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**Comments on the
Scoping of the future revision of Chapter IV
(administrative approaches) of the OECD's
Transfer Pricing Guidelines**

EBIT's Members at the time of writing this submission:
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EBIT Comments on the Scoping of the future revision of Chapter IV (administrative approaches) of the OECD's Transfer Pricing Guidelines

Jefferson VanderWolk
Head, Tax Treaties, Transfer Pricing and Financial Transactions Division
OECD/CTPA
2, rue André Pascal
75016 Paris
FRANCE

Sent via upload TransferPricing@oecd.org

Brussels, 20 June 2018

Dear Jeff,

EBIT's Members are grateful for the opportunity to provide comments on the OECD's public consultation running from 9 May – 20 June 2018 with regard to the scoping of the future revision of Chapter IV (administrative approaches) of the OECD's Transfer Pricing Guidelines ("TPG").

The comments provided in the present EBIT position paper are in line with the submission by EBIT from January 2015 to the OECD: <http://www.ebit-businessstax.com/pdf/pwc-ebit-comments-oecd-beps-action-january-2015.pdf>

Comments

Below are a number of issues that EBIT believes are important for Working Party no. 6 of the OECD on the Taxation of Multinational Enterprises to do further work on.

ICAP (International Compliance Assurance Programme)

Early in 2018, the OECD launched the ICAP pilot, which "is a voluntary programme that will use CbC Reports and other information to facilitate open and co-operative multilateral engagements between MNE groups and tax administrations, with a view to providing early tax certainty and assurance." ICAP aims to facilitate multilateral discussions between MNE groups and participating tax administrations and improve the effectiveness of current risk assessment processes.

Further benefits of ICAP for authorities and MNEs are the following:

- A duly informed and targeted use of CbCR information by tax authorities.
- A more efficient use of resources and a co-ordinated approach to engagement by tax authorities.
- A faster, clearer route to multilateral tax certainty for tax authorities and MNEs.
- Fewer disputes entering into MAP as less double taxation given provided multilateral tax certainty.

Due to the fact that ICAP intends to facilitate and improve the effectiveness of co-operative multilateral engagements for the involved stakeholders, which is also a general objective of Chapter IV of the OECD TPG - we suggest that this could also be a part of the revised Chapter IV of the OECD TPG in the future as it could prove particularly useful in the area of transfer pricing.

Co-operative compliance and joint initiatives

Co-operative compliance and similar joint initiatives between business and tax authorities help to increase transparency for all stakeholders involved. They help to reduce the risk of tax evasion and avoidance as well as double or multiple taxation, and they help to ensure tax certainty and to increase efficiency in tax audits for both tax administrations and taxpayers. EBIT considers that the OECD TPG could benefit from introducing a section describing the pros and cons of approaches such as co-operative compliance or similar approaches such as promoting the enhanced relationship.

EBIT recommends that in the area of transfer pricing, because of the immediate cross-border effects of the transactions, guidance be developed that helps streamline the approaches taken in the different countries. This could promote enhanced co-operative relations between tax administrations and taxpayers on the basis of mutual trust in order to prevent tax-related disputes or enhance their effective resolution at an early stage i.e. already at the stage of consideration of an audit, preparation of an audit or actually at the beginning or during an audit. Several countries have already introduced cooperative compliance programmes in order to improve compliance and counter tax avoidance. It could be useful to discuss and reflect the use of such programmes in particular in the area of transfer pricing and develop guidance drawn from the existing experiences.

In this context, early communication can prevent misunderstandings and inefficient allocation of resources from all stakeholders involved by helping to focus on the most critical aspects, which contribute to effective risk management. A cooperative approach should also imply the disclosure and understanding of the facts and circumstances of the case under consideration by the taxpayer. In light of this, the concept of “early notification” could be considered.

Based on our experience, we see that upon the opening of a tax audit, tax administrations tend to ask for information (for e.g. detailed financial information or documentation) that may go beyond what can be reasonably expected to be provided by the taxpayers at that point in time of the audit. In certain cases, taxpayers may also be challenged by information that is neither publicly available nor available to independent parties. EBIT considers that guidance on the type and level of information and cooperation that tax administrations can reasonably expect to receive during a tax audit would be helpful. We also anticipate that the amount of information which may reasonably be expected to provide could be substantially reduced if there is a co-operative compliance type agreement already in place with that tax administration and taxpayer. We recognise that part of the discussion is already covered in Chapter V Documentation, but in this respect a more broad review of international procedures, compliances practise, standardised approaches, etc. could be discussed.

In parallel, since the environment in which tax administrations and taxpayers are operating is undergoing fundamental changes as part of the digital transformation, EBIT considers that the concept of Tax Control Framework (and risk assessment) should be developed and taken further and that additional work on measures of effectiveness should be added.

Safe Harbours

EBIT welcomes the use of safe harbours. Although WP6 has decided that there is no need at this stage to revise or supplement the current guidance, EBIT believes that the guidance could still be improved.

In the 2013 revision of the section on safe harbours, three Draft Memoranda of Understanding (“MoU”) were developed on low risk distribution, low risk manufacturing and low risk research and development, respectively, to assist in the conclusion of bilateral or multilateral safe harbours, thus increasing the tax certainty and predictability for all stakeholders (MNEs as well as tax administrations) involved. In our day-to-day experience,

however, the use of such bilateral or multilateral safe harbours has been minimal. We therefore request WP6 to urge countries to commit to concluding such bilateral safe harbours, where they may be appropriate.

Furthermore, EBIT considers that the MoU should not be limited to the low risk transactions involving distribution, production and research and development, but rather should be extended to all low risk transactions, including low risk services and low risk financial transactions. Although under BEPS Action 8-10 a safe harbour on low value-adding intra-group services was developed (simplified approach), EBIT notes that not all services transactions that do not qualify as low value-adding are as a result high risk. In particular, the MoU could be beneficial for these kind of transactions. Further, we encourage the use of the safe harbour (simplified approach) on low value-adding intra-group services to be acknowledged and used on a more global scale.

Mutual Agreement Procedure (MAP)

The limited involvement or participation of MNEs in the MAP process was already flagged in the 1995 version of the OECD's TPG. EBIT regrets that up until today, the taxpayer is no more involved or participates more in the process. Although we understand that the MAP procedure is typically a process between tax authorities, we believe that all parties involved would benefit from more access to and participation of the taxpayer in the process.

In EBIT's view, the OECD TPG guidance needs to ensure predictable and timely access to MAP for the taxpayer. From our day-to-day experience, in order to gain access to MAP, in some cases the taxpayer needs to give up his rights to the local appeal process and/or not have certainty as to if/when MAP can be commenced. In some countries there is the expectation that the taxpayer has to pay the taxes assessed before going to MAP. The OECD TPG guidance should emphasize that this is against the outcomes of the BEPS Action 14 Report (for example Best practice 6: countries should take appropriate measures to provide for a suspension of collection procedures during the period a MAP case is pending) and guidance of the Manual on effective Mutual Agreement Procedure (for example best practice 19 on audit settlements and unilateral APAs).

Although the BEPS action 14 standard on MAP should guarantee access to the MAP, there is still no guarantee that the procedure will lead to an outcome that will resolve the taxation not in accordance with the treaty. Therefore we would urge developing guidance encouraging the use of arbitration for transfer pricing cases, or a commitment from the tax authorities 'to resolve the case' instead of 'endeavour to resolve' the case. With regard to arbitration, the possibility to resolve the case through an international dispute panel should be explored.

EBIT welcomes the peer review process to monitor the implementation of BEPS Action 14. We understand from the peer reviews that have been finished already that one issue relates to the resources available to the competent authority function. A lack of tax authority resources in relation to MAPs may lead to the postponement of the cases or preparation of the cases that are not ideal. The same applies to APAs. In our experience, there are cases whereby the tax authorities are currently not staffed to handle all the APA requests. WP6 guidance on MAPs and APAs should provide that sufficient resources (including knowledgeable human resources on transfer pricing) be put at the disposal of the competent authority function. It is encouraged that detailed guidelines for APAs are published and that taxpayers committing substantial resources to assist in the efficient progress through an APA process could be entitled to a 'fast-track' approach, especially for unilateral APAs, where there are fewer relationships that have and interests to be coordinated through the process.

As already indicated, we believe that with the incorporation of some minimum standards and best practises contained in BEPS Action 14 significant improvements were introduced with regard to the efficiency in tax dispute resolution proceedings. However, based on our day-to-

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day experiences, EBIT Members consider that it would still be very useful to consider a “fast-track” MAP for simple/low risk dispute cases.

For example, one could define which well-defined MAP cases could be resolved under this fast-track procedure, such as transactions involving the rendering of low value-adding intra-group services, transactions involving low risk manufacturing and distribution or low risk research and development. This simplification would ensure that qualifying MAP cases would be resolved within a relatively short period of time (e.g. we have experiences where such Agreements are obtainable within 1-2 months in some locations, compared to over 2 years in other locations for ostensibly the same issues, so would encourage a framework which could lead to an efficient acceleration of the certainty process). With regard to APAs, the OECD should find ways to speed up the APA renewal process when there have been no material changes to the functions, risks and assets.

When agreeing an APA, there should be an option in all countries for this to be rolled back to cover the years open for audit except where already covered by an existing APA. If available, there is an opportunity to ensure efficient use of tax authority and taxpayer resources if audits addressing the same issues are not raised on a concurrent basis to the APA process.

EBIT believes that the OECD could provide more clarity on acceptable comparables, since different tax authorities have different approaches, e.g. on the ranges for comparables, which results in Transfer Pricing disputes.

EBIT Members consider that secondary adjustments create complexity and likely double taxation, therefore they should be discouraged, and they should be managed as part of the MAP. There should not be a one-sided consequence and double taxation as a result of secondary adjustments.

EBIT's Members trust that the above comments are helpful and hope that they will be taken into account by Working Party 6 of the OECD. EBIT is always ready to discuss with the OECD and any other stakeholders.

Yours sincerely,

European Business Initiative on Taxation – June 2018

For further information on EBIT, please contact EBIT's Secretariat via Bob van der Made, Telephone: + 31 6 130 96 296; Email: bob.vandermade@pwc.com).

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