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Transfer pricing: managing documentation requirements in 26 countries

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CMS Tax Connect

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Introduction

The determination and verification of a transfer pricing policy involves the consideration of a range of information not necessarily contained in the documents that must be submitted to a tax authority (such as a company's tax returns or contracts). This specificity of transfer pricing, together with the fact that, generally, the tax authorities bear the burden of proof for making adjustments, has led various States to introduce specific documentation obligations in this context.

These obligations are recent (they are mostly less than ten years old) and undoubtedly reflect the increasing attention that the tax authorities are paying to transfer pricing. The first state to impose such requirements on its taxpayers was the United States in the mid-1990s. It was not until the mid-2000s that the phenomenon became widespread, with the introduction of documentary requirements in states such as Germany (2003), China (2008), Spain (2009) or France (2010).

Alongside these national initiatives, several multilateral groups have also turned their attention to the matter. Firstly of course there is the OECD, whose 1995 guidelines provided directions that have been used in practice by taxpayers and authorities without change to national laws.

Standardised approaches have also been proposed by other multilateral groups in order to reduce the cost to businesses of producing such documentation. In 2003, the Pacific Association of Tax Administrators (comprising Australia, Canada, Japan and the U.S.) published the final version of its standard multilateral documentation and, more recently, the European Union's Joint Forum on Transfer Pricing produced a code of conduct which was adopted by the Council of Ministers of the EU in 2006. The application of this Code of Conduct is becoming widespread in Europe, even though member states are not strictly obliged to incorporate it into their national law, either by the introduction of laws (like the obligations introduced in Spain and France) or by administrative practice. In Europe, it is becoming increasingly advisable for companies to retain the type of documentation proposed by this Code of Conduct.

As shown in this CMS Tax Connect, the provisions of national laws are far from being harmonised (either in respect of the range of companies to which such requirements apply, the content of the documentation required, or the penalties resulting from the absence of such documentation). However, in relation to the content of the documentation, a consensus is emerging based on the following four main threads:
— a description of the group and the industry in which it operates
— a business analysis – a description of the business functions, risks and assets – of entities involved in intra-group transactions
— a description and justification of the method(s) utilised for setting transfer prices for different transactions
— one or more economic studies, intended to justify the parameter(s) of the methods applied.

These documentary requirements impose constraints and additional costs on businesses. However, they also provide legal certainty to taxpayers, as they specify what information is expected by the government, thereby avoiding certain discussions having to take place during assessments.

Keeping such documentation also enables companies to better identify the potential risks they face in this context and enables them, if necessary, to change their transfer pricing policy to limit such risks.
Finally, the documentation also acts as a precise statement of the company's position on transfer pricing. It should therefore not be seen as a compilation of information, but rather as the primary tool enabling businesses to persuade tax authorities that their transfer pricing policies are consistent with the principle of full competition.

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Algeria

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

According to current Algerian tax law and regulations, it is not mandatory to maintain transfer pricing documentation. It should be noted that transfer pricing concept was restated by the 2007 and 2008 Finance Acts. An older provision contained in article 189 of the Algerian tax code was already in force but in practice the tax authority made very limited use of it. While we have, as yet, no experience of the tax authority's understanding of the new provisions, we expect that the tax authority will require the tax payer to justify the inter-company prices. According to verbal answers from the head of the tax authority, transfer pricing audits are focusing, at this stage, on transactions where prices paid to Algerian companies are under cost price.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
All transactions with associated enterprises, including associated enterprises located within Algeria.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
The definition is similar to the OECD's article 9 definition of associated enterprises. Article 142 bis of the Algerian code defines an "associated enterprise" as an enterprise operating in Algeria or outside Algeria which participates directly or indirectly in the management, control or capital of an enterprise operating in Algeria or out of Algeria. It should be noted that the Algerian tax code extends the application of transfer pricing rules beyond cross border transactions to transactions between entities operating in Algeria.
The wording of the older definition in article 189 of the Algerian tax code, which has not yet been repealed, refers to dependent entities, or controlling companies, out of Algeria.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable. The content of the documentation is not defined by regulations.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
From a practical stand point, tax authorities may require any information that may support the declared transaction price.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
There is no provision setting out the benchmark or method to be used. The source providing the benchmark is more relevant and more important than the scope of the study (regional/global). That is to say database figures or data provided by a government agency are more likely to be accepted than internal market forecast studies.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
The document should be provided officially in Arabic but a French version or certificated translation will be accepted.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

No official deadline is set for preparing the documentation. However, where it has to be prepared within the context of a tax audit, the deadline for replying to the tax notification should be observed (usually 30 days).

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

There is not any documentation-related penalty.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

As stated in answer one above, the taxpayer should support his position with evidence. Where the tax authority rejects the taxpayer's documents, this will lead to a reassessment of the taxable base and the taxpayer remains obliged to provide the evidence within the contentious/litigation process.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

No, the tax payer is still entitled to apply for the mutual agreement procedure. However, in practice, this procedure is not used.

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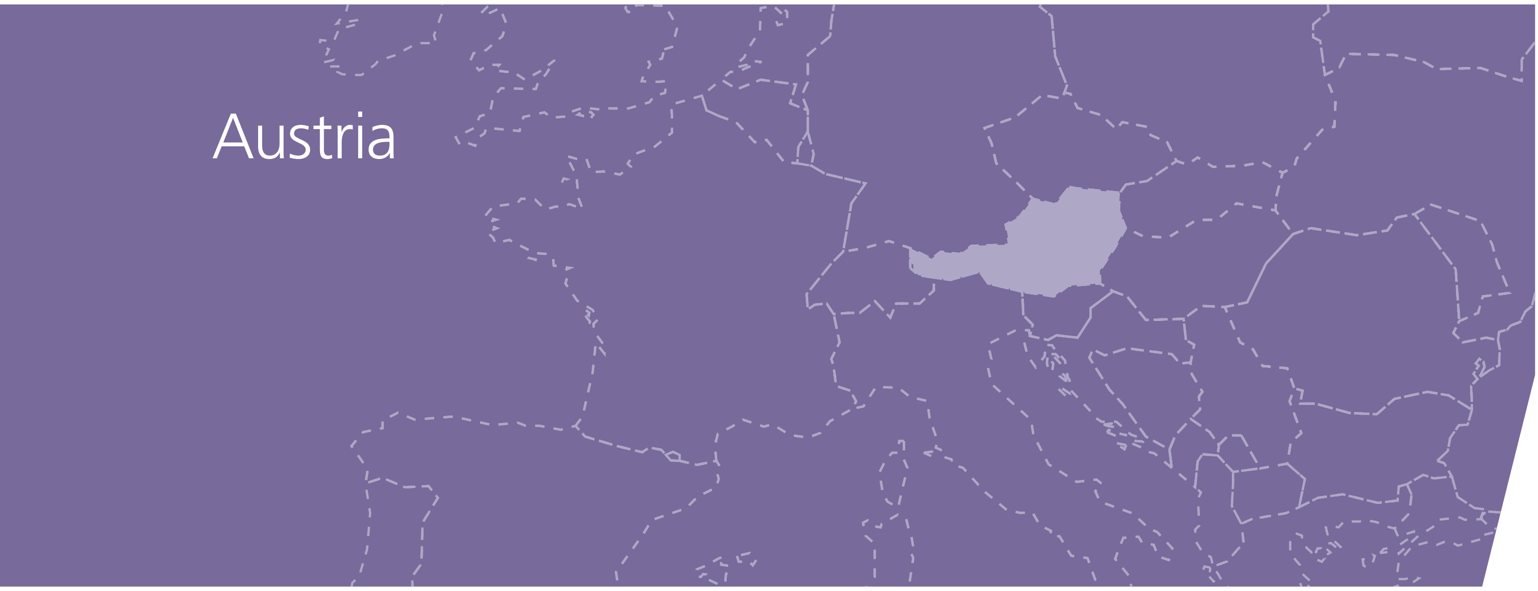
Austria



1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Taxpayers are obliged to maintain transfer pricing documentation (cf. Chapter 3 of the Draft Transfer Pricing Guidelines). This obligation applies to all taxpayers without exemption.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
All transactions with associated enterprises must be documented.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
The definition of "associated enterprises" complies with Art. 9 (1) of the OECD Model Convention: (i) an enterprise which participates directly or indirectly in the management, control or capital of another enterprise or (ii) where the same persons participate directly or indirectly in the management, control or capital of two enterprises.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Documentation in line with the EUTPD will be accepted as core documentation (cf. Draft Transfer Pricing Guidelines Rz 309). The Austrian tax authority may however request further information and documents during a tax audit (cf. Draft Transfer Pricing Guidelines Rz 309 referring to sec. 3.18 of the EUTPD).

The list of information to be provided as a transfer pricing documentation has not yet been published by the Austrian tax authorities. It will probably be published in mid-2010.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
Such a commitment is not requested. In general, the tax authorities may request information from any person even if it does not concern its own tax matters (sec. 143 (1) of the Austrian Federal Fiscal Code). Further, according to prevailing case law, there is an increased obligation to cooperate with the tax authorities in cases with international elements, such as transfer pricing issues. In practice therefore, the tax authorities usually request information – including information regarding foreign group companies – from the Austrian taxpayer.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
There is no restriction in this respect, i.e. regional benchmark studies are accepted.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
In practice, transfer pricing documentation in the German or English language is accepted.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The transfer pricing documentation must be provided to the tax authority at the beginning of a tax audit or upon specific request from the tax authorities.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

There are no documentation-related penalties.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

Yes.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Not applicable (documentation-related penalties do not apply).

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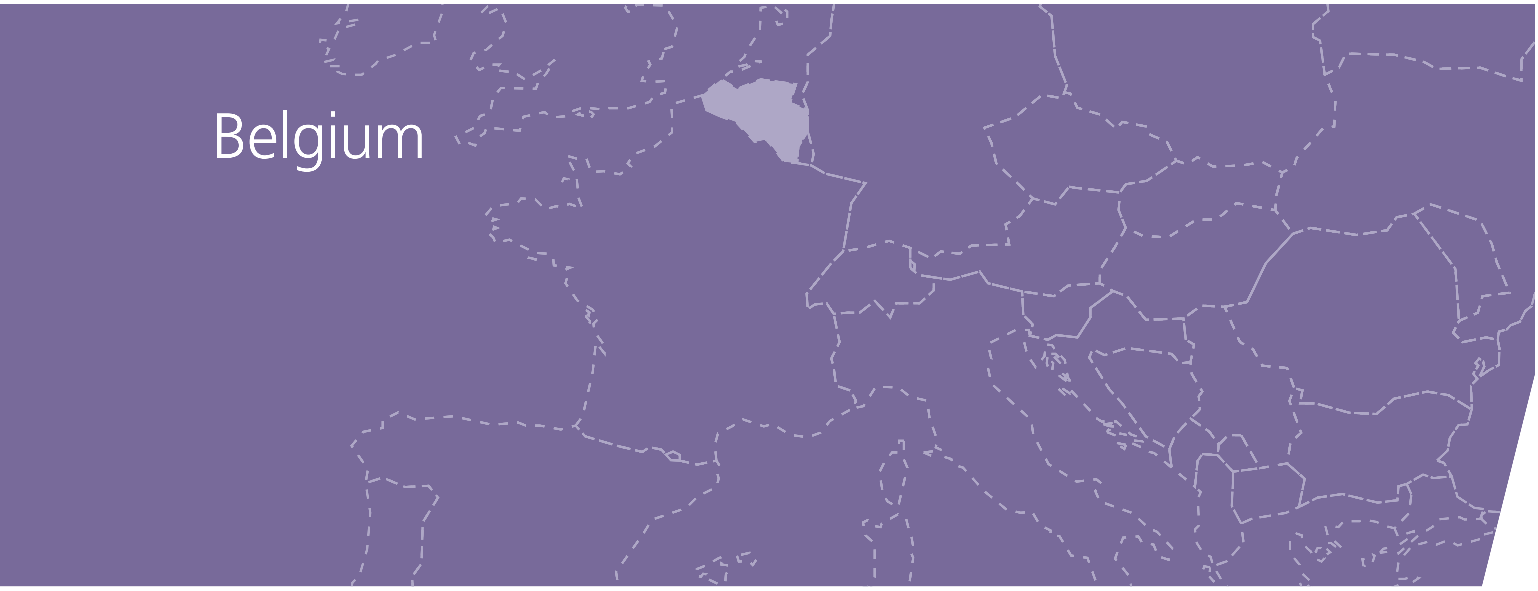
Belgium



1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

All Belgian taxpayers which are part of an international group of companies have to maintain transfer pricing documentation.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
All transactions with associated companies have to be documented and their price must be justified at all times.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
In accordance with the Belgian company code, "associated companies" are:
— (A) any company which has control of another (based on share ownership, voting power, power to appoint the majority of the members of board),
— (B) any company which is controlled by another,
— (C) companies which are part of a consortium,
— (D) other companies which are controlled by the companies mentioned above on (A), (B) and (C).

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
The tax authorities have published a circular relating to transfer pricing documentation which transposes the content of EUTPD. However, this circular also states that the European documentation is only a minimum requirement for companies and does not prevent complementary information being requested (depending on the facts and the circumstances). This might be:
— information concerning the company (activities, structure, shareholding, sales, turnover, and transactions with associated companies…),
— information concerning the transactions (market, conditions, circumstances, framework…),
— information concerning the functions of the company (production, marketing, advertising, transport, management…),
— information concerning the risks (financial, loan conditions, liability, and change in prices…),
— information concerning the assets (tangible or intangible).

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
The Belgian tax authorities may request information only from Belgian taxpayers. Such requested information could include information which comes from another State. Regarding taxpayers which are not established in Belgium, the Belgian tax authorities could request assistance from the tax authorities of the foreign jurisdiction in obtaining information.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
In practice, regional benchmark studies and in particular pan-European benchmark studies are generally accepted by the Belgian tax authorities.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
The languages which are used in Belgium are French, Dutch or German depending on the location of the registered seat/establishment of the company.
However, given the international aspects of the transfer pricing issues, the Belgian tax authorities also accept transfer pricing documentation in English.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

As a rule, taxpayers have to provide the transfer pricing documentation upon specific request from the tax authorities (generally made in the context of a tax audit) within a period of one month. However, due to the importance of the documentation to be provided, the tax authorities will generally agree to extend the deadline for providing the information to three months from the request.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

If the required information is not provided, the tax authorities could adjust the taxpayer's taxable basis on the grounds that the transaction does not comply with the "arm's length principle". In addition, tax on the non-reported portion of income could be increased through penalties of 10% to 200%, depending on the nature and seriousness of the taxpayer's infringement. Finally, administrative fines ranging in amount from EUR 50 to EUR 1,250 could also be applied for each violation of the provisions of the Belgian income tax code.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

As indicated above, if the required information is not provided, the tax authorities could adjust the taxpayer's taxable basis; the taxpayer will then have to demonstrate based on supporting evidence/documentation that the transaction complies with the "arm's length principle" and that the tax authorities may not adjust its taxable basis. This does indeed imply a reversal of the burden of proof.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Neither the reassessment of the taxable basis, nor the application of the penalties, prevents the taxpayer from engaging a mutual agreement procedure provided for by a double tax treaty or by any international treaty.

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Bosnia and Herzegovina

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

In order to understand the transfer pricing system of Bosnia & Herzegovina (BiH), it must be noted that the Dayton Agreement (hereinafter "DA", 1995) established a Constitution for BiH and in addition Constitutions for the Entities within BiH – the Federation of BiH (hereafter FBiH) and Republika Srpska (hereafter RS); subsequently, Brcko District ("BD") was created as a third unit.

As a result, taxation systems vary between the three units and different tax administrations (entity, cantonal and municipal levels) are in charge of tax collection, with the exception of a centrally administered value added tax regime.
Regarding corporate profit tax, and specifically transfer pricing rules, only two pieces of legislation are applicable:

- in RS, transfer pricing issues are regulated by the RS Corporate Profit Tax (CPT) legislation,
- in FBiH and BD, transfer pricing issues are regulated by the FBiH Corporate Profit Tax (CPT) legislation.

In all jurisdictions, the taxpayer has an obligation to report related party transactions on its tax statement (an additional document submitted with the tax return). In addition, the taxpayer must separately report the values of related-party transactions based on market prices or substantially similar transactions (i.e. at "arm's length" prices).

Based on current practice, the taxpayer bears the risk that tax authorities might not fully recognize the expenses or might increase the revenue generated by transactions with affiliated companies when adequate transfer pricing studies are not available.

There are no special provisions in the CPT legislation limiting the obligation to maintain appropriate documentation to specific categories of taxpayers/ thresholds.

2. What is the content of the documentation that must be prepared?

FBIH and RS:
The CPT legislation does not explicitly regulate the content of transfer pricing documentation. However, it does stipulate which transfer pricing methods can be used, specifically the methods of establishing the market value of the goods/services. A taxpayer has an obligation to maintain business documentation in accordance with accounting principles and the law on Tax Administration.

RS:
In order to ensure tax recognition of transactions, certain documentation is prescribed under the CPT and must be kept. This relates to the taxpayer's legal status and business activities, and specifically to:

- identification of transactions between related parties (relevant data has to be kept for five years),
- identification of activities and data relating to business partners, insofar as relevant to the transactions,
- identification of the chosen method and reasons for choosing it.

FBIH: No additional regulations.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
FBIH and RS:
Under the CPT legislation there are no exceptions/ thresholds regarding transactions that should be documented.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
FBIH:

- an individual or legal entity which is able to control or exert considerable influence over business decisions,
- a legal person which has the same legal entities participating in control, supervision or capital, or influencing business decisions, as the taxpayer.

For the purpose of this definition, the possession of more than 50% or the largest single portion of shares or interests is treated as enabling the holder to control the taxpayer. Also, influence over a taxpayer's business decisions exists when a person associated with a taxpayer has more than 50% or has the largest single number of votes in the taxpayer's controlling bodies.

RS:
A natural or legal person is considered as associated with an entity if it directly or indirectly owns 10% or more of the shares in that entity.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
FBIH and RS:
Both RS and FBiH legislations regarding transfer pricing are still under development. Therefore, there is no specific requirement or rule for each specific situation. As a general rule, a taxpayer is expected to provide documents required by tax authorities.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
FBIH and RS:
Generally, the tax authorities accept regional benchmark studies if they can be substantiated with reliable documentation. However, the requirements are rather stringent in this regard.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
FBIH and RS:
The Act on Tax Administration prescribes that one of the official languages used in RS or (as the case may be) FBiH shall be used.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

FBIH and RS:
The CPT legislation does not prescribe any specific deadline for providing transfer pricing documentation. There is no legal obligation to submit transfer pricing documentation with standard tax returns, except the obligation to report transactions between associated parties by submitting the tax statement.
According to the Law on Tax Administration, the taxpayer is obliged to participate in tax procedures by truly presenting the facts which are relevant to taxation.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

FBIH and RS:
There are no penalties specifically related to transfer pricing documentation. Generally, a person who fails to submit a tax declaration to the Tax authorities in a manner prescribed by the tax legislation will be subject to a penalty of 10% of the tax which is due or required to be reported on the declaration for each month until the declaration is filed, up to a maximum of 150%.

FBIH:
Please note that the tax authorities are entitled to estimate the tax base of a taxpayer if the taxpayer has not submitted the tax declaration within fifteen (15) days of the due date for the tax declaration as set out in the tax legislation.

For any declaration prepared by the tax authorities on behalf of the taxpayer, there shall be a penalty in the amount of 10% of the assessed tax which is a subject to adjustment when an investigation is completed or a declaration submitted. The burden of proving that the tax determination is incorrect is on the taxpayer.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

FBIH and RS:
In the course of any tax investigation, the authorities are required to clarify all facts and circumstances relevant to the scope of the investigation, including facts and circumstances favourable to the taxpayer. There are no specific stipulations concerning the burden of the proof where transfer pricing documentation is missing, but as stated above the taxpayer is at risk of the CPT base being increased by the tax authorities on that ground.

The burden of the proving that the tax liability established by the authorities is incorrect is on the taxpayer (reversed).

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

FBIH and RS:
Not applicable, no documentation related penalties.

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Brazil

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

There is no obligation on taxpayers to establish and maintain contemporaneous transfer pricing documentation similar to that contained for instance in the 2006 EU Code of Conduct; however, enterprises must be in a position to provide information upon request to justify their transfer pricing policy. There are no detailed legal provisions as to the supporting documentation. Information on transactions with related parties resident abroad, as well as on the method adopted and the parameter prices calculated should be set out in an appendix to the annual tax return. Taxpayers are required to maintain documents describing all of their controlled transactions and demonstrating compliance with one of the transfer pricing methods provided for in the Brazilian legislation. At a tax audit, those additional documents should be provided to the Brazilian tax authorities.

As there is no precise list of information that has to be provided, taxpayers must be prepared to reply to any question from the Brazilian Tax Authorities, except on transfer of technology as this is outside the scope of the transfer pricing legislation.

2. What is the content of the documentation that must be prepared?

Taxpayers may justify their transfer pricing policies by showing books, invoices, import and export documents, contracts and any other document capable of evidencing the arm’s length character of the prices.

a) Does this obligation apply to all taxpayers or does it apply to certain categories only (e.g., taxpayers exceeding a certain threshold of turnover, assets)?
Not applicable (all enterprises have to abide by the transfer pricing regulations as indicated in 1. above).

b) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
Taxpayers have to justify the transfer prices only with “associated enterprises” outside Brazil; there is no such obligation in respect of transactions within Brazil, even transactions with an associated enterprise.

c) What is the definition of “associated enterprises” for the purposes of this requirement?
The transfer pricing legislation applies to “associated enterprises”, defined by reference to a 10% capital test that applies directly or indirectly (between parent and subsidiary companies, or between sister companies under common control). This threshold is very low as compared with other countries where it is generally at least 50%.
In addition, the legislation applies even in the absence of shareholding links in situations where a non resident uses the services of an agent, distributor or concessionaire in Brazil and that agent, distributor or concessionaire has exclusive rights in respect of the purchase and sale of products, services or other rights.

d) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises (“EU TPD”)? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable.

e) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
No. The Brazilian Tax Authorities have no jurisdiction over foreign persons.
The Brazilian Tax Authorities may request any document able to prove that the information provided is accurate, including information that is located in a foreign jurisdiction such as a foreign tax return or similar documents.

f) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
The problem is that there is no data base of comparables in Brazil; so the comparable analysis is very limited. In effect, the Brazilian Tax Authorities may choose to consider comparables of any kind and the taxpayer is in a very difficult position in this respect. Brazilian transfer pricing legislation does not require taxpayers to prepare a benchmark study.

g) What language(s) must be used by taxpayers in submitting the transfer pricing documentation?
All documents must be submitted in Portuguese; it is possible to submit a notarized and "consularized" copy of the document duly translated by a sworn translator. There is no need for "consularization" where Brazil has an appropriate treaty with the country in question, as it does for example with France.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

Generally speaking in the case of a tax audit the enterprise has to respond to any request from the Tax Authorities within a period of 20 days. However, any transaction with a foreign related party must be notified by the Brazilian tax payer in its annual income return (DIPJ). Information on transactions with foreign related parties should be presented in an appendix to the taxpayer's annual tax return.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

There are no documentation related penalties. In the event of omissions and/or wrong information, the Tax Authorities may apply a penalty of up to 75% of the total amount of tax that is due.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

In all instances, the burden of the proof is on the taxpayer; so the question is not relevant as regards Brazil.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

The issue in Brazil is that there is no experience of the Tax Authorities agreeing to discuss a case under the Mutual Agreement Procedure; in effect, some tax treaties provide for such a procedure but the Tax Authorities have taken a general position that they will not apply it anyway.

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Bulgaria

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

The transfer pricing guidelines drafted by the Bulgarian tax authorities recommend that taxpayers prepare and maintain transfer pricing documentation contemporaneously with the controlled transaction or by the date of filing the tax return at the latest. However, taxpayers are not obliged by law to create and maintain transfer pricing documentation before or at the time of the controlled transaction. In case of a tax audit the taxpayers have to be able to evidence conformity with market principles with sufficient data and documents. Furthermore, tax authorities may require any documents and information evidencing conformity with the arm's length principle.

For "small" and "micro" enterprises the Bulgarian transfer pricing guidelines recommend that the authorities do not require complete transfer pricing documentation. Nevertheless, the obligations for provision of information and evidencing that controlled transactions are conducted at arm's length apply to all taxpayers regardless of their size, turnover, etc.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
According to the recommendations of the Bulgarian transfer pricing guidelines, taxpayers should not be required to create and maintain full and complete transfer pricing documentation for transactions which do not exceed certain thresholds. Such thresholds are for example approximately EUR 100,000 for sale of goods and approximately EUR 200,000 for the sale financing.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
The definition of "associated enterprises" generally complies with the definition contained in article 9 of the OECD Model Convention.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
The content of the documentation discussed in the Bulgarian transfer pricing guidelines is similar to that of the EUTPD.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
Taxpayers not established within the territory of Bulgaria are not required to commit to provide information to the tax authorities.

Local taxpayers are generally obliged to provide any information or document, even if located abroad, which is necessary for the taxpayer's tax liability to be determined and for tax to be levied.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
There are no restrictions in this respect but generally local comparables would be preferable.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
The official language is Bulgarian and all documents must be in Bulgarian. Foreign documents and data may be used but must be translated in the Bulgarian language.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

Corporate taxpayers must disclose information about their controlled transactions and all dealings with associated enterprises in their annual financial statements. The information disclosed therein, or the lack of such information, may serve as a ground for the tax authorities to request additional data and conduct an audit.

In the event of a tax audit the tax authorities may demand the submission/production of certain documents and information. The period for the submission of such documents is fixed by the authorities and is usually around two weeks. Taxpayers may request an extension for a period of up to three months. The extension may be granted only once.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

There are no documentation-related penalties.

If there is no documentation or the documentation is incomplete, the tax authorities may conduct a transfer pricing reassessment.

Tax authorities may impose co-operation-related penalties. A taxpayer may be fined up to EUR 250 for a first offence and EUR 500 for a second offence if the taxpayer fails to furnish information and documentation requested by the tax authorities. Such failure to furnish information is considered to be uncooperative behaviour obstructing the tax authorities in determining and charging the correct taxes.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

The burden of proof is reversed in the event of absence or incompleteness of the transfer pricing documentation.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Not applicable.

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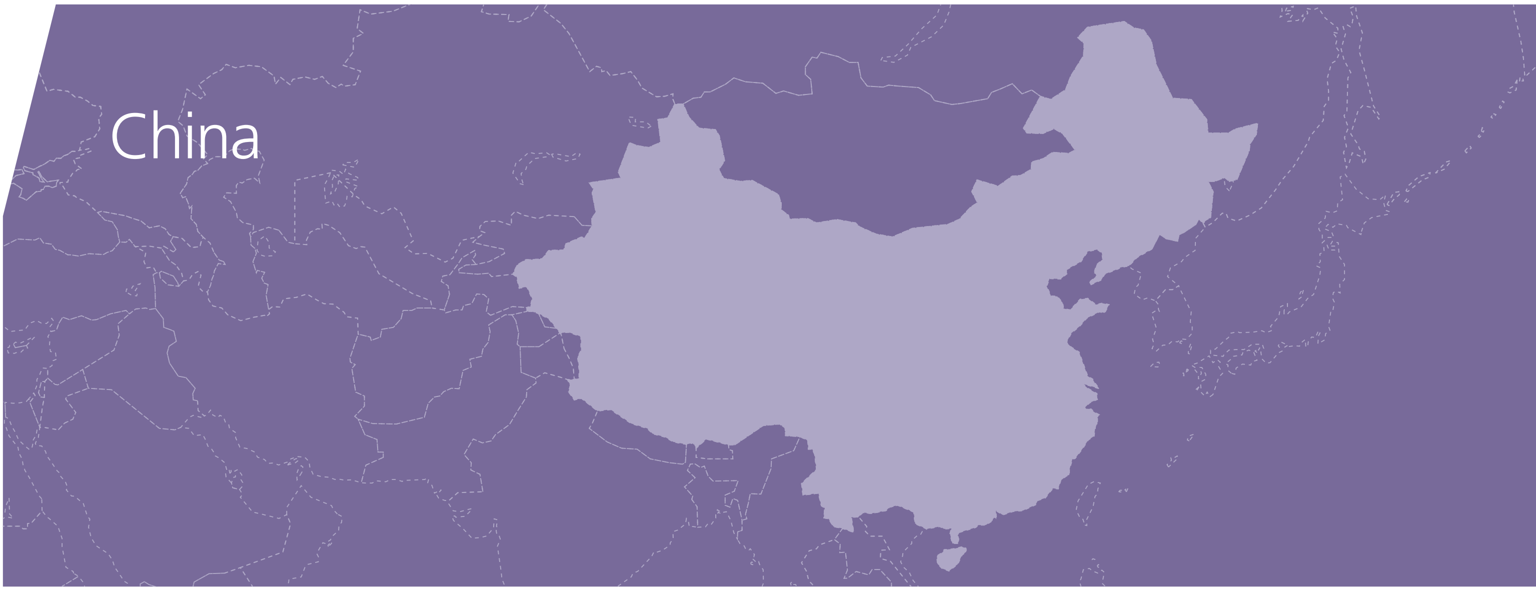

China

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

In China, all taxpayers are required to prepare transfer pricing documentation unless they fall under the following categories:

— companies with an annual related party transaction value (purchase and sale) below RMB 200 million (approximately EUR 20 million) and with other annual related party transactions (services etc.) below RMB 40 million (approximately EUR 4 million),

— companies covered by an advance pricing arrangement (arrangement with the Chinese tax authorities regarding transfer pricing),

— companies with related party transactions limited to China (excluding Hong Kong, Macau and Taiwan) and in which foreign investors hold less than 50% equity.

As an exception to the general rules above, if a company with foreign investors (i) only has limited functions and takes limited risks in China (such as sole manufacture, a distribution company or a research company), (ii) does not bear the financial or market risks on decision making, and (iii) has incurred losses in a given year, it must prepare documentation for that year.

In addition, a company that has been subject to transfer pricing reassessment in a given year will be subject to a reassessment supervision period of 5 years and will be obliged to provide documentation in each year of the supervision period.

2. What is the content of the documentation that must be prepared?

The documentation shall contain the following:

— organisation structure, such as global organisation and shareholding structure of the group, description of any change of shareholding or organisation structure, related tax and preferential tax treatment of each associated party,

— overall business operation, such as business overview of the company, industry analysis, company development, composition of principal activities, market position and competitors, internal organisation structure, functions and risks consolidated financial statement of the groups,

— description of related party transactions, such as type of each transaction, trading mode, supply chain information covering both physical product flow, cash flows and transfer of title, intangible assets, copies of related contracts, sales, costs and expenses and profits analysis,

— comparability analysis, such as functions and risks, source of comparables, selection method and reasons, and benchmarking results,

— description and justification of transfer pricing methodology, such as reasoning, assumptions or other information supporting the selected transfer pricing methodology.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?

Companies obliged to make transfer pricing declarations must document all their related party transactions. For the time being, no threshold has been provided by related tax regulations.

b) What is the definition of "associated enterprises" for the purposes of this requirement?

Chinese law does not define "associated enterprises", but defines "associated relationship" which is used to determine "associated enterprises". An "associated relationship" includes:

— direct or indirect ownership of more than 25% of equity interests/shares of the other party, or direct or indirect ownership by a third party of more than 25% of equity interests/shares of both parties. Where there is an intermediate party or parties, ownership of more than 25% equity interests/shares by an intermediate party provided that one party holds at least 25% in such intermediate party,

— loan representing more than 50% of the total paid-up capital of the other party, or security interests

representing more than 10% of the loan (not applicable to independent financial institutions),
- control of the management decision making of the other party through appointment of high ranking staff,
- dependence on proprietary technologies (such as industrial property rights, technology know-how etc) of the other party in order to carry out activities,
- control of purchases and sales activities or services by the other party,
- control of the activities of the other party by other means, such as family members and relatives, etc, irrespective of the shareholding ratio as mentioned in point **1.** above.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
Taxpayers who are not established in China do not need to commit to provide specific information on the request of the tax authorities. If the tax authorities wish to obtain such information, they should either implement the information exchange procedures provided for in bilateral tax treaties, or ask the Chinese company to provide information related to foreign associated companies.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Chinese law does not contain explicit provisions on this issue. The tax authorities do not exclude the possibility of applying benchmarks of companies in other Asian countries. However, we consider that such application would be quite limited.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
The documentation as well as any appendix must be submitted in Chinese. In the absence of a Chinese version, a Chinese translation must be submitted.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

Where requested by the competent tax authorities, the contemporaneous documentation must be submitted to tax authorities within 20 days.

As an exception, if a company with foreign investors has only limited functions and bears only limited risks in China (see question 1) this company must submit the documentation before 20 June of the following tax year.

In addition, a company that has been subject to transfer pricing reassessment in a given year shall provide the documentation before 20 June of the following tax year during the 5 year supervision period.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

If the company fails to provide documentation or provides incomplete or false information, the tax authorities can impose a fine up to RMB 50,000 (approximately EUR 5,000), and the tax authorities have the right to make a transfer pricing reassessment in accordance with "arm's length" principle or other reasonable methods. In addition, the tax authorities have the right to impose interest on the outstanding taxes.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

No.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

A company which has been subject to transfer pricing reassessment has the right to apply for an adjustment eliminating any double taxation resulting from such reassessment within 3 years of receipt of the notice of reassessment. However, irrespective of this provision, the tax authorities will not make any adjustment in respect of tax already paid by the company which relates to passive income transferred abroad, such as royalties, rentals and interest.

Chinese law does not stipulate whether such an application for adjustment will be accepted after the documentation-related penalties have been imposed on the company.

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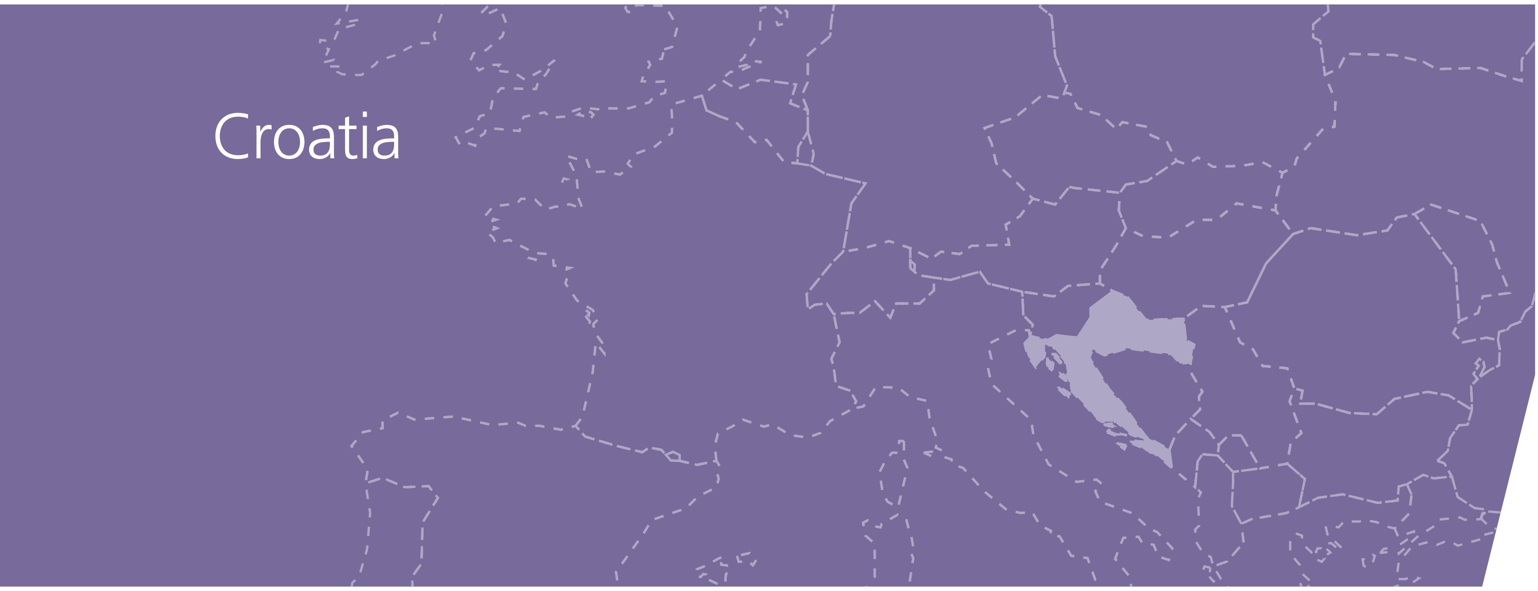
Croatia



1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Generally, transfer pricing issues are regulated by Croatian Corporate Profit Tax (CPT) legislation. Although Croatia is not a member of the OECD, OECD guidelines are adopted by the local Tax Administration.

Croatia introduced general transfer pricing principles in the year 2000. Compliance standards for taxpayers are still not finalized. Starting from 2009, the Croatian Tax Authorities have been using the Amadeus database tax/transfer pricing inspections.

According to the CPT legislation, business relations between associated persons shall only be recognised if a taxpayer has and provides, upon the request of the Tax Authority, data and information about associated persons and his/her business relations with those persons, the methods used for the determination of comparable market prices, and his/her reasons for selecting a particular method.

There are no special provisions in the CPT legislation limiting the obligation to maintain appropriate documentation to certain categories of taxpayers/thresholds.

Recently the Tax Gazette (an official gazette released by the Ministry of Finance) has published several on transfer pricing issues, along with recommendations/guidelines regarding documentation. Transfer pricing is therefore becoming a more and more important issue in Croatia.

2. What is the content of the documentation that must be prepared?

Neither the primary nor the secondary CPT legislation explicitly regulates the content of transfer pricing documentation. However, the primary legislation stipulates which transfer pricing methods can be used, and the secondary legislation contains transfer pricing documentation requirements, such as:

- identification of the chosen method and reasons for choosing it,
- description of data, explanation of the method of analysis used to establish the transfer price,
- explanation of assumptions and assessments used to establish the result according to the principles of an impartial transaction (risk analysis, functional analysis and comparability),
- explanation of all calculations used for the selection of the appropriate method,
- documents relating to previous years which were used as a basis for the current year should be updated on a regular basis,
- documents that can support the transfer pricing calculations, or which are mentioned/used for the purpose of the analysis, must be kept as part of the documentation.

Based on current practice of the Croatian authorities, the following documents have to be prepared (the requirements are in line with the OECD guidelines):

- on the group level (masterfile):
  - history and activities of the group – legal, functional, financial, management and organizational structure,
  - economic role of the affiliated companies within the group,
  - intellectual property.
- on the level of the subject/local company (country-specific file):
  - activities/functions of the company and market,
  - functional analysis,
  - usage of intellectual property based on contractual relationships,
  - financing of the company.
- analysis of transactions between related parties:
  - functional analysis of the transactions (definition of functions, risks, economic and financial conditions of the contracts),
  - analysis of the transactions with non-related parties,
  - analysis of turnover and margin for each transaction,
  - analysis of transfer pricing methods, with an explanation of the method applied,
  - documents proving that applied method is in line with the principles of an impartial transaction.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
According to the CPT legislation there are no exceptions/ thresholds regarding transactions that should be documented.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
The General Tax Act defines "associated persons" as legally independent companies in which one of the companies has more than 50% of shares in the other, or directly or indirectly has the majority of the shareholder's rights. On the other hand, the Croatian CPT legislation specifically prescribes that in business relations between associated resident and non-resident persons, the term "associated persons" encompasses situations in which:
— one of the parties directly or indirectly participates in the management, control or capital of the other,
— the same persons participate, directly or indirectly, in the company's management, control or capital.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
As stated above, the Croatian legislation regarding transfer pricing is still in the process of "fine-tuning". Therefore, there is no specific requirement or rule for each specific situation.
Recent practice indicates that the authorities should limit their demands regarding documentation to those documents available to the taxpayer. Also these documents should be restricted to those that contain data which is relevant to the tax inspection. It is specifically stated in various guidelines issued by the authorities that a taxpayer could have difficulties obtaining documentation form abroad, especially if a taxpayer is minority shareholder in the foreign company or a subsidiary. Also, where the costs of obtaining the documentation would be too high for the taxpayer (for example where they would equal the value of the transaction) the tax authorities have to find alternative sources of information (Amadeus, Orbis, Tax Authorities information system, cross-border exchange of data between tax authorities, etc.).

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Generally, the tax authorities accept regional benchmark studies, if these studies can be substantiated with reliable documentation.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
Under the General Tax Act, where the taxpayer submits documents in a foreign language the tax authorities will determine a deadline by which it must submit verified Croatian translations.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The CPT legislation does not prescribe any specific deadline for the provision of transfer pricing documentation.
There is no legal obligation to submit transfer pricing documentation together with the regular tax returns.
Transfer pricing documentation should be kept and maintained by the taxpayer, ready to be delivered to tax authorities for the purposes of a tax inspection.
According to the General Tax Act, the taxpayer is obliged to participate in the tax procedures by completely and truly presenting the facts which are relevant to taxation and by submitting credible evidence for its statements.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

Generally, no penalties specifically related to transfer pricing documentation are prescribed. A taxpayer who does not keep business books in accordance with the accounting principles, who does not keep business books and other documents in a way ensuring availability, readability and credibility of data, or who does not deliver required documents to the tax authorities, is subject to penalties in the range of HRK 5,000 – 500,000 (approximately EUR 700-70,000).

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

Usually, the burden of the proof is upon the tax authorities, meaning that the taxpayer does not have to prove that a transaction adhered to the arm's length principle. However, if the transfer price has been challenged, the tax authorities expect the taxpayer to participate in the tax procedure as mentioned before.

The General Tax Act and the Accounting Act prescribe the obligation of the taxpayer to maintain reliable and credible documentation.
According to the General Tax Act, the burden of the proof is borne:

- in relation to facts establishing the tax liability, by the tax authorities,
- in relation to facts reducing or eliminating the tax liability, by the taxpayer.

The reversal of the burden of proof is not provided for by the General Tax Act, although it was noticed on several occasions that tax inspectors "silently" tried to implement such a reversal during tax inspections.

The General Tax Act and a special bylaw prescribe that both parties (taxpayer and tax authorities) should act in "good faith", irrespective of which of them actually bears the burden of proof.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Not applicable, no documentation related penalties.

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Czech Republic

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Transfer pricing documentation is not compulsory in Czech law. Of course associated enterprise transactions must be carried out according to the arm's length principle for income tax purposes. Taxpayers can use the transfer pricing documentation described in the OECD guideline, or the EUTPD, or other proof and documents.
Taxpayers can ask the tax authorities for a binding ruling regarding transfer prices for related-party transactions. Based on this binding ruling, taxpayers can get confirmation that the prices agreed between associated enterprises comply with the arm's length principle.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
The taxpayer is obliged to document all transactions between associated enterprises. There are no limitations.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
In Czech law the definition of "associated enterprises" is as follows:

— parties related through capital:
  - one person or party directly or indirectly participates in the capital or voting rights of the other and has a holding of at least 25%.

— parties related otherwise than through capital:
  - one person or party participates in the management or control of another person or party,
  - there is a controlling person or party and a controlled person or party, or more than one person or party with the same controlling person or party,
  - close parties,
  - persons or parties which have established a legal relationship predominantly for the purpose of reducing their tax base or increasing their tax loss.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
In Czech law there are no specific requirements for transfer pricing documentation. If the taxpayer decides to prepare the documentation according to the EUTPD, Czech tax authorities must accept the regulations of EUTPD. If not, there are no special requirements for transfer pricing documentation and the taxpayer can use any documents. On the other hand, the tax authorities are entitled to judge all documents at their discretion.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
Under Czech law, the tax authority has a general right to ask for information from any person who may have relevant knowledge, being knowledge related to the case under consideration within the tax procedure. If the taxpayer uses the EUTPD, he must explicitly agree to provide information to the tax authorities.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Such studies are not compulsory.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
The language of the documentation is not directly prescribed. Czech tax authorities accept Czech or Slovak language documents; in the case of other foreign languages they can ask for a translation of some parts or even the whole of the documentation.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The deadline to provide the documentation is upon specific request from the tax authorities.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

In Czech law there are no special documentation-related penalties. In the event that the prices agreed between associated enterprises differ from the prices used by independent parties, without such difference being properly documented, the tax authorities shall adjust the tax base by the difference. Czech tax authorities then assess a penalty on additional tax.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

No, since there is no compulsory documentation.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Not applicable.

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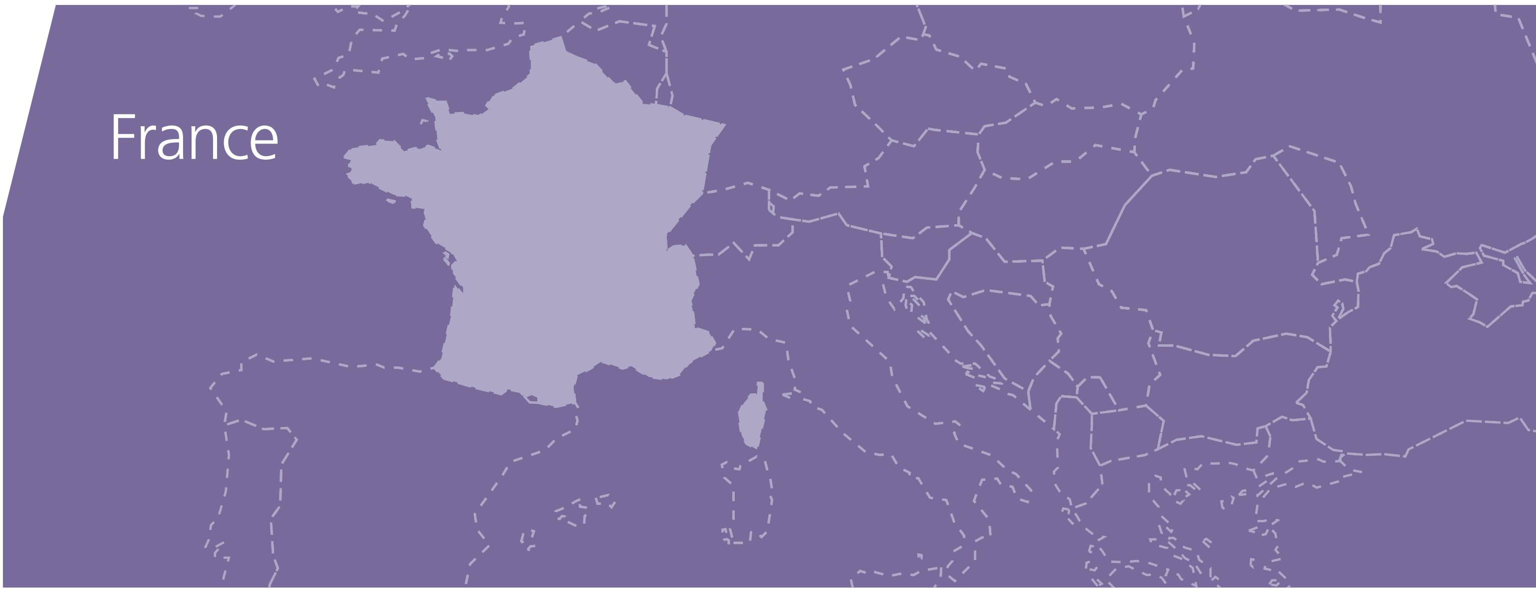

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

In France, the amending finance bill for 2009 has introduced a transfer pricing documentation requirement for financial years beginning on or after 1 January 2010. Legal entities established in France are subject to the documentation requirement if:

— (A) they have an annual turnover (taxes excluded), or gross balance sheet asset value of at least EUR 400 million (hereafter "the minimum threshold"); or
— (B) at the close of the tax year, they directly or indirectly hold more than half of the financial or voting rights in an entity which meets the minimum threshold (being a legal entity, body, trust or comparable institution established or constituted in France or outside France); or
— (C) at the close of the tax year, more than half of their financial or voting rights are directly or indirectly held by an which meets the minimum threshold; or
— (D) they have the benefit of a ruling granting a worldwide tax consolidation regime as provided for by article 209(5) of the French tax code ("FTC") (in such a case the obligation applies to all enterprises which are taxable in France and which fall within the scope of the consolidation); or
— (E) they belong to a French tax group under article 223 A of the FTC, and that group includes at least one legal entity meeting the requirements above.

For the cases listed in (A) to (C) above, we believe that the documentation requirement should apply to French companies not meeting the minimum threshold if they own at least 50% of a foreign affiliate which does meet the minimum threshold, or where they are at least 50% owned by such an affiliate. In the coming months the French tax authorities are expected to publish official guidelines on the documentation requirement, and it is to be hoped that this point will be clarified.

For entities outside of the scope of the new legislation, there is no formal transfer pricing documentation requirement. However, if the French tax authorities gather material, in the course of a tax audit, which tends to indicate that the enterprise in question has made an indirect transfer of profits to a related non-French entity, they may require that certain documents and information be produced. The taxpayer then has a maximum of three months to provide the information required. In order to comply with this time frame, French companies whose transactions with foreign associated companies are significant generally document their transfer pricing policy in advance.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
The documentation must cover all transactions entered into with associated enterprises established or constituted outside of France.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
Associated enterprises are foreign entities with which dependency ties exist. Such dependency ties are deemed to exist between two enterprises where:

— one enterprise directly or indirectly owns the majority of the share capital of the other, or effectively exercises decision-making powers within the other enterprise,
— both enterprises are under the control of the same third enterprise (control being defined as under as above).

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
The content of the French transfer pricing documentation is very close to that of the EUTPD.

Indeed, the "standard" content encompasses the two levels of documentation proposed by the Code of Conduct drawn up by the EU Joint Transfer Pricing Forum:

— general information concerning the group of associated enterprises (the concept of a masterfile under the Code of Conduct); and
— specific information concerning the associated enterprise subject to a tax audit (the concept of country-specific documentation under the Code of Conduct).

As regards general information on the group of associated enterprises, the following must be provided:

— a general description of the activity carried out, including any changes which occurred during the period subject to the tax audit in comparison with prior tax years,
— a general description of the legal and operational structures of the group, identifying associated enterprises which are engaged in controlled transactions,
— a general description of the functions carried out and risks assumed by the associated enterprises, to the extent that they affect the audited enterprise,
— a list of the main intangible assets owned (e.g. patents, trademarks, trade names, know-how), in relation to the audited enterprise; and
— a general description of the transfer pricing policy of the group.

As regards the specific information concerning the audited enterprise, the following must be provided:

— a description of the activity carried out, including any changes which occurred during the period subject to the tax audit in comparison with prior tax years,
— a description of the transactions carried out with associated enterprises, including the nature of flows and the amounts thereof (including any royalties),
— a list of any cost-sharing agreements and a copy of any advance pricing agreements or transfer pricing rulings which affect the audited enterprise's results,
— a description of the method(s) applied to determine transfer prices in compliance with the arm's length principle, including an analysis of functions carried out, assets used and risks assumed, and an explanation as to how the chosen methods were selected and applied); and
— when the chosen method so requires, an analysis of the comparison elements (benchmarks) regarded as pertinent by the enterprise.

"Additional" documentation must be provided where transactions are undertaken with one or more associated enterprise(s) established in a non cooperative State or territory (within the meaning of article 238-0 A of the FTC). The "additional" documentation should include, for each associated enterprise, all documents required from companies which are subject to corporate income tax, including the balance sheet and profit and loss account drawn up in accordance with French GAAP (as provided for by the French CFC rules - article 209 B of the FTC).

For 2010, the list of non cooperative States or territories is the following (this list should be updated on a yearly basis):

Anguilla	Guatemala	Niue
Belize	Cook Islands	Panama
Brunei	Marshall Islands	Philippines
Costa Rica	Liberia	Saint Kitts and Nevis
Dominica	Montserrat	Saint Lucia
Grenada	Nauru	Saint Vincent and the Grenadines

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?

The French tax authorities may request information only from French taxpayers. In practice, such requested information can include information located in another State.

To obtain information located in another State, the French tax authorities can request the assistance of foreign tax authorities on the basis of the exchange of information provisions of the applicable tax treaty.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?

The French tax authorities generally accept regional benchmark studies and, in particular, pan-European benchmark studies when a French taxpayer is involved.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?

The transfer pricing documentation should be in French. However, in practice, documentation that has been prepared in English is often accepted by the French tax authorities. Though the legislation contains no specific provision, it is likely that the French tax authorities will at least accept that the first part of the documentation (general information on the group of associated enterprises) may be drafted in English.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The documentation must be made available to the French tax authorities on the date the tax audit begins, i.e. on the date of the first on-site arrival of the tax inspector as mentioned in the notification of tax audit.

Where the audited enterprise does not provide the documentation, or where it provides incomplete documentation, the French tax authorities must send a notice to provide or, as the case may be, complete the documentation, within a 30-day period. This notice must specify the documents or complementary information required.

The documentation requirement applies to transactions undertaken during tax years beginning on or after 1 January 2010. In practice, the documentation may be requested in the course of the first tax audits relating to tax years beginning in 2010, i.e. at the soonest during the third quarter of 2011.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

If the audited enterprise does not provide the required documentation, or if it provides incomplete documentation within the period mentioned above, the enterprise is liable, for each tax year covered by the tax audit, to:

— a penalty of EUR 10,000 or,
— if the corresponding amount is higher and depending on the seriousness of the default, to a penalty of up to 5% of the transfer pricing reassessment made by the French tax authorities.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

The absence of documentation or an incomplete documentation does not reverse the burden of the proof as regards the arm's length character of the transactions: to make a reassessment, the French tax authorities still need to demonstrate that the transactions do not comply with the arm's length principle.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

For the time being it is unclear how far documentation-related penalties could prevent a taxpayer from engaging a mutual agreement procedure, or the procedure set out in the EU Arbitration Convention. It is to be hoped that this issue will be clarified by the French tax authorities in the official guidelines expected to be published in the coming months.

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Germany

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

In Germany, specific requirements for transfer pricing documentation have been enacted in recent years, starting in 2003. Pursuant to s. 90, para. 3 of the German General Tax Code (*Abgabenordnung*), the taxpayer must prepare transfer pricing documentation concerning all cross-border transactions with related parties. Furthermore, the taxpayer must deliver supporting evidence for such transactions. Therefore, inter-company transactions generally have to be evidenced by written contracts in order to be accepted by the German tax authorities. These contracts must be concluded before the respective transaction is executed, and their terms must be complied with in full.
Besides this, for exceptional business transactions (e.g. restructurings or the conclusion of long-term agreements) documentation has to be prepared contemporaneously, which is defined to mean within six months of the conclusion of the fiscal year.
Less strict transfer pricing documentation requirements may apply in Germany, but only where:

- the value of all transactions concerning goods and products with all related parties does not exceed the amount of EUR 5 million per year; and
- the sum of all remuneration for all (other) services does not exceed an amount of EUR 500,000 per year.

However, even in such cases, documents (e.g. contracts), information and explanations have to be provided to the tax authorities upon request. Documentation of exceptional business transactions has to be prepared, but the transfer pricing documentation for general (ongoing) inter-company transactions is less formal.

2. What is the content of the documentation that must be prepared?

On the basis of s. 90, para. 3 of the German General Tax Code (*Abgabenordnung*), the German Ministry of Finance has enacted a decree (GAufzV, dated 13 November 2003, BStBl I, 2003, p. 2296) providing details as to what documentation is required. Further details are included in the 2005 Administrative Guidelines (*Verwaltungsgrundsaetze-Verfahren* of 12 April 2005, BStBl I, 2005, p. 570). In general, the documentation must be based on the single transaction in question, but it is permissible to group comparable transactions if such grouping is determined before the occurrence of the transaction. Under s. 90, para. 3 of the German General Tax Code (*Abgabenordnung*), each separate German entity has to provide the following:

- general information about the group and ownership structure, the business and group organization, i.e. its legal and economic basis (facts and circumstances). This may include legal structure charts for the group, corporate details of related parties or permanent establishments, organizational and operative group structure charts, descriptions of business type (e.g. distribution, manufacturing services, etc.), business strategy, market situations, major competitors, an overview of inter-company contracts, information as to any set-off of benefits, a summary of any tax rulings, advance pricing agreements or mutual agreement procedures, financial statements, or the calculation of financial ratios.
- information as to business relations with related parties, i.e. the type and extent of the business conducted with related parties (e.g. purchases, sales services, financing, and other use of assets), including an overview of flows of goods and services, all relevant agreements concluded (e.g. on goods, services, R&D, licenses, leases, loans), an overview of intangible assets owned by the taxpayer and licensed to related parties, information on how contractual agreements have actually been carried out, etc.
- an analysis of functions and risks, and a description of the value production chain, including the function and associated risk undertaken by the taxpayer and related parties in respect of the particular business transaction, material assets, business strategy, the relevant market and competition.
- analysis of transfer pricing policy, including a description and explanations of the appropriateness of

the chosen transfer pricing method, explanation of the appropriateness of the transfer prices applied, calculation records, data about comparable third parties (comparable search), price adjustments and reasons for losses.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
Pursuant to s. 90, para. 3 of the German General Tax Code (*Abgabenordnung*), the taxpayer must deliver transfer pricing documentation with respect to all cross-border transactions with associated enterprises or transactions outside Germany. This is subject to an exemption where the value of all associated party transactions concerning goods and products does not exceed EUR 5 million per year, and the sum of all remuneration for all (other) services does not exceed EUR 500,000 per year.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
A definition of "associated enterprises" is included in s. 1 para. 2 of the German Foreign Tax Act (*Außensteuergesetz*). Pursuant to this, the term associated party (related party) may – in particular – be based on a direct or indirect shareholding of at least 25%, a dominating influence, any other possible influence, or it may be based on identical interests or acting in concert.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
German tax legislation on transfer pricing and the decrees issued by the German tax authorities do not explicitly refer to the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the EU (EUTPD). Therefore, the EUTPD cannot formally be chosen as an alternative to local German transfer pricing rules.
In particular, the German rules do not refer to a division between (i) a masterfile containing common standardised information relevant for all EU group members and (ii) country-specific documentation. However, in practice such a split is generally accepted by the tax auditor, as long as the documentation as a whole includes all relevant information required under German transfer pricing documentation rules. Moreover, German transfer pricing regulations do not prevent the taxpayer from submitting separate reports as described above.
Furthermore, the content of country-specific documentation as set out in the EUTPD is basically also required under German law. However, some specific German rules (e.g. further details) may need to be observed in addition.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
According to s. 90, para. 2 of the German General Tax Code (*Abgabenordnung*), the taxpayer has the burden of delivering supporting evidence for all cross-border transactions or transactions outside Germany. This applies to all taxpayers subject to tax in Germany, irrespective of their location. The taxpayer is obliged to use all existing legal and practical options to achieve this. The requirement extends to requesting information from associated parties, if this is relevant for German tax purposes.
Besides this, the taxpayer must keep all the records and documentation of the German entity in Germany, unless an exemption applies (e.g. records of a foreign branch are to be maintained at the premises of such branch based on the relevant foreign tax law), or the German tax authorities have agreed an exemption, e.g. allowing the taxpayer to maintain documents outside Germany (ss. 146 and 148 of the German General Tax Code – *Abgabenordnung*).

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
According to s. 90, para. 3 of the German General Tax Code (*Abgabenordnung*) and the GAufzV (BStBl I, 2003, p. 2296), the taxpayer is obliged to collect, to the extent possible,

comparable internal and publicly obtainable data supporting the transfer pricing method applied. In particular, the taxpayer has to document comparable data resulting from its own third-party transactions, e.g. pricing, general terms and conditions, cost quota, profit margin, cross margin and net margin. This is relevant for testing the transfer prices resulting from the resale price method or cost-plus method. Furthermore, such comparables become relevant in connection with cost sharing agreements, and the determination of interest rates or license fees.

If external (publicly obtainable) data is used, sufficient and comparable data has to be available in a database, e.g. Amadeus, which is generally accepted by the German tax authorities. Such data may be based on regional benchmark studies. However, the most important factor is that the data should be comparable to the taxpayer's particular case. This may not always be the case. Therefore, according to the 2005 Administrative Guidelines (*Verwaltungsgrundsaetze-Verfahren* of 12 April 2005, BStBl I, 2005, p. 570, No. 3.4.12.4), comparable research based on a digital data bank is not mandatory in all cases.

Furthermore, the German tax authorities state in No. 3.4.12.4 of their 2005 Administrative Guidelines that a calculation based solely on database research is not sufficient for determining the appropriate transfer price. The specific facts and circumstances of the underlying case have to be considered. External database information generally does not provide for such an individual approach, and the proper determination and documentation of transfer prices requires more detailed consideration.

If electronic database research is carried out, the taxpayer must document all data retrieved, as well as the research process by which the data was extracted. The German tax authorities must be able to review the whole research process, which also includes access to electronic data for carrying out their own alternative calculations (s. 147 paras. 5 and 6 of the German General Tax Code – *Abgabenordnung*). In particular, the function of the different entities included in the database needs to be comparable to the function of the tested entity. Furthermore, the German tax authorities often expect the products to be comparable as well as the functions. In practice, data is often averaged over 3 years in order to eliminate high variances.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?

Generally, all documentation has to be in German. A translation of transfer pricing documentation has to be provided within a time frame of 60 days, unless the tax authorities have accepted the filing of the documents in another language (e.g. English).

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

Under s. 90, para. 3 of the German General Tax Code (*Abgabenordnung*), taxpayers have to submit appropriate transfer pricing documentation (which must not be essentially unusable) within 60 days of a request made by the tax authorities during a tax audit. It is not necessary to submit such documentation when filing tax returns.

The time frame of 60 days is reduced to 30 days for exceptional business transactions (e.g. restructuring or change of sales systems) or similar matters of major importance; an extension may only be granted upon application, where good reason is shown.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

The German tax authorities are allowed to charge penalties if the documentation requirements are not fulfilled. Therefore, the taxpayer has to pay a penalty of EUR 5,000 if the documentation has not been produced or if the documentation is materially unusable. However, the penalty has to be 5% to 10% of the additional income that is assessed as a result of the non-production of the records, if this amount exceeds EUR 5,000. If the documentation is produced after the 60-day period or the 30-day period, a minimum penalty of EUR 100 per day will be due, up to EUR 1 million.

Such penalties do not qualify as taxes and are not tax deductible. The following table provides an overview of the penalties that can be imposed:

Issue	Penalty
No or unusable documents provided	• 5-10% of the income increase • at least EUR 5,000
Late filing of usable documents	• at least EUR 100 per day of delay • maximum EUR 1 million

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

If all transfer pricing documentation requirements under German law are fulfilled and appropriate transfer prices have been used, no adjustment is possible by the tax authorities. In such a case, the burden of proof is on the tax authorities if they intend to change the income calculation.

However, if this is not the case, the German tax authorities may assume that the taxpayer's income taxable in Germany is higher than the amount the taxpayer declared (s. 162 para. 3 of the German General Tax Code – *Abgabenordnung*). Thus, if the documentation is insufficient, the burden of proof is shifted to the taxpayer. The tax authorities are allowed to carry out their own calculations and to adjust the tax basis. If there is a range of prices, the tax authorities may choose the point of the price range that is most disadvantageous to the taxpayer.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Almost all double tax treaties concluded by Germany include an equivalent of Art. 25 of the OECD Model Convention which describes the mutual agreement procedure. Under this procedure, two treaty partners can resolve discrepancies in the application of the double tax treaty. In practice, most cases deal with different interpretations of Art. 9 and the application of the arm's length principle. Alternatively, in EU cases, the taxpayer can apply for a procedure under the EU Arbitration Convention of 1993.
However, the tax authorities have indicated in a published letter that the mutual agreement procedure will not be commenced if the taxpayer does not fully comply with its duty to provide information to the tax authorities (BMF of 13 July 2006, BStBl I, 2006, p.461). Therefore, if no sufficient transfer pricing documentation is available, this would prevent the German taxpayer from a mutual agreement procedure or a procedure set forth in the EU Arbitration Convention.

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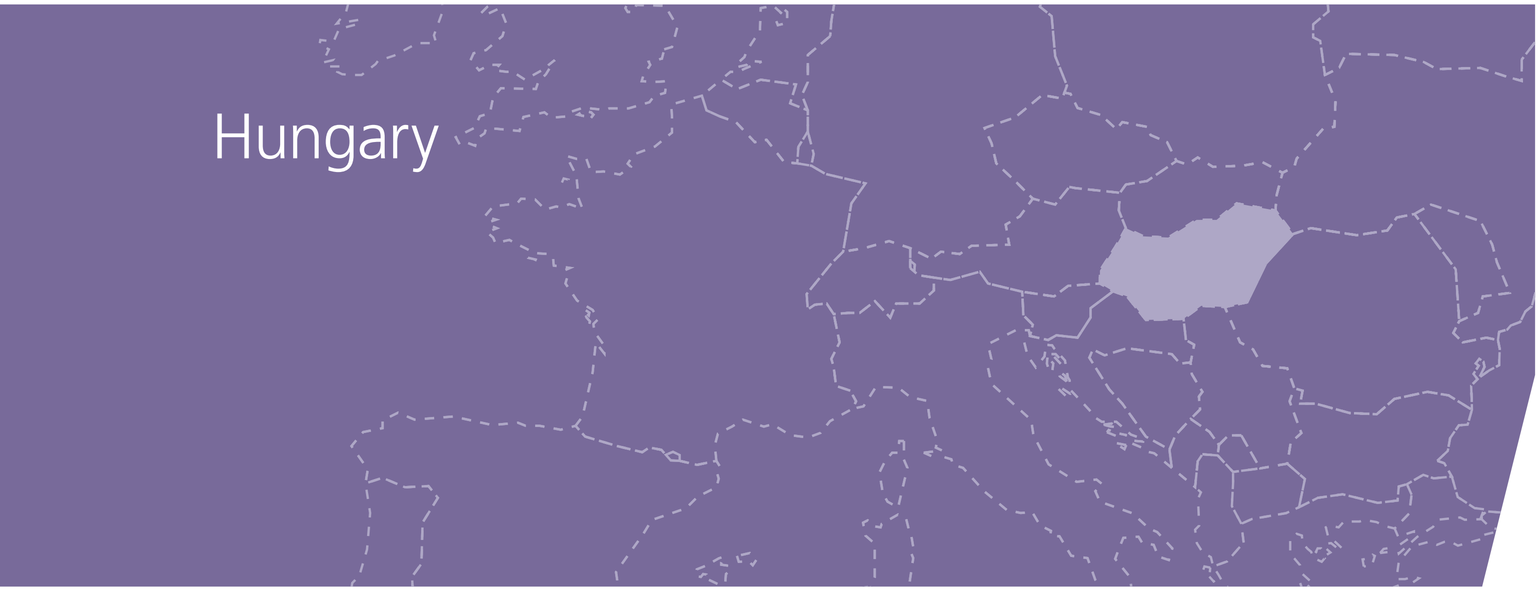
Hungary



1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

In Hungary, all Hungarian resident entities subject to corporate income tax, including PEs of foreign entities, are generally required to maintain TP registers with regard to transactions made with affiliated entities. This applies even where the affiliated entity is wholly domestic, and is subject to only a few exceptions.
The principal exception concerns companies or PEs which qualify as a "small enterprise" on the last calendar day of the relevant financial year. These are exempted from the obligation to maintain TPD. A taxpayer will qualify as a "small enterprise" (and thus will not have to maintain TPD) if:
- it has less than 50 employees; and
- it has an annual net sales revenue or balance-sheet total not exceeding EUR 10 million; and
- the Hungarian State and/or any Hungarian Local Municipality, individually or in total, do not have a direct or indirect holding exceeding 25% in its voting stock or capital.

The above conditions must be satisfied at a consolidated level.

Medium-sized enterprises are exempted from having to maintain TPD in relation to long-term contracts which are made with affiliated companies for the purposes of making joint purchases and sales in order to overcome a competitive disadvantage. This however is subject to the proviso that the combined voting rights of small and medium-enterprise shareholders in the related party exceed 50%. Under the relevant Hungarian regulations, the taxpayer will qualify as a medium-sized enterprise if, on a consolidated basis:
- it has less than 250 employees; and
- it has an annual net sales revenue not exceeding EUR 50 million or a balance-sheet total not exceeding EUR 43 million; and
- the Hungarian State and/or any Hungarian Local Municipality, individually or in total, do not have a direct or indirect holding exceeding 25% in its voting stock or capital.

The obligation for preparing transfer pricing documentation does not apply to:
- contracts concluded with private individuals (other than private entrepreneurs),
- taxpayers in which the Hungarian state has direct or indirect majority control,
- not-for-profit organizations,
- transactions effected on the stock exchange or at an officially determined price. However, cases of insider trading, fraudulent attempts to influence exchange rates and applying prices in breach of legal regulations are not exempt.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
All transactions with associated enterprises must be documented. However, it is possible to prepare simplified documentation if the net value of the transaction (or the aggregate value of very similar transactions) does not exceed HUF 50 million (approximately EUR 188,000) in aggregate on the last day of the tax year.
Amongst other things, simplified documentation need not include a detailed analysis of how the arm's length price was reached (statistical-functional analysis, etc.).

b) What is the definition of "associated enterprises" for the purposes of this requirement?
The relevant Hungarian definition of related parties basically states that two taxpayers will generally be regarded as related parties when one of them has direct or indirect majority control over the other. This also applies when a third person has such influence on two other persons (which makes those two persons "related").
The definition also applies to a head office and its PE.
The term "majority control" is defined by the Hungarian Civil Code, according to which an individual or a legal entity has majority control in another entity if:

- it holds more than 50% of the votes in the other entity, either directly or indirectly,
- one of its members or shareholders is entitled to appoint or dismiss the majority of executive officers and/or supervisory board members of the other entity; or
- one of its members or shareholders controls, under an agreement with other members or shareholders, more than 50% of the votes in the other entity.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?

As of 1 January 2010 a new Ministry of Finance decree on transfer pricing documentation requirements ("the Decree") has come into force, aiming to bring the Hungarian legislation more into line with the EUTPD. However, this goal has only partially been achieved.

The decree allows taxpayers to choose to adopt the EU masterfile/country file approach (as set out in the EUTPD) instead of unitary documentation. However, it does not avoid the need to analyse each agreement/transaction separately. This means that in many (if not most) cases, it will be very difficult to save costs by using a masterfile for all EU companies in a group as the most costly analyses will still need to be prepared and presented on a transactional basis.

The masterfile should contain standardised information relevant for all EU group members. According to the relevant provisions these include the following:

- a general description of the business and business strategy (including changes in business strategy from the previous tax year),
- a general description of the group's organisational, legal and operational structure,
- a list of intercompany transactions with group members operating in the EU,
- general identification of the associated enterprises which are engaged in controlled transactions involving enterprises in the EU,
- a general description of intercompany transactions (by listing the major transactions),
- a general description of functions performed and risks assumed,
- a description of the ownership of intangible assets, including amounts of royalties paid and/or received,
- the group's intercompany transfer pricing policy, or a description of the group's transfer pricing system,
- a list of cost contribution agreements, APAs and rulings covering transfer pricing aspects as far as these affect group members in the EU,
- a summary of any pending court or administrative proceedings relating to the determination of arm's length consideration,
- the date of preparation and amendment of the masterfile.

According to the current Hungarian legislation the "country file" (which is to be prepared on a transaction by transaction basis, not simply on a country basis) should contain at least the following items:

- the name, seat and tax number of the related entity (if the latter is unavailable, the company registration number and the name of the court or authority with which it is registered),
- a general description of the taxpayer's business and business strategy (including changes in its business strategy from the previous tax year),
- the subject of the agreement, the date it was made or amended, and its term,
- a comparability analysis (main attributes of the goods or services provided, functional analysis, terms of the agreement, economic conditions, specific business strategy),
- a description of the comparables used,
- a description of how the group transfer pricing policy was applied (with particular reference to the method used to establish fair market value),
- the date of preparation and amendment of the country file.

Please note that, if the group so decides, any of the above mentioned items can be included in the masterfile. However they should be as detailed as is required in the case of the country file.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
According to the current Hungarian provisions, Hungarian taxpayers are not obliged to insert a commitment in their masterfile, whereby they undertake to provide supplementary information upon request and within a reasonable time frame according to national rules. However, the Hungarian Tax Authority ("HTA") can ask the foreign tax authority of another EU country or of another treaty country to collect the information.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
In general, regional benchmark studies are accepted by the HTA.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
As of 1 January 2010 it is possible to prepare TPD in languages other than Hungarian. However, the HTA may request a "professional translation" into Hungarian, which could involve some extra cost. Therefore, in practice, a Hungarian version of TPD affecting Hungarian taxpayers should continue to be prepared along with the foreign version.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The deadline for preparing TPD is the statutory deadline for filing the taxpayer's Hungarian corporate income tax return in respect of the foregoing tax year. Assuming that the business year of the taxpayer corresponds to the calendar year, the TPD is required to be in place by 31 May of the calendar year following that in which the intercompany transaction was concluded.

It is not necessary to submit the documentation to the HTA, but it should be kept on file and ready to be shown to the HTA if requested during an audit. The statute of limitations in Hungary (for tax purposes) is generally 6 years (7 in extreme cases).

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

If the taxpayer was liable to keep internal records but failed to do so, or the TPD was incomplete, and the HTA established this during a tax audit, it could impose a fine on the taxpayer of up to HUF 2 million (approximately EUR 7,500) for each missing or incomplete TPD set. Consequently, the HTA may levy the maximum default penalty even where the TPD was available, but had not been prepared in accordance with the relevant provisions of Hungarian legislation.

If the taxpayer fails to present the appropriate TPD to the HTA and is thus subject to a default penalty, the HTA may renew their request for the documentation on the basis of an extended deadline, and may levy the penalty every time the documentation is not provided.

In practice, the penalty is often levied in cases where the HTA can prove (e.g. on the basis of the data used for the benchmarking study) that the TPD was not available at the statutory deadline despite being available at the time of the audit.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

If the taxpayer has prepared appropriate TPD in relation to its related party transactions, the HTA bears the burden of proof, i.e. the HTA has to prove that the arm's length price presented in the TPD is not adequate. However, if the HTA has established during a tax audit that the taxpayer has no documentation, or that its documentation is inadequate, it may determine the appropriate pricing level itself. Few restrictions apply in this regard. Formally, the HTA would still need to justify its findings, but as it would not be constrained by any existing TPD the tax payer would have to prove that the HTA's analysis was wrong. Thus, the burden of proof would effectively be shifted to the taxpayer.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

No special provision exists in Hungary in this regard, thus only the Arbitration Convention is relevant and this only applies to EU countries. According to Hungary's declaration in relation to Article 8 of the Convention, it reserves the right to deny the mutual agreement procedure only in cases of criminal penalties, or penalties which relate to unpaid taxes exceeding HUF 50 million. This means that the procedure under the EU Arbitration Convention may not be denied solely on the basis of the HUF 2 million procedural penalty for not having drawn up a TPD. However, in the case of a re-assessment, the procedure may theoretically be denied, if the re-assessment results in unpaid taxes exceeding HUF 50 million (approximately EUR 188,000). This would however correspond to a tax base re-assessment of approximately EUR 1 million.

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India

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

The legislation with regard to transfer pricing is enshrined in the Income Tax Act, 1961 ("the Act") read along with the Income Tax Rules, 1962 ("the Rules") – referred to here as the Indian transfer pricing regulations ("TPR"). More specifically, Section 92 of the Act and Rule 10 of the Rules elaborate on the transfer pricing guidelines for persons engaging in international transactions with their associated enterprises.

As regards the documentation requirements, section 92D of the Act requires every person who has entered into an international transaction to maintain such information and documentation.

Also, section 92E requires each such person to obtain a certificate issued by a qualified Chartered Accountant in a prescribed format (referred to as Form 3CEB) certifying that its international transactions are in compliance with the arm's length principle.

While each taxpayer is required to furnish the accountant's certificate regardless of the total value of international transactions, there is a minimum threshold prescribed for maintenance of contemporaneous transfer pricing documentation. Thus, it is only where the aggregate value of all international related-party transactions exceeds INR 10 million (approximately EUR 165,000) in a given financial year that the taxpayer is required to maintain transfer pricing documentation.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?

The Indian TPR requires the taxpayer to document all international transactions with associated enterprises in cases where the aggregate value of international related-party transactions exceeds INR 10 million (approximately EUR 165,000) in a financial year. However, no such limits have been prescribed for documentation requirements on an individual international transaction basis.

b) What is the definition of "associated enterprises" for the purposes of this requirement?

Section 92A(1) of the Act defines the term associated enterprise as follows:

— one enterprise participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or
— one or more persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of one enterprise are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

While Section 92A(1) lays out a general definition of the term 'associated enterprise', Section 92A(2) describes specific situations where two enterprises are deemed to be associated enterprises, as follows:

— one enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent. of the voting power in the other enterprise; or
— any person or enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent. of the voting power in each of such enterprises; or
— a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent. of the book value of the total assets of the other enterprise; or
— one enterprise guarantees not less than ten per cent. of the total borrowings of the other enterprise; or
— more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise; or
— more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons; or

- the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licenses, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights; or
- ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise; or
- the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise; or
- where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual; or
- where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family, or by a relative of a member of such Hindu undivided family, or jointly by such member and his relative; or
- where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent. interest in such firm, association of persons or body of individuals; or
- there exists between the two enterprises, any relationship of mutual interest, as may be prescribed.

The provisions of sub-section (2) of Section 92A supplement the definition of associated enterprise given in sub-section (1) by listing various situations under which two enterprises shall be deemed to be associated. The memorandum to the Finance Bill, 2002 clarified that mere participation by one enterprise in the management or control or capital of the other enterprise, or the participation of one or more persons in the management or control or capital of both the enterprises, will not make them associated enterprises, unless the criteria in Section 92A(2) are satisfied. Thus, Section 92A(1) should be interpreted in light of the conditions laid down in Section 92A(2) as regards the purview of definition of associated enterprises in the context of Indian TPR.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises (“EU TPD”)? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable.

Rule 10D (1) of the Rules articulates the prescribed documentation a taxpayer must maintain in relation to its international transactions.

The taxpayer is required to maintain information and documentation covering the following:
- a description of the ownership structure of the taxpayer enterprise, with details of shares or other ownership interests held therein by other enterprises,
- a profile of the multinational group of which the taxpayer enterprise is a part, along with the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions have been entered into by the taxpayer, and ownership linkages among them,
- a broad description of the business of the taxpayer and the industry in which the taxpayer operates, and of the business of the associated enterprises with whom the taxpayer has transacted,
- details of the nature and terms, including prices, of the international transactions entered into with each associated enterprise, details of property transferred or services provided and the quantum and value of each such transaction or class of such transaction. However, there is no guidance or elaboration on how and what

principles would govern the categorisation of various transactions into a 'class'. It would be useful if such principles of aggregation were further elucidated by way of appropriate examples,

- a description of the functions performed, risks assumed and assets employed or to be employed by the taxpayer and by the associated enterprises involved in the international transaction,
- records of the economic and market analysis, forecasts, budgets or any other financial estimates prepared by the taxpayer for the business as a whole and for each division or product separately, which may have a bearing on the international transactions entered into by the taxpayer,
- records of uncontrolled transactions taken into account for analysing their comparability with the international transactions entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties, which may be of relevance to the pricing of the international transactions,
- records of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction,
- a description of the methods considered for determining the arm's length price in relation to each international transaction or class of transaction, the method selected as the most appropriate method along with explanations as to why such method was so selected, and how such method was applied in each case,
- records of the actual working carried out for determining the arm's length price, including details of the comparable data and financial information used in applying the most appropriate method, and adjustments, if any, which were made to account for differences between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions,
- the assumptions, policies and price negotiations, if any, which have critically affected the determination of the arm's length price,
- details of the adjustments, if any, made to transfer prices to align them with arm's length prices determined under these rules and consequent adjustment made to the total income for tax purposes,
- any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.

Further, as per Rule 10D (3) of the Rules, the primary documentation needs to be supported by the following, to the extent available and relevant:

- official publications, reports, studies and data bases from the government of the country of residence of the associated enterprise, or of any other country,
- reports of market research studies carried out and technical publications brought out by institutions of national or international repute,
- price publications including stock exchange and commodity market quotations,
- published accounts and financial statements relating to the business affairs of the associated enterprises,
- agreements and contracts entered into with associated enterprises or with unrelated enterprises in respect of transactions similar to the international transactions,
- letters and other correspondence documenting any terms negotiated between the taxpayer and the associated enterprise; and
- documents normally issued in connection with various transactions under the accounting practices followed.

It is also pertinent to note that in a recent Tax Court judgment, it was held that the documentation to be maintained should be read with a practical perspective and in line with the relevance of the transfer pricing methodology adopted by the taxpayer.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?

Foreign companies which are taxable in India in relation to transactions with associated enterprises are also required to comply with transfer pricing requirements. Such transactions could be in the nature of royalties and/or fees for technical services.

The Assessing Officer/Transfer pricing officer has a wide range of powers to seek information on overseas enterprises if they have reasons to believe that the Indian company may be in the possession of such information/ documentation.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
While the TPR does not mandate the use of Indian comparables only, at a practical level domestic comparables are preferred over regional or global comparable sets.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
The transfer pricing report must be documented and submitted in English.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The taxpayer is obliged to prepare and maintain the transfer pricing documentation no later than the date by which corporate tax return is due for filing i.e. on or before the 30 September falling after the end of the relevant financial year. Thus for financial year ending 31 March 2010, the due date is 30 September 2010.

However, the transfer pricing documentation is not required to be annexed or submitted along with the tax return. The tax authorities typically make a specific request for the documentation to be produced at the beginning of the transfer pricing audit.

It is mandatory for the taxpayer to attach to the corporate tax return a certificate issued by a qualified accountant which gives a summary of the international transactions and certifies the arm's length nature of those transactions.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

The prescribed information and documents must be kept and maintained for eight financial years from the end of the year immediately following the relevant tax year. An overview of penalties prescribed under Indian TPR is provided below:

Nature of default	Penalty
As per Section 271(1) (c) of the Act, if any person has concealed the particulars of his income or furnished inaccurate particulars of such income, a penalty may be imposed on such person. Such penalties could be in relation to any transfer pricing adjustment.	Up to 300% of tax on the adjusted amount
As per Section 271AA of the Act, if any person fails to keep and maintain any such information and document as required by Section 92D, the Revenue may impose a penalty.	2% of the value of each international transaction
As per Section 271G of the Act, if any person who has entered into an international transaction fails to furnish any such information or document as required under Section 92D, the Revenue may impose a penalty.	2% of the value of the international transaction
As per Section 271BA of the Act, if any person fails to furnish a report from an accountant as required by Section 92E of the Act, the Revenue may impose a penalty.	INR 0,1 million (approximately EUR 1,650)

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

In India, the burden of proof is primarily on the taxpayer. However, this is limited to the condition that the taxpayer maintains and furnishes the requisite documentation and information. If the taxpayer maintains/furnishes the documentation as prescribed, then the burden of proof shifts to the tax administration to prove that transfer pricing is not at arm's length. If the taxpayer is not able to present proper documentation during a tax audit, the onus for preparation and submission of fresh documentation rests upon him. The concept of burden of proof is a subjective one and jurisprudence in relation to transfer pricing is still evolving.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Whilst the taxpayer can pursue assessments and appeals available to him under the domestic transfer pricing law, he may also consider seeking relief under the Double Taxation Avoidance Agreement ("DTAA") with countries with which India has entered into tax avoidance treaties.
It is pertinent to note that MAP is viewed as a procedure independent of the domestic transfer pricing proceedings and thus the imposition of penalties does not act as a barrier for the taxpayer in filing a MAP application. However any MAP application needs to be filed in the time frame prescribed by the relevant DTAA.

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Italy

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

There is no specific provision of law which obliges Italian taxpayers to maintain proper transfer pricing documentation. However it is advisable for them to maintain such documentation in readiness for a possible assessment by the tax authorities.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
All transactions with associated enterprises.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
Under the Italian income tax code (Presidential Decree 22 December 1986, N. 917), transfer pricing rules apply in cases of "control". This means that one company is considered to be the associate of another if the former (i) is controlled by the latter, (ii) controls the latter or (iii) is controlled by the same entity that controls the latter. Both legal control (i.e., direct or indirect participation in the majority of the capital of the company) and de facto control should be taken into account.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Both taxpayers and tax authorities usually refer to EUTPD.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
Taxpayers who are not established in Italy do not need to commit to provide any particular information upon request. However, the Italian tax authorities might start an exchange of information procedure with the country where the taxpayer is established. Moreover, taxpayers who are established in Italy should be ready to provide certain information on other entities of the group that are not established in Italy, in order to support the transfer prices that have been adopted.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Yes, but only if there are no Italian comparables and it is demonstrated that the market to be taken into account is the regional and not the Italian one.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
In theory it could be in English but de facto it has to be in Italian (or to be translated upon request).

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

Upon specific request from the tax authorities. Otherwise during the eventual claim before the Tax Court.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

No.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

In theory, the absence or incompleteness of documentation does not reverse the burden of proof. However in practice, in order to face tax authority challenges to the adopted transfer prices, the taxpayer should not only oppose their calculations point by point, but also provide its own reconstruction of the said prices.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Not applicable (documentation-related penalties are not provided for by Italian law).

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Japan

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

New documentation requirement: Up until 2010, Japanese transfer pricing regulations did not require detailed documentation on the taxpayer's transfer pricing policy. However, the 2010 annual tax reform, which took effect on 1 April 2010, introduced certain documentation requirements. Before the amendment, it was only required that the taxpayer should produce "books and records that are necessary to compute the arm's length price". In the practical context of transfer pricing audits, it was often pointed out that it was unclear what specific documents that wording covered. That is, if the taxpayer fails to produce certain transfer pricing documentation to the Japanese tax authority without delay, upon being so requested in the course of a transfer pricing audit, the Japanese tax authority is entitled to issue a transfer pricing assessment using a presumed arm's length price determined according to certain prescribed methodologies. This means that, if the taxpayer wishes to avoid a transfer pricing assessment on the basis of presumption by the tax authority (which should be the case for all transfer pricing audits), the taxpayer must have the required documentation prepared and in good order, and be ready to submit it to the tax authority without delay upon a request made in the course of a transfer pricing audit. There is no threshold determining which taxpayers are subject to the requirements on the basis of turnover, corporate size, etc.

Disclosure by tax returns: In addition to the documentation requirement discussed above, all corporate taxpayers who engage in controlled transactions with foreign affiliates must attach to their corporate tax return a statement concerning foreign affiliates, referred to as Schedule 17(4). The statement requires disclosure of certain facts relating to the foreign affiliates and the controlled transactions, including the following:

— corporate details:
  - corporate name,
  - headquarters,
  - principal business,
  - number of employees,
  - amount of stated capital,
  - classification/type of affiliated relationship,
  - shareholding ratio,

— profit/loss status of the foreign affiliates for the latest fiscal year:
  - gross sales or turnover,
  - operating expenses (costs of goods sold, and sales, general and administrative expenses),
  - operating profits,
  - earnings before taxes,
  - retained earnings,

— status of controlled transactions with foreign affiliates:
  - type of controlled transactions (sale and purchase of inventory, provision of services, royalties for use of tangible property, royalties for use of intangible property, interest on loans, or other transactions),
  - total amount received from or paid to the foreign affiliate, with respect to each type of the controlled transactions,
  - transfer pricing methodology adopted by the taxpayer, with respect to each type of the controlled transactions,

— whether or not the taxpayer obtained an advance pricing arrangement (APA) with respect to the foreign affiliates.

The information to be disclosed on Schedule 17(4) is mere facts or numbers, and may not be very onerous to fill in. However, taxpayers should bear in mind that the information disclosed in Schedule 17(4) will be the basis for the Japanese tax authority to conduct a transfer pricing audit on the taxpayer. If there is any inconsistency between the information provided in Schedule 17(4) and the taxpayer's position on transfer pricing in a tax audit (especially in relation to the transfer pricing methodology) this would be a problem. As such, taxpayers must be cautious in preparing Schedule 17(4) and must bear in mind the possibility of a future transfer pricing audit.

2. What is the content of the documentation that must be prepared?

The regulations provide that the required transfer pricing documentation will include the following items:

— terms and substance of controlled transactions with foreign affiliates, including:
  - details of assets and services pertaining to the controlled transaction,
  - functions performed and risks assumed by the taxpayer and the foreign affiliate in the controlled transaction,
  - details of intangibles used by the taxpayer and the foreign affiliate in the controlled transaction,
  - contractual documents pertaining to the controlled transaction,
  - details of the amounts paid or received by the taxpayer to or from the foreign affiliate, as well as details of the negotiation of such amounts,
  - details of the respective profits and losses of the taxpayer and the foreign affiliate pertaining to the controlled transaction (i.e., segmented P&Ls),
  - market analysis and other market information pertaining to the controlled transaction,
  - business policies of the taxpayer and the foreign affiliate; and
  - details of other transactions closely related to the controlled transaction, if any

— arm's length price of the controlled transaction, including:
  - the transfer pricing methodology adopted by the taxpayer for the controlled transaction, as well as the reasons for its adoption,
  - the process of selection of comparables for the controlled transaction and the details of the selected comparables,
  - if the taxpayer adopted the profit split method as the transfer pricing methodology, computation of respective profits of the taxpayer and the foreign affiliate, such as the factors used for the profit split,
  - if the taxpayer computed the arm's length price by treating several controlled transactions as one integrated transaction, the reasons for such computation and details of each of such controlled transactions; and
  - if the taxpayer made an adjustment of differences with respect to the comparables, the reasons for and the method of such adjustment.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

This new documentation requirement will apply to transfer pricing assessments with respect to taxpayers' fiscal years beginning on or after 1 April 2010.
This means that the taxpayer must be able to produce the required documentation if audited for any of these fiscal years. Without exception, all Japanese corporate taxpayers who are subject to Japanese transfer pricing regulations (including of course Japanese subsidiaries of European companies, and Japanese parent companies having European subsidiaries) are required to comply. While the documentation must be provided "without delay" in a transfer pricing audit, there is no express requirement that the documentation must be contemporaneous, i.e., no specific deadline for its preparation. There is also no limitation on applicable foreign jurisdictions.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

Failure to comply with the documentation requirement could result in a transfer pricing assessment on the basis of a presumption by the Japanese tax authority as mentioned above, as well as associated deficiency penalty tax (as normally imposed); however, there is no special penalty directly linked to noncompliance with the documentation requirement per se. Even if the taxpayer complies with the documentation requirement, while it is able to avoid the presumption, it will not follow that the taxpayer's transfer pricing methodology and the price computed thereunder will bind the Japanese tax authority and will be respected as the arm's length price. In other words, the taxpayer could still be subject to normal transfer pricing assessment and deficiency penalty tax as a result of the audit. It would be wrong to interpret the introduction of the new documentation requirement as effectively shifting the burden of proof from the Japanese tax authority to the taxpayer in a transfer pricing dispute; in other words, the amendment should have no adverse effect upon the burden of proof issues in a transfer pricing dispute.

As is obvious from the items that are required to be provided in the documentation as set out above, it could be very onerous to comply with the requirement. The documentation is not a matter of mere facts or numbers or mere retention of books and records, but requires quantitative and qualitative analysis and evaluation of transfer pricing, especially from an economic viewpoint. These exercises may be difficult to perform especially for small size corporate taxpayers who do not have sufficient internal resources for transfer pricing compliance. In addition, the language of the regulations suggests that the documentation should be prepared with respect to each of the controlled transactions that the taxpayer engages in (provided that some controlled transactions can be treated as one integrated transaction as mentioned above). This would entail not only an administrative burden, but also require the taxpayer to maintain consistency in its overall transfer pricing policy applicable throughout all controlled transactions. Taxpayers should be reminded of the necessity to establish a consistent global transfer pricing policy that could survive scrutiny in a transfer pricing audit.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

As it is brand-new, we do not yet know the actual enforcement practice of the Japanese tax authority in relation to this documentation requirement, including how complete and detailed the documentation must be with respect to each required item, and how vigorously the tax authority will try to pursue the presumption by alleging incompleteness of the documentation. For example, if the taxpayer fails to present the segmented P&Ls of the subject controlled transaction without delay, as it takes substantial time to produce the information, will the tax authority immediately proceed with the presumption, or are they, in practice, willing to wait? We will have to carefully monitor how the practice of the tax authority develops.

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Morocco

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Article 7 of finance act 40-08 for the budgetary year 2009 introduced an obligation for businesses which are taxable in Morocco to supply the tax authority with documents and information relating to transactions undertaken with connected businesses established outside Morocco. This obligation is now contained in article 214 (III) of the Moroccan General Tax Code.

Nonetheless, such documents and information need only be remitted to the tax authority on its express request. There is no specific obligation to keep documentation at the disposal of the Moroccan tax authority. Nevertheless, considering the short period for sending such documentation, and the importance of the required documents, Moroccan businesses which have relationships of dependency with businesses established outside Morocco, and carry out transactions with them, are advised to make up such documentation in advance.
Does this obligation apply to all taxpayers or does it apply to certain categories only (e.g., taxpayers exceeding a certain threshold of turnover, assets)?

Under article 214 (III) of the Moroccan GTC, this obligation applies to all businesses which are taxable in Morocco and carry out transactions with connected businesses situated outside Morocco.

The legislation is directed to businesses only, with no mention of any threshold based on turnover or balance sheet asset value.

2. What is the content of the documentation that must be prepared?

Article 214 (III) of the Moroccan GTC stipulates that the authority may request all documents and information relating to the following matters to be provided:

— the nature of the relationship connecting the business which is taxable in Morocco with those situated outside Morocco,
— the nature of the services provided or the products sold,
— the method by which the price of transactions effected between those countries is determined, and the data supporting this,
— the regimes and tax rates applicable to the businesses situated outside Morocco.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
In the absence of detailed supplementary provisions, the effect of the GTC is that all transactions carried out with connected businesses situated outside Morocco must be documented. There is no threshold in terms of the value of the transactions, under either the Moroccan GTC or the tax authority's commentary on the finance act for the 2009 budgetary year.

b) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Article 213 (II) of the Moroccan GTC refers to businesses which have relationships of direct or indirect dependency with businesses situated in Morocco or outside Morocco. This definition has been refined by the Moroccan tax authority in a draft circular. The circular is not yet effective, but it can serve as a point of reference for the tax authority's interpretation of the provisions of the Moroccan GTC.
In fact, the concept of dependence is conceived by the Moroccan tax authority in terms of relationships between:
— parent companies and their subsidiaries,
— non-resident companies and their establishments in Morocco,
— companies and their branches.
According to the Moroccan authority, a subsidiary is dependent on its parent both in legal terms (by virtue of the number of shares held by the parent company, or

where, either directly or through a third party intermediary, the parent exercises decision-making power over the subsidiary) and also in economic terms (by virtue of the close links governing the business activity carried out, constituting dependence in terms of the supply of raw materials or spare parts, or the use of a brand or patents held by the parent company).

Furthermore, the Moroccan tax authority makes reference to the indirect links of dependency which form, in its view, between subsidiaries within the same group (especially in relation to financial dependency by virtue of reciprocal shareholdings).

Finally, reference is made to de facto situations resulting from a monopoly or quasi-monopoly position, or from a common interest (especially where the management personnel of one company have an influence on the management of other companies, by virtue of their shareholdings in those others).

The definition of dependent businesses in Moroccan law is thus very wide in scope, and the Moroccan tax authority considers that transfer pricing control applies both to transactions between parent companies and subsidiaries (i.e. where there is a direct connection) and to transactions between sister companies (i.e. where there is an indirect connection).

c) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
The Moroccan GTC does not contain any right on the part of the tax authority to require foreign entities to provide specific information relating to the transfer prices applied as between the Moroccan company and the foreign company.

Nevertheless, by virtue of article 214 (III) of the Moroccan GTC, the Moroccan tax authority may require a company established in Morocco to supply information relating to the regimes and tax rates applicable to businesses situated outside Morocco with which they have effected transactions.

Furthermore, article 214 (II) establishes, as a matter of domestic law, a right on the part of the Moroccan tax authority to request information from the tax authorities of States with which Morocco has entered into a double taxation convention. Nevertheless, the draft circular referred to above stipulates in this regard that such requests for information may only be made in the circumstances set out in the conventions made between Morocco and the State in question.

d) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
The Moroccan tax authority has the right to adjust the profits of businesses which have made indirect profit transfers.

Nonetheless, the comparables which the business must supply under article 214 (III) are not expressly defined in the Moroccan GTC.

Furthermore, the Moroccan tax authority’s commentary remains relatively brief in relation to the appropriate method for determining transfer prices between two companies of the same group. It does not go beyond stating the principle that the price should be that of so-called “full competition”.

In the event of an inspection, the only reference to comparables is in the authority’s power to rectify the business’s tax base by reference to the prices applied by “similar businesses” or “by means of direct valuation” on the basis of the information available to it.

Difficulties may thus arise to the extent that, in practice, the authority does not always have access to relevant comparables. In some cases, the Moroccan tax authority has gone as far as to refuse to take into account comparables which have been provided by the business under inspection.

It is advisable, however, for businesses which are established in Morocco, and which may have relationships of the relevant kind with businesses situated outside Morocco, to keep a file of documents containing comparables from businesses in the same sector, and evidencing the international practices of the group.

Furthermore, it should be noted that the Kingdom of Morocco is not currently a member of the OECD, even though references to OECD commentaries are to be found in the circulars published by the Moroccan tax authority.

Also, as long as Morocco is no more than a special observer on OECD bodies, the implementation of OECD recommendations is not absolute. In the event of a conflict, the Moroccan tax administration will not consider itself bound by the stated positions of OECD members.

e) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
In practice, documents presented to the tax authority must be written in one of the two official languages of the Kingdom, namely French or Classical Arabic. However, the majority of documents relating to Moroccan taxation are written in French.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

Under article 214 (III) of the Moroccan GTC, documents relating to transfer prices must be sent at the request of the authority (in the form of a letter giving notice) within 30 days of receipt of that request.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

In the event of a breach of the provisions relating to the authority's right to the documentation, a fine of 2,000 dirhams (approximately EUR 180) is provided for, as well as a late payment penalty of 100 dirhams (approximately EUR 9) per day, up to a maximum of 1,000 dirhams (approximately EUR 90).

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

Article 214 (III) of the Moroccan GTC provides that in the absence of a response or in the event that the documentation is incomplete, the relationship of dependency is presumed established.

Thus, documentation which is incomplete or which is not submitted will not, in the true sense, reverse the burden of proof in relation to the fully competitive nature of the transaction, but will definitively establish that the businesses in question are dependent.

Where the relationship of dependency is established in this way, the tax authority will then be able to invoke article 213 (II) of the GTC, and thus adjust taxable profit by bringing in the profits it considers to have been indirectly transferred by means of increases or reductions in purchase prices or sales prices.

In such a case, the remuneration and costs paid by the Moroccan entity will be subject to general corporation tax at the rate of 30%.

The following penalties and late payment interest may be added to that tax:

— an increase of 15% for failure to file or late filing of returns,

— a penalty of 10% and an increase of 5% for the first month of delay, followed by 0.5% for every further month or part thereof.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

On this point, we should note that the Kingdom of Morocco has made its reservations known on the subject of introducing a mutual agreement procedure. Morocco has reserved the right not to include article 9 paragraph 2 of the OECD model tax convention in its conventions.

Consequently, whether or not penalties for absent or insufficient documentation are imposed, it is unlikely that the Moroccan tax authority will adjust the reconstituted profit for the amount of transferred profits already taxed abroad.

Only a few of the existing double tax conventions expressly provide for this possibility. The conventions entered into with the following States can be given by way of example: Austria, Bulgaria, Denmark, United Arab Emirates, Poland, Portugal, Romania and Senegal.

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The Netherlands

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

With respect to transactions with related entities (Dutch and foreign) there is an obligation to maintain transfer pricing documentation. It applies (potentially) to all corporate entities.

2. What is the content of the documentation that must be prepared?

The rules are brief and rather general: they state that the entity must have information in its control showing how the transfer price has been determined, and from that information one must be able to demonstrate that the agreed price and conditions are such that independent parties would have agreed to them.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
All transactions with associated enterprises.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
There is no clear definition of associated entities for the transfer pricing documentation rules. According to the general rule, entities are considered to be associated (in this respect) where they are related via shareholding and/or management.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
The Dutch rules on transfer pricing documentation are very brief and general, and they are not similar to those described in the EUTPD Code of Conduct.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
Taxpayers which are not established in the Netherlands are not obliged to provide information. In order to oblige an entity to provide information, the entity must reside in the Netherlands or be subject to Dutch tax.

Under certain circumstances, the Dutch tax authorities have a limited right to request a Dutch taxpayer to provide information about a foreign entity related to the Dutch entity.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Dutch tax law does not (explicitly) require comparable studies to be provided. On the other hand, it may prove useful to have such a study in some cases. If so, it is not required to be in any given format.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
There are no clear rules in this respect, except that the tax authorities should be able to understand the documents in English. It is commonly accepted that documentation may be in Dutch or English.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

In principle, the taxpayer must have the documentation available from the moment that the transaction takes place. In practice, however, it is sufficient if the documentation is provided within a reasonable period after the tax authorities request for it (generally six weeks).

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

There are no documentation-related penalties in the Netherlands.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

If the taxpayer fails to provide appropriate documentation, the burden of proof may shift to the taxpayer.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

A penalty or shifting of burden of proof does not prevent the taxpayer requesting a mutual agreement procedure.

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Russia

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

At present, no specific rules with respect to transfer pricing documentation exist in Russia.
Nevertheless, all taxpayers must maintain the documents relating to the transactions carried out in order to justify the deductibility of the expenses for the purposes of profit tax.
It should be noted that a draft law on transfer pricing was adopted by the lower house of the Russian Parliament on 19 February 2010 (first reading). This draft, if enacted, would provide for transfer pricing documentation requirements. Considering that major amendments to the draft are still awaited, we cannot provide any reliable information on the rules of transfer pricing documentation at this stage.

2. What is the content of the documentation that must be prepared?

The general set of documents needed to justify the deductibility of expenses usually includes agreements, acts of acceptance, invoices, transport documents and other documents confirming effective purchase of goods, works or services by the taxpayer (e.g. reports, memoranda, emails, notes of phone calls and meetings, etc). The taxpayer must be able to provide these documents at any time after completion of the transaction.
Specific documents, in particular those relating to the affiliation between the parties and the method by which the price was determined, must be provided by the taxpayer upon the request of the Russian tax authorities, provided that this is made in the course of a tax audit.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
All transactions concluded by the taxpayer must be documented for profit tax purposes.
The transactions that can be subject to "transfer pricing" control by Russian tax authorities include the following:

- transactions between affiliated persons,
- barter transactions,
- foreign trade transactions,
- any transaction whereby the price deviates upwards or downwards by more than 20% from the prices applied by the taxpayer to identical (similar) goods (works, services) within a short period of time.

In practice, however, Russian tax authorities rarely proceed with reassessment of the taxpayers' profit tax liabilities in connection with the transfer pricing matters as in such cases they are required to prove that the transaction was not in accordance with the arm's length principle. In order to avoid this burden of proof, Russian tax authorities usually challenge the deductibility of expenses on the grounds of lack of economic justification and/or appropriate documentation.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
For transfer pricing purpose, affiliated persons are defined as individuals and/or legal entities whose relations may influence the conditions or economic results of their activities or the activities of the persons they represent.
The individuals and/or legal entities shall be deemed affiliated in the following cases:

- one legal entity directly and/or indirectly holds a participation in another legal entity that amounts to more than 20%,
- one individual is subordinated to another individual due to professional hierarchy,
- the individuals are spouses, relatives, are related to each other by marriage, adoption, etc. in accordance with Russian family law.

Russian courts consider persons to be affiliated on other grounds, if the relations between them could influence the economic outcome of transactions in connection with the sale of goods (or works or services).

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
According to the law, foreign companies are not liable to provide any information to the Russian tax authorities with respect to transfer pricing matters. However, the tax authorities can request information held by foreign companies from the Russian taxpayer and/or from the foreign tax authorities, within the framework of an official procedure.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Regional benchmark studies are not compulsory. They may be done by the taxpayer to demonstrate that the price has been fixed according to the arm's length principle. In practice, Russian tax authorities usually pay no attention to these studies but courts do. Therefore, it is useful to have such in case of tax litigation.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
The documents provided to Russian tax authorities should normally be in Russian.

It should be noted that Russian legislation does not require execution of all contractual documentation in Russian. Therefore, if initially the documents are established in a language other than Russian, the tax authorities can request the translation of the documents into Russian.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The documents must be submitted to the tax authorities within 10 days of receipt of a request to provide information issued by Russian tax authorities in the course of a tax audit.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

If the taxpayer fails to submit the documents within the above period, it may be liable to a penalty in the amount of RUB 50 (EUR 1,3) for each non-submitted document. Furthermore, the taxpayer's officers may be liable to a penalty in the amount of RUB 300 (EUR 7,5) to RUB 500 (EUR 12,5).

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

Formally, no. However, in practice, in the event of tax litigation it will be difficult for the taxpayer to defend its position in the absence of documents.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

At present, procedures aimed at elimination of double taxation are not used in Russia in connection with transfer pricing matters.

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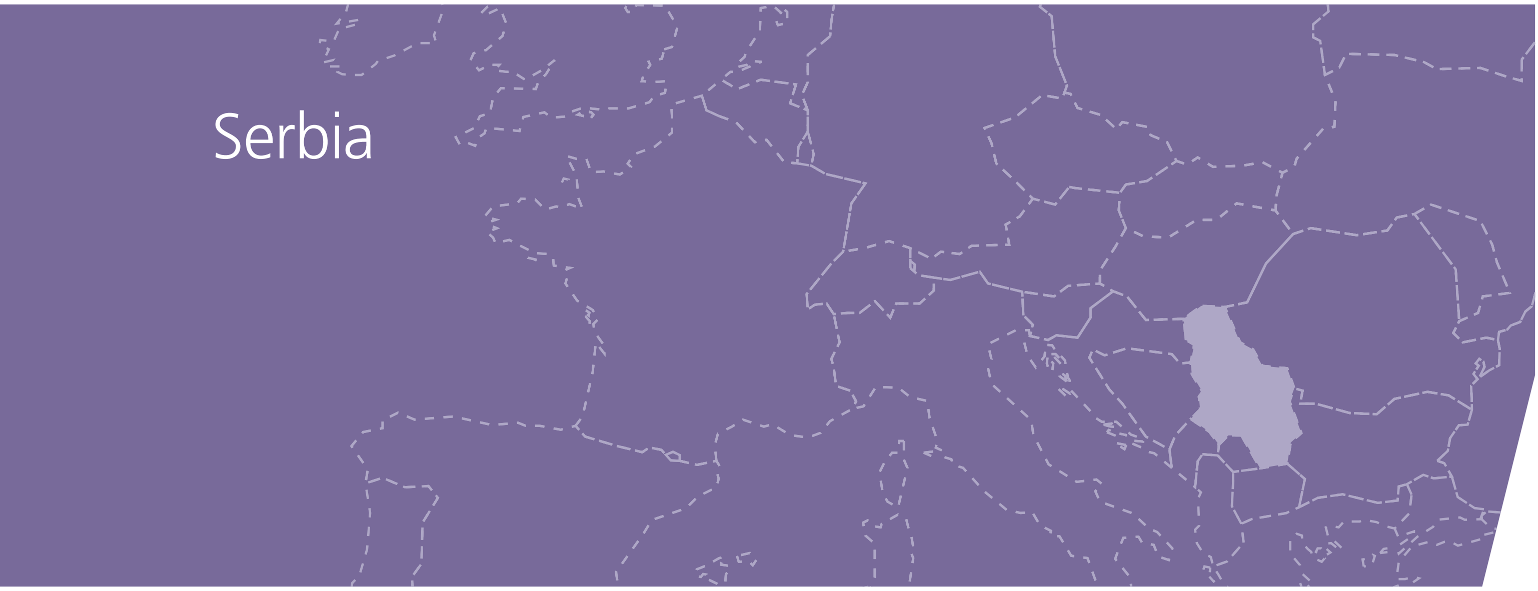

Serbia

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Generally, transfer pricing issues are regulated by the Serbian Corporate Profit Tax (CPT) legislation. Although Serbia is not a member of the OECD, the Serbian CPT legislation adopted some basic principles of the OECD transfer pricing guidelines.
Serbian CPT law does not prescribe a specific obligation to maintain transfer pricing documentation, except for the obligation to declare transactions involving assets or making commitments among associated persons separately in the tax statement (an additional document submitted with the tax return).
A taxpayer is obliged to declare the value of such transactions separately, at the prices that would have been agreed on the market for such or similar transactions, had an associated person not been involved (the "arm's length" principle).
This obligation applies to transactions between any resident permanent operating unit (branch, plant, representative office, place of production, factory or workshop etc.) and its non-resident head office.
Current practice indicates that the taxpayer faces a risk of the tax authorities not fully recognizing expenses or increasing revenues generated by transactions with affiliated companies when adequate transfer pricing studies are not available.
There are no special provisions in the CPT legislation limiting the obligation to maintain appropriate documentation to certain categories of taxpayers/ thresholds.

2. What is the content of the documentation that must be prepared?

Serbian CPT legislation does not explicitly regulate the content of transfer pricing documentation. However, CPT law stipulates which transfer pricing methods can be used and also imposes the obligation to declare transactions between associated persons in the tax statement. A taxpayer has an obligation to maintain business documentation in accordance with accounting principles and Serbian Law on Tax Proceedings and Tax Administration.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
According to the CPT legislation there are no exceptions/ thresholds regarding transactions that should be documented.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
The Serbian CPT legislation stipulates that a person associated with a taxpayer shall be:
For the purpose of this definition, the possession of more than 50% or the largest single portion of shares or interests shall mean that control over the taxpayer is possible. Also, influence on a taxpayer's business decisions exists when a person associated with a taxpayer has more than 50% or the largest number of votes individually in the taxpayer's controlling bodies:

- an individual or legal entity which is able to control or exert considerable influence over business decisions,
- a legal person which has the same legal entities participating in control, supervision or capital, or influencing business decisions, as the taxpayer.

For the purpose of this definition, the possession of more than 50% or the largest single portion of shares or interests is treated as enabling the holder to control the taxpayer. Also, influence over a taxpayer's business decisions exists when a person associated with a taxpayer has more than 50% or has the largest single number of votes in the taxpayer's controlling bodies.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
As stated above, the Serbian legislation regarding transfer pricing is still under development. Therefore, there is no specific requirement or rule for each specific situation.
The Serbian Law on Tax Proceedings and Tax Administration stipulates that a taxpayer shall only be obliged to deliver accounting books and related documents located abroad if it has control or influence over the foreign company of a kind that would enable him to fulfil this request.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Generally, the tax authorities accept regional benchmark studies if they can be substantiated with reliable documentation. However, the requirements are rather stringent in this regard.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
Under the Serbian Law on Tax Proceedings and Tax Administration, the taxpayer must submit verified Serbian translations of the documents upon the request of tax authorities, if documents are submitted in a foreign language.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The Serbian CPT legislation does not prescribe any specific deadline for providing transfer pricing documentation. There is no legal obligation to submit transfer pricing documentation with the regular tax returns, except the obligation to report transactions between associated parties by submitting the tax statement.
According to the Law on Tax Proceedings and Tax Administration, the taxpayer is obliged to participate in tax procedures by truly presenting the facts which are relevant to taxation.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

Generally, no penalties specifically related to transfer pricing documentation are prescribed, except for the case described under A2.d, where penalties for disregarding the tax authorities’ request shall be charged in the range of approximately EUR 1,000 - EUR 6,000.
If a taxpayer fails to declare the value of the transactions conducted with associated persons in accordance with “arm’s length principle” separately in the tax statement, a penalty in the amount of approximately EUR 1,000 - 6,000 is prescribed.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm’s length character of the transactions?

Generally, the Law on Tax Proceedings and Tax Administration prescribes that the burden of the proof is borne:
- in relation to facts establishing the tax liability, by the tax authorities,
- in relation to facts reducing or eliminating a tax liability, by the taxpayer for the facts that reduce or eliminate a tax liability.

An exception from this general rule exists where a taxpayer denies information to the tax authorities, or where the tax authorities challenge and reassess the tax base during a tax audit.
The Law on Tax Proceedings and Tax Administration prescribes that both parties (taxpayer and tax authorities) should act with “good faith”.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Not applicable, no documentation related penalties.

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Slovakia

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Slovakia became a member of the OECD in 2000 and the current income tax law in Slovakia is consistent with the OECD transfer pricing guidelines. As of 1 January 2009, an amendment to the Income Tax Act has introduced an obligation for all Slovak taxpayers involved in transactions with foreign related parties to prepare Transfer Pricing documentation. Taxpayers are obliged to provide transfer pricing documentation in accordance with section 18 (1) of the Income Tax Act.

Accordingly, the Ministry of Finance of the Slovak republic issued guidelines laying down the content of the TP documentation, in order to reduce any uncertainty concerning this issue. The guidelines distinguish between two types of TP documentation. The standard TP documentation is the more complex type, but it is obligatory only for material transactions undertaken by Slovak taxpayers that prepare their financial statements in accordance with International Financial Reporting Standards (IFRS). Other Slovak taxpayers involved in transactions with foreign associated enterprises can prepare simplified TP documentation that includes information on transactions with foreign associated enterprises. This must be attached to the financial statements of the Slovak taxpayer.

2. What is the content of the documentation that must be prepared?

The Guidelines are based on the principles set out in the OECD Transfer Pricing Guidelines and EU recommendations. They were published in the Financial Bulletin on the official web site of the Ministry of Finance of the Slovak Republic. The standard TP documentation has two parts. It must include **general documentation**, relating to the whole group of enterprises, and **specific documentation** on the specifics of the particular taxpayer.

The general part must:
- identify the group members and describe the group ownership structure,
- describe the business activities and business strategy of the group, and identify the industry,
- state the planned future business strategy,
- describe the functions that the individual entities of the group carry out and the estimated risks assumed by them.

The specific documentation is directly related to the general documentation and contains information on the Slovak taxpayer. It must:
- identify of the taxpayer and its ownership structure,
- describe the business activities and the industry,
- state the planned future business strategy of the taxpayer,
- list the intra-group transactions of the taxpayer,
- provide an overview of the entity's intangible assets,
- list the measures underlying the pricing, e.g. reconciliation of the pricing method,
- give a general description of the functions that the taxpayer performs and the estimated risks which it bears,
- set out benchmarking studies,
- describe the transfer pricing system adopted by the taxpayer and provide information relating to the selected transfer pricing method.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?

The purpose of the TP documentation is to evidence the process of pricing the business transactions of a foreign dependent person with related parties. The Slovak taxpayer is obliged to maintain TP documentation on all its significant transactions with foreign associated enterprises.
- "administration" shall mean the relationship of members of the statutory or supervisory bodies of a company or co-operative towards that company or cooperative,
- the term "other interrelation" means a relationship established exclusively for the purpose of reducing the tax base or increasing tax losses,
- the term "non-resident related party" refers to the situation in which a resident individual or legal entity is

interrelated with a non-resident individual or legal entity. This also applies to the relationship between a taxpayer with unlimited tax liability and its permanent establishments abroad, and to the relationship between a taxpayer with limited tax liability and its permanent establishment in the territory of the Slovak Republic.

b) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
The Slovak Ministry of Finance issued guidelines that outline the content requirements of the TP documentation in Slovakia. The guidelines are based on the principles set out in the OECD Transfer Pricing Guidelines and the principles outlined in the Resolution of the European Council on the EUTPD. They are applicable to transactions carried out by Slovak taxpayers from 1 January 2009.

The guidelines distinguish two types of standard documentation: general documentation and specific documentation. The general documentation contains general TP documents relating to the group (masterfile), while the specific TP documentation contains information on the Slovak taxpayer. Standard documentation is compulsory for Slovak taxpayers who report their financial statements under international financial reporting standards (IFRS). For other taxpayers which enter into an intra-group transaction with foreign associated enterprises, is sufficient to maintain simplified documentation that contains evidence of the taxpayer's controlled transactions and demonstrates the taxpayer's adherence to the arm's length principle in those transactions.

Although the standard TP documentation is not obligatory for all taxpayers, it is recommended that all Slovak entities involved in transactions with foreign associated enterprises produce more detailed TP documentation. During a tax inspection, an entity involved in such transactions will need to demonstrate that they were conducted in conformity with the arm's length principle, and it is highly unlikely that the required content of the simplified TP documentation will be sufficient for that purpose.

c) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
The Transfer Pricing documentation which tax payers are obliged to maintain must contain information on the group and its members. The main purpose of the provided information is to evidence that the arm's length principle has been observed in controlled intra-group transactions. Therefore the detail of the information varies from case to case. According to the guidelines, the minimum information required on the specific foreign group member is its identification, legal form and an explanation of its ownership structure. However the authorities may ask the Slovak taxpayer to provide any other relevant information on foreign group members that they deem important as evidence that the arm's length principle has been observed in controlled transactions.

d) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Benchmark studies are a relatively new content requirement of the TP documentation. However, according to our experience a well prepared regional benchmark study is considered sufficient in most cases. In general, the Slovak tax authority insists on benchmark comparisons within the local business environment.

e) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
The transfer pricing documentation must be provided in the Slovak language, unless, upon request, the Slovak tax authorities approve the use of another language.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The compulsory TP documentation must be provided to the tax authorities during the tax inspection within a period of 60 days beginning on the day of the request. As the simplified documentation is based on the information provided in the notes to the financial statements, it will be provided to the tax authorities regularly with the income tax return. If the simplified documentation provided as part of the notes to financial statement is considered insufficient, the tax authority could challenge the tax payer to complete required scope of information.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

If the Slovak taxpayer does not provide the Slovak tax authorities with the obligatory TP documentation within the required deadline, the tax authorities are empowered by law to impose penalties. However no specific regulation on transfer pricing penalties exists, and fines and penalties are imposed according to the Slovak Act No. 511/1992 on the administration of taxes and fees (as amended), which stipulates that if the taxpayer does not comply with its material obligations, a fine up to EUR 33,190 may be imposed by the tax authorities. The amount of penalty depends on the nature of violation and whether there is a continuing irregularity.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

In the absence of the compulsory TP documentation, or where incomplete documentation is submitted, a fine is imposed on the tax payer. This however does not in any way affect the taxpayer's obligation to provide evidence and prove that significant controlled transactions adhere to the arm's length principle. The proof of burden remains on the taxpayer in the event of a tax audit. If compliance with the arm's length principle is not proven, the tax authority could deem the associated transfer (expense) which decreased the taxable income to be non-deductible, and levy the penalty for under-declaration of Income Tax.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

The Slovak Republic ratified the Arbitration Convention and it came into force on 1 April 2006. The imposition of any document related penalty or previous TP reassessment is not considered to be an obstacle according to recent regulations.

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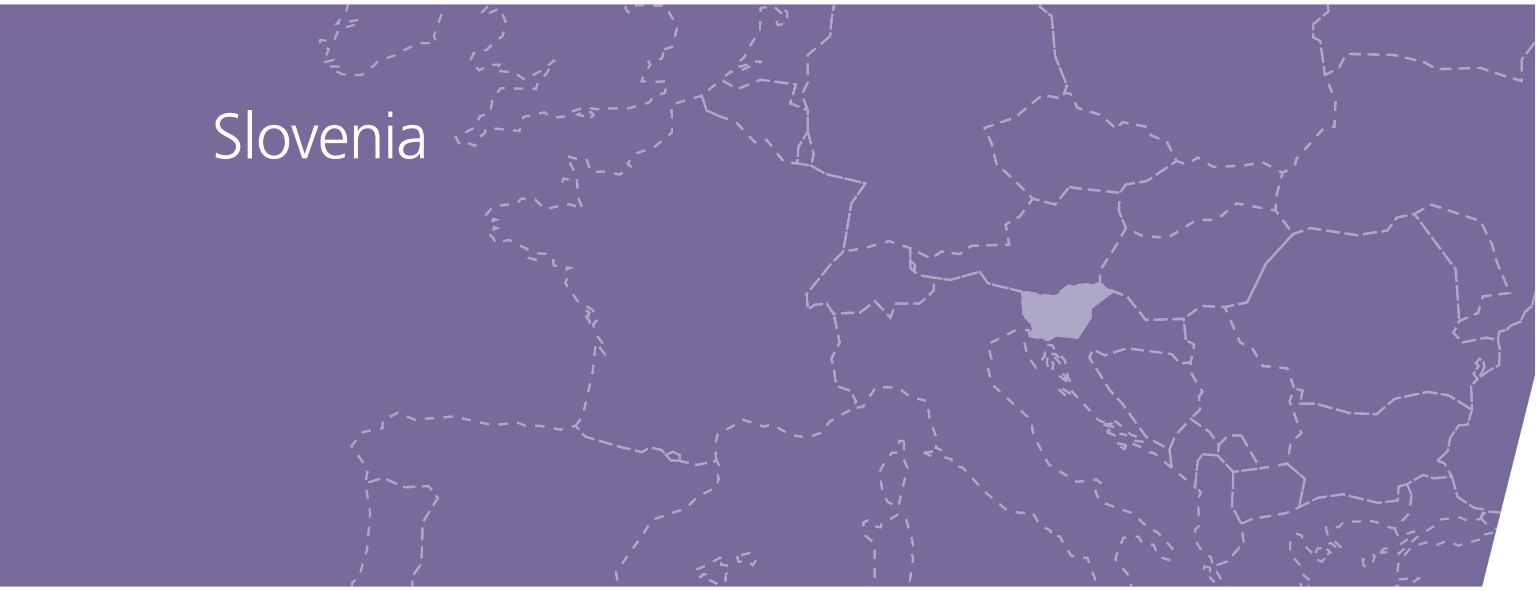
Slovenia



1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Slovenia is not a member of the OECD, just an observer. However, the tax authorities have generally adopted the arm's length principle and methods provided by the OECD Guidelines.
There is no direct reference to the OECD Transfer Pricing Guidelines in the Slovenian Corporate Profit Tax (CPT) Law; however the provisions of the CPT Law and regulations for transfer prices follow the OECD Transfer Pricing Guidelines.
There are no special provisions in the CPT legislation limiting the obligation to maintain appropriate documentation to certain categories of taxpayers/ thresholds.

2. What is the content of the documentation that must be prepared?

A taxable person is obliged to keep and provide information about related parties, the extent and type of business transactions with such parties, and the determination of comparable market prices as prescribed by the Tax Procedure Act (TPA). The provisions of the TPA on transfer pricing follow the EU Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (EUTPD). Therefore, companies need to prepare a masterfile and a country-specific documentation as described below:

— the masterfile should set out (at least) a description of the taxable person, the global organizational structure and type of relationship, the transfer pricing system, a general business description, the business strategy, general economic and other factors and the competitive environment,
— the country-specific documentation should contain information about transactions with related entities (description, type, value, terms and conditions), benchmark analysis, functional analysis, terms of contracts, circumstances that have an influence on transactions, application of the transfer pricing method used and other relevant documentation.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
According to the applicable TP rules there are no exceptions/thresholds regarding transactions that should be documented, except for inter-company loans.
Entities that have transactions with related parties must submit, together with the tax return, certain information on the value of controlled transactions and on interest rates between related parties.
The Slovenian CPT Law has a provision on the determination of an arm's-length interest rate for inter-company loans. A supplement to the tax return containing information on interest rates between related parties should be submitted only when the cumulative values of loans received and granted in the tax period amount to over EUR 50,000 per related entity.
Where the controlled transactions do not differ in their essential nature, the taxpayer may provide transfer pricing documentation for a group of transactions. However, appropriate adjustments still need to be made with respect to any differences which may exist between the transactions in question.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
The CPT Law provides the definition of related parties in cross-border dealings. According to the CPT Law, a resident or non-resident taxpayer and a foreign party (being a legal entity or a party without legal personality) which is not a taxpayer are considered to be associated enterprises when:

— the taxpayer directly or indirectly holds at least 25% of the value or number of shares or equity holdings, participates in the management, control and/or voting rights of a foreign person, or controls the foreign person on the basis of a contract, or the transaction conditions differ from the conditions that have been or would have been agreed between non-associated enterprises under equivalent or comparable circumstances; or

— the foreign person directly or indirectly holds at least 25% of the value or number of shares or equity holdings, participates in the management, control and/or voting rights of the taxpayer, or controls the taxpayer on the basis of a contract, or the transaction conditions differ from the conditions that have been or would have been agreed between non-associated enterprises under equivalent or comparable circumstances; or
— the same person at the same time directly or indirectly holds at least 25% of the value or number of shares or equity holdings, participates in the management, control and/or voting rights of the taxpayer and foreign person or of two taxpayers, or controls these persons on the basis of a contract, or the transaction conditions differ from the conditions that have been or would have been agreed between non-associated enterprises under equivalent or comparable circumstances; or
— the same individuals or their family members directly or indirectly hold at least 25% of the value or number of shares or equity holdings, participate in the management, control and/or voting rights of the taxpayer and foreign party or of the two resident parties or control them on the basis of a contract, or the transaction conditions differ from the conditions that have been or would have been agreed between non-associated enterprises under equivalent or comparable circumstances.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Slovenian legislation prescribes the content in line with EUTPD.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
According to the Tax Procedure Act, a taxpayer is obliged to submit data regarding non-resident affiliates to the Tax Authorities upon request, as far as available to the taxpayer.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
The Slovenian tax authorities have access to the Amadeus database and local databases containing financial information for Slovenian companies, such as GVIN and IBon. In accordance with the Slovenian Companies Act, companies and sole shareholders are required to submit annual reports that are publicly available.
The Slovenian tax authorities have a preference for using local comparable companies for benchmarking purposes, although a pan-European benchmark may also be accepted.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
All documents should be submitted in Slovenian.
Under the Slovenian TPA, the taxpayer must submit verified Slovenian translations of the documents upon the request of tax authorities, if previously submitted in foreign language.
If the masterfile is not in Slovenian, it must be translated upon the request of the tax authorities, within (minimum) 60 days.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

According to the CPT Law a taxpayer is obliged to maintain transfer pricing documentation for each state in which it enters into transactions with associated enterprises. The taxpayer must simultaneously collect documentation on transfer pricing for an individual transaction (contemporaneous documentation). The documentation shall be prepared or collected, at the latest, by the date for submission of the tax return for the year in question. The

documentation is not submitted to the tax authorities with the tax return, but is kept by the taxpayer and submitted upon the request of the tax authorities at the beginning of a tax audit.
During a tax audit, the TP documentation should be submitted to the tax authorities immediately upon their request. If this is not possible, the tax authorities may grant an extension of not less than 30 and not more than 90 days.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

Any entity engaged in intra-group transactions must be able to show that prices agreed between related parties meet the arm's length criterion. Failure to comply with these laws may result in tax exposure and penalties.
If the transfer pricing documentation is not submitted, or is not submitted in accordance with the relevant provisions, the penalty is EUR 1,600 to 25,000 for the legal entity and EUR 400 to 4,000 for its responsible person.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

Since documentation requirements for transfer prices came into force in Slovenia, the effective burden of proof has been on the taxpayer. Taxpayers must maintain specific documentation proving that they apply transfer prices in line with the arm's length principle. If proper transfer pricing documentation is in place, together with the corporate tax return, the burden of proof shifts to the tax authorities.
When examining transfer prices, the Slovenian tax authorities must use the method(s) previously applied by the taxpayer to determine whether inter-company transactions comply with the arm's length principle, provided that the taxpayer has submitted prepared documentation, has used one of the recognized methods, and that the method used is supported by appropriate calculations.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

In principle specific TP-related penalties do not prevent the taxpayer from engaging a mutual agreement procedure. However, this area is still under development.

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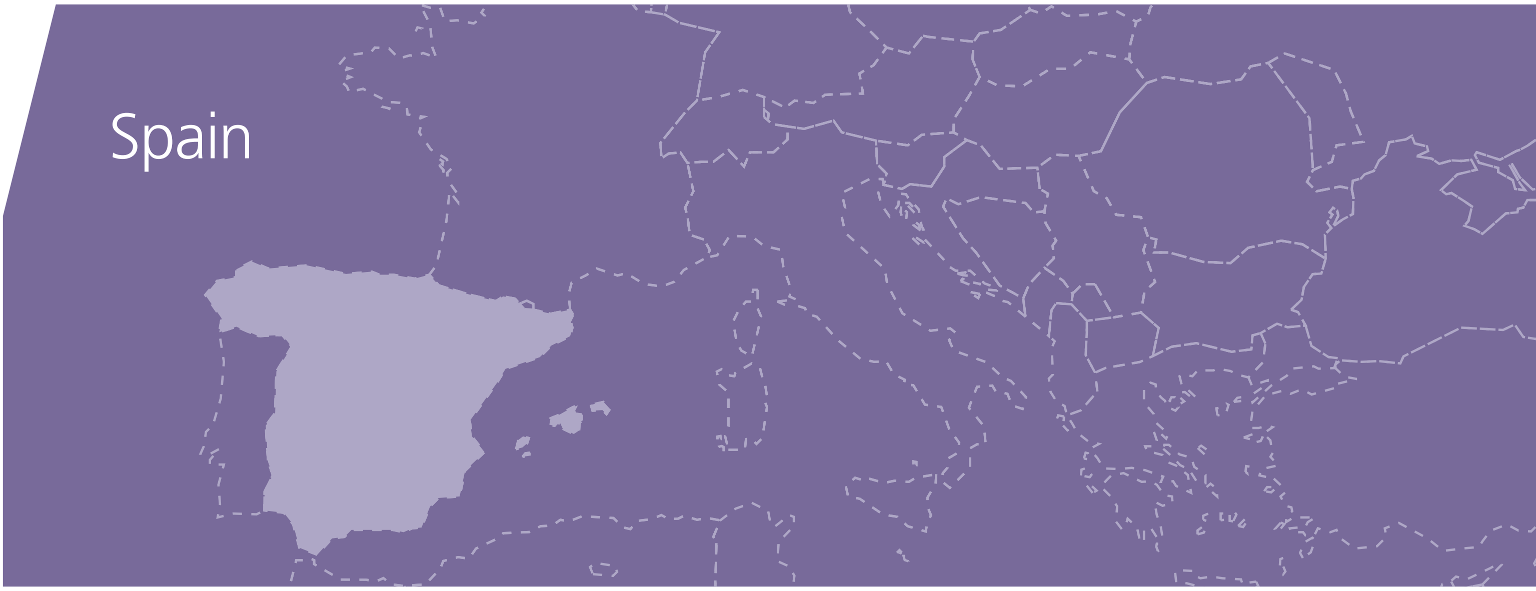
Spain



1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Article 16 of the Spanish Corporate Income Tax Law (hereinafter, "CITL") was amended by Law 36/2006, which came into force on 1 December 2006, establishing a documentation obligation for transactions carried out between related parties (as well as detailed documentation rules, penalty procedures, a tax audit transfer pricing process, provision for secondary adjustments, and a specific procedure for advanced pricing agreements). In this regard, as the modifications to the CIT Regulations came into force on 19 February 2009, this obligation applies to transactions carried out as of that date.
There are exceptions to the general obligation for transactions entered into by individuals, or by taxpayers having the benefit of the small and medium-sized entities regime established by the CITL (hereinafter, "the SME"). This regime applies where net revenues for the consolidated group were less than EUR 8 million in the previous tax year. These taxpayers are excluded from the general documentation obligation; however they are subject to specific documentation requirements.
Finally, it should be noted that documentation will be required for transactions with entities which are resident in tax havens, whether they are related or not.

2. What is the content of the documentation that must be prepared?

Two categories of documentation may be required depending on whether or not the taxpayer belongs to a group within the meaning of article 42 of the Spanish Commerce Code (for these purposes, there will be a group essentially when a parent company directly or indirectly controls its subsidiaries by holding a stake of over 50% or having the majority of voting rights). Where the taxpayer belongs to a group, it will be generally obliged to fulfil both the requirement for documentation relating to the group and that for documentation relating to the taxpayer itself.

In contrast, where the taxpayer does not belong to a group it will only be asked to fulfil the obligation concerning documentation relating to itself.
In this respect, the CIT Regulations develop the content of each of the obligations referred to:

— Documentation relating to the group:
  - general description of the organizational, legal and transactional structure of the group,
  - identification of the related companies involved in intra-group transactions,
  - general description of the nature, amounts and flows of intra-group transactions,
  - general description of the functions performed and risks assumed by related entities which directly or indirectly affect the transactions carried out by the taxpayer,
  - details regarding the ownership of patents, trademarks and other intangible assets,
  - description of the transfer pricing policy followed by the group, showing compliance with the arm's length principle,
  - details regarding any cost sharing agreements and service agreements within the group,
  - details regarding any advance pricing agreement (hereinafter, "APA") or analogous arrangements involving the group,
  - annual report of the group (or the equivalent thereof).

None of these requirements apply to those groups benefiting from the SME regime.

— Documentation relating to the taxpayer itself:
  - (A) identification details of the taxpayer, as well as a detailed description of the relevant intra-group transactions and their amounts and characteristics; these data also will be required for transactions with entities which are resident in tax havens, whether or not they are related parties,
  - (B) comparability analysis,
  - (C) the valuation methods that have been chosen, the reason for their selection and the resulting values or ranges of values,
  - (D) criteria for the distribution of jointly rendered services in favour of other related parties and any services and/or cost sharing agreements related thereto,

- (E) any other relevant information and shareholder agreements.

Notwithstanding the above, companies benefiting from the SME regime and individuals are subject only to some of these documentation requirements, depending on the transactions they are carrying out (for example: transfers of real estate or intangible assets must fulfil requirements (A), (C) and (E) from the list above).

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?

The general obligation of taxpayers to document their transactions with related parties properly is subject to the following exceptions only:

— transactions between companies which are integrated in a tax consolidation group,

— transactions between an economic interest grouping (Asociación de interés económico, "AIE") or between a joint venture (Unión temporal de empresas, "UTE") and its members,

— transactions carried out in the context of a takeover bid or a public stock offering.

b) What is the definition of "associated enterprises" for the purposes of this requirement?

Article 16.3 of the CITL contains an extensive description of cases and circumstances in which there is deemed to be an "association" between individuals and companies for the purposes of the application of the Spanish Transfer Pricing regime.

For the sake of simplicity, all companies which are part of a group under article 42 of the Spanish Commerce Code (see above), and all companies holding a direct participation of 5% in their subsidiaries (1% if listed) or an indirect participation of 25%, are considered to be related parties.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?

The content of the documentation required is similar to the one described in the Code of Conduct on transfer pricing documentation for associated enterprises in the EU.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?

The Spanish Tax Authorities (hereinafter, "STA") are entitled to require the whole documentation of the group the taxpayer belongs to. In this regard, foreign parent companies of a group must appoint a resident entity of the group to be responsible for storage of the documentation.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?

Practically speaking, pan-European benchmark are accepted by Spanish tax authorities.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?

Although no specific rule has been laid down in the Spanish legislation, several STA personnel who deal with transfer pricing issues have indicated in different seminars that this will actually depend on the tax inspector in charge of the audit, who may accept documentation in foreign languages or not. In any case it is preferable to prepare documentation in Spanish or to translate it into Spanish.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

As established in the Spanish CIT Regulations, all the documentation must be at disposal of the Spanish Tax Authorities (hereinafter, "STA") by the filing date of the final CIT return.

The STA are entitled to request all the documentation that is to be at their disposal by the filing date of the final CIT return, e.g. for the first time, assuming the fiscal year of the company ends on 31 December 2009, by 25 July 2010 (25 days after the period of 6 months in which the annual accounts are to be approved).

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

A specific penalty regime is applicable; in this regard there are two situations that should be distinguished in determining the applicable penalty:

- the taxpayer has met the documentation requirements and has valued the transactions based on the arm's length price derived from such documentation: in this case, no penalty will be imposed, even if the taxpayer's valuation is modified,
- the taxpayer has failed to comply with the documentation requirements: this conduct constitutes a tax infringement that is subject to penalties. These penalties are determined as follows:
  - if the STA do not modify the taxpayer's valuation, the penalty consists of a fixed amount of EUR 1,500 per data item and EUR 15,000 per group of data items with regard to each one of the documentation requirements that is not complied with or which is improperly complied with, under the CIT Regulations; and
  - if the STA modify the taxpayer's valuation, the penalty is 15% of the amounts resulting from any corrections made, with a minimum penalty of EUR 3,000 for each data item or EUR 30,000 per group of data item.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

Formerly, the burden of the proof was borne by the STA, but with the recent legislative amendments regarding this issue, the burden of proof now rests with the taxpayer.

In this regard, as the taxpayer must value the related-party transactions on an arm's length basis consistent with the documentation filed, the documentation obligation has assumed primary importance in terms of providing detailed evidence and helping to reduce the likelihood of the STA proposing adjustments.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Article 21 of Royal Decree 1794/2008 establishes that a taxpayer who has been definitively sanctioned for a serious infringement is not entitled to initiate any mutual agreement procedure which may be provided for by an applicable tax treaty with the aim of eliminating any double taxation resulting from a transfer pricing reassessment. In this regard, article 16.10 of the CITL establishes that infringements consisting of a failure to observe the documentation requirements are considered serious infringements.

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Switzerland

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

No. There are no specific transfer pricing documentation obligations in Switzerland. However, having coherent transfer pricing documentation helps to convince the tax authorities that the intragroup charges meet the arm's length standard.

2. What is the content of the documentation that must be prepared?

Not applicable.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

Not applicable.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

Not applicable.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

In general, it is the taxpayer's obligation to prove all facts reducing its tax bill.

Therefore, although there are no transfer pricing documentation obligations, good transfer pricing documentation can effectively reverse the burden of proof in favour of the taxpayer.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Not applicable.

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Ukraine

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Generally, Ukrainian taxpayers that are involved in: (i) transactions with related parties (ii) barter transactions (i.e., when assets are exchanged not for money but for other forms of consideration, e.g., goods) and, arguably, (iii) transactions with non-Ukrainian counterparties, are obliged to follow transfer pricing rules and, thus, must maintain transfer pricing documentation. The application of transfer pricing rules to a transaction does not depend on any threshold in terms of turnover volume or value of assets.
As a general comment, please note that transfer pricing rules are not well developed and not consistently applied in Ukraine.

2. What is the content of the documentation that must be prepared?

The documents and their content may differ depending on the kind of transaction subject to the transfer pricing rules (see above). However, the main principle is that the set of documents with respect to a particular transaction has to be sufficient to prove that the value/price of such a transaction is in line with a fair market price.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
Ukrainian law does not use a value/volume threshold criterion but rather applies transfer pricing rules to certain types of transaction (see above).

b) What is the definition of "associated enterprises" for the purposes of this requirement?
Ukrainian tax legislation gives a rather broad definition of "associated enterprises":
A legal entity is considered to be an associated enterprise of another legal entity if it controls, is controlled by or is under common control with that other legal entity.
A physical person is considered to be associated with a legal entity if that physical person or members of his/her family control the legal entity or if a physical person or members of his/her family are officers of the entity and are authorised to enter into transactions on its behalf.
The term "control" means that the entity/individual in question directly or indirectly owns the majority of the entity's authorised capital, possesses the majority of votes in the legal entity's governing body, or owns at least 20% of its authorised capital.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable to Ukraine.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request?
No, they do not bear such responsibility.
Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
Yes, potentially, tax authorities may request such information. As a general rule, if the tax authorities require certain tax related documents/information, a taxpayer should provide such documents/information and explain their contents.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Not applicable in Ukraine.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
The Ukrainian language has to be used in any communications with the Ukrainian tax authorities. If the documents/information is not in the Ukrainian language, a certified translation needs to be provided.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

Tax officers are authorised to request transfer pricing documentation in a course of a tax audit and a tax payer has to provide such documentation at their request. There is no express obligation to provide such documentation with the tax return, or at the beginning of a tax audit if not requested by the tax authorities.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

There are no separate penalties for non-provision of transfer pricing documentation. In case of absence or insufficiency of transfer pricing documentation, the tax authorities may independently determine a "fair market price" of the transaction as a basis for tax reassessment, however, tax law currently lacks a clear methodology describing how tax reassessment should be carried out.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

The general rule is that the tax authorities have the burden of proof. During a tax audit, the tax authorities may ask a taxpayer to provide documents substantiating the level of the contractual price and the taxpayer can either provide such documents or refuse to do so and refer to the clause placing the burden of proof on the tax authorities. However, such refusals are unusual and taxpayers usually try to substantiate their contractual prices and provide relevant documentation.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

Theoretically, transfer pricing re-assessment may affect the mutual agreement procedure; however, we are not aware of any instance of implementation of the mutual agreement procedure in Ukraine.

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United Kingdom

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

Under general record-keeping obligations imposed by Corporation Tax Self Assessment, records must be kept as may be needed to enable a taxpayer to deliver correct and complete tax returns within 12 months of the relevant year end, including any adjustments to their commercial profits that arise where the provision between two connected persons differs from an 'arm's length' provision, and profits used to calculate UK tax are reduced, or losses increased, as a result of that provision.
UK transfer pricing legislation provides for certain exemptions for enterprises that are defined under EU rules as small and medium sized. Where the enterprise is part of a group or association, the limits apply to that group. The criteria, tested on the basis of the whole consolidated group, are:

	Maximum number of staff	And less than one of the following limits:	
		Annual turnover	Balance sheet total
Small Enterprise	50	€ 10 million	€ 10 million
Medium Enterprise	250	€ 50 million	€ 43 million

If the UK company is within a group that qualifies as small, it is exempt from the need to apply and document arm's length prices in respect of transactions with related parties in countries with which the UK has a Double Tax Treaty with an appropriate non-discrimination article.
If the UK company is within a group that qualifies as medium sized, the UK company need not apply arm's length transfer pricing unless it is dealing with related parties in territories without a qualifying double tax treaty (as for 'small' groups above). However HMRC can subsequently require a medium sized group to apply arm's length transfer pricing to any of its related party transactions during a given chargeable period.

2. What is the content of the documentation that must be prepared?

UK guidelines follow principles set out in the OECD guidelines.

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
Any provision between "connected persons".
The definition of 'provision' is broad, and represents a transaction or series of transactions including arrangements, understandings and mutual practices whether or not they are, or are intended to be, legally enforceable.

b) What is the definition of «associated enterprises» for the purposes of this requirement?
'Connected persons' are where one party controls the other, or where parties are under common control, with control generally meaning the power to secure by the means of holding of shares or the possession of voting or other powers that the affairs of a company are conducted in accordance with the wishes of the person tested. With effect from 1 April 2004 a 40% participant in a joint venture is also deemed to control that joint venture, a joint venture for these purposes being a company or partnership which is controlled by two persons, each of whom has at least a 40% interest in the venture.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises («EU TPD»)? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Taxpayers rather follow the OECD Model.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
Taxpayers outside the UK do not have to commit to provide information to HM Revenue and Customs. However to the extent that non-UK taxpayers are counterparties to UK transactions, HMRC may request certain information relating to that non-UK counterparty from the UK taxpayer.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
Sometimes, if UK data is unavailable/limited.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
English.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

There are no specified deadlines for provision of transfer pricing documentation. Taxpayers should maintain records of transactions and adjustments for a given period prior to the filing date of the relevant tax return; general information powers under Corporation Tax Self Assessment require that the taxpayer provides evidence that pricing of transactions is at arm's length usually within 30 days from the date of request by the tax authorities.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

Penalties may be raised where:

- a return is made which is not in accordance with the arm's length principle,
- it can be shown that the return was submitted fraudulently or negligently by the taxpayer; and
- UK tax is lost as a result.

These penalties fall within general provisions relating to incorrect corporation tax returns, namely that a transfer pricing adjustment may lead to a maximum 100% penalty based on potential tax lost, the rate of the penalty being dependent on the behaviour giving rise to the understatement: penalties are up to 30% for a failure to take reasonable care, up to 70% for a deliberate understatement or overclaim, and up to 100% for a deliberate understatement aggravated by concealment.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

No. There are no specific UK documentation rules relating to transfer pricing, these fall under CTSA regulations as outlined above.

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

No.

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United States Of America

1. In your jurisdiction, are taxpayers obliged to maintain transfer pricing documentation? Does this obligation apply to all taxpayers, or only to certain categories (e.g. taxpayers with turnover or assets exceeding a particular threshold)?

In the United States, tax law governing transfer pricing is addressed under Internal Revenue Code Sections 482 and 6662, and associated regulations. Taxpayers with controlled transactions are required to maintain transfer pricing documentation, as covered in Section 6662, in order to avoid the imposition of penalties in the event of an adjustment to taxable income by the Internal Revenue Service. It is worth noting that a taxpayer is not automatically subject to penalty if contemporaneous transfer pricing documentation is not maintained. Transfer pricing related penalties can only be triggered by an adjustment to taxable income. This requirement applies to all US taxpayers, as the US rules and regulations do not provide a safe harbor for small taxpayers. Documentation requirements can be segmented into two categories: "Principal Documents" and "Background Documents". Taxpayers and practitioners generally view an annual transfer pricing report documenting the arm's length nature of intercompany transactions that cross US borders as comprising the Principal Documents.
These Principal Documents are:

— an overview of the taxpayer's business, including an analysis of the economic and legal factors that affect the pricing of its property or services,
— a description of the taxpayer's organizational structure (including an organization chart) covering all related parties engaged in transactions potentially relevant under Section 482, including foreign affiliates whose transactions directly or indirectly affect the pricing of property or services in the United States,
— any documentation explicitly required by the regulations under Section 482, such as for substantiation of a market share strategy or documentation required for cost sharing arrangements,
— a description of the method selected and an explanation of why that method was selected,
— a description of the alternative methods that were considered and an explanation of why they were not selected,
— a description of the controlled transactions (including the terms of sale) and any internal data used to analyze those transactions. For example, if a profit split method is applied, the documentation must include a schedule providing the total income, costs, and assets (with adjustments for different accounting practices and currencies) for each controlled taxpayer participating in the relevant business activity and detailing the allocations of such items to that activity,
— a description of the comparables that were used, how comparability was evaluated, and what (if any) adjustments were made,
— an explanation of the economic analysis and projections relied upon in developing the method. For example, if a profit split method is applied, the taxpayer must provide an explanation of the analysis undertaken to determine how the profits would be split,
— a description or summary of any relevant data that the taxpayer obtains after the end of the tax year and before filing a tax return, which would help determine if a taxpayer selected and applied a specified method in a reasonable manner; and
— a general index of the principal and background documents and a description of the recordkeeping system used for cataloging and accessing those documents.

Background documents are supplemental material to support "[t]he assumptions, conclusions, and positions contained in the principal documents". Examples of background documents include accounting records, legal agreements, projections, and invoices.

2. What is the content of the documentation that must be prepared?

a) Which transactions must be documented (all transactions with associated enterprises, or only those which exceed a particular threshold)?
All transactions involving the transfer of tangible and intangible property, the provision of services, the extension of a loan or advance, and the use of property (e.g., leases

and rental agreements) between related parties must be documented. The US rules and regulations do not provide thresholds or otherwise contain safe harbor provisions for small taxpayers, for example.

b) What is the definition of "associated enterprises" for the purposes of this requirement?
Section 482 of the Internal Revenue Code applies a very broad definition of associated enterprises or related parties. Indeed, Treasury Regulation § 1.482-1(i) (4) defines "controlled" to include: "…any kind of control, direct or indirect, whether legally enforceable or not, and however exercisable or exercised, including control resulting from the actions of two or more taxpayers acting in concert or with a common goal or purpose. It is the reality of the control that is decisive, not its form or the mode of its exercise. A presumption of control arises if income or deductions have been arbitrarily shifted". Thus, parties can be considered to be related under Section 482 even if one party has less than 50%, or even 0%, ownership in another party.

c) For EU countries, is the content of the documentation similar to that described in the EU Code of Conduct on transfer pricing documentation for associated enterprises ("EU TPD")? If not, are taxpayers entitled to choose between the local requirements and the EU TPD?
Not applicable.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?
Documentation requirements are applicable to all US taxpayers. For purposes of this discussion, "taxpayer" includes any person required to file a US tax return under US tax law. It is important to note that transfer pricing rules and regulations apply to all taxpayers so defined, not just those persons that actually file a return. As such, taxpayers are required to maintain information that pertains to related party transactions involving a US taxpayer in the form of principal and background documents, and the Internal Revenue Service may request this information. For example, a US affiliate of a foreign-based parent company is required to provide information on the parent company and any other foreign-based related parties with which the US affiliate transacts. Such information may include an organizational chart and functional analysis, financial data and projections that may impact the economic analysis, marketing materials and analyses, and accounting records.

e) If comparable studies are to be provided, do the tax authorities generally accept regional benchmark studies (e.g. pan-European benchmark studies)?
The use of regional benchmarks, such as pan-continental comparable sets, is not explicitly addressed in the US transfer pricing rules and regulations. Data on US companies is readily available, as independent, publicly-traded companies are required to file their financial statements with the Securities and Exchange Commission in a Form 10-K. In addition, there are a number of third-party databases that provide business descriptions, financial data, and other company-specific data for US companies. Such databases are commonly used to identify companies that may provide reliable benchmarks in transfer pricing matters. Thus as a practical matter US comparables are generally used to benchmark a US tested party. In practice, pan-regional comparable sets are sometimes used to test a non-US party if data on local comparables are not sufficiently available.

f) What language(s) are to be used by taxpayers in submitting the transfer pricing documentation?
While the US transfer pricing rules and regulations are silent as to the language to be used in transfer pricing documentation, in practice, documentation is prepared and submitted in English.

3. What is the deadline or timescale for providing transfer pricing documentation to the tax authorities (is it to be provided for example upon filing of the tax returns, at the beginning of a tax audit, or on the specific request of the tax authorities)?

The US maintains a contemporaneous documentation requirement, meaning that the documentation must be in existence at the time the tax return is filed. Therefore the existence of documentation alone is not sufficient to avoid penalties; taxpayers must prepare such documentation with the timely filing of the US tax return. Specifically, the principal documents numbers 1 through 8 must be prepared by the tax filing. Upon request from the Internal Revenue Service in the course of an audit, taxpayers must produce all 10 principal documents within 30 days. An additional request for background documents may also be provided, which must be produced within 30 days of request.

4. In the event that the documentation is not provided within the applicable timescale, or is incomplete, do documentation-related penalties apply in your jurisdiction? If so, please detail the penalties and the circumstances in which they do and do not apply.

The regulations under Section 6662 of the Internal Revenue Code contain specific penalty rules for transfer pricing misstatements. There are two types of penalties that can be imposed on an adjustment to taxable income: a transactional penalty and a net adjustment penalty. For each type of penalty, the regulations allow for either a "substantial" or a "gross" misstatement penalty depending on the severity of the tax misstatement. The penalties are calculated as a percentage of the underpayment of tax (i.e., the difference between the adjusted taxable income as determined by the Internal Revenue Service and the taxable income reported by the taxpayer). An adjustment may be excluded from penalties if the taxpayer demonstrates reasonable cause and good faith efforts, including maintaining contemporaneous documentation.

A transactional penalty is applicable if the taxpayer's transfer prices are over- or under-stated by certain percentage thresholds. Therefore, a transactional penalty may be triggered even if the adjustment is relatively small on an absolute dollar basis. A substantial valuation misstatement is defined in Treasury Regulation § 1.6662-6: "In the case of any transaction between related persons, there is a substantial valuation misstatement if the price for any property or services (or for the use of property) claimed on any return is 200% or more (or 50% or less) of the amount determined under Section 482 to be the correct price." In the event of a substantial valuation misstatement, the applicable transactional penalty is equal to 20% of the resultant underpayment of tax. A gross valuation misstatement occurs "… if the price for any property or services (or for the use of property) claimed on any return is 400% or more (or 25% or less) of the amount determined under Section 482 to be the correct price." In such instances, the applicable penalty increases to 40% of the tax underpayment.

Penalties can also be triggered by the aggregate of all allocations made under Section 482 (the net adjustment penalty): "The term net Section 482 adjustment means the sum of all increases in the taxable income of a taxpayer for a taxable year resulting from allocations under Section 482 (determined without regard to any amount carried to such taxable year from another taxable year) less any decreases in taxable income attributable to collateral adjustments as described in Treasury Regulation § 1.482- 1(g)." As in the transactional penalty, "substantial" and "gross" misstatement thresholds are established for the net adjustment penalty, but are based on absolute rather than relative size. A substantial valuation misstatement occurs if a net Section 482 adjustment is greater than the lesser of USD 5 million or 10% of gross receipts. In the event of a substantial valuation misstatement, the applicable penalty is equal to 20% of the resultant underpayment of tax. A gross valuation misstatement occurs "… if a net Section 482 adjustment is greater than the lesser of USD 20 million or 20% of gross receipts." In such instances, the applicable penalty increases to 40% of the tax underpayment.

In theory, an adjustment could trigger both a transactional and a net adjustment penalty. To address this potential taxpayer concern, the regulations under Section 6662-6(f) require coordination of penalties and do not allow the Internal Revenue Service to impose multiple penalties on the same adjustment. If an adjustment triggers both a gross valuation transactional penalty (e.g., the reported price is less than 25% of the adjusted price) and a substantial valuation net adjustment penalty (e.g., the adjustment is USD 10 million), the amount of the adjustment that is related to the gross valuation misstatement under the transactional penalty is subject to a 40% penalty, and the remaining amount of the adjustment is subject to a 20% penalty. If an adjustment were to trigger both a substantial transactional penalty and a gross valuation net adjustment penalty (e.g., the adjustment is greater than USD 20 million), the entire amount is subject to the net adjustment penalty of 40%; no portion would be subject to a 20% penalty.

5. Does the absence or incompleteness of documentation reverse the burden of the proof as regards the arm's length character of the transactions?

The Internal Revenue Service is granted broad discretion in transfer pricing cases. Section 482 of the Internal Revenue Code provides that the Internal Revenue Service "…may distribute, apportion, or allocate gross income, deductions, credits, or allowances…if … such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect …income." Thus, the burden of proof rests with the taxpayer, regardless of whether or not documentation is prepared. In general, to avoid a transfer pricing adjustment, a taxpayer must prove that the adjustment initiated by the Internal Revenue Service was "arbitrary, capricious or unreasonable" and that the disputed transaction satisfies the arm's length standard under Treasury Regulation § 1.482-1(b).

6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (or, for EU countries, the procedure contained in the EU Arbitration Convention) with a view to eliminating any double taxation resulting from the transfer pricing reassessment?

In the US, taxpayers are not prevented from seeking Competent Authority relief as specified in the mutual agreement procedure provisions of applicable tax treaties in the event of a transfer pricing adjustment, irrespective of whether the proposed adjustment would imply a penalty. Competent Authority relief may not alleviate documentation-related penalties, however. For example, if an adjustment initiated by the Internal Revenue Service included a penalty, the Competent Authority process can eliminate the penalty only if the settlement results in an adjustment below the thresholds described in Sections 6662(e) and 6662(h) of the Internal Revenue Code. Otherwise a potential penalty will be evaluated in reference to the adjustment amount as determined in the settlement.

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