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**COMMUNICATION FROM THE COMMISSION
TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND
THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**on the work of the EU Joint Transfer Pricing Forum on transfer pricing documentation
for associated enterprises in the EU**

Proposal for a

CODE OF CONDUCT

on transfer pricing documentation for associated enterprises in the EU

(presented by the Commission)

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1. INTRODUCTION

1. The aim of this communication is to report on the work done by the EU Joint Transfer Pricing Forum (JTPF) from January 2004 to May 2005 on transfer pricing documentation for associated enterprises in the EU and to present the conclusions which the Commission draws from this work.

2. BACKGROUND

2. To follow up its study on "Company Taxation in the Internal Market"¹, in its 2001 communication "Towards an internal market without obstacles - A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities"² the Commission proposed the establishment of an "EU Joint Transfer Pricing Forum". On 11 March 2002 the Council adopted conclusions welcoming this move.

The Forum was formally established by the Commission in June 2002 and consists of one expert from the tax administrations of each Member State plus 10 experts from business. Representatives from applicant countries and the OECD Secretariat attend as observers. The summary records of the proceedings of the JTPF are available on the Commission's website³.

3. As also reflected in the Council conclusions, the JTPF should work on the basis of consensus and should produce pragmatic, non-legislative solutions within the framework of the OECD Transfer Pricing Guidelines to the practical problems posed by transfer pricing practices in the EU.
4. The JTPF met for the first time in October 2002 and established a two-year work programme.
5. The main achievements of the JTPF in its first term of activity were its conclusions and recommendations on issues related to the Arbitration Convention (Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with

¹ "Company Taxation in the Internal Market", Commission staff working paper, SEC(2001) 1681, 23.10.2001.

² Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: "Towards an internal market without obstacles - A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities" COM(2001) 582 final, 23.10.2001.

³ http://europa.eu.int/comm/taxation_customs/taxation/company_tax/transfer_pricing/index_en.htm

the adjustment of profits of associated enterprises) and on certain related issues concerning mutual agreement procedures under double tax treaties between Member States.

6. The JTPF's conclusions and recommendations were taken as the basis for a Commission communication⁴ on the activities of the JTPF from October 2002 to December 2003, including a proposal for a Code of Conduct for the effective implementation of the Arbitration Convention and certain related issues of the mutual agreement procedure under double tax treaties between Member States, which was published on 23 April 2004. The proposed Code of Conduct was adopted by the Council on 7 December 2004.
7. Considering the constructive results and the important outstanding issues remaining on the JTPF's work programme, in December 2004 the Commission extended the JTPF's mandate for another two years (from January 2005 to December 2006).

3. ACTIVITIES OF THE EU JOINT TRANSFER PRICING FORUM FROM JANUARY 2004 TO MAY 2005

8. A report on the activities of the JTPF, adopted by consensus in May 2005 and covering the work on transfer pricing documentation requirements is included in a Staff Working Document⁵. The activity report summarises the deliberations of the JTPF. It concludes that standardized and partially centralized transfer pricing documentation for associated enterprises in the EU could benefit the development of the single market.
9. Examination of transfer pricing documentation for associated enterprises in the EU was the main activity of the JTPF from January 2004 to May 2005. It has been noticed that documentation requirements in the EU have increased and there are significant differences in documentation requirements between Member States.
10. The existence of different sets of documentation requirements in the internal market places a burden on a company in one Member State that wants to set up and/or conduct business with an affiliated company in another Member State. The preparation of separate and unique documentation packages in different Member States is uneconomic. Small and medium-sized enterprises especially can be affected by these problems.
11. In order to remedy this situation, the Forum identified different approaches to documentation requirements and, in the light of their pros and cons, in particular in terms of legal certainty and flexibility, decided to pursue the concept of standardized "EU Transfer Pricing Documentation" (EU TPD). The main features of the EU TPD are standardization of the documentation requirements necessary for a tax administration as a risk assessment tool and to obtain sufficient information for the assessment of a group's transfer prices; the possibility of centralization of the core

⁴ COM(2004) 297 final, 23.4.2004: "Communication on the work of the EU JTPF from October 2002 to December 2003 and on a proposal for a Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990)."

⁵ SEC(2005) Report on transfer pricing documentation prepared by the EU Joint Transfer Pricing Forum.

part of the documentation (the "masterfile") at group level; and the availability to all EU Member States concerned of common standardized transfer pricing information relevant for all EU affiliates of a multinational enterprise.

12. The Forum further discussed the use of database searches for comparables, the issue of risk assessment and proposals for more general recommendations related to the timing and preparation of documentation, aggregation of transactions, simplification of documentation requirements for SMEs, language requirements, documentation-related penalties, the application of documentation rules to permanent establishments and the effect of the re-entry into force of the Arbitration Convention on 1 November 2004.

3.1. Use of database searches for comparables

13. To support the arm's length nature of intra-group transactions, both the taxpayer and the tax administration have various possibilities for obtaining evidence. These range from the preferred source of information readily available within the company or group (internal comparables) to external comparables that can be obtained from a variety of sources, including searches of databases when the latter satisfy the comparability requirements and the rules on the aggregation of transactions. The Forum agreed that tax administrations 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.

3.2. Risk assessment

14. Globalization complicates taxation issues and the ability of tax administrations to track down trade and income flows. By increasing significantly the amount and type of income earned abroad, globalization also reduces the ability of tax administrations to verify the accuracy of taxpayers' transfer pricing. In the light of limited resources available, tax administrations need to maximize administrative efficiency. Enterprises, on the other hand, are confronted with varying and often extensive documentation requirements and are also more and more exposed to penalties for non-compliance with such documentation requirements or the arm's length principle. The Forum therefore briefly discussed the issue of risk assessment in the context of documentation requirements from the point of view of both the tax administration and business and identified specific and common objectives.
15. For tax administrations, risk assessment is regarded as the most important case selection tool and as a tool for specific inquiries and tax audits. For business on the other hand risk assessment may help taxpayers to concentrate pro-actively on "risk" transactions which may require more detailed explanations and documentation and can also help to improve the transfer pricing system applied.
16. The common objective of risk management is to enable a business or a tax administration to establish what amount of effort and cost is appropriate in establishing, in particular circumstances, what the "arm's length" result of a transaction between associated enterprises should be and how evidence should be kept to demonstrate that result. In other words, risk assessment enables both tax

administrations and business to allocate and use their scarce resources as efficiently and effectively as possible.

17. The Forum concluded that the more common understanding there was between businesses and tax administrations about the basis of risk assessment, the greater would be the benefits for all concerned. It considered that an agreed procedure for reviewing tax risks with a company would be particularly helpful in questions concerning transfer pricing.
18. The Forum examined the risk assessment process, reviewed risk indicators and ratios and considered the scope for an EU-wide risk assessment procedure and the possible merits of a standardized risk assessment form. However, it was not possible to complete the work on risk assessment because, due to time constraints, the Forum decided to pursue the more important work on transfer pricing documentation for associated enterprises in the EU.

3.3. The EU transfer pricing documentation: description of the approach

19. A common EU-wide approach on documentation requirements was considered beneficial both for taxpayers, in terms of reducing compliance costs and exposure to documentation-related penalties, and for tax administrations due to enhanced transparency and consistency. The Forum therefore examined the potential and merits of several possible common approaches to documentation requirements, i.e. "best practice", "standardized documentation" and "centralized (integrated global) documentation". The JTPF discussed this issue in the light of the experience of the Pacific Association of Tax Administrators (PATA) and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, aiming at maintaining a balance between the tax administrations' right to obtain from a taxpayer the information necessary to assess whether the taxpayer's transfer pricing is at arm's length and the compliance cost for the taxpayer.
20. In the light of the pros and cons of the standardized and the centralized approaches, the JTPF developed a new approach called "EU Transfer Pricing Documentation" (EU TPD) which combines aspects of the standardized approach and of the centralized (integrated global) documentation approach. It consists of two main parts: one set of documentation containing common standardized information relevant for all EU group members (the "masterfile") and several sets of standardized documentation each containing country-specific information ("country-specific documentation"). The EU TPD approach means, therefore, that a multinational group of companies has a standardized and consistent set of documentation (the "masterfile" supplemented by "country-specific documentation") at company level.
21. The "masterfile" should follow the economic reality of the enterprise and provide a "blueprint" of the company and its transfer pricing system that would be relevant for all EU Member States concerned. Together, the "masterfile" and the "country-specific documentation" constitute the documentation file for the relevant EU Member State.
22. The EU TPD should cover all group entities resident in the EU including controlled transactions between enterprises outside the EU and group entities resident in the EU.

23. The EU TPD would serve both as a basic set of information for the assessment of a multinational enterprise (MNE) group's transfer prices and as a risk assessment tool for taxpayers to identify transactions that may require more detailed explanations and documentation and for tax administrations for case selection purposes and as a starting point for examination of the company's transfer pricing. The EU TPD would have the potential to improve the quality of the documentation and enhance taxpayers' compliance with transfer pricing documentation requirements in EU Member States. It would thus reduce the risk of double taxation and exposure to documentation-related penalties. For tax administrations, the main advantage of the EU TPD approach is that all tax administrations involved would have access to the same common documentation and information in the masterfile element.
24. The EU TPD leaves some flexibility to taxpayers and to tax administrations as use of the EU TPD is optional for taxpayers while Member States may decide not to require transfer pricing documentation at all or to have transfer pricing documentation rules which require less information and documents than the EU TPD.
25. MNEs opting for the EU TPD should generally apply this approach collectively to all associated enterprises to which transfer pricing rules apply. However, some MNE groups have a decentralized organisational, legal or operational structure, or consist of several large divisions with completely different product lines and transfer pricing policies. In other cases the divisions of a MNE group have no inter-company transactions. Also, implementing a MNE's EU TPD in the group or in a recently acquired company may take some time. In all those cases, one single masterfile covering all EU group members might be inappropriate. In well justified cases, a MNE group should, therefore, be allowed to produce more than one masterfile or to exempt specific group members from the EU TPD.
26. A MNE group should not arbitrarily opt in and out of the EU TPD approach for its documentation purposes but should retain consistency and continuity in its documentation policy. Therefore, a MNE group that adopts the EU TPD should do so in a way that is consistent throughout the EU and from year to year.
27. Member States have to decide how to implement the EU TPD at national level, e.g. through domestic legislation, guidance, administrative practices, etc. so as to allow acceptance of the EU TPD at national level. The EU TPD should be implemented flexibly and should recognise the particular circumstances of the business concerned. In particular, smaller and less complex businesses (including SMEs) should not be expected to produce the amount or complexity of documentation that might be expected from larger and more complex businesses.
28. The masterfile should be provided and accepted in a commonly understood language for the Member States concerned. Translations of the masterfile should be made available only upon request. The country-specific documentation should be prepared in a language prescribed by the specific Member State concerned, even if the taxpayer has opted to keep the country-specific documentation in the masterfile.
29. The taxpayer should have to submit its EU TPD to the tax administration only at the beginning of a tax audit or upon specific request. However, each Member State retains the right to require, in its domestic law, a taxpayer to provide, upon specific

request or during a tax audit, more information and documents than would be contained in the EU TPD.

30. 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 the EU TPD or with a Member State's domestic documentation requirements and apply their documentation properly to determine their arm's length transfer prices.
31. 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 reasonable time additional information and documents going beyond the EU TPD.

3.4. Re-entry into force of the Arbitration Convention

32. After ratification by all Member States, the Protocol to the Arbitration Convention, re-entered into force on 1 November 2004 (with retroactive effect from 1 January 2000) inter alia extending its validity by periods of five years.
33. Considering the diverging positions taken by Member States during the interim period when not all Member States had ratified the Protocol (see Annex 1 to the first report⁶ of the JTPF) the Forum was of the opinion that discussing the different problems related to the re-entry into force of this instrument, in particular with regard to the tax treatment of pending cases, could be useful for finding common solutions and ensuring taxpayers' legal certainty.
34. The replies to a questionnaire on pending mutual agreement procedures (MAPs) under the EU Arbitration Convention that was sent to Member States' tax administrations revealed that a total of 109 cases were pending on 31 December 2004. In 64 of these cases the time already spent on the mutual agreement procedures exceeded two years and in 24 cases the taxpayer had made the request prior to 1 January 2000, which means that these cases had been pending for more than five years (unless the two-year time limit has been extended in accordance with Article 7(4) of the Arbitration Convention).
35. The results of the questionnaire clearly show the importance of the JTPF's work on the Code of Conduct for the effective implementation of the Arbitration Convention⁷. Member States are, therefore, urged to expedite reaching mutual agreements on their pending MAPs under the Arbitration Convention, especially as regards those cases on which more than two years have already been spent. Those Member States concerned with the 24 cases where the taxpayer made the request prior to 1 January 2000 are urged to set up advisory commissions, without further delay, and to submit the cases for arbitration, in order urgently to eliminate the double taxation.

⁶ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of business taxation from October 2002 to December 2003 and on a proposal for a Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990) (COM(2004) 297 final of 23 April 2004).

⁷ Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises OJ L 255, 20.8.1990, p. 10-24.

In the case of requests made by taxpayers before 1 November 2004, in line with the provisions of the Prolongation Protocol, the arbitration procedure (the second phase of the Convention) should be initiated as follows (unless the two-year time limit has been extended in accordance with Article 7(4) of the Convention):

- for cases where the mutual agreement procedure was initiated more than two years before 1 November 2004: as soon as possible after the Protocol entered into force, i.e. soon after 1 November 2004; and
- for cases where the mutual agreement procedure was initiated less than two years before 1 November 2004: two years after the commencement of the mutual agreement procedure.

3.5. Future work programme of the JTPF

36. At its meeting on 14 December 2004 the Forum agreed to discuss the following issues in 2005 and 2006:

- Alternative dispute avoidance and resolution procedures (including APAs and prior consultation);
- Interest and penalties relating to transfer pricing adjustments;
- Certain aspects of the interaction of the mutual agreement and arbitration procedure with administrative and judicial appeals; and
- The influence of accounting systems on transfer pricing (consequences and possibilities of more harmonized and integrated accounting systems on transfer pricing).

3.6. Monitoring

37. The Forum also agreed to assist the Commission in monitoring the implementation by Member States of the Code of Conduct on the effective implementation of the Arbitration Convention and the ratification process regarding the Convention on the accession of the ten new Member States to the Arbitration Convention⁸. This will allow the effectiveness of these instruments in the elimination of double taxation in connection with the adjustment of profits of associated enterprises to be assessed.

4. COMMISSION CONCLUSIONS

38. Considering the aforementioned report on the activities of the JTPF, once again the Commission can only express its satisfaction with the work done by the JTPF. The experts from the Member States and from business have examined the different issues in an open and constructive manner that has led to pragmatic proposals and recommendations for solutions.

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Not yet published in the OJ.

39. The Commission believes that the work achieved by the JTPF on transfer pricing documentation is a pragmatic solution to the problems posed by the significant differences in documentation requirements between Member States as indicated in the Commission study on *"Company Taxation in the Internal Market"*. A common approach on transfer pricing documentation should lead to a reduction of compliance costs and provide more consistency in transfer pricing documentation requirements in the EU.
40. The Commission considers the EU TPD to be the most appropriate and efficient approach to transfer pricing documentation on the growing intra-group cross-border trade transactions in the EU. This new approach will reduce tax obstacles to cross-border economic activities on the internal market.
41. The Commission fully supports the conclusions and suggestions contained in the JTPF's second report. On the basis of this work, the Commission has drawn up a proposal for a Code of Conduct on transfer pricing documentation for associated enterprises in the EU.
42. The Commission invites the Council to adopt the proposed Code of Conduct on transfer pricing documentation for associated enterprises in the EU and invites Member States to implement quickly the recommendations included in the Code of Conduct in their national legislation or administrative rules.
43. The Commission also fully supports the new work programme agreed by the JTPF at its meeting in December 2004 and expects substantive progress in the field of avoidance and resolution of tax disputes. The Commission will report on this issue as soon as the JTPF completes its work.
44. Member States are invited to report annually to the Commission on any measures they have taken further to this Code of Conduct and its practical functioning. On the basis of these reports, the Commission will periodically review this Code of Conduct.

EXPLANATORY MEMORANDUM

Taking into consideration the European Commission's Study "Company Taxation in the Internal Market"⁹, the Commission proposed in its 2001 Communication "Towards an Internal Market without obstacles - a strategy for providing companies with a consolidated corporate tax base for their EU-wide activities"¹⁰ the establishment of a "EU Joint Transfer Pricing Forum" (hereafter: JTPF). On 11 March 2002, the Council adopted conclusions welcoming this initiative. The Commission formally established the JTPF in June 2002.

A first Commission Communication¹¹ was issued in April 2004 and adopted by the Council in December 2004 on the activities of the JTPF from October 2002 to December 2003. This included a proposal for a Code of Conduct for the effective implementation of the Arbitration Convention¹² and certain related issues of the mutual agreement procedure under double tax treaties between Member States.

Considering the constructive results and the remaining important issues of the JTPF's work programme, the Commission decided in 2004 to extend until the end of 2006 the initial period of two years foreseen for the activities of the JTPF.

Transfer pricing documentation for associated enterprises in the EU was the second issue of the work programme discussed by the JTPF. An EU-wide common approach on documentation requirements was considered beneficial both for taxpayers, in particular in terms of reducing compliance costs and the exposure to documentation related penalties and for tax administrations due to enhanced transparency and consistency.

The JTPF discussed the purpose and content of good and effective documentation including the benefit of risk assessment and the issue of burden of proof, preparation, submission and storage of documentation, the question in which language transfer pricing documentation should be presented, the use of database searches for comparables and the application of transfer pricing documentation to permanent establishments.

In light of the pros and cons of the traditional approaches (a code of best practice, EU-wide standardized documentation rules and centralized (integrated global) documentation in particular in terms of legal certainty and flexibility, the JTPF eventually considered a new approach, the most appropriate, i.e. a standardized "EU Transfer Pricing Documentation" (EU TPD). The EU TPD consists of two main parts: (i) one set of standardized and consistent documentation relevant for all EU group members of a multinational enterprise ("MNE") group (the "masterfile"), and (ii) several sets of standardized documentation containing country specific information that fit together with the "masterfile".

⁹ "Company Taxation in the Internal Market" Commission staff working paper, SEC(2001) 1681 23.10.2001.

¹⁰ Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: "Towards an Internal Market without obstacles - a strategy for providing companies with a consolidated corporate tax base for their EU-wide activities" COM(2001) 582 final, 23.10.2001.

¹¹ "Communication on the work of the EU JTPF from October 2002 to December 2003 and on a proposal for a Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC 23 July 1990)" Com(2004) 297 final, 23.04.2004.

¹² Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ L 255, 20.8.1990, p. 10-24.

The main features of the EU TPD are: (i) standardisation of the documentation requirements necessary for a tax administration as a risk assessment tool and to obtain sufficient information for the assessment of the MNE group's transfer prices, (ii) the possibility for centralisation of the core part of the documentation (the "masterfile") at group level, and (iii) the availability to all EU Member States concerned of common standardised transfer pricing information relevant for all EU affiliates of a multinational enterprise.

The JTPF adopted its report and conclusions by consensus in May 2005. The work on transfer pricing documentation achieved by the JTPF is reported in a Commission Staff Working Document¹³.

The deliberations of the Forum and its report on documentation have clearly highlighted the need to provide all parties (Member States and the business community) with an instrument providing some recommendations in the field of transfer pricing related documentation.

The Commission supports the conclusions and the recommendations contained in the second report of the JTPF. Indeed, the new EU TPD approach reduces compliance costs and provides more simplicity, consistency and transparency in the area of transfer pricing.

Since the objective of the proposed action, namely setting up of a standardized and partially centralized (integrated global) documentation as regards transfer pricing for associated enterprises in the EU, should respect the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty establishing the European Community and should remain optional for companies, a Commission proposal for a Code of Conduct to be adopted by the Council is considered the most appropriate legal tool.

¹³ SEC(2005) Report on transfer pricing documentation prepared by the EU Joint Transfer Pricing Forum.

Proposal for a

CODE OF CONDUCT

on transfer pricing documentation for associated enterprises in the EU

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

HAVING REGARD TO the European Commission's study on "Company Taxation in the Internal Market"¹⁴, the proposal made by the Commission, in its 2001 communication "Towards an internal market without obstacles - A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities"¹⁵, for the establishment of a "EU Joint Transfer Pricing Forum" (hereinafter referred to as "JTPF"), the Council conclusions of 11 March 2002 welcoming this move and the establishment of the JTPF in June 2002,

WHEREAS:

1. The internal market comprises an area without frontiers in which the free movement of goods, persons, services and capital is guaranteed.
2. In an internal market having the characteristics of a domestic market, transactions between associated enterprises from different Member States should not be subject to less favourable conditions than those applicable to the same transactions carried out between associated enterprises from the same Member State.
3. 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.
4. This Code of Conduct provides Member States and taxpayers with a valuable instrument for the implementation of standardized and partially centralized transfer pricing documentation in the EU, with the aim of simplifying transfer pricing requirements for cross-border activities.
5. Standardized and partially centralized transfer pricing documentation required in Member States to support transfer pricing on an arm's length basis could help businesses to benefit more from the internal market.
6. Transfer pricing documentation in the EU must be viewed in the framework of the OECD Transfer Pricing Guidelines.

¹⁴ "Company Taxation in the Internal Market" Commission staff working paper, SEC(2001) 1681, 23.10.2001.

¹⁵ Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: "Towards an internal market without obstacles - A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities" COM(2001) 582 final, 23.10.2001.

7. Standardized and partially centralized documentation should be implemented flexibly and should recognize the particular circumstances of the business concerned.
8. 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 this Code of Conduct,

ACKNOWLEDGING that a common EU-wide approach on 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 due to enhanced transparency and consistency,

WELCOMING the 2005 Commission communication on the work of the EU Joint Transfer Pricing Forum in the field of business taxation and on a proposal for a Code of Conduct on transfer pricing documentation for associated enterprises in the EU,

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,

ACKNOWLEDGING that the implementation of this Code of Conduct should not hamper solutions at a more global level,

HEREBY ADOPT THE FOLLOWING CODE OF CONDUCT:

Without prejudice to the respective spheres of competence of the Member States and the Community, this Code of Conduct concerns the implementation of standardized and partially centralized transfer pricing documentation for associated enterprises in the EU.

1. Member States will accept standardized and partially centralized transfer pricing documentation for associated enterprises in the EU, i.e. the “EU TPD” referred to in the Annex, and consider it as a basic set of information for the assessment of a multinational enterprise (MNE) group's transfer prices.
2. The use of the EU TPD will be optional for a MNE 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 SMEs) 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; and
 - 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 standardized 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. This Code of Conduct is addressed to Member States but it is also intended to encourage MNEs to apply the EU TPD approach.
9. In order to ensure the even and effective application of this Code, Member States are invited to report annually to the Commission on any measures they have taken further to this Code and its practical functioning. On the basis of these reports, the Commission intends to report to the Council and may propose a review of the provisions of this Code.

ANNEX TO THE CODE OF CONDUCT

EUROPEAN UNION TRANSFER PRICING DOCUMENTATION (EU TPD)

SECTION 1

CONTENT OF THE EU TPD

1. A multinational enterprise (MNE) group's standardized and consistent EU TPD consists of two main parts: (i) one set of documentation containing common standardized information relevant for all EU group members (the "masterfile"); and (ii) several sets of standardized 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, a 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 organizational, legal and operational structure (including an organization 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, APAs 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; and
- 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 about 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. A 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 specific 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 specific Member State concerned.

SECTION 2

GENERAL APPLICATION RULES AND REQUIREMENTS FOR MNEs

10. Use of the EU TPD is optional for MNE groups. However, a 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. A 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, a 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 a 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 a 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 (cf. 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 (cf. paragraph 18).

21. Taxpayers should have 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 minimize 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 for 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 which apply to each enterprise in the group.

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 centralized or in a decentralized manner.

30. The way that documentation is stored - whether on paper, in electronic form or in any other system - 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 a MNE group has a decentralized organizational, 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, a 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:

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

STANDARDIZED 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 standardized set of documentation, i.e. each entity in a multinational group prepares its own documentation, but according to the same rules.

CENTRALIZED (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 standardized 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 standardized and of the centralized (integrated global) documentation approach. A multinational group would prepare one set of standardized and consistent transfer pricing documentation that would consist of two main parts: (i) one uniform set of documentation containing common standardized information relevant for all EU group members (the "masterfile") and (ii) several sets of standardized 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 standardized 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.