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Mr. Masatsugu Asakawa  
Chair of the OECD Committee on Fiscal Affairs  
2, rue André Pascal  
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France

**Subject: Comments on the OECD White Paper on Transfer Pricing Documentation, 30 July 2013.**

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Dear Mr. Masatsugu Asakawa,

Rödl & Partner is an audit, legal, management and tax consulting company active at 91 wholly-owned locations in 40 countries. We have a Global Transfer Pricing Team that, amongst other services, assists German medium-sized Groups and family-owned companies in the implementation and elaboration of their Transfer Pricing policies and Documentations.

We welcome the opportunity given by the OECD to submit comments on the OECD White Paper on Transfer Pricing Documentation (hereinafter referred to as the "White Paper").

We are very grateful for the OECD's leadership efforts to promote and maintain a broad international consensus on Transfer Pricing issues related to the Documentation.

We do not have any objection with posting our comments on the OECD's website. Additionally, we submit our comments to the White Paper based on our capacity as a professional organization.

For clarification of any aspects of these comments sent on behalf of the Rödl & Partner Global Transfer Pricing Team, please contact:

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## I. INTRODUCTION

Rödl & Partner shares the OECD's view contained in the White Paper that *"the proliferation of diverse local transfer pricing documentation requirements, combined with a dramatic increase in the volume and complexity of international intra-group trade [...], makes transfer pricing documentation one of the top tax compliance priorities on the agendas of both tax authorities and businesses"*.

In this sense it is relevant for the near future to improve the quality of the Documentation presented to the Tax Authorities, but also, if justified, to reduce the compliance burden related to the elaboration of such Documentation.

The White Paper states that one of its purposes is to simplify the Transfer Pricing Documentation's rules and to make them more straightforward. In this regard, part of our comments is related to the proposed Masterfile (II.) and Local File Documentation's requirements (III.). In our opinion, some requirements should be specified more in order to avoid any misunderstanding.

Additionally, our comments are also related to the materiality standard, Transfer Pricing risks and "safe harbours" (IV.), as well as to the translation of the Documentation and use of local and regional comparables (V.), and the instruments to unify Documentation practices (VI.).

## II. MASTERFILE DOCUMENTATION

The structure of the proposed Masterfile Documentation (Chapter V of the White Paper) eliminates the duplicities of many requirements presented in the Masterfile and Local File concept of the EU TPD<sup>1</sup>. In this regard, we appreciate this modification.

However, some of the information required in the proposed Masterfile Documentation should be specified to avoid any misunderstanding or different interpretations:

- *"Management structure"*: Is this information similar to the organizational structure according to the EU TPD? Some examples of a "management structure" would be welcomed.
- *"Important drivers of business profit"*: Does this refer to drivers such as patents, know-how, position in the market and development potential? Some examples of these drivers would be welcomed.
- *"Chart showing important related party service arrangements other than R&D services"*: This requirement seems to be duplicated with the previous requirement (*"chart showing the supply chain for material [...] services"*). In this regard, it would be important to further explain this Documentation requirement or explain whether a list of contracts between related parties is requested.
- *"Key competitors"*: From our point of view, this information is more appropriate within the Local File, since generally there are different competitors in each local market. Furthermore, this information does not always help to determine the arm's length remuneration.
- *"Internet links to representative analyses of the industry and company prepared by rating agencies, stock analysts, or others familiar with the business"*: From our point of view, it is more appropriate to include an industry analysis within the Local File, as generally there are diverse industry developments in different markets. Additionally, we would appreciate clarification that

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<sup>1</sup> Code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), 2006.

such links have to be provided only if they are available for the taxpayer without exaggerated efforts to incorporate such.

- *“A description of any material transfers of interests in intangibles”*: We would also recommend including any material change (establishing, adjusting or termination) regarding license rights.
- In order to simplify the requirements regarding consolidated accounts, the most recent and two previous years could be requested in only one requirement.

The homogenization of the requirements of the Masterfile Documentation and the obligation to prepare such Documentation is a very important issue to be discussed.

The fact that a country, where the head of the Group is located, does not impose the elaboration of the Masterfile Documentation or that the Documentation’s requirements are different to other jurisdictions, causes increasing extra costs generally covered by the subsidiaries of multinational enterprises (hereinafter “MNEs”); since following a Tax Administration’s request for the Masterfile Documentation, such subsidiaries have to prepare or amend the Masterfile Documentation in order to avoid the penalties charged for the lack of or incomplete Masterfile Documentation.

From our point of view, the obligation to elaborate the Masterfile Documentation by the head of the Group and the unification of its requirements would avoid unnecessary resources being employed by the different subsidiaries to fulfill diverse local Transfer Pricing rules.

Finally, it would be very positive if the taxpayers could obtain feedback from the Tax Authorities, informing them whether the Transfer Pricing Documentation prepared complies with all the local requirements and if this is not the case, indicating which parts should be amended to allow supplements or adjustments.

### III. LOCAL FILE DOCUMENTATION

The structure of the proposed Local File Documentation (Chapter V of the White Paper) is more simplified than the structure of the Local File concept according to the EU TPD.

However, some of the information required in the proposed Local File Documentation should be specified to avoid any misunderstanding or different interpretations:

- *“Management structure”*: Is this information similar to the organizational structure according to the EU TPD?
- *“Indicate the most appropriate transfer pricing method with regard to the category of transaction and the reasons for selecting that method.”* From our understanding of this requirement, the best method rule should be applied. In which case, it is not necessary to reject other methods that will not be applied and indicate the reasons for such rejections. In this sense, some specification and simplification regarding the most appropriate transfer pricing method would be welcomed.
- *“Important assumptions made in applying the transfer pricing methodology”*: Some examples regarding this requirement would be welcomed.
- *Comparability analysis*: This concept is not completely included in the proposed Local File Documentation, since the contractual terms, economic circumstances (such as the industry analysis), and specific business strategies are not described in such Documentation.

## IV. MATERIALITY STANDARD, TRANSFER PRICING RISKS AND SAFE HARBOURS

From our point of view, an important number of Documentations or Transfer Pricing Studies prepared by MNEs are not requested or, if delivered on request, are not even reviewed by the Tax Authorities.

This situation triggers the notion that important resources employed by MNEs to prepare such Documentation could have been used to carry out their normal operating activities generating growth and jobs.

In this sense, from our perspective, not all the subsidiaries of MNEs should prepare the Local File Documentation before a tax audit. The obligation to prepare the Local File Documentation should instead be linked to the materiality of each type of intercompany transaction (A.), as well as to the concrete Transfer Pricing risks of the taxpayer (B.). If the taxpayer meets one of these two requirements (materiality or risk), it ought to prepare the Local File Documentation.

The “safe harbours” may also help to reach some of the objectives of the White Paper regarding the simplification of the Transfer Pricing Documentation (C.)

### A. Materiality

The **materiality** should be established per type of transaction and not as in some countries (for example Spain) where the threshold for the Documentation obligation is the sum of all the intercompany transactions performed between two related parties in one tax year<sup>2</sup>.

We understand that the **materiality** standard may vary from country to country. However, due to intense international trade, a common approach regarding the materiality standard could help to avoid that the Documentation will be required in a determined country and not in the other country where a related party is located.

In relation to this, it would be very beneficial to establish a homogeneous materiality standard at least amongst the Members of the European Union and the USA, since according to the Impact Assessment Report on the future of EU-US trade relations<sup>3</sup> published on March 2013 by the European Commission:

*“The EU and the US are the world's **major global traders and investors**. In fact, the EU is the largest economy in the world, representing 25.1% of world GDP and 17.0% of world trade and the US is the second largest economy accounting for 21.6% of world GDP and 13.4% of world trade”.*

*“Together the EU and the US account for almost half of the world GDP and **one third of total world trade**. [...] In 2011, the **EU was the first trading partner of the US** with 17.6% of trade in goods while the **US was the EU's second largest trading partner** with 13.9% of the EU's total trade in goods”.*

Furthermore, it is estimated that a third of the trade across the Atlantic actually consists of intra-company transfers<sup>4</sup>.

In this sense, by imposing a common approach regarding the materiality standard for the EU and USA, an important part of the intercompany transactions would be subject to the same rules.

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<sup>2</sup> In such cases, if the threshold is met, the taxpayer has to document all intercompany transactions (the material and the less material transactions) in order to avoid the penalties for incomplete documentation.

<sup>3</sup> European Commission Staff Working Document: Impact Assessment Report on the future of EU-US trade relations. Strasbourg, March 12<sup>th</sup>, 2013.

<sup>4</sup> Source: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>. Information obtained on September, 20<sup>th</sup> 2013.

As mentioned before, the materiality standard should vary depending on the type of transaction. For example, residual amounts transferred between related parties for management services, if such reasonably comply with the arm's length principle, may not generally create any relevant shift of profits from one country to another.

## B. Transfer Pricing Risks

In addition to the materiality criterion, we propose having a compulsory Local File Documentation in case one or more **Transfer Pricing risks** (as described in paragraph 69 of the White Paper) are significantly presented by the taxpayer (i.e. significant transactions with related parties in low tax jurisdictions, transfers of intangibles, business restructuring, year on year loss making, etc.).

Furthermore, local Tax Authorities may increase or reduce the list of Transfer Pricing risks based on the current risks identified by them during the tax audits. In this sense, it would be highly recommendable to publish statistics on the tax audits and Transfer Pricing adjustments performed, as well as the new types of risks indentified.

Finally, we believe that establishing the obligation to elaborate the Local File Documentation following the above mentioned requirements (materiality and risks) would avoid unnecessary costs for preparing the Local File Documentation.

## C. Safe Harbours

From our point of view, the rules regarding "**safe harbours**" should be developed and unified in order to establish the arm's length value of some types of intercompany transactions and as a consequence, should simplify the Transfer Pricing Documentation.

As described in paragraph 4.93 of the OECD TPG<sup>5</sup> the application of the arm's length principle:

- can be a fact-intensive process;
- can require proper judgment;
- may present uncertainty;
- may impose a heavy administrative burden on taxpayers and Tax Administrations that can be exacerbated by both legislative and compliance complexity.

The use of safe harbours would simplify the compliance for the taxpayers in determining arm's length prices/margins, it would provide more assurance to taxpayers that the price or margin of the intercompany transaction will be accepted by the Tax Authorities and it would avoid the administrative burden on taxpayers and Tax Administrations.

From our perspective, the acceptance of safe harbours would be very positive when the type of intercompany transaction allows for this kind of simplification.

Naturally, safe harbours shall not be applied for transactions that are considered risky (i.e. paragraph 69. of the White Paper). However, it should be analyzed whether the application of safe harbours is convenient for transactions such as low value-added intragroup services, ordinary financial transactions<sup>6</sup>, contract manufacturing and limited-risk distribution, domestic intercompany transactions, etc.

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<sup>5</sup> OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, July 2010.

<sup>6</sup> Remuneration based on comparable transactions identified in the statistical information published by the Central Banks.

## V. TRANSLATION OF THE DOCUMENTATION AND USE OF LOCAL AND REGIONAL COMPARABLES

The White Paper mentions some mechanical issues that make the process of preparing Transfer Pricing Documentation more difficult. Two of these issues are the translation of the Documentation (A.) and use of local and regional comparables (B.).

From our perspective, both aspects are highly relevant and for this reason we would like to make some comments regarding them.

### A. Translation of the Documentation

As described in paragraph 77 of the White Paper, the *"necessity to provide documentation in local language is sometimes noted as one of the complicating factors with respect to transfer pricing compliance"*.

In fact, in many countries (as for example Italy), it is compulsory to submit the Transfer Pricing Documentations in the local language. We agree that not all tax inspectors around the world speak the same language, however English is a very widely-used language in the area of business, and many tax inspectors can speak and/or understand English.

In this sense, we would like to remark upon and welcome the position of the Spanish Tax Authorities who published information<sup>7</sup> stating that they would make all efforts to accept the Documentation in a language different from the official language in Spain; this different language is normally English. Indeed, Rödl & Partner has assisted clients in Transfer Pricing audits and the Tax Authorities in Spain have accepted the Masterfile and the Local File written in English.

From our perspective, since the Transfer Pricing Documentation has an international character, it should be accepted in a common language such as English. However, if such is not possible, it should be established that at least the Tax Authorities will make all efforts to accept and review (relevant parts of) the Documentation in English and will only request a translation when such is necessary.

### B. Use of Local and Regional Comparables

The use of a standard set of regional comparables in the Documentations prepared for countries in the same geographical region provides substantial simplification, and from our point of view, does not worsen comparability.

In this sense, please note that even in the Guidelines on low value adding intra-group services, published by the EU Joint Transfer Pricing Forum in 2011, it is mentioned that:

*"In cases where it is appropriate to use a mark up, this will normally be modest and experience shows that typically agreed mark ups fall within a range of 3-10%, often around 5%. However that statement is subject to the facts and circumstances that may support a different mark up."*

We understand that such information is based on the behavior/margin of independent parties located in the European Union, and not only on one single country.

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<sup>7</sup> Grupo de trabajo: Precios de Transferencia Conclusiones. Foro de Grandes Empresas. Agencia Tributaria. Extract of the text: *"No obstante, y con el fin de minorar la carga administrativa indirecta de los contribuyentes y de seguir los consejos del Foro Europeo, la Agencia Tributaria tratará de facilitar, teniendo en cuenta las circunstancias de cada caso, el tipo de documentación y las explicaciones dadas por el contribuyente, que determinada documentación pueda aportarse en un idioma no oficial en España, normalmente el inglés. A tales efectos, y en función de los medios disponibles en cada momento, se proporcionará a los funcionarios que deban analizar dicha documentación, cuando así lo necesiten, el apoyo necesario para solventar los problemas que esta circunstancia pueda generar"*.

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## VI. INSTRUMENTS TO UNIFY DOCUMENTATION PRACTICES

Paragraph 83 of the White Paper mentions that an *“important question relates to the instruments and procedures that could be used to create greater uniformity in documentation practices”*.

In our opinion, the starting point to make the improvements contained in the White Paper effective would be to modify Chapter V of the OECD TPG on a non-binding basis. Since the aspects contained in the White Paper are not so huge, an independent report may not be necessary.

Following on from such, more “binding” forms should be established; otherwise some countries (i.e. especially those with low taxes) will not have any incentive for unifying their Documentation’s rules. One option could be to establish various lists of countries depending on the level of compliance (i.e. see the OECD’s project on automatic exchange of information).

## VII. CONCLUSIONS

We would like to reaffirm our enthusiasm with the OECD’s leadership efforts to promote and maintain a broad international consensus on Transfer Pricing issues related to the Documentation.

The interest shown by the OECD to simplify the Transfer Pricing Documentation, as well as to concentrate the focus on the most important aspect of the Transfer Pricing risk assessment is very much appreciated by us.

We hope that our comments can contribute to the new simplified concept of the Masterfile and Local File Documentation and we are naturally open to attend to any questions that you care to make.

Madrid, September 30<sup>th</sup>, 2013

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