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EU JOINT TRANSFER PRICING FORUM

Monitoring of the Code of Conduct on EU transfer pricing documentation

Business members' contributions

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Business Members (BMs) have submitted contributions from two sources and in differing formats (word and excel).

The first source is JTPF BMs responding on behalf of their corporate groups together with responses from BM professional advisors drawn from their client base. Section 1 of this document details the responses.

The second source is from BusinessEurope invited by BMs to make a response to the questionnaire. The BusinessEurope summary is at Section 2 of this document. The excel document called 'BusinessEurope data on EUTPD' on which that summary is based is provided separately.

I. Contributions received from JTPF's corporate groups and advisers in word format.

Invitation to European Business to respond to a questionnaire on the implementation of the Code of Conduct[1] on transfer pricing documentation for associated enterprises in the European Union (EU TPD).

Preamble:

This questionnaire is based on the Council resolution dated 27/C176/ 2006. The main purpose of the questions are to establish the extent to which the EU TPD has been taken up by MNEs throughout the Member States and what value the adoption of an EU TPD approach is adding to an efficient application of transfer pricing rules to in turn assist the smoother functioning of an internal market balanced with the desire to minimise compliance costs.

The questionnaire also addresses some more specific points contained within the Code and concludes with an invitation for any other comments. A similar questionnaire was sent to the tax administrations.

Finally, when responding to the questionnaire please bear in mind that the application of EUTPD was agreed to apply equally to documentation requirements for the attribution of profits to permanent establishments.

This questionnaire is addressed to tax directors and to tax advisors.

Q1. Based on your own knowledge, would you assess the extent to which the EUTPD option has been adopted by (your) MNEs: to be at the level of minimal, medium, extensive?

ANSWER:

- On November, 2006, the Belgian tax administration issued an internal transfer pricing circular letter with respect to TP audits and TP documentation (November 11, 2006), in

[1] See Coc in annex

which they explicitly refer to the EU TPD and formally adopt the principles and guidelines as set out by the JTPF. As such, the adoption in Belgium can considered to be extensive.

- Medium level acceptance, but hardly any formal adoption: the EUTPD is by MNE's and tax advisors perceived as guidance for determining a documentation strategy and consistent cross-country TP documentation approach.
- Minimal
- Extensive.
- A distinction needs to be made between those countries that have introduced formal transfer pricing legislation which is based on EUTPD and those where the application of the EUTPD concept is not imposed by local legislation. For the first group of countries, MNE's are legally obliged to the follow EUTPD (e.g. Romania, Greece, etc) making the question of level of take-up less relevant. In all other countries, the application of EUTPD is dependent on the assessment of groups on how to best structure their transfer pricing documentation and develop their transfer pricing defence strategy. Based on what we see in practice, few groups have in these circumstances spontaneously formally opted into EU TPD.
- *Medium, but in a two years timeframe it will be extensive*

Q2. Depending on your assessment of the level of take up:

(i) What in your view has contributed to the levels of take up?

ANSWER:

- The issuance of the November 2006 administrative circular which explicitly embeds the EU TPD principles has certainly contributed to the extensive level of take up within the Belgian TP practice.
- The guidance towards the EU member countries in combination with the cooperation between tax authorities and MNE's.
- MNEs often have related party transactions outside the EU area. Based on our knowledge, MNEs accordingly prefer a general OECD approach that allows master file and country specific documentation, which is more flexible compared to the EUTPD.

  Further, domestic documentation requirements in general reflect the scope and content for documentation as set out in the Code of Conduct. Accordingly, it is the view of many Danish MNEs that the Code of Conduct does not add specific privileges for MNEs operating within the EU area.

  Certain paragraphs of the Code of Conduct may from the viewpoint of MNEs rather be seen as a less flexible solution for documentation purposes than adding privileges:

  Para. 4.2(d) requires full disclosure of transaction flows and amounts involving associated enterprises in the EU. Based on our knowledge, this information may better be placed in the country specific documentation.

  Para. 4.2(h) requires a list of APAs and rulings involving group members within the EU. Based on our experience, many MNEs prefer to disclose this information to the involved tax administrations only. Accordingly, this information may be better placed in the country specific documentation.

Para. 4.2(i) requires an undertaking from the involved group members to provide supplementary information upon the request of the domestic tax administration. In our experience, this paragraph adds to the administrative burden of taxpayers, since the information is not limited to information that is deemed *reasonable* by the domestic tax administration and the taxpayer. This is also the case for para. 18.

The purpose of para. 12 seems unclear and adds to the administrative burden of taxpayer (According to the Danish documentation requirements, taxpayer should only submit documentation on the request of the Danish tax administration. Based on our experience, informing the tax administration upfront when opting for EUTPD adds another requirement for information not deemed necessary by many Danish MNEs).

Para. 20 does not exempt MNEs from the domestic penalty provisions in place and does not add any privileges for MNEs operating within the EU.

- The adoption of the Code of Conduct conclusions through legal and regulatory instruments.
- The main hurdle for (spontaneously) formally opting into EUTPD (hence resulting in a relatively low level of take-up) is the fact that the level of (transactional) detail which is required both in the Masterfile and the Local Country Files is high and that MNE's seem to be reluctant to share such information in every European jurisdiction MNE is active in, regardless of the size of the operations in that particular jurisdiction (e.g. a MNE might be reluctant to share an APA obtained in Member State A with authorities in Member State B).
- Desire for standardisation
- Italy has no specific documentation obligation in respect of intercompany transactions. Of course, taxpayers are expected to be able to support their transfer pricing policy and prove it is in compliance with the arm's length standard, however how they can achieve that goal it is basically left to them. In other words, Italy's tax administration is more interested on what documentation should do – provide evidence of "market" pricing – rather than the format of the documentation itself. In addition, because of the lack of specific documentation provisions, there is no penalty relief achievable just based on the presence of such a documentation: The advantage of having the latter in place relates therefore "just" on the higher likelihood of the taxpayer being able to persuade tax offices/courts about the fairness of his/her intercompany transfer prices. Nevertheless, it must be noted that the EUTPD is accepted in Italy as providing a comprehensive example of TP documentation, valid in the whole EU.
- The main reason for the minimal level of adoptance of the EUTPD in Poland is the higher extend of information required by the EUTPD compared to the Polish documentation rules. The Polish do not require an economic analysis. 2. The second reason is for consintency purposes the EUTPD documentation documents major transactions leaving not-documented transactions with lower values, one-off transactions and domestic (non cross-border transactions). In Poland, all above transactions should be documented if their value is over the regulatory thresholds, which are relatively low. 3. The third reason is that the master file has to be translated into Polish language, which is not cost efficient
- Main reason for the progressive very efficient adoption is that the new Spanish regulations passed 2 years ago are following very closing the EU code of conduct recommendations. Additionally, the introduction to the law, clearly states for the very

frist time that for any clarification or interpretation, tax payer has to go to either the OCDE guidelines of the EU code of conduct

- reduction of burden - it is more efficient to make one "master document" with local chapters - as this eliminates the requirement to draft a "full document" for each country
- Legal requirements - The EU JTPD approach is an efficient way to meet documentation requirements especially if you follow global models.
- Strong convincement of the top management on the usefulness of such a standarized and comprehensive documentation and on the benefit which might arise from its adoption
- structured approach to document I/C transactions in an efficient way

Negative impact:

- Organizational complexities and strong and deep integration between central and local management is necessary for preparing and keeping updated the documentation
- EU TPD approach is understood to provide mandatory transparency for authorities involved

(ii) What in your view could be done to improve the levels of take up?

ANSWER:

- Issuing further guidance towards the EU member countries geared towards practical implementation.
- The take up may be improved, if the Code of Conduct adds privileges for MNEs operating within the EU area or imposes a lesser administrative burden for taxpayers:

  Para. 9 states that country specific documentation should be prepared in a language prescribed by the Member State concerned. For MNEs with a centralised transfer pricing function, this paragraph adds to the administrative burden of the tax payer. The level of take up for EUTPD may be improved if a common language (e.g. English) was agreed to be accepted in all Member States.

  Para. 20 does not allow for penalty protection under domestic transfer pricing regulations. The level of take up for EUTPD may be improved if a penalty protection was in fact introduced when opting for EUTPD.
- To the contrary, in Spain it should be mitigated. The combination of the Code of Conduct conclusions with the already existing domestic legislation on transfer pricing has given rise to a very large extension of the documentation obligations, in terms of: (a) companies obliged; (b) transactions to be covered by the documentation; and (c) information to be provided. (See Q7 and Q9 below).
- Please refer to the response under Q2 (iii).[bullet 4 starting with “The following issues…”]
- No “improving” in the levels of take-up is foreseeable until documentation requirements are explicitly introduced in the Itlaian regulations and specific penalties for non-compliance are associated with it.
- Higher level of use if EUTPD will require higher consistency between EUTPD and the PL tp rules, in the three areas stated above. This may increase documentation requirements and lead to higher compliance costs in Poland

- Additional security from applying the EU TPD
- Simplify the EU TPD
- Limit the requirements in the EU TPD (not all information included in the master file is necessary)
- Strict requirements and extention of personal liabilities, fixed by domestic law would increase the local management awarness and commitment
- English language should be openly accepted by all MS without any exceptions
- reduce requirement for Master- / Country files
- increase legal certainty in adopting EU TPD approach
- country specific documentation is according to CoC to be prepared in country language which is an obstacle in preparing the set of documents

(iii) Please detail any key issues either of principle or content that in your view may prevent wider adoption of the Code.

ANSWER:

- See above under íi.
- Para. 4.2(i) and para. 18 may constitute too strong a remedy for tax administrations to require more and different information by specific request (even considering para. 19).
- N/A
- The following issues are encountered:

On the contents:

1. EU TPD covers all group entities resident in the EU including controlled transactions between enterprises resident outside the EU and group entities resident in the EU. Question is why a MNE would voluntarily disclose related party transactions with non-EU residents.

2. In principle all EU resident entities should be covered by the EU TPD regardless of any materiality (for that particular MNE). We are however not in favour of imposing documentation requirements based on a fixed materiality threshold as materiality should be regarded on a case by case basis.

3. The EUTPD adopts very much a transactional approach often imposing an additional administrative burden for MNE's wanting to formally comply with EU TPD. MNE's sometimes take the stance that as long as the profit presented on a legal entity level is arm's length (factoring in relevant function and risk profile), this should be defendable during a tax audit. Such legal entity approach is – sensu stricto - not compliant with EU TPD.

4. The level of details required under EU TPD package is high. In this respect not all MNEs are willing to share this level of detail with tax authorities in all relevant EU jurisdictions. As a mere example, reference can be made to the obligation to share rulings, APA's or cost contribution arrangements.

On the application:

1. EU TPD may be felt to lack flexibility in terms of entrance and exit. Arguments are obviously available for a consistent and coherent transfer pricing approach across Europe, yet MNE's perceive entrance/exit as an additional hurdle.

2. Under EU TPD, MNE using EU TPD should inform its tax administration thereof. Such notification might – at least that is the perception – trigger a tax audit.

3. EU TPD provides penalty protection (to the extent properly complied with). MNE's not active in countries with penalties have hence little incentive to adopt EU TPD.

4. The Code urges tax authorities to minimise costs in respect of translation and Member States should accept documents in foreign language as far as possible. However, practice reveals that e.g. a number of (Eastern) European countries still require a translation. A similar remark goes for the need for local comparables.

- The UK "rules" on what document should consist of are less prescriptive in certain ways than other jurisdictions. The UK focuses more on what documentation should do – provide evidence of a/l pricing – rather than the format of the documentation itself. The EUTPD was designed to provide a ceiling on TP documentation rules in the EU; since the UK is general thought to be below that ceiling, the EUTPD has proved of less relevance.We do not see that "improving" the levels of take-up is generally in point since this might well increase documentation requirements in the UK

- The Code sets forth a standard, but does not prevent Member States of putting into place more stringent documentation requirements. In other words, even if a MNE formally opts for EU TPD, this does not necessarily imply that the MNE will meet all documentation requirements in the Member States.
- If from formal application of the EU TPD there would be an increased certainty of deductibility / penalty prevention (over and above just meeting documentaton compliance requirements) then we would expect the approach to be adopted more frequently and formally. The same would be true if the EU TPD would put a more limited burden on tax payers / would be simplified.
- Very different and not standardised requirements of domestic law among countries might prevent a wide adoption of the EU TPD
- Issue of transparency

Q3. In your experience where your (an) MNE has not formally opted into the EUTPD are you aware that the content of EU TPD (Section 1 of the Code) has nonetheless been adopted internally, in part or whole, by the MNE (s)?

ANSWER:

- In our experience, formal option into the EU TPD almost never occurs. We have been assisting MNEs with the production of pan-European TP documentation. The approach and content is oftentimes based on EU TPD, but depending on the scope (and budget) of the project, MNEs tend to prefer preparing a 'master file' that can be rolled-out locally when needed at the moment a local audit occurs. This 'master file' is usually produced

in line with the guidelines of EU TPD, without following in full detail all requirements. We are aware of only a very few MNEs which choose to fully prepare EU TPD.

- See Q1: The EU TPD approach is more often used as a further guidance in developing the TPD strategy for a MNE.
- Based on our experience, MNEs have adopted a general OECD approach that allows master file and country specific documentation, which is more flexible compared to the EUTPD.
- In Spain, TPD is mandatory and not optional. Therefore, MNEs doing business in Spain have to comply with the TPD obligations in any case.
- Our experience shows that MNE's starting to document their inter-company dealings increasingly use the ideas behind EUTPD to come to an appropriate level of documentation, i.e. basically using two layers of documentation in a cost effective and consistent manner by avoiding duplication of efforts on a central and local level.
- UK: Not in a way that could be said to be purposefully based on the EUTPD
- IT: Yes, we are, although in a limited number of cases
- Yes, though 1. In limited cases and 2. On the basis of subjective selection of certain parts of Section 1 that will best suit the Polish needs

Q4. Based on your experience to what extent do you consider the Code has (or has not) contributed to any improvement and its consistency of application in dealings with tax administrations in the area of transfer pricing documentation.

ANSWER:

- The Code certainly has its merits, being that it improves consistency and predictability as to what can be expected from MNEs in terms of TP documentation. For Belgium, EU TPD is certainly used as a guideline by the tax administration (cf. November 2006 administrative circular) and taxpayers.
- The EU TPD and the involvement of specialists from all areas (Government, MNE's as well as advisors) contributed highly in this area. Certainly since there was and still is a growing interest by tax authorities and MNE's in this area.
- The Danish documentation requirements are similar to the content of the Code of Conduct. The Code of Conduct might have served as inspiration for the Danish tax administration.
- In Spain, the Code of Conduct has been very important to develop TP awareness among businesses since it has contributed to the creation of consistent TP policies within Spanish MNEs with international presence. For foreign MNEs with presence in Spain the adoption of the EU TPD can contribute to the simplification of the documentation obligations to the extent that other EU countries follow this set of rules. However, the extensive adoption of the Code of Conduct recommendations has given rise to a significant burden for the remaining enterprises (eg, Spanish enterprises without international presence and, generally, Spanish SMEs in the sense set out in footnote 2).
- Generally speaking, the introduction of the Code has increased the awareness of MNE's to have documentation available and hence also facilitated dealings with tax administrations. Many European tax authorities are familiar with the Masterfile concept (either formally opted into or not). This means that tax authorities are increasingly accepting documentation which is (partly) drafted in a centralised and consistent manner. The fact that, for example, countries like Romania and Greece have formally

adopted EUTPD makes it easier for MNE's operating in both countries through a similar business set-up to 'replicate' their transfer pricing documentation.

- Not in the UK per se but there are more obvious advantages in some other EU MSs. The EUTPD might prove more advantageous for taxpayers caught up in dealings between tax administrations
- Not in Italy per se but there are more obvious advantages in some other EU MSs. The EUTPD might prove more advantageous for taxpayers caught up in dealings between tax administrations
- Not so far for dealings between Polish taxpayer with Polish tax administration. The EUTPD might prove more useful dealings between two EU tax administrations, although no evidence so far
- Since the framework is now common, it helps to great extent in dealing with the Spanish Tax Administration, who knows that the EU guidelines are the future for consistency purposes

Q5. Section 2 of the Code relates to " General application Rules and Requirements for MNE`s" have you encountered or are you aware of any issues in the practical implementation of those rules? In particular:

(i) Paragraph 23 of the EUTPD states that MS should accept documents in a foreign language as far as possible. Do you have any evidence that this request is not adhered to in practice?

ANSWER:

- No, on the contrary, the Belgian tax administration accepts – as is laid down in the November 2006 administrative circular – TP documentation in another language than one of the three official Belgian languages (i.e., documentation in English is very common).
- Not an issue in the Netherlands. Other countries such as Poland (may) see this differently.
- We have no specific evidence from the Danish tax administration. However, Danish documentation requirements only accept documentation prepared in Scandinavian or English language. Based on this, we expect other languages will not be accepted for documentation purposes.

  Further, in our experience certain Member States only accept their domestic language (e.g. Poland) for documentation purposes.

- Regarding documents in English, the Administration is, in general terms, accepting them in the course of tax audits, but not the Courts (eg, Judgment of the Spanish National Court ("Audiencia Nacional") dated 4 December 2007), which call for a Spanish translation of whatever documents are to be brought into the controversy.
- In general, this principle is adhered to by many EU member states. However, amongst the EU member states there are several countries that require local languages for documentation purpose and it is explicitly stated in their transfer pricing legislations. Examples are countries like Greece, Hungary, Latvia, Poland, Portugal, Romania etc.
- UK: No
- IT: yes we have, apart from documents in English language

- As stated above, the transfer pricing documentation should be in Polish. The economic analysis could be in foreign language as it is anyway not part of the tp documentation. It has to be translated into Polish however, if the taxpayer wants to use it as to confirm that the transfer price is at arm's length
- The Spanish Authorities are being flexible with it, they normally request as the minimum the IC agreements translated but are used to read TP documentations in English. Sometimes they require specific other documents or executive summaries of the TP policies to be translated

(ii) Paragraph 25 of the EUTPD advises "MS to evaluate domestic or non-domestic comparables with respect to the specific facts and circumstances of the case. For example, comparables found in pan-European databases should not be rejected automatically. The use of non-domestic comparables by itself should not subject the taxpayer to penalties for non-compliance". Do you have any evidence that the acceptance of non-domestic (e.g. Pan-European) comparables has increased or decreased since the issuance of the Code of Conduct?

ANSWER:

- The Belgian tax authorities have always been open-minded on this point. The use of Pan-European comparables was always accepted. The November 2006 administrative circular formally confirms this viewpoint. In practice, we certainly see that this viewpoint has not changed.
- Acceptance has increased, in part through the EUTPD initiative.
- The acceptance of Pan-European comparables has increased in Denmark. However, we do not know whether this stems from the general increase in the technical experience of the Danish tax administration or from para. 25 in the Code of Conduct.
- Not really, but in any case the Code of Conduct has contributed positively to the growing trend of accepting pan-Europeans by the Spanish tax authorities.
- Based on our experience, the majority of the EU member states accept pan-European comparables. However, still a number of Member States require local comparables (e.g. Poland) or require a formal justification of the non-existence of local comparables (e.g. Germany, Italy and Romania).
- There are general indications that Pan European comparable searches are now more likely to be accepted provided that relevant comparability criteria are met
- We do not any evidence of any significant change in the attitude of the Italian tax office in respect to Pan European comparable searches: They are considered "legitimate" (i.e. the recourse to them does not per se trigger any penalty), still usually challenged
- We have observed a slight positive change in the meaning that Pan European comparable are not automatically rejected
- We have observed a positive change in the Spanish Authorities in the meaning that Pan European comparable are not automatically rejected, althought if no Spanish company at all in the final set the discussion will depend on each case. In Spain there are country specific data bases with more detailed information and financial breakdown than what Amadeus provides

(iii) Please provide a brief description of any other issues arising under this section.

ANSWER:

- No further comments.
- See Q7 and Q9 below. [penultimate bullet]
- See Q2. [final bullets]
- At the same time, acceptance of Pan European comparables has drawn the tax authorities' attention to the selection criteria related to other than geography area indicators, which are now more scrutiny (e.g. financial criteria that twill limit the sample).
- The fact that several MS have clearly specified in their domestic law that documentation must be provided in the local language is the main topic concerning the implementation of rules from Member States.

Q6 Section 4 of the Code relates to "General application Rules and Requirements applicable to MNE`s and Member States have you encountered or are you aware of any issues in the practical implementation of those rules? If so please provide a brief description of the issue.

ANSWER:

- No issues or comments.
- No further comments.
- See Q7 and Q9 below. [penultimate bullet]
- The General application Rules and Requirements captured under section 4 cover 3 main topics:
  - process/requirements for updating and replicating documentation;
  - differentiation between documentation requirements for a parent company and A subsidiary;
  - storage and disclosure of documentation

Q7 The Recitals of the EUTPD Code set out that Member States undertake not to require smaller and less complex enterprises (including small and medium-sized enterprises[2]) to produce the amount or complexity of documentation that might be expected from larger and more complex enterprises.

Taking into account the above, do you consider that the level of documentation required by your tax administration is appropriate for SMEs?

ANSWER:

- Yes, the Belgian circular letter of November 2006 holds the same requirements as set out in the EU TPD with respect to documentation requirements for SMEs. SMEs are allowed to produce less complex and less extensive documentation. The Belgian tax administration applies a realistic approach and accepts more limited TP documentation reports for SMEs.

[2] EU law defines a Small and Medium-sized company (SME) as an enterprise which employs fewer than 250 persons and which has an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

- In principle the required TPD in the Netherlands depends on the complexity and materiality of transfer pricing.
- Danish requirements include similar provision with reference to the threshold defined by the European Commission. SMEs are fully exempt from the Danish documentation requirements for transactions within the EU area or to countries having a tax treaty with Denmark.
- No, it is not. In Spain, although in principle the documentation required to the SMEs is not so large as the one required to the other enterprises, the reality is that many enterprises, which would be considered as SMEs under the EU law, are not considered as SMEs under the Spanish law (the Spanish law defines a SME as an enterprise which has an annual turnover not exceeding EUR 8 million. If the enterprise belongs to a group of companies, it will be considered as a SME if the aggregated annual turnover of the group does not exceed EUR 8 million) and, as a consequence, they cannot benefit from the minimal level of documentation but must comply with the general documentation regime, which is extensive (see below).

  In addition, in Spain, the scope of the transactions in relation to which an entity has to comply with the TPD obligations is very wide since such obligations must be complied in relation to all the transactions carried out with any related entity and not only with the entities belonging to the same group. Apart from that, it must be mentioned that the Spanish concept of "related entity" is very wide (eg, the transactions carried out by an enterprise with a shareholder who owns a shareholding of at least 5%, or 1% if it is a listed company, or with its Directors, or with the relatives of its shareholders or of its Directors, are considered as transactions with related entities).

  As a result of the above, the compliance costs in Spain are very significant because they affect to a number of enterprises which is excessive from a transfer pricing risk-assessment approach, and because the information that must be provided is too extensive due to the broad definition of "related entity" which is applicable.

  In my view, it would be advisable that: (a) a common definition of SME was applicable within the Single Market for documentation obligations purposes (the Code of Conduct lacks of a common definition of SME which, in the absence of harmonization of this definition for these purposes, can create inbound and outbound restrictions to the freedom of establishment within the Single Market by laying down very different compliance costs throughout the Member States for this large set of companies which qualify as SMEs under the Member States national tax laws); and (b) the scope of the transactions covered by the documentation obligations was also addressed in the Code of Conduct (in this sense, it would be advisable that only the transactions carried out between the entities belonging to the same group were covered by such obligations).

- The absence of a specific materiality threshold included in the Code, has triggered certain local legislations (which are deemed to endorse the Code) that impose very onerous transfer pricing documentation requirements to all MNE’s without any form of materiality level. Although we are not advocating that the Code would include a formal materiality threshold which does not reflect the size of an MNE or the overall context, local legislation should still reflect the underlying idea of the Code that a fair balance should be made between the cost of compliance and the size of a transaction.

- The UK largely exempts SMEs from TP so the question is not relevant. However, as a general point, the public policy of HMRC is to recognise that the amount and content of documentation should be commensurate with the size and complexity of the case
- Lacking specific documentation rules, this question cannot be precisely answered with reference to Italy. However, as a general point, the Italian tax administration, is in practice (i.e. during tax audits) more keen to accept less comprehensive documentation from SMEs than from larger businesses. It must be considered, as a further remark, that the EU definition of SMEs is not applicable in Italy in this contest and that, under Italian "standards" 50Ml Euro of turnover already qualifies a company as "middle sized"
- In Poland the same rules apply to all enterprises. The only differentiating factor is the value of the transactions subject to documentation. However, as this value is very low, in practise it allows for exclusion only of very small businesses
- In Spain there are reduced documentation TP obligations for SME, understanding by it companies or groups whose aggregated last year turnover does not exceeds 8 Million euros. So Spain has followed here the EU indications

Q8. Have you faced (or one/some of your client(s)) a documentation penalty? If so please briefly outline the facts and circumstances that lead to the penalty.

ANSWER:

- There are no documentation penalties as such in Belgium. Non-compliance with the recommendations of the administrative circular letter leads usually to a more in-depth transfer pricing audit. If fraud or malpractices can be demonstrated, the tax authorities can apply the standard tax penalties (varying between 10 and 200% of additional tax). We have seen penalties of 10% in cases where no/not sufficient TP documentation was available and where TP adjustments have been made.
- Not to our knowledge in the Netherlands.
- To our knowledge, no documentation penalties have been issued in Denmark to date.
- No, I have not because the legislation has been effective only in 2009 and hence it will take not less than 2 years before we will start to see its application by the tax authorities. (Note: According to Spanish legislation, if the tax payer: (a) fails to submit the documentation required; (b) submits such documentation in an incomplete or inaccurate way or containing false data; or (c) declares in its tax return a figure other than the market value derived from the required documentation, it will commit a very serious infringement. Such infringement will be penalised with a fixed penalty (ranging from 1.500€ per datum to 15.000€ per set of data) provided that the Tax Administration has not had to make TP adjustments. Otherwise, it will be penalised with a proportional penalty equals to 15% of the TP adjustment).

  It must also be mentioned that the Spanish regulation setting out the infringements on documentation which can give rise to document-related penalties is too objective and that it does not mention that only negligent actions can be penalised. As a consequence, a strict application of this set of rules might eventually penalise diligent behaviours.
- We have not yet encountered such cases.
- The UK penalty regime has recently been expanded so it is likely that more documentation related penalties will be seen in the future
- PL: none of our clients has faced a documentation penalty.

- ES: None of our clients has faced a documentation penalty yet. But if they do not have it when the inspectors come, they can have it from 09 onwards
- Although services were rendered and cost were incurred - were challenged on the deductibility based on 3 arguments: not proven services are rendered / not sufficiently demonstrated the costs were concerned; The benefit of the services rendered was not sufficiently demonstrated.

Q9 Do you wish to make any other comment on the Code of Conduct in terms of its implementation?

ANSWER:

- Increased focus on providing guidance with respect to topics, where practical pan-EU unity is desired and where the OECD has not yet come around to: e.g. recognition of & analysis requirements of intercompany financial transactions, recognition of IP economic / legal / process ownership. Further questionnaires could be a good initiative as would be further communication and guidance through the TTPF would be on the practical experience and implementation.
- No further comments.
- According to Spanish regulations, the entities must include in the country-specific documentation information on the shareholders' agreements ("pactos parasociales"). This obligation to provide information on the shareholders' agreements goes beyond the information obligations contained in the Code of Conduct and it is considered to be excessive by many authors and practitioners in Spain.
- It is our overall feeling that EUTPD can be a powerful tool in harmonizing documentation practices in the different member states. Indeed, it should allow a centralised documentation approach that enables tax authorities across the EU to determine tax risk based on documentary evidence as put together in a coherent and consistent way. This is an approach which may particularly be appealing for new member states which have no legacy legislation. However, practice shows that certain aspects of the Code (e.g. the transactional mapping requirement) tend to be interpreted and/or implemented in local legislation in a too onerous fashion which creates an additional burden on MNE's.
- Paragraph 31 (Section 4) states that in well justified cases more than one masterfile should be allowed. In order to avoid any domestic interpretation, paragraph 31 should be better clarified as it might occur that specific domestic law, not strictly related to transfer pricing, could prevent the application of a particular transfer pricing policy, even if from an MNE's point of view no significant functional differences exist to justify it.
- a very good tool that dramatically reduces the compliance efforts - moreover it enables to defend a European TP policy and benchmarks when the business has a true European scale.
- The only impact it had in France was to provide support to the FTA for enacting contemporaneous documentation obligations. Otherwise, one can regret that the Code of Conduct did not provide for an automatic EU Arbitration procedure in case of a TP re-assessment on a compliant taxpayer. That would have represented a breakthrough in achieving tax harmonisation within EU, while the current Code hardly change anything for the major juridictions.

II BusinessEurope questionnaire: summary

The work-sheet "Overview" summarizes all replies, and the subsequent sheets are composed of the individual replies.

The characteristics of the sample are the following:

The average turnover of these groups is €14 billion, the average number of employees 28.000 within the EU. The smallest group has 1.557 employees, the largest 100.000. The largest turnover per group is €130 billion, the smallest €1.3 million.

- On average, a group has subsidiaries in 21 EU Member States, with 16 groups operating in more than 20 MS.

Here is a short analysis of the quantitative results:

- Four groups have formally adopted the EUTPD (3 to a medium and 1 to an extensive extent); 13 have informally adopted it (7 to a medium extent) and 7 have not adopted it for their groups
- On average, respondents consider that the EUTPD has improved "to some extent" the dealing with tax administrations for transfer pricing documentation
- Over halve of respondents (13 out of 22) have encountered or are aware of problems in the implementation of rules concerning MNEs. Respondents consider that para 23 (foreign language) is adhered "to some extent" in practice, while para 25 (non-domestic comparables) not enough.
- Only 3 groups out of 19 have encountered or are aware of problems in the implementation of rules concerning MNEs and MS (section 4).
- Overall, respondents consider that the level of documentation required is appropriate also for SMEs ("to some extent").
- Only 2 respondents have replied to have incurred a penalty (one of €1 million, one of €10 million).

Some of the key factors preventing a more wide-scale adoption are:

- High costs and lack of flexibility
- Reliance on core documentation (masterfile) fails to deal with local requirements
- Different languages
- Not binding no certainty that penalties will be prevented if EUTPD adopted
- Requires disclosure of foreign intra-company transactions which are irrelevant in the tested party analysis
- Requirement to adhere to EUTPD in all EU MS if adopted formally
- Disclosure of sensitive information by tax authorities in other MS to competitors

Some of the key suggestions how to improve the uptake:

- Simplify the masterfile: identify priority areas, remove documentation obligations in low-risk areas
- Enforcement of EUTPD through a EU Directive: no penalties if conformity with EUTPD, no domestic deviations
- Masterfile documentation (in English) to be approved by local tax offices in all EU MS
- Remove country-specific requirements
- Harmonize with respect to information required for indirect tax purposes (e.g. custom valuations)
- Coordinate local documentation rules for SMEs with EU documentation approach
- Develop EU cooperation with PATA (US, etc.) in transfer pricing documentation

- Unification of interest levels and EU-wide binding agreement on deductibility of interests for late tax payments
- Etc.

To conclude, it might be interesting to quote one respondent who writes “There will always be requests for information in relation to complex transactions. The Code could nevertheless lead to a fair level of information on common core transactions”.

For more detailed information please refer to the Excel sheet called 'BusinessEurope data on EUTPD'