MNE group should be allowed to produce more than one masterfile or to exempt specific group members from the EU TPD.

SECTION 5

GLOSSARY

MULTINATIONAL ENTERPRISE (MNE) AND MNE GROUP

According to the OECD Transfer Pricing Guidelines:

- an MNE is a company that is part of an MNE group,
- an MNE group is a group of associated companies with business establishments in two or more countries.

STANDARDISED DOCUMENTATION

A uniform, EU-wide set of rules for documentation requirements according to which all enterprises in Member States prepare separate and unique documentation packages. This more prescriptive approach aims at arriving at a decentralised but standardised set of documentation, i.e. each entity in a multinational group prepares its own documentation, but according to the same rules.

CENTRALISED (INTEGRATED GLOBAL) DOCUMENTATION

A single documentation package (core documentation) on a global or regional basis that is prepared by the parent company or headquarters of a group of companies in a EU-wide standardised and consistent form. This documentation package can serve as the basis for preparing local country documentation from both local and central sources.

EU TRANSFER PRICING DOCUMENTATION (EU TPD)

The EU Transfer Pricing Documentation (EU TPD) approach combines aspects of the standardised and of the centralised (integrated global) documentation approach. A multinational group would prepare one set of standardised and consistent transfer pricing documentation that would consist of two main parts:

- (i) one uniform set of documentation containing common standardised information relevant for all EU group members (the 'masterfile'), and
- (ii) several sets of standardised documentation each containing country-specific information ('country-specific documentation').

The documentation set for a given country would consist of the common masterfile supplemented by the standardised country-specific documentation for that country.

DOCUMENTATION-RELATED PENALTY

An administrative (or civil) penalty imposed for failure to comply with the EU TPD or the domestic documentation requirements of a Member State (depending on which requirements the MNE has chosen to comply with) at the time the EU TPD or the domestic documentation required by a Member State was due to be submitted to the tax administration.

COOPERATION-RELATED PENALTY

An administrative (or civil) penalty imposed for failure to comply in a timely manner with a specific request of a tax administration to submit additional information or documents going beyond the EU TPD or the domestic documentation requirements of a Member State (depending on which requirements the MNE has chosen to comply with).

ADJUSTMENT-RELATED PENALTY

A penalty imposed for failure to comply with the arm's length principle usually levied in the form of a surcharge at a fixed amount or a certain percentage of the transfer pricing adjustment or the tax understatement.
