Overview of the OECD work on transfer pricing

Written contribution to the Conference "Alternative Methods of Taxation of Multinationals" (13-14 June 2012, Helsinki, Finland) by **Marlies de Ruiter**, Head of the Tax Treaty, Transfer Pricing and Financial Transactions Division, Centre for Tax Policy and Administration, **OECD**

The arm's length principle has a long history, dating back to the League of Nations Model Tax Conventions that formed the international consensus in the first half of last century. In 1963, the arm's length principle made its way to Article 9 of the OECD Model Tax Convention and later in 1980 the United Nations also adopted the arm's length principle, which is reflected in Article 9 of the United Nations Model Double Taxation Convention between Developed and Developing Countries. Accordingly, the arm's length principle has today universal application as it forms the basis of an extensive network of bilateral income tax treaties between OECD member countries and between OECD member countries and non OECD economies and of transfer pricing rules in nearly every country's domestic legislation (of which there are currently more than a 100).

Since 1979, the OECD has developed practical guidance for the implementation of the arm's length principle. The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD TPG") are continuously revised and updated with new guidance in order to address and cope with the enormous changes and challenges posed by an increasingly globalized economy. In particular, the OECD TPG were revised in 2010 to take account of the revision of the guidance on comparability and profit methods, which resulted in the revision of Chapter I-III of the OECD TPG; and, the new guidance on the transfer pricing aspects of business restructurings, which crystallized in the new Chapter IX of the OECD TPG.

Despite the extensive and detailed guidance provided in the OECD TPG, such implementation poses difficulties. And, although these are common to developed and developing countries, such as the availability and access to public data for comparability, in practice such problems are likely to be more acute for the latter given the need of sufficiently skilled human resources.

The OECD is taking on board these issues and is committed with non OECD economies and other international organisations to ensure that its standards and guidance are relevant to, and meet the needs of, non OECD economies. For instance, it is worth emphasizing the active cooperation of the OECD in the current work of the United Nations Subcommittee on Transfer Pricing on the development of a manual on practical transfer pricing issues.

This document provides an overview of the OECD work in transfer pricing matters.[1]

[1] For further information, please visit the website links indicated in each section.

1. OECD projects on the transfer pricing aspects of intangibles and the simplification of transfer pricing

(www.oecd.org/ctp/tp)

In 2011, the OECD launched two new projects dealing with the transfer pricing of intangibles and the simplification of transfer pricing.

Working Party No. 6[2] has made a concerted effort to involve key non OECD economies in its regular work programme. Currently, 9 non OECD countries representing a significant portion of the world's economy (Argentina, Brazil, China, Colombia, India, Malaysia, Russia, Singapore, and South Africa) participate in the work of the OECD on transfer pricing, shaping future guidance and bring their views, perspectives and priorities to the table.

Project on the transfer pricing aspects of intangibles: In the framework of the projects on comparability and profit methods and the transfer pricing aspects of business restructurings, transfer pricing issues pertaining to intangibles were identified as a key area of concern to governments and taxpayers, due to insufficient international guidance in particular on the definition, identification and valuation of intangibles for transfer pricing purposes. Given that this could lead to many complex and monetarily-significant transfer pricing disputes and to risks of double or less-than-single taxation, the OECD decided to address these issues in a new project that it is expected will result in an update of Chapter VI of the OECD TPG, and possibly of Chapter VIII as need may be. On 6 June 2012, the OECD Working Party No. 6 released an interim discussion draft on the transfer pricing aspects of intangibles for public comments by 14 September 2012.

Project on transfer pricing simplification: In addition to the considerable efforts invested by the OECD dealing with matters related to the interpretation and application of the arm's length principle, the OECD launched in 2011 a project on transfer pricing simplification. For the OECD, this is a high priority project, as much can be done to streamline the administration of the transfer pricing system. This is important for both developing and developed countries, in order to permit both taxpayers and tax administrations to alleviate the compliance burdens and focus their resources on the most important matters.

This project has identified five areas where simplification and streamlining are possible:

1. The revision of the language of Chapter IV OECD TPG to more clearly reflect country practice with respect to safe harbours;
2. The creation of model memoranda of understanding (MOUs) for use by country competent authorities in adopting bilateral safe harbours related to common transfer pricing issues;
3. Simplification of transfer pricing documentation;
4. Issues related to the transfer pricing treatment of head office and regional administrative expenses; and
5. Simplification of the APA process, focused primarily on accelerating the processing of more routine APA cases.

[2] Working Party No. 6 of the OECD Committee on Fiscal Affairs covers issues related to the taxation of multinational enterprises and is the body responsible for the ongoing development of the OECD TPG.

A discussion draft containing the revision of the safe harbours guidance has already been release for public comments by 14 September 2012, together with three sample MOUs for low risk manufacturing services, low risk distribution services and low risk R&D services.

The OECD is confident that this project will contribute to enable developing countries to manage their own transfer pricing exposures in a more efficient way. In addition, it is expected to improve the enforcement of transfer pricing rules, shorten case processing times and relieve taxpayers and tax administration of unnecessary burdens in many cases.

A. Global Forum on Transfer Pricing

(www.oecd.org/ctp/tp)

As the role and engagement of developing countries and emerging economies in the OECD transfer pricing work has significantly increased, the OECD has given a more prominent role to the Global Forum on Transfer Pricing. This mechanism aims at ensuring that non OECD economies have a voice in developing international tax standards and guidelines, in particular in the transfer pricing area, so that these continue to be of wide relevance and practical use to all in an increasingly interdependent global economy.

Annual International Meeting on Transfer Pricing: In March 2012, the OECD held its 1st Annual International Meeting on Transfer Pricing under the auspices of the Global Forum on Treaties and Transfer Pricing. The event provided a unique opportunity for the attending government officials from 90 countries and international organisations to discuss a range of relevant transfer pricing issues and developments, share their expertise and exchange views on policy and administrative aspects of transfer pricing. The OECD intends to hold this specific meeting every year to provide a forum for developing and developed countries to examine transfer pricing related issues in greater detail.

Steering Committee: The OECD has organized a Steering Committee for the transfer pricing activities of the Global Forum on Transfer Pricing. The Committee, which aims at strengthening the dialogue with non OECD economies, is comprised of members of the Working Party No. 6 Bureau and representatives of key non OECD economies[3] and its main competences are: a) planning the Annual International Meeting on Transfer Pricing; b) undertake work on an important transfer pricing related topic with a specific developing country focus; in 2012, the Steering Committee addressing best practices in conducting a transfer pricing risk assessment; and, c) provide a forum for discussion of other transfer pricing issues important to both developing and developed countries.

B. OECD's Task Force on Tax and Development

(www.oecd.org/tax/globalrelations/development)

The OECD's Tax and Development work, guided by the Task Force on Tax and Development, has identified transfer pricing as one of its high-priority areas and has formulated a detailed work programme designed to support developing countries introduce and implement transfer pricing rules.

[3] Argentina, Brazil, China, Colombia, Egypt, Ghana, India, Indonesia, Kenya, Malaysia, Russia, Singapore, South Africa and Vietnam.

The programme has made significant progress in delivering capacity development initiatives in Colombia, Ghana, Kenya, Rwanda and Vietnam, as well as providing assistance to other countries. These are each tailored to the specific needs of the respective country, and each made up of a number of elements, delivered in partnership between the OECD, other international organisations and donors. The programmes, each expected to span at least 2 years, are wide in scope, encompassing support on policy issues, administrative structures, regulations and guidance and building practical auditing skills.

The Tax and Development programme is also considering practical aspects of the implementation of transfer pricing rules, such as the availability of comparables data and, in this context, is considering how developing countries can better access the financial data sometimes needed to apply transfer pricing rules.

A key feature of the country programmes is co-operation between the international agencies involved in their delivery. In particular, the OECD has formed an international partnership with the European Commission and World Bank in order to work together on providing coherent and co-ordinated support. .

The country programmes are supported by complementary initiatives, including the development of new supporting tools, such as a transfer pricing "Country Needs Assessment Tool" and draft "model" legislation on Advanced Pricing Agreements (APAs) and on thin capitalisation.

The OECD and other members of the Task Force are also providing support and assistance to regional organisations, such as the African Tax Administration Forum (ATAF), in delivering their work programmes on transfer pricing. This support ranges from delivering technical training programmes, assistance with the production of guidance, support with creating a Panel of Experts who would be appropriate transfer pricing specialists able and willing to provide technical advice to ATAF members, and the production of analytical tools to help countries identify and address their transfer pricing needs.

Last but not least, in May 2012 the OECD's Task Force on Tax and Development launched the concept of "Tax Inspectors Without Borders". This is a new initiative to help developing countries bolster their domestic revenues by making their tax systems fairer and more effective. The OECD will establish an independent foundation, to be up and running by the end of 2013 that will provide international auditing expertise and advice to help developing countries better address tax base erosion, including tax evasion and avoidance.

C. Global relations programme

(www.oecd.org/tax/globalrelations)

The OECD's long-standing Global Relations programme (which in 2012 celebrates its 20th anniversary), is the core of the OECD's dialogue with non OECD economies on tax issues and, in the area of transfer pricing, has actively contributed to capacity-building activities for non OECD economies.

In 2012, it is anticipated that the OECD will present more than 20 training seminars for tax authorities from non OECD economies at locations around the world on various aspects of transfer pricing. These events provide a forum for both North-South and South-South dialogue that allows countries to share their approaches to transfer pricing and other related issues, mainly through real case study analysis. The events also provide a means for a very broad range of non OECD countries to input their perspectives into the OECD's work.

The programme, which is demand-driven and shaped by an Advisory Group for Non OECD Economies,[4] plays a key role in inputting non OECD economies views into the work of the Global Relations programme and the wider work of the OECD in the tax area. The Global Relations programme is delivered in partnership with regional organisations, such as ATAF in Africa and Inter American Centre of Tax Administrations (CIAT) in Latin America.

D. Forum on Tax Administration

(www.oecd.org/tax/fta)

The OECD's Forum on Tax Administration[5], a group of the Commissioners or Heads of Taxation of over 40 OECD and non OECD economies, is also undertaking work on countries' approaches to the administration of their transfer pricing rules. The aim of the Forum on Tax Administration is to produce outputs of significant relevance to non OECD countries and that effectively addresses the priorities of developing countries. In 2012, the Forum on Tax Administration published the report "Dealing Effectively with the Challenges of Transfer Pricing" which addressed in detail the practical administration of transfer pricing programmes by tax administrations.

[4] The Advisory Group for Non OECD Economies is a group of representatives from non OECD economies, OECD countries and regional organisations with an interest in the delivery of, or participation in, the CFA's Global Relations programme.

[5] OECD's Forum on Tax Administration is a group of Commissioners and Heads of Taxation from over 40 countries (Australia, Austria, Argentina, Belgium, Brazil, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong China, Hungary, Iceland, India, Indonesia, Ireland, Italy, Japan, Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, People's Republic of China, Poland, Portugal, Russian Federation, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.