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

Prepared by the CFE Fiscal Committee

Submitted to OECD Centre for Tax Policy and Administration

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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).

Mr. Joseph L. Andrus
Head of the Transfer Pricing Unit
OECD Centre for Tax Policy and Administration
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Dear Mr. Andrus,

As you are aware, Transfer Pricing is one of the most topical issues for multinational enterprises. Transfer pricing rules determine how international transactions within a multinational company must be priced to ensure that each country receives its fair share of tax.

These rules should have the aim to eliminate double taxation and guarantee improved taxpayers' compliance.

The above rules are based on the respect of the arm's length principle, as a concept generally accepted as the best possible means to set prices in intercompany transactions and avoid double taxation on international business. The arm's length principle is outlined in Article 9 of the OECD Model Tax Convention.

Transfer pricing compliance and transfer pricing administration have become rather complex, time consuming and costly, for both, taxpayers and tax administrations alike.

Taxpayers have to deal with numerous compliance requirements along with the uncertainty that generally surrounds tax positions involving transfer pricing, while tax administrations have limited resources to challenge transfer pricing cases, which are rather complex.

At the same time, transfer pricing has become one of the most controversial tax issues, with a growing number of disputes.

During the past few years, an increasing number of cross-border intercompany transactions could be observed as well as the entry in the international market of a large number of small and medium enterprises (hereinafter, SMEs).

SMEs face more difficulties than multinational enterprises in view of their lack of knowledge, experience on the subject, and resource availability.

In 2011, the OECD officially launched its project on the administrative aspects of transfer pricing, including a review of practices that may be implemented by countries to optimise the use of taxpayers' and tax administrations' resources.

The project started with a survey of the transfer pricing simplification measures in existence in OECD and non-OECD countries and led WP6 to review the current guidance on safe harbours in Chapter IV of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter, OECD Transfer Pricing Guidelines).

The survey focused specifically on simplification measures adopted by countries as part of their transfer pricing regimes. These include safe harbours, less stringent documentation requirements, reduced penalties, streamlined procedures, etc.

The implementation of some transfer pricing simplification measures could result in advantages for both taxpayers and tax administrations.

From a taxpayer's perspective, such simplification measures should facilitate transfer pricing compliance, reduce related costs as well as transfer pricing litigation cases, and guarantee certainty with regard to tax positions.

From a tax administrations perspective, such simplification measures eliminate the risk of tax base erosion, and create the opportunity to focus their limited resources on higher risk transfer pricing cases.

It is worth noting that tax authorities in several countries have developed simplification measures to alleviate the burden of taxpayers' transfer pricing compliance requirements.

Simplification is also requested at OECD level.

The Confédération Fiscale Européenne is pleased to provide inputs on the contents of 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" (hereinafter, the Discussion Draft) released by the OECD on 6 June 2012, as part of the project on administrative aspects of transfer pricing, officially launched in 2011.

The Confédération Fiscale Européenne strongly supports the OECD project on administrative aspects of transfer pricing, which should be conducted in order to:

- guarantee taxpayers' certainty;
- facilitate transfer pricing compliance;
- reduce cost compliance; and
- avoid double taxation.

The Confédération Fiscale Européenne's comments on the Discussion Draft are outlined below.

In commenting on the Discussion Draft, the Confédération Fiscale Européenne has been influenced by the proposed timeline. As a result, our comments are not a comprehensive list of all issues and areas of uncertainty, but a focus on the most significant issues which we believe can be addressed within the

said timeline. This does not preclude the discussion of other issues if it might be convenient to include these within the project.

We will be pleased to answer any questions you may have concerning the Confédération Fiscale Européenne's comments, outlined below.

Sincerely yours,

Confédération Fiscale Européenne

Comments to 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. 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*” (hereinafter, the Discussion Draft), containing two principal elements:

- a proposed revision of the provisions under Chapter IV of the Transfer Pricing Guidelines;
- 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 harbours 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 June 10, 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.

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

A clear definition of safe harbours at 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 taxpayers' uncertainty.

3. Safe harbours benefits

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

- improved taxpayers' 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 taxpayers' compliance burden.

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;
- 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 harbour 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 size enterprises in making comparable analysis;
- issue guidelines in 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.