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The European Commission Proposal for a Council Directive on transfer pricing COM(2023) 529 final

Opinion

Näringslivets Skattedelegation(NSD) supports the objectives of the current proposal and recognizes the Commission's ambition to enhance the functioning of the internal market by reducing the occurrence of tax disputes, double taxation, and compliance costs for businesses. However, we do not believe that the objectives can be achieved through the means outlined in the proposed directive.

NSD does not agree with the Commission's assessment that transfer pricing disputes within the EU generally arise because Member States have codified and applied the arm's length principle in different ways. In our view, transfer pricing disputes generally arise due to divergent views of the facts and circumstances in the specific case, rather than uncertainties as to how the existing guidelines should be interpreted. We question whether such differences in assessments can be addressed through a more harmonized codification of the arm's length principle.

NSD believes that a comprehensive harmonization of the arm's length principle within the EU will limit the flexibility of the arm's length principle and reduce the possibilities to reach mutual agreements in transfer pricing disputes with third countries. In contrast to the objectives of the proposal, such a development may, in our view, lead to an increase of double taxation cases.

The OECD transfer pricing guidelines evolve over time, and a potential directive needs to have a dynamic structure so that it can be amended in line with changes in the OECD transfer pricing guidelines. However, we are concerned that the codification of the arm's length principle into EU law over time will result in two parallel and potentially conflicting standards, increasing uncertainty for businesses and making mutual agreement procedures even slower, more costly, and difficult than they currently are.

The principals of NSD are:

**Stockholm Chamber of Commerce * Confederation of Swedish Enterprise
Swedish Bankers' Association * Insurance Sweden * Swedish Property Federation**

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The arm's length principle is an internationally accepted principle that applies not only within the EU but is also crucial for trade with third countries. NSD questions the need for EU regulation in this area. Transfer pricing is a global issue that, in our view, requires global solutions. We believe that to achieve the set goals, the Commission should focus on procedural and governance aspects of transfer pricing rather than legislative rules.

NSD urges the Swedish Government to oppose the transfer pricing proposal. We question whether a harmonized codification of the arm's length principle leads to improved predictability in taxation and a reduction in the occurrence of double taxation cases. NSD is concerned that, for businesses, such codification will instead result in two parallel and conflicting standards, leading to increased legal uncertainty, administrative burden, and disputes.

Background

The proposal was presented by the Commission on September 12, 2023, as part of a package called "Business in Europe: Framework for Income Taxation" which also includes a separate proposal for a directive aimed at presenting common rules for calculating the tax base for multinational enterprises (MNEs) in the EU (BEFIT).¹

For a long time, the OECD has developed guidelines for transfer pricing (the OECD transfer pricing guidelines).² These guidelines aim to provide guidance to companies and tax authorities when applying the arm's length principle, thereby reducing the number of disputes over transfer pricing. However, the OECD guidelines themselves are not binding.

The current proposal aims to codify the arm's length principle into EU law. In addition, uniform binding rules on certain core issues related to the arm's length principle are to be introduced. Furthermore, the Commission opens up for additional harmonization in specified areas. The proposal is intended to align with the OECD transfer pricing guidelines.

If adopted by Member States, the proposal is expected to come into force on January 1, 2026.

The proposal in short

The draft proposal introduces regulations to ensure a consistent application of the arm's length principle in the EU. The proposal's overarching objective is to enhance tax certainty for MNEs, thereby mitigating the risk of litigation related to transfer pricing arrangements and the challenges associated with double taxation. According to the Commission, implementing the proposal will also reduce opportunities for MNEs to engage in aggressive tax planning practices through the use of transfer pricing. This goal is to be achieved by incorporating the arm's length principle into EU law, harmonizing key transfer pricing rules, clarifying the role and status of the OECD transfer pricing guidelines, and creating opportunities to establish uniform binding rules within the EU regarding specific transfer pricing areas.

¹ [Proposal for a council directive on Business in Europe: Framework for Income Taxation \(BEFIT\), COM/2023/532 final.](#)

² [OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration 2022.](#)

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The proposal would be applicable to all companies that are resident in a Member State and to permanent establishments situated in the EU. Hence, it is not limited to intragroup transactions within the EU but would also apply in relation to cross-border transactions with associated enterprises in third countries.

The proposal can be divided into three parts. The first part covers the arm's length principle and the consequences of its application, the second part addresses key issues relevant to the application of the arm's length principle, and the third part includes a mechanism for introducing additional uniform rules in specified areas to simplify and provide predictability for taxpayers regarding the interpretation and application of the arm's length principle.

Comments

NSD supports the objectives of the current proposal and recognizes the Commission's ambition to enhance the functioning of the internal market by reducing the occurrence of tax disputes, double taxation, and compliance costs for businesses. However, NSD does not believe that the objectives can be achieved through the means outlined in the proposed directive.

The Commission argues that, despite almost all EU Member States being members of the OECD and thus committing to follow OECD's principles and recommendations, the Member States differ in their views on the role and status of the OECD transfer pricing guidelines. The Commission further believes that the Member States' divergent interpretation of the OECD transfer pricing guidelines creates complexity and an uneven playing field for businesses. According to the Commission, the complexity of transfer pricing and the Member States' varied implementation of the arm's length principle in domestic law give rise to issues such as profit shifting, tax evasion, tax disputes, double taxation, and high compliance costs. This in turn hinders the functioning of the internal market.

NSD does not agree with the Commission's assessment that transfer pricing disputes within the EU generally arise because Member States have codified and applied the arm's length principle in different ways. Transfer pricing disputes are not uncommon and have indeed increased. However, in our opinion, transfer pricing disputes generally arise due to divergent views of the facts and circumstances in the specific case, rather than as a result of divergent views on how the existing guidelines should be interpreted. The facts and circumstances of each case are crucial for the interpretation and application of the arm's length principle, as well as the assessment of arm's length conditions in each intra-group transaction. The circumstances must be assessed concerning both the specific situation and the comparable situation that independent parties would be in. Assessments are a central part of the arm's length principle. NSD questions whether such differences in assessments can be addressed through a more harmonized codification of the arm's length principle.

The OECD transfer pricing guidelines are a more flexible instrument than legislative regulation. In addition, they are continuously under review and subject to change. NSD recognizes the Commission's intention to link the EU legislation directly to the OECD transfer pricing guidelines so that these are adopted consistently in the interpretation and application of the arm's length principle within the EU. However, NSD is concerned that the codification of the arm's length principle into EU law over time will result in two parallel and potentially

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conflicting standards, increasing uncertainty for businesses and making mutual agreement procedures even slower, more costly, and difficult than they currently are.

We believe that a comprehensive harmonization of the arm's length principle within the EU will limit the flexibility of the arm's length principle and reduce the possibilities to reach mutual agreements in transfer pricing disputes with third countries. In contrast to the objectives of the proposal, such a development may, in our view, lead to an increase of double taxation cases with third countries.

In addition, NSD believes that the proposed directive would undermine the established position of the OECD transfer pricing guidelines regarding the interpretation of the arm's length principle in national legislation. This would increase the administrative burden for internationally operating companies, as they would have to adapt their transfer pricing processes separately for transactions within the EU and outside the EU, despite the fact that one arm's length principle currently applies to all.

The arm's length principle is an internationally accepted principle that applies not only within the EU but is also crucial for trade with third countries. NSD believes that, since transfer pricing is a global issue, global solutions are preferable to those at EU level. The latter may pose new challenges with third countries and thereby undermine the competitiveness of the EU. To achieve set goals, NSD believes that the Commission should concentrate on specific procedural and governance aspects of transfer pricing, such as streamlining transfer pricing procedures and documentation requirements, rather than introducing legislative rules that are unlikely to lead to simplifications. Additionally, we propose that the Commission should investigate the possibility of reintroducing the Joint Transfer Pricing Forum (JTPF).³ During its existence, the JTPF provided valuable practical solutions to challenges posed by transfer pricing practices within the EU.

NSD urges the Swedish Government to oppose the transfer pricing proposal. NSD questions whether a harmonized codification of the arm's length principle leads to improved predictability in taxation and a reduction in the occurrence of double taxation cases. NSD is concerned that, for businesses, such codification will instead result in two parallel and conflicting standards, leading to increased legal uncertainty, administrative burden, and disputes.

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³ See [EU Joint Transfer Pricing Forum \(JTPF\)](#).