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Working Party No. 6 of the Committee on Fiscal Affairs

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sent by e-mail

**Subject: COMMENTS ON THE WHITE PAPER ON TRANSFER PRICING DOCUMENTATION
of July 30th, 2013**

Dear Sirs and Madams,

“Transfer Pricing Centre” Association (“TPCA”) welcomes the opportunity to provide comments on the Public Discussion White Paper on Transfer Pricing Documentation (the “White Paper”).

“Transfer Pricing Centre” Association is a non-profit organization aimed at promoting transfer pricing knowledge in Poland, founded by specialists working for capital groups in Poland, mainly in energy and industry sector. Hence we hereby present the comments as representatives of business.

We would like to confirm that we have no objections with posting our comments on the OECD website.

We appreciate the intention imbedded in the White Paper to launch a global conversation on how transfer pricing documentation rules can be improved, standardised and simplified. On forthcoming pages, we present our comments on the White Paper proposal.

We wish to thank the Transfer Pricing Unit and the Working Party No 6 of the OECD for the work pursued within the programme to streamline and simplify the transfer pricing documentation requirements and for the opportunity to express our views on the developed ideas. We are at your disposal to discuss any aspect of our comments. We look forward to developments and further discussions on the topic.

Yours faithfully,

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A. General comments

The Committee on Fiscal Affairs invited public comments on the White Paper on Transfer Pricing Documentation, encouraging also to present comments on whether additional or other possible mechanisms can be developed for complying with the transfer pricing documentation elements of the BEPS Action Plan.

We appreciate efforts to create a standardised description of the transfer pricing documentation that should be required by tax authorities to demonstrate the arm's length nature of cross-border intra-group transactions. We agree with the observation, however, that the initiatives were discretionally adopted while mainly local transfer pricing documentation formats were further developed and implemented.

As one of business representatives, we admit that currently business feels overburdened by the increasing local compliance demands while country-specific transfer pricing documentation requirements vary significantly from country to country, which makes it hardly possible to efficiently align on international scale. For example, the idea to use the same documentation in both the country of the seller and the buyer (or the service provider and of the service recipient), thus allowing for consistency, uniformity and standardization – which would also allow for savings of time and money – can hardly be put in practice in MNEs. Due to substantial differences between TP file requirements in different countries the documentation prepared in home country of the seller or service provider usually requires a great deal of adjustments to use it in another country – where the buyer or service recipient is located.

Polish transfer pricing provisions are relatively flexible and allow for significant level of liberty in layout and presentation of required elements, therefore it is often possible to adopt transfer pricing documentation prepared by the other party to the transaction by simply translating it into local language. The abovementioned problem is recognized, however, where the documentation prepared locally is intended to be used in other countries.

It is frustrating if the adjustments refer to some minor details, not crucial for the general quality of the transfer pricing documentation. It is, however, especially demotivating, if the local requirements include formalities that seem to be beyond rational necessity. The extreme and luckily rare example of such formalities is requirement of information in a transfer pricing documentation study be certified by an outside auditor or prepared by a consulting firm. It is, however, more often that only local comparables are accepted in a certain jurisdiction. Such approach often leads to the situation where e.g. the result obtained based on local comparables is not attainable taking into account the total margin available for distribution between both related parties.

The impression one could have is that strict local transfer pricing requirements of a certain jurisdictions are designed to safeguard higher level of transfer prices attributable to this jurisdiction.



B. Comments on proposed content of masterfile in Coordinated Documentation Approach

We recognize that the general overview of the MNE may provide a perfect background and comprehensive map useful for the MNE's transfer pricing analysis. Having gone through the outline of proposed content of the masterfile we are afraid, however, that in many cases the information expected within the section of the masterfile might be too excessive while not always necessary and relevant in the analysis of the intercompany transactions concluded by a single local entity.

The only case, probably, where the full proposed content of the masterfile would be of use are holding companies, having the operational and transactional links with the majority of its group member companies. It seems, however, that in the case of a single local entity (potentially operating at the end of the supply chain within one of many sectors of an MNE) it might be irrelevant and too demanding to require all the details listed under masterfile section.

We fear at the same time that, if such complete list of elements is required under OECD recommendations – while the strictness of such requirement would depend on local implementation process, any mismatch in the transfer pricing file with the model list could result in adverse consequences for a given taxpayer, even if bringing just a little or not even that much to the analysis of transfer prices of such entity.

Having gone through many points of the masterfile we are also afraid that the list contains information which is of key business importance and often treated almost as business secret, even in internal relationships with group members (e.g. a list of the main markets, information on key competitors). Such information is often an element of competitive advantage which holding companies prefer to keep under control and cascaded only if absolutely necessary. Such approach seems to be understood, particularly in the era of fierce competition, extreme difficulty in creating competitive advantages and mobility of personnel from and to competition. Hence, local entities may be in a difficult position when expecting from the headquarters comprehensive input to the masterfile on issues of strategic importance, while such comprehensive information may be perceived as of little importance for transfer prices of a given local entities.

Furthermore, taking into account the imbalanced position of many local entities within MNEs to effectively demand certain information available only on group headquarter level, it seems a bit unfair to impose the obligation on local entity to present such information and to bear penalties in the case of non-compliance with such an obligation, subject to local regulations.

Below we try to comment on several points of the content of the masterfile, trying to better illustrate the above mentioned concerns.

- *Chart illustrating the MNE's legal and ownership structure and geographical location of principal operating entities*

While it can be understood that the network of relationships of a given entity and the group of related parties is necessary to list all the related party transactions concluded by such entity, we believe in some cases it might be a demanding task to develop a chart illustrating the complete legal and ownership structure and geographical location of all principal operating entities.



There may be several practical points which make such task complicated:

- Date, for which such a chart would be up-to-date and complete – in large MNEs legal and ownership structure may vary significantly over the time, while there may be a timing difference between a change and a related information diffused within the MNEs.
- In large MNEs a mere list or group companies may count dozens of pages, while drafting a chart may be a challenging task itself.

Notwithstanding the above, irrespectively from the size of a given MNE, a group entity may be involved in a very limited number of transactions with related parties. In such a case, the task to prepare the group structure chart might be disproportionately burdensome.

We believe that in large MNEs this is really often the case that a single local entity is involved in transactions with a small fraction of group entities, while there are practically no interactions with the rest of the group. In all such cases the chart of group structure would only be a time-consuming element but of little value for the examination of arm's length nature of transactions concluded by such entity. Consequently, we rather see it as not always necessary and in some cases even not appropriate.

An exception are maybe holding companies, interacting with the majority of its group member companies and where the chart of the group structure might be a nice orientation map useful for investigation of intercompany transactions. It seems, however, that it is too demanding to require that from any group entity. We fear at the same time that if, such a group chart is an obligatory element (while the strictness of requirements would depend on local implementation model), any mismatch in the group chart with the current status for a desired date could result in adverse consequences, even if bringing really a little to the analysis of transfer prices.

- *Management structure and geographical location of key management personnel*

The comments presented above on group chart are largely valid for this point as well, however the purpose to analyse the management structure of the group seems more self-explanatory and understood in this case. To avoid misunderstanding, though, it would be desired to have precised, what is meant under 'management structure', particularly that in large MNEs there are often many organizational pillars or sectors, which have separate operational management, while naturally there is also certain level of general management centralization.

Again, we are afraid that if the OECD recommendations are directly implemented to the local regulations and strictly required, any level of imprecision could create a risk for a taxpayer, particularly if interpreted to the benefit of the tax authorities.

- *MNE's intangibles*

As in the case of other masterfile elements one should bear in mind that a local entity required to prepare the transfer pricing file may operate in one of many industry sectors in which such MNE operates. Therefore, intangibles crucial in all the group activity areas might be of no relevance for the transfer pricing analysis at the level of a local entity. It seems desirable, therefore, that the scope of request be limited accordingly and precised to avoid misunderstanding.



It is worth elaborating also, that intangibles are generally of key attention within the MNEs where they largely contribute to the market position. Hence, a local entity's request to the headquarter for comprehensive description of the MNE's strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management, as required under this masterfile section, may often evoke certain reluctance of the headquarter to share such data.

- *MNE's financial and tax positions*

Section MNE's financial and tax positions is an example of data, which may be difficult to present by a local entity without a significant input from MNE headquarter, particularly in the case of large groups.

Items such as: *MNE's consolidated accounts for the prior (x) years, a list and brief description of the MNE group's applicable unilateral or bilateral/multilateral APAs, a list and brief description of other relevant tax rulings related to the allocation of income to particular jurisdictions, a list and brief description of transfer pricing matters pending under treaty MAP processes or resolved in MAP during the last two years, or a schedule showing for each country in which the MNE does business the total number of employees in the country* – may be of potential relevance in the case of transfer pricing investigation at the level of the holding company, but it may be irrelevant where there is a transfer pricing audit of a local entity involved in just a couple of middle-scale trading transaction, while the workload to collect such information is obviously huge.

Summarising the comments on the masterfile concept, we are afraid that the masterfile may add to the number of documents that need to be prepared nowadays. We would encourage that official information of MNEs that is reported to the market (e.g. financial statements, group reports) are used during tax audits.

C. Information that should be covered by the documentation

In point 70 of the White Paper, the OECD states that documentation would need to focus on selected types of information, including information on other countries' entities and their financial data (as mentioned in point 72 – management accounts, consolidating income statements, balance sheets, tax returns). We are afraid that various jurisdictions are forbidden to require information on entities that are foreign taxpayers. We understand that there are some jurisdictions that require such information but for other countries it might be impossible due to legal restrictions (e.g. constitutional law). Moreover, please note that consolidating income statements eliminate intragroup flows so they might not be useful for the purposes of transfer pricing analysis.

D. Comparable data in the local file

Not all administrations require taxpayers to provide data regarding comparables, although taxpayers are free to present such data. Obligatory provision on comparable data to be included in the local file may constitute huge financial and compliance burden for both small and medium enterprises and also for big MNEs in the case of their auxiliary transactional flows (which- when analysed jointly – may involve material values).



We are concerned by the fact that the local file may be used to shift the burden of proof from the tax administration on to the local taxpayers, taking into account that the local file should include evidence that the local transactions are conducted on an arm's length basis.

If comparable data studies should be required, a prudent business manager concept should allow for a new comparable search to be performed not more often than every 3 years, unless there is a huge change in an economic environment (which has an impact on business flows in a group).

E. Areas where guidance is required

- *Documentation thresholds*

From our perspective it is very important that OECD would give some guidance on the thresholds for documentation. Without the standardised thresholds, in our opinion, the goal for reducing tax burdens would not be achieved, since there will be differences in the approach of various tax administrations.

We would support some guidance on thresholds in order to eliminate documentation requirement for immaterial transactions within MNEs, including in some countries also such cases as pure recharge of costs of a courier service (while one could even argue here whether this type of arrangement should be treated as a typical 'transaction'). In our opinion TP documentation should not be required for such minor transactions.

Another issue is the way how the thresholds are applied, in particular how to aggregate transactions that should be measured against given threshold. Should the transactions be compared separately against given threshold to see if the value exceeds level of materiality? Or should transactions of similar kind be first cumulated and then compared as a total with the threshold?

We agree that sometimes all auxiliary flows may create substantial values but those flows should not be looked at jointly but separately. In this regard we would like to present an example. Take a group company which historically has a lot of immovable property in various parts of a country (e.g. office spaces and it is not related with main business operations of the company). For some business or even legal reasons, the company is obliged to lease the immovable property to the group companies. When we analyse the lease agreements jointly, their value might exceed some local documentation thresholds, while in fact every lease agreement is concluded with another entity, has its own conditions and is not related to other agreements. We believe that in such case each agreement should be analysed separately.

- *PE documentation*

From our perspective it is very important that OECD would give some guidance on transfer pricing documentation for dealings within one legal entity – for dealings between the headquarters and permanent establishments. As many MNEs operate through PEs around the world, also such dealings should be reflected in the documentation works.



- *Shareholder's costs*

We believe that although in theory well recognised, the area of shareholder's costs is relatively poorly covered in practice and lacks standardisation. It is hardly possible to describe a well-established and generally followed replicative model of how shareholder's cost are identified and excluded from other cost of a shareholding company. Simultaneously, the problem of proper documentation supporting various management and general assistance contracts is one of key weak points on majority group tax managers' lists.

Agreements usually follow the general idea that shareholder's costs are excluded from service charges, but a consistent file showing that such idea is actually applied in practice is rather an open point on tax managers' wish list than a daily practice. The practical aspects how to approach such costs seems a significant dilemma, while any decision as to what should be included or excluded is linked with financial consequences of immediate effect.

We believe that it would be of great value if any guidance is presented by OECD.

It seems also justified that shareholder's costs are analysed in liaison with the issues of group management, where one often expects or is afraid of some interactions and grey areas of duality of nature between those two categories of activities / costs. We would suggest therefore considering to include this subject on the content of masterfile. Section '*Management structure and geographical location of key management personnel*' in masterfile seems to be a good point that could be elaborated or neighboured by the 'Shareholders' activities and cost follow-up model section.

Warsaw, October 1st, 2013