KPMG responds to European Commission public consultation on Transfer Pricing proposal

European Commission – Fair taxation – Business in Europe – Framework for Income Taxation – Profit allocation – Transfer Pricing

On December 27, 2023, KPMG[1] member firms in the EU submitted a response to the European Commission's (EC) public consultation on the Transfer Pricing initiative.

KPMG welcomes the EC's ambition to increase tax certainty for businesses, reduce the incidence of disputes between Member States and simplify the administration of transfer pricing obligations in the EU. The submission intends to provide constructive comments on specific areas within the Transfer Pricing Directive (TP Directive) proposal that may require careful consideration of the EC to effectively meet the objectives of the initiative. KPMG will respond separately to the public consultation on the BEFIT proposal.

Background

On September 19, 2023, the EC published its proposal for an EU TP Directive and initiated a call for public feedback on the text. The objective of the EC is to put an end to the divergence in status and role of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines) from Member State to Member State. According to the EC, the lack of harmonization of TP rules in the EU has fostered a complex and uneven playing field for taxpayers and has adverse effects on the EU Single Market.

To address these issues, the EC has therefore proposed a Directive, which would incorporate the OECD arm's length principle and OECD Transfer Pricing Guidelines into EU law. The Directive would also provide for the gradual development of common approaches in the EU to the practice of applying TP rules, including primary and

[1] The comment paper was produced on behalf of KPMG member firms located in the EU forming part of KPMG's Europe, the Middle East & Africa (EMA) region. Throughout the submission, "we", "KPMG", "us" and "our" refer to the network of independent member firms operating in the EU.

corresponding adjustments, the application and selection of appropriate TP methods and TP documentation requirements.

For more information on the initiative, please refer to Euro Tax Flash Issue 521.

KPMG's contribution

KPMG member firms in the EU were pleased to provide comments on the EC's TP Directive proposal. We share the EC's belief that establishing a binding set of rules applicable to tax administrations and taxpayers within the EU has the potential to lead to a simplified, consistent, and transparent ecosystem for taxpayers and tax administrations within the EU and to provide reduced ambiguity for all stakeholders that interact with the EU on transfer pricing matters. However, we believe that it is important that the TP Directive does not depart from the OECD TP Guidelines or their current most common interpretation as any deviations from the internationally endorsed principles would likely increase complexity and uncertainty rather than provide a more stable and certain environment for businesses operating in the EU. The key comments made by KPMG can be summarized as follows:

- Further clarification and harmonization on the interpretation of the OECD TP Guidelines within the EU would be useful for businesses in the EU, especially for the transactions stated in article 14(2) of the TP directive proposal. We recommend harmonizing interpretations in the areas where EU countries have (significant) divergent interpretations.
- We recommend eliminating the differences with the OECD TP Guidelines included in the TP Directive proposal, especially with respect to the priority provided for the CUP method and the "traditional transaction methods" in the OECD TP Guidelines but also using the full range (instead of the interquartile range) in case the range comprises results of relatively equal and high reliability.
- We recommend that the TP Directive proposal explicitly clarifies the issues concerning the timing mismatches on future amendments to the OECD TP Guidelines.
- We recommend using a threshold exceeding 50% instead of 25% for the definition of an associated enterprise in Article 5 of the TP Directive proposal. We believe that using a 25% threshold would create a disproportionate compliance burden for multinational enterprises.
- We welcome the provisions under Article 6 of the TP Directive proposal on the so-called "fast track" corresponding adjustments.
- We welcome the harmonization of the TP documentation requirements and suggest using existing Local and Master Files templates as included in Annex I – II to Chapter V of the OECD TP Guidelines as a common template across Member States. Furthermore, we recommend harmonizing (i) the criteria when the Local File and Master File documentation requirements apply taking into account differences in economies within the EU and (ii) simplified documentation requirements for small and medium-sized enterprises that will not fall under the Local File and Master File documentation requirements.

KPMG reiterates our support for initiatives that result in simplification and greater tax certainty for taxpayers, and that mitigate the risk for disputes between tax administrations, which are costly to both taxpayers and the Member States However, we highlight the need for alignment with the existing international framework so as not to undermine the EU's competitive position and create disruptions for taxpayers, which would jeopardize the benefits of the proposed Directive.

We also encourage the EC to work with stakeholders in developing the rules, as well as any further guidance on a common EU interpretation.

ETC Comment

Following the conclusion of the public consultation period, the EC is expected to review the feedback received with a view to informing discussions among the Member States in the appropriate Council working groups.

We note that as part of its program for the Presidency of the Council of the EU, Belgium welcomed the BEFIT package and expressed the intention to explore the usefulness of more unified tax rules in other fields over the long term. The Presidency may therefore want to progress work on the TP Directive file with a view to implementation from January 1, 2026, as proposed by the EC. To date, there has been no suggestion that this timeline would be postponed or delayed, but this will be something to monitor over the coming months.

As the legal basis for the proposal is Article 115 of the Treaty on the Functioning of the EU (TFEU), the proposal would require unanimous approval in the Council in order to be adopted. In this regard, it should be noted that some EU Member States (e.g. Finland and Sweden) have already questioned the need for such a Directive and have raised concerns that the rigid codification of the arm's length principle at EU level may limit flexibility and hinder the ability of EU countries to reach mutual agreements with third countries. The proposal is therefore likely to be subject to in-depth discussions and potential amendments following Council working group discussions.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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