

**REPLY TO THE OECD'S REQUEST FOR COMMENTS ON THE  
"WHITE PAPER ON TRANSFER PRICING DOCUMENTATION – 30 JULY 2013"  
FROM CMS**

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## **Introduction**

1. We would like to welcome the OECD willingness to raise the increasing need for simplification and standardisation of the Transfer Pricing (“TP”) documentation. We were very interested in reviewing the “*White Paper On Transfer Pricing Documentation*” dated 30 July 2013 (further referred to as the “White paper”), which provides an excellent overview of the current state of affairs as regards TP documentation requirements.

2. TP Documentation and TP Risk Assessment are very close topics. Our comments on the White paper must therefore be reviewed in the light of our comments on the Draft Handbook on Transfer Pricing Risk Assessment.

## **Comments on the proposed form of a TP documentation**

### Masterfile approach

3. Inspired by the two-tier structure laid out in the EU documentation, the White paper advocates for the masterfile approach. The underlying thought is that it should be possible to prepare certain core elements that are required by all countries where the multinational enterprises (“MNE”) operates, and leverage from that to prepare additional documentation as required by each specific country, rather than producing entirely separate reports for each country.

4. Furthermore, the masterfile – as envisaged in the White paper - requires broader MNE-wide basis information than the EU TP Documentation: we believe that this approach is not without drawbacks. For instance, assuming that the MNE’s holding company did not prepare TP documentation or that the MNE does not operate a centralised business model, then the masterfile approach may enable far less leverage in the local preparation of a transfer pricing report. In that framework, a documentation approach where the masterfile requires deep information may have the opposite effect and increases the compliance burden.

## **Comments on the content of a TP documentation**

### Profit Split approach

5. At the outset (second paragraph on page 1), the OECD first and foremost emphasizes profit split approaches by stating that there is a need that “*MNEs provide all relevant governments with information on their global allocation of the income*”. There seems to be a recurring and latent idea behind the White paper that the profit split method should be the “preferred TP method”. In further instances, such as in §72, §74 or Table 1, the White paper suggests that the TP documentation should solicit information as to how the global income, profit and taxes

are allocated rather than only country-specific data. However, such requirement introduced by the White paper seems irrelevant and rather unnecessary when MNEs use “one-sided” TP methods. Indeed, such one-sided approaches solely seek to test the arm’s length remuneration of the routine entity without any regard to the overall trade of the enterprise or to the profits generated by all the connected parties. Though not explicitly recognised, the continued focus on global financial information may indicate OECD desires to promote profit split approach. It is inconsistent with the current OECD Guidelines which do not always recognize the profit split as the most appropriate TP method. In our view, information to be disclosed by the MNEs should be related to the TP method selected in accordance with the OECD Guidelines.

#### Presumption of Transfer of Benefits abroad

6. In the same way as in the “*Draft Handbook on Transfer Pricing Risk Assessment*” dated 30 April 2013, the White paper provides in §64 that: “*the OECD believes that it is important that government be able to access the information they need to conduct a risk assessment enabling an informed decision to perform an audit*”. We are concerned that the White paper creates a risk of presumption of transfer of benefits abroad in the mind of tax auditors.

7. Furthermore, §69 lists factors that suggest to the tax administration that TP risk may be high with regard to a particular taxpayer. Such risk features are of key importance since they drive documentation requirements on information that would enable the tax authority to identify whether the foregoing risk indicators are present. However, it should be reminded that the OECD had introduced features that may indicate the presence of significant TP risks in the above mentioned Draft Handbook. Therefore, we are concerned that only part of these factors were considered here and question the rationale behind the removal of certain risk indicators such as the effective tax rate for instance.

8. The White Paper should insist on the fact that the team in charge of the tax audit should be sufficiently “open minded” to hear and accept explanations provided by the taxpayer regarding the feature that may indicate the presence of significant TP risk. Such as for the Draft Handbook, we are very concerned that the White Paper could allow auditors to definitively conclude to the existence of non-arm’s length pricing on the basis of irrelevant upstream analyses.

#### Definition of material transactions

9. According to the White paper, documentation would need to focus on “*material cross border transactions between associated enterprises*” (§70). However, the scope of the concept “material” would benefit from further clarification, especially since it triggers the need for TP documentation. Although we fully agree that only material flows should be considered and documented for efficiency and cost saving purposes, the White paper does not provide any guidance with respect to the notion of “materiality”. In this regards, questions remain due to

the lack of international consensus regarding (i) how to assess the extent to which a transaction is material or not and (ii) a materiality threshold. We thus urge the OECD to expressly provide a definition of this key concept which remains rather subjective at the moment.

#### Set of regional comparables

10. With regards to the acceptability of regional comparable sets in documentation prepared for countries in the same geographic region, the White paper does not settle the question and do not even move forward the debate. In order to be consistent with its primary objective of TP simplification, we suggest that the White paper explicitly accepts regional-wide approach and reserves the use of local comparables in situations where regional comparables are not appropriate. In such a case, the burden of proof should stay with the tax authorities.

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