

Opinion Statement of the CFE on the OECD Discussion Draft “Proposed Revision of the Section on Safe Harbours in Chapter IV of the OECD Transfer Pricing Guidelines”

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Comments on the Discussion Draft “Proposed Revision of the Section on Safe Harbours in Chapter IV of the OECD Transfer Pricing Guidelines and Related Provisions and Draft Sample Memoranda of Understanding for Competent Authorities to Establish Bilateral Safe Harbours”

CFE (*Confédération Fiscale Européenne*) is the umbrella organisation representing the tax profession in Europe. Our members are 32 professional organisations from 24 European countries (21 EU Member States) with 180,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

CFE is registered in the EU Transparency Register (no. 3543183647-05).

1. Introduction

On 6 June 2012, the OECD published the Discussion Draft “Proposed Revision of the Section on Safe Harbours in Chapter IV of the OECD Transfer Pricing Guidelines and Related Provisions and Draft Sample Memoranda of Understanding for Competent Authorities to Establish Bilateral Safe Harbours”¹ (hereinafter, the Discussion Draft), containing two principal elements:

- a proposed revision of the provisions under Chapter IV of the Transfer Pricing Guidelines; and
- associated sample memoranda of understanding for competent authorities to establish bilateral safe harbours.

The OECD released the Discussion Draft as part of its project to improve the administrative aspects of transfer pricing.

The *Confédération Fiscale Européenne* appreciates the work done by the OECD, the intention of which is to reduce the complexity of transfer pricing compliance procedures.

2. The Safe Harbour Concept

The Discussion Draft defines a safe harbour as:

[...] a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country’s general transfer pricing rules. A safe harbour substitutes simpler obligations for those under the general transfer pricing regime. Such a provision could [...] allow taxpayers to establish transfer prices in a specific way, e.g. by applying a simplified transfer pricing approach provided by the tax administration. Alternatively, a safe harbour could exempt a defined category of taxpayers or transactions from the application of all or part of the general transfer pricing rules.

The current Discussion Draft reflects the OECD Transfer Pricing Guidelines, which have a negative outlook on transfer pricing safe harbours, discouraging their adoption.

In particular, the current provisions do not reflect the practice of OECD countries, a number of which have adopted transfer pricing safe harbour rules.

Furthermore, the current Chapter IV of the OECD Transfer Pricing Guidelines does not make any reference to the possibility of a bilateral agreement establishing a safe harbour.

The “*OECD Multi-Country Analysis of Existing Transfer Pricing Simplification Measures*”, released on 10 June 2011, confirmed that many countries have some form of unilateral safe harbours. In particular, safe harbour rules have been applied to smaller taxpayers and less complex transactions.

The *Confédération Fiscale Européenne* welcomes the development of safe harbours as a means to improve both transfer pricing compliance and transfer pricing administration.

Countries with particularly limited tax administration resources or transfer pricing expertise should also find them helpful.

1. OECD, Discussion Draft – Proposed Revision of the Section on Safe Harbours in Chapter IV of the OECD Transfer Pricing Guidelines and Draft Sample Memoranda of Understanding for Competent Authorities to Establish Bilateral Safe Harbours (6 June to 14 September 2012).

The *Confédération Fiscale Européenne* believes that safe harbours should be available to all taxpayers at least for low value-added services and other routine functions.

A clear definition of safe harbours at the OECD level and the implementation of their operative guidance could reduce the risk of inconsistency in safe harbours between/ among the various jurisdictions, as well as taxpayer uncertainty.

3. Safe Harbour Benefits

The Discussion Draft indicates that the use of safe harbours could guarantee the following benefits:

- improved taxpayer compliance, simplifying the burden for taxpayers and reducing compliance costs;
- certainty that the taxpayer's transfer prices will be accepted by the tax administration providing the safe harbour;
- greater administrative simplicity for the tax administration, which could use its limited resources and concentrate its efforts on the examination of more complex or higher risk transactions and taxpayers.

The *Confédération Fiscale Européenne* welcomes the development of safe harbours, especially for some types of transactions such as low-added value transactions, in order to reduce the compliance burden of taxpayers.

Furthermore, the *Confédération Fiscale Européenne* believes that the adoption of safe harbours could be of particular help to SMEs, for which the relative burden of compliance is more significant.

The *Confédération Fiscale Européenne* believes that Chapter IV should provide specific guidance for the application of safe harbours to low-added value transactions and SMEs.

4. Risk of Using Safe Harbours

The Discussion Draft lists the possible negative consequences deriving from the availability of safe harbours:

- divergence from the arm's length principle;
- risk of double taxation or double non-taxation;
- inappropriate tax planning; and
- equity and uniformity issues.

The *Confédération Fiscale Européenne* emphasizes the importance of a bilateral or multilateral adoption of safe harbours, in order to reduce and/or eliminate the risks listed above.

As stated in the Discussion Draft (paragraph 25):

[...] it is important to observe that the problems of non-arm's length results and potential double taxation and double non-taxation arising under safe harbours could be largely eliminated if safe harbours were adopted on a bilateral or multilateral basis by means of competent authority agreements between countries. Under such a procedure, two or more countries could, by agreement, define a category of taxpayers and/or transactions to which a safe harbours provision would apply and by agreement establish pricing parameters that would be accepted by each of the contracting countries if consistently applied in each of their countries [...].

The *Confédération Fiscale Européenne* appreciates the ongoing work of the OECD on developing sample Memoranda of Understanding (MOU) for use by competent authorities in negotiating bilateral safe harbours for common categories of transfer pricing cases involving low risk distribution functions, low risk manufacturing functions, and low risk research and development functions.

The *Confédération Fiscale Européenne* believes that tax authorities should:

- provide assistance to small and medium-sized enterprises in making comparable analyses;
- issue guidelines on the application of the cost plus method, for instance by saying that except in exceptional circumstances a cost plus 8% shall not be criticized in case of general headquarters services, cost plus 3%/5% for logistical centers, cost plus 1% for mere re-invoicing, etc.