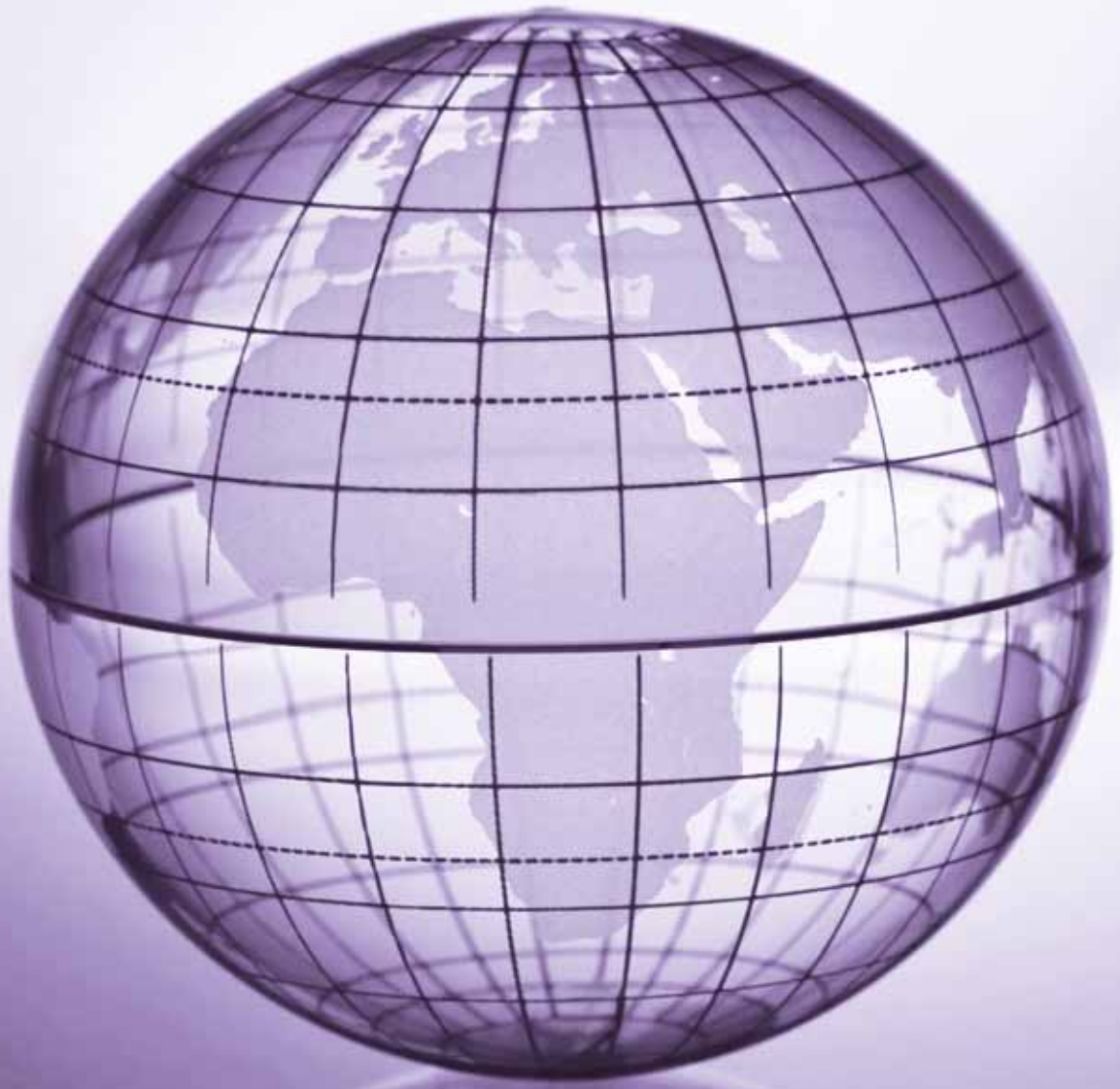
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Tax Connect

Transfer pricing: managing documentation requirements in 30 countries

July 2013

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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), France (2010) or Russia (2012). According to the UN manual described below, the number of countries having specific transfer pricing documentation requirements rose from approximately 15 in 2001 to almost 60 in 2012.

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. More recently (October 2012), the UN issued the "Practical transfer pricing manual for developing countries" which includes developments on transfer pricing documentation.

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 Joint Transfer Pricing Forum 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 points:

— A description of the group and the industry in which it operates;
— A functional 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 the various intra-group transactions;
— One or more economic/benchmark 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 arm's length principle.

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Albania



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)?

Albanian tax legislation, specifically article 36 of law 8438 of 28 December 1998, concerning tax on profits, regulates transfer pricing issues between connected/related parties. The law does not make any distinction between individuals and legal entities, or on the basis of turnover.

The law refers to transfer pricing documentation but there is no express obligation to maintain such documentation. However, it is advisable to do so in case of a tax audit.

The condition *sine qua non* for tax authorities to recalculate income (and consequently profit) is that the tax administration has verified that there is a substantial discrepancy between the income declared by the connected/related parties and market prices at the time of the transaction.

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

Albania is a member state of the OECD and its Ministry of Finance has issued two important regulations governing the procedure for reassessment of transfer prices. Ministry of Finance regulation 1 of 11 February 2002, concerning transfer prices, makes provision as to the methods that can be used to recalculate the taxpayer's income. The content of the documentation exactly follows the current OECD recommendations.

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

The documentation should cover all transactions with related parties.

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

Article 2 c) of law 8438 of 28 November 1998 concerning tax on profits contains a definition of "associated parties", which can be translated as follows: "persons are considered to be associated where one of them acts or is empowered to act in accordance with the directives, suggestions or will of the other, or where both act in accordance with the directives, suggestions or will of a third person, regardless of whether these matters have been reported". In particular, the following parties are considered to be associated:

— Spouses, parents and their children;
— A company and another company or person directly or indirectly holding 50% or more of its shares (by value or number) or voting power;
— Two or more companies linked by virtue of the fact that a third party directly or indirectly holds 50% or more of their shares (by value or number) or voting power.

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?

Albania is not yet a member of the European Union, although it has an Association Agreement with 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?

Albania has signed various agreements to avoid double taxation with European and non-European countries. Under those agreements the competent tax authorities may request information from the tax authorities of the relevant country.

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

We are not aware of cases where the tax authorities have accepted regional benchmark studies.

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

The documents that are used for transactions with Albania should preferably be in the Albanian 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)?

In the absence of any clear obligation to maintain transfer pricing documentation, there is no specific deadline for providing it to the tax authorities.

Where the documentation required by the tax authority is not filed within the prescribed period, there are no documentation-related penalties.

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

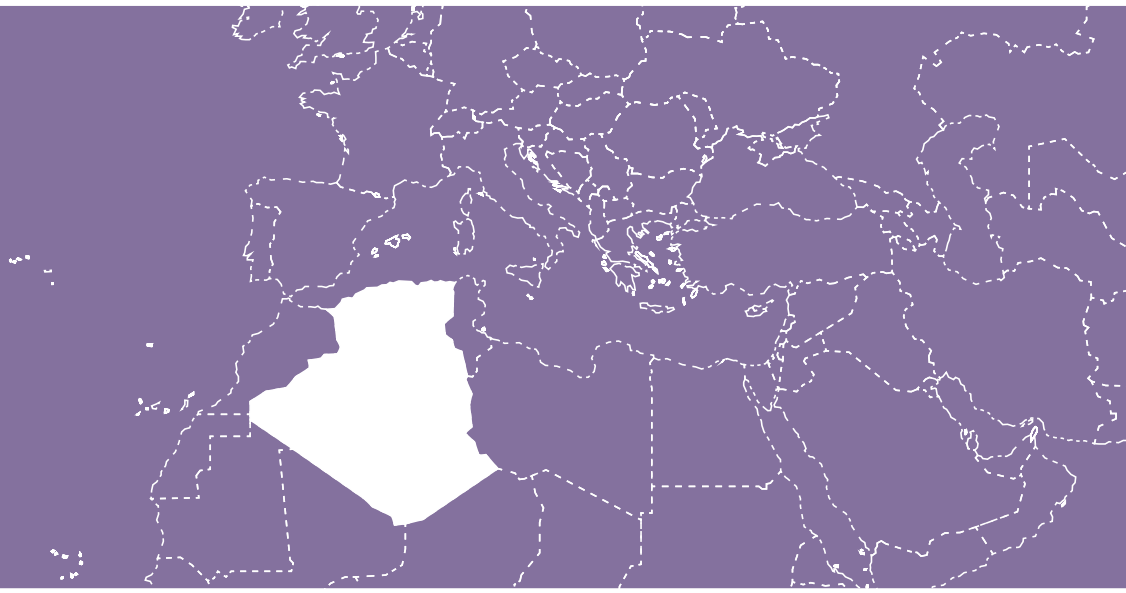
No.

5. 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?

Since there is no documentation-related penalty, this is not applicable.

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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)?

The Supplementary Finance Act 2010 refers to the obligation on companies under the supervision of the large companies' directorate[1] to annex documentation to their corporate tax return clarifying their transfer pricing policy with regard to non-resident or resident related parties. Although the implementing regulations have not yet been released, we expect them to provide for methods such as the comparable uncontrolled price method, the resale price method, the cost plus method, the profit split method and the transactional net margin method to be used to determine arm's length prices. While we have, as yet, no experience of the tax authority's approach to the new provisions, we expect that it will require the taxpayer to justify inter-company prices.

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 those located in Algeria. The Supplementary Finance Act 2010 provides some examples of situations where profits may be transferred to non-resident and resident related parties, such as where the sale price is increased or the acquisition price decreased, where excessive royalties are paid or disproportionate consideration is paid for services rendered, where interest-free loans or low-interest loans are made, or where the interest provided for by a loan agreement is waived.

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 141*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 another enterprise operating in Algeria or outside Algeria. It should be noted that the Algerian tax code extends the application of transfer pricing beyond cross-border transactions to transactions between entities operating in 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 Decree of application of article 141*bis* of the Direct Tax Code has been published in the official journal dated 20 January 2013. The latter describes the documentation to be produced by the affiliated firms with the purpose of to justify the transfer price. Such documentation shall contain general (such as financial information, general and administrative costs, costs of research and development information) and specific (such as copies of all contracts between the concerned companies) information.

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[1] Large enterprises falling within the jurisdiction of this directorate include:
— Companies with revenue of DZD 100 million or more;
— Oil companies;
— Members of major foreign groups; and
— Members of groups if one of the members satisfies the first requirement.

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 standpoint, the 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). In other words, 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?

Strictly speaking the document should be provided in Arabic, but a French version or certified 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)?

According to article 169*bis* of the Algerian tax procedure code, transfer pricing documentation should be annexed to the corporate tax return that must be filed by 30 April of each year. In the absence of implementing regulations, this provision has not yet been put into practice by the taxpayers or the tax authorities. However, where the documentation has to be provided within the context of a tax audit, pursuant to article 20*ter* of the Algerian tax procedure code, the deadline is 30 days from the notice.

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 provide missing or correct incomplete transfer pricing documentation within 30 days of notice, its taxable base will be reassessed and the tax authority will impose a penalty of 25% of the benefit obtained from the transfers.

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 its position with evidence. Where the tax authority rejects the taxpayer' documents, this will lead to a reassessment of the taxable base and the taxpayer will remain obliged to provide the evidence within the contentious/litigation process.

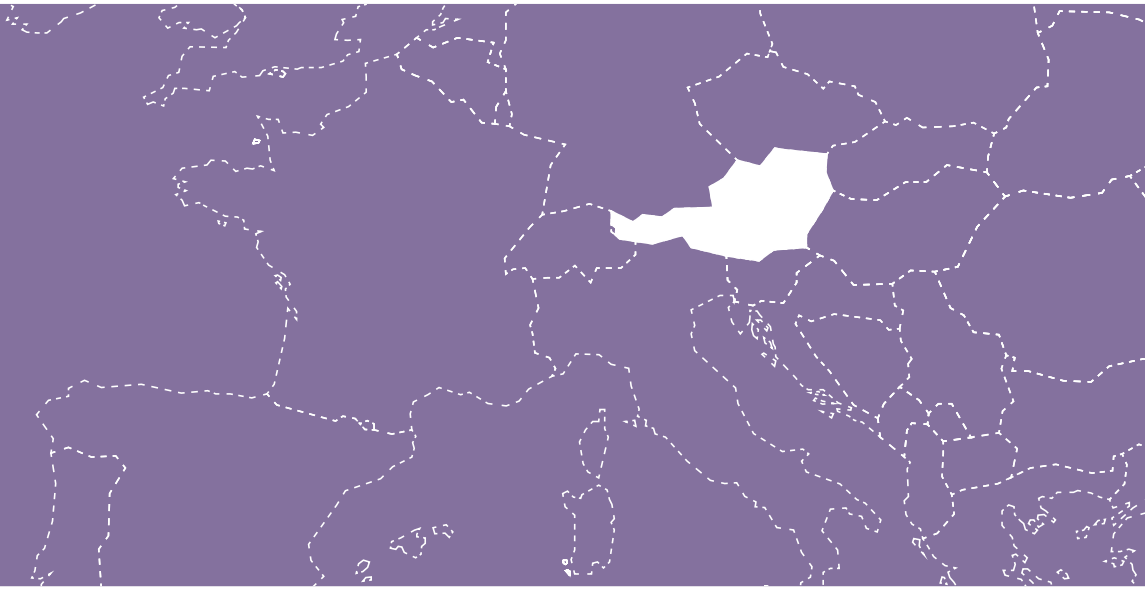
6. In the event that the tax authorities (i) impose documentation-related penalties and (ii) make a transfer pricing reassessment, does the imposition of documentation-related penalties prevent the taxpayer from initiating any mutual agreement procedure which may be contained in an applicable tax treaty (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 taxpayer 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 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. Transfer Pricing Guidelines Rz 309).

The Austrian tax authority may however request further information and documents during a tax audit (cf. Transfer Pricing Guidelines Rz 309 referring to sec. 3.18 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?

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)?

As a preliminary remark, it is important to note that Bosnia and Herzegovina (BiH) comprises three administrative units:
— Federation of BiH ("FBiH");
— Republika Srpska (RS); and
— Brcko District ("BD"),
each with its own corporate tax legislation. Consequently, transfer pricing rules may vary from one administrative unit to another.

There is no obligation to maintain specific transfer pricing documentation in any of the three jurisdictions. However, taxpayers have an obligation to report all related party transactions (domestic and cross-border) in their annual tax statement. There is a separate obligation, applicable to all taxpayers, to report the value of related-party transactions based on market prices or substantially similar transactions (i.e. at 'arm's length' prices). No thresholds are applicable.

None of the jurisdictions requires the taxpayer to maintain transfer pricing documentation, but there is a general obligation to maintain business documentation in accordance with accounting legislation and legislation regulating tax procedures and tax administration.

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

The format of transfer pricing documentation is not explicitly laid down by the Corporate Profit Tax legislation in any of the three jurisdictions. However, the legislation does stipulate which transfer pricing methods may be used to establish the market value of the goods/services.

Under a rule specific to RS and BD, in order for the transactions to be tax recognised the taxpayer must keep documentation:
— Establishing the legal status and business activities of the taxpayer;
— Identifying the related party transactions (relevant data must be kept for five years);
— Listing the activities and providing information about business partners, insofar as relevant to the transactions;
— Identifying the chosen transfer pricing method and explaining reasons for applying it.

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

All transactions with related persons have to be documented.

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

RS and BD:
A natural or legal person is considered to be associated with an entity if it owns, directly or indirectly, 10% or more of the shares in the entity.

FBiH:
The definition refers to:
— An individual or legal entity which is capable of exercising control over or exerting significant influence on business decisions,
— A legal person in which the same legal entities participate in control, supervision or capital or influence business decisions.

It is provided that control over a taxpayer is achieved by holding a share of 50% or more in the taxpayer (as a highest single percentage of shares). Additionally, it is considered that having 50% or more of voting rights (as the highest percentage of voting rights) in the taxpayer enables an entity to exert significant influence over the taxpayer's business decisions. Significant influence may

also be achieved through an extraordinary volume of mutual transactions, technological dependency etc.

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?

N/A – BiH is not an EU Member State.

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 tax authorities can require the taxpayer to submit all the business books, records, business documentation and any other document held by the taxpayer (or any other person holding required documentation).

Additionally, international cooperation agreements enable the tax authorities to request the relevant information from tax authorities in other jurisdictions.

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

The tax authorities generally accept regional benchmark studies in all three jurisdictions.

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

For all three jurisdictions, the legislation regulating tax administration and tax procedures prescribes that one of the official languages in RS, BD, or FBiH has to be used (Serbian, Bosnian or Croatian).

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 previously explained, taxpayers have an obligation to report all related party transactions in their annual tax statement, which must be filed by 31 March of the following year.

In RS and BD, taxpayers are obliged to submit information regarding affiliated persons along with the tax return.

In all three jurisdictions, it is advisable for the taxpayer to maintain documentation supporting transfer prices, ready to be delivered to the tax authorities upon request (usually 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.

There are no penalties specifically related to maintaining transfer pricing documentation.

Specific to RS:
A taxpayer which does not keep business books and records in accordance with the tax regulations, or does not provide documents upon the request of the tax authorities, is subject to a penalty in the range of BAM 1,000–3,000 (EUR 500–1,500). Penalties may also be imposed on the person responsible, in the range of BAM 500–1,500 (EUR 250–750).

A taxpayer which does not calculate its tax liability and submit its tax return is subject to a penalty of 25% of the tax liability established.

Specific to FBIH:
A taxpayer which fails to submit a tax return in the manner prescribed by the tax legislation is subject to a penalty of 10% of the tax due or required to be reported on the tax return, for each month until the declaration is filed, up to a maximum of 150% of that amount. The responsible person is subject to a penalty in the range of BAM 500–3,000 (EUR 250–1,500).

Please note that the tax authorities are authorised to submit a tax declaration on behalf of a taxpayer if the taxpayer has not submitted the tax declaration within 15 days of the due date for the tax declaration as laid down by the tax legislation. For any declaration prepared by the tax authorities on behalf of the taxpayer, a penalty in the amount of 10% of the assessed tax due may be imposed.

A taxpayer which does not provide documents upon the request of the tax authorities is subject to a penalty of BAM 200 (EUR 100) for every omission, subject to a maximum of BAM 25,000 (EUR 12,500).

Specific to BD:
A taxpayer which fails to submit a tax return in a manner prescribed by the tax legislation is subject to a penalty in the range of BAM 1,000–5,000 (EUR 500–2,500). The responsible person is subject to penalty in the range of BAM 200–1,000 (EUR 100–500).

A legal person which fails to submit its business books and records in accordance with the tax legislation is subject to a penalty in the range of BAM 1,500–5,000

(EUR 750–2,500). It may also be prohibited from carrying out business activities for a period of six months to five years, if the omission is repeated within two years.

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 course of any tax audit, the tax authorities are required to clarify all circumstances and facts within the scope of the audit, including circumstances and facts favourable to the taxpayer. There are no specific stipulations concerning the burden of proof due to missing transfer pricing documentation, but the taxpayer bears the risk of tax base adjustment due to the lack of appropriate supporting documentation.

The burden of proof that the tax liability established by tax authorities is incorrect is borne by 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?

The imposition of document-related penalties does not prevent the taxpayer from initiating a mutual agreement procedure, as prescribed by applicable tax treaties.

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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, there is an obligation to provide information and supporting documentation upon the request of the tax authorities.

In the event of a tax inspection, any taxpayer that has entered into transactions relating to goods, assets, services or rights with a related party located abroad, or with a party (whether or not related) located in a tax haven or subject to a preferred tax regime, will be obliged to provide transfer pricing information and supporting documentation. The information must show the prices applied and the calculation of benchmarks.

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

Spreadsheets containing the transfer pricing calculation together with the supporting documentation for all variables (e.g. document numbers, dates, quantities, values and currencies).

The supporting documentation must demonstrate that the information contained in the spreadsheets is correct, and will depend on the calculation method chosen by the taxpayer.

To prove the price of import transactions, the relevant documents will be as follows:
- Import Declaration;
- Brazilian invoice;
- International invoice;
- Initial and final inventory of the imported products and the finished products (where the imported product is intended for a production process); and
- Bill of materials (to verify final inventory of the imported product where it is intended for a production process).

To prove the price of export transactions the relevant documents will be as follows:
- Brazilian Invoice;
- International Invoice; and
- Bill of lading.

To prove the parameter price calculation for import transactions, the documents will depend on the method, as follows:
- Resale Price Less Profit Method – PRL
  - Invoices in respect of internal sales of the imported product and the finished product (where the imported product is intended for a production process);
  - Bill of materials;
  - Acquisition cost of the imported goods;
  - Sales cost.
- Comparable Independent Prices Method – PIC
  - Invoices in respect of the unrelated transactions used to calculate the benchmark.
- Production Cost Plus Profit Method – CPL
  - Production cost information provided by the manufacturing company located abroad, which must be calculated in accordance with Brazilian accounting principles and Brazilian law.
  - The documents used to demonstrate such production costs should be copies of those which support bookkeeping entries, such as documents showing the cost of leasing, maintaining and repairing the equipment used in the production process, the apportionment of direct and indirect labour costs, and payroll information.
- Quotation Price on Imports – PCI
  - The supporting documentation for this method is expected to be prescribed by the Brazilian Federal Revenue Service.

As to proof of the parameter price calculation for export transactions, the documents will also depend on the method, as follows:

— Purchase or Production Cost Plus Taxes and Profit Method – CAP
  - Detailed information on the purchase or production cost, which must be supported by information on the taxpayer's database.
— Wholesale or Retail Price in Country of Destination Less Profit – PVA and PVV
  - Invoices in respect of sales of the exported items in the wholesale market (PVA) or retail market (PVV) of the country of destination.
— Export Sales Price – PEVEX
  - Invoices in respect of the unrelated-party export transactions used to calculate the benchmark.
— Quotation Price on Exports – PECEX
  - The supporting documentation for this method is expected to be prescribed by the Brazilian Federal Revenue Service.

In addition to the documents and information referred to above, the tax authorities can request a list of suppliers and clients showing their names, countries and relationships with the taxpayer (related or unrelated) including balance sheets, if requested by the authorities, and any other information that appears necessary.

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)?

The obligation to provide transfer pricing information and supporting documentation in the event of a tax inspection applies to all taxpayers that have entered into transactions relating to goods, assets, services or rights with a related party located abroad or a party (whether or not related) located in a tax haven or benefiting from a privileged tax regime.

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

All transactions capable of influencing the price applied, or the parameter price, must be documented. Note that documentation concerning transactions with unrelated parties can also be demanded (for example, internal market purchases of the same item that is imported from a related party).

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

The concept of the "associated enterprises" or related parties of the Brazilian legal entity encompasses (i) its branches; (ii) its headquarters; (iii) its controlled companies; (iv) its controlling shareholders (individuals or legal entities); (v) companies under common corporate or common management control; and (vi) its managers; and/or (vii) relatives by blood or marriage, up to the third degree, spouses, or significant others, of the managers or of the controlling shareholders.

Additionally, the Brazilian legislation treats as related-party transactions those entered into with (i) the Brazilian legal entity's foreign affiliated companies as defined by article 243, paragraphs 1 and 2 of Law 6404/76 – Brazilian Corporation Law; (ii) foreign companies, when the same individual or legal entity holds an equity stake of at least 10% in both the foreign company and the Brazilian legal entity; (iii) foreign individuals or legal entities who, together with the Brazilian legal entity, hold an equity stake in a third legal entity that qualifies them as controlling shareholders or affiliated in relation to this third legal entity; (iv) companies that participate with the Brazilian legal entity in a joint enterprise, under a 'consortium' or 'condominium', as defined by the Brazilian law; (v) foreign legal entities that grant to the Brazilian legal entity (as their agent, distributor or dealer), exclusive rights to buy or sell assets/goods/services/rights; and (vi) foreign agents, distributors or dealers of the Brazilian legal entity, to whom the latter has granted exclusive rights to buy or sell assets/goods/services/rights.

It is important to emphasise that the transfer pricing legislation applies to related party transactions, as described above, even where they are effected through an interposed person, and to transactions entered into with a party (whether or not related) located in a low tax jurisdiction or under a privileged tax regime.

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. However, the Brazilian tax authorities may request from the Brazilian taxpayer any document capable of showing that the information used to the transfer pricing calculation is accurate, including external information that could be located in a foreign jurisdiction (e.g. invoices used in the PIC method calculation; costs used in the CPL method calculation and invoices used in the PVA or PVV method calculation).

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 database 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.

However, the Brazilian transfer pricing legislation states in article 21 of Law 9430/96 and in article 29 of Normative Instruction 243/02 that comparable information may be used and is to be based on:

I Official publications or reports from the government of the country of origin of the seller or buyer, or a declaration from the tax authorities of that country where it has a double taxation or information exchange treaty with Brazil;

II Market research conducted by a recognized, technically qualified firm or institution or technical publication, which specifies the industry sector, period, companies researched and profit margins, and identifies, for each company, the data collected and analysed.

Publications, research and technical reports will only be accepted as evidence if carried out in accordance with internationally accepted appraisal criteria and referable to the concurrent IRPJ tax computation period of the Brazilian entity.

Additionally, the price information acceptable as evidence comprises:

I National stock market quotations;

II Quotations from internationally recognized stock markets, such as those in London and Chicago;

III Research conducted by international organizations, such as the Organization of Economic Cooperation and Development (OECD) and the World Trade Organization (WTO).

It is also stated that technical publications, research and reports may be rejected by the tax authorities if deemed to be inconsistent or unreliable.

Given the extreme bureaucracy, and the prospect of research and reports being rejected by the tax authorities, comparable studies are difficult and unusual.

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

All documents must be submitted in Portuguese; it is possible to submit a notarised and "consularised" copy of the document, duly translated by a sworn translator. There is no need for "consularisation" 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 event 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 taxpayer in its annual income tax return (DIPJ). Information on transactions with foreign related parties should be presented in an appendix to the taxpayer's annual tax return that is generally requested to be filed on 30 June of the subsequent year.

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 no documentation-related penalty. However, if the tax authorities' calculation results in a transfer pricing adjustment different from that calculated by the taxpayer, interest and fines of 75% will apply.

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 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; although some tax treaties make provision for such a procedure, the tax authorities have taken a general position that they will not implement it.

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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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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 five 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 five 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 three 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)?

Under the Corporate Profit Tax ("CPT") Law, business relations between associated persons are only recognised for tax purposes if the taxpayer has, and provides, information about the associated persons and its business relations with those persons, the methods used to determine comparable market prices, and the reasons for selecting a particular method. In that sense, taxpayers are obliged to maintain transfer pricing ("TP") documentation.

This obligation applies to all taxpayers and all intragroup transactions, no thresholds are applicable.

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

The Croatian tax legislation does not prescribe the exact format of the transfer pricing documentation required.

While the CPT Law makes general provision as to which transfer pricing methods can be used, the CPT Regulations give more detail as to what the taxpayer must do in order to establish/document whether a transaction was performed at arm's length, specifically:

- Collect information about the group, the position of the taxpayer within the group and the analysis of intragroup transactions, i.e. general information which may be the same for other members of the group, as well as specific information relating to the taxpayer;
- Identify the chosen TP method, describe the data, methods and analyses conducted to determine transfer prices and explain why the particular method was chosen;
- Compile documentation as to the assumptions and estimates adopted in determining transfer prices (in relation to comparability, functional analysis and risk analysis);
- Compile and document all calculations performed in applying the chosen transfer pricing method, in relation to the taxpayer in question and the comparable taxpayers;
- Appropriately update any documentation from previous years that is relied upon in respect of the current year, showing any adjustments which are necessary to reflect material changes of circumstances;
- Compile documentation that demonstrates the basis, or otherwise supports or is mentioned in the analysis of transfer prices.

In practice, in respect of the transfer pricing documentation requirements, the Croatian tax authorities follow the OECD guidelines. Therefore, the transfer pricing documentation compiled should include, at a minimum, the following:

- On the group level (master file):
  - History and activities of the group – legal, functional, financial, management and organisational 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 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 the selected method reflects the arms' length principle.

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

Under Croatian tax legislation all transactions between associated persons must be documented; no thresholds are applicable.

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

Under Croatian corporate tax legislation, resident and non-resident persons are regarded as associated:
- Where one of them directly or indirectly participates in the management, control or capital of the other;
- Where the same persons participate, directly or indirectly, in their management, control or capital.

Note, however, that the transfer pricing rules also apply to intragroup transactions between resident companies if one of them:
- Is subject to corporate profit tax at a rate below the standard rate, or is exempt from corporate profit tax; or
- Has tax losses carried forward.

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?

N/A – Croatia is not yet an EU Member Country. Membership is expected as of 1 July 2013.

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 tax authorities can require the taxpayer to submit all business books, records, business documentation or other documents held by the taxpayer or any other person in possession of required documentation, keeping in mind the principle of efficiency under which the tax audit should be restricted to essential facts that could increase or decrease tax liability.

Additionally, under international cooperation agreements, the tax authorities may request the relevant information from the authorities in other jurisdictions.

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.

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

The documentation should be submitted in the Croatian language. However, if the taxpayer submits documents in a foreign language, the tax authorities will set a deadline for the taxpayer to 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 submitting 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 upon request (usually in the course of 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.

No specific penalties are prescribed in respect of transfer pricing documentation. Generally, the taxpayer is subject to penalties in the range of HRK 5,000–500,000 (approximately EUR 670–67,000) if it:
- Does not keep business books and other records in accordance with the mode of taxation or does not ensure that information is available, legible and credible;
- Does not respond to a request made by the tax authorities;
- Does not deliver the requested business books, records and other documentation to the tax authorities.

In the same circumstances, the responsible person of the taxpayer is subject to a penalty in the range of HRK 2,000–100,000 (approximately EUR 270–27,000).

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

Generally, the burden of proof is borne:
- In relation to facts establishing a tax liability, by the tax authority;
- In relation to facts reducing or eliminating a tax liability, by the taxpayer.

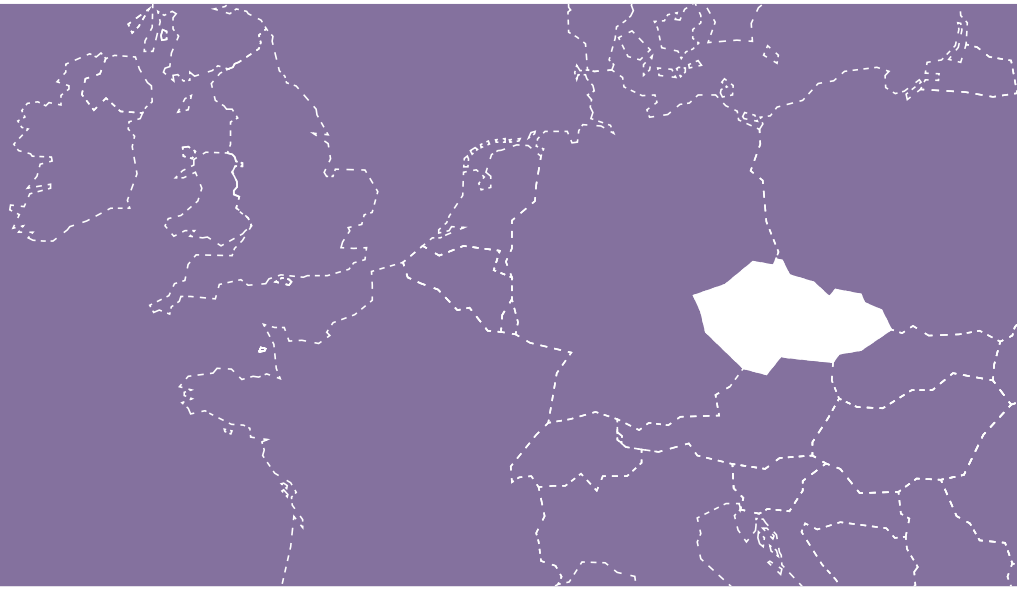
In practice, if the transfer price is challenged/reassessed (which may be for various reasons, including the absence or incompleteness of transfer pricing documentation), the tax authorities must thoroughly justify and document their calculation of the market price and the transfer pricing adjustment, to avoid undermining the taxpayer's right to an efficient appeal.

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 imposition of document-related penalties does not prevent the taxpayer from initiating a mutual agreement procedure under an applicable tax treaty.

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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?

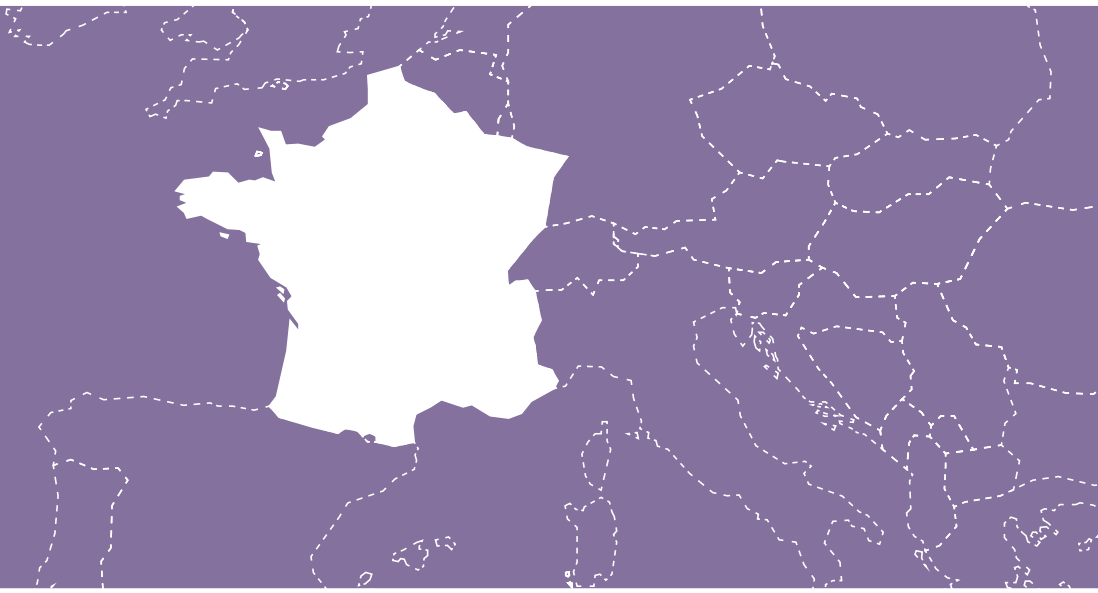
No, since there is no compulsory documentation.

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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France



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.

Under article L 13 AA of the French tax procedure code ("FTPC"), 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 entity 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 quinquies 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)[1]; 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 one of the requirements above.

In cases (A) to (C) above, we believe that the documentation requirement should apply to French companies not meeting the minimum threshold where 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 statement of practice published in 2010[2], the French tax authorities indicated that the expression "legal entities established in France" included foreign legal entities having a permanent establishment in France. In this situation:

— The conditions mentioned in (A) above would be considered to be fulfilled if they were fulfilled at the level of the French permanent establishment or of the foreign legal entity;

— The conditions mentioned in (B) above would be considered to be fulfilled if they were fulfilled at the level of the French permanent establishment;

— The conditions mentioned in (C) above would be considered to be fulfilled if they were fulfilled at the level of the foreign legal entity.

For entities outside the scope of this legislation, there is no formal transfer pricing documentation requirement. However, under article L13 B of the FTPC, if the French tax authorities gather information, 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 certain documents and information to 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 which are not subject to the documentation requirement, but whose transactions with foreign associated companies are

[1] The worldwide tax consolidation regime has been abolished for financial years closed as from 6 September 2011.

[2] Statement of practice 4 A-10-10 of 23 December 2010. For taxable events occurring on or after 12 September 2012, the former statements of practice containing the French tax authorities' commentaries on the tax legislation have been revoked and replaced by a new internet resource called "BOFiP", which is supposed to incorporate the former commentaries without change. However, in the first few months of the new system it has become apparent that a number of commentaries are missing (either partially or even totally on certain issues). These include statement of practice 4 A-10-10 of 23 December 2010. The French tax authorities are currently collecting the missing elements and correcting the published commentaries. For taxable events occurring on or after 12 September 2012, to be in a position to oppose their commentaries to the French tax authorities, it will be advisable to check that the BOFiP as it then stands does include the aspects of statement of practice 4 A-10-10 of 23 December 2010 referred to in this document.

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 entities (established or constituted outside of France) 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 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 EU TPD.

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 specific information concerning the audited enterprise, the following must be provided[3]:

— 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) used 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 comparables (benchmarks) regarded as pertinent by the enterprise.

Under article L 13 AB of the FTPC, "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). On 1 January 2012, the list of non-cooperative States or territories is as follows (this list is updated on a yearly basis):

— Botswana;
— Brunei;
— Guatemala;
— Marshall Islands;
— Montserrat;
— Nauru;
— Niue;
— Philippines.

[3] Note that statement of practice 4 A-10-10 of 23 December 2010 includes certain precisions as regards the specific information to be prepared by enterprises operating within the banking industry.

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 only request information 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 under 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.

Statement of practice 4 A-10-10 of 23 December 2010 provides that the benchmark studies should contain the most recent information available at the time of invoicing of the transactions. However, where there has been no change to the circumstances under which the activity is carried out, it is permissible for the benchmark studies to be updated every three years.

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 accept at least the first part of the documentation (general information on the group of associated enterprises) in English. Note that statement of practice 4 A-10-10 of 23 December 2010 indicates that the French tax authorities may require the taxpayer to provide a translation of documents drafted 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 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 supplementary information required and the penalties applicable in the event of non-compliance.

The documentation requirement applies to transactions undertaken during tax years beginning on or after 1 January 2010.

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 documentation required under articles L 13 AA and L 13 AB of the FTPC, 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, a penalty of up to 5% of the transfer pricing reassessment made by the French tax authorities (article 1735*ter* of the FTC).

5. Does the absence or incompleteness of documentation reverse the burden of 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 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?

Statement of practice 4 A-10-10 of 23 December 2010 confirmed that the documentation-related penalty does not constitute a serious penalty within the meaning of article 8-1 of the European Arbitration Convention

of 23 July 1990. Therefore, such a penalty does not prevent the enterprise from using the procedures provided for by that Convention, or the mutual agreement procedures provided for by bilateral income tax treaties (the French practice being generally to refuse the benefit of the latter, as well as the former, where a serious penalty is imposed).

Where a company subject to a transfer pricing reassessment opens a mutual agreement procedure under an applicable bilateral income tax treaty, or the procedure set forth under the European Arbitration Convention, the collection of the reassessed tax may be suspended in certain circumstances (article L 189 A of the FTPC). In statement of practice 4 A-10-10 of 23 December 2010, the French tax authorities indicated that, in such a case, the collection of the documentation-related penalty would not be suspended.

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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 since 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. internal 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 at the latest. This also applies in the case of a transfer of business functions out of Germany (s. 1, para. 3 of the German Foreign Tax Act (Außensteuergesetz); regulations thereon dated 12 August 2008, BGBl I, 2008, p. 1680; administrative decree of 13 October 2010, BStBl I, 2010, p. 774).

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 (Verwaltungsgrundsätze-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) and based on the above-mentioned decree, 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 (EU TPD). Therefore, the EU TPD 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 master-file containing common standardized 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 EU TPD 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 (including electronic data) 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 (Verwaltungsgrundsätze-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 three 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 generally 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 proper documentation is delivered 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?

Many of the 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.

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 can 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 permanent establishments ("PEs") of foreign entities, are generally required to maintain a transfer pricing documentation ("TPD") 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;
- Charitable 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;
- Transactions where the historical net value of the transaction (or the aggregate value of very similar transactions) does not exceed HUF 50 million (approximately EUR 176,000) in aggregate on the last day of the tax year;
- Transactions when costs are recharged without applying any mark-up; provided that the transaction is not the main activity of either party, and the service provider is not a related party of either the taxpayer or the cost bearing entity;
- Transactions where the tax authority established the applicable arm's length price in a resolution;
- Gratuitous cash transfers;
- Transaction carried out between a Hungarian resident taxpayer's foreign PE and its related party, if the relevant double tax treaty exempts the income of such PE for Hungarian corporate income tax purposes.

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, for low value adding intra-group services taxpayers may prepare TPD that encompasses a less detailed technical analysis. This type of documentation may only be applied if the value of the transaction does not exceed HUF 150 million (approximately EUR 526,400), 5% of the service provider's net income and 10% of the recipient's operational costs and expenditures in the tax year in question. In this case, the cost plus method is accepted without a separate analysis, and mark-ups between 3% and 7% are considered by the law to be at arm's length.

In principle, TPD has to prepared separately for each transaction, however, a consolidated TPD may be prepared with respect to several transactions if the requirement of comparability is respected, and the subject of the agreements are the same, or similar. The fact of consolidation should be justified in detail in the TPD.

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 and was further amended as of 1 January 2012, aiming to bring the Hungarian legislation more into line with the EUTPD. However, this goal has only been partially 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, advance pricing 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 2012 the HTA accepts TPD and the related supporting documents not only in Hungarian, but also in English, German and 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)?

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 (provided further that any performance was effected on the basis of the agreement in such year).

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 six years (seven 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 establishes this during a tax audit, it may impose a fine on the taxpayer of up to HUF 2 million (approximately EUR 7,000) for each missing or incomplete TPD set and up to HUF 4 million (approximately EUR 14,000) in the event of repeated non-compliance. Furthermore, in the event of a repeated offense concerning the same transaction, the penalty may be four times that previously levied. 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.

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 taxpayer 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

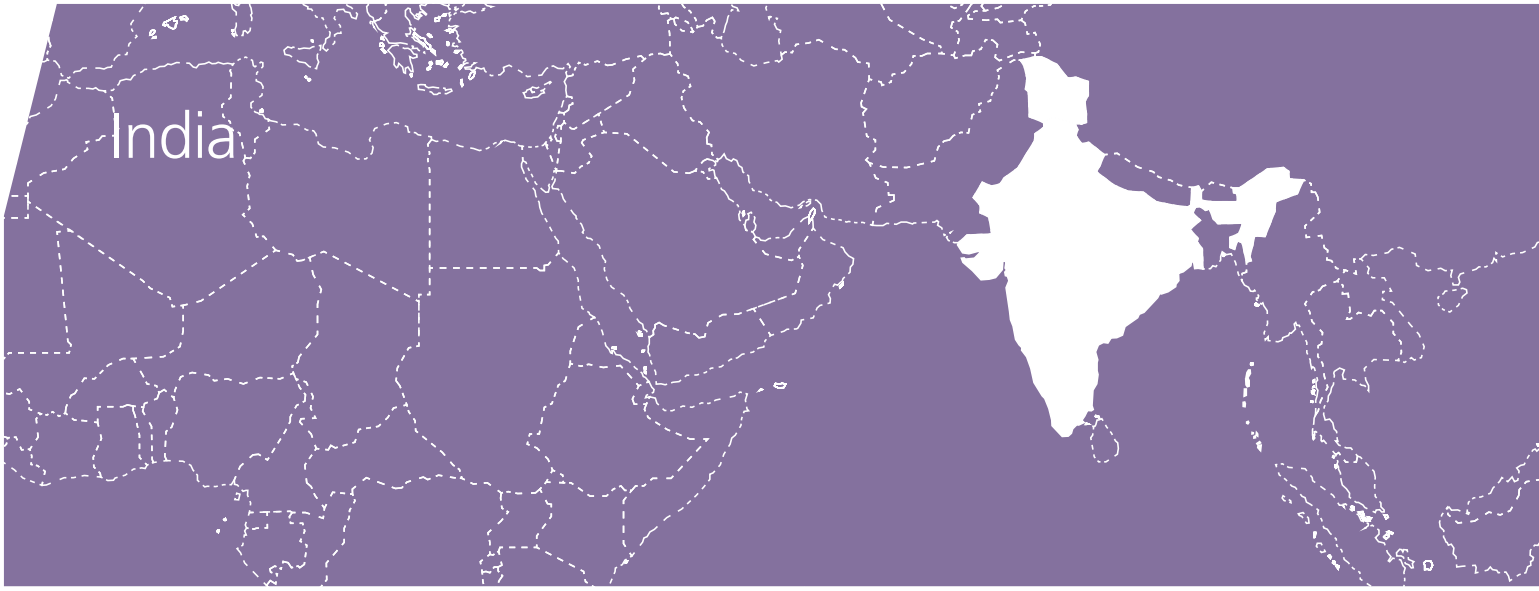
a view to eliminating any double taxation resulting from the transfer pricing reassessment?

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 176,000). This would however correspond to a tax base re-assessment of approximately EUR 1 million.

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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)?

Yes, in India, every person who has entered into an international transaction or specified domestic transaction must keep and maintain information and documents as specified in Rule 10D of the Income Tax Rules ("Tax Rules") (as discussed below).

However, if the aggregate value of international transactions as recorded in the books of account of the assessee does not exceed one crore rupees (approximately EUR 137,000) then the documents and information prescribed under Rule 10 are not required to be kept. Documents and information relating to international transactions must be maintained for a period of eight years from the end of the relevant assessment year.

Section 271AA of the [Indian] Income Tax Act ("Tax Act") prescribes the penalty for not maintaining information and documents in respect of international transactions and specified domestic transactions.

Under section 271AA of the Tax Act, any person who fails to keep and maintain information in respect of an international transaction or specified domestic transaction, or who fails to report such a transaction, will be liable to pay a penalty of two percent of the value of each international transaction entered into by such person.

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

The Tax Rules, by Rule 10D, require the following information and documents to be maintained by person(s) who have entered into international transactions:

- Description of the ownership structure of the assessee enterprise with details of the shares or other ownership interests held therein by other enterprises;
- Profile of the multinational group of which the assessee enterprise is a part, along with the name, address, legal status and country of tax residence of each group enterprise with which the assessee has entered into international transactions, and the ownership linkages between them;
- Broad description of the business of the assessee and the industry in which it operates, and of the business of the associated enterprises with which the assessee has transacted;
- Nature and terms (including prices) of international transactions entered into with each associated enterprise, details of the property transferred or services provided and the quantum and the value of each such transaction or each class of such transactions;
- Description of the functions performed, risks assumed and assets employed or to be employed by the assessee and by the associated enterprises involved in the international transaction;
- Record of the economic and market analyses, forecasts, budgets or any other financial estimates prepared by the assessee 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 assessee;
- Record 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;
- Record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction;
- Description of the methods considered for determining the arm's length price in relation to each international transaction or class of transaction and the method selected as the most appropriate, along with explanations as to why it was selected and how it was applied in each case;

— Record 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 the 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;
— 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; and
— 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.

The information mentioned above must be supported by authentic documents as specified below:
— Official publications, reports, studies and databases from the government of the country of residence of the associated enterprise, or 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 assessee and the associated enterprise; and
— Documents normally issued in connection with the various transactions under the accounting practices followed.

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

As mentioned above, if the aggregate value of international transactions as recorded in the books of account of the assessee does not exceed one crore rupees (approximately EUR 137,000) then the documents and information prescribed under Rule 10D are not required to be kept. In such a case the assessee must be able to substantiate, on the basis of material available to it, that the income arising from international transactions it has entered into has been computed in accordance with transfer pricing regulations as prescribed in the Tax Act.

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

Section 92A of the Tax Act defines "associated enterprise" as follows:
"… 'associated enterprise', in relation to another enterprise, means an enterprise –
— which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or
— in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, 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.

For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year, –]
— 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, licences, 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 (i) 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."

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?

In appropriate circumstances, the Indian tax authorities may issue notice to a non-resident where income chargeable to tax has escaped assessment but has subsequently come to the notice of the assessing officer in the course of proceedings.

In the case of *Coca Cola India Inc. v. Assistant CIT, (2009) 1 Comp LJ 460,* the High Court of Punjab and Haryana has upheld the validity of a notice issued to a company incorporated under the laws of the USA, requiring it to produce evidence on which the arm's length price could be determined.

To obtain information located in another country, the Indian tax authorities can request the assistance of foreign tax authorities under 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)?

Rule 10A of the Tax Rules lays down the principles for comparability of an international transaction with an uncontrolled transaction. An "uncontrolled transaction" means a transaction between enterprises other than associated enterprises, whether resident or non-resident.

In the case of *Sony India (P) Limited v. Deputy CIT, [2008]114ITD 448 (Delhi),* it was laid down that "the first step in the determination of arms length price is to analyse the specific characteristics of the controlled transaction whether it relates to transfer of goods, services or intangibles. Without proper study of specific characteristics of controlled transaction, no meaningful comparison or location of comparable is possible".

Therefore, comparables for determining arms length price will depend upon the characteristics of the transaction between associated enterprises.

The comparability of an international, i.e. uncontrolled transaction and a controlled transaction is to be judged under Rule 10B(2) of the Tax Rules with reference to the following:
- The specific characteristics of the property transferred or services provided in either transaction;
- The functions performed, taking into account the assets employed or to be employed and the risks assumed, by the respective parties to the transactions;
- The contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions; and
- Conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

Rule 10B(3) of the Tax Rules provides that an uncontrolled transaction will be comparable to an international transaction if –
- None of the differences between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or
- Reasonably accurate adjustments can be made to eliminate the material effects of such differences.

Pursuant to the selection of comparables, the best method of determining arm's length price is selected as per the provisions of the Tax Act.

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

The Tax Rules provide that the report submitted to the assessing officer should be in the English 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)?

Under section 92E of the Tax Act, every person who has entered into an international transaction during a previous year must obtain a report from an accountant and furnish such report to the assessing officer. The report must be duly signed and verified by such accountant and must be submitted to the assessing officer in Form 3CEB on or before 30 November.

However, section 92D(3) of the Tax Act also provides that the assessing officer or commissioner (appeals) may, in the course of any proceedings under the Tax Act, require any person who has entered into an international transaction or specified domestic transaction to furnish any information or document with respect to the same.

Pursuant to the notice being received from the assessing officer or commissioner (appeals), the person must submit the information or document required within a period of 30 days from the date of receipt of notice. However, the assessing officer or commissioner (appeals) may, at its sole discretion, grant a further extension of 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.

Yes, in India there are penalties relating to failure to provide and/or concealment of appropriate documentation within a specified timescale.

Set out below are the penalties imposed upon the assessee for failure to submit documents pertaining to transfer pricing:

- **Concealment of particulars:** Section 271 of the Tax Act provides that any person who has concealed the particulars of his income or has furnished inaccurate particulars of such income will be liable for a penalty equal to *a sum of three times the amount* of tax sought to be evaded by reason of concealment of particulars of his income or furnishing of inaccurate particulars of such income.
- It is pertinent to note that further explanation to section 271 of the Tax Act provides that in the case of an international transaction or specified domestic transaction, where any amount is added or disallowed by the assessing officer in computing the total income of the assessee, such amount will be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been published. However, the assessee may prove that the computation was done in accordance with the transfer pricing regulations and in good faith and with due diligence.
- **Failure to submit report:** Section 271BA of the Tax Act provides that any person who fails to submit a report in form 3CEB to the assessing officer, will be liable to a *penalty of one lakh rupees* (approximately EUR 1,351).
- **Failure to provide information required by the assessing officer or commissioner (appeals):** Section 271G of the Tax Act provides that if any person who has entered into an international transaction or specified domestic transaction fails to furnish any information required by the assessing officer or commissioner (appeals), such person will be liable to pay a penalty of *a sum equal to two percent of the value of the international transaction* or specified domestic transaction for such failure.

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

Under the Tax Act, where during the course of any proceedings for the assessment of income, the assessing officer or transfer pricing officer (upon reference being made by assessing officer) is, on the basis of material or information or document in his possession, of the opinion that the information or data used in computation of the arm's length price is not reliable or correct or the assessee has failed to furnish any information or document, the assessing officer may proceed to determine the arm's length price in relation to the international transaction or specified domestic transaction.

It is pertinent to note that the burden of proof of establishing arm's length price is primarily on the assessee.

In the case of *Maruti Suzuki India Ltd. v. Additional CIT/TPO [2010] 328 ITR 210,* the Delhi High Court has held that, **"the onus is on the assessee** to satisfy the Assessing Officer/TPO that the arm's length price computed by it is in consonance with the provisions contained in section 92. The Assessing Officer/TPO can reject the price computed by the assessee and determine it only when he finds that the assessee has not discharged the onus placed on it or he finds that the data used by the assessee is unreliable, incorrect or inappropriate…".

Also, in the case of *Aztech Software and Technology Services Limited v. Additional CIT, [2007] 107 ITD 141 (Bang),* the Income Tax Appellate Tribunal has held that, "Having regard to above statutory provisions, it is clear that burden to establish that international transaction was carried at ALP is on the taxpayer. He has also to furnish comparable transactions, apply appropriate method for determination of ALP and justify the same by producing relevant material and documents before the revenue

authorities. In case revenue authorities are not satisfied with the ALP and the supporting documents/information furnished by the taxpayer, the authorities have ample power to determine the same and make suitable adjustments. In such a situation, as rightly admitted in the ground of appeal by the revenue, **this responsibility of determination of ALP is shifted to the revenue authorities who are to determine the same in accordance with statutory regulations."**

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?

India has entered into various double taxation avoidance agreements making provision for a mutual agreement procedure ("MAP"). The MAP can be invoked by the assessee to contest an adjustment. Further, Rule 44 of the Tax Rules lays down the procedure which will be followed by the Central Board of Direct Taxes (which is the competent authority in India and is referred to as the "Board") for receiving references from the competent authority outside India and resolution of any case under any agreement with regard to any action taken by any income tax authority in India.

In addition to the MAP, which is a post-assessment process, there is now a provision in the Tax Act (Section 92CC) which enables the Board, with the approval of the Central Government of India, to enter into an **advance pricing agreement ("APA")** with any person, determining the arm's length price or specifying the manner in which arm's length price is to be determined, in relation to an international transaction **to be entered into** by that person.

An APA scheme may be unilateral, bilateral or multilateral, as explained below:

- *Unilateral* – APA entered into between a taxpayer and the tax administration of the country where it is subject to taxation
- *Bilateral* – APA entered into between the taxpayers, the tax administration of the host country and the foreign tax administration.
- *Multilateral* – APA entered between the taxpayers, the tax administration of the host country and more than one foreign tax administrations. The Indian APA rules allow for all the three types of APAs.

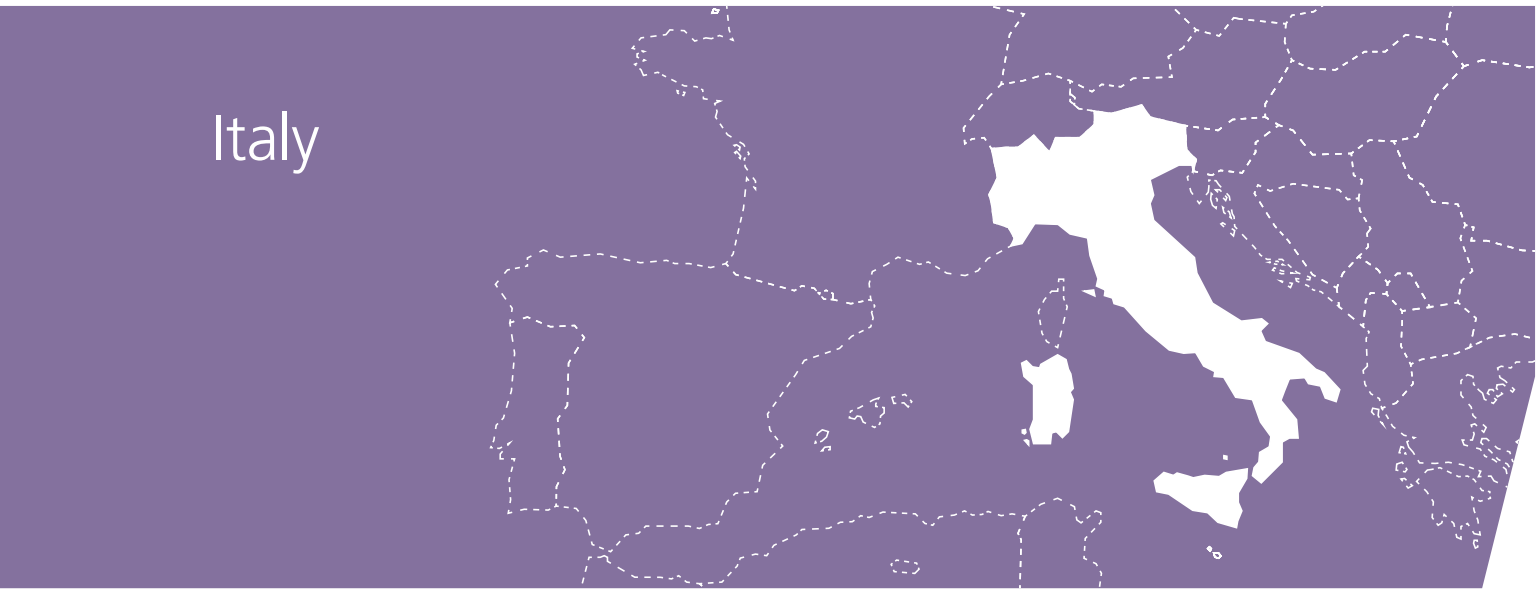
An APA provides certainty on the pricing and/or the transfer pricing methodology to be adopted for the covered inter-company transactions. Further, a bilateral/multilateral APA also eliminates the risk of potential double taxation arising from controlled transactions.

The key advantages of APAs can be summarised as:

- Certainty with respect to outcome of covered transactions during the APA term
- Low annual reporting cost
- Reduction in risk/cost associated with audits and appeals over the APA term
- Flexibility in developing practical approaches for complex transfer pricing issues
- APA renewal provides an excellent leverage of time and efforts expended during negotiations for the original APA.

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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. Moreover, there is a penalty protection regime that excludes the possibility to apply penalties in case of transfer pricing assessment if the taxpayer (i) has prepared proper transfer pricing documentation and (ii) has informed the Italian Revenue Agency about the existence of such documentation (to that end a specific box has to be marked in the relevant tax return). It is basically a matter of disclosure, i.e. if pricing policies are disclosed (through proper transfer pricing documentation) the assessment is however possible but penalties on assessed amounts may not be imposed.

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, except those that may be considered "residual" (i.e. transactions that, even if not taken into account, are not able to affect the reliability of the entire analysis).

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 associated to 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. However, in order to apply the above mentioned penalty protection regime there is a specific format required by the Italian Revenue Agency.

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?

It has to be in Italian.

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.

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, including so-called "secret comparables".

This means that, if the taxpayer wishes to avoid a transfer pricing assessment on the basis of presumption by the tax authority – or the use of secret comparables (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;

— Calculation of the 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.

With respect to the above-listed items, the subsequent 2011 annual tax reform has created the following important ramifications: first, with respect to the transfer pricing methodology adopted by the taxpayer, the 2011 annual tax reform has employed the so-called "best method rule," which, consistently with the OECD Guidelines, provides that the most appropriate transfer pricing methodology for the transaction(s) at issue must be applied. In this regard, it has become more important to describe in the documentation why the adopted transfer pricing methodology should be regarded as the "best method" among other methodologies. Second, with respect to the selected comparables, it must be noted that the 2011 annual tax reform has approved the concept of a "range" of arm's length price; so it would be important to describe in the documentation sufficient comparability of the comparables forming the arm's length range to be claimed by the taxpayer.

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.

The taxpayer must be able to produce the required documentation, without delay, 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 or use of "secret comparables", 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.

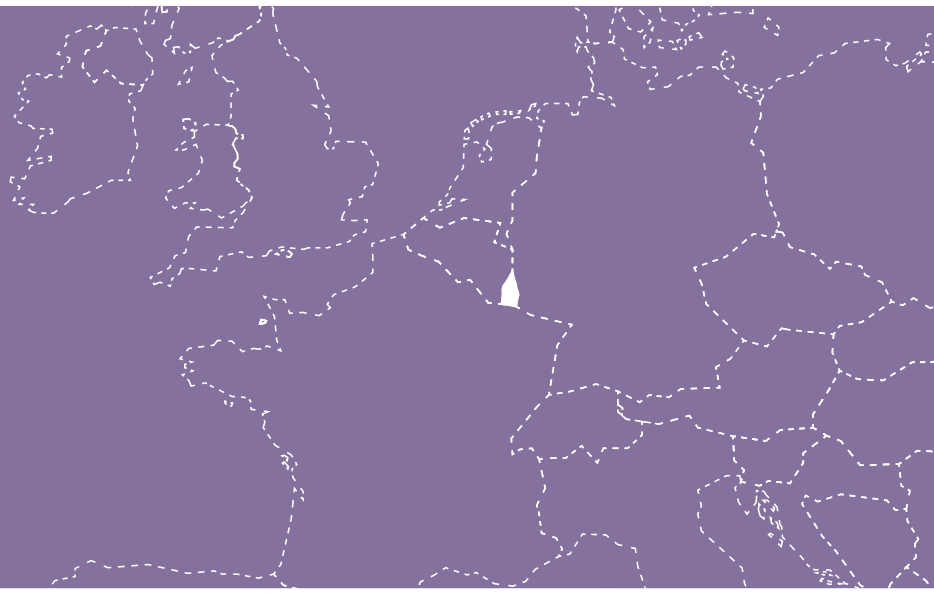
As is obvious from the items that are required to be provided in the documentation as set out above, it could be very onerous to comply with the requirement. The documentation is not a matter of mere facts or numbers or mere retention of books and records, but requires quantitative and qualitative analysis 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 relatively new, it is not yet established what the actual enforcement practice of the Japanese tax authority in relation to this documentation requirement would be like, 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 or use of "secret comparables" 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? In this regard, the Japanese tax authority has clarified the practical enforcement policy, in conjunction with the 2011 annual tax reform, as follows: (i) if there is a reasonable cause for the taxpayer's failure to submit, another audit session should be set in a future date, (ii) if some audit sessions are held and a considerable time period has passed from the first request for submission, the tax authority should explain that the requirements for the presumption and use of "secret comparables" will be satisfied unless there is a prospect for the taxpayer to be able to submit the requested information, and, (iii) if "secret comparables" are to be used eventually, the tax authority should give the taxpayer sufficient explanation as to the selection, substance, etc. of such "secret comparables". It would be fair to say that, according to that policy, the Japanese tax authority would not unreasonably "abuse" the presumption and "secret comparables" but rather is willing to allow some reasonable time depending upon the taxpayers' circumstances. The practical enforcement policy also provides that, if the documentation prepared and submitted by the taxpayer is based upon inaccurate information, that will not constitute lawful submission of the required documentation, and the tax authority shall order re-submission based upon the accurate information. While the scope of application of this rule is not clear, the better view would be that the tax authority should not treat the taxpayer's documentation as inaccurate merely because the tax authority has a different view from the taxpayer's in terms of economic or other evaluation of the subject controlled transaction.

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Luxembourg



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)?

Luxembourg does not have specific transfer pricing documentation requirements.

With the exception of transfer pricing documentation regarding intragroup financing activities in the context of Advance Pricing Agreement (APA) requests[1], Transfer pricing documentation requirements in Luxembourg are based on general tax law provisions. The preparation of transfer pricing documentation as such is not required.

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)?

Luxembourg tax law only requires the Luxembourg taxpayer to have its bookkeeping and financial statements duly organised.

The preparation of transfer pricing documentation as such is not required. However, Luxembourg taxpayers must be in position to justify and document any transaction with directly or indirectly related parties to the extent that evidence is available, reasonable and relevant.

In the context of intragroup financing activities, an APA request filed with the Luxembourg direct tax authorities must include the following information (i) name, address and taxpayer number (if available); (ii) detailed description of the transactions; (iii) overview of the legal structure, including details of the beneficial owner(s); (iii) tax years to which the request relates; (iv) transfer pricing study in accordance with OECD principles and guidelines; (v) description of the industry and market context; (vi) analysis of the relevant tax issues with reference to the methodology adopted; and (vii) confirmation that the information provided is complete and gives an accurate view of the transaction(s).

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

There is no general definition of "associated enterprises". Transactions with directly and indirectly related parties may fall within the scope of the general transfer pricing rules.

Luxembourg transfer pricing Circulars on intragroup financing provide a specific definition which applies in that context, as follows: *"two companies are related if one of them participates, directly or indirectly, in the direction, control or share capital of the other, or if the same persons participate, directly or indirectly, in the direction, control or share capital of both".*

In addition, Luxembourg adheres to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and follows the OECD Model Tax Convention. The Luxembourg tax authorities rely on the principles contained in those documents.

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?

[1] In 2011, Circulars 162/2 (dated 28 January 2011) and 164/2*bis* (dated 8 April 2011) were issued in relation to intragroup financing activities.

No, there are no specific transfer pricing documentation requirements, except for those set out in the Luxembourg transfer pricing Circulars on intragroup financing (please see above).

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?

In cross-border cases, the Luxembourg tax authorities may request information from Luxembourg taxpayers under an extended duty of co-operation. The taxpayer must use all legal and available means to obtain the relevant information.

Furthermore, Luxembourg tax treaties generally provide for exchange of information. The competent authorities of the Contracting States may exchange such information as is foreseeably relevant for implementing the treaty, or for the administration or enforcement of domestic laws concerning taxes of every kind and description which are imposed by the Contracting States, their political subdivisions or local authorities, insofar as such taxation is not contrary to the treaties.

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

Transfer pricing studies must generally be in line with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Authorities and follow the OECD Model Tax Convention. However, in practice, the Luxembourg tax authorities may accept documentation prepared for foreign jurisdictions (e.g. pan-European benchmark studies, if applicable).

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

French, German and English should be acceptable.

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 is no specific deadline or timescale for providing transfer pricing documentation to the Luxembourg 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 is no obligation to prepare transfer pricing documentation as such.

If there is no documentation or the documentation is incomplete (e.g. where the taxpayer has not complied with its obligations regarding bookkeeping and financial statements, where transactions are not documented, etc.) the taxpayer is in breach of its duty of co-operation and the tax authorities may conduct a transfer pricing adjustment.

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

Even if relatively low, the burden of proof should still be with the Luxembourg tax authorities.

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?

Luxembourg does not impose documentation-related penalties. There should be no impact on a mutual agreement procedure provided for by a double tax treaty, or any international treaty.

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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 of Morocco. This obligation is now contained in article 214 (III) of the Moroccan General Tax Code ("GTC").

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 allowed to the taxpayer for sending such documentation and the importance of the required documents, Moroccan businesses which have relationships of dependency with businesses established outside of Morocco, and enter into transactions with them, are advised to prepare such documentation in advance.

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

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

The transfer pricing documentation requirements for associated companies only concern the transactions performed between a Moroccan company and its affiliated companies located abroad. However, as in Morocco, the concept of transfer of profits is also applicable between associated companies located in Morocco, we recommend, to justify in the transfer pricing documentation the prices applied between those associated companies located in Morocco, also.

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:

- The nature of the relationship connecting the business which is taxable in Morocco with those situated outside of 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 of 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 of Morocco must be documented. There is no threshold in terms of transaction value, under either the Moroccan GTC or the tax authority's commentary on the Finance Act for the 2009 budgetary year.

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

Article 213 (II) of the Moroccan GTC refers to businesses which have relationships of direct or indirect dependency with businesses situated outside of Morocco.

This definition has been refined by the Moroccan tax authority in its Circular Note published on 24 May 2011.

In fact, the concept of dependency 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 dependency 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 exist, in its view, between subsidiaries within the same group (especially financial dependency arising by virtue of reciprocal shareholdings).

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

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) 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?

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 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 of Morocco with which they have effected transactions.

Furthermore, article 214 (II) establishes 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 Circular Note 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.

e) 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 transfers of profit.

Nonetheless, the Moroccan GTC does not provide that the companies are required to supply benchmark studies to justify the prices. Indeed, the article 214 (III) only provides that companies that are taxable in Morocco can be requested to justify the method of determination of the prices.

Furthermore, the Moroccan tax authority's commentary remains relatively brief in relation to the appropriate method for determining transfer prices between two companies in the same group. It does not go beyond stating the principle that the price should be at arm's length.

In the event of an inspection, the only reference to comparables is in the authority's power to adjust 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 of 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.

f) 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.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 admitted languages by the Kingdom, namely French or Classical Arabic. 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 MAD 2,000 (approximately EUR 180) is provided for, as well as a late payment penalty of MAD 100 (approximately EUR 9) per day, up to a maximum of MAD 1,000 (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 to be 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 arm's length 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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Poland



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 Poland the obligation to prepare transfer pricing ("TP") documentation is imposed on taxpayers which are engaged in (i) transactions with associated enterprises (according to the definition provided in the Polish Corporate Income Tax ("CIT") Act) or (ii) transactions involving payments made directly or indirectly to entities based in a *country applying harmful tax competition,* i.e. "tax haven" (the list of such countries is included in the ordinance issued by the Polish Finance Minister), if the value of such transactions in a tax year exceeds thresholds specified in the Polish CIT Act.

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

The provisions of the Polish CIT Act indicate obligatory and non-obligatory elements that should be included in the documentation. Specifically, it should contain:

- A description of the functions of the parties to the transaction, taking into account assets employed and risk taken. In practice, the analysis should include:
  - The types of functions fulfilled by the parties;
  - The type and value of tangible assets employed, such as real estate, buildings, machines, equipment, or means of transport;
  - The type and value of intangible assets employed;
  - The human capital engaged;
  - The division of entrepreneurial risk and responsibility between the parties;
- A specification of all costs related to the transaction, stating the form of payment and deadline;
- The method by which the profit has been calculated and the transaction price determined;
- A description of the business strategy and other actions within the strategy, provided they influence the transaction value;
- A description of other factors, if such factors were taken into account for the purpose of determining the price;
- A description of benefits gained by the taxpayer preparing the transfer pricing documentation, in the case of agreements concerning services.

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

Taxpayers which engage in transactions with associated enterprises (according to the definition provided in the Polish CIT Act) must provide documentation in respect of such transactions where their value exceeds the following thresholds:

- EUR 100,000 where the value of the transactions does not exceed 20% of the share capital of the taxpayer. For the purposes of this calculation the share capital does not include:
  - The part which was not actually paid-up; and
  - In-kind contributions made to the taxpayer's share capital in a form of: debts and interest due from the taxpayer to its shareholders, or intangible assets that cannot be subject to depreciation write offs according to Polish CIT Act (e.g.: works of art or goodwill that does not emerge as a result of a purchase of a business enterprise or its organised part);
- EUR 30,000 in the case of supply of services, intangible property transactions, including sale or license of intangible assets;
- EUR 50,000 in other cases.

Taxpayers involved in transactions involving payments made directly or indirectly to entities based in a country applying harmful tax competition, i.e. "tax haven" (the list of such countries is included in the ordinance issued by the Polish Finance Minister) must prepare transfer pricing documentation if the value of such transactions in a single tax year exceeds EUR 20,000.

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

The definition of "associated enterprises" provided in the Polish CIT Act refers to both international and domestic relationships.

International relationships:
- A taxpayer resident in Poland participates directly or indirectly in the management or control of an enterprise located abroad, or has a share of at least 5% in the capital of such an enterprise;
- A natural or legal person resident abroad participates directly or indirectly in the management or control of an entity located in Poland, or has a share of at least 5% in the capital of such an entity;
- The same natural or legal persons simultaneously participate, directly or indirectly, in the management or control of both an entity resident in Poland and an entity resident abroad, or have a share of at least 5% in each of them.

The above criteria also apply to a permanent establishment of a foreign taxpayer.

Domestic relationships:
- A Polish entity participates directly or indirectly in the management or control of another Polish entity, or has a share of at least 5% in the capital of such an entity;
- The same natural or legal persons simultaneously participate, directly or indirectly, in the management or control of Polish entities, or have a share of at least 5% in each of them.

In the domestic context, the relationships which cause the parties to be regarded as "associated enterprises" include (i) family ties, an employment relationship or property relations between domestic entities or persons responsible for management, control or supervision within those entities, and (ii) the situation where any person is performing management, control or supervisory functions in both entities.

Please note that for the purpose of determining indirect participation in capital, it is assumed that if entity A has a given share in the capital of entity B, and entity B has the same share in the capital of entity C, then entity A indirectly has the same share in capital of entity C. If the respective shares of A and B in the capital of C are different, the lower share is treated as an indirect share.

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 TP documentation specified in the Polish CIT Act partly overlaps with the EUTPD requirements for country-specific documentation. Nevertheless there are some differences. There is no official option of choosing between the local standard and EUTPD. However, no detailed rules for preparing TP documentation have been enacted, which means that the taxpayer is free to choose the form of the documentation, provided that it includes the content which is obligatory under the Polish CIT Act. Therefore, we believe EUTPD would be accepted if it contained all the mandatory elements, emphasized in such a way as to present them clearly to the Polish tax authorities. This could be done for instance by presenting them in separate sections or chapters of the documentation.

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?

In order to answer this question, we have to distinguish between two situations:
(A) A taxpayer that is not established in Poland but is subject to limited tax obligations in Poland, due to having a permanent establishment in Poland;
(B) A taxpayer that is neither established in Poland nor subject to limited tax obligations in Poland.

In situation (A), a taxpayer which is involved in transactions with an "associated enterprise", and is required to prepare transfer pricing documentation, has to provide certain information to the tax authorities, upon request, for the purposes of carrying out a transfer pricing analysis in the course of a tax audit.

In situation (B), in the case of a taxpayer not established in Poland which is merely a party to a transaction with an "associated enterprise" that is subject to transfer pricing documentation requirements in Poland, the tax authorities can only request information from the latter entity.

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

Comparable studies are not mentioned as an obligatory element of the transfer pricing documentation. The documentation should indicate "the way and method of calculating profit and determining the transaction price". In practice, taxpayers which are obliged to prepare transfer pricing documentation may enclose comparable benchmark studies as evidence that the transaction prices are arm's length prices.

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

It is not forbidden to submit the documentation in language other than Polish, but the taxpayer must provide a Polish version upon the request of the tax authorities.

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)?

Taxpayers are obliged to provide transfer pricing documentation to the tax authorities upon specific request, within 7 days of receiving 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 taxpayer fails to provide the transfer pricing documentation within the 7-day period, and the tax authorities estimate the taxpayer's income as higher than declared (or its loss as lower than declared), then the difference is subject to the penal tax rate of 50%. If the documentation is submitted, but regarded as incomplete or unreliable by the tax authorities (while still amounting in principle to transfer pricing documentation) the estimated difference will be taxed at the normal tax rate of 19%.

Theoretically, there is the potential for criminal liability for failure to submit the documentation, or submission of false documentation, under the Polish Fiscal Penal 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?

The only consequences of the absence of documentation or incomplete documentation are mentioned in the answer to the previous question.

There is no official reversal of the burden of the proof, which lies with the tax authorities.

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 Polish CIT Act, nor the Finance Minister's Ordinance implementing the mutual agreement procedure, states that the imposition of the 50% penal tax rate prevents the taxpayer from initiating this type of procedure.

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Portugal



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)?

Pursuant to article 63/6 of the Portuguese Corporate Income Tax Code, Portuguese taxpayers are required to maintain transfer documentation regarding their transfer pricing policy, including guidance and instructions for its implementation, contracts and other relevant legal documents executed between the taxpayer and associated enterprises, documentation and information regarding such enterprises, and documentation and information regarding the entities, services and goods used as comparables (including a detailed analysis of business functions performed, assets used and risks assumed, as well as selection and application of the most appropriate transfer pricing methodology).

This obligation is not imposed on all taxpayers, but only those who have disclosed an annual net sales volume of EUR 3,000,000 or more in their previous annual return. Taxpayers who have disclosed an annual net sales volume under EUR 3,000,000 in the previous year are not required to comply with the transfer pricing documentation requirements.

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)?

Portuguese taxpayers who are subject to the transfer pricing documentation rules must document all transactions with associated enterprises, including both resident and non-resident entities.

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

Under article 63/4 of the Portuguese Corporate Income Tax Code, for the purposes of the transfer pricing rules two entities are considered to be associated enterprises whenever one has significant direct or indirect influence over the management of the other. This is deemed to occur in the case of:

- An entity and shareholders of that entity (or their spouses or relatives) who have a direct or indirect shareholding representing at least 10% of the share capital or voting rights;
- Two entities in which the same (third) entity has a direct or indirect shareholding of at least 10%;
- An entity and the members of its corporate organs, or any board of administration, direction, management or supervision;
- Entities in which the majority of the board of directors is constituted by the same persons;
- Entities related by virtue of a subordination agreement or any other agreement of a similar nature;
- Entities in a dominant shareholding relationship as defined by the relevant legislation;
- Entities with a relationship of economic, commercial, financial, professional or legal dependence;
- Transactions between a resident entity and entities resident in a clearly more favourable tax regime (as listed in Ministerial Order 150/2004).

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?

Portuguese transfer pricing regulations as to the content of the documentation are compliant with the EU TPD.

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?

No. The Portuguese tax authorities may only request information from Portuguese resident entities. As to information relating to non-resident entities or other jurisdictions, the Portuguese tax authorities may only request such information through the mechanisms provided under the exchange of information provisions in Tax Treaties entered by Portugal.

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

The Portuguese tax authorities tend to prefer local comparables, but regional comparables may be allowed, particularly in situations where local comparables are limited.

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

The transfer pricing documentation should be organized and filed in Portuguese. Reports in English tend to be accepted, but the Portuguese tax authorities may accept, refuse or require a translation into Portuguese.

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 information should be prepared and organized within the framework of the corporate income tax compliance obligations imposed on Portuguese taxpayers. On this basis, it must be prepared by the 15th of the 7th month following the tax year-end, which is the date for filling the Annual Return of Simplified Corporate Information (IES/DA).

Filing is only required upon specific request by the Portuguese tax authorities. Notwithstanding this, transfer pricing documentation has recently been specifically included in the list of documents that form part of the company's annual tax file.

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.

Yes. Failing to comply with the transfer pricing compliance regulations, by refusing to submit information or submitting information which is not accurate, will result in penalties of up to EUR 100,000.

Additionally, penalties of up to EUR 10,000 may be imposed by reference to the general tax compliance obligations.

Recent transfer pricing audits show that the Portuguese tax authorities are looking more deeply into controlled transactions involving low tax jurisdictions and intra-group services.

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

Yes. Portuguese taxpayers which comply with the transfer pricing documentation obligations are protected against penalties, and compliance simultaneously shifts the burden of proof to the tax authority. The risk of unexpected adjustments to the taxpayer's taxable income is also mitigated.

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 event of transfer pricing adjustments to transactions between a Portuguese tax payer and a non-resident entity, the mechanisms provided for in the relevant double taxation treaty should be applied, and corresponding adjustments may be made by means of a competent authority procedure.

If the non-resident entity is located in a different EU Member State, then the taxpayer may also invoke the provisions of the Arbitration Convention on the elimination of double taxation (EC Convention 90/436/CEE).

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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 Russia, the requirement for transfer pricing documentation applies to financial years beginning on or after 1 January 2012. Only entities entering into "controlled transactions" are subject to the requirement.

Both domestic and cross-border transactions may fall under the definition of controlled transactions for transfer pricing purposes. Controlled cross-border transactions include:

- All related-party transactions, regardless of amount, save for the below exceptions;
- Third party transactions, where they relate to trading in goods on a foreign trade exchange and where the aggregate value of transactions with the third party in question exceeds RUB 60 million (EUR 1.5 million) in a calendar year; and
- Transactions between a Russian tax resident and an offshore tax resident (located in a jurisdiction specified in the Ministry of Finance blacklist) where the aggregate value of transactions between the parties in question exceeds RUB 60 million (EUR 1.5 million) in a calendar year.

Controlled domestic transactions include, in the first place, a general provision catching all related-party transactions where the aggregate value of transactions with the party in question exceeds RUB 3 billion (EUR 75 million)[1] in a calendar year, as well as more specific cases (transactions involving residents of special economic zones, participants in the "Skolkovo" project, 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)?

As a general rule, all controlled transactions are subject to the transfer pricing documentation requirement. However, special transitional rules apply to the financial years 2012 and 2013. In respect of 2012, the requirement applies only to controlled transactions entered into between given related parties where the total amount of income/expense derived by the Russian taxpayer under those transactions exceeds RUB 100 million (EUR 2.5 million). In 2013, the threshold will be decreased to RUB 80 million (EUR 2 million). As from 2014, turnover limits will cease to apply, and, therefore, all controlled transactions will need to be documented.

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

In Russian law there is a relatively extensive list of "related parties". The general definition is that parties are related where the particular features of their relationship are such that they may influence the terms and/or effects of the transactions they enter into, and/or the economic outcome of their activities or those of persons they represent. The term "influence" includes, in this respect, the ability to influence through the participation of one party in the charter capital of the other, or by virtue of an agreement concluded between the parties, or any other circumstances.

2012 threshold; will be reduced to RUB 2 billion (EUR 50 million) in 2013 and RUB 1 billion (EUR 25 million) from 2014.

More particularly, the list of related parties includes:

- Two companies, where one directly or indirectly holds more than 25% of the charter capital of the other;

[1] 2012 threshold; will be reduced to RUB 2 billion (EUR 50 million) in 2013 and RUB 1 billion (EUR 25 million) from 2014.

— A company and an individual who directly or indirectly holds more than 25% of its charter capital;
— Two companies with the same parent company, where the parent has more than a 25% shareholding (direct or indirect) in the charter capitals of each one;
— A company and its CEO or director, or companies with the same CEO;
— Successive chains of individuals/companies with more than 50% participation in the capital of the subsidiary, etc.

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 Russian tax authorities with respect to transfer pricing matters. However, tax authorities can request information held by foreign companies from the Russian taxpayer and/or from the foreign tax authorities, pursuant to 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)?

For the purposes of benchmark analysis, Russian legislation recognises primary and secondary sources of information. Primary sources include "official" data (information on prices and quotations from world trade exchanges for goods traded on such exchanges, customs statistics, etc.), and accounting and statistical data reported by Russian companies. Data reported by foreign companies is treated as a secondary information source, however, and may be used for the purposes of benchmarking analysis only where no information on Russian companies is available, or such information is insufficient.

The effect of the above is that the Russian tax authorities will not accept regional benchmark studies unless the taxpayer proves that no information is available from "official" sources or Russian companies, or that such information is irrelevant.

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

The documents provided to the Russian tax authorities should normally be in Russian. Accordingly, if the original documents are in another language, the tax authorities can request a translation.

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)?

Transfer pricing documentation should be provided to the tax authorities upon their request, which may be issued on or after 1 June of the year following the year of the controlled transaction. The company has 30 calendar days from the date of the request to provide the documentation.

In addition, transfer pricing notifications (documents prepared under a special form established by the Russian Federal Tax Service and containing general information on the parties to the controlled transaction, transaction price, method adopted, etc.) are to be provided to the tax inspectorates where ordinary corporate profits tax returns are filed before 20 May of the year following the year of the relevant controlled transaction.

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 simple fact that the documentation is not provided within the applicable timescale, or is incomplete, triggers a penalty in the amount of RUB 200 (EUR 5). However, if a tax reassessment is made as a result of non-provision of documentation to the tax administration, or provision of incomplete documentation, there may be a penalty for late payment of tax, and a fine equal to 20% of the excess tax (from 2014) or 40% (from 2017).

For the avoidance of doubt, no fines for underpayment of tax due to incorrect application of transfer prices may be imposed on Russian taxpayers before 2014. It is also noteworthy that such fines will only be applicable if the relevant company does not have in place transfer pricing documentation corresponding to the requirements set by the law.

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 incomplete documentation does not reverse the burden of proof as regards the arm's length character of the controlled

transactions: to make a reassessment, Russian tax authorities still need to demonstrate that the transactions in question 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?

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)?

Serbian corporate profit tax ("CPT") law imposes obligations to declare transactions made between associated persons in the tax statement (an additional document submitted with the tax return), to maintain transfer pricing documentation and to provide such documentation with the tax statement. There are no special provisions in the CPT legislation limiting the obligation to maintain appropriate documentation to certain categories of taxpayers/thresholds.

Such transactions are declared separately, making a comparison between the actual prices and the arm's length prices. This obligation also applies to transactions between permanent establishments in Serbia and their non-resident head offices.

On the basis of current practice, in cases where adequate transfer pricing studies are not available to substantiate transactions between associated parties, the taxpayer faces a risk that the tax authorities will not fully recognise the expenses generated or will increase revenues by the difference between the actual and arm's length prices.

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

Serbian CPT law does not explicitly regulate the content of transfer pricing documentation. However, the law stipulates which transfer pricing methods may be applied, as well as imposing the obligation to declare transactions between associated persons in the tax statement, and to provide the documentation with the tax statement. In addition to the obligation to maintain transfer pricing documentation, the taxpayer has a general obligation to maintain business documentation that is relevant for tax purposes (not specifically transfer pricing documentation) in accordance with prescribed accounting principles and the Serbian Law on Tax Proceedings and Tax Administration. Furthermore, the Ministry of Finance is expected to issue specific rules as to the content of transfer pricing documentation in the near future.

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

There are no exceptions/thresholds regarding the transactions that are to be documented.

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

According to the Serbian CPT legislation, a related party is a natural or legal person whose relationship with the taxpayer is such that control or significant influence may be exercised in business decisions. Entities owned, controlled or managed indirectly or directly by the same natural or legal entities are also considered associated parties.

A person holding 25% or more of the shares in the taxpayer is deemed to be in control of it. Furthermore, it is considered that holding 25% or more of voting rights in the taxpayer enables a person to exert significant influence over the taxpayer's business decisions. In addition, any non-resident from a jurisdiction with a preferential tax regime ("tax paradise") is considered to be a related party as are certain persons in marital or common-law relationships with the taxpayer, and the taxpayer's blood relatives.

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?

The Serbian Law on Tax Proceedings and Tax Administration stipulates that a taxpayer is obliged to deliver accounting books and related business documentation located abroad if it has control or influence over the foreign entity such that it can procure delivery of the requested documentation.

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 where documents are submitted in a foreign language and the tax authorities request a translation.

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 the Serbian CPT legislation the taxpayer is generally obliged to provide transfer pricing documentation upon filing of the tax return. However, if this is not done the tax authority will set an additional period for the taxpayer to provide the documentation, ranging from 30 to 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.

For failure to declare the value of the transactions conducted with associated persons in accordance with the "arm's length principle" in the tax statement, a fine in the amount of approximately EUR 900–18,000 is imposed.

If the taxpayer fails to submit transfer pricing documentation, or submits incomplete documentation, the tax authority will issue a warning requiring the taxpayer to submit or complete the documentation within a fixed period, ranging from 30 to 90 days. If the taxpayer still does not submit or complete the documentation, a fine in the amount of approximately EUR 900–18,000 will be imposed.

Should the taxpayer fail to obtain the accounting and business documentation from abroad (see above) a penalty in the range of approximately EUR 900–5,400 is imposed.

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 proof is borne:
- in relation to facts establishing a tax liability, by the tax authorities,
- in relation to facts reducing or eliminating a tax liability, by the taxpayer.

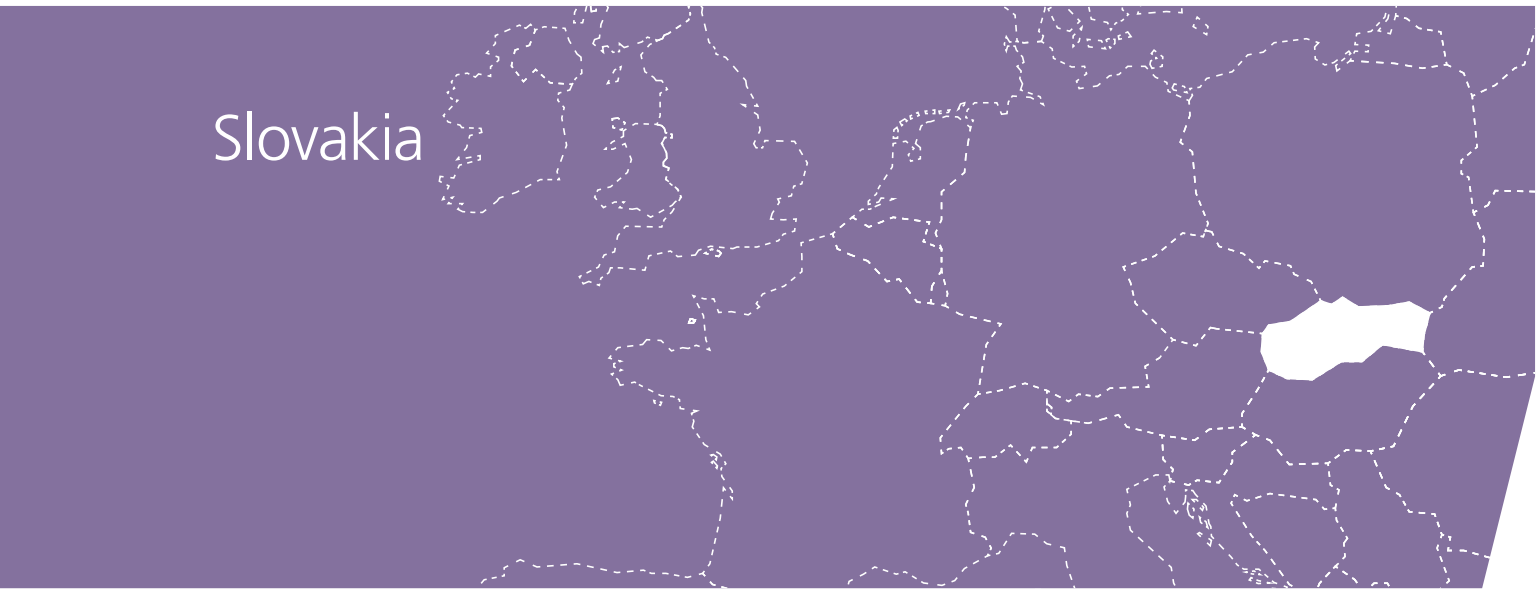
There is an exception to this general rule where the tax authorities challenge and reassess the tax base during a tax audit.

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 imposition of document-related penalties does not prevent the taxpayer from initiating mutual agreement procedure contained in the applicable tax treaty with a view to eliminating any double taxation resulting from the transfer pricing reassessment.

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

Consistently, the Ministry of Finance of Slovak republic issued guidelines, which lay down the content of the TP documentations to reduce any uncertainty concerning this issue. The Guidelines distinguish between two types of TP documentation. The basic TP documentation is more complex, 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 shall prepare a simplified TP documentation that includes information on transactions with foreign associated enterprises and that has to 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 Ministry of Finance of the Slovak Republic.

The basic TP documentation has two parts. It shall include a general documentation, relating to the whole group of enterprises and a specific documentation on the specifics of particular taxpayer.

The general part shall contain the following:
- Identification of the group members and description of the group ownership structure;
- Description of the business activities and business strategy of the group, including the industry identification;
- Planned business strategy in the future;
- Description of 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 shall contain the following information:
- Identification of the taxpayer and its ownership structure;
- Description of the business activities and the industry;
- Planned business strategy of the taxpayer in the future;
- List of intra group transactions of the taxpayer;
- Overview of the entities intangible assets;
- List of measures preceding the pricing, e.g. the reconciliation of the pricing method;
- General description of functions that the taxpayer performs and the estimated risks, which he bears;
- Benchmarking studies;
- Description of the system of taxpayer's transfer pricing and 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 has the obligation to maintain TP documentation on all its significant transactions with foreign associated enterprises.

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

For the purposes of Income Tax Act:

- The term "related party" – shall mean a close party or another party, which is economically, personally, or otherwise interrelated with the first party;
- The term "economic or personal interrelation" – shall mean a situation, in which one party participates in the ownership, control, or administration of another party, or shall mean a relation between parties, which are under the control or administration of the same party, or in which the same party has direct or indirect equity interest, while the participation in the:
  - "Ownership or control" – shall mean any direct, indirect, or indirect derivative holding of more than 25% of the registered capital or the voting rights. Indirect holding shall be calculated by multiplying the percentages of direct holdings divided by one hundred, and by multiplying the result so obtained by one hundred. The indirect derivative holding shall be calculated by summing up the indirect holdings. The indirect derivative holding shall only be used to calculate the participation of a single party in the ownership or control of another party, where such a single party participates in the ownership or control of several parties, each of which holds a participation in the ownership or control of the same third party; if the indirect derivative holding exceeds 50%, then all the parties, which were included in the calculation thereof, shall be regarded as economically interrelated regardless of their actual interests;
  - "Administration" shall mean the relationship of members of statutory bodies or supervisory bodies of a company, or co-operatives, towards such a company, or cooperative;
- The term "other interrelation" – shall mean a relationship established exclusively for the purpose of reduction of the tax base or increase of tax loss;
- The term "non-resident related party" – shall mean a situation, in which a resident individual or legal entity is interrelated with a non-resident individual or legal entity; the above shall apply also to the relation 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.

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 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 and of the representatives of the governments of the Member States on the Code of Conduct on transfer pricing documentation for associated enterprises in the EU. The guidelines are applicable to transactions carried out by Slovak taxpayers from 1 January 2009.

The guidelines distinguish two types of documentation: basic documentation and specified documentation. The basic documentation shall contain a general TP documentation (Masterfile), relating to the group and a specified TP documentation, containing information on the Slovak taxpayer. The basic documentation is obligatory to Slovak taxpayers who report their financial statements under international financial reporting standards (IFRS). For the rest of the taxpayers, involved in any intra-group transaction with foreign associated enterprises, is sufficient to maintain a simplified documentation that contains evidence on the taxpayers controlled transactions and evidencing the taxpayer's adherence to the arm's length principle in those transactions.

Though the basic TP documentation is not obligatory to all taxpayers, it is recommended to all Slovak entities involved in transactions with foreign associated enterprises to maintain a detailed TP documentation. During tax inspection, the entity involved in the above mentioned transactions shall evidence that it conducted the transaction in conformity with the arm's length principle and it is highly unlikely that the required content of the simplified TP documentation is able to serve that purpose.

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 TP documentation, which taxpayers are obliged to maintain, shall 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 transaction. Therefore the precision 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 the explanation of its ownership structure. However the authorities may request from the Slovak taxpayer on foreign group members any other relevant information they deem important to evidence that the arm's length principle has been observed in controlled transactions.

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

The 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, Slovak tax authority performs benchmark studies within local business environment.

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

The transfer pricing documentation must be provided in Slovak language, unless, upon request, the Slovak tax authorities approve the use of any other 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 obligatory TP documentation shall be provided to the tax authorities during the tax inspection within 60 days counted from the day of request. As the simplified documentation is based on the information provided in notes to financial statement, it shall be provided regularly to the tax authorities when the income tax return is due. If simplified documentation is considered insufficient as a part of the notes to financial statement, tax authority could challenge the taxpayer 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.

In case the Slovak taxpayer does not provide the Slovak tax authorities with the obligatory TP documentation within the required deadline, tax authorities are empowered by law to impose penalties. Penalty could be imposed according to the Slovak Act No. 563/2009 on the administration of taxes (Tax Code) as amended, which stipulates, that if the taxpayers do not comply with their obligations of not material nature, a fine up to EUR 3,000 could be imposed by the tax authorities. An amount of penalty depends on nature of violation or continuation of a status offending the law.

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

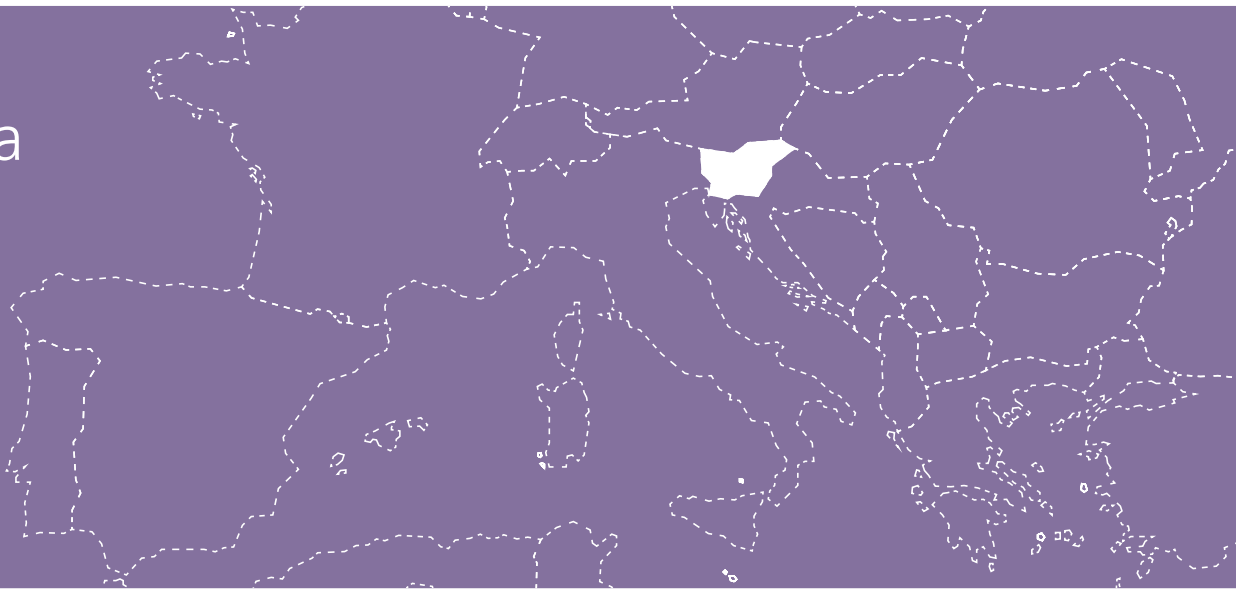
In absence of the obligatory TP documentation or in case of incomplete documentation, fine is imposed on the taxpayer, but it does not affect in any way the obligation of the taxpayer to provide evidence and prove the adherence of the significant controlled transactions with the arm's length principle. The burden of the proof remains on the taxpayer in case of tax audit. If the compliance with arm's length principle is not proven, the tax authority could concern relevant transfer (expense) which decreased the taxable income as tax non-deductible item and levy the penalty for shortening 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 mutual agreement procedure commences upon request of the taxpayer. The written request shall be delivered to the Ministry of Finance of Slovak republic or to the tax authorities accompanied by the obligatory TP documentation. The imposition of any document related penalty or previous TP reassessment is not considered as 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)?

All taxable persons entering into transactions with related parties must maintain information about related entities, the type and extent of their business transactions with such entities, and the determination of comparable market prices, as prescribed by the Slovenian Tax Procedure Act.

Transfer pricing documentation for cross-border inter-company transactions must be prepared on an on-going basis, while the documentation for domestic inter-company transactions is required to be submitted on the request of the tax authorities in a tax audit.

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 should be documented, there is no threshold applicable.

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

The legislative provisions differentiate between domestic related parties and cross-border related parties.

Cross-border controlled transactions are transactions between a resident and a foreign entity where those entities are related in such a way that:

— The taxable entity directly or indirectly holds 25% or more of the value or number of shares of the foreign entity through holdings, control over management, supervision or voting rights; or controls the foreign entity pursuant to a contract or terms of agreement different from those that are or would be achieved in the same or comparable circumstances between unrelated parties, or
— The foreign entity directly or indirectly holds 25% or more of the value or number of shares of the taxable entity through holdings, control over management, supervision or voting rights; or controls the taxable entity pursuant to a contract or terms of agreement different from those that are or would be achieved in the same or comparable circumstances between unrelated parties, or
— The same entity directly or indirectly holds 25% or more of the value or number of shares, or participates in the management or supervision of the taxable entity and the foreign entity, or of two taxable entities, or they are under the same control pursuant to a contract or terms of agreement that differ from those that are or would be agreed in the same or comparable circumstances between unrelated parties, or
— The same individuals or members of their families directly or indirectly hold 25% or more of the value or number of shares, holdings, voting rights or control over the management or supervision of the taxable entity and the foreign entity, or of two Slovene tax resident entities; or they are under their control pursuant to a contract or terms of agreement that differ from those that are or would be agreed in the same or comparable circumstances between unrelated parties.

Domestic inter-company transactions are transactions between two taxable resident persons, which are:

— Related in terms of capital, management or supervision by virtue of one resident, directly or indirectly, holding 25% or more of the value or number of shares, equity holdings, control, supervision or voting rights of the other resident; or controlling the other resident pursuant to a contract in a manner that is different from relationships between non-related parties, or

— The same legal or natural persons or their family members directly or indirectly hold 25% or more of the value or number of shares, holdings, control, supervision or voting rights; or control the residents on pursuant to a contract, in a manner that is different from relationships between non-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 local provisions on transfer pricing documentation follow the EU TPD.

d) Do taxpayers which are not established in your jurisdiction need to undertake to provide any specific information upon request?

Yes, under the exchange of information provisions of tax treaties.

Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?

Yes, the taxpayer should provide the relevant information, regardless of where it is kept.

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

Yes, pan-European benchmark studies are usually accepted.

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

If the documentation is not in the Slovenian language and the tax authorities request a translation, this must be provided. A minimum of 60 days is allowed to the taxpayer. It is, however, not uncommon for the tax authorities to accept the English version of the documentation without requesting a translation.

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)?

Transfer pricing documentation for cross-border inter-company transactions must be kept on an on-going basis. However, if the documentation is not available immediately, the tax authorities will set a deadline of 30 to 90 days in which it is to be provided.

Transfer pricing documentation for domestic inter-company transactions only needs to be submitted if requested by the tax authorities during a tax audit. The same period is allowed as for cross-border 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.

If adequate transfer pricing documentation is not in place, the penalty is EUR 1,500–15,000 for micro and small legal entities, EUR 3,200–30,000 for medium and large legal entities and up to EUR 4,000 for the responsible person in the entity.

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

Taxpayers must keep 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 authority.

When auditing transfer prices, the tax authorities should determine the arm's length nature of inter-company transactions using the method previously adopted by the taxpayer, provided that the taxpayer has submitted documentation prepared in line with the recognised methods and 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?

It is unlikely that a failure to submit transfer pricing documentation and the penalty levied in this respect would constitute a serious penalty which would prevent the initiation of the mutual agreement procedure. Note, however, that the tax authorities have not published any clarification on this issue.

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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 the net turnover for the consolidated group (irrespective of residence) was less than EUR 10 million in the previous tax year. These taxpayers are excluded from the general documentation obligation up to a global threshold of EUR 100,000; although it should be noted that as a general rule documentation will be required for transactions with related entities which are resident in tax havens.

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 fulfill 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 fulfill 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 (as long as transactions directly or indirectly affect the transactions carried out by the taxpayer):
  - General description of the organizational, legal and transactional structure of the group, as well as any relevant changes;
  - 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;
  - 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 fulfill 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 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 Interes Económico, "AIE") or between a joint venture (Union Temporal de Empresas, "UTE") and its members;

— Transactions carried out in the context of a takeover bid or a public stock offering;

— Transactions carried out in the context of bank integrations;

— Transactions carried out in the fiscal year with the same related party when the consideration of all transactions with such party do not exceed a market price EUR 250,000. Certain transactions are excluded from this threshold and are therefore subject to specific documentation requirements (e.g. transfers of real estate assets, transfer of non-listed shares, etc.).

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 (or individuals) 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 documentation or additional information of the group which they deem necessary, specially to determine whether the transactions directly or indirectly affect the transactions carried out by the taxpayer. 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, although the STA can summon any taxpayer of the group to furnish such group 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, the STA have informed that the documentation should be generally accepted for review in English, except in the case it is very complex and specific translation is requested. In any case, since the language of Spanish administrative procedures is generally Spanish according to law, it is always possible that translation of the documentation is requested, so it is preferable to keep the documentation in 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 STA by the filing date of the annual CIT return. Therefore, the STA are entitled to request all the documentation that is to be at their disposal by the filing date of the annual CIT return, e.g. assuming the fiscal year of the company coincides with the calendar year, 25 days following the period of six 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 about mutual agreements on direct taxation 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?

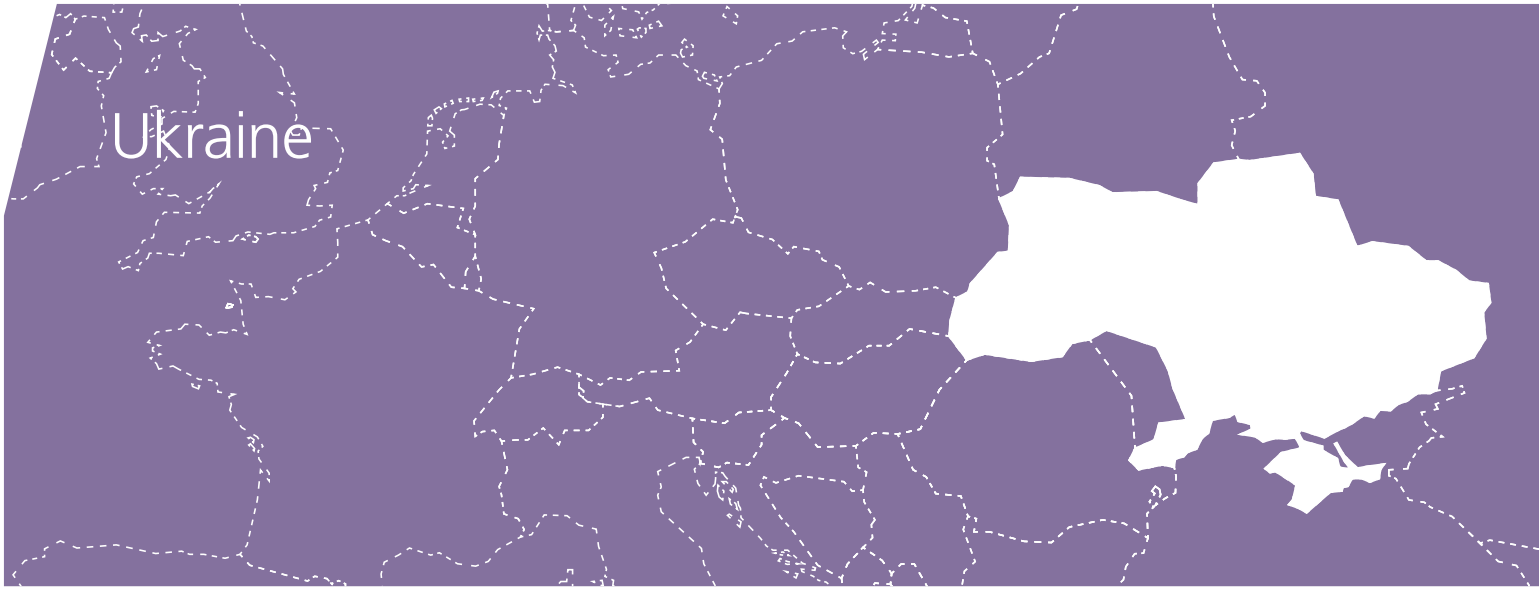
In general, it is the taxpayer's obligation to prove all facts reducing its tax bill.

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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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)?

Ukrainian taxpayers that enter into:
- Transactions with related parties;
- Barter/swap transactions (i.e., when assets are exchanged not for money but for other forms of consideration such as goods);
- Transactions with parties who are not liable for Ukrainian corporate profit tax ("CPT") at the standard rate, which potentially includes non-Ukrainian parties; and
- Certain other transactions, including in-kind contributions of fixed assets to the charter capital of Ukrainian companies, as envisaged in the Tax Code of Ukraine;

are obliged to follow transfer pricing rules and therefore to maintain transfer pricing documentation.

The applicability of the transfer pricing rules to a given transaction does not depend on any threshold in terms of turnover volume or value of assets.

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 which triggers the transfer pricing rules (see above). However, the main principle is that the set of documents relating to a particular transaction has to be sufficient to prove that the value/price of that transaction is in line with fair market price.

Also, with effect from 2013 the Tax Code of Ukraine provides for major taxpayers (whose income for the preceding four tax quarters exceeds UAH 500 million (approximately EUR 45 million) or the total amount of taxes paid exceeds UAH 12 million (approximately EUR 1.1 million)) to make an advance pricing agreement ("APA") with the principal tax authority of Ukraine, an option that was not previously available. However, it remains unclear whether the parties to an APA could set a price (or method of defining the price) for the local sale of imported goods at a lower level than the customs value of the goods. In other words, it is unclear whether the new provisions should be treated as overriding the general rule that the fair market price for the domestic sale of goods previously imported to Ukraine is no lower than the customs value of such goods.

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 but provides that transfer pricing rules apply 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", including but not limited to the following cases:
- 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 at least 20% of the authorised capital and/or possesses majority voting power in respect of the appointment of the legal entity's governing body and its entry into agreements of crucial importance.

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? Can your tax authorities require the taxpayer in your jurisdiction to provide information which is located in another state?

No, they do not bear that responsibility.

Yes, potentially the tax authorities may request such information. As a general rule, if the tax authorities require particular tax related documents/information, the taxpayer should provide such documents/information together with an explanation.

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

Ukrainian tax authorities may potentially accept such regional comparable studies, provided that they have been carried out by a dedicated state controlled agency or an approved provider of commercial information.

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 are not in Ukrainian, a certified translation has 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 the taxpayer must 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 it is 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 the event of absence or insufficiency of transfer pricing documentation, the tax authorities may independently determine the "fair market price" of the transaction as a basis for reassessment of tax.

The penalty itself would be applied to the reassessed amount of tax liabilities, and in most cases would be 25% of that amount.

We note, however, that where the taxpayer disagrees with the reassessment because it takes a different view as to fair market price, the tax authorities must apply to court and prove that the fair market value adopted for the purposes of the tax reassessment was correct.

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 provision placing the burden of proof on the tax authorities.

However, such refusals are unusual in practice 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 the procedure being used 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)?

Yes. 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:

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

HMRC will accept documentation prepared in accordance with EUTPD guidelines. It is recommended that taxpayers who intend to explicitly follow the EUTPD Code of Conduct in relation to local documentation advise HMRC of this in writing.

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?

Yes, to the extent that the foreign taxpayer is a counterparty to a transaction involving a UK legal entity, information relating to the foreign taxpayer may be requested from the UK party to substantiate the pricing of that transaction for UK tax purposes.

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

— If an incorrect return is made and a business has been careless or negligent in establishing the arm's length basis for the return; or.

— If a business does not maintain the appropriate documentation necessary to demonstrate that it has made its returns on the basis that the terms of connected party transactions were considered to be on arm's length terms.

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 negligence or carelessness, up to 70% for deliberate inaccuracies, and up to 100% for a deliberate inaccuracies 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 Corporation Tax Self Assessment 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 ten 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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