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Proposal for a

COUNCIL DIRECTIVE

on transfer pricing

{SWD(2023) 308-309 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

This proposal is part of the package known as ‘Business in Europe: Framework for Income Taxation’, or ‘BEFIT’. The package includes, next to this transfer pricing proposal which integrates key transfer pricing principles into EU law with the aim of putting forward certain common approaches for Member States, a second separate proposal which lays down a common set of rules for computing the tax base of large groups of companies in the EU.

Transfer pricing refers to the setting of prices for transactions between associated enterprises (i.e. members of the same Multinational Enterprise - MNE) involving the transfer of property or services. A significant volume of global trade consists of international transfers of goods and services, capital and intangibles (such as intellectual property) within an MNE; such transfers are called “intragroup transactions”.

The “intragroup transactions” are not necessarily governed by market forces but may largely be driven by the common interests of the group as a whole. Since tax calculations are generally based on entity-level accounts, the prices or other conditions at which these intragroup transactions take place will affect the relevant entities’ income and/or expenses in relation to those transactions, and as a consequence, will impact on the amount of profit each group entity records for tax purposes. A higher price increases the seller’s income and decreases the buyer’s income. A lower price decreases the seller’s income and increases the buyer’s income. The transfer price therefore influences the tax base of both the country of the seller and the country of the buyer involved in a cross-border transaction.

It is therefore important to establish the appropriate price, called the “transfer price”, for intragroup transfers. “Transfer pricing” is the general term for the pricing of transactions between related parties.

According to the current international standards, which have been developed by the Organisation for Economic Cooperation and Development (OECD)¹, cross-border transactions between related entities of a multi-national group must be priced on the same basis as transactions between third parties under comparable circumstances. This is known as “arm’s length principle” and is reflected in Article 9 (Associated Enterprises) of the OECD Model Tax Convention on Income and on Capital².

However, Article 9 does not set out detailed transfer pricing rules. Over time the OECD has developed the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations³ (OECD Transfer Pricing Guidelines) which provide guidance on the meaning and application of the arm’s length principle. Those guidelines have been developed as a non-binding instrument with the aim to assist MNEs and tax authorities in finding solutions to transfer pricing cases that minimize conflicts and limit litigation. The OECD Transfer Pricing Guidelines were first published in 1995 and are regularly updated.

¹ See OECD website: <https://www.oecd.org/>.

² OECD Model Tax Convention on Income and Capital (<https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm>).

³ OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (<https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>).

Article 9 of the OECD Model Convention is not considered to create a domestic transfer pricing regime if the arm's length principle has not been incorporated in the national law. In fact, it is generally understood that article 9 is not "self-executing" as to domestic application. However, jurisdictions normally have in place domestic legislation that ensures some harmonization on basic principles, in accordance with the arm's length standard, even if the application is not identical around the globe. Further, jurisdictions may have in place their own administrative guidance and/or regulations to better explain the national provisions and provide guidance on their interpretation.

The rationale of this proposal derives from the fact that almost all Member States are also members of the OECD⁴ and therefore committed to follow the OECD principles and recommendations. However, despite the political commitment by the majority of Member States, the status and role of the OECD Transfer Pricing Guidelines currently differs from Member State to Member State. In addition, at the level of the Union, transfer pricing rules are currently not harmonized through legislative acts, although all Member States have in place domestic legislation that provides for a common approach to the basic principles. Yet, this is not fully aligned. The fact that each Member State enjoys large discretion in interpreting and applying the OECD Transfer Pricing Guidelines gives rise to complexity and an uneven playing field for businesses.

For example, domestic legislation of Member States shows differences in the definition of 'associated enterprises' and in particular, on the notion of 'control' which is normally the precondition to apply transfer pricing. Certain Member States apply a threshold of 25% while others apply a threshold of 50% shareholding when it comes to determining whether the control criterion is met. It translates into businesses facing tax uncertainty, high compliance costs as well as frequent, time-consuming legal disputes leading, amongst others, to considerable amounts of legal fees and creating barriers to cross-border operations and high risks of double and/or over-taxation.

The risk of double taxation and over-taxation for businesses operating cross-border leads to a lack of tax certainty due to possible tax disputes⁵ between tax administrations of different Member States in cases where they take different views in relation to the treatment of a specific transaction within their corporate tax system. In a continuously more globalised and competitive world economy there is an increased need for more tax certainty in the Single Market. Thus, to increase tax certainty regarding their tax affairs, some businesses seek to obtain tax rulings from a tax authority in respect of the treatment of certain transactions. However, if the tax ruling is unilateral, other Member States concerned may still challenge the agreed treatment of such transactions. Therefore, even when a unilateral tax ruling is obtained, there is a real risk of tax disputes and possible double or over-taxation.

The complexity of the transfer pricing rules and their different implementation in national law of Member States gives rise to a number of other problems:

- **Profit shifting and tax avoidance**⁶: transfer prices can be easily manipulated to shift profit and be used in the context of aggressive tax planning schemes.

⁴ Malta, Cyprus, Bulgaria and Romania are not members of the OECD.

⁵ A large firm also pointed out that tax disputes related to intra-EU transfer pricing and withholding tax elimination increased.

⁶ At the beginning of the BEPS project in 2013, OECD estimates, while acknowledging the methodological and data limitations, that the scale of global corporate income tax revenue losses due to BEPS practices could be between USD 100 to 240 billion annually (see <https://www.oecd.org/tax/beps->

- **Litigation⁷ and double-taxation⁸**: transfer pricing is more subjective than other areas of direct and indirect taxation and, for this reason, sensitive to disputes as tax administrations do not always share a common interest and interpretation. This is because, to prevent double taxation, a well-founded primary (upward) adjustment by one tax administration should ideally be followed by a corresponding (downward) adjustment by the other. This implies that the second tax administration would have to reduce its tax base accordingly, which is most probably an option that a tax administration would preferably avoid taking.
- **High compliance costs**: Double taxation is already a considerable cost for businesses operating cross-border. In addition, also the tax compliance costs⁹ related to transfer pricing are significant. These costs result from the obligation on businesses to determine what prices could be regarded as arm's length, conducting studies and compiling and maintaining/updating the related documentation.

These tax barriers for businesses impede the proper functioning of the Single Market and hamper the prospect for achieving its potential in terms of efficiency gains. As a result, the competitiveness of the Single Market is undermined.

This proposal aims at simplifying tax rules through increasing tax certainty for businesses in the EU, thereby reducing the risk of litigation and double taxation and the corresponding compliance costs and thus improve competitiveness and efficiency of the Single Market. A clear outcome from both the targeted and public consultations was the business desire for tax, and more broadly, legal certainty. Tax certainty has always been a high priority for business, often highlighted as a more important concern than the tax rate. This has become an increasingly critical issue due to the vast number of ambitious reforms in international corporate taxation over the recent years.

[project-explanatory-statement-9789264263437-en.htm](https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2021-inventory-trends.htm#tpcases)); Transfer Pricing manipulation was identified as one of the BEPS practices. In particular, Actions 8-10 of the BEPS project were dedicated to enhancing the guidance on the arm's length principle to ensure that what dictates results is the economic rather than the paper reality. In this regard, the final report of Actions 8-10 seeks to align transfer-pricing outcomes with the value creation of the MNE group.

⁷ The OECD official statistics show that at the end of 2021 the number the pending Mutual agreement procedures (MAPs) activated to resolve double taxation arising from Transfer Pricing cases has increased by 33% compared to the 2016 (the MAP inventory at the end 2021 results were 6000 against the 4500 pending MAP cases at the end of 2016). OECD MAP statistics are available at: <https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2021-inventory-trends.htm#tpcases>. The EU official statistics on MAPs under the Arbitration Convention show an increase of transfer pricing disputes between Member States of 17% compared to the previous year (total MAP inventory of Member States at the end of 2020 was 2213 while total MAP inventory of the Member States at the end of 2019 was 1889). EU MAP statistics are available here: https://taxation-customs.ec.europa.eu/taxation-1/statistics-apas-and-maps-eu_en.

⁸ According to a survey on transfer pricing published by Ernst & Young (and available at http://www.ey.com/global/content.nsf/International/2007-2008_Transfer_Pricing_Global_Survey), one of the reasons why business considers transfer pricing a priority tax issue is indeed its connection with double taxation. According to the survey (interviews with 850 multinational companies across 24 countries (of which 11 EU Member States) were conducted), business have reported that 42% of cases of adjustment gave rise to a permanent double taxation. This is primarily because firms do not generally refer cases to mutual agreement procedures, as they consider the procedures too lengthy and costly.

⁹ According to the Company Tax Study conducted by the European Commission in 2001 (Taxation in the Single Market'. SEC (2001) 582 final) Medium-sized multinational enterprises are reported to spend approximately EUR 1 million to EUR 2 million a year on complying with transfer pricing rules. Large multinational enterprises incur compliance costs related to transfer pricing of approximately EUR 4 million to EUR 5.5 million a year.

This objective is achieved by: (1) incorporating the arm's length principle into Union law; (2) harmonizing the key transfer pricing rules; (3) clarifying the role and status of the OECD Transfer Pricing Guidelines; and (4) creating the possibility to establish, within the Union, common binding rules on specific transfer pricing subjects within the framework of the OECD Transfer Pricing Guidelines.

The proposal would provide a gradual development of common and consistent approaches among Member States' tax authorities to the interpretation and application of transfer pricing rules through the incorporation of the arm's length principle into Union law and the clarification of the role and status of the OECD Transfer Pricing Guidelines. Furthermore, the prospect for establishing common binding rules for Member States on specific transactions within the framework of the OECD Transfer Pricing Guidelines should improve businesses' resilience in the Union, reduce distortions and contribute towards a level playing field in the Single Market.

- **Consistency with existing policy provisions in the policy area**

This proposal for a Directive is fully consistent with existing EU policies in the field of direct taxation. It follows up to the Commission's and Union's efforts as part of its tax policy agenda to create a robust, efficient and fair tax framework, which delivers solid revenues and is conducive to growth as set out in the Business Taxation in the 21st century Communication in 2021¹⁰. This policy initiative aligns with the efforts to provide business with tax certainty and a level playing field, while ensuring that national governments can access fair and stable corporate tax revenues.

In 2016, the anti-tax avoidance directive (ATAD)¹¹ was adopted to ensure coordinated implementation in Member States of key measures against tax avoidance stemming from the internal Base Erosion and Profit Shifting Project actions and to lay down a number of specific and general anti-tax abuse rules. It was amended in 2017 to include further anti-avoidance rules regarding mismatches between tax systems¹².

In parallel, the directive on administrative cooperation (DAC)¹³ has, since its adoption in 2011, been revised and expanded on several occasions to allow a large-scale and timely exchange of tax related information between tax authorities across the Union to support the enforcement of Member States tax laws.

In particular, DAC3¹⁴ and DAC6¹⁵ are of specific relevance to this proposal due to their connection to transfer pricing. Under DAC3, national competent authorities, amongst others,

¹⁰ Communication on Business Taxation for the 21st Century see: https://taxation-customs.ec.europa.eu/communication-business-taxation-21st-century_en.

¹¹ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016L1164>).

¹² Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0952>).

¹³ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32011L0016>).

¹⁴ Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32015L2376>).

exchange automatically information related to so-called Advance Price Agreements (APAs)¹⁶. DAC6 regulates the automatic exchange of information on reportable cross-border arrangements which have been reported by intermediaries or by the relevant taxpayer. The reportable cross-border arrangements are identified on the basis of a number of “hallmarks”, which include different indicators of a potential risk of tax avoidance. Hallmark E relates to arrangements relevant to transfer pricing.

The proposal is also consistent with the past output of the Joint Transfer Pricing Forum (JTPF)¹⁷, an expert group which was set up by the Commission in 2002 to propose pragmatic, non-legislative solutions to practical problems posed by transfer pricing practices in the Union. The JTPF worked within the framework of the OECD Transfer Pricing Guidelines and operated on the basis of consensus. Building on the work done by the JTPF, the Commission initiated a set of co-ordinated measures, either guidance or recommendations, which were all subsequently endorsed by the Council. One of these is the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD)¹⁸, which is broadly followed by Member States. The mandate of the JTPF expired in March 2019 and it was not renewed.

The Arbitration Convention¹⁹ is also complementary to the proposal. It establishes a procedure to resolve disputes where double taxation occurs between enterprises of different Member States as a result of an upward adjustment of profits of an enterprise of one Member State. Whilst most bilateral double tax treaties include a provision for a corresponding downward adjustment of profits of the associated enterprise concerned, they do not generally impose a binding obligation on the Contracting States to eliminate the double taxation. The Arbitration Convention provides for the elimination of double taxation by agreement between the contracting states including, if necessary, by reference to the opinion of an independent advisory body. The Arbitration Convention thus improves the conditions for cross-border activities in the Internal Market.

In addition to the Arbitration Convention, the taxpayers can rely on the new rules on tax dispute resolution which apply since 1 July 2019. They are laid down in Council Directive on tax dispute resolution mechanisms in the European Union²⁰ and bring a significant improvement to resolving tax disputes, as they ensure that businesses and citizens can resolve disputes related to the interpretation and application of tax treaties more swiftly and effectively. The new rules also cover issues related to double taxation which occurs when two

¹⁵ Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0822>).

¹⁶ An APA refers to any agreement, communication or any other instrument or action with similar effects, determining in advance, an appropriate set of criteria for establishing the transfer price of cross-border transactions between associated enterprises or the attribution of profits to a permanent establishment.

¹⁷ See EU Joint Transfer Pricing Forum (JTPF) here: https://taxation-customs.ec.europa.eu/joint-transfer-pricing-forum_en.

¹⁸ 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2006.176.01.0001.01.ENG&toc=OJ%3AC%3A2006%3A176%3AFULL

¹⁹ Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC).

²⁰ Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32017L1852>).

or more countries claim the right to tax the same income or profits of a company or person. This can happen, for example, due to a mismatch in national rules or different interpretations of the transfer pricing rules in a bilateral tax treaty.

Finally, in July 2020, the Commission committed to develop, together with interested Member States, an EU Cooperative Compliance Framework, commonly called European Trust and Cooperation Approach (ETACA)²¹. Its purpose is to provide a clear, EU-wide framework for a preventive dialogue between tax administrations and business taxpayers in order to stimulate a preventive dialogue leading to the performance by the tax administrations of a high-level risk assessment of the transfer pricing policy adopted by large multinational enterprises. As a result, companies receive support in their internationalisation in order to avoid double taxation issues and reduce tax compliance costs. A pilot phase of the program has been concluded in March 2023 and the Commission services are currently evaluating whether and how to roll forward the program on a permanent basis.

Lastly, the Commission continues to support the implementation of its agenda for fair and simple taxation, such as the Directives mentioned above through its Technical Support Instrument²² and other Union programmes.

- **Consistency with other Union policies**

This proposal for a Directive is in line with the Commission's SME strategy on taxation and SMEs²³. Most SMEs consider taxation matters to be the most burdensome policy area that affects them. SMEs have many difficulties regarding tax matters, for example: direct taxation (income, capital, double taxation etc.), tax compliance costs and the administrative burden that arises from tax rules. Since our proposal aims at creating a common approach towards transfer pricing and thus create more tax certainty in this area across the Union for companies regardless of their size, SMEs will also benefit from a more harmonised approach which could lead to a reduction of compliance cost as well as increased certainty vis-à-vis tax authorities in the different Member States.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for legislative initiatives on taxation is Article 115 of the Treaty on the Functioning of the European Union (TFEU). Although no explicit reference to direct taxation is made, in this article, it does refer to issuing directives for approximating national laws that directly affect the establishment or functioning of the single market. It follows that, under Article 115 TFEU, directives are the appropriate legal instrument for the Union in this field. Based on Article 288 TFEU, directives will be binding as to the result to be achieved upon Member States but leave the choice of form and methods to the national authorities.

²¹ See ETACA website here: https://taxation-customs.ec.europa.eu/eu-cooperative-compliance-programme/european-trust-and-cooperation-approach-etaca-pilot-project-mnes_en.

²² Regulation (EU) 2021/240 of the European Parliament and of the Council of 10 February 2021 establishing a Technical Support Instrument, OJ L 57, 18.2.2021, p. 1.

²³ See Taxation and SMEs Website: https://single-market-economy.ec.europa.eu/smes/sme-strategy/taxation-and-smes_en.

- **Subsidiarity (for non-exclusive competence)**

In accordance with the subsidiarity principle laid down in Article 5 of the Treaty on the European Union, action at Union level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States acting alone and in addition, by reason of the scale or effects of the proposed action, can be better achieved by the Union.

The cross-border nature of the problem at stake requires a common initiative across the single market. Since transfer pricing is of inherent cross border nature, it can only be tackled by laying down legislation at Union level. This initiative is therefore in line with the subsidiarity principle, considering that individual uncoordinated action by the Member States would only add to the current fragmentation of the legal framework for transfer pricing and fail to achieve the intended results. A common approach for all Member States would have the highest chances of achieving the intended objectives.

A legislative initiative is therefore in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on the European Union.

- **Proportionality**

The envisaged measures do not go beyond the minimum necessary level of protection for the Single Market and are therefore compliant with the principles of proportionality. The Directive ensures a common approach with regard to the core transfer pricing principles and provides targeted rules for specific transactions where most added value for the Union can be created. A common arm's length principle standard and a more harmonised approach towards transfer pricing should result in a less fragmented application and interpretation of the arm's length principle across the Union which should reduce disputes, litigation and the overall compliance costs for businesses operating across the Union.

In this light, the proposal for a Directive does not go beyond what is necessary to achieve its objectives and is therefore compliant with the principle of proportionality.

- **Choice of the instrument**

The proposal is for a Directive, which is the only instrument permissible under the legal basis as prescribed in Article 115 of Treaty on the Functioning of the European Union.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

There is no previous existing Union legislation in the field of transfer pricing therefore no ex-post evaluations or fitness checks were performed.

- **Stakeholder consultations**

A call for evidence and an online survey on the broader BEFIT initiative were published from 13 October 2022 to 26 January 2023. Overall, the consultation activities received 123 contributions. Among those, there are 46 feedback contributions, 77 responses to the public consultation survey, of which 29 included written submissions. All contributions received from stakeholders were considered in the impact assessment.

- **Collection and use of expertise**

The Commission consulted and received input from various sources during the preparation of the proposal. Among others, the Commission relied on publicly available information, consulted with the OECD secretariat and received input from academics specialised in the field of transfer pricing by organising a virtual panel discussion.

- **Impact assessment**

An impact assessment was carried out to prepare the BEFIT initiative, of which this proposal is part. The draft impact assessment report was submitted to the Commission's Regulatory Scrutiny Board (RSB) on 26 April 2023. Following a meeting on 24 May 2023, the RSB delivered a positive opinion with reservations on 26 May 2023, suggesting some areas for further improvement regarding the costs and benefits of the overall BEFIT initiative. No further specific data was updated related to this proposal. The executive summary accompanying the impact assessment has been published under the following link: [to be added later]

The impact assessment, as revised following the recommendations from the RSB, examined the baseline option (i.e. no change) and two policy options:

Option 1: Inclusion of the OECD arm's length principle and Transfer Pricing Guidelines in EU law

This option is about harmonising the transfer pricing norms within the Union in the form of principles-based legislation. The arm's length principle would be integrated into Union law. In addition, the law would clarify the status and role of the OECD Transfer Pricing Guidelines and refer to the latest version thereof for the interpretation of the arm's length principle. By effect, the Guidelines would be turned into a binding tool but this would exclusively concern the (latest) version which would be incorporated in Union law; not any revisions thereof. The aim would be to ensure that Member States follow the same principle and have a common approach to applying transfer pricing.

Option 2: Inclusion of the OECD arm's length principle and Transfer Pricing Guidelines in EU law alongside the gradual development of common approaches to the practice of applying transfer pricing.

This option builds on Option 1 and would not only aim to ensure that EU Member States apply the same principle but would go a step further into implementing a mechanism which would ensure a coordination of views and interpretations of the OECD Transfer Pricing Guidelines among Member States.

As under Option 1, the arm's length principle would be incorporated in Union law and the legislation would clarify the role and status of the OECD Transfer Pricing Guidelines, but these would also be complemented with a mechanism for coordinating their interpretation and application at Union level. Additionally, this includes several provisions laying down the core rules of transfer pricing. This option would further establish specific anti-abuse rules in transfer pricing. It would also call for setting up of an expert group to discuss and agree on the interpretation of the arm's length principle ensure a coordinated interpretation and approach to practical problems that emerge from transfer pricing practices in the Union.

The two options were compared against the following criteria: effectiveness, efficiency, coherence and proportionality. In the impact assessment it was concluded that option 2 was the preferred option.

This proposal reflects this option 2 albeit with minor amendments. Firstly, the proposal does not include any specific anti-abuse rule. Yet, the proposal addresses the issue of downwards adjustments as a systematic rule in line with OECD Model Tax Convention approach. Secondly, binding rules regarding certain transactions are now envisaged to be issued in the form of Council implementing acts following a proposal by the Commission.

The Commission considers that a positive economic impact will materialise due to lower compliance costs both at the level of the tax administrations and the taxpayer due to more tax certainty and thus less tax disputes. The social and environmental impact is expected to be rather limited.

Fundamental rights

Fundamental rights, in particular the requirements concerning the protection of personal data under the General Data Protection Regulation ('GDPR')²⁴, are safeguarded. The personal data will only be processed to the extent and only as long as it is strictly necessary for their competent authorities to ensure compliance with their national tax legislation and mitigation of the risk of tax fraud, evasion or avoidance in Member States, in particular by verifying the correct application of the transfer pricing rules enshrined in this Directive.

4. BUDGETARY IMPLICATIONS

The main budgetary implications of the initiative for the Commission include additional human resources to cover the new tasks and the creation of an expert group. This expert group will be composed of experts in the area of transfer pricing and will provide the Commission with knowledge and expertise to consider which elements should be covered in the implementing acts that it will propose to the Council. The legislative financial statement provides details regarding the human and administrative resources required.

5. OTHER ELEMENTS

• Implementation plans and monitoring, evaluation and reporting arrangements

The Commission shall evaluate the Directive five years after national rules transposing the Directive come into effect and every five years thereafter.

For the purpose of monitoring and evaluating the implementation of the Directive, Member States shall provide the Commission with data on an annual basis reflecting relevant information on the functioning of the Directive. The relevant information is to be defined via an implementing act in line with the procedure stated in Article 17 of the proposal.

• Detailed explanation of the specific provisions of the proposal

The proposal can be divided into three parts: (1) the first part covers the arm's length principle and possible consequences of applying this principle; (2) the second part lays down core elements which are relevant for applying the arm's length principle; and (3) the third part includes a mechanism for establishing further common rules covering a limited set of subjects that will provide further simplification and tax certainty for taxpayers on the interpretation and application of the arm's length principle.

²⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

(i) The arm's length principle

The principle

Article 4 specifies that when the terms and conditions of cross-border intragroup transactions are not at arm's length, they must be adjusted to reflect the terms and conditions that would have been established between independent parties and the profits taxed accordingly.

For the purpose of this Directive, a permanent establishment should be treated as an associated enterprise and thus the general rule contained in article 4 is also relevant for the attribution of profit to permanent establishment. As a consequence, the internal dealings between head office and permanent establishment should be determined in accordance with the arm's length principle.

Under the arm's length principle, price of transactions between associated enterprises ("transfer prices") are tested and may be adjusted to reflect prices of comparable uncontrolled transactions.

For a transaction to be in scope of the general rule provided by article 4, it must take place between two associated entities. Thus, it is imperative to have a common definition of associated enterprise within the Union. Article 5 includes the definition of associated enterprise that Member States must implement for the purpose of applying the transfer pricing rules laid down in this proposal for a Directive.

Adjustments

Transfer pricing adjustments can be classified into two main categories: (i) those made by a tax administration after the company's tax return is filed, which can comprise primary adjustments and corresponding adjustments and (ii) those voluntarily made by the taxpayer before the company's tax return is filed, which are known as compensating adjustments.

Article 6 provides rules on how Member States should deal with primary and corresponding adjustments. Primary adjustments concern the increase of the taxable profits of a company, as a result of cross-border transactions with an associated enterprise not having been carried out at arm's length. Corresponding adjustments are made in response to a primary adjustment and aim at eliminating any double taxation which may occur as a result of a primary adjustment. In fact, when a tax administration increases a company's taxable profits in one tax jurisdiction (by means of a primary adjustment), a corresponding adjustment may be necessary in order to lower the tax liability of that company in the second tax jurisdiction involved.

The primary objective of paragraph 1 of Article 6 is to ensure that Member States have in place an adequate mechanism to enable them to make a corresponding adjustment when a primary adjustment is made in another jurisdiction. Where there is no corresponding adjustment taxpayers operating cross-border are likely to suffer double taxation, a situation that should be avoided. In this regards, Member States should have the possibility to perform corresponding adjustments and should consider not limiting the granting of such an adjustment in the context of mutual agreement procedures but also, for example, as results of a "fast-track" procedure when there is no doubt that the primary adjustment is well founded or joint audits.

In some cases, there may be legitimate reasons why a corresponding adjustment is not granted. Member States should not grant corresponding adjustments if: (i) the primary

adjustment is not considered to be consistent with the arm's length principle; (ii) the primary adjustment does not result in the taxation of an amount of profits in another jurisdiction on which the associated enterprise in the relevant Member State has already been subjected to tax; (iii) when a third country jurisdiction is involved, if there is no double tax treaty in place. In the absence of a primary adjustment, Member State can perform a downward adjustment only if (i) the downward adjustment is consistent with the arm's length principle; (ii) an amount equal to the downward adjustment is included in the profit of the associated enterprise in the other jurisdiction; (iii) a communication on the intention to perform the downward adjustment has been sent to the relevant jurisdictions. This is aimed at ensuring that Member States can preserve their national tax sovereignty and the right to assess whether the primary adjustment is at arm's length and that there is neither double taxation nor double non-taxation.

A "compensating adjustment" is defined in the Glossary of the OECD Transfer Pricing Guidelines as "an adjustment in which the taxpayer reports a transfer price for tax purposes that is, in the taxpayer's opinion, an arm's length price for a controlled transaction, even though this price differs from the amount actually charged between the associated enterprises". However, compensating adjustments are a cause of double taxation as they tend not to be recognised in all jurisdictions on the grounds that the tax return should reflect the actual transactions. To avoid litigation and establish a common approach to compensating adjustment within the Union, Article 7 provides the conditions under which Member States should recognise a compensating adjustment. This provision is inspired and should be interpreted in conjunction with the report JTPF/009/FINAL/2013/EN²⁵ on compensating adjustments approved by the Joint Transfer Pricing Forum in 2013.

(ii) Common core elements

Accurate delineation of the commercial and financial relations

Article 8 of the Directive provides that transfer pricing outcomes must be determined in accordance with the actual conduct of related parties in the context of the contractual terms of the transaction. To achieve this objective, the provision requires careful delineation of the actual transaction between the associated enterprises by analysing the contractual relations between the parties in combination with the conduct of the parties. In this regard, the critical first step of the transfer pricing analysis must be to accurately define the intercompany transactions by analysing their economically relevant characteristics, as reflected not only in the contracts between the parties, but also their conduct and any other relevant facts. The contractual terms should be the starting point for the analysis and to the extent that the conduct or other facts are inconsistent with the written contract, the parties' conduct (rather than the terms of the written contract) should be taken as the best evidence of the transaction(s) actually undertaken.

Transfer Pricing Methods

In line with chapter III of the OECD Transfer Pricing Guidelines, article 9 of the proposal for a Directive refers to the following main transfer pricing methods,

The "Comparable Uncontrolled Price Method" compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services

²⁵ EU Joint Transfer Pricing Forum Report on compensating adjustments (JTPF/009/FINAL/2013/EN): https://taxation-customs.ec.europa.eu/system/files/2016-09/jtpf_009_final_2013_en.pdf.

transferred in a comparable uncontrolled transaction in comparable circumstances. If there is any difference between the two prices, this may indicate that the conditions of the commercial and financial relations of the associated enterprises are not arm's length, and that the price of the controlled transaction may need to be substituted by the price of the uncontrolled transaction. The comparable uncontrolled price method can be applied on the basis of the taxpayer's transactions with independent enterprises (internal comparables), or on the basis of transactions between other independent enterprises (external comparables). Although this method is potentially available for all types of transactions, the product comparability requirement to be able to apply it in a reasonably reliable manner is especially high, because any product difference may materially affect the price of the transaction while it is often not practicable to determine reasonably accurate comparability adjustments for such product differences.

The "Resale Price Method" begins with the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. This price (the "resale price") is then reduced by an appropriate gross margin (the "resale price margin"), determined by reference to gross margins in comparable uncontrolled transactions, representing the amount out of which the reseller would seek to cover its selling and other operating expenses and, in light of the functions performed (taking into account assets used and risks assumed), make an appropriate profit. What is left after subtracting the gross margin can be regarded, after adjustment for other costs associated with the purchase of the product (e.g. customs duties), as an arm's length price for the original transfer of property between the associated enterprises.

The "Cost-Plus Method" begins with the costs incurred by the supplier of property or services in a controlled transaction for property transferred or services provided to an associated enterprise. An appropriate mark up, determined by reference to the mark up earned by suppliers in comparable uncontrolled transactions, is then added to these costs, to make an appropriate profit in light of the functions performed and the market conditions. Such arm's length mark-up may be determined by reference to the mark up that the same supplier earns in comparable uncontrolled transactions (an internal comparable), or by reference to the mark up that would have been earned in comparable transactions by an independent enterprise (external comparable). In general, the cost-plus method will use margins computed after direct and indirect costs of production or supply, but before the operating expenses of the enterprise (e.g. overhead expenses).

The "Transactional Net Margin Method" compares the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realises from a controlled transaction (or from transactions that are appropriate to aggregate and consider together) with the net profit margin earned in comparable uncontrolled transactions. The arm's length net margin of the taxpayer from the controlled transaction(s) may be determined by reference to the net margin that the same taxpayer earns in comparable uncontrolled transactions (internal comparables), or by reference to the net margin earned in comparable transactions by an independent enterprise (external comparables). In cases where the net profit margin is weighed against costs or sales, the transactional net margin method operates in a manner similar to the cost plus and resale price methods respectively, except that it compares the net profit margins arising from controlled and uncontrolled transactions (after relevant operating expenses have been deducted) instead of comparing a gross margin on resale or gross mark up on costs. Functional comparability is generally of greater importance than product comparability in applying the transactional net margin method.

The “Profit Split Method” identifies the combined profit from the controlled transactions in which the associated enterprises are engaged and then splits that profit between the associated enterprises on an economically valid basis with the aim to approximate the division of profits that would have been agreed at arm’s length between independent enterprises. This economically valid basis may be supported by independent market data (e.g. uncontrolled joint-venture agreements) or by internal data. The types of such internal data that are relevant to split the combined profit between the associated enterprises (“splitting factor/s”) will depend on the facts and circumstances of the case and may include, for example, allocation keys relating to the respective sales, research and development expenses, operating expenses, assets or headcounts of the associated enterprises. The splitting factor/s should reflect the respective contributions of the parties to the creation of income from the controlled transaction and be reasonably independent from transfer pricing formulation (i.e. it should be based on objective data (such as sales to unrelated parties), not on data relating to the remuneration of controlled transactions (such as sales to associated enterprises)).

The combined profit may be divided between the associated enterprises based upon a residual or a contribution analysis.

In the residual analysis, in a first step the routine profits attributable to contributions which can be reliably benchmarked, i.e. typically less complex contributions for which reliable comparables can be found, are identified and attributed to the associated enterprises. Ordinarily this initial remuneration would be determined by applying one of the traditional transaction methods or a transactional net margin method to identify the remuneration of comparable transactions between independent enterprises. Thus, it would generally not account for the return that would be generated by a second category of contributions which may be unique and valuable, and/or are attributable to a high level of integration or the shared assumption of economically significant risks. In a second step, any residual profit (or loss) remaining after allowing for the profits attributable to the first category of contributions would be based on an analysis of the relative value of the second category of contributions by the parties.

In the contribution analysis, differently than in the residual analysis, the combined profit is divided between the associated enterprises all at once based upon the relative value of the contributions made by each of the associated enterprises participating in the controlled transaction.

This proposal does not advocate any preference for any of the above listed recognised transfer pricing method. The rule provided for in Article 10 must be applied and thus the most appropriate method must be chosen taking into consideration the facts and circumstances of the specific case.

Paragraph two of Article 9 further provides that a transfer pricing method other than the approved methods provided in paragraph 1 can be applied only where it can be demonstrated that (i) none of the approved methods can be reasonably applied to determine arm’s length conditions for the controlled transaction, and (ii) such other method produces a result consistent with that which would be achieved by independent enterprises engaging in comparable uncontrolled transactions under comparable circumstances. The taxpayer or the tax administration asserting the use of a method other than the approved methods contained in paragraph 1 shall bear the burden of demonstrating that the requirements of paragraph 2 of Article 9 have been satisfied.

When the conditions provided for in paragraph 2 are fulfilled and an economic valuation technique is applied to identify an arm's length price, the content and recommendations of report JTPF/003/2017/FINAL/EN²⁶ on the use of economic valuation techniques in transfer pricing approved by Joint Transfer Pricing Forum in 2017 shall be taken in due consideration. The report provides a comprehensive description of valuation techniques and the specific elements that should be taken into consideration when using those for transfer pricing purposes.

Selection of the most appropriate Method

Article 10 of the Directive provides that the selection of a transfer pricing method must always aim at finding the most appropriate method for a particular case.

For this purpose, the selection process should take account of the respective strengths and weaknesses of the transfer pricing methods; the appropriateness of the method considered in view of the nature of the controlled transaction, determined in particular through a functional analysis; the availability of reliable information (in particular on uncontrolled comparables) needed to apply the selected method and/or other methods; and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate material differences between them. No one method is suitable in every possible situation, nor is it necessary to prove that a particular method is not suitable under the circumstances.

In general, the Comparable Uncontrolled Price method is an appropriate method for establishing an arm's length price for a) sales of commodities traded on a market, subject to the controlled transaction and comparable uncontrolled transaction(s) taking place in comparable circumstances, including at the same level of the commercial chain (e.g. sale to a secondary manufacturer, to a distributor, to a retailer, etc.), and b) some common financial transactions, such as the lending of money. Market prices (such as commodity prices or rates of interest) may be publicly available for these types of transactions.

The Resale Price method is most useful where it is applied to sales and marketing operations such as those typically carried out by a distributor. In some circumstances, the resale price margin of the reseller in the controlled transaction may be determined by reference to the resale price margin that the same reseller earns on items purchased and sold in comparable uncontrolled transactions (an internal comparable). In other circumstances the resale price margin may be determined by reference to the resale price margin earned by independent enterprises in comparable uncontrolled transactions (external comparables).

The Cost-plus method is most useful where a) goods are sold by a manufacturer that does not contribute valuable unique intangible assets or assume unusual risks in the controlled transaction, such as may be the case under a contract or toll manufacturing arrangement; or b) where the controlled transaction is the provision of services for which the provider does not contribute any valuable unique intangible assets or assume unusual risks.

The transactional net margin method operates in a manner similar to the cost plus and resale price methods respectively, except that it compares the net profit margins and it is useful

²⁶ EU Joint Transfer Pricing Forum Report on the use of economic valuation techniques in transfer pricing (JTPF/003/2017/FINAL/EN): https://taxation-customs.ec.europa.eu/system/files/2017-10/2017_10_16_jtpf_003_2017_en_final_en.pdf.

where there is no or limited publicly available reliable gross margin information on third parties and as a consequence, the former traditional transaction methods are difficult to apply. In general, it is observed that cost-based net profit margin indicators are used for manufacturing and service activities; sales-based indicators are used for sales activities; and asset-based indicators are used for asset-intensive activities. In any case, the selected financial indicator should be one that: (i) reflects the value of the functions performed by the tested party (i.e. the party to the controlled transaction for which a financial indicator is tested), taking account of its assets and risks; (ii) is reasonably independent from transfer pricing formulation, i.e. it should be based on objective data (such as sales to unrelated parties), not on data relating to the remuneration of controlled transactions (such as sales to associated enterprises); and (iii) is capable of being measured in a reasonably reliable and consistent manner at the level of the controlled transaction and of the comparable uncontrolled transaction(s).

One-sided methods (Resale Price, Cost Plus, Transactional Net Margin Method) are not reliable if each party to a transaction makes unique and valuable contributions in relation to the controlled transaction, or where the parties engage in highly integrated activities. In such a case, the profit split method is the most appropriate method, since independent parties might effectively price the transaction in proportion to their respective contributions, making a two-sided method more appropriate. Furthermore, since those contributions are unique and valuable there will be no reliable comparables information which could be used to price the transaction in a more reliable way, through the application of another method.

One-sided methods are appropriate in cases where one of the parties makes all of the unique and valuable contributions involved in the controlled transaction, while the other party does not make any unique and valuable contribution. In such a case, the tested party should be the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found. The party that does not make any unique and valuable contributions in relation to the transaction will most often be the one to which a one-sided transfer pricing method can be applied most reliably.

Comparability Analysis

The comparability analysis is the cornerstone for application of the arm's length principle.

In order to apply the arm's length principle, it is necessary to carry out a comparability analysis, which broadly consists of two key aspects: (i) identifying the commercial or financial relations between the associated enterprises and the conditions and economically relevant circumstances attaching to those relations; and (ii) comparing the conditions and economically relevant circumstances of transactions between associated enterprises (controlled transactions) with those of comparable transactions between independent enterprises (comparable uncontrolled transactions).

As regards the first aspect, Article 11 provides the comparability factors that Member States should take into account when identifying the circumstances of a controlled transaction. These factors are the contractual terms of the transaction, the functional analysis (the functions that each enterprise performs, taking into account assets used and risks assumed), the characteristics of the product or service object of a transaction, the economic circumstances, and the business strategies. Once the circumstances of the controlled transaction have been established, the actual comparison and assessment of whether the transaction is at arm's length has to take place. For that, it is necessary to identify which magnitude will be the object of

comparison (i.e. a transfer pricing method has to be selected); and with what it will be compared (i.e. a potential comparable uncontrolled transaction has to be identified).

A controlled and an uncontrolled transaction are regarded as comparable if the economically relevant characteristics of the two transactions and the circumstances surrounding them are sufficiently similar to provide a reliable measure of an arm's length result.

The two transactions do not necessarily have to be identical to be comparable. Instead, none of the differences between them should materially affect the arm's length price or profit; where such material differences exist, reasonably accurate adjustments should be made to eliminate their effect.

These adjustments (which are referred to as "comparability adjustments") are to be made only if the effect of the material differences on price or profits can be ascertained with sufficient accuracy to improve the reliability of the results.

Article 11 further specifies that Member States should ensure that the search for comparable uncontrolled transactions is based on a principle of transparency. This means that taxpayers should justify and document the steps of the searches vis-à-vis the tax administration, and, symmetrically, that the tax administration should provide the relevant information for these steps to the taxpayer, when preparing or challenging such searches.

In the search for comparables uncontrolled transactions, the recommendations contained in the report JTPF/007/2016/FINAL/EN²⁷ on the use of comparables within the EU approved by the Joint Transfer Pricing Forum in 2016 should be taken in due consideration.

Establishing the arm's length range

In some cases, application of a pricing method will produce a single result that is the most reliable measure of an arm's length result. In other cases, application of a method may produce a number of results from which a range of reliable results may be derived. In line with the best international practices, Article 12 prescribes that where the application of the most appropriate method produces a range of figures, the arm's length range must be determined using the interquartile range. The interquartile range is the range from the 25th to the 75th percentile of the results derived from the uncontrolled comparables.

In order to minimize disputes and ensure a common approach across the Union, the provision further prescribes that (i) a taxpayer should not be subjected to adjustment when its results fall within the interquartile range unless the tax administration or the taxpayer prove that a specific different positioning in the range is justified by the facts and circumstances of the specific case; (ii) when the results of a controlled transaction fall outside the arm's length range, tax administrations must make an adjustment to the median of all the results unless the taxpayer or the tax administration prove that any other point of the range determines a more reliable arm's length price in the specific case at hand.

Transfer Pricing Documentation

A major element of compliance for transfer pricing is the documentation to show that the relevant transactions are priced in line with the arms' length principle. Annex 2 shows the

²⁷ EU Joint Transfer Pricing Forum Report on the use of comparables in the EU (JTPF/007/2016/FINAL/EN): <https://taxation-customs.ec.europa.eu/system/files/2017-04/jtpf0072017encomps.pdf>.

basic elements for rules on the documentation and will be further specified by the Commission later on, in compliance with the provisions set out in Article 13, to possibly add elements like standard templates setting the type and content of transfer pricing information, timeframes to be covered, linguistic requirements and taxpayers in scope of the documentation obligation.

(iii) Application of the arm's length principle and future common rules on specific subjects

To ensure a common application of the arm's length principle the latest version of the OECD Transfer Pricing Guidelines will be binding when applying the arm's length principle in the Member States. As the OECD Transfer Pricing Guidelines will be amended from time to time these new guidelines should be the new binding reference framework. In order to ensure adherence to these new guidelines in the Member States the procedure pursuant to article 218 paragraph 9 of the Treaty on the Functioning of the European Union should be applicable. The Commission may in addition also propose an amendment to this Directive in order to reflect an amendment of the OECD Transfer Pricing Guidelines

In order to achieve the objective to create more certainty for taxpayers it is proposed to establish further common binding rules in the area of transfer pricing by way of implementing acts. These implementing acts will provide taxpayers with a clear view of what tax authorities in the Union would consider acceptable to be used for specified transactions and also provide so-called safe harbours that will bring down the compliance burden and the amount of disputes.

In view of the sensitive nature of such measures which touch on national executive and enforcement powers regarding direct taxation, the exercising of taxing rights allocated under bilateral or multilateral tax conventions that prevent double taxation or double non-taxation and given the potential financial ramifications on Member States' tax bases, implementing powers to adopt decisions under this Directive should be conferred on the Council, acting on a proposal from the Commission.

Proposal for a

COUNCIL DIRECTIVE

on transfer pricing

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament²⁸,

Having regard to the opinion of the European Economic and Social Committee²⁹,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) Transfer pricing refers to the setting of prices for cross-border transactions between associated enterprises within an MNE group. Since tax calculations are generally based on entity-level accounts, the prices or other conditions at which cross-border transactions between associated enterprises take place will affect the relevant entities' income and/or expenses in relation to those transactions, and as a consequence, will impact on the amount of profit each group entity records for tax purposes in the jurisdictions where they operate.
- (2) The globally recognised standard for determining the prices between associated enterprises for tax purpose is the so called "arm's length principle". The arm's length principle prescribes that individual group members of a MNE must transact with each other as if they were independent third parties. In other words, the transactions between two associated enterprises should reflect the outcome that would have been achieved if the parties were not related i.e. if the parties were independent of each other and the outcome (price or margins) was determined by (open) market forces.
- (3) Where Member States apply or interpret the arm's length principle differently, they create situations that could harm the internal market. Inconsistency in applicable transfer pricing rules not only could lead to double taxation but also allow for profit shifting and tax avoidance. Such inconsistency is a serious tax obstacle for businesses operating across borders, is likely to cause economic distortions and inefficiencies and has a negative impact on cross-border investment and growth.
- (4) This Directive lays down rules to ensure a common application of the arm's length principle across the Union with the aim of increasing tax certainty and reducing occurrences of double taxation as well as double non taxation.

²⁸ OJ C , , p. .

²⁹ OJ C , , p. .

- (5) To ensure that the arm's length principle is applied in a uniform way across the Union, Member States should apply a common definition of associated enterprises. In order to ensure equal treatment, a permanent establishment should be treated, for the purpose of this Directive, as an associated enterprise and thus the internal dealings between head office and permanent establishment should be determined in accordance with the arm's length principle.
- (6) To ensure the mitigation of double taxation, Member States should have adequate mechanisms in place to enable them, when a primary adjustment is made in another Member State or third country jurisdiction, to make a corresponding adjustment. In particular, Member States should have the possibility to perform corresponding adjustments and should not limit the granting of such an adjustment in the context of mutual agreement procedures (MAPs) but also as a result of: (i) a "fast-track" procedure to be concluded in 180 days without the need to open a MAP when there is no doubt that the primary adjustment is well founded; or (ii) joint audits or other forms of international cooperation such as multilateral risk assessment programs like the European Trust and Cooperation Approach (ETACA) and the International Compliance Assurance Programme (ICAP).
- (7) There may be legitimate reasons as to why a corresponding adjustment is not given or is less than the primary adjustment. In particular, Member States should not grant corresponding adjustments if: (i) the primary adjustment is not considered to be consistent with the arm's length principle; (ii) the primary adjustment does not result in the taxation of an amount of profits in another jurisdiction on which the associated enterprise in the relevant Member State has already been subject to tax; and (iii) when a third country jurisdiction is involved, there is no tax treaty in place. In the absence of a primary adjustment, Member States may perform a downward adjustment only if: (i) the downward adjustment is consistent with the arm's length principle; (ii) an amount equal to the downward adjustment is included in the profit of the associated enterprise in the other jurisdiction and therein subject to tax; and (iii) a communication on the intention to perform a downward adjustment has been sent to the relevant jurisdiction. The aim of the previous provisions is to ensure that: (i) Member States can preserve the right to assess whether the primary adjustment is at arm's length; and (ii) there is neither double taxation nor double non-taxation. Member States should not create situations of double non-taxation.
- (8) In order to establish a common approach to compensating adjustments within the Union and to avoid litigation, this Directive provides the conditions under which Member States should recognise a compensating adjustment. This provision should be interpreted in conjunction with the Commission's 2013 EU Joint Transfer Pricing Forum Report on compensating adjustments³⁰.
- (9) To ensure that transfer pricing outcomes are determined in accordance with the actual conduct of related parties, this Directive requires careful delineation of the actual transaction between the associated enterprises by analysing the contractual relations between the parties in combination with the conduct of the parties. In this regard, the critical first step of the transfer pricing analysis should be to accurately define the intercompany transactions by analysing their economically relevant characteristics, as reflected not only in the contracts between the parties, but also their conduct and any

³⁰ JTPF/009/FINAL/2013/EN, Meeting of 5 November 2013: https://taxation-customs.ec.europa.eu/system/files/2016-09/jtpf_009_final_2013_en.pdf

other relevant facts. The contractual terms should be the starting point for the analysis and, to the extent that the conduct or other facts are inconsistent with the written contract, the parties' conduct (rather than the terms of the written contract) should be taken as the best evidence of the transaction(s) actually undertaken.

- (10) Transfer pricing methods are used to establish the arm's length prices for transactions between associated enterprises. The methods listed in this Directive are in line with Chapter III of the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022 ('OECD Transfer Pricing Guidelines'). This Directive does not have a preference for any of these recognised transfer pricing methods. Instead, the most appropriate method rule provided for in this Directive should be applied and thus the most appropriate method should be chosen taking into consideration the facts and circumstances of the specific case. This Directive further provides that a transfer pricing method other than the OECD recognised methods may be applied only where it can be demonstrated that: (i) none of the OECD recognised methods can be reasonably applied to determine arm's length conditions for the controlled transaction (i.e. the transaction between associated enterprises); and (ii) such other method produces a result consistent with the result which would be achieved by independent enterprises engaging in comparable uncontrolled transactions under comparable circumstances. The taxpayer, or the tax administration, that uses a method other than one of the OECD recognised methods should bear the burden of demonstrating that the requirements have been satisfied. When the conditions are fulfilled and an economic valuation technique is applied to identify an arm's length price, the content and recommendations of the Commission's 2017 EU Joint Transfer Pricing Forum Report on the use of economic valuation techniques in transfer pricing³¹ should be taken into due consideration.
- (11) The selection of the transfer pricing method should always aim at finding the most appropriate method for a particular case. The selection process of the most appropriate transfer pricing method should take account of (i) the respective strengths and weaknesses of the transfer pricing methods; (ii) the appropriateness of the method considered in view of the nature of the controlled transaction, determined in particular through a functional analysis; (iii) the availability of reliable information (in particular on uncontrolled comparables) needed to apply the selected method or other methods; and (iv) the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate material differences between them. No one method is suitable in every possible situation, nor is it necessary to prove that a particular method is not suitable in a given set of circumstances. It should be noted that one-sided methods such as Resale Price, Cost Plus, Transactional Net Margin Method are not considered reliable if each party to a transaction makes unique and valuable contributions in relation to the controlled transaction, or where the parties engage in highly integrated activities. In such a case, the profit split method is the most appropriate method, since independent parties might effectively price the transaction in proportion to their respective contributions, in which case a two-sided method would be more appropriate. One-sided methods are appropriate where one of the parties makes all of the unique and valuable contributions

³¹ JTPF/003/2017/FINAL/EN, Meeting of 22 June 2017: https://taxation-customs.ec.europa.eu/system/files/2017-10/2017_10_16_jtpf_003_2017_en_final_en.pdf

involved in the controlled transaction, while the other party does not make any unique and valuable contribution. In such a case, the tested party, that is, the party to the controlled transaction for which a financial indicator is tested, should be the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found. The party that does not make any unique and valuable contributions in relation to the transaction will most often be the one to which a one-sided transfer pricing method can be applied most reliably.

- (12) In order to apply the arm's length principle, it is necessary to carry out a comparability analysis, which broadly consists of two key aspects: (i) identifying the commercial or financial relations between the associated enterprises and the conditions and economically relevant circumstances attached to those relations; and (ii) comparing the conditions and economically relevant circumstances of transactions between associated enterprises (controlled transactions) with those of comparable transactions between independent enterprises (comparable uncontrolled transactions). The comparability factors to be considered are (i) the contractual terms of the transaction, (ii) the functional analysis (the functions that each enterprise performs, taking into account assets used and risks assumed), (iii) the characteristics of the product or service which is the object of a transaction, (iv) the economic circumstances, and (v) the business strategies. Once the circumstances of the controlled transaction have been established, the actual comparison and assessment of whether the transaction is at arm's length should take place. For that, the conditions of the controlled transaction under examination should be compared to the conditions of a comparable uncontrolled transaction. A controlled and an uncontrolled transaction are regarded as comparable if the economically relevant characteristics of the two transactions and the circumstances surrounding them are sufficiently similar to provide a reliable measure of an arm's length result. The two transactions do not have to be identical to be comparable. Instead, none of the differences between them should materially affect the arm's length price or profit; where such material differences exist, reasonably accurate adjustments should be made to eliminate their effect. In the search for comparable uncontrolled transactions, the recommendations contained in the Commission's 2016 EU Joint Transfer Pricing Forum Report on the use of comparables within the EU³² should be taken into due consideration.
- (13) In order to minimise disputes and ensure a common approach across the Union, this Directive further provides that a taxpayer should not be subject to adjustment when its results fall within the interquartile range unless the tax administration or the taxpayer proves that a specific different positioning in the range is justified by the facts and circumstances of the specific case. When the results of a controlled transaction fall outside the arm's length range, tax administrations should be required to make an adjustment to the median of all the results unless the taxpayer or the tax administration proves that any other point of the range determines a more reliable arm's length price in a given case.
- (14) In order to lower the compliance burden for taxpayers that operate cross-border within the Union a common approach towards the documentation on transfer pricing should further be introduced. One standard template, rules on content and linguistic arrangements, timeframes and which taxpayers should be in scope would bring

³² Commission's 2016 EU Joint Transfer Pricing Forum Report on the use of comparables in the EU (JTPF/007/2016/FINAL/EN):<https://taxation-customs.ec.europa.eu/system/files/2017-04/jtpf0072017encomps.pdf>

simplicity and potential cost savings taking into account chapter V ‘Documentation’ of the OECD Transfer Pricing Guidelines and the Code of conduct on transfer pricing documentation for associated enterprises in the European Union³³.

- (15) The rules provided by this Directive should be applied in a manner consistent with the OECD Transfer Pricing Guidelines.
- (16) In order to create more certainty for taxpayers and mitigate the risk of double taxation, the possibility to establish further common transfer pricing binding rules by way of implementing acts is provided in this Directive. Those implementing acts should provide taxpayers with a clear view of what tax authorities in the Union would consider to be acceptable to be used for specified transactions and provide so-called ‘safe harbours’ that bring down the compliance burden and the number of disputes. In view of the potential impact of such measures on national executive and enforcement power regarding direct taxation, the exercising of taxing rights allocated under bilateral or multilateral tax conventions that prevent double taxation or double non-taxation and in view of potential impact on Member States’ tax bases, implementing powers to adopt decisions under this Directive should be conferred on the Council, acting on a proposal from the Commission.
- (17) In order to evaluate the effectiveness of the new rules set out in this Directive, the Commission should prepare an evaluation on the basis of the information provided by Member States and other available data.
- (18) To allow businesses to directly enjoy the benefits of the internal market without incurring an unnecessary additional administrative burden, information on the tax provisions set out in this Directive should be made accessible through the Single Digital Gateway (‘SDG’) in accordance with Regulation (EU) 2018/1724³⁴. The SDG provides a one-stop-shop for cross-border users for the online provision of information, procedures and assistance services relevant to the functioning of the internal market.
- (19) The processing of personal data carried out within the framework of this Directive should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council³⁵. Member States may process personal data under this Directive. .
- (20) The retention period of 10 years is justified in order to allow Member States to comply with most statutes of limitations.
- (21) In order to lower the administrative burden for taxpayers, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of the transfer pricing

³³ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C..2006.176.01.0001.01.ENG&toc=OJ%3AC%3A2006%3A176%3AFULL>

³⁴ Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012 (OJ L 295, 21.11.2018, p. 1).

³⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

documentation, by laying down common templates, setting linguistic requirements, defining the type of taxpayer to abide by these templates and the timeframes to be covered. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

- (22) Since the objective of this Directive cannot sufficiently be achieved by the Member States but can rather, by reason of the cross-border nature of the transfer pricing rules and the need to reduce compliance costs in the internal market as a whole, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (23) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council and delivered its opinion [to be inserted].

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Directive lays down rules to harmonise transfer pricing rules of Member States and to ensure a common application of the arm's length principle within the Union.

Article 2

Scope

This Directive applies to taxpayers that are registered in, or subject to, tax in one or more Member States, including permanent establishments in one or more Member States.

Article 3

Definitions

For the purposes of this Directive, the following definitions apply:

- (1) 'arm's length principle' means the international standard that prescribes that associated enterprises must transact with each other as if they were independent third parties. In other words, the transactions between two associated enterprises should reflect the outcome that would have been achieved if the parties were not related i.e. if the parties were independent of each other and the outcome (price or margins) was determined by (open) market forces.

- (2) ‘arm’s length result’ means the outcome of a controlled transaction if the conditions made or imposed between the associated enterprises in their commercial or financial relations had been those which would have been made between independent enterprises.
- (3) ‘arm’s length range’ means a range of figures that is acceptable for establishing whether the conditions of a controlled transaction are at arm’s length and that are derived from applying the same transfer pricing method to multiple comparable data;
- (4) ‘permanent establishment’ means a fixed place of business, as defined under the relevant bilateral convention on the avoidance of double taxation or, in absence thereof, in national law;
- (5) ‘independent enterprises’ means enterprises that are not associated enterprises within the meaning of Article 5;
- (6) ‘primary adjustment’ means an upward adjustment made to a company’s taxable profits by a tax administration in a first jurisdiction as a result of applying the arm’s length principle to transactions involving an associated enterprise in a second tax jurisdiction;
- (7) ‘corresponding adjustment’ means a downward adjustment to a company’s taxable profits made by the tax administration in a second jurisdiction as a consequence of a primary adjustment made by the tax administration in a first jurisdiction, so that the allocation of profits by the two jurisdictions is consistent;
- (8) ‘compensating adjustment’ means an adjustment in which the taxpayer reports a transfer price for tax purposes that is, in the taxpayer’s opinion, an arm’s length price for a controlled transaction, even though this price differs from the amount actually charged between the associated enterprises;
- (9) ‘comparable uncontrolled price method’ means a transfer pricing method that compares the price for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances;
- (10) ‘resale price method’ means a transfer pricing method based on the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise; the resale price being reduced by the resale price margin and the result, after subtracting the resale price margin, can be regarded, after adjustment for other costs associated with the purchase of the product, e.g. custom duties, as an arm’s length price of the original transfer of property between the associated enterprises;
- (11) ‘cost plus method’ means a transfer pricing method using the costs incurred by the supplier of property (or services) in a controlled transaction; an appropriate mark-up is added to these costs, to make an appropriate profit in light of the functions performed (taking into account assets used and risks assumed) and the market conditions; the price, after adding the mark-up to the proper cost base, may be regarded as an arm’s length price of the original controlled transaction;
- (12) ‘transactional net margin method’ means a transactional profit method that examines the net profit margin relative to an appropriate base, e.g. costs, sales, assets, that a taxpayer realises from a controlled transaction that it is appropriate to aggregate;
- (13) ‘profit split method’ means a transactional profit split method that shows the relevant profits to be split for the associated enterprises from a controlled transaction (or

controlled transactions that it is appropriate to aggregate) and then divides those profits between the associated enterprises on an economically valid basis that approximates the division of profits that would have been agreed at arm's length;

- (14) 'comparability analysis' means a comparison of a controlled transaction with an uncontrolled transaction;
- (15) 'controlled transaction' means a transaction between two associated enterprises;
- (16) 'comparable uncontrolled transaction' means a transaction between independent enterprises that is comparable to the controlled transaction under examination;
- (17) 'multinational enterprise group' ('MNE group') means a multinational enterprise group of associated enterprises with business establishments in two or more jurisdictions;
- (18) 'OECD Transfer Pricing Guidelines' means the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022, endorsed by the OECD Council pursuant to the OECD Council Recommendation of the Council on the Determination of Transfer Pricing between Associated Enterprises [C(95)126/Final], and as amended in January 20, 2022 and included in Annex I, and any further amendments to these OECD Transfer Pricing Guidelines that the Union approved in the context of the OECD Committee on Fiscal Affairs via the adoption of a Union position under 218(9) TFEU;
- (19) 'cost contribution arrangement' is a contractual arrangement among business enterprises to share the contributions and risks involved in the joint development, production or the obtaining of intangibles, tangible assets or services with the understanding that such intangibles, tangible assets or services are expected to create benefits for the individual businesses of each of the participants.

CHAPTER II

TRANSFER PRICING RULES

Article 4

General rule on the application of the arm's length principle

1. Member States shall ensure that, where an enterprise engages in one or more commercial or financial cross-border transactions with an associated enterprise, such enterprise determines the amount of its taxable profits in a manner that is consistent with the arm's length principle.
2. Member States shall ensure that, where the conditions made or imposed in commercial or financial cross-border transactions between associated enterprises are not consistent with the arm's length principle, then any amount of profits that would have accrued to either one of the enterprises and been taxable to that enterprise in a Member State if the conditions of the transactions had been consistent with the arm's length principle, but have not accrued to that enterprise due to the non-arm's length conditions, are to be included in the taxable profits of that enterprise and taxed accordingly.

Article 5
Associated enterprises

1. For the purpose of this Directive, ‘associated enterprise’ means a person who is related to another person in any of the following ways:
 - (a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;
 - (b) a person participates in the control of another person through a holding that exceeds 25 % of the voting rights;
 - (c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25 % of the capital;
 - (d) a person is entitled to 25 % or more of the profits of another person.
2. If more than one person participates in the management, control, capital or profits of the same person, as referred to in paragraph 1, all persons concerned shall be regarded as associated enterprises.
3. If the same persons participate in the management, control, capital or profits of more than one person, as referred to in paragraph 1, all persons concerned shall be regarded as associated enterprises.
4. For the purposes of paragraphs 1 and 2, a person shall mean both legal and natural persons. A person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.
5. In indirect participations, the fulfilment of the criteria set out in point (b) and (c) of paragraph 1 shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50 % of the voting rights shall be deemed to hold 100 % of the voting rights.
6. An individual, his or her spouse or recognised partner, in accordance with the applicable national law, and his or her lineal ascendants or descendants and his or her siblings shall be treated as a single person.
7. A permanent establishment shall be considered an associated enterprise of the enterprise of which it is a part of.

Article 6
Corresponding adjustments

1. When a primary adjustment is made, Member States shall ensure that they make a corresponding adjustment so as to prevent the double taxation if the following conditions are met:
 - (a) the Member State that was requested to perform the corresponding adjustment agrees that the primary adjustment is consistent with the arm’s length principle both in principle and as regards the amount;
 - (b) the primary adjustment results in the taxation of an amount of profits in another jurisdiction on which the associated enterprise in the Member State that was requested to perform the corresponding adjustment has already been subject to tax in such Member State;

- (c) where a third country jurisdiction is involved, a tax treaty is in force to prevent economic double taxation.
2. Member States may grant a corresponding adjustment as a consequence of a mutual agreement procedure under a double tax treaty under the 1990 intergovernmental Convention on Elimination of Double Taxation ('the Arbitration Convention')³⁶ or under Directive (EU) 2017/1852³⁷.
3. Notwithstanding paragraph 2, Member States shall ensure that a corresponding adjustment may be performed as a consequence of a taxpayer's request in view of a primary adjustment made in another jurisdiction. The following procedure shall apply to the corresponding adjustments performed under this paragraph:
- (a) the taxpayer's request shall:
 - (i) indicate all factual and legal circumstances necessary to evaluate, under the arm's length principle, the primary adjustment performed in the other jurisdiction;
 - (ii) provide a certificate (or equivalent document) attesting the definitive nature of the primary adjustment abroad; if the primary adjustment is still not definitive on the date of submission of the request, this is to be indicated along with the conditions for the adjustments to become definitive; the certificate of the definitive nature of the primary adjustment shall nonetheless be presented to the Member State concerned before the corresponding adjustment is granted.
 - (b) Member States shall declare the request admissible within 30 days by virtue of a notification to the taxpayer if all the information provided in paragraph 3, point (a), has been submitted. In the same timeframe, Member States shall notify the taxpayer of the lack of any necessary information and grant at least 30 days to provide it. If the taxpayer does not provide the requested information within the assigned deadline, the request may be rejected as inadmissible.
 - (c) Member States shall ensure that when the double taxation arises from a primary adjustment made in another Member State, the procedure is concluded within 180 days from the receipt of the taxpayer's request with a reasoned act of acceptance or rejection.
 - (d) In the case of acceptance, Member States shall communicate to the tax authority of the other relevant jurisdiction the recognition of the corresponding adjustment.
 - (e) Member States shall ensure that, when the corresponding adjustment is not granted, the taxpayer is still able to pursue mutual agreement procedures under a double tax convention, the Arbitration Convention or Directive (EU) 2017/1852.
4. Notwithstanding paragraphs 2 and 3, Member States shall ensure that a corresponding adjustment may be made as a consequence of joint tax audits or other

³⁶ Convention 90/463/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ L 225, 20.8.1990, p. 10).

³⁷ Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (OJ L 265, 14.10.2017, p. 1).

forms of international administrative cooperation when the following conditions are met:

- (a) the relevant tax administrations agree on the determination of the arm's length price;
 - (b) primary and corresponding adjustments are granted symmetrically for the same amount in all the relevant jurisdictions.
5. Notwithstanding paragraph 1, in the absence of a primary adjustment, Member States may perform a downward adjustment only if the following conditions are met:
- (a) the downward adjustment is consistent with the arm's length principle both in principle and as regards the amount;
 - (b) an amount equal to the downward adjustment is included in the profit of the associated enterprise in the other jurisdiction and taxed in both the Member State and the other jurisdiction and thus subject to double taxation;
 - (c) the Member State requested to perform the downward adjustment has communicated to the tax administration of the relevant jurisdiction the intention to perform a downward adjustment providing all the factual and legal circumstances necessary to evaluate the downward adjustment under the arm's length principle.

Article 7

Compensating adjustment

Member States shall ensure that a compensating adjustment in the form of year-end adjustment initiated by the taxpayer is accepted if the following conditions are met:

- (a) before recording the relevant transaction, or series of transactions, the taxpayer made reasonable efforts to achieve an arm's length outcome;
- (b) the taxpayer makes the adjustment symmetrically in the accounts in all Member States involved;
- (c) the taxpayer applies the same approach consistently over time;
- (d) the taxpayer makes the adjustment before filing the tax return;
- (e) the taxpayer is able to explain why its forecast did not match the result achieved.

Article 8

Identifying the commercial or financial relations

1. Member States shall ensure that the application of the arm's length principle starts with the identification and accurate delineation of, on the one side, the commercial and financial relations of the associated enterprises and, on the other, the actual transaction or transactions between the associated enterprises.
2. The identification and accurate delineation of the commercial and financial relations of the associated enterprises and the actual transaction(s) shall be based on the following aspects:
 - (a) a preliminary broad-based understanding of the industry sector in which the associated enterprises operate and of the factors affecting the performance of enterprises operating in that sector;

- (b) an analysis of how each associated enterprise operates, to identify its commercial or financial relations with associated enterprises;
- (c) an analysis of the economically relevant characteristics of the controlled transactions having regard to both their form and substance.

Article 9

Transfer pricing methods

1. Member States shall ensure that the arm's length price charged in a controlled transaction between associated enterprises is determined using one of the following transfer pricing methods:
 - (a) the comparable uncontrolled price method;
 - (b) the resale price method;
 - (c) the cost-plus method;
 - (d) the transactional net margin method;
 - (e) the profit split method.
2. In addition to those methods listed in paragraph 1, Member States shall allow for the application of any other valuation methods and techniques to estimate the arm's length price only if it can be demonstrated in a satisfactory manner that:
 - (a) none of the methods referred to in paragraph 1 is appropriate or workable in the circumstances of the case;
 - (b) the selected valuation method or technique is consistent with the arm's length principle and provides a more reliable estimate of the arm's length result than the methods listed in paragraph 1.

Article 10

The most appropriate method rule

1. Member States shall ensure that the arm's length price is determined by applying the most appropriate transfer pricing method to the circumstances of the case.
2. The most appropriate transfer pricing method shall be selected from among the transfer pricing methods set out in Article 9, taking into consideration the following criteria:
 - (a) the respective strengths and weaknesses of the transfer pricing methods;
 - (b) the appropriateness of a transfer pricing method in view of the nature of the controlled transaction, determined in particular through an analysis of the functions undertaken by each enterprise in the controlled transaction, taking into account assets used and risks assumed;
 - (c) the degree of comparability between the controlled and uncontrolled transactions, including the reliability of comparability adjustments, if any, that may be required to eliminate differences between them;
 - (d) the availability of reliable information needed to apply the selected transfer pricing method.

Article 11
Comparability analysis

1. Member States shall evaluate whether a controlled transaction produces an arm's length result by comparing the conditions of the controlled transaction with the conditions that would have been set, had the associated enterprises been independent and had they undertaken a comparable transaction under comparable circumstances.
2. Member States shall ensure that the transactions under analysis are comparable. In order to determine whether two or more transactions are comparable, the following factors shall be considered, to the extent that they are economically relevant to the facts and circumstances of a transaction:
 - (a) the contractual terms of the transaction;
 - (b) the functions performed by each of the parties to the transaction, taking into account assets used and risks assumed, including how those functions relate to the wider generation of value by the MNE group to which the parties belong, the circumstances surrounding the transaction, and industry practices;
 - (c) the characteristics of the property transferred or of services provided;
 - (d) the economic circumstances of the parties and of the market in which the parties operate;
 - (e) the business strategies pursued by the parties.
3. An uncontrolled transaction is comparable to a controlled transaction if either of the following conditions is met:
 - (a) none of the differences (if any) between the transactions being compared or between the enterprises undertaking those transactions could materially affect the price in the open market;
 - (b) reasonably accurate adjustments can be made to eliminate the material effects of such differences.
4. Member States shall ensure that the search for comparable uncontrolled transactions is transparent and reproducible.

Article 12
Determination of the arm's length range

1. Member States shall ensure that, when the application of the transfer pricing methods produces a range of values, the arm's length range is determined using the interquartile range of the results of the uncontrolled comparables.
2. The interquartile range is the range from the 25th to the 75th percentile of the results derived from the uncontrolled comparables.
3. Member States shall ensure that a taxpayer is not subject to adjustment if its results fall within the arm's length range, unless it is proven that a specific different positioning in the range is justified by the facts and circumstances of the specific case.
4. Member States shall ensure that, if the results of a controlled transaction fall outside the arm's length range, an adjustment is made to the median of all the results unless it is proven that any other point of the range determines an arm's length price taking

into consideration the circumstances of the specific case. The median is the 50th percentile of the range of results of the comparable uncontrolled transactions.

Article 13

Transfer pricing documentation

1. Member States shall ensure that a taxpayer has sufficient information and analysis available to verify that the conditions of its transactions with associated enterprises are in accordance with Article 4(1) and should at least encompass the elements referred to in articles 8, 9, 10, 11 and 12.
2. The Commission shall be empowered to adopt delegated acts, in accordance with Article 18, in order to further supplement the rule referred to in paragraph 1 with regard to the documentation, by laying down common templates, setting linguistic requirements, defining the type of taxpayer to abide by these templates and the timeframes to be covered .

CHAPTER III ORGANISATION

Article 14

Application of the arm's length principle

1. Member States shall include in the national rules transposing the transfer pricing rules laid down in Chapter II of this Directive provisions that ensure that those transfer pricing rules are applied in a manner consistent with the OECD Transfer Pricing Guidelines.
2. The Council may lay down further rules, consistent with the OECD Transfer Pricing Guidelines, on how the arm's length principle and the other provisions laid down in Chapter II of this Directive are to be applied in specific transactions to ensure more tax certainty and mitigate the risk of double taxation. Those specific transactions or dealings are the following:
 - (a) transfer of intangibles asset or rights in intangible assets between associated enterprises, including hard-to-value intangibles;
 - (b) the provision of services between associated enterprises, including the provision of marketing and distribution services;
 - (c) cost contribution arrangements between associated enterprises;
 - (d) transactions between associated enterprises in the context of business restructurings;
 - (e) financial transactions;
 - (f) dealings between the head office and its permanent establishments.
3. The rules referred to in paragraphs 2 shall be taken by means of Council implementing acts based on a proposal from the Commission.

CHAPTER IV FINAL PROVISIONS

Article 15

Evaluation

1. The Commission shall examine and evaluate the application of this Directive every 5 years and submit a report on its evaluation to the European Parliament and to the Council. The first report shall be submitted by 31 December 2031.
2. Member States shall communicate to the Commission relevant information for the evaluation of this Directive with a view to improving the application of the arm's length principle, to reducing double taxation as well as to combatting tax abuse, in accordance with paragraph 3.
3. The Commission shall, by means of implementing acts, specify the information to be provided by Member States in accordance with paragraph 2, and specify the format and the conditions of communication of that information. Those implementing acts shall be adopted in accordance with the examination procedure referred to in article 17.
4. The Commission shall keep the information communicated to it pursuant to paragraph 2 confidential in accordance with the provisions applicable to Union institutions and Article 16 of this Directive.
5. Information communicated to the Commission by a Member State under paragraph 2, as well as any report or document produced by the Commission using such information, may be transmitted to other Member States. The information shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it.

Article 16

Data protection

1. Member States may process personal data for the purposes of applying this Directive. When processing personal data for the purposes of this Directive, the competent authorities of Member States shall be considered as controllers, within the meaning of Article 4(7) of Regulation (EU) 2016/679, within the scope of their respective activities under this Directive.
2. Information, including personal data, processed in accordance with this Directive shall be retained only for as long as necessary to achieve the purposes of this Directive, in accordance with each data controller's national law on statute of limitations, but in any case no longer than 10 years.

Article 17

Committee procedure

1. The Commission shall be assisted by a Committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2014³⁸.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

³⁸ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13–18)

Article 18

Exercise of delegation

1. The power to adopt the delegated act referred to in Article 13 shall be conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Article 13 may be revoked at any time by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of the delegated act if already in force.
3. Before adopting the delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Inter-institutional Agreement on better law making of 13 April 2016.
4. As soon as it adopts the delegated act, the Commission shall notify it to the Council.
5. The delegated act adopted pursuant to Article 13 shall enter into force without delay and shall apply as long as no objection is expressed by the Council. The Council may object to the delegated act within two months of the notification of that act. That period shall be extended by two months at the initiative of the Council. In such a case, the Commission shall repeal the act immediately following the notification of the decision to object by the Council.

Article 19

Informing the European Parliament

The European Parliament shall be informed by the Commission of the adoption of delegated acts, of any objection formulated to them, and of the revocation of the delegation of powers by the Council.

Article 20

Transposition

1. Member States shall adopt and publish, by [31 December 2025]at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.
They shall apply those provisions from [1 January 2026].
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 21

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 22
Addressees

This Directive is addressed to the Member States.

Done at Strasbourg,

For the Council
The President

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

Directive on transfer pricing

1.2. Policy area(s) concerned

Tax Policy

1.3. The proposal/initiative relates to:

a new action

a new action following a pilot project/preparatory action³⁹

the extension of an existing action

a merger or redirection of one or more actions towards another/a new action

1.4. Objective(s)

1.4.1. General objective(s)

Increase of tax certainty; the proposal aims at increasing tax certainty by introducing a clearer and more common approach to transfer pricing across the EU.

1.4.2. Specific objective(s)

- 1) Introducing the Arm's length principle into EU legislation.
- 2) Clarifying the role of the OECD Transfer Pricing Guidelines.
- 3) Ensuring coherent application of the ALP across the Union
- 4) reduction of double taxation and double non taxation

1.4.3. Expected result(s) and impact

Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.

Clearer and more harmonised rules could also lead to a reduction of transfer pricing related disputes across the EU as well as a reduction of double taxation and double non taxation. A more common approach towards transfer pricing may lead to a reduction of costs related to compliance with transfer pricing rules in the different Member States.

1.4.4. Indicators of performance

Specify the indicators for monitoring progress and achievements.

- 1) Objective: Reducing the risk of double taxation and litigation.

Indicators: Number of double taxation disputes between Member States, which feature as "new entries" (after the Transfer Pricing Directive started to apply) in MAP procedures and Arbitration.

³⁹ As referred to in Article 58(2)(a) or (b) of the Financial Regulation.

Measurement Tools: Data collected by TAXUD on new MAPs and numbers of cases under the Arbitration Convention and Directive on tax dispute resolution mechanisms.

2) Objective: Increase in tax certainty

Indicators: Number of double taxation disputes between Member States, which feature as “new entries” (after the Transfer Pricing Directive started to apply) in MAP procedures and Arbitration.

Measurement Tools: Data collected by TAXUD on new MAPs and numbers of cases under the Arbitration Convention and Directive on tax dispute resolution mechanisms.

1.5. Grounds for the proposal/initiative

1.5.1. Requirement(s) to be met in the short or long term including a detailed timeline for roll-out of the implementation of the initiative

The Commission aims at proposing draft implementing acts regarding the majority of transactions listed in article 14 and provide further specification regarding uniform transfer pricing documentation listed in article 13 in the first 5 years of application of the Directive.

1.5.2. Added value of Union involvement (it may result from different factors, e.g. coordination gains, legal certainty, greater effectiveness or complementarities). For the purposes of this point 'added value of Union involvement' is the value resulting from Union intervention, which is additional to the value that would have been otherwise created by Member States alone.

Reasons for action at European level (ex-ante)

All EU Member States have implemented the arm's length principle into their domestic legislation. Still, domestic legislation of MS shows relevant differences. In addition, the status and role of the OECD Transfer Pricing Guidelines differ from Member State to Member State creating different interpretations of the arm's length.

Expected generated Union added value (ex-post)

Due to the inherent cross border element of transfer pricing the added value of the Union involvement stems from the possibility to establish an EU wide common approach towards transfer pricing which will result in greater tax certainty and can only be achieved at EU level.

1.5.3. Lessons learned from similar experiences in the past

This legislative initiative is new at EU level. Transfer Pricing rules are not harmonised at EU level through legislative acts. In the past, the Commission dealt with transfer pricing issues through the work of the Joint Transfer Pricing Forum (JTPF)⁴⁰, an expert group set up by the Commission in 2002 and whose work was to propose to the Commission pragmatic, non-legislative solutions to practical problems posed by transfer pricing practices in the EU. Its mandate expired in March 2019 and was not renewed.

⁴⁰ See EU Joint Transfer Pricing Forum (JTPF) here: https://taxation-customs.ec.europa.eu/joint-transfer-pricing-forum_en.

1.5.4. *Compatibility with the Multiannual Financial Framework and possible synergies with other appropriate instruments*

This Directive reflects one of the actions laid down in the 'Action Plan for fair and simple taxation supporting the recovery strategy'. Ensuring fair taxation requires preventing tax abuse. The Proposal will use similar procedures, arrangements and IT tools already established or under development under the DAC.

1.5.5. *Assessment of the different available financing options, including scope for redeployment*

In order to propose implementing act the Commission will need to engage with experts in the area of transfer pricing and will organise meetings to seek their advice. A permanent expert group might be set-up to accommodate the exchange of expertise. Relevant costs related to these meetings will be financed by the EU budget.

1.6. Duration and financial impact of the proposal/initiative

limited duration

- in effect from YYYY to YYYY
- Financial impact from YYYY to YYYY for commitment appropriations and from YYYY to YYYY for payment appropriations.

unlimited duration

- Implementation with a start-up period from YYYY to YYYY,
- followed by full-scale operation.

1.7. Method(s) of budget implementation planned⁴¹

Direct management by the Commission

- by its departments, including by its staff in the Union delegations;
- by the executive agencies

Shared management with the Member States

Indirect management by entrusting budget implementation tasks to:

- third countries or the bodies they have designated;
- international organisations and their agencies (to be specified);
- the EIB and the European Investment Fund;
- bodies referred to in Articles 70 and 71 of the Financial Regulation;
- public law bodies;
- bodies governed by private law with a public service mission to the extent that they are provided with adequate financial guarantees;

⁴¹ Details of budget implementation methods and references to the Financial Regulation may be found on the BUDGpedia site: <https://myintracomm.ec.europa.eu/corp/budget/financial-rules/budget-implementation/Pages/implementation-methods.aspx>

- bodies governed by the private law of a Member State that are entrusted with the implementation of a public-private partnership and that are provided with adequate financial guarantees;
- bodies or persons entrusted with the implementation of specific actions in the CFSP pursuant to Title V of the TEU, and identified in the relevant basic act.
- *If more than one management mode is indicated, please provide details in the 'Comments' section.*

Comments

2. MANAGEMENT MEASURES

2.1. Monitoring and reporting rules

Specify frequency and conditions.

The Commission will ensure that arrangements are in place to monitor and evaluate the functioning of the intervention and evaluate it against the main policy objectives.

Member States will submit data on an annual basis to the Commission with the information outlined in the above Table on indicators of performance which will be used to monitor compliance with the Directive. As monitoring data is available, and if deemed appropriate, the Commission will assess revising some its features in the implementing act for the reporting system.

An evaluation will take place five years after the implementation of the Directive which will allow the Commission to review the results of the policy with respect to its objectives as well as the overall impacts in terms of improving the uniform application of the arms' length principle across the EU and also reducing double taxation and double non taxation.

2.2. Management and control system(s)

2.2.1. Justification of the management mode(s), the funding implementation mechanism(s), the payment modalities and the control strategy proposed

The implementation of the initiative will rely on the competent authorities (tax administrations) of the Member States.

After adoption of the Directive the Commission will only be involved in preparing of the rules by way of implementing acts and would only act in case of infringements of the Directive.

2.2.2. Information concerning the risks identified and the internal control system(s) set up to mitigate them

The main elements of the control strategy are:

Procurement contracts

The control procedures for procurement defined in the Financial Regulation: any procurement contract is established following the established procedure of verification by the services of the Commission for payment, taking into account contractual obligations and sound financial and general management. Anti-fraud measures (controls, reports, etc.) are foreseen in all contracts concluded between the Commission and the beneficiaries. Detailed terms of reference are drafted and form the basis of each specific contract. The acceptance process follows strictly the

TAXUD TEMPO methodology: deliverables are reviewed, amended if necessary and finally explicitly accepted (or rejected). No invoice can be paid without an "acceptance letter".

Technical verification of procurement

DG TAXUD performs controls of deliverables and supervises operations and services carried out by contractors. It also conducts quality and security audits of their contractors on a regular basis. Quality audits verify the compliance of the contractors' actual processes against the rules and procedures defined in their quality plans. Security audits focus on the specific processes, procedures and set-up.

In addition to the above controls, DG TAXUD performs the traditional financial controls:

Ex-ante verification of commitments

All commitments in DG TAXUD are verified by the Head of the Finances and the HR business correspondent Unit. Consequently, 100% of the committed amounts are covered by the ex-ante verification. This procedure gives a high level of assurance as to the legality and regularity of transactions.

Ex-ante verification of payments

100% of payments are verified ex-ante. Moreover, at least one payment (from all categories of expenditures) per week is randomly selected for additional ex-ante verification performed by the head of the Finances and HR business correspondent Unit. There is no target concerning the coverage, as the purpose of this verification is to check payments "randomly" in order to verify that all payments were prepared in line with the requirements. The remaining payments are processed according to the rules in force on a daily basis.

Declarations of the Authorising Officers by Sub-Delegations (AOSD)

All the AOSD sign declarations supporting the Annual Activity Report for the year concerned. These declarations cover the operations under the programme. The AOSD declare that the operations connected with the implementation of the budget have been executed in accordance with the principles of the sound financial management, that the management and control systems in place provided satisfactory assurance concerning the legality and regularity of the transactions and that the risks associated to these operations have been properly identified, reported and that mitigating actions have been implemented.

2.2.3. *Estimation and justification of the cost-effectiveness of the controls (ratio of "control costs ÷ value of the related funds managed"), and assessment of the expected levels of risk of error (at payment & at closure)*

The controls established enable DG TAXUD to have sufficient assurance of the quality and regularity of the expenditure and to reduce the risk of non-compliance. The above control strategy measures reduce the potential risks below the target of 2% and reach all beneficiaries. Any additional measures for further risk reduction would result in disproportionately high costs and are therefore not envisaged. The overall costs linked to implementing the above control strategy – for all expenditures under Fiscalis programme – are limited to 1.6% of the total payments made. It is expected to remain at the same ratio for this initiative. The programme control

strategy limits the risk of non-compliance to virtually zero and remains proportionate to the risks entailed.

2.3. Measures to prevent fraud and irregularities

Specify existing or envisaged prevention and protection measures, e.g. from the Anti-Fraud Strategy.

The European Anti-fraud Office (OLAF) may carry out investigations, including on-the-spot checks and inspections, in accordance with the provisions and procedures laid down in Regulation (EC) No 1073/1999 of the European Parliament and of the Council³ and Council Regulation (Euratom, EC) No 2185/96⁴ with a view to establishing whether there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union in connection with a grant agreement or grant decision or a contract funded under this Regulation.

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

- Existing budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number	Diff./Non-diff. ⁴²	from EFTA countries ⁴³	from candidate countries and potential candidates ⁴⁴	from other third countries	other assigned revenue
	03 04 0100					
	Improving the proper functioning of the tax systems	Diff.	NO	NO	NO	NO

- New budget lines requested

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number	Diff./Non-diff.	from EFTA countries	from candidate countries and potential candidates	from other third countries	other assigned revenue
	[XX.YY.YY.YY]	Diff.	YES/NO	YES/NO	YES/NO	YES/NO

⁴² Diff. = Differentiated appropriations / Non-diff. = Non-differentiated appropriations.

⁴³ EFTA: European Free Trade Association.

⁴⁴ Candidate countries and, where applicable, potential candidates from the Western Balkans.

3.2. Estimated financial impact of the proposal on appropriations

3.2.1. Summary of estimated impact on operational appropriations

- The proposal/initiative does not require the use of operational appropriations
- The proposal/initiative requires the use of operational appropriations, as explained below:

EUR million (to three decimal places)

Heading of multiannual financial framework	Number	03 04 0100
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DG: TAXUD			Year 2025 ⁴⁵	Year 2026	Year 2027	Year	Year	Year	TOTAL
○ Operational appropriations									
Budget line ⁴⁶	Commitments	(1a)	0,065	0,065	0,065				0,195
	Payments	(2a)	0,065	0,065	0,065				0,195
Budget line	Commitments	(1b)							
	Payments	(2b)							
Appropriations of an administrative nature financed from the envelope of specific programmes ⁴⁷									
Budget line		(3)							
TOTAL appropriations for DG TAXUD	Commitments	=1a+1b+3	0,065	0,065	0,065				0,195
	Payments	=2a+2b	0,065	0,065	0,065				0,195

⁴⁵ Year N is the year in which implementation of the proposal/initiative starts. Please replace "N" by the expected first year of implementation (for instance: 2021). The same for the following years.

⁴⁶ According to the official budget nomenclature.

⁴⁷ Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former 'BA' lines), indirect research, direct research.

		+3								
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○ TOTAL operational appropriations	Commitments	(4)								
	Payments	(5)								
○ TOTAL appropriations of an administrative nature financed from the envelope for specific programmes		(6)								
TOTAL appropriations under HEADING <...> of the multiannual financial framework	Commitments	=4+ 6								
	Payments	=5+ 6								

If more than one operational heading is affected by the proposal / initiative, repeat the section above:

○ TOTAL operational appropriations (all operational headings)	Commitments	(4)								
	Payments	(5)								
TOTAL appropriations of an administrative nature financed from the envelope for specific programmes (all operational headings)		(6)								
TOTAL appropriations under HEADINGS 1 to 6 of the multiannual financial framework (Reference amount)	Commitments	=4+ 6								
	Payments	=5+ 6								

Heading of multiannual financial framework	7	‘Administrative expenditure’
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This section should be filled in using the 'budget data of an administrative nature' to be firstly introduced in the [Annex to the Legislative Financial Statement](#) (Annex 5 to the Commission decision on the internal rules for the implementation of the Commission section of the general budget of the European Union), which is uploaded to DECIDE for interservice consultation purposes.

EUR million (to three decimal places)

		Year 2025	Year 2026	Year 2027	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
DG TAXUD									
<input type="radio"/> Human resources		1.026	1.026	1.026					3.078
<input type="radio"/> Other administrative expenditure		0.052	0.052	0.52					0.156
TOTAL DG TAXUD	Appropriations	1.078	1.078	1.078					3.234

TOTAL appropriations under HEADING 7 of the multiannual financial framework	(Total commitments = Total payments)	1.078	1.078	1.078					
--	--------------------------------------	-------	-------	-------	--	--	--	--	--

EUR million (to three decimal places)

		Year N ⁴⁸	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL

⁴⁸ Year N is the year in which implementation of the proposal/initiative starts. Please replace "N" by the expected first year of implementation (for instance: 2021). The same for the following years.

TOTAL appropriations under HEADINGS 1 to 7 of the multiannual financial framework	Commitments	1.143	1.143	1.143						3.429
	Payments	0.065	0.065	0.065						0.195

3.2.2. *Estimated output funded with operational appropriations*

Commitment appropriations in EUR million (to three decimal places)

Indicate objectives and outputs ↓			Year N		Year N+1		Year N+2		Year N+3		Enter as many years as necessary to show the duration of the impact (see point 1.6)						TOTAL	
	OUTPUTS																	
	Type ⁴⁹	Average cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	Total No	Total cost
SPECIFIC OBJECTIVE No 1 ⁵⁰ ...																		
- Output																		
- Output																		
- Output																		
Subtotal for specific objective No 1																		
SPECIFIC OBJECTIVE No 2 ...																		
- Output																		
Subtotal for specific objective No 2																		
TOTALS																		

⁴⁹ Outputs are products and services to be supplied (e.g.: number of student exchanges financed, number of km of roads built, etc.).

⁵⁰ As described in point 1.4.2. 'Specific objective(s)...'

3.2.3. Summary of estimated impact on administrative appropriations

- The proposal/initiative does not require the use of appropriations of an administrative nature
- The proposal/initiative requires the use of appropriations of an administrative nature, as explained below:

EUR million (to three decimal places)

	Year 2025 ⁵¹	Year 2026	Year 2027	Year	Enter as many years as necessary to show the duration of the impact (see point 1.6)	TOTAL
--	----------------------------	--------------	--------------	------	--	-------

HEADING 7 of the multiannual financial framework								
Human resources	1.026	1.026	1.026					3.078
Other administrative expenditure	0.052	0.052	0.052					0.156
Subtotal HEADING 7 of the multiannual financial framework	1.078	1.078	1.078					3.234

Outside HEADING 7⁵² of the multiannual financial framework								
Human resources								
Other expenditure of an administrative nature								
Subtotal outside HEADING 7 of the multiannual financial framework								

TOTAL	1.078	1.078	1.078					3.234
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The appropriations required for human resources and other expenditure of an administrative nature will be met by appropriations from the DG that are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

⁵¹ Year N is the year in which implementation of the proposal/initiative starts. Please replace "N" by the expected first year of implementation (for instance: 2021). The same for the following years.

⁵² Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former 'BA' lines), indirect research, direct research.

3.2.3.1. Estimated requirements of human resources

- The proposal/initiative does not require the use of human resources.
- The proposal/initiative requires the use of human resources, as explained below:

Estimate to be expressed in full time equivalent units

	Year 2025	Year 2026	Year 2027	Year	Year	Year	Total
○ Establishment plan posts (officials and temporary staff)							
20 01 02 01 (Headquarters and Commission's Representation Offices)	6	6	6				6
20 01 02 03 (Delegations)							
01 01 01 01 (Indirect research)							
01 01 01 11 (Direct research)							
Other budget lines (specify)							
○ External staff (in Full Time Equivalent unit: FTE)⁵³							
20 02 01 (AC, END, INT from the 'global envelope')							
20 02 03 (AC, AL, END, INT and JPD in the delegations)							
XX 01 xx yy zz ⁵⁴	- at Headquarters						
	- in Delegations						
01 01 01 02 (AC, END, INT - Indirect research)							
01 01 01 12 (AC, END, INT - Direct research)							
Other budget lines (specify)							
TOTAL	6	6	6				6

XX is the policy area or budget title concerned.

The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Description of tasks to be carried out:

Officials and temporary staff	Preparing of meetings and correspondence with Member States, preparing the implementing acts, organise the meetings with experts, participate in meetings of the OECD. Currently DG TAXUD does not have the necessary resources, thus additional FTEs would need to be added in the future budget of DG TAXUD.
External staff	

⁵³ AC= Contract Staff; AL = Local Staff; END= Seconded National Expert; INT = agency staff; JPD= Junior Professionals in Delegations.

⁵⁴ Sub-ceiling for external staff covered by operational appropriations (former 'BA' lines).

3.2.4. *Compatibility with the current multiannual financial framework*

The proposal/initiative:

- can be fully financed through redeployment within the relevant heading of the Multiannual Financial Framework (MFF).

Explain what reprogramming is required, specifying the budget lines concerned and the corresponding amounts. Please provide an excel table in the case of major reprogramming.

- requires use of the unallocated margin under the relevant heading of the MFF and/or use of the special instruments as defined in the MFF Regulation.

Explain what is required, specifying the headings and budget lines concerned, the corresponding amounts, and the instruments proposed to be used.

- requires a revision of the MFF.

Explain what is required, specifying the headings and budget lines concerned and the corresponding amounts.

3.2.5. *Third-party contributions*

The proposal/initiative:

- does not provide for co-financing by third parties
- provides for the co-financing by third parties estimated below:

Appropriations in EUR million (to three decimal places)

	Year N ⁵⁵	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			Total
Specify the co-financing body								
TOTAL appropriations co-financed								

⁵⁵ Year N is the year in which implementation of the proposal/initiative starts. Please replace "N" by the expected first year of implementation (for instance: 2021). The same for the following years.

3.3. Estimated impact on revenue

- The proposal/initiative has no financial impact on revenue.
- The proposal/initiative has the following financial impact:
 - on own resources
 - on other revenue
 - please indicate, if the revenue is assigned to expenditure lines

EUR million (to three decimal places)

Budget revenue line:	Appropriations available for the current financial year	Impact of the proposal/initiative ⁵⁶							
		Year N	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			
Article									

For assigned revenue, specify the budget expenditure line(s) affected.

Other remarks (e.g. method/formula used for calculating the impact on revenue or any other information).

⁵⁶ As regards traditional own resources (customs duties, sugar levies), the amounts indicated must be net amounts, i.e. gross amounts after deduction of 20 % for collection costs.



EUROPEAN
COMMISSION

Strasbourg, 12.9.2023
COM(2023) 529 final

ANNEX 1

ANNEX

to the proposal for a Council Directive

on transfer pricing

[...]

ANNEX

OECD TRANSFER PRICING GUIDELINES

[OCED Transfer Pricing Guidelines](#)

COM (2023) Number 529

Information Note

1. Proposal

Proposal for a COUNCIL DIRECTIVE on Transfer Pricing

2. Date of Commission document

12 September 2023

3. Number of Commission document

COM (2023) 529

4. Number of Council document:

12954/23

5. Dealt with in Brussels by

Council Working Party on Tax Questions

6. Department with primary responsibility

Department of Finance

7. Other Departments involved

Revenue Commissioners

8. Background to, Short summary and aim of the proposal

This proposal was launched on 12 September 2023, as part of the package known as ‘Business in Europe: Framework for Income Taxation’, or ‘BEFIT’ which proposes a common framework for the corporate income tax base of large groups of companies in the EU.

Transfer pricing is a mechanism to determine the pricing of transactions between companies that are part of the same group. A significant volume of global trade consists of international transfers of goods and services, capital and intangibles, such as intellectual property, within a multinational group. These are called intra-group transactions. The current international best practice standards in this area are based on the OECD's ‘arm's length principle’ where transactions between associated entities must be priced on the same basis as transactions between third parties under comparable circumstances. This arm's length principle is further

elaborated in the OECD's Transfer Pricing Guidelines. Ireland has adopted the OECD Transfer Pricing Guidelines in Part 35A of the Taxes Consolidation Act 1997.

The aim of the transfer pricing proposal is to harmonise the implementation and application of transfer pricing rules within the EU with Member States taking a common approach. The proposal seeks to incorporate the arm's length principle and other elements of the OECD's Transfer Pricing Guidelines into EU law, to clarify the role and status of the Guidelines within the Union, and to create the possibility to establish, within the Union, common binding rules on how the arm's length principle should be applied to specific transactions.

The Commission outlines that the proposal would reduce the opportunities for companies to use transfer pricing for aggressive tax planning purposes, increase tax certainty and mitigate the risk of litigation and double taxation.

9. Legal basis of the proposal

Article 115 TFEU.

10. Voting Method

Unanimity

11. Role of the EP

Consultation

12. Category of proposal

Major significance

13. Implications for Ireland & Ireland's Initial View

While Ireland already adopts OECD Transfer Pricing Guidelines, the approach proposed calls for broad harmonisation and removes flexibility for Member States to operate national systems. In discussing the file it will be important to ensure that transfer pricing rules at EU level for specific transactions do not create difficulties or uncertainty for taxpayers, and nor should it create a divergence in understanding of the globally accepted arm's length standard both within the EU and vis-à-vis third countries.

14. Impact on the public

Limited direct impact on the public.

15. Have any consultations with Stakeholders taken place or are there any plans to do so?

The Commission outlines that Transfer Pricing was considered as part of the wider public consultation on the broader BEFIT proposal published on 13 October 2022, that consultation received 123 contributions. This proposal is covered by the same impact assessment report. A further public consultation opened on 19 September for a period of 8 weeks. The 8 week feedback period is being extended every day until the proposals are available in all EU languages. The Department of Finance intends to also consult with Irish stakeholders on the broader BEFIT proposal including through bilateral meetings.

16. Are there any subsidiarity issues for Ireland?

The Commission note outlines that the proposal is cross border and a common initiative across the single market and thus that the initiative is in line with the subsidiarity principle. Notwithstanding this, issues of subsidiarity may arise as the file is negotiated. Ireland like

many Member States already apply transfer pricing guidelines at a national level and it remains to be seen if the Directive is necessary to achieve greater alignment at EU level in order to deliver the objectives outlined and improve the certainty of outcomes for taxpayers. It will also be important to ensure that any extension of the scope of transfer pricing rules at a national level is also necessary to achieve these objectives.

17. Anticipated negotiating period

To be established. Linked to the wider BEFIT negotiations.

18. Proposed implementation date

1 January 2026

19. Consequences for national legislation

The Taxes Acts will need to be amended in order to transpose the Directive if agreed.

20. Method of Transposition into Irish law

If agreed at Council, primary legislation via a Finance Bill amendment to the Taxes Consolidation Act will be likely be required to transpose this directive.

21. Anticipated Transposition date

31 December 2025

22. Consequences for the EU budget in Euros annually

None

23. Contact name, telephone number and e-mail address of official in Department with primary responsibility

Ciaran Parkin

EU/International Tax

D/Finance

ciaran.parkin@finance.gov.ie

Contact: (01) 773 7688

Date: 10 October 2023