PKF International Limited

PKF Transfer Pricing Documentation Standards 2020/21

LOCAL KNOWLEDGE, GLOBAL EXPERTISE

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Foreword

Over the last decade, due to economic developments, many countries experienced reduced tax bases and declining tax revenues. As a consequence, the pressure has never been higher on governments and tax authorities to protect domestic tax revenues without increasing tax rates. In order to increase the tax base, many countries decided to work together in the project lead by the Organisation for Economic Co-operation and Development (OECD) on Base Erosion and Profit Shifting, which came known as the BEPS-project. The BEPS-project resulted in 15 action points to increase the tax base by countering tax avoidance. With 4 action points dealing with transfer pricing, it is clear that transfer pricing has become one of the most important areas tax authorities will be focusing on going forward.

Within this context, BEPS action point 13 provides guidance to countries by establishing common minimum standards for transfer pricing documentation for midsize and large size multinational enterprises, consisting of a master file, local file and a country-by-country report This publication provides the reader a comprehensive overview of the implementation of BEPS action 13 in domestic legislation, which not only covers documentation standards but also deals with specific local requirements on domestic exemptions, timing and penalty regimes.

PKF has a global transfer pricing practice and provides a one-stop service for multinational groups in taking care of their transfer pricing requirements across many jurisdictions. With offices in over 400 locations, we operate in more than 150 countries across our 5 regions, and specialise in providing high quality transfer pricing services to international and domestic organisations in all our markets. We can assist you in managing your transfer pricing risks and ensuring that your transfer pricing policies and documentation are BEPS-proof. Notably, our services include:

BEPS proof transfer pricing health check

A diagnostic health check will identify inappropriate BEPS transfer pricing policies and inadequate documentation from a BEPS and local standpoint. This will provide a clear summary of potential issues.

Development of transfer pricing mechanisms and policies

We will develop your transfer pricing policies and ensure they conform to OECD and local country principles and regulations.

Preparation of transfer pricing documentation based on a functional analysis

We can help you prepare robust documentation to support the arm's-length pricing nature of your related party transactions, including supportive transfer pricing studies and reports.

Advance Pricing Agreements

We assist throughout the negotiation process with a tax authority to agree a specified transfer pricing method which can be applied to certain transactions and remove uncertainty.

Responses to transfer pricing questions from the authorities

We assist you in responding to tax authority queries, in any jurisdiction, where rational explanations of why your related party transactions comply with local regulations are required.

Representation and dispute resolution

We will assist you to defend against additional tax assessments resulting from administrative or legal challenges to your transfer pricing policies

Against this background, our publication of "PKF transfer pricing documentation standards" is intended to give you an initial overview of essential requirements for transfer pricing documentation in important countries regarding ever-recurring questions. The positive feedback we received on our first two editions in 2018 and 2019 has encouraged us to produce an updated and expanded edition in 2021, in which even more countries are commented upon than in the first two editions. To find more information on how PKF may help you with your transfer pricing requirements, please visit our website at **www.pkf.com/services/taxation/transfer-pricing**.

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1. Introduction

The purpose of Australia's transfer pricing framework is to ensure the appropriate amount of Australian tax is paid. This is achieved by requiring businesses to price International Related Party Dealings (IRPDs) according to what independent parties acting independently would reasonably be expected to have done in the same situation.

Pricing for IRPDs should reflect a fair return for the functions carried out in Australia, the assets used in Australia (whether sold, lent or licensed), and the risks assumed in carrying out these activities.

There are several internationally accepted methodologies that can be used to comply with the arm's length principle. Australia's transfer pricing rules do not mandate any particular methodology or preference for the order in which you apply methodologies to arrive at an arm's length outcome. The Australian legislation simply seeks to adopt the method that is the most appropriate or best suited to the circumstances of each particular case.

The appropriate arm's length consideration should reflect the reality of operating in a commercial or financial environment. That is, whatever method a taxpayer uses should give a commercially realistic outcome. It is generally expected that a reasonable business person would seek to:

- maximise the price received for supplying property or services
- reduce cost associated with acquiring property or services
- be appropriately rewarded for any activities carried out.

Australian application of the law in this area is aligned with the approach taken by the OECD.

1.1. Legal context

Current transfer pricing laws are contained in Division 815 of the Income Tax Assessment Act 1997.

Subdivisions 815-B, 815-C and 815-D took effect for income years commencing on or after 29 June 2013 and were intended to strengthen Australia's transfer pricing rules and ensure alignment with OECD transfer pricing guidelines. The legislation has been specifically updated to note that it is to be interpreted to achieve consistency with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017. This update will apply retrospectively for income years starting on or after 1 July 2017.

The rules provide the ATO with broad powers to replace actual operating conditions with arm's length conditions. Where an Australian entity gets a transfer pricing benefit from actual conditions which differ from the arm's length conditions in connection with their financial or commercial relations, the arm's length conditions are taken to operate for income tax purposes and the taxpayer would be required to make an upwards adjustment to their taxable income.

Key elements of the system include:

- The provisions are self-executing and do not rely on the ATO making a determination.
- OECD guidance has been specifically incorporated into Australia's domestic transfer pricing rules

- The Public Officer is expected to ensure compliance with the transfer pricing rules
- A 7-year time limit for making transfer pricing adjustments
- The ATO has been given specific reconstruction provisions to disregard actual transactions and substitute hypothetical arm's length transactions in circumstances such as where:
  - the form of the actual commercial or financial relations is inconsistent with the substance of those relations;
  - independent entities dealing wholly independently with one another in comparable circumstances would have entered into alternate commercial or financial relations (i.e. being different in substance from the actual commercial or financial transactions); or
  - independent entities dealing wholly independently with one another in comparable circumstances would not have entered into commercial or financial relations at all (refer to TR 2014/6).

Transfer pricing rules and guidance are contained in various publications and ATO guidance documents. We have listed a number of the key provisions below:

- Taxation Ruling (TR) 92/11: Loan arrangements and credit balances
- TR 94/14: Basic concepts underlying the operation of Australia's transfer pricing rules
- TR 97/20: Arm's length pricing methodologies
- TR 98/11: Documentation and practical issues
- TR 98/16: Penalty tax guidelines
- TR 1999/1: Pricing for intra-group services
- TR 2000/16: Relief from double taxation and the mutual agreement procedure
- TR 2001/11: Attributing profits to permanent establishments
- TR 2003/1: Applying the arm's length debt test
- TR 2004/1: Cost contribution arrangements
- TR 2007/1: Effect of determinations under Division 13, including consequential adjustments
- TR 2010/7: Interaction of thin capitalisation transfer pricing
- TR 2011/1: Business restructurings by multinational enterprises
- TR 2014/6: Application of section 815–130
- TR 2014/8: Transfer pricing documentation and Subdivision 284-E
- TR 2020/4: Thin capitalisation – the arm's length debt test
- Practice Statement Law Administration (PS LA) 2014/2: Administration of transfer pricing penalties for income years commencing on or after 29 June 2013
- PS LA 2014/3: Simplifying transfer pricing record-keeping
- PS LA 2015/4: Advance pricing arrangements

Australian transfer pricing rules are also complimented by other specific rules designed to counter multinational tax avoidance as follows:

Multinational Anti-Avoidance Rule

The Australian Multinational Anti-Avoidance Rule applies in the following circumstances:

- A foreign entity makes supplies to an Australian customer
- Activities are undertaken in Australia by an Australian entity (or permanent establishment) which are directly in connection with the supply by an entity which is an associate of, or commercially dependent on, the foreign entity
- Some or all of the income derived by the foreign entity is not attributable to an Australian PE of the foreign entity; and
- There is a principal purpose of obtaining an Australian tax benefit or a reduction in tax liabilities arising under foreign law.

Penalties of up to 120% of the tax avoided can be payable. The application of the MAAL requires an ATO assessment.

Diverted profits Tax

The Diverted Profits Tax (DPT) was introduced in March 2017 which imposes a penalty tax of 40% to profits diverted offshore through related party arrangements. The DPT will apply to income years commencing on or after 1 July 2017, whether or not the relevant transactions were entered into before that date.

The DPT:

- Imposes a 40% penalty rate of tax on profits transferred offshore through related party transactions with insufficient economic substance where the tax paid on the profit is reduced by more than 20%.
- Applies where it is reasonable to conclude based on information available to the ATO that the arrangement is designed to secure a tax reduction
- Requires upfront payment of any DPT liability which can only be adjusted following a successful review of the initial assessment
- Puts the onus on taxpayers to provide relevant and timely information on offshore related party transactions to the ATO to prove why the DPT should not apply.

The DPT does not operate on a self-assessment basis and so requires an assessment to be issued by the ATO.

Anti-hybrid measures

The Australian government has introduced hybrid mismatch rules with effect from 1 January 2019 (with no grandfathering of existing arrangements) which will have a broad impact

A “hybrid mismatch” arises where there is exploitation of differences in the tax treatment of an entity or a financial instrument under the laws of two or more countries and a tax benefit arises as a result.

Some examples of hybrid arrangements include financing instruments that may be treated as equity in one jurisdiction and debt in another jurisdiction (e.g. redeemable preference shares) or entities that may be treated as taxable in one jurisdiction but “flow through” in another (e.g. limited partnerships).

These arrangements provide tax benefits to multinational groups because they result in payments that may be tax deductible in one jurisdiction but not assessable or assessable to lower tax in another jurisdiction or alternatively be deductible in both jurisdictions. They can also apply where a payment made by an Australian entity ‘imports’ a hybrid outcome into Australia.

To neutralise these tax benefits the rules will deny tax deductions for the Australian entity or require an amount to be included in assessable income.

Note, there are also integrity measures which apply where an interest payment is made to an interposed foreign entity within the same group, the tax rate on the income is 10% or less and it is reasonable to conclude that the purpose of the entities that were a part of the scheme included enabling foreign income to be imposed at 10% or less. If these criteria are applicable, the Australian entity can be denied a deduction for the interest expense.

The ATO have released Practical Compliance Guideline PCG 2018/7 which sets out the ATO's views as to whether steps taken by taxpayers to comply with the hybrid mismatch rules will be seen to be low risk (e.g. simply removing hybrid arrangements) or high risk (e.g. replacing existing hybrid arrangements with new arrangements that comply with the proposed new laws but preserve the tax benefit received under the former hybrid arrangements).

1.2. Practical context

In order to assist taxpayers manage their Australian transfer pricing obligations, the ATO has issued a number of practical compliance guidelines (PCGs). These are intended to provide a framework to convey to taxpayers the ATO's assessment of relative levels of tax compliance risk across a spectrum of behaviours and arrangements. These PCGs allow for taxpayers to assess their risk by taking into account the ATO's specific views on the arrangements in question:

- PCG 2017/1 – this contains out the ATO's compliance approach in relation to offshore related party procurement, marketing, sales and distribution hubs. The PCG identifies and defines hub arrangements and classifies these into one of six different transfer pricing risk categories or 'zones'. To the extent that the particular hub falls outside the green zone then these are more likely to be reviewed by the ATO.
- PCG 2017/2 – this update previously released guidance on the Simplified Transfer Pricing Record Keeping (STPRK) options that are available to taxpayers in certain circumstances. For qualifying taxpayers, the STPRK options reduce the compliance burden in relation to documentation and risk of their international related party dealings. To the extent that taxpayers can apply the STPRK options, the ATO will not dedicate compliance resources to qualifying taxpayers/international dealings.
- PCG 2017/4 – this contains the ATO's proposed compliance approach with respect to how the ATO assess risk in relation to cross-border related party financing arrangements. This PCG continues the use of a colour spectrum (previously used in PCG 2017/1) to assess and clarify tax risk in respect of funding arrangements whilst also allocating scores to various attributes of the funding arrangements. The ATO intend to allocate compliance activities depending on the colour of classification. A draft Schedule 3 was released in August 2020 which applies to interest-free loans between related parties.
- PCG 2019/1 – this guidance outlines the ATO's compliance approach to the transfer pricing outcomes associated with inbound distributors who purchase goods from related foreign entities for resale and distributors of digital products or services where the intellectual property in those products or services is owned by related foreign entities. It provides a framework allowing taxpayers to 'self-assess' their risk profile for such activities based on an EBIT margin calculation and a series of high/medium/low risk benchmarks, depending on the particular industry the taxpayer operates in.
- PCG 2020/7 – this contains the ATO's compliance approach to applying the arm's length debt test. It provides guidance and a risk assessment framework for companies to consider. It applies to income years commencing from 1 January 2019 where the arm's length debt test has been used to establish an entity's maximum allowable debt.
- The ATO has also released informal guidance regarding how they will assess the impact of the JobKeeper payment on transfer pricing arrangements to ensure that the Australian entity should retain the benefit of

the Government assistance it receives. In other words, the Government subsidies should not result in an adjustment to the transfer price paid in relation to any services provided offshore.

- Taxpayer Alert 2018/2 – this outlines the ATO's concerns where payments made by Australian entities that are partly for the use of intangible assets may be mischaracterised as payments solely for goods and services, therefore, reducing any liability to royalty withholding tax. The ATO views these situations as arising in practice where an offshore entity owns and maintains intangibles offshore and the Australian entity enters into an arrangement to undertake certain activities in Australia (e.g. manufacturing, marketing and distribution of products). These activities require the use of offshore intangibles and the purchase of goods/services from offshore but the payments made by the Australian company do not specifically allocate an amount in relation to the use of the offshore party's intangibles. Note, this is not intended to apply to international arrangements that involve the incidental use of an intangible asset (e.g. Australian resellers of finished tangible goods where the activity of reselling the goods involves an incidental use of a brand name that appears on the goods and related packaging).

2. Formal requirements

2.1. Which taxpayers

The transfer pricing rules apply to all Australian taxpayers.

Significant Global Entities (SGEs) are defined to be members of a group where the total annual group revenue exceeds A$1bn. There are significant additional obligations on SGEs including a requirement to lodge the following documents with the ATO under Country-by-country reporting (CBC reporting) requirements:

- General Purpose Financial Statements;
- Master File
- Local File
- Country-by-country report

SGEs also have a higher potential penalty exposure and a significant exposure to late lodgement penalties for all tax filings (including, but not limited to, the above documents).

Please note that the size of the Australian entity is irrelevant to its classification as an SGE. Thus, any subsidiary of a global group with revenue in excess of A$1bn is classified as an SGE in Australia (and must comply with all relevant documentation filing requirements).

2.2. Aggregation of transactions

Aggregation of transactions may be required in appropriate circumstances.

2.3. Deadlines (timing)

Transfer pricing documentation must be contemporaneous in order for the taxpayer to qualify for any penalty protection. Documentation will only be considered contemporaneous if it is prepared prior to lodgement of the tax return.

For SGEs the general purpose financial statements must be lodged at the same time as the tax return (usually 6 months and 15 days after the end of the tax year). The remainder of the CbC reports must be lodged within 12 months of the end of the tax year.

2.4. Materiality

There is no specified materiality level for the transfer pricing rules to apply in Australia.

There are a variety of options for taxpayers with relatively simple affairs to comply with certain 'safe harbours' and minimise the need to prepare detailed transfer pricing documentation. These options are referred to as the Simplified Transfer Pricing Record Keeping Options. For example, loans in certain circumstances (including the interest rate being set in accordance with a specified benchmark) may qualify for this treatment.

2.5. Retention of documents

As the ATO has 7 years to make transfer pricing adjustments, a taxpayer should retain documentation for at least this long.

2.6. Frequency of documentation updates

The preparation of transfer pricing documentation in Australia is not compulsory, however, as noted elsewhere, only contemporaneous transfer pricing documentation will qualify a taxpayer for penalty protection.

This documentation is required to be prepared annually, however, it is possible to roll-forward analysis undertaken in prior years if no significant changes to the facts or circumstances have occurred. Such a roll-forward would usually be done by way of a short report explaining why no changes have occurred and the previous transfer pricing analysis can continue to be relied upon.

2.7. Tax return disclosures

The tax return lodged by Australian taxpayers contains a number of questions relating to international related party dealings (IRPDs). In particular, taxpayers with annual IRPDs in excess of $2m are required to complete an International Dealings Schedule (IDS). The IDS contains various requirements including disclosure of the quantum and type of IRPDs as well as the relevant countries involved and the applicable transfer pricing methodology used.

Much of the information on an IDS is similar to what is included in a local file. As a result, SGEs can choose to file Part A of their local file at the same time as their tax return should they wish to avoid this duplication of effort.

2.8. Burden of proof

In Australia, the burden of proof on tax matters rests with the taxpayer under a self-assessment regime. The ATO's expectation is that the Public Officer (person responsible for tax filings in Australia and who signs the tax return) will ensure that transfer pricing requirements are given due consideration.

2.9. Penalties

2.9.1. General

Australia has a comprehensive penalty regime for taxpayers based on an assessment of their conduct:

- 25% for lack of reasonable care or not having a reasonably arguable position
- 50% for recklessness or a scheme where the sole or dominant purpose was reducing tax
- 75% for intentional disregard of a tax law.

Please note that these penalties are doubled for SGEs.

The relevant percentages are applicable to the tax shortfall amount.

2.9.2. *Penalties in case of a TP-adjustment*

The penalty regime for TP follows the above percentages. Please note that unless the taxpayer has contemporaneous TP documentation (i.e. prepared before the income tax is lodged) the taxpayer will not be considered as having a reasonably arguable position – i.e. will not be able to argue for any penalty protection. There are various other provisions which can apply to increase or reduce the base penalty provisions.

2.9.3. *CbC-reporting*

Failure to lodge the CbC reporting documentation (any of country-by country report, master file, local file or general purpose financial statements) can attract a penalty for late lodgement ranging from $105,000 to $525,000 per document.

2.10. Interest

Interest will be charged in relation to any tax shortfall. The rate depends on the specific facts and circumstances of the case but is usually at a punitive rate (i.e. above cost of funding) and it is compounded. As a result, interest can rise quickly.

2.11. Use of most reliable information

The ATO generally prefers local comparables, however, foreign comparables can be used where local comparables are not available.

2.12. Languages

All documentation must be available in English.

2.13. Confidentiality

The ATO actively exchanges information with other tax authorities where permitted to do so by:

- Exchange of information articles included in Australia’s Double Tax Agreements
- Tax Information Exchange Agreements.

Australia is a party to the Multilateral Convention on Mutual Administrative Assistance in Tax matters and an active participant in the Joint International Tax Shelter Information Centre.

3. Standards with respect to the content of transfer pricing documentation

Importantly, the Master File and Local File are not considered transfer pricing documentation in Australia capable of providing any sort of penalty protection. Thus, under Australian rules, the Master File and Local File are additional to the normal requirement to prepare complying transfer pricing documentation.

Complying transfer pricing documentation (i.e. that which is eligible to provide penalty protection) needs to be prepared in accordance with the Australian transfer pricing rules, including the OECD Guidelines, and the ATO’s taxation rulings and practice statements interpreting the Australian transfer pricing rules.

The ATO has issued guidance on the documentation process, contained within Taxation Ruling TR 2014/8, which sets out the ATO’s ”5 step” process for taxpayers to follow when preparing transfer pricing documentation in order to comply with the transfer pricing documentation standards. The five steps are:

- **Step 1:** Identify the actual conditions in connection with the commercial or financial relations;
- **Step 2:** Select the most appropriate and reliable method to be used to identify the arm’s length conditions;
- **Step 3:** Identify the comparable circumstances relevant to identifying the arm’s length conditions.

These are the conditions that might be expected to operate between independent entities dealing wholly independently with one another in comparable circumstances.

To identify comparable circumstances Section 815-125(3) requires a consideration of the following factors being:

i. Functions performed, assets used and risks borne by the entities;

ii. Characteristics of any property or services transferred;

iii. Terms of any relevant contractual arrangements between the entities;

iv. Economic circumstances, for example, a consideration of the different markets, market sizes, position of competitors etc.; and

v. Business strategies of the entities; for example, are they going through a market penetration/ expansion phase.

The "basic rule" for identifying arm's length conditions is set out in Section 815-130(1) of the Act. The basic rule requires that the identification of arm's length conditions must be based on the actual commercial or financial relations that operated and should have regard to both the form and the substance of the relations.

Whilst the ATO states that in its view the "basic rule" will apply in most cases, this rule is subject to three exceptions (when the actual conditions can be replaced by alternative arm's length conditions).
The exceptions are:

- The actual relations can be disregarded if the form of those dealings is inconsistent with their substance – Section 815-130(2);
- Independent parties would have entered into transaction different, in substance, in comparable circumstances – Section 815-130(3); or
- Independent parties would not have entered into the transaction in comparable circumstances –Section 815-130(4).

- **Step 4:** Application of the transfer pricing rules so as best to achieve consistency with the OECD Transfer Pricing Guidelines.
- **Step 5:** Monitor, review and update transfer prices, as necessary.

These 5 steps are usually included within a detailed transfer pricing report which is retained by the taxpayer – i.e. this report is not required to be lodged with the ATO as part of the normal tax filing requirements.

4. Country-by-Country reporting standards

4.1. Threshold and required content

As noted above, SGEs (i.e. members of a group where the total annual group revenue exceeds A$1bn) are required to file CBC reports in Australia.

General principles – Master file

The Australian requirements on the content of a Master File are in accordance with the OECD requirements.

General principles – Local File

The ATO have specified information required in the local file which goes significantly beyond OECD guidelines.

An Australian local file comprises 3 parts:

1. Short form local file
2. Part A of the local file
3. Part B of the local file

More information on these is provided below.

Short form local file

The short form local file requires high level disclosures, as set out below, about five aspects of the local Australian entities and their operations:

- organisational reporting structure including overseas reporting lines for local functions
- business and strategy
- business restructures including significant changes in ownership structure, related party funding arrangements, assets or operations
- transfer of intangibles including associated related party licensing or service arrangements
- key competitors.

The short form local file is intended to be a narrative style report with sufficient level of information and detail to ensure the ATO are aware of:

- formal and effective overseas reporting lines for your functions and staff, including any dual or multiple reporting lines
- significant changes in your ownership or related party funding structure, including any resulting cross border tax hybrid arrangements
- significant disposals or acquisitions, or commencement or cessation of operations
- transactions or dealings connected with relevant changes or transfers.

For some taxpayers below relevant materiality thresholds, only a short-form local file is required.

Other taxpayers will be required to complete Part A and Part B of the Local File in the electronic format (XML) as prescribed by the ATO. Note only a small number of software providers offer a complying reporting solution. The specific requirements are as noted below:

Controlled Transactions - Part A

The following information for all controlled transactions for the income year (note, in some circumstances where the transactions are included in a relevant agreement series (RAS), all the agreements covered by the particular RAS are aggregated for the purpose of completing Part A):

- Australian counterparty TFN or ABN
- name of the non-resident counterparty
- country of tax residence of the non-resident counterparty
- transaction category
- amounts of consideration payable/receivable (of a capital nature for Australian income tax purposes)

- amounts of expenditure/revenue (not of a capital nature for Australian income tax purposes)
- for IRP debt factoring and securitisation arrangements, the book value of transferred debts
- where foreign currency gains or losses are incurred for the transaction, disclosure of the FX Gains and losses
- the transfer pricing method or capital asset pricing methodology relied on for the transaction
- the transfer pricing documentation code/STPRK for the purposes of Part B and whether the transaction is covered by a category on the exclusions list.

Documentation - Part B

For each transaction not covered by the exclusions list, essentially material controlled transactions, the following information is required:

- the transfer pricing method relied on for the transaction
- an indication whether there is a written agreement and, if so, whether the agreement has been previously provided to the ATO (if previously provided, the title of the agreement must be provided again to enable ATO identification)
- a copy of the agreement (unless previously provided)
- any foreign Advance Pricing Arrangement (APAs) or rulings provided by another jurisdiction in relation to an agreement (unless previously provided).

4.2. Notification requirement for subsidiary companies

Each taxpayer which meets the SGE criteria is responsible for lodging their own CBC reports subject to the following comments:

- General Purpose Financial Statements – these must be lodged by each taxpayer;
- Master File – this can be lodged by one group entity in Australia which must notify the ATO of all other entities which it is lodging on behalf of. Each other entity must also notify the ATO of who has lodged the Master File on their behalf.
- Local file – this must be lodged by each taxpayer
- Country-by-Country report – this can be lodged by either an Australian group entity or an overseas entity (provided it is lodged in a country which has agreed to exchange information with Australia). The local Australian taxpayer must notify the ATO of who has lodged the Country-by-Country report on its behalf and their country of residence.

Given the significant penalties involved with late lodgement of any CBC reports, it is imperative that all relevant requirements (e.g. notification) are promptly complied with.

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1. Introduction

1.1 Legal context

Before 1 January 2016 Art 9 OECD-model convention, section 6 no 6 EStG 1988 and the according legal requirements laid down in the BAO required a proper documentation for transnational transactions. This legal framework is still in force for all companies, regardless of their size.

In 2016 the “Verrechnungspreisdokumentationsgesetz” (“VPDG”) and the accompanying decree “Verrechnungsp reisdokumentationsgesetz-Durchführungsverordnung), (“VPDG-DV”) were implemented. The obligation to file the CbC Report and to establish a Master and a local file was defined. This is applicable for fiscal years starting 1 January 2016 or later.

1.2 Practical context

This law transposes into Austrian law Directive 2016/881 amending Directive 2011/16/EU with respect to the obligation of automatic exchange of information in the field of taxation, and the multilateral intergovernmental agreement on the exchange of country-specific reports.

2. Formal requirements

2.1 Which taxpayers

Austria requires Austrian-parented multinational enterprises (MNEs) or a local subsidiary with a global consolidated group turnover of at least EUR 750 million in the previous year to file a CbCR.

According to paragraph 5 of the VPDG, an Austrian entity is allowed to file the CbC Report as a surrogate if:

- the ultimate parent company does not have to file a CbC Report in its country of residence;
- the country of residence of the ultimate parent company did not ratify a binding agreement for data exchange of the CbC Report; or
- there is a systemic failure of the country of residence of the ultimate parent company.

An entity will fall under the Master File documentation requirement if it has turnover exceeding EUR 50 million in each of the 2 preceding years. However, a Master File must also be presented even if the Austrian entity will not exceed the revenue threshold but there is another group entity that must prepare a Master File.

There is an exemption for companies of which the threshold of EUR 50 million turnover is not met in the two preceding years. In that case, the Austrian TP requirements according to the Austrian TP Guidelines apply.

Local subsidiaries that are part of a non-resident group only need to file the Master File prepared in another country upon request.

The local entity is required to prepare a Master File if the country of the parent company or reporting entity of the group has not adopted a Master File requirement in its local rules or regulations if the local entity's turnover exceeds EUR 50 million in each of the 2 preceding years.

2.2 Aggregation of transactions

Following section 7 para 1 no 2 VPDG in combination with section 9 VPDG, the local file has to inform about intragroup business transactions which are material and influencing transfer prices and for control of the correct pricing level.

2.3 Deadlines (timing)

For ordinary business transactions there is basically no deadline for the preparation of the documentation by the taxpayer. However, if the documentation is prepared based on data or documents collected or established much later after the respective reporting period, the fiscal authorities might challenge the documentation, because it might appear to have been prepared as subsequent justification.

Regarding extraordinary business transactions (i.e. conclusions and changes of long term agreements, which have a material effect on the income derived by the taxpayer; transfers of assets in the course of a business restructuring procedure etc.), this documentation needs to be prepared on a timely basis.

CbCR:

By the last day of the tax year the ultimate parent company is obliged to inform the fiscal authorities that it falls within the scope at these duties. Entities which are part of such a group have to file a declaration by the last day of their tax year, in which the ultimate parent company publishing the CbCR and its home country are identified.

The CbCR has to be submitted electronically to the relevant tax authority. The deadline is 12 months from tax year-end.

The CbCR will be sent to the other relevant tax authorities after 15 months from tax year-end. The first sharing may be done up to 18 months after the end of the tax year.

Master and local file:

The master and the local file do not have to be submitted automatically. The tax authorities have the right to request submission after filing of the income or corporate tax return regarding the respective tax year. The timeline to disclose the documents is 30 days.

2.4 Materiality

In principle all transactions with associated enterprises should be supported by TP documentation. There are no formal thresholds below which no TP documentation is required. However, in consideration of the basic principle that the administrative burden should be justified by the complexity and (tax) importance of the transaction, the more complex and material the transactions are, the more extensive the TP-documentation should be.

2.5 Retention of documents

Basically, the documentations have to be retained for seven years. The retention period does not expire as far and as long as the documents are of importance for taxes for which the assessment period has not yet run out.

2.6 Frequency of documentation updates

The Master File, Local File and CbC-report must be updated every year as they relate to a particular tax year.

For continuous business transactions (e.g. long-term loans), the company has to collect and record information even after the conclusion of the business transaction (e.g. the conclusion of the loan agreement). A significant change in the facts and circumstances could also result in an update of the documentation.

2.7 Tax return disclosures

There is no separate disclosure to the tax returns. For filing the Local and the Master File, see 2.3.

2.8 Burden of proof

If the taxpayers keep appropriate TP documentation in their records and do not have an explicitly unreasonable and unsupported point of view with respect to the used transfer prices, the tax authorities must prove that the used transfer prices are incorrect. If there is no TP documentation available or there are evident shortcomings in the documentation, the burden of proof can turn to the taxpayer.

2.9 Penalties

2.9.1 General

Non-compliance with CbCR regulations may lead to a fine of up to EUR 50,000 (section 49b Finanzstrafgesetz).

An administrative offence can be:

- late filing; or
- not filing requested information or errors in the information.

Gross negligence can be fined up to EUR 25,000. Minor negligence for submitting the wrong data does not constitute an offence.

2.9.2 Penalties in case of a TP-adjustment

Apart from the rules mentioned above in section “2.9.1.Penalities regarding CbCR”, there are no specific rules on penalties in case of a TP adjustment. As a consequence, the normal rules on the consequences of income adjustments apply including fines for thoughtless tax evasion.

2.10 Use of most reliable information

There are no specific requirements in Austria regarding the use of comparables and as to the question of whether only domestic or foreign comparables will be accepted by the tax authorities.

2.11 Languages

The documentation has to be prepared in German or in English (section 10 VPDG).

2.12 Confidentiality

The CbCR will be submitted automatically to the relevant foreign tax authorities.

The Austrian tax authorities will treat the TP documentation confidentially. The tax authorities can only exchange the TP documentation with the tax authorities of another country if there is a legal basis. This legal basis can be found in national law, a tax treaty or an EU-directive. The TP documentation is never available to the public.

3. Standards with respect to the content of transfer pricing documentation

The TP documentation standards are published in detail in the directive on transfer pricing 2010 (Verrechnungspreisrichtlinien 2010). Documentation standards regarding the Master and the Local File can be found in the VPDG-DV.

3.1 Master File

The following information has to be included in the Master File (section 6 VPDG, section 1 VPDG-DV):

1. Organisational structure

Chart illustrating the MNE's legal and ownership structure and geographical location of operating entities.

2. Description of MNE's business(es)

General written description of the MNE's business including:

a) Important drivers of business profit.

b) A description of the supply chain for the group's five largest products and/ or service offerings by turnover plus any other products and/or services amounting to more than 5 percent of group turnover. The required description could take the form of a chart or a diagram.

c) A list and brief description of important service arrangements between members of the MNE group, other than research and development (R&D) services, including a description of the capabilities of the principal locations providing important services and transfer pricing policies for allocating services costs and determining prices to be paid for intra-group services.

d) A description of the main geographic markets for the group's products and services that are referred to under b.

e) A brief written functional analysis describing the principal contributions to value creation by individual entities within the group, i.e. key functions performed, important risks assumed, and important assets used.

f) A description of important business restructuring transactions, acquisitions and divestitures occurring during the tax year.

3. MNE's intangibles (as defined in Chapter VI of the OECD Transfer Pricing Guidelines)

a) A general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management.

b) A list of intangibles or groups of intangibles of the MNE group that are important for transfer pricing purposes and which entities legally own them.

c) A list of important agreements among identified associated enterprises related to intangibles, including cost contribution arrangements, principal research service agreements and licence agreements.

d) A general description of the group's transfer pricing policies related to R&D and intangibles.

e) A general description of any important transfers of interests in intangibles among associated enterprises during the fiscal year concerned, including the entities, countries, and compensation involved.

4. MNE's inter-company financial activities

a) A general description of how the group is financed, including important financing arrangements with unrelated lenders.

b) The identification of any members of the MNE group that provide a central financing function for the group, including the country under whose laws the entity is organised and the place of effective management of such entities.

c) A general description of the MNE's general transfer pricing policies related to financing arrangements between associated enterprises.

5. MNE's financial and tax positions

a) The MNE's annual consolidated financial statement for the fiscal year concerned if otherwise prepared for financial reporting, regulatory, internal management, tax or other purposes.

b) A list and brief description of the MNE group's existing unilateral advance pricing agreements (APAs) or similar arrangements.

3.2 Local File

The following information should be included in the Local File (section 7 VPDG, section 7 ff VPDG-DV):

1. Local entity

a) A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices.

b) A detailed description of the business and business strategy pursued by the local entity including an indication whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and an explanation of those aspects of such transactions affecting the local entity.

c) Key competitors.

2. Controlled transactions

For each material category of controlled transactions in which the entity is involved, provide the following information:

a) A description of the material controlled transactions (e.g. procurement of manufacturing services, purchase of goods, provision of services, loans, financial and performance guarantees, licences of intangibles, etc.) and the context in which such transactions take place.

b) The amount of intra-group payments and receipts for each category of controlled transactions involving the local entity (i.e. payments and receipts for products, services, royalties, interest, etc.) broken down by tax jurisdiction of the foreign payer or recipient.

c) An identification of associated enterprises involved in each category of controlled transactions, and the relationship amongst them.

d) Copies of all material inter-company agreements concluded by the local entity.

e) A detailed comparability and functional analysis of the taxpayer and relevant associated enterprises with respect to each documented category of controlled transactions, including any changes compared to prior years.

f) An indication of the most appropriate transfer pricing method with regard to the category of transaction and the reasons for selecting that method.

g) An indication of which associated enterprise is selected as the tested party, if applicable, and an explanation of the reasons for this selection.

h) A summary of the important assumptions made in applying the transfer pricing methodology.

i) If relevant, an explanation of the reasons for performing a multi-year analysis.

j) A list and description of selected comparable uncontrolled transactions (internal or external), if any, and information on relevant financial indicators for independent enterprises relied on in the transfer pricing analysis, including a description of the comparable search methodology and the source of such information.

k) A description of any comparability adjustments performed, and an indication of whether adjustments have been made to the results of the tested party, the comparable uncontrolled transactions, or both.

l) A description of the reasons for concluding that relevant transactions were priced on an arm's length basis based on the application of the selected transfer pricing method.

m) A summary of financial information used in applying the transfer pricing methodology.

n) A copy of existing unilateral and bilateral/multilateral APAs and other tax rulings to which the local tax jurisdiction is not a party and which are related to controlled transactions described above.

3. Financial information

a) Annual local entity financial accounts for the fiscal year concerned. If audited statements exist they should be supplied and if not, existing unaudited statements should be supplied.

b) Information and allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements.

c) Summary schedules of relevant financial data for comparables used in the analysis and the sources from which that data was obtained.

4. Country-by-Country reporting standards

4.1 Threshold and required content

A MNE with a consolidated group revenue of more than EUR 750 million should provide the Austrian tax inspector with a CbC-report. The report contains the following information about the MNE:

a) For each country in which the MNE is active, information about the revenue, the earnings before tax (EBT), the paid income tax, the accrued income tax, the stated capital, the accumulated earnings, the number of employees and the tangible assets other than cash and cash equivalents.

b) A description of every group entity of the MNE mentioning the tax jurisdiction of residence, and if deviant, the state under whose law the group entity is established and the main business or operations of that group entity.

c) Additional information which is considered as necessary or that would facilitate the understanding of the CbCR. They have to be given in English (section 11 VPDG-DV).

4.2 Notification requirement for subsidiary companies

In principle, the country report is provided by the ultimate parent company of the MNE in its state of residence. The state of residence will exchange the country report automatically with the Austrian tax authorities. An Austrian ultimate parent company needs to provide the Austrian tax inspector with the country report. The Austrian tax authorities will automatically exchange this report with the jurisdictions in which the MNE is active and with which Austria has concluded an Agreement for automatic exchange of information.

The Austrian group entity is required to provide the Austrian tax authorities with the report if:

1. The foreign ultimate parent company is not required to provide the tax authorities a report in its state of residence.

2. The foreign ultimate parent company is required to provide the tax authorities a report in its state of residence, but there is no Agreement between that state and Austria which provides for automatic exchange of the report.
3. The Austrian tax authorities informed the Austrian group entity there is a structural negligence of the state of residence of the ultimate parent company.

This requirement by the Austrian group entity can be prevented, if the report is provided by a surrogate ultimate parent company, under the following conditions:

1. The surrogate ultimate parent company is required to provide the report in its state of residence.
2. There is an agreement between that state and Austria which provides for automatic exchange of report.
3. The state of residence of the surrogate ultimate parent company is not structurally negligent in the exchange of the report.
4. The surrogate ultimate parent company has notified its state of residence it will act as a surrogate ultimate parent company.
5. The Austrian group entity has notified the Austrian tax authorities which foreign group company has taken over the requirement to provide the report.

In this way it is ensured that the Austrian tax authorities are provided with the report, either by an Austrian taxpayer or by the tax authorities of another state.

The MNE must provide the report within 12 months after the last day of the financial year of the MNE.

A subsidiary company needs to notify the Austrian tax authorities should the ultimate mother refuse to provide the information needed. The reporting then has to be done with the information available.

Belgium

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1. Introduction

1.1 Legal context

The Belgian Law of 1 July 2016 formally introduced transfer pricing ("TP") documentation rules into Belgian tax law. Those rules are laid down in article 321/1-321/7 of the Belgian Income Tax Code ("BITC") and contain specific TP documentation requirements which may have a significant impact on "large" companies which are part of a multinational Group and which are active in Belgium.

The Belgian TP documentation rules entered into force for financial years commencing as of 1 January 2016 and include a master file ("MF") and local file ("LF") and a Country-by-Country report ("CbC report") or CbC notification ("CBC not.") form.

1.2 Practical context

The new documentation requirements which entered into force as of 1 January 2016 can lead to a significant administrative burden as they are applicable to every Belgian tax resident affiliate or Belgian permanent establishment ("PE") of a multinational Group which exceeds certain thresholds in the financial year preceding its most recently closed financial year according to its Belgian GAAP annual accounts on a non-consolidated basis or based on the consolidated group turnover.

It is therefore advised for all multinational taxpayers that are active in Belgium to timely and critically consider their (actual and relevant) TP documentation obligations. In early 2020, the Belgian tax authorities published a TP circular letter elaborating on the tax authorities' commentaries on specific topics or questions raised by taxpayers upon the preparation of the Belgian TP documentation requirements (i.e. LF, MF, CbC not. form or CbC report).

2. Formal requirements

2.1 Which taxpayers

The Belgian TP documentation requirements are applicable to every Belgian tax resident affiliate or Belgian PE of a multinational Group which exceeds one of the below criteria in the financial year preceding its most recently closed financial year according to its BE GAAP annual accounts on a non-consolidated basis:

- Gross operational and financial turnover (excluding one-off transactions) exceeding EUR 50 million;
- Balance-sheet total exceeding EUR 1 billion;
- Average personnel exceeding 100 full time equivalents.

If the above condition is met, the Belgian affiliate or Belgian PE will have to timely file a MF and a LF with the Belgian tax authorities.

In addition and in summary, if the Group has a consolidated gross turnover (i.e. gross operational, gross financial and gross extraordinary turnover) of more than EUR 750 million, a CbC reporting formality will have to be satisfied. Such CbC report will, in principle, have to be filed by the parent company of the Group in the country of which this parent company is a tax resident. However, in some cases, a Belgian tax resident company or Belgian PE of the Group can be obliged to file the CbC report in Belgium, and this within 12 months after the date on which the financial year of the parent company of the Group is closed. Every Belgian tax resident company or Belgian PE of a "large" multinational Group will in any event have to inform the Belgian tax authorities of the identity of the company that will file the CbC report, and this before the financial year of the parent company is closed. This is the so-called CbC not formality.

2.2 Aggregation of transactions

Strictly speaking, the premise is that TP documentation is required for each individual transaction with associated enterprises. Obviously, in practice this could lead to an unreasonable administrative burden. Therefore, it is not excluded that the Belgian tax authorities agree that if a proper aggregation of transactions is possible (e.g. because there is a large number of similar transactions), the transactions can be jointly assessed. In that case, it is expected from the taxpayer that he can substantiate that the used transfer prices with regard to the aggregation of transactions are at arm's length.

2.3 Deadlines (timing)

The LF needs to be filed within the legal deadline which also applies for the filing of the Belgian corporate income tax return, i.e. usually by the end of September. E.g. the LF with respect to the financial year per 31.12.X should generally be electronically filed with the Belgian tax authorities by the end of September X+1. The MF in turn needs to be filed within 12 months as of the last day of the reporting period of the group.

The CbC report needs to be filed within 12 months after the date on which the financial year of the parent company of the Group is closed. The CbC not formality needs to be complied with before the end of the financial year of the ultimate parent company.

2.4 Materiality

In principle, all transactions with associated enterprises should be supported by TP documentation. There are no formal thresholds below which no TP documentation is required. However, in light of the proportionality principle that the administrative burden should be justified by the complexity and (tax) importance of the transaction, the more complex and material the transactions are, the more extensive the TP documentation should be like.

Furthermore, it should be noted that Belgian tax law provides for the following thresholds with respect to TP documentation reporting requirements:

- The LF contains a specific section (part 2) applicable to cross-border transactions in the hands of a business unit of a Belgian tax resident company. Specifically, part 2 only needs to be filed if the company has at least one business unit which realised cross-border inter-company transactions exceeding EUR 1 million per annum;
- In addition, the taxpayer has the option to only report transactions in part 2 of the LF exceeding a materiality threshold of EUR 25,000 per transaction.

2.5 Retention of documents

A Belgian taxpayer is required to keep its administrative records for at least 7 years whereas the retention term is 15 years if real estate is involved. Since the TP documentation is part of the records of a taxpayer, this 7 year period also applies to the TP documentation.

2.6 Frequency of documentation updates

In practice, TP documentation should be updated every few years to account for normal business and market developments. A significant change in the facts and circumstances could also lead to an update of the documentation.

The MF, LF and CbC report must be updated every year, because they relate to a particular fiscal year.

2.7 Tax return disclosures

Belgian corporate taxpayers have the option to attach the LF as an annex to their annual Belgian corporate tax return. However, if they do not do so, the LF in any event needs to be filed via an electronic platform within the same deadline as the one applicable to file the corporate income tax return.

2.8 Burden of proof

It is up to the taxpayer to prove that any applied inter-company TP is at arm's length. Hence the need for qualitative and robust TP documentation.

2.9 Penalties

2.9.1 General

If the TP documentation requirements are infringed, a fine of EUR 1,250 can be due upon the 2nd infringement, but if the Belgian tax authorities also demonstrate bad (incl. tax evasion) intentions in the hands of the taxpayer, a fine of EUR 12,500 can be due as of the 1st infringement. As of the 2nd infringement and in case of bad intentions, the fine goes up to EUR 25,000. Upon infringement of the TP documentation requirements, but without bad intentions, the fine goes up as of the 2nd infringement.

2.9.2 Penalties in case of a TP-adjustment

In case of a TP adjustment, standard tax increases varying between 10% and 200% of the adjustment may be applied.

2.10 Increased focus of Belgian tax authorities on TP aspects

We would like to share with you the following recent trends on the market:

- Within the Belgian tax authorities, there is a special team that is exclusively specialised in TP matters. Specifically, as of 2018 this team has increased its headcount from 27 to 42 TP tax inspectors to be fully equipped to carry out TP tax audits;
- The co-operation between the specialised TP team of the Belgian tax authorities and the latter's Departments for resp. "Big Companies" and the "Special Tax Inspection" (BBI/ISI: this is a Department focusing on the bigger cases of tax evasion and tax avoidance) has been extended. To illustrate: these teams will have common training sessions and will carry out joint tax audits;
- Going forward, the specialised TP team will adopt a new tax audit methodology. Before, approximately 100 companies per annum that were selected at random received a detailed TP questionnaire. Conversely and going forward, companies and PEs will be selected for TP tax audit purposes based on information derived from e.g. a LF, MF and/or CbC Report;
- In February 2020, the Belgian tax authorities have published a circular letter elaborating on the TP principles applicable to multinationals. The purpose of this circular letter is to provide an overview of the most important principles derived from the OECD guidelines TPG 2017. The Belgian tax authorities align themselves with these TP principles and guidelines, but also provide more insight in some special topics, including amongst others TPG 2017 and the recent guidelines relating to financial transactions. In addition, in this circular letter,

the Belgian tax authorities also elaborate on the attribution of profit to Belgium based PEs in view of the determination of the PE's taxable basis.

2.11 Use of most reliable information

With regard to the benchmarking analysis to be made, the OECD prefers to use the most reliable information available. In this regard the BEPS-report states the following "The requirement to use the most reliable information will usually…require the use of local comparables over the use of regional." (BEPS Action 13, p. 24-25). However, local comparables may not be sufficiently available. If local comparables are insufficiently available, regional comparables are allowed.

In case of Belgium, (Western) European comparables are generally accepted.

2.12 Languages

The TP reporting can be made in English or in one of the 3 Belgian official languages (being Dutch, French or German). If the TP reporting is prepared in English, the Belgian tax inspector may ask for a translation into one of the 3 Belgian official languages upon a tax audit.

2.13 Confidentiality

The Belgian tax authorities will treat the TP documentation confidentially. The tax authorities can only exchange the TP documentation with the tax authorities of another country if there is a legal basis. This legal basis can be found in Belgian domestic tax law, a tax treaty or a EU Directive. The TP documentation is not available to the public.

3. Standards with respect to the content of transfer pricing documentation

The Belgian TP documentation standards are published in the Belgian Law of 1 July 2016 and 3 Royal Decrees dated 28 October 2016. The Royal Decrees provide information and models regarding the forms to be filed and further clarification is provided in the circular letter published in June 2020. The English version of these models are included in sections 3.1 (Master File) and 3.2. (Local File) hereafter:

3.1 Master File

The following information should be included in the MF (Form 275MF):

1. Organisational structure

Chart illustrating the MNE's (multinational enterprise's) legal and ownership structure and geographical location of operating entities.

2. Description of the MNE's business(es)

General written description of the MNE's business including:

a) Important drivers of business profit

b) A description of the supply chain for the Group's five largest products and/or service offerings by turnover plus any other products and/or services amounting to more than 5 percent of group turnover. The required description could take the form of a chart or a diagram

c) A list and brief description of important service arrangements between members of the MNE Group, other than research and development (R&D) services, including a description of the capabilities of the principal locations providing important services and TP policies for allocating services costs and determining prices to be paid for intra-group services

d) A description of the main geographic markets for the Group's products and services that are referred to under b

e) A brief written functional analysis describing the principal contributions to value creation by individual entities within the Group, i.e. key functions performed, important risks assumed, and important assets used

f) A description of important business restructuring transactions, acquisitions and divestitures occurring during the tax year

3. MNE's intangibles (as defined in Chapter VI of the OECD TP Guidelines for MNE's and Tax Administrations)

a) A general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management

b) A list of intangibles or groups of intangibles of the MNE group that are important for TP purposes and which entities legally own them

c) A list of important agreements among identified associated enterprises related to intangibles, including cost contribution arrangements, principal research service agreements and licence agreements

d) A general description of the Group's TP policies related to R&D and intangibles

e) A general description of any important transfers of interests in intangibles among associated enterprises during the tax year concerned, including the entities, countries, and compensation involved

4. MNE's intercompany financial activities

a) A general description of how the Group is financed, including important financing arrangements with unrelated lenders

b) The identification of any members of the MNE Group that provide a central financing function for the Group, including the country under whose laws the entity is organised and the place of effective management of such entities

c) A general description of the MNE's general TP policies related to financing arrangements between associated enterprises

5. MNE's financial and tax positions

a) The MNE's annual consolidated financial statement for the tax year concerned if otherwise prepared for financial reporting, regulatory, internal management, tax or other purposes

b) A list and brief description of the MNE Group's existing unilateral advance pricing agreements (APAs) and other tax rulings relating to the allocation of income among countries

3.2 Local File

The following information should be included in the LF (Form 275 LF):

1. General company information

a) A description of the management structure of the Belgian company, i.e. a description of the departments/ divisions/sections of the Belgian company and the name of the manager of each department/division/section

b) A description of the Belgian organisational structure, i.e. an overview of the direct shareholders or the head-office of the company

c) A description of the direct shareholdings over which the company has direct control

d) A description of the Belgian reporting structure within the Belgian company and from the Belgian company towards foreign countries

e) A description of the most important activities of the Belgian company

f) An overview of the most important competitors

g) Key data of the Belgian company, i.e. ultimate parent entity, reporting structure, foreign head-office and foreign permanent establishments, restructurings

h) Overview of transactions, both related and unrelated (only if the company is not required to submit full model accounts with the Central balance sheet Office of the National Bank of Belgium)

2. Detailed information about each business unit which exceeded the threshold for cross-border transactions with group entities in the last completed financial year

a) A description of the activities per business unit

b) An overview of transaction details, both related and unrelated per business unit

c) An overview of related cross-border goods transactions per business unit during the current taxable period

d) An overview of related cross-border service provision transactions per business unit during the current taxable period

e) An overview of related cross-border financial transactions per business unit during the current taxable period

f) An overview of other related cross-border transactions per business unit during the current taxable period

g) An overview of related loans per business unit

h) An overview of related cash pooling per business unit

i) An overview of related trade receivables and payables per business unit

j) A description of the TP methodology and studies per business unit and per nature of transaction

k) An overview of cost contribution agreements, advance pricing agreements, rulings and in-house (re)insurance policies

4. Country-by-Country reporting standards

4.1 Threshold and required content

A MNE Group with a consolidated group revenue of more than EUR 750 million should provide the Belgian tax authorities with a CbC report.

The following information should be included in the CbC report (Form 275 CbC):

The report contains the following information about the MNE:

a) For each jurisdiction in which the MNE is active, information about the revenue, the earnings (losses) before tax, the amount of income tax paid, the accrued income tax, the stated capital, the accumulated earnings, the number of employees and the tangible assets other than cash and cash equivalents

b) A description of every Group entity of the MNE mentioning the tax jurisdiction of residence, and if different, the state under whose law the Group entity is established and the main business or operations of that Group entity

4.2 Notification requirement for subsidiary companies

In principle, the CbC report is filed by the ultimate parent company of the MNE Group in its state of residence. The state of residence will, in turn, exchange the CbC report automatically with the Belgian tax authorities.

In principle, a Belgian ultimate parent company needs to provide the Belgian tax authorities with the CbC report. The Belgian tax authorities will automatically exchange this report with the jurisdictions in which the MNE Group is active and with which Belgium has concluded an Agreement for Automatic Exchange of Information.

In addition, a Belgian tax resident Group entity (not being the ultimate parent company) or Belgian PE is required to provide the Belgian tax authorities with the CbC report if:

1. The foreign ultimate parent company is not required to provide the tax authorities with a CbC report in its tax residence country, or
2. The jurisdiction of the ultimate parent company has at the latest 12 months after the reporting period no qualifying Exchange of Information Agreement with Belgium, or
3. The jurisdiction of the ultimate parent company is systematically failing to exchange CbC reports and the Belgian tax authorities have informed the Belgian group entity thereof.

In the aforesaid 3 cases, the Belgian group entity or Belgian PE does not have to file a CbC report after all if such report is provided by a “surrogate ultimate parent company” in the latter’s country of tax residence.

Specifically, if a Belgian tax resident affiliate or Belgian PE of a MNE Group will not file the CbC report in Belgium, that affiliate or PE will have to timely inform the Belgian tax authorities via a CbC notification (“CbC not.”) form what (ultimate or surrogate) parent company will file the CbC report in the latter’s qualifying tax residence country. On this point, Belgian tax law has been amended introducing the tolerance that no CbC not. form has to be filed with the Belgian tax authorities after all in case the data as mentioned in the CbC not. form relating to the prior financial year are still the same. The conditions for such tolerance need to be verified each financial year by the Belgian group affiliates.

Brazil

MEMBER FIRM

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1. Introduction

1.1 Legal context

The main federal law regulating transfer pricing rules in Brazil is Law No. 9,430/1996. Federal Law 12,715, which was published on 17 September 2012, also introduced significant changes to the Brazilian transfer pricing rules.

To regulate Brazilian transfer pricing, the Brazilian Federal Revenue Agency (“FRB”) has enacted important Normative Instructions such as No. 1,312/2012, updated by Normative Instruction No. 1,870/2019.

Brazil’s transfer pricing rules diverge from international standards, including the Organisation for Economic Co-operation and Development (“OECD”) Guidelines. However, the OECD Guidelines can be applied to assist in the interpretation of certain topics, if it does not contravene Brazilian legislation. Brazil’s TP rules do not adopt the internationally accepted arm’s-length principle. Instead, Brazil’s TP rules define a maximum price for deductible expenses on inter-company import of goods, services, rights and interest payments and minimum gross income floors for inter-company export transactions.

Brazil’s TP rules do not apply to domestic inter-company transactions.

The transactions subject to TP rules must be documented on a strict transactional basis and fixed statutory profit margins apply. The FRB must evidence its compliance with at least one of Brazil’s statutory transactional methodologies for each imported or exported product or service. Further details are provided in Section 5 below.

1.2 Practical context

While incorporating transaction-based methods, Brazilian TP rules exclude profit-based methods. This makes it a challenge for entities operating in Brazil to comply with local rules and at the same time avoid double taxation issues.

Despite Brazil generally not adapting OECD standards, in August 2016, the executive branch enacted Decree No. 8,842, which enforced the OECD’s Convention on Mutual Administrative Assistance in Tax Matters as from 1 October 2016.

In 2016 the FRB issued Normative Instruction No.1,680/2016, which regulates Common Reporting Standards in accordance with Action 13 of the BEPS Act, and Normative Instruction No.1,681, which imposes a mandatory country-by-country report, electronically submitted to the tax authorities through a regular administrative obligation platform (“ECF/SPED”).

The available mechanisms to resolve transfer pricing disputes in Brazil are rulings and Mutual Agreement Procedures. There are no Advance Pricing Agreements in Brazilian TP legislation. In 2016, to demonstrate Brazil’s commitment to the BEPS project and its intention to move closer to the OECD, the FRB published Normative Instruction no.1,669/2016 to implement MAP in Brazil.

On 29 November 2018, the FRB published Normative Instruction No. 1,846/2018, which replaced IN 1,669/16, and made some changes that allow more taxpayers to access the MAP.

2. Formal requirements

2.1 Which taxpayers

The rules are applicable to imports and exports of products, services and rights, charged between a Brazilian company and one of the following:

- A related party* domiciled abroad;
- A third-party resident in a favourable or low tax jurisdiction (as defined in Brazilian legislation);
- A party benefiting from a privileged tax regime.

Brazil's transfer pricing rules do not apply to domestic inter-company transactions.

The main purpose of these rules is to determine the criteria for evaluating international transactions by assessing whether the prices agreed between the relevant parties are higher or lower than legal parameters and establishing a minimum price for export transactions and a maximum price for import of goods, services, rights and interest payments. TP rules also cover inter-company loans.

The FRB has issued lists that should be used as guidance for determining which countries, jurisdictions and tax regimes are included in the legal definition of a favourable tax jurisdiction and a privileged tax regime.

*Definition of Brazilian Related Parties:

- The foreign parent company of a Brazilian company;
- A foreign subsidiary or branch of a Brazilian company;
- The foreign controller of or affiliate to a Brazilian company;
- A foreign company controlled by or affiliated to a Brazilian company;
- A foreign company that is under control or management of the same company that controls or manages a Brazilian company;
- A foreign company of which at least 10% of its capital and the capital of a Brazilian company belong to the same shareholder;
- A foreign company that together with the Brazilian company controls a third company or the aggregate participation of its capital follows the concept of an affiliated company;
- A foreign associated company (consortium or condominium);
- A foreign exclusive agent of the Brazilian company;
- A foreign company for which the Brazilian company is an exclusive agent;
- An exclusive agent, distributor or dealer of a Brazilian company;
- A foreign company for which the Brazilian company is an exclusive agent, distributor or dealer;
- A non-resident individual, relative, spouse or companion of the manager, the director, or the shareholder-controller of the Brazilian company.

2.2 Aggregation of transactions

The rules require that a Brazilian company corroborates its inter-company import and export prices on an annual basis by comparing the actual transfer price with a parameter price determined under any one of the Brazilian equivalents of the OECD's comparable uncontrolled price method (CUP method), resale price method (RPM) or cost plus method (CP method).

Taxpayers are required to elect and apply the same method for each individual product or type of transaction consistently throughout the respective fiscal year. However, taxpayers are not required to apply the same method for different products and services.

2.3 Deadlines (timing)

Related-party transactions are required to be disclosed on the annual tax return which must be submitted by July following the calendar year in which the transactions were performed. Transfer prices may be reviewed as part of a comprehensive tax audit or through a specific TP audit.

For Brazilian tax purposes, TP checks take place on an annual basis, except in case of incorporation or closure of a company and/or suspected fraud.

2.4 Materiality

In the case of export sales, the regulations provide a safe harbour whereby a taxpayer will be deemed to have an appropriate transfer price. This applies when the average export sales price is at least 90% of the average domestic sales price of the same property, services or intangible rights on the Brazilian market during the same period under similar payment terms.

There is a secondary compliance rule (herein referred to as the 'relief of proof rule') whereby a taxpayer may be relieved of the obligation to substantiate the export sales price to foreign-related persons using some statutory methods.

If a taxpayer can meet the relief of proof rule, it may prove that the export sales prices charged to related foreign persons are adequate for Brazilian tax purposes using only the export documents related to those transactions.

The relief of proof rules do not apply to export transactions carried out with companies located in low-tax jurisdictions or beneficiaries of a privileged tax regime.

For inter-company import and export transactions, even if the actual transfer price exceeds the determined transfer price (for import transactions) or does not exceed the determined transfer price (for export transactions), no adjustment will be required as long as the actual import transfer price does not exceed the determined transfer price by more than 5% or as long as the actual export transfer price exceeds the calculated transfer price by more than 5%.

Brazilian legislation provides a simplification to the documentation requirement for export transactions if the income derived from those transactions represents less than 5% of the total net income of the entity. This simplification does not apply to commodities transactions.

2.5 Retention of documents

The statute of limitations for taxes and contributions levied on income is 5 years starting from the taxable event. Therefore, Brazilian taxpayers are required to keep documents for at least 5 years. Since the TP documentation is part of the records of a taxpayer, this five-year period also applies to the TP documentation.

2.6 Frequency of documentation updates

TP documentation must be updated annually in July, in relation to the transactions performed during the previous calendar year. Once documentation has been submitted with the FRB, no further updates are required.

2.7 Tax return disclosures

Since 1999 information concerning TP must be included as part of the annual Corporate Income Tax Return. As of 2015 the corporate income tax return is submitted by taxpayers through a system called ECF. The ECF encompasses the information required for purposes of transfer pricing, Country-by-Country Reporting and a simplified Local File.

Brazilian TP legislation does not require taxpayers to prepare a Master file and a Local file consistent with Chapter V of the TPG.

Companies must provide detailed disclosure regarding their inter-company import and export transactions, the method applied to test the inter-company price for several import and export transactions, and the amount of any adjustments to income resulting from the application of the method to a specific transaction during each fiscal year.

2.8 Burden of proof

There are no statutory TP documentation requirements in place. Taxpayers are obliged to prove that they have complied with the TP regulations from the date the annual income tax return is filed.

However, the fact that the Brazilian rules allow taxpayers to choose between several methods for each type of transaction provides properly prepared taxpayers with an advantage over the tax authorities. Proper and timely preparation enables taxpayers to collect the necessary information and choose the most appropriate method in advance.

According to the legislation in force, the tax authorities can disregard information when considered unsuitable or inconsistent. Assuming the methodology is applied and documented correctly, taxpayers can satisfy the burden of proof and push the burden back to the tax authorities. This also applies when a taxpayer can satisfy the relief of proof rule for inter-company export transactions.

2.9 Penalties

2.9.1 General

There is no specific penalty in place for non-compliance with TP documentation requirements. In case of untimely filing, taxpayers are subject to a penalty of BRL 1,500 (approximately USD 450) for each month or infraction of delay. In case of omitted, incomplete or inaccurate information, taxpayers are subject to a 3% penalty on the value of the commercial or financial transactions omitted.

In case of a tax assessment, taxpayers must present a new calculation and its supporting documentation within 30 days of the first one being rejected. The tax authority is not required to use the most favourable method available. Consequently, the tax authorities will most likely use the method that is most easily applied under the circumstances and assess income tax and social contributions at the maximum aggregate rate of 34%. The objective of an assessment would not necessarily result in the true arm's-length price but would be based on an objective price determined by the regulations.

2.9.2 Penalties in case of a TP-adjustment

If the Brazilian tax authorities were to conclude that there is a deficiency and makes an income adjustment, penalties may be imposed at a rate of 75% of the assessed tax deficiency. The rate may be reduced by 50% of the penalty imposed if the taxpayer agrees to pay the assessed tax deficiency within 30 days without challenging the assessment. If during a tax audit the taxpayer does not present the supporting documentation related to the transfer pricing adjustments, the general 75% penalty rate is increased to 112.5%.

2.9.3 CbC-reporting

In case of failure to comply with CbC reporting, or existence of inaccuracies or omissions, the company must provide clarification within the time limits stipulated by the tax authority and shall be subject to the following fines:

i. By extemporaneous presentation: from BRL 500 to BRL 1,500 per calendar month or infraction.

ii. Failure to comply with CbC reporting or to provide clarifications within the periods stipulated by the tax authority: BRL 500 per calendar month; and

iii. Omission of information, provision of inaccurate or incomplete information: 3% but not less than BRL 100, of the omitted, inaccurate or incomplete amount.

2.10 Interest

In case of a TP adjustment, interest will be imposed on the amount of the tax deficiency from the date the tax would have been due if it had been properly recognised. In this instance, the interest rate used is the federal rate established by the Brazilian Central Bank, known as SELIC.

2.11 Use of most reliable information

For Brazilian TP purposes, choosing the more favourable method is the taxpayer's prerogative, and not a compulsory obligation imposed by the tax authorities.

The regulations require a Brazilian taxpayer to provide the TP calculation used to test inter-company transactions conducted with foreign related parties, along with supporting documentation. If the taxpayer fails to provide complete information regarding the methodologies and the supporting documentation, the regulations grant the tax inspector the authority to make a TP adjustment based on available financial information by applying one of the applicable methods.

Companies must prepare the necessary information and have appropriate reporting systems and controls in order to provide reliable accounting information regarding all transactions conducted with foreign-related parties in advance to properly defend against an audit.

Brazilian taxpayers must therefore present supporting documents complying with the method established to determine the current price and the calculation reports related to the determination of the price to be used as parameter. This way, whenever required by the Brazilian tax authorities, supporting documentation cannot be useless or insufficient to demonstrate the correction of the calculations, and much less so fail to present useful data in order to permit verification of the calculations of the parameter price under the rules of the chosen TP method. Otherwise, non-compliance with this recommendation may result in arbitration of the parameter price.

With respect to proof of prices, it is important to mention that there is a mechanism in Brazil similar to the Advanced Pricing Agreements (APAs) but much more complex from an operational point of view and with a less favourable position. By making use of it, the profit margin and arbitration may be adjusted by the Ministry of Finance and will be launched in general, sectoral or by specific request, ex officio, in response to the request of a trade association representative of the economic sector or by request of the interested party. However, practice has shown that these are not easily issued by the tax authorities.

2.12 Languages

Most of the TP information is submitted in Portuguese, the official local language. The CbC Report can be submitted in Portuguese, Spanish or English.

2.13 Confidentiality

The information requested by the tax authorities to evaluate TP calculations may require the company to provide confidential data regarding the production cost per product, the prices charged in the domestic market, and the prices charged to foreign-related and independent parties. The Brazilian tax authorities will treat TP documentation as confidential.

3. Standards with respect to the content of transfer pricing documentation

There are no statutory TP documentation requirements in place.

4. Country-by-Country reporting standards

4.1 Threshold and required content

Multinational entities in Brazil with revenue equal to or greater than BRL 2,260,000,000 (approximately EUR 750 million, or its equivalent in the local currency of the jurisdiction of the ultimate parent entity) must prepare the Country-by-Country (CbC) reporting.

The CbC Report should contain various information and indicators related to the location of the multinational enterprise's (MNE) activities, the global allocation of income and taxes paid and due as well as all jurisdictions in which the MNE operates and all constituent entities (including permanent establishments) located in those jurisdictions. The economic activities they perform should also be identified.

5. Brazil's TP-methods

Brazilian companies may adopt any TP method and the tax authorities may only change the method chosen if the company does not provide documentation justifying the calculation presented. Exceptions are the mandatory method for transactions involving certain types of commodities, as well as the TP on interest paid on financial transactions, subject to a specific methodology.

5.1 Import of goods, services or rights

Deductible import prices relating to the acquisition of property, services and rights from foreign-related parties should be determined under one of the following Brazilian methods:

- **Comparable independent price method (PIC)** – The Brazilian equivalent of the comparable uncontrolled price (CUP).
- **Resale price less profit method (PRL)** - The Brazilian equivalent of the resale price method (RPM). As of 1 January 2013, a 20% to 40% gross profit margin is required for diverse industries/sectors.
- **Production cost plus profit method (CPL)** - The Brazilian equivalent of the cost plus (CP) method. Production costs for application of the CPL are limited to costs of goods, services, or rights sold. Operating expenses, such as research and development (R&D), sales and administrative expenses, may not be included in the production costs of goods sold to Brazil.
- **Quotation price on imports method (PCI)** - This new Brazilian method, introduced by Law 12715/12, must be applied to test imports of commodities that are quoted on a commodities exchange (from 2013 onwards).

5.2 Export of goods, services or rights

- **Export sales price method (PVEx)** - The Brazilian equivalent of the CUP method.
- **Resale price methods - The Brazilian versions of the RPM for export transactions:**
  - A profit margin of 15%, calculated by reference to the wholesale price in the country of destination (wholesale price in country of destination less profit method, or **PVA**).
  - A profit margin of 30%, calculated by reference to the retail price in the country of destination (retail price in country of destination less profit method, or **PVV**)
- **Purchase or production cost-plus taxes and profit method (CAP)** - The Brazilian equivalent of the CP method.
- **Quotation price on exports method (PECEX)** - This new Brazilian method, introduced by Law 12715/12, must be applied to test exports of commodities that are quoted on a commodities exchange (from 2013 onwards).

5.3 Intercompany loans – TP rules in Brazil

As of January 2013, interest expenses payable to related parties outside Brazil are subject to TP deduction limits, apart from and on top of thin capitalisation rules. If the recipient is located in a tax haven or privileged tax regime jurisdiction, thin capitalisation and transfer pricing rules apply even if the lender is not a related party.

For transfer pricing purposes, interest paid or credited to a related party located abroad will be deductible up to an amount that does not exceed the rate determined based on the following rules, plus a 3.5% spread:

- In case of a loan denominated in US dollars and subject to a fixed interest rate: the rate corresponding to the Brazilian sovereign bonds issued in US dollars on foreign markets;
- In case of a loan denominated in Brazilian Real and subject to a fixed interest rate: the rate corresponding to the Brazilian sovereign bonds issued in Reals on foreign markets;
- In all other cases, LIBOR for a period of six months.

Bulgaria

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1. Introduction

1.1 Legal context

The main legislation on transfer pricing (TP) in Bulgaria consists of the Corporate Income Tax Act (CITA) and the Tax and Social Security Procedures Code (TSSPC).

As from 1 January 2020, the amendments in the TSSPC introduce new TP rules requiring qualifying taxpayers to prepare and regularly update their TP documentation. The new rules implement the mandatory TP documentation requirements and define the taxpayers that should prepare TP documentation comprising both a Local and a Master file. In contrast to the previous regime, the new requirements are binding, quite detailed and associated with significant penalties in case of non-compliance.

The recent amendments align the Bulgarian TP regime with the OECD three-tier documentation standard.

1.2 Practical context

The new TP rules in Bulgaria aim to place the main compliance burden of the enhanced requirements on large multinational enterprises (MNEs) and introduce detailed requirements as to the content of the Local and Master files, which should be updated and available at the time of submitting the respective annual corporate tax return. Country-by-Country (CbC) reporting also remains mandatory.

2. Formal requirements

2.1 Which taxpayers

The new amendments in the Law stipulate that Bulgarian entities (including non-residents with a Bulgarian permanent establishment) will be required to prepare a Local File.

The Local file should be prepared in case the intra-group transactions for the year exceed the below-mentioned thresholds:

- BGN 400,000 for transactions related to sales of goods;
- BGN 200,000 for other types of transactions;
- In case of a loan, BGN 1 million concerning capital or BGN 50,000 concerning interest expense/income.

However, a taxpayer will not be obliged to prepare a Local file if at least two of the below-mentioned threshold amounts are not exceeded (also known as the SME exemption):

- Net book value of assets: BGN 38 million (approximately EUR 19 million);
- Net sales: BGN 76 million (approximately. EUR 39 million); and
- Average number of employees for the reporting period: 250.

There are also some cases in which a taxpayer is exempt from the obligation of preparing a TP file, irrespective of the above-mentioned thresholds:

- The taxpayer only has domestic related-party transactions;
- The transactions are performed with individuals (except for sole traders);
- The taxpayer is exempt from Corporate Tax under Part Two, Chapter Twenty Two, Section II of the CITA; or
- The taxpayer is subject to an alternative tax under Section V of the CITA.

2.2 Materiality levels

The amended TSSPC measures the materiality of the concerned inter-company net value transactions (before value added tax and excise duties, where applicable), as follows:

- for sales of goods - BGN 400,000 per annum;
- for provision of services and all other transactions - BGN 200,000 per annum;
- for inter-company financing - a principal of at least BGN 1 million or interest of BGN 50,000 per annum.

2.3 Aggregation of transactions

The above-listed thresholds are calculated separately for each controlled transaction. An exception is made when two or more transactions with one or more related parties are concluded under the same or similar terms. In that case, the thresholds are applied on the aggregate value of those transactions.

2.4 Deadlines

The deadline for the preparation of the Local file is March 31 of the following year, the same date as the deadline for filling the Corporate Tax Return, whereas the Master file must be prepared by March 31 of the year following the one of the local file preparation. The TP documentation is submitted to the tax authorities upon request, for which the deadline is 14 days after receiving the notification for this during a tax audit.

The CbC Reporting must be submitted within 12 months of the end of the MNE’s tax year by:

- The parent company which is a local resident for tax purposes;
- The parent company when it is not a local resident for tax purposes, or by the tax authorities from the country, in which the parent company is a local resident;
- The entity that is part of the MNE and a local resident for tax purposes, but not the ultimate parent, when the parent company will not submit the report for various reasons.

2.5 Retention of documents

All entities must retain all accounting and tax records (including TP documentation) for at least 10 years.

2.6 Frequency of documentation updates

As a general rule, all TP documentation should be updated after the end of the tax year in which the relevant events occur.

2.7 Tax return disclosures

All entities disclose information about transactions with related parties annually in the Tax Return for Corporation Tax purposes.

2.8 Penalties

2.8.1 General

In case of failure to submit the TP file by a taxpayer to the tax authorities, a penalty of 0.5% of the total amount of transactions that should have been documented may be imposed.

If a taxpayer fails to submit the Master file, a penalty between BGN 5,000 and BGN 10,000 may be imposed. Finally, in case of the submission of incomplete or incorrect data, the penalty ranges from BGN 1,500 to BGN 5,000.

Furthermore, an entity involved in a “hidden profit distribution” as defined by CITA would be subject to an administrative sanction amounting to 20% of the expense and classified as a hidden profit distribution (unless voluntarily disclosed to the tax authorities). Both the expense classified as a hidden profit distribution and the sanction would be non-deductible for corporate income tax purposes. In addition, the expense will be considered a deemed dividend and thus subject to a 5% withholding tax.

Business expenses may be classified as a hidden profit distribution if an entity has:

- Accrued, paid or distributed to the benefit of the entity’s shareholders or their related parties amounts that are not business-related or are in excess of market price levels
- Accrued interest costs on debt financing if at least three of the following criteria are met:
  1. The loan principal exceeds the equity of the borrower as of 31 December of the preceding year;
  2. The repayment of the principal or the interest on the loan is not limited by a fixed time period;
  3. The loan repayment or interest payment depends on whether the borrower ended on a profit position;
  4. The repayment of the loan depends on satisfaction of other creditors’ claims or on payment of dividends;

2.8.2 Penalties in case of a TP-adjustment

We refer to the section above.

2.8.3 CbC-reporting

- A reporting entity that has an obligation to file a CbC report in Bulgaria but fails to do so within the stipulated deadline will be subject to a fine ranging from BGN 100,000 to BGN 200,000.
- A reporting entity that files a CbC report but omits or declares false or incomplete data will be subject to a fine ranging from BGN 50,000 to BGN 150,000. The same fine will be applied if the incomplete or wrong data are due to a refusal of the ultimate parent company to come forward with the required data;
- A constituent entity that has an obligation to file a CbC report but does not notify the Bulgarian tax authorities if the ultimate parent company has refused to provide the requested information will be subject to a fine of BGN 10,000;
- A constituent entity that fails to notify the Bulgarian tax authorities whether it or some other group entity will file the CbC report will be subject to a fine ranging from BGN 50,000 to BGN 150,000. In case of a repeated offence higher fines may be imposed.

2.9 Use of most reliable information

The Bulgarian TP Guidelines state that comparable data could be obtained both from internal and external transactions and the source database should be publicly available. In addition, according to the Guidelines, exemplary sources of comparable transactions data could be the National Statistical Institute, local industry associations and others.

It is the NRA transfer pricing inspectors' recent practice to challenge benchmarking analyses for lack of Bulgarian data and analyses of the local market players. In such cases, the revenue authority performs its own benchmark analysis and test of the profitability of the local entities based on local business databases. In this respect, it is highly recommended that the benchmark analysis contained in the TP documentation of the taxpayer reviews Bulgarian comparables and gives these precedence.

2.10 Languages

All documents must be in Bulgarian. If there are any original documents in a different language, a translation should be made by a certified translator.

2.11 Confidentiality

Confidentiality must be maintained under all circumstances by the tax authorities during a tax inspection. The information acquired should not be disclosed to third parties unless there is a legal requirement to do so.

3. Standards with respect to the content of transfer pricing documentation

Taxpayers not included in the exemptions above should prepare a Local file (and a Master file, where applicable) in order to support the arm`s-length nature of their material inter-company transactions with related companies or sole traders, domestic or cross-border. Transactions with individuals other than sole traders are explicitly excluded from the new documentation requirements.

The amendments to Bulgarian legislation have introduced detailed requirements for the content of the Local and Master files, largely in line with the recommended three-tier documentation standard of the OECD (Annex I and II to Chapter V of the 2017 TP Guidelines).

4. Country-by-Country reporting standards

4.1 Threshold and required content

All MNEs with consolidated group revenue of more than EUR 750 million whose ultimate parent company is not a local resident for tax purposes, or with consolidated group revenue of more than BGN 100 million whose ultimate parent company is a local resident for tax purposes, should complete a CbC report containing:

- For each country in which the MNE operates, information about revenue, earnings before tax (EBT), paid income tax, accrued income tax, stated capital, accumulated earnings, number of employees and tangible assets other than cash and cash equivalents
- A list of all entities within the MNE on an aggregate basis with the tax jurisdiction of residence of each entity and the main business or operations of that entity.

4.2 Notification requirement for subsidiaries

A declaration must be completed by the end of the reporting tax year (31st December) by all subsidiaries that are local residents. The purpose of this declaration is to inform the National Revenue Agency which is the ultimate parent company and which company will submit the CbC report.

A subsidiary should complete the CbC report when:

- The ultimate parent company is not obliged to submit a CbC report;
- An international agreement between Bulgaria and the country in which the parent company is resident has entered into force, but does not contain a clause to submit a CbC report;
- The country in which the parent company is resident is systematically uncooperative in exchanging CbC reporting.

Chile

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1. Introduction

1.1 Legal context

The transfer pricing rules in force, last amended in 2012, are stated in Article 41E of the Income Tax Law (ITL). Circular 29 of June 14, 2013, issued by the Servicio de Impuestos Internos (IRS) provides guidance on its application and operation.

Article 41 E of ITL states that the IRS may challenge established prices, values or yields, or establish them if necessary, where cross-border transactions and those arising from entrepreneurial reorganisations or restructuring, between businesses domiciled, resident or established in Chile, engaged into with related parties abroad have not been carried out at normal market prices, values or returns.

The regulations shall be applied with respect to entrepreneurial reorganisations or businesses indicated when, in the opinion of the IRS, an overseas transfer has occurred entailing goods or activities susceptible to generate taxable income in the country, and it is believed that if the goods have been transferred, the rights have been ceded, the contracts have been concluded or the activities have been developed between independent parties, a different price, value or profitability would have been agreed. To analyse these effects, the ITL proposes several methods, that will be identified further in this Chapter.

Normal market prices, values or returns are those which would have been agreed on by independent parties in comparable transactions and circumstances, taking into account, for example, the characteristics of the relevant markets, the roles assumed by the parties, the specific characteristics of the goods or services contracted and any other reasonably relevant circumstance. When such operations have not been carried out at their normal market prices, values or profitability, the IRS may challenge them in accordance with the provisions of the mentioned article 41.

The IRS must summon taxpayers, in accordance with Article 63 of the Tax Code, to deliver all records regarding market price, value or profitability in the context of overseas transactions with related parties. The transfer pricing methods are the comparable uncontrolled price (CUP), resale price minus, cost plus, profit split, the transactional net margin method (TNMM) and the residual method.

1.2 Practical context

Chile is an OECD member country and although the Income Tax Law does not mention the OECD Guidelines they should be regarded as relevant when dealing with Chilean Transfer Pricing matters. Regarding documentation requirements, Article 21 of the Tax Code contains a general rule stating that is for the taxpayer to prove with documents, accounting records or other means established in the law, as necessary or mandatory for him, the truth of his declarations or the nature of the backgrounds and amount of the operations that must be used for the tax calculation.

The IRS may also ask the taxpayer for additional documentation during a tax audit (Article 35 of the Tax Code). The ITL states that taxpayers must file one or more annual affidavits regarding transfer pricing according to the OEDC guidelines, which are required by the IRS. One of them is Affidavit No. 1907 containing information on the operations subject to transfer pricing rules. However, the IRS has not issued instructions on the specific or standard documentation to support the transfer pricing affidavit. However, the IRS has stated the obligation to submit an additional annual affidavit (Affidavit 1937) Country by Country Report (CbC), in line with OECD Action 13 Documentation on Transfer Pricing and CbC Reporting, which enhances transparency for the tax administration taking into account the compliance cost for enterprises. Also, the IRS has recently issued two additional affidavits, i.e. Affidavit 1950 (Master File) and Affidavit 1951 (Local File). The latter complete the three-tiered documentation providing taxpayers with a detailed view on transfer prices and offering useful information in order to assess the risks of their operations with related companies.

The information provided through these affidavits may also be used by the IRS for the examination of income tax, taxes on sales and services as well as donations and inheritance tax.

2. Formal requirements

2.1 Which taxpayers

Taxpayers that enter into cross-border transactions with a related enterprise are required to keep available for the IRS all the documentation on the basis of which the methods stated in the ITL have been applied or elaborated upon.

If the IRS challenges the respective prices, values or profitability, it must notify the taxpayer in order to allow him to provide any information that will prove that its operations with related parties have been made at prices, values or taking into account normal market returns, according to methods stated in the IT which are as outlined in the OECD Guidelines. The taxpayer should use the most appropriate method considering the characteristics and circumstances of the particular case. For this purpose, the advantages and disadvantages of each method must be taken into account; the applicability of the methods in relation to the type of operations and the circumstances; the availability of relevant information; the existence of comparable operations and ranges and comparability adjustments.

Taxpayers may provide the IRS with a transfer pricing study on the determination of prices, values or returns of their transactions with related parties.

The application of the methods or presentation of studies does not relieve the taxpayer of its obligation to keep at the disposal of the IRS all documentation under which such methods have been applied or elaborated upon.

A transfer pricing study should contain an overview of the company, an analysis of the relevant industry (or industries), a functional analysis, the basis and justification for the selected pricing method, a description of comparable companies, provide supporting documentation, and be completed in Spanish.

The IRS may request information from foreign authorities regarding transactions that are subject to transfer pricing controls.

2.2 Deadlines (timing)

The Tax Code states several circumstances under which the IRS may ask for documentation or information. However, it is important to bear in mind that when the IRS sends a notification to the taxpayer to provide all background information regarding transfer pricing, the legal term to respond is one month, extendable by another month.

2.3 Materiality

Annual affidavit

In accordance with Article 41E ITL an annual affidavit must be submitted by the last working day of June. These are the taxpayers subject to the transfer pricing rules that have to file an affidavit, with the information required by the IRS:

- Taxpayers who, as per 31st December of the reporting year, belong to Medium or Large Business segments and have carried out operations in that year with related parties not having their domicile or residence in Chile, in accordance with the rules established in article 41 E of the ITL;
- Taxpayers not included in the above-mentioned segments and having reported transactions in the corresponding period with related parties not domiciled or residence in Chile for amounts greater than CLP 500,000,000 (approximately USD 650,000), or its equivalent according to the exchange parity between the national currency and the foreign currency in which said transactions were carried out, as per 31st December of the reporting year;
- Taxpayers not covered under the above-mentioned segments that have operations with people domiciled or resident in a territory or jurisdiction with a preferential tax regime described in article 41 H of the ITL.

Information required

The transfer pricing affidavit includes the following information:

- Identification of the taxpayer;
- Related party information (e.g. name, country, etc.) and the features of each transaction (nature, type, currency, etc.);
- The methodology used for calculating prices, profitability and returns;
- Information concerning intra-group services, financial transactions, royalties and commissions, etc.;
- Transfer pricing adjustments, if any, either in accounting records or in the taxable income determined;
- A business restructuring affecting the taxpayer's operation in Chile.

If the amount of operations of the same type (sales, purchases, interests, etc.) per each related company is less than CLP 200,000,000 (approximately USD 260,000) it will not be mandatory to report all the details indicated in the affidavit.

2.4 Penalties

2.4.1 Affidavit N°1907

When the transfer pricing affidavit is late, not filed, incomplete or incorrect, the penalty ranges from 10 to 50 Annual Tax Units (approximately USD 7,800 to USD 39,000), with a maximum of 15% of the equity for tax purposes or 5% of the effective capital, whichever is higher. A maliciously false affidavit is subject to higher penalties and a jail term (Article 41 E N°6 of the ITL).

2.4.2 Penalties in case of a TP-adjustment

When a tax adjustment is made by the IRS, it will send a payment order. The payment order will be for the tax outstanding (a single tax at a rate of 40%), inflation-linked adjustments, interest and a 5% penalty on the adjusted amount. Such fine cannot be applied if the documentation requested by the IRS during the tax audit has been duly and timely delivered.

3. Country by country reporting standards

3.1 Affidavit N° 1937

Chilean MNE groups with a consolidated revenue of more than EUR 750 million must submit annually to the IRS affidavit No. 1937 CbC Report containing financial and tax information, among other things. The obligation is on the parent company that consolidates the financial statements. However, a different entity of the group may be appointed to file the CbC report and notice of this must be given to the IRS within 30 days of the affidavit due date.

As with Affidavit No. 1907, Affidavit No.1937 has to be filed by the last working day of June (or September if an extension is requested).

3.2 Information required

The information comprehends the revenue and other income from business transactions with third parties, with related parties and the total amount; profit or loss for the year before income taxes; income tax paid in the fiscal year and income tax determined for the fiscal year (excluding deferred taxes); equity; retained profit; number of employees and tangible assets, other than cash and cash equivalents. Also, the affidavit requests information about each company of the group and the business activities conducted by them.

3.3 Penalties

Affidavit No.1937 will be considered part of Affidavit No. 1907 on transfer pricing. Consequently, the facts that cause the application of a penalty and the penalties themselves are the same as those described in paragraph 2.4.1 above.

4. Master File and Local File

4.1 Affidavit 1950 and Affidavit 1951

Subject to compliance with the same requirements and conditions established for the presentation of affidavits 1907 and 1937, Chilean MNE groups must file Affidavit 1950 and Affidavit 1951.

Affidavit 1950 (Master File) contains standardised information about all the members of a multinational group of companies. The Affidavit 1950 form must provide detailed information on the structure and organisation of the MNE group, contracts between related parties and transfer pricing agreements, as well as other group background information.

Annex 3 refers to the descriptive information and the documentation that must be submitted regarding affidavit 1950. The latter consists of the delivery of separate files with information on the group's corporate network; copy of agreements with related companies, advance pricing agreements and other agreements issued by a tax authority; annual consolidated financial statements, transfer pricing policies, and others. An electronic file will be available on the IRS website for the presentation of the files. Documents can be submitted in English or Spanish.

The Affidavit 1951 form (Local File) requires detailed information on the taxpayer, its operations, and economic-financial information (similar to Affidavit 1907). Documentation referring specifically to operations of at least CLP 200,000,000 (approximately USD 260,000) of the local taxpayer must be submitted. Credit and financial operations documents must be submitted regardless of their amount. Annex 6 refers to the descriptive information (e.g., details on the activity, business strategy, main competitors, analysis of linked operations, etc.) and the documentation that must be submitted regarding affidavit 1951. The latter consists of the delivery of separate files with information on the organisational structure, copy of contracts with related companies or detailed descriptions if they are not agreed in writing, amortisation tables, advance pricing agreements, annual individual financial statements of the local taxpayer, etc. The affidavit, its annex and the requested documentation must be delivered on an aggregate basis through the electronic file made available for this purpose on the IRS website. Documents can be submitted in English or Spanish.

The terms to file the affidavits and penalties when the affidavits are late, not presented, incomplete or incorrect are identical to those stipulated for affidavits 1907 and 1937.

China

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1. Introduction

1.1 Legal context

In 2009, the State Tax Authorities of China ("SAT") issued a transfer pricing (TP) Circular, Guo Shui Fa [2009] No. 2 ('Circular 2') that became effective from 1 January 2008 and is considered a pivotal step in the development of China's TP regime as it adopted a systematic approach and set out detailed rules on the administration of TP. One of the milestones of Circular 2 is to provide detailed instructions on the preparation of TP documentation. Following Circular 2, the SAT issued Public Notice [2016] No. 42 ('PN42') on 29 June 2016. PN42 made substantial changes to the Circular 2 rules and refined the reporting of related party transactions and the administration of TP documentation. It also introduced new TP compliance obligations including Country-by-Country (CbC) reporting (in line with BEPS 13), annual reporting forms for related-party transactions (RPT Forms) and TP documentation (which now includes the completion of a master file, local file and special issue file).

On 17 March 2017, the SAT issued new regulations to improve administration of Special Tax Investigation and Adjustment and Mutual Agreement Procedures (Public Notice [2017] No.6 ('PN6')). These regulations largely complete the revision of the TP specific clauses of Circular 2, and add to the TP framework set out in the previously issued PN42. PN6 has clarified certain key TP issues, as well as the methodology and procedures for special tax audits and adjustments. In making the changes, the SAT has generally incorporated positions taken in the Discussion Draft regarding intangible assets, related party services and the monitoring of profit levels, as well as the guidance around mutual agreement procedures. PN6 puts more emphasis on a risk-oriented tax administration system which aims to improve cooperation between enterprises and tax authorities, and overall compliance with the regulations. The regulation incorporates changes arising from the OECD's Base Erosion and Profit Shifting (BEPS) Actions 8 to 10 and Action 14.

1.2 Practical context

The new TP regulations also require taxpayers to provide analyses which are specifically related to the Chinese market such as labour cost saving and market premium etc. The new TP regulations constitute a milestone for localisation and implementation of BEPS Action 13 in China as well as provide a new landscape of TP administration in China.

2. Formal requirements

2.1 Which taxpayers

Based on China TP regulations, the thresholds for the preparation of TP documentation are listed below.

If the company meets either of the following criteria, it shall prepare a Master File:

- Have cross-border related party transactions, and belong to a group which has prepared the master file, or
- The total annual related party transactions exceed RMB 1 billion.

For the preparation of a Local File, the thresholds depend on the types of related party transactions, which are listed below:

- RMB 200 million for tangible assets transfer (in the case of tolling manufacturing, the total amount in the annual customs record including raw material should be counted);
- RMB 100 million for financial assets transfer;
- RMB 100 million for intangible assets transfer; and
- RMB 40 million for other related party transactions in total.

The special issue file is required for taxpayers who are engaged in a cost sharing agreement, or fall within the thin capitalisation threshold.

The new TP compliance regulations also require the submission of a country by country report if a Chinese resident company is the ultimate holding company of the group and aggregated revenue of all types shown on the annual consolidated financial statement for the last year exceeds RMB 5.5 billion or it is nominated as the reporting entity by the group.

Chinese companies that only have domestic related party transactions do not need to prepare a master file, local file and special issue file.

2.2 Aggregation of transactions

There is no clear rule on the separation analysis of each related party transaction. However, TP regulations do require taxpayers to present the financials by products and different types of business in the documentation. In practice, TP analysis is usually performed by the respective transaction type and sometimes transactions are jointly assessed.

2.3 Deadlines (timing)

For related party transactions carried out in a fiscal year, the Local File and Special Issue File should be completed by 30 June of the following year while the Master File should be completed within 12 months from the end of the same fiscal year of the group's ultimate holding company.

Timeframe

For the TP documentation, taxpayers should submit the TP report within 30 days upon the tax authorities' request.

When the company meets the criteria in 2.1, the CbC report is filed along with the annual related party transactions forms by the end of May of the following year.

If a resident company in China is designated by a multinational enterprise group as the reporting company of the CbC report, and the final holding company's fiscal year is different from that of the reporting company, it is required to submit the country report for the fiscal year that the ultimate holding company has ended before 31st December of the previous year. For example, if the final holding company's fiscal year ended by 30 June 2017 and the Chinese company is designated as the company to submit the CbC report: for calendar year 2017, the CbC report for the final holding company's fiscal year from 1 July 2016 to 30 June 2017 should be submitted to China tax authorities before 31 May 2018.

2.4 Materiality

Generally, Chinese TP regulations set the threshold for taxpayers to prepare TP documentation but the exact materiality on the transaction amount is not stipulated. In practice, however, the Chinese tax authorities often focus the investigation on taxpayers with material related party transaction amounts.

PN6 has given due consideration to enterprises with the following risk characteristics in the implementation of the special tax investigation:

a) The enterprise has large-amount related party transactions or has carried out various types of related party transactions;

b) The enterprise has had losses for a long time, makes meager profit or its profits fluctuate substantially;

c) Its profit level is lower than the industry level;

d) Its profit level does not match its functional risks assumed, or the earnings shared are not proportional to the costs allocated;

e) It has carried out related party transactions with affiliates in low tax jurisdictions;

f) It fails to report related party transactions or to prepare contemporaneous documentation as required;

g) The proportions of debt investment and equity investment made by its affiliates exceed the prescribed standards;

h) It is under the control of a resident enterprise or a resident enterprise and Chinese resident that is established in a country (region) where the actual tax burden is less than 12.5%, and that does not distribute profit or distributes less profit without reasonable business needs; or

i) It carries out other tax planning or arrangements that do not have reasonable business purposes.

Apart from that, an enterprise engaged in processing or processing with imported materials or other single production operations, or distribution, contract research and development business shall maintain a reasonable level of profit.

If these enterprises incur losses, regardless of whether they are required to prepare contemporaneous documentation according to PN42, they shall prepare local documents of contemporaneous documentation for the year of losses.

If these enterprises assume the risks and losses that shall be borne by the affiliates due to errors in decision making, insufficient start-up, poor product sales, research and development failure etc., the tax authorities may apply special tax adjustments.

2.5 Retention of documents

According to PN42, the documentations have to be retained for ten years. When the Chinese tax authorities carry out a TP audit, they could trace back the audit period for 10 years.

2.6 Frequency of documentation updates

The TP documentation is required to be prepared on a yearly basis when the preparation threshold is met.

The CbC reporting has to be submitted along with the annual related party transaction declaration forms and annual corporate income tax filing for each fiscal year when the submission criteria are met.

2.7 Tax return disclosures

China adopts stringent requirements on related party transactions disclosure and taxpayers have to disclose related party transaction details on Related Party Transaction Forms by the end of May of the following year.

Regarding CbC reporting, when the taxpayer meets the reporting requirement, it needs to submit the CbC reporting along with the annual related party transaction forms.

2.8 Burden of proof

Where the taxpayer under investigation does not provide the information in connection with a special tax investigation, or provides false or incomplete information, the tax authorities will order it to correct the information within a prescribed time limit. In case they fail to make corrections within the prescribed time limit, the tax authorities shall handle the situation in accordance with the relevant provisions of the Law on the Administration of Tax Levying and its implementing rules and determine the taxable income in accordance with the law.

2.9 Penalties

2.9.1 Administrative penalties

If a taxpayer fails to submit the related party transaction reporting forms or TP documentation in due time, the tax authority may require the taxpayer to make a correction and may impose a penalty of no more than RMB 2,000. For serious situations such as continuous non-compliance, the tax authorities may impose a penalty between RMB 2,000 and RMB 10,000.

2.9.2 Penalties in case of a TP-adjustment

In case a taxpayer does not provide contemporaneous documentation and relevant materials in accordance with the relevant provisions, 5% additional charges will be added to the interest mentioned in 2.10. Where the enterprise can effectively provide relevant materials, the 5% additional charges will be waived.

In case an enterprise pays taxes or overdue taxes before or after receiving the Notice on Special Tax Investigation and Adjustment, the interest payable shall be calculated from 1st June of the year subsequent to the taxable year until the date when taxes or overdue taxes are paid.

2.10 Interest

When taxpayers perform related-party filing and provide contemporaneous documentation and other relevant materials in accordance with relevant regulations, the tax authorities - while conducting special tax investigations and collecting unpaid tax - may apply the RMB benchmarking interest rate published by the People's Bank of China for loans from the date on which the tax should have been paid to when additional tax is levied. For example, when the tax underpayment is attributed to year 2017, the tax authorities will levy arrear interest at the rate of 4.75% per year as from the due date.

2.11 Use of most reliable information

There are no specific requirements in China regarding the use of comparables and as to whether only domestic or foreign comparables will be accepted by the tax authorities. In practice, Chinese tax authorities do prefer Chinese comparables.

2.12 Languages

The documentation needs to be prepared in Chinese.

For the CbC-report, it also provides for the forms in English and it could be submitted in both Chinese and English.

2.13 Confidentiality

After the submission of the relevant information to the tax authorities, documentation as well as CbC-reporting are generally subject to confidential treatment by tjje Chinese tax authorities.

3. Standards with respect to the content of transfer pricing documentation

PN42 lists the detailed requirement for material file and local file as well as special issue files, which are elaborated upon in paragraph 3.1 and 3.2.

3.1 Master File

The following information should be included in the Master File:

1. Organisational structure

Global organisational structure, global shareholding structure and geographic locations.

2. Business of the group

a) Description of the group's business, including the key value drivers creating profits.

b) Description of the supply chain and major market geographic locations in relation to the group's top five products or labour services by turnover, and any other product or labour service accounting for more than 5% of group turnover.

c) Brief description of important intra-group related-party labour services, other than the research and development services.

d) Analysis of the main contribution of all member entities within the group in terms of value creation.

e) Business restructuring, the industrial structure adjustment, and the transfer of functions, risks or assets of all enterprises within the group during the fiscal year of the group.

f) Changes in legal forms, debt restructuring, equity acquisition, asset acquisition, mergers and divisions occurred in the group.

3. Intangible Assets

a) Description of the group's overall strategy for developing and applying the intangible assets and determining the ownership of intangible assets.

b) Intangible assets or intangible asset portfolios in the group which have a significant impact on the group's transfer pricing policy, and the corresponding legal owners of such intangible assets.

c) A list of important agreements related to the intangible assets between the member entities in the group and their related parties, including costs allocation agreements, major research and development service agreements and licence agreements, etc.

d) Group's transfer pricing policies on research and development activities and intangible assets.

e) Description of the group's transfer of the ownership of and right to use material intangible assets between related parties.

4. Financing activities

a) Financing arrangements between related parties and major financing arrangements between non-related parties within the group.

b) Situations of member entities performing concentrated financing functions within the group.

c) Overall transfer pricing policies on the financing arrangements between related parties in the group.

5. Financial and tax position

a) Group's annual consolidated financial statement for the latest fiscal year.

b) Unilateral advance pricing arrangements and bilateral advance pricing arrangements entered into by member entities in the group and the list of other tax rulings relating to the income distribution among countries.

c) Names and locations of enterprises that file the country-by-country report.

3.2 Local File

1. Overview of enterprises

a) Organisational structure, including the setup, scope of responsibilities and number of employees of all the enterprise's functional departments.

b) Management structure, including the parties to whom the enterprise's management of different levels report and the locations of principal offices of such parties.

c) Industry description, including an overview of the industry in which the enterprise engages and its industrial policies, trade restrictions, and other major economic and legal issues that may impact the enterprise and industry, and its key competitors.

d) Operation strategies, including the business process, operational mode and value drivers of different departments and work streams in the enterprise.

e) Financial data, including the income, costs, expenses and profits of different types of business and products of the enterprises.

f) Any restructuring or transfer of intangible assets which involves the enterprises or has an impact on the enterprises, and the impact analysis on the enterprises.

2. Related-party relationships

a) Information on related parties, including any related party which directly or indirectly holds the equity of the enterprise, and which the enterprise enters into transactions with, including the names, legal representatives, composition of senior management personnel, registration places, actual business address of related parties, and the names, nationalities and residences of related individuals.

b) Types of taxes, tax rates and any corresponding preferential income tax treatments available to the above related parties.

c) Changes in the enterprise's related relationships during the fiscal year.

3. Related-party transactions

(1) Overview of related-party transactions

a) A description and details of related-party transactions, including relevant contracts or agreements, duplicates of relevant related-party transactions, statement on their performance, characteristics of traded objects, types of related-party transactions, participants, time, transaction amount, settlement currencies, trading conditions, trade modes and differences and similarities between related-party transactions and non-related-party transactions.

b) Processes of related-party transactions, including the flows of the information, logistics and funds of related-party transactions, as well as their differences and similarities between the non-related-party transactions.

c) A description of functions and risks, including the functions performed, risks assumed and assets employed by enterprises and their related parties in various types of related-party transactions.

d) Factors affecting the pricing of transactions, including intangible assets involved in related-party transactions and their impacts, and geographical specific factors such as costs cutting and market premium. Geographical specific factors shall be analysed from such aspects as labour costs, environmental costs, market size, extent of market competition, consumer purchasing powers, substitutability of goods or labour services and government control, etc.

e) Data of related-party transactions, including the transaction amount involved in related parties and various types of related-party transactions. Income, costs, expenses and profits of related-party transactions and non-related-party transactions shall be disclosed separately; if direct imputation cannot be conducted, they shall be allocated according to a reasonable proportion and the grounds for such allocation proportion shall be explained.

(2) Analysis of value chain

a) Business flows, logistics and fund flow within the group, including design, development, manufacturing, marketing, sales, delivery, settlement, consumption, aftersales services, cyclic utilisation and other process of products, labour services and other trade objects, as well as all participants.

b) Annual financial statements of the latest fiscal year of each participant in the above processes.

c) Calculation and attribution of the contribution of geographical specific elements to the value creation of the enterprise.

d) Allocation principles and results of group profits among the global value chain.

(3) Outbound investment

a) General information on outbound investment, including the investment location, investment value, main business and strategic plan of outbound investment projects.

b) Overview of outbound investment projects, including the shareholding structure and organisational structure of outbound investment projects, employment mode of senior management personnel and the attribution of the decision-making power of outbound investment projects.

c) Data of outbound investment projects, including operational information of outbound investment projects.

(4) Transfer of related-party equity

a) Overview of equity transfer, including background, participants, time, pricing, payment method and other factors affecting the equity transfer.

b) Information on the equity transferred, including the geographical location of the equity transferred, date, method and costs for the equity acquired by the transferor, interests derived from the transfer, and other information.

c) Other information relevant to the equity transfer including due diligence report or asset valuation report.

(5) Related-party labour services

a) Overview of related-party labour services, including the service providers and recipients, contents, characteristics, service method, pricing principles, and payment methods of labour services, and interests gained by each party after the performance of labour services.

b) Imputation method, projects, amount, allocation criteria, calculation process and results of labour service costs.

c) Where an enterprise and the group to which it is affiliated have the same or similar kind of labour service transactions with the non-related parties, differences and similarities of the pricing principles and transaction results between related-party labour services and non-related-party labour services shall also be elaborated.

(6) Advance pricing arrangements entered into and other tax rulings made by tax authorities of countries other than China that are directly relevant to the enterprise's related-party transactions.

4. Comparability analysis

a) Factors taken into account for the comparability analysis, including the characteristics of the assets or labour services in transactions, functions, risks and assets of all parties involved in transactions, contractual terms, economic environment and operational strategies, etc.

b) Relevant information such as functions performed, risks assumed and assets employed by the comparable enterprises.

c) Searching method, information source, selection criteria and rationale of comparable targets.

d) Comparable uncontrolled transaction information selected internally and externally and the financial information of comparable enterprises.

e) Difference adjustments made to the comparable data and the reasons therefore.

5. Selection and employment of transfer pricing methods

a) Selection of parties under test and rationale of the selection therefor.

b) Selection of transfer pricing methods and the reasons; whichever transfer pricing method is selected, the contribution made by the enterprise to the overall profits or surplus profits of the group shall be explained.

c) Assumptions and judgements made for determining the prices or profits of comparable non-related-party transactions.

d) Determining the prices or profits of non-related-party transactions by using appropriate transfer pricing methods and results of comparability analysis.

e) Other materials to justify the transfer pricing method selected.

f) Analysis on whether the pricing of related-party transactions complies with the arm's length principle and the conclusions thereof.

6. Special issue file

Special issue file includes details on cost allocation agreements and on thin capitalisation. Where the taxpayer enters into or performs cost allocation agreements, special issue file on cost allocation agreements shall be prepared. Where the related-party debt-to-equity ratio of a taxpayer exceeds the standard ratio and thus it is necessary to explain its compliance with the arm's length principle, a special issue file on thin capitalisation shall be prepared.

(1) Cost allocation agreements

Special issue file on cost allocation agreements includes the following:

- Duplicates of cost allocation agreements.
- Other agreements entered into between all participants for the purpose of implementing the cost allocation agreements.

- Details on the use of agreement results by non-participants, the amount and form of the payment made by them, and the method for allocating the payment between the participants.
- Details on participants joining or exiting the cost allocation agreement during the current year, including the names, countries, related-party relationships of the participants joining or exiting, and the amount and form of payment for joining the agreement or compensation for exiting the agreement.
- Details on the amendments to or terminations of the cost allocation agreements, including the reasons for amendments or terminations, and the disposal or allocation of formed agreement results.
- The total costs arising from the cost allocation agreements during the current year and their composition.
- Details on the cost allocation by participants during the current year, including the amount, form and target of cost payment, and the amount, form and target for making or receiving compensation payments.
- A comparison of the expected income and the actual income arising from the agreement during the current fiscal year and the corresponding adjustments as per the comparison.
- The calculation of expected income, including the selection of measurement parameter indicators, calculation methods and reasons for changes.

(2) Thin-capitalisation

Special issue file on thin capitalisation includes the following:

- An analysis of the enterprise's solvency and borrowing ability.
- An analysis of borrowing ability of the group and its financing structure.
- A description of changes in registered capital and other equity investments made by the enterprise.
- The nature and purposes of the related-party debt investments and the market conditions upon acquisition of the investments.
- The types of currency, amount, interest rate, terms and financing conditions of related-party debt investments.
- Whether the non-related party is able and willing to accept the above financing conditions, financing amount and interest rate.
- Details on security provided by the enterprise in order to obtain the debt investment and the conditions for providing such security.
- Status of the guarantors and conditions for providing the guarantee.
- Interest rate of loans of the similar type and same period and financing conditions for such loans.
- Conversion conditions for convertible corporate bonds.
- Other documents which can prove its compliance with the arm's length principle.

4. Country-by-Country reporting standards

China TP regulations require the following to be reported in CbC reporting:

Part 1: Overview of allocation of income, taxes and business activities by tax jurisdiction.

- Revenue and other operating income from business transactions with (a) third parties, (b) relate parties (c) the total of (a) and (b)
- Income taxes paid in the fiscal year
- Income taxes paid or accrued in and for the fiscal year
- Profit/loss for the year before income taxes
- Stated capital
- Accumulated Earnings
- Number of employees
- Tangible Assets other than Cash and Cash Equivalent

Part 2: Country-by-country information of all included entity's major business activities.

Part 3: Additional information necessary for understanding of the data in Part 1 and Part 2.

Czech Republic

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1. Introduction

1.1 Legal context

The main tax legislation is the Czech Income Tax Act (ITA). The transfer pricing rules are contained within Section 23(7) ITA, Directives D-332, D-333, and D-334, and General Financial Directorate Decree D–10. The Czech Republic is an OECD member country and the OECD Guidelines and the Code of Conduct are generally accepted (Directive D-334). The Czech Republic follows the transfer pricing methods outlined in Chapter II of the OECD Guidelines.

2. Formal requirements

2.1 Which taxpayers

All taxpayers doing business in the Czech Republic should compile TP documentation if transactions with related parties have been realised. A related party is defined under tax legislation where one party owns more than 25% of the other (based on voting power, share capital, or common control). There is no threshold where a business relationship exists predominantly for tax evasion purposes.

2.2 Retention of documents

Czech taxpayers are required to keep their administrative records for at least ten years except for particular documents. Since TP documentation is part of the records of a taxpayer, this ten-year period also applies to the TP documentation.

2.3 Frequency of documentation updates

In practice TP documentation should be updated every few years to account for normal business and market developments. A significant change in the facts and circumstances could also lead to an update of the documentation.

The statute of limitations for the assessment of transfer pricing adjustments is generally three years from the tax return filing date, which is extended to ten years in case of repeated tax audits (and further extensions may apply to companies with tax incentives and/or tax losses).

2.4 Tax return disclosures

Taxpayers are not obliged to attach TP documentation as tax return disclosures but the tax authority will probably require TP documentation in case of a tax audit. A taxpayer is required to file an annual TP disclosure (Form 5404/Ea), which summarises a taxpayer’s transactions with each related party (separate forms for each overseas related party having transactions with the taxpayer during the year are required to be filed electronically). Failure to submit Form 5404/Ea to the tax authority is likely to result in a TP-focused tax audit.

2.5 Burden of proof

The burden of proof rests with the taxpayer, who shall provide sufficient evidence that the prices agreed between related parties comply with the arm´s length principle. If no TP documentation is available, the tax authority shall adjust the taxpayer's tax base by the difference between the agreed and "market" price.

2.6 Penalties

Submitting TP documentation is not mandatory but it is recommended. TP documentation "should be sufficient" for substantiating the method of calculating the arm's length price (Code of Conduct). When TP documentation is requested by the tax authority, it must be provided within 30 days.

2.7 Languages

The law does not require that the documentation is compiled in a specific language, but the information in the documentation should be accessible to the tax authorities. The Czech tax authorities are authorised to request TP documentation in Czech or for a Czech translation.

2.8 Confidentiality

The Czech tax authorities will treat TP documentation confidentially. The tax authorities can only exchange the TP documentation with the tax authorities of another country if there is a legal basis, which can be found in domestic law, a tax treaty or a EU-directive. The TP documentation is never made available to the public.

3. Standards with respect to the content of transfer pricing documentation

When a TP study is prepared, its content should follow Chapter V of the OECD Guidelines; with an emphasis on demonstrating that related party services invoiced were actually received (a 'benefits and proof' test).

The Czech tax authority does not insist on the use of local comparables in a benchmarking study or comparative analysis (although local comparables can support regional analyses). It uses the Amadeus database and develops and maintains its own internal comparables. The tax authority focusses on the interquartile range in a transactional net margin method (TNMM) analysis and it typically accepts comparables providing averaging results covering multiple years (three or five years).

Where a TP assessment (adjustment) made by the tax authority is challenged, a taxpayer can lodge an appeal with the Appeal Financial Directorate. If unsuccessful, a taxpayer can then lodge an appeal with a regional court.

The Czech Republic's double tax treaty network is extensive, and the competent authority is effective in obtaining double tax relief.

Unilateral, bilateral, and multilateral Advance Pricing Agreements (APAs) can be negotiated with the tax authorities. There is a filing fee of CZK 10,000 (approximately USD 400).

4. Country-by country reporting standards

The following taxpayers have to comply with CbC reporting:

- Czech resident taxpayers which are the ultimate parent entity of an MNE group, where the MNE group is defined as a group whose consolidated revenue exceeds EUR 750 million;
- A constituent entity of the MNE group resident in the Czech Republic which is not the ultimate parent entity of an MNE group needs to file a CbC report with respect to the reporting tax year of an MNE group of which it is

a constituent entity, if the ultimate parent entity of the MNE group is not a resident of the European Union and one of the following criteria are satisfied:

— the ultimate parent entity of the MNE group does not need to file a CbC report in its jurisdiction of tax residence; or

— for purposes of filing the CbC report for the reporting tax year, the jurisdiction of tax residence of the ultimate parent entity of the MNE group is not involved in the exchange of CbC reports.

the CbC report needs to be filed within twelve months of the end of the reportable accounting period. This twelve-month period may be extended if the Ministry of Finance (MoF) has announced less than three months prior to the end of this period that there was systemic failure in respect of the jurisdiction of the ultimate or surrogate parent entity, in which case the period for filing the CbC report will be extended by three months from the publication of this information by the MoF.

The Czech constituent entity needs to provide the tax authority with a notification no later than the end of the first reportable period.

The Czech constituent entity also has the subsequent notification obligation in case there are any changes in respect of the notified information, in which case the period for filing a new notification is fifteen days from the date when that change takes place.

Denmark

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1. Introduction

1.1 Legal context

Strongly increased international trade and simultaneous development of cross-border groups, in combination with very diverse taxation levels in the individual countries have entailed much more focus on the transfer pricing problem, meaning the prices of intra-group transactions (controlled transactions) and the taxation thereof. With the BEPS project (Base Erosion and Profit Shifting) from 2015 finally approved on 23 May 2016, the OECD has made material changes/clarifications to the OECD's Transfer Pricing Guidelines with the aim that the taxation of controlled transactions is not moved from high-taxed countries to low-taxed countries.

First of all, the Danish TP rules are based on section 2 of the Danish Tax Assessment Act, which was implemented by Act No. 432 of 26 June 1998 and with effect from 28 June 1998. Before that, sections 4-6 of the Danish State Tax Act were the authority for TP correction. These rules still apply alongside section 2 of the Danish Tax Assessment Act, which lays down the so-called arm's length principle. This principle must be interpreted in compliance with the OECD's Model Convention, article 9(1) and the OECD's Guidelines which also form a general basis for interpretation of the Danish transfer pricing rules. The detailed documentation rules appear from section 3B of the Danish Tax Control Act. This provision was implemented by Act No. 91 of 25 February 1998 to increase the prospect of the Danish tax office of ensuring that prices and terms of controlled transactions were determined in compliance with the arm's length principle. The rule was supplemented by the Statutory Order No. 42 of 24 January 2006.

The Danish tax agency ("Skattestyrelsen") has, however, implemented new documentation rules as a consequence of OECD's BEPS Action 13. According to these rules, TP documentation must consist of standardised information relevant for the entire group (Master File) and country-by-country (CbC) documentation for each taxpayer in the group (Local File). The new rules appear from the Statutory Order No. 401 of 28 April 2016, which generally has effect for accounting periods starting on 1 January 2016. However, it also appears that for accounting periods starting in the period from 1 January 2016 up to and including 31 December 2016, the TP documentation can instead be prepared according to the old Statutory Order No. 42 of 24 January 2006. From 1 January 2017, the documentation can only be prepared according to the new rules. Additionally, Skattestyrelsen's legal guidance, section C.D.11 contains a description of the TP area. Finally, Skattestyrelsen has prepared TP valuation guidelines E-No. 238 of 30 June 2018.

From 1 January 2019 the rules in section 3B are moved to the new Danish Tax Control Act No. 1535 of 19 December 2017 section 37-42. Effective from 1 January 2019 Statutory Order No. 401 of 28 April 2016 is replaced by Statutory Order No. 1297 of 31 October 2018. The new rules use new terms for tax return and deadline, but essentially the new rules are consistent with the current rules.

In the wake of the BEPS report, for large groups new rules have been implemented in section 3B(10)-(16) of the Danish Tax Control Act about so-called country-by-country reporting (CbC). These rules apply from 1 January 2016 and their purpose is to increase transparency with respect to cross-border controlled transactions taking place in large groups. In relation to this, Statutory Order no. 1133 of 27 August 2016 was issued on CbC reporting and more detailed requirements as to the contents of the reporting.

From 1 January 2019 the above-mentioned rules are moved to the new Danish Tax Control Act No. 1535 of 19 December 2017 section 47-52. Furthermore, Skattestyrelsen has implemented a new CbC reporting announcement No. 1304 of 14 November 2018, which is essentially consistent with current CbC reporting. The new rules apply from 1 January 2019.

1.2 Practical context

Both the new and the previous rules for documentation of TP transactions apply to both cross-border activities and transactions between entities in Denmark. The new rules implement a two-tier system with standardised information relevant for the entire group documentation and country-specific documentation, which entails a larger administrative burden on the enterprises. The Danish tax authorities have also put a considerably larger focus on this area for the past years, and the penalty rules have been changed, so that large fines can be imposed for non-compliance with the documentation rules. It is therefore necessary that the enterprises have a critical focus on their TP documentation to a much larger degree, and prepare convincing material which in fact shows all circumstances of importance to the controlled transactions. It is also important that the enterprises gain control of digital solutions that store and automate the documentation and related records.

2. Formal requirements

2.1 Which taxpayers

Section 2 of the Danish Tax Assessment Act and the documentation requirements under section 37-42 of the new Danish Tax Control Act and the documentation statutory orders cover taxpayers

- over which natural or legal persons exercise control
- that exercise control over legal persons
- that are affiliated with a legal person
- that have a permanent establishment located abroad
- that are a foreign natural or legal person with a permanent establishment in Denmark, or
- that are a foreign natural or legal person with a hydrocarbon-related business covered by section 21(1) or (4) of the Danish Hydrocarbon Tax Act.

However, the documentation requirements need not be complied with if you are a taxpayer which, alone or together with affiliated enterprises, has:

- less than 250 employees and
- either has an annual total balance sheet of less than DKK 125 million, or
- annual revenue not exceeding DKK 250 million.

This exemption does not apply to taxpayers who have controlled transactions with the following:

- Individuals or corporate bodies located in a foreign state, which does not have a double taxation treaty with Denmark and which also is not a member of the EU/EEA.
- A permanent establishment located in a foreign state, which does not have a double taxation treaty with Denmark and which also is not a member of the EU/EEA.
- A permanent establishment located in Denmark, provided that the taxpayer is resident in a foreign state, which does not have a double taxation treaty with Denmark and which also is not a member of the EU/EEA.

As a consequence, the mentioned taxpayers must prepare the TP documentation in spite of being small within the above-mentioned meaning.

Taxpayers obliged to compile TP documentation must, according to Statutory Order No. 1297 of 31 October 2018 and OECD's BEPS Report Action 13 prepare the following:

- Standardised documentation (Master File), which contains information for the entire group, such as a description of the entire group, business activities, intangible assets, financial activities, accounting and tax positions.
- Country-specific documentation (Local File), which contains a detailed description of the enterprise, detailed information, descriptions and analyses concerning the controlled transactions in which the enterprise is involved and material about the economic, financial and accounting affairs of the enterprise.

The duty to disclose applies whether or not the taxpayer has been affiliated with a natural or legal person for only part of the year.

The rules in section 47-52 of the new Danish Tax Control Act on CbC reporting generally apply to any multinational group's ultimate parent company, which for tax purposes is domiciled in Denmark and whose accounting period starts on 1 January 2016 or later and which has consolidated revenue of at least DKK 5.6 billion (EUR 750 million) in the financial year preceding the financial year for which reporting must be made. Under certain conditions, a Danish domiciled consolidated company which is not the ultimate parent company, must file the CbC reporting on behalf of the foreign ultimate parent company (see section 49 of the new Danish Tax Control Act). However, this rule only applies to accounting periods starting on 1 January 2017 or later.

2.2 Aggregation of transactions

Generally, documentation rules set the stage for each individual controlled transaction being assessed individually. However, there may be instances where more transactions can be described in aggregate if they are similar in relation to an overall assessment of the five comparability factors, which are:

- Properties of products (goods, services, assets, intangible assets etc.);
- A functional analysis (functions, assets and risks);
- Contractual terms;
- Financial circumstances; and
- Business strategy.

It is the taxpayer's responsibility to assess which transactions can be described and priced as aggregate.

2.3 Deadlines (timing)

The TP documentation must be prepared on an ongoing basis and be available in a completed form at the date of the tax return according to section 39 of the new Danish Tax Control Act. Thus, documentation for each accounting period must be prepared. For enterprises that use the calendar year as the financial year, the documentation must thus be available no later than on 1 July after the end of the financial year – form No. 05.021 must be filled in at the same time, at the latest, and submitted to Skattestyrelsen, so that they will be informed of the TP transactions – the form is submitted as a schedule to the tax return submitted digitally through Skattestyrelsen's TastSelvSelskabsskat (online corporation tax). The form must be used only if the aggregate controlled transactions exceed DKK 5 million in the accounting period. An English version is available as form No. 05.022. Be aware that the old requirement, where only controlled transactions exceeding DKK 5 million were to be reported for a group on the group companies' tax returns, has been canceled for the income year 2019 and onwards. This means that majority shareholders who have a controlling influence must also fill in and submit form 05.021 which can be found here: https://skat.dk/skat.aspx?oid=56184. A detailed guide is attached to the form.

Via the form, the majority shareholder must report the controlled transactions of the calendar year. Note that the company's income year and the main shareholder's income year may be different. All controlling transactions must be disclosed except salary and dividend.

Typical controlled transactions can be: purchase and sale of fixed assets/real estate, interest on balances between the shareholder and the controlled company, etc. It is irrelevant that no payment has been made.

The form can be submitted electronically via TastSelv Borger.

If form 05.021 is not submitted, the majority shareholder risks a fine.

At Skattestyrelsen's request, the documentation must be sent to them within 60 days of their request.

On 3 December 2020, the Danish Parliament adopted a new Act (L 28) on mandatory submission of TP documentation to Skattestyrelsen. The bill was partly a reintroduction of Bill L 48 (from the Danish Parliament's 2019-20 sessional year), in which the only amendment is that the new adopted amendments will apply to income years commencing on 1 January 2021 or later (the original bill was effective from FY2020). This implies that TP documentation must be submitted within 60 days after the deadline for submission of the corporate income tax return on 30 June 2022 for taxpayers with calendar year financial statements and in the same way going forward, i.e. within 60 days after the deadline of submission of the corporate income tax return.

CbC reporting must be submitted digitally to Skattestyrelsen no later than 12 months after the last day of the accounting period for which reporting must be made. The rules have effect from 1 January 2016. Before the end of the accounting period for which reporting must be made, Skattestyrelsen must be notified digitally of who is under an obligation to file CbC reporting, and Skattestyrelsen must be notified in writing at the time when this obligation no longer exists. These notifications may take place in connection with the filing of the tax return.

Under section 43-45 of the new Danish Tax Control Act, Skattestyrelsen may demand that the taxpayer obtains an auditor's opinion on the TP documentation, whereby the auditor must declare whether the auditor, in the work performed, has become aware of circumstances that give cause for concluding that the documentation submitted to Skattestyrelsen does not give a true and fair view of the controlled transactions. The detailed rules to that effect are stipulated in Statutory Order No. 1298 of 31 October 2018.

2.4 Materiality

In general, all controlled transactions must be described in TP documentation, unless the enterprise is below the minimum requirements in section 39 of the new Danish Tax Control Act, and there are none of the special situations in section 39 of the new Danish Tax Control Act. If the enterprise is covered by the documentation rules, however, documentation for immaterial controlled transactions can be omitted, i.e. transactions which are either one-off or of a modest economic value. However, an enterprise must state the type of these transactions which were assessed as being immaterial.

2.5 Retention of documents

Like other accounting records, the TP documentation must be kept on file for five years after expiry of the accounting year, under section 10 of the Danish Bookkeeping Act. As an extended tax assessment time limit applies to Skattestyrelsen in these matters until 1st May six years after the expiry of the accounting year in question (see section 26(5) of the Danish Tax Administration Act), and as Skattestyrelsen still has the possibility of effecting extraordinary reopening according to the rules of section 27 of the Danish Tax Administration Act, it is recommended that the documentation is kept on file for 10 years. It should be noted that groups operating in several countries must be able to submit the materials to the tax authorities of the countries in which they operate, observing local – possibly different – rules on filing and time-barring.

2.6 Frequency of documentation updates

The TP documentation must be prepared on an ongoing basis and be in a complete form at the tax return date so that it can be filed with Skattestyrelsen on request. Thus, documentation for each accounting period must be prepared.

CbC reporting must be prepared and filed to Skattestyrelsen for each accounting period.

2.7 Tax return disclosures

The TP documentation should only be delivered at Skattestyrelsen's request and be in a completed form at the time of the tax return. Before the same time, form No. 05.021 should be filled in for Skattestyrelsen together with the tax return, so that Skattestyrelsen is informed about the TP transactions – the form is sent as a schedule to the tax return, which is stated digitally through Skattestyrelsen's TastSelvSelskabsskat. An English version can be found as form No. 05.022. Please note the changes for income years commencing on 1 January 2021 or later (cf. above under section 2.3).

The CbC reporting must be submitted digitally in a fixed XLM file format to Skattestyrelsen no later than 12 months after the last day of the accounting period for which reporting must be made.

Who is obliged to submit the CbC reporting must be stated digitally to Skattestyrelsen before expiry of the accounting period for which reporting must be made, and Skattestyrelsen must be given notice digitally at the time when this obligation no longer exists. This may take place in connection with the tax return.

The audit opinion which can be prepared in a template (see schedule 1 to Statutory Order no. 1298 of 31 October 2018) must be submitted to Skattestyrelsen no later than 90 days after the date on the order. The order cannot be given within 7 days after the receipt of the TP-documentation.

2.8 Burden of proof

Generally, the burden of proof that the controlled transactions are not in compliance with the arm's length principle rests with Skattestyrelsen. Skattestyrelsen must therefore carry the burden of proof that the TP documentation is not sufficient, and that their assessment is then more true and fair. If the documentation is very defective or has not been prepared at all, then Skattestyrelsen has the right to estimate, and then the onus of proof reverses so that it is the taxpayer who in such case must prove that Skattestyrelsen's estimate is not true and fair.

Generally, Skattestyrelsen has the option to give notice of an ordinary tax assessment no later than on 1st May in the sixth year after expiry of the accounting year, which means that if you follow the calendar year, Skattestyrelsen can give notice of the changes of the controlled transactions for the accounting year 2011 no later than on 1 May 2017. Skattestyrelsen must then make a decision to that effect no later than on 1 August in the same year as the notice is given (a letter of intent). In special circumstances, Skattestyrelsen can give notice of an extraordinary assessment change going further back, but that requires that a number of specific conditions are complied with (see section 27 of the Danish Tax Administration Act). Please note that the rules on extended time limits also apply if it is the taxpayer who wants to change the tax assessment.

2.9 Penalties

In addition to the ordinary rules on tax addition and day fines for non-submission of the tax return, including non-submission of form 05.021, for the intentional or grossly negligent non-performance of the rules in section 43, 48, 49 and 51 of the new Danish Tax Control Act on TP documentation, including also CbC reporting and missing audit opinion, there is a fine, which generally amounts to DKK 250,000 for each individual taxpayer and for each accounting period, whether or not an income increase is made. However, the fine may be halved to DKK 125,000 if you subsequently prepare the lacking material in the required quality. Said fine can be increased by up to 10%

of any amount by which Skattestyrelsen may correct the taxable income as a result of non-observance of the arm's length principle. These amounts are not deductible.

2.10 Interest

If Skattestyrelsen makes a correction of the taxable income, a residual tax addition is calculated for each accounting period at 4.8% in 2011, 4.3% in 2012, 3.9% in 2013, 4.6% in 2014, 3.6% in 2015, 3.4% in 2016, 3.1% in 2017, 2.8% in 2018 and 4.7% in 2019. These amounts are not deductible.

Further, interest is calculated depending on the period which the subsequent collection concerns. From 1 January 2016, interest of 0.5% for the accounting periods 2011-12 will be calculated, 0.4% until 31 July 2013 and then 0.7% from 1 August 2013, 0.8% for the accounting periods 2014-2015, in all cases for each month that elapses after the calculated income tax is due for payment. For the accounting period 2016, it is possible to avoid payment of interest or an additional percentage if it has been paid before 1 January 2017. If the residual tax is paid in the period from 1 January to 1 July 2017, day-to-day interest of 2.0% must be paid. If the residual tax is not paid until after 1 July 2017, no day-to-day interest is due. However, an additional percentage of 4% applies. Regarding the accounting period 2018-2020 an interest of 0.7% will be applied. All these amounts are deductible.

2.11 Use of most reliable information

Denmark has no particular rules on materials to be used in connection with the preparation of the comparability analysis. However, guidance can be found in the BEPS reporting, Action 13, pages 24-25, from which it appears that the most reliable information must be used, which will often be from either other national enterprises or other European enterprises that operate under comparable circumstances.

2.12 Languages

The TP documentation, including the CbC reporting, can be prepared in Danish, English, Swedish or Norwegian. If the documentation is in another language, Skattestyrelsen may demand that it is translated. For the purpose of delivery to the authorities of other countries or internal use in a number of countries, it may be an advantage to prepare the material in English.

2.13 Confidentiality

The documents which the taxpayer submits to Skattestyrelsen in connection with the tax return of Skattestyrelsen's requests for the purpose of processing a tax case are covered by a strict duty of confidentiality under section 17 of the Danish Tax Administration Act. Others do not have access to the material submitted by the taxpayer to Skattestyrelsen, including also TP material, nor may Skattestyrelsen under said rule state if a case is pending or has been pending at all with an actual taxpayer.

3. Standards with respect to the content of transfer pricing documentation

In general, the TP documentation must be of such a nature that it can form the basis of an assessment of whether prices and terms have been determined on arm's-length terms. The more complex and comprehensive the controlled transactions are, the larger requirements can be imposed as to the contents of the documentation.

3.1 Transfer pricing documentation according to Statutory Order no. 42 of 24 January 2006

According to the previous Statutory Order No. 42 of 24 January 2006., which can still be used for accounting periods that begin on 31 December 2016, the TP documentation for the controlled transactions must contain the following:

A) The group and the business activities

1. The group's legal structure.
2. The group entities' geographic location.
3. The group's organisational structure.
4. Primary business activities of the taxpayer and the related entities with which the taxpayer has had TP transactions.
5. An overview of the revenue of the past three years and results of operating activities of the taxpayer and the related entities with which the taxpayer has had TP transactions.
6. A brief historical description of the group and the enterprise. Development in the number of employees.
7. Description of restructuring, purchases and sale.
8. Explanation of losses.
9. Changes in material functions and risks.
10. A brief description of industrial circumstances for the group.
11. A description of material competition parameters.

B) The controlled transactions

1. More transactions together (aggregate transactions) – which transactions are aggregate, i.e. which of more transactions are so alike that they can be described together.
2. How much was transferred in the controlled transactions and between which parties.
3. Properties of the products (the items transferred).
4. A functional analysis based on functions, risks and assets.
5. Contractual terms.
6. Financial circumstances.
7. Business strategies.
8. A description of cost allocation agreements.
9. Other circumstances that may be of importance to the arm's length assessment, for example public law regulation or campaigns on new markets.

C) Comparability analysis

1. A description of the pricing of the controlled transactions.
2. An account of why the pricing is in compliance with the arm's length principle.
3. An account of used comparable independent transactions.
4. An account of selection of method.
5. An account of the taxpayer's own transactions with independent parties.

6. An account of choice of transactions between independent parties and other related parties' transactions with independent parties.
7. Which potential comparable transactions have been deselected and why.
8. Database examination (not mandatory, but if it has been prepared or if Skattestyrelsen requests so, it must be attached).

D) An account of the implementation of the pricing principles

1. The specification of the extent to which the taxpayer or related parties have made subsequent adjustment of prices and terms of the controlled transactions in both Denmark and abroad. It must be described if these adjustments are in compliance with the arm's length principle.

E) List of any written agreements concerning the controlled transactions

1. A copy of the written agreements concerning the controlled transactions.
2. Copies of any written agreements which the taxpayer or related parties have entered into with authorities in other countries concerning controlled transactions – both retrospective and forward-looking agreements. (Does not apply to agreements to which Danish tax authorities are a party).

Skattestyrelsen may impose on the taxpayer to present further information and material and request the preparation of a database examination with a deadline of between 60 and 90 days.

3.2 Transfer pricing documentation according to Statutory Order No. 1297 of 31 October 2018

In sections 4 and 5, the newest documentation Statutory Order No. 1297 of 31 October 2018 imposes a number of requirements with respect to TP documentation, in that there is a split in the standardised documentation and the country-specific documentation. All paras and sub-sections mentioned in sections 4 and 5 of the documentation Statutory Order must be included in the standardised information relevant for the entire group documentation. If the group does not have the stated types of activities, agreements, transactions etc. specified in the paras, it must be stated positively that the group does not have such activities, agreements, transactions etc. in the documentation under said paragraph.

The standardised documentation must generally contain the following:

1. A group chart showing the group's legal and organisational structure, including a specification of the countries from which the group operates

a) All companies in the group must be shown individually.

b) Equity interests whereby the different parties are related must be shown.

c) Each group unit's geographic location (tax jurisdiction) must be shown.

d) The organisational and business activities of each unit must be stated.

2. A general description of the group's business activities, including a description of material drivers of business profit in the group

a) A description of the group's supply chain for the five top products and/or services measured in terms of sales and for the products and/or services that constitute more than 5% of the group's consolidated revenue. The description can be illustrated by a diagram.

b) A list with a short description of the most material service agreements between the related parties of the group, except for research and development service agreements, and a description of the material services which the main service centres in the group handle or can handle, and the used TP policies for the allocation of service costs and determination of settling prices for the intra-group services.

c) A description of the largest geographical markets measured in terms of sales of products and services, see a.

d) A brief functional analysis that describes the primary contributions to the group's total value creation with information as to which of the individual related parties of the group contribute to this in relation to material functions, risks and assets.

e) A description of considerable restructurings, acquisitions and divestments occurred during the accounting year.

3. Information about the group's intangible assets

a) A general description of the group's overall strategy for development, ownership and use of intangible assets, including geographic location of the group's primary research and development facilities and a statement on from where these activities are managed.

b) A list of the intangible assets or groups of intangible assets in the group of importance to transactions between related parties and with a statement of which entities of the group are the legal owners of these intangible assets.

c) A list of material agreements between the related parties concerning intangible assets, including primary CCA agreements (Cost Contribution Arrangements), research and development service agreements and licence and royalty agreements.

d) A general description of the group's overall TP policies in relation to research and development activities as well as intangible assets.

e) A general description of all material transfers of rights in intangible assets between the related parties during the accounting year with a related statement of which entities and countries are involved in the transfers, and the payments incidental thereto.

4. Information about the group's funding

a) A general description of how the group is funded, including a description of the most central financial arrangements with independent lenders.

b) Identification of all the related parties with a central financing function in relation to the group, including a statement on the countries under whose laws these entities are organised and the place from where the entities are managed.

c) A general description of the group's TP policies in relation to the financial arrangements between the related parties.

5. Information about the group's accounting/financial and tax position

a) The group's consolidated financial statements for the year if made for the purpose of financial reporting, internal control, tax statement or prepared in another context.

b) A list and brief description of the group's existing unilateral APAs (Advanced Pricing Agreements), tax agreements and tax decisions with a forward-looking effect.

The country-specific documentation must include:

1. A detailed description of the organisation

a) A description of the taxpayer's management structure, a local organisational chart and a description of the persons to whom the local management reports, and a specification of the countries in which these persons have their usual office addresses.

b) A detailed description of the enterprise and the business strategy pursued by the taxpayer, and a statement of whether the taxpayer has been involved in or affected by restructuring or transfers of intangible assets in the current accounting year and the accounting year immediately preceding the current accounting year, and an explanation of why such transactions have otherwise influenced the taxpayer.

c) A specification of the taxpayer's most substantial competitors.

2. Detailed information, descriptions and analyses concerning the controlled transactions in which the taxpayer is involved

a) A description of the controlled transactions (for example acquisitions, production, sale, delivery or receipt of services, loans, guarantees, purchase and sale of intangible assets, payment of royalty etc.) and a description of the context in which the controlled transactions took place.

b) An account in terms of value of the total internal payments for each category of controlled transactions in which the taxpayer is included (e.g. payments for products, services, royalties, interest etc.) specified over the tax jurisdictions to and from which the payments took place.

c) Identification of each of the related parties involved in each category of controlled transactions with the taxpayer, and a brief description of the relation to each of these parties.

d) Copies of all material controlled agreements in which the taxpayer is included.

e) A detailed comparability analysis and functional analysis of the taxpayer and the relevant related parties in relation to each category of controlled transactions, including a description of all changes in relation to previous years.

f) A statement on the most suitable TP method in relation to each category of transactions and grounds for the selection of method.

g) When it is relevant in relation to the TP method, it must be stated which of the transaction parties has been selected as the tested party, and the choice must be reasoned.

h) A description of the conditions and assumptions that have been applied in the use of the TP method.

i) If a multi-year analysis has been made, this approach must be reasoned.

j) A list with a related description of the selected comparable transactions (internal and external) and information about the financial indicators (PLI's) for the independent enterprises used in the TP analysis, including a description of the selection process and the source of the information used.

k) An account of any comparability adjustments and of whether adjustments have been made for the results with the tested party, the comparable transactions or both.

l) An account of why it can be concluded that the relevant transactions have been priced in compliance with the arm's length principle by employing the selected TP method.

m) An overview with a specification of the financial data/accounting data employed in the use of the TP method.

n) A copy of existing unilateral, bilateral and multi-lateral APAs and other tax agreements and tax decisions with a forward-looking effect to which the taxpayer is not a party, but which are relevant in relation to the controlled transactions.

3. Material concerning the economic, financial and accounting data

a) If there are audited financial statements for the taxpayer for the accounting year, they must be enclosed, and if not, any existing unaudited financial statements are enclosed instead.

b) Data and allocation forms showing how the accounting data used in the TP method can be reconciled with the financial statements of the taxpayer.

c) Overviews and forms that show the relevant economic, financial and/or accounting data for the comparable independent transactions, or which have been used in the TP analysis, and a statement of the source of this data.

Skattestyrelsen may impose on the taxpayer to present further information and material and request the preparation of a database examination with a deadline of at least 60 days and no more than 90 days.

4. Country-by-Country reporting standards

4.1 Country-by-country reporting according to Statutory Order no. 1304 of 14 November 2018

The CbC reporting, which must be submitted digitally in a fixed XLM file format to Skattestyrelsen no later than 12 months after the last day of the accounting period for which reporting must be made, must contain the following:

- Identity information of the ultimate parent company or the company with the obligation to file the CbC reporting.
- Table 1 which shows an overview of the allocation of income, taxes and business activities for each tax jurisdiction (the geographic location).
- Table 2 which shows a list of identification information for all consolidated companies in the group.
- Table 3 which shows other information in support of the information provided in tables 1 and 2.

Ecuador

MEMBER FIRM

City	Name	Contact Information
Guayaquil	Edgar Naranjo	+593 4 236 7833 enaranjo@pkfecuador.com
Guayaquil	Manuel García	+593 4 236 7833 pkf@pkfecuador.com

1. Introduction

1.1 Legal context

Transfer pricing regulations have been in place in Ecuador since Presidential Decree No. 2430 issued on 31 December 2004, although various important changes, mainly disclosure requirements, have been implemented since then. At present, five unnumbered articles added after article 15 of the Ecuadorian Tax Law refer to the arm's length principle, criteria of comparability, methodologies to establish TP, exemptions from the transfer pricing regime, and related party transactions. Articles 4 and 84 to 91 of the Ecuadorian Tax Ruling complement the legal context for TP. In Ecuador there have been no official statements so far on the implementation of the BEPS initiative, including a master file, a local file and CbC reporting.

1.2 Practical context

TP requirements apply to both local and foreign related parties, which result in an important burden not only on local branches or subsidiaries of a multinational group, but also on domestic companies.

2. Formal requirements

2.1 Which taxpayers

An Ecuadorian taxpayer that performs transactions with related parties is subject to the TP regime and is required to submit the Transfer Pricing Annex, Transfer Pricing Report and/or TP-documentation with respect to those transactions. The definitions of related parties can be found in the unnumbered article added after article 4 of the Ecuadorian Tax Law and article 4 of the Ecuadorian Tax Ruling. The local tax authority may also determine other related parties by assumption.

Taxpayers are required to file the Transfer Pricing Annex if the accumulated transactions with related parties (domestic and foreign) exceed USD 3 million.

Taxpayers are required to submit the Transfer Pricing Integral Report (TP Report) if the accumulated transactions with related parties (domestic and foreign) exceed USD 15 million.

Exemptions from the TP regime apply to taxpayers that comply with all of the following conditions:

- Having a payable corporate income tax greater than 3% of taxable revenue.
- Not performing transactions with tax havens.
- Not having government contracts related to the exploration and exploitation of non-renewable resources.

2.2 Aggregation of transactions

The income tax return must include the total amount of transactions performed with domestic and foreign parties during the tax year, disaggregated as follows: assets, liabilities, income, and expenses.

2.3 Deadlines (timing)

TP adjustments and transactions with related parties must be included in the corporate income tax form (Form 101), which is due in April of each year.

The Transfer Pricing Annex and/or the Transfer Pricing Integral Report should be submitted with the local tax authority by June if each year, according to the ninth digit of the tax identification number of the taxpayer.

2.4 Materiality

In principle, all transactions with related parties should be supported by appropriate TP documentation. There are no formal thresholds below which no TP documentation is required. However, considering the basic principle that the administrative burden should be justified by the complexity and tax effect of the transaction, the more complex and material the transactions are, the more extensive the TP-documentation should be.

2.5 Retention of documents

An Ecuadorian taxpayer is required to keep its administrative records for at least seven years. The statute of limitations with respect to the tax liability is three years if the income tax return was filed accurately and in due time, and six years if the return was incomplete or filed late. Since TP documentation is part of the records of a taxpayer, this seven-year period also applies to the TP-documentation.

2.6 Frequency of documentation updates

The documentation is required for each year in which business transactions with domestic and foreign related parties occur that exceed the applicable transaction thresholds.

2.7 Tax return disclosures

Taxpayers must include in the income tax return (Form 101) the amount of the adjustment determined in the TP study to determine the taxable income and income tax. If adjustments are determined after filing the income tax return, the taxpayer may file an amended return to pay income tax plus corresponding interest.

Also, as commented in 2.2, the taxpayer must include the total amount of transactions performed with domestic and foreign related parties during the tax year.

2.8 Burden of proof

In practice, the burden of proof rests with the taxpayer for filing the TP Annex and the TP Integral Report.

2.9 Penalties

2.9.1 General

If a taxpayer does not submit the annex and/or the report or does submit incomplete, altered, false or incorrect documentation, it is subject to a penalty of up to USD 15,000.

The local tax authority issued a document that establishes penalties according to the seriousness of the fault or misdemeanour. Based on this document, late filing of the Transfer Pricing Integral Report and/or the Annex could result in a penalty of up to USD 333.

Assessments of any kind, including TP adjustments, lead to interest due (around 13% per year) for the time from when the taxes were payable (typically, April of the year after the transactions were performed) until the time when the tax is finally paid. In addition, a 20% surcharge on the assessment will be applied.

2.9.2 Penalties in case of a TP-adjustment

Apart from the rules mentioned above in chapter “2.9.1 General”, there are no specific rules as to penalties in case of a TP adjustment.

2.9.3 CbC-reporting

There are no CbC-reporting requirements in Ecuadorian Tax Law and Ruling.

2.10 Interest

Interest is not charged on penalties.

2.11 Use of most reliable information

Only the current tax year should be considered for identifying comparable companies.

Although Ecuadorian companies are required to disclose their audited annual financial statements by filing a copy with the local business regulator (“Superintendencia de Compañías”), this information is generally insufficient and limited in its use as a resource of comparable transactions. Consequently, foreign comparables are accepted by the local tax authority for TP purposes. Tax legislation also allows the local tax authority to use secret comparables.

2.12 Languages

Ecuadorian tax law requires the documentation to be submitted only in Spanish.

2.13 Confidentiality

The Ecuadorian tax authorities will treat the TP documentation confidentially. The tax authorities can only exchange the TP documentation with the tax authorities of another country if there is a legal basis. This legal basis can be found in national law or in a tax treaty. The TP documentation is never made available to the public.

3. Standards with respect to the content of transfer pricing documentation

Current requirements for filing the Transfer Pricing Integral Report are the following:

- The report should be filed in a non-recordable compact disc, in PDF, and must comply with the following structure: executive summary, scope and objective, content and conclusions.
- Description of each inter-company transaction.
- Characteristics of the transactions.
- The background and functions performed by the group the taxpayer belongs to.
- The background, functions performed, risks borne and assets used by the taxpayer in its business.
- Contractual terms.
- Market analysis.
- Economic analysis.
- Listing of selected comparables that were rejected, stating the reasons for such consideration.

- Listing quantification and methodology used to practice adjustments necessary on selected comparable.
- Median and interquartile range.
- Profit and loss statement of the comparable entities corresponding to the commercial years considered for the economic analysis, indicating the source of information.
- Conclusions.
- Additional information.

The same electronic file must include the annexes and working papers of the TP Report in Microsoft Excel.

3.1 Master File

Issuance of a master and local file is not required by Ecuadorian tax law. However, taxpayers are required to issue a local TP report according to the specifications defined by local regulations.

3.2 Local File

Cfr. Master File.

4. Country-by-Country reporting standards

4.1 Threshold and required content

Ecuador has not signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports. Issuance of a CbC report is not required by Ecuadorian tax law

4.2 Notification requirement for subsidiary companies

Ecuador has not signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports. Issuance of a CbC report is not required by Ecuadorian tax law.

France

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1. Introduction

1.1 Legal context

Transfer Pricing ("TP") regulations in France are based on Article 57 of the French Tax Code which sets the arm's length principle. These regulations are consistent with the OECD Guidelines and closely follow the BEPS developments.

Holding TP documentation is mandatory for entities exceeding specific thresholds (Article L 13 AA of the French Tax Procedural Code).

As from 1st January 2014, the TP documentation must also include a copy of the rulings obtained from foreign tax authorities by associated enterprises which may have an impact on the taxable profit of the group, but the French Constitutional Court considers that this requirement cannot oblige French entities to provide the French tax administration with documents which are not at their disposal.

According to Article L 13 AB of the French Tax Procedural Code, additional documentation must be provided where transactions are undertaken with one or more associated enterprises established in a non-cooperative State or territory within the meaning of Article 238-0 A of the French Tax Code. This includes, for each associated enterprise, all documents required from companies which are subject to corporate income tax, notably the balance sheet and profit and loss account drawn up in accordance with French GAAP. The list of non-cooperative countries, which has been updated on 7 January 2020, includes Anguilla, the Bahamas, Fiji, Guam, the British Virgin Islands, the US Virgin Islands, Oman, Panama, American Samoa, Samoa, the Seychelles, Trinidad and Tobago, and Vanuatu.

Since 2014, a yearly declaration of TP policies shall be filed when a specific threshold is met (Article 223 quinquies B of the French Tax Code).

The Finance Bill for 2016 has also introduced into the French Tax Code (in Article 223 quinquies C of the French tax Code), the obligation to file a CBCR. This requirement applies to financial years starting as from 1st January 2016. Its content is in line with the OECD model and has been published in Decree No. 2016-1288 of 29 September 2016.

1.2 Practical context

Administrative guidelines regarding TP regulations are published by the tax administration (BOI-BIC-BASE-80 and sub.).

The French tax administration has also published a Transfer Pricing manual for SMEs (http://www2.impots.gouv.fr/documentation/prix_transfert/index.htm).

2. Formal requirements

2.1 Which taxpayers

French TP documentary obligations concern legal entities established in France, having intragroup transactions with related parties established abroad, when:

- their annual turnover (excluding taxes), or gross balance sheet asset value is higher or equal to EUR 400 million ("minimum threshold"); or
- at the close of the financial year, they directly or indirectly hold more than half of the financial or voting rights in an entity which meets the minimum threshold; or
- at the close of the financial year, more than half of their financial or voting rights are directly or indirectly held by an entity which meets the minimum threshold; or
- they belong to a French tax consolidation group under article 223 A or 223 A bis of the French tax code ("FTC"), and that group includes at least one legal entity meeting one of the above requirements.

Local branches fall under the scope of French TP documentation requirements.

For entities outside the scope of this legislation, there is no formal TP documentation requirement. However, during a tax audit, the French tax administration may require certain information to be produced regarding the transfer of profits to a related non-French entity. The taxpayer then has two months to provide the information required. Accordingly, French companies which are not subject to the documentation requirement, but whose transactions with foreign associated companies are significant, shall document their TP policy in advance.

2.2 Aggregation of transactions

Documentation shall be made per type of international transaction with an Associated Enterprise, as long as they are similar in terms of functions, risks and assets. However, amounts and a detailed calculation of prices and margins shall be provided for each counterparty.

2.3 Deadlines (timing)

In case of a tax audit of the French entity, the required TP documentation must be available to the administration on the date of the first on-site intervention as set out in the account verification notice, or within 30 days upon a formal request.

2.4 Materiality

TP documentation is required for those companies exceeding the above-mentioned threshold. However, in the local file only "significant transactions" shall be reported that are defined as those which amount per category of transaction per year, and per one or multiple associated counterparties shall exceed EUR 100,000. This threshold shall not be the result of a netting.

2.5 Retention of documents

There is no tax requirement regarding retention of TP documentation. In practice, documentation shall be kept for a period of at least 4 years in order to meet the French statutes of limitation period. However, companies which are in a tax loss position need to be able to justify TP transactions even if the latter has been realised beyond such timeframe of 4 years. In such case TP documentation shall be kept until the past losses have been completely offset.

Please also note that accounts and supporting documents such as invoices shall be kept during at least 6 years according to Articles L 85 and L 102 of the French Procedural Code, and during at least 10 years according to Article L123-22 of the French Commercial Code.

2.6 Frequency of documentation updates

TP documentation needs to be contemporaneous and shall be prepared on an annual basis. Benchmarks shall contain the most recent information and accordingly financial data of comparables shall be updated annually.

When there has been no change as to the circumstances under which the activity is carried out, it is permissible for the benchmark studies to be fully re-updated every three years.

2.7 Tax return disclosures

France does not require TP documentation to be filed along with the tax return. However, a yearly declaration of TP policy shall be filed when a specific threshold is met (Article 223 quinquies B of the French Tax Code): French companies belonging to large groups must file each year – within 6 months from the filing date of the tax return – a declaration of their TP policy when their annual turnover (excluding taxes) or a gross balance sheet asset value amounts to at least EUR 50 million (the minimum threshold) or when they are controlling or being controlled by an entity which meets the minimum threshold.

Are excluded from the scope of the filing requirement: companies having no transactions with foreign related parties or carrying out transactions with foreign related entities for an amount not exceeding EUR 100,000 per nature of transactions.

The declaration (form 2257) includes the following information:

- General information on the group of associated enterprises, i.e.:
  - a general description of the activity carried out, including any changes which occurred during the tax year;
  - a list of the main intangible assets owned (e.g. patents, trademarks, trade names, know-how); and
  - a general description of the TP policy of the group, including any changes which occurred during the tax year.
- Specific information concerning the company filing the declaration, i.e.:
  - a description of the activity carried out, including any changes which occurred during the tax year;
  - a statement of the transactions carried out with associated enterprises, by type and by amount, where such transactions (by type) exceed EUR 100,000; and
  - a description of the method(s) applied to determine transfer prices in compliance with the arm's length principle, including an indication of the main method used and any changes made during the tax year.

2.8 Burden of proof

To make a re-assessment, the French tax administration will need to demonstrate that the transactions do not comply with the arm's length principle. The absence of documentation or incomplete documentation does not reverse the burden of proof.

However, the burden of the proof is reversed in case of transactions with tax havens (Article 238A of the French Tax Code).

2.9 Penalties

2.9.1 General

In the event that the company fails to submit the required documentation within 30 days of receipt of a formal notice (extension can be granted), it is liable for a minimum EUR 10,000 fine, which can be up to the higher of the two following amounts: (i) 0.5% of the amount of the transactions concerned or (ii) 5% of the adjustments of the result relating to these transactions (Article 1735 ter of the French Tax Code).

The penalty applies to each and every tax year covered by the tax audit.

A penalty can therefore apply even in the absence of a re-assessment of the TP policy of the taxpayer.

In addition, failure to submit the yearly declaration of TP policy or making erroneous statements on the tax form (2257-SD) will trigger penalties as follows: (i) EUR 50 if the declaration is not submitted, or (ii) EUR 15 per error with a minimum penalty of EUR 60 and a maximum penalty of EUR 10,000. Failure to submit the yearly declaration would also increase the risk of a tax audit.

2.9.2 Penalties in case of a TP-adjustment

Re-assessed profits are qualified as a deemed distribution of a benefit and a withholding tax on the re-assessed amounts is imposed by the French Tax Administration (FTA) when the applicable double tax treaty allows it.

- When the double tax treaty permits the FTA to treat the TP re-assessment as a deemed dividend distribution, the actual withholding tax applied depends on the relevant tax treaty provisions.
- Otherwise, or in the absence of a specific tax treaty, the withholding tax rate applied is 30% and increases to 75% when the foreign entity is based in a “non-cooperative” jurisdiction.

In addition, when the transfer is treated as a deemed dividend, the FTA also usually applies a 10% penalty for not declaring the withholding tax, which applies irrespective of the good faith of the taxpayer.

However, if certain cumulative conditions are met, the withholding taxes may be waived at the request of the taxpayer (except if the non-French related party that entered into the re-assessed transaction is located in a non-cooperative state or territory). In order to benefit from this measure provided by Article L62 A of the French Tax Procedural Code, the taxpayer shall file a written request before the FTA issues the tax bill and the amounts classified as deemed dividends shall be repatriated to the benefit of the French taxpayer within 60 days from the request.

Additional penalties may also apply if the taxpayer is considered as being in bad faith (40%) or has acted fraudulently (80%). In these cases, taxpayers are denied recourse to the European Union Arbitration Convention.

Also, TP adjustments may trigger the re-assessment of other taxes and contributions which are based on the net taxable result (e.g., business tax, employee profit-sharing).

2.9.3 CbC-reporting

Failure to submit the CBCR is subject to a fine of up to EUR 100,000 (Article 1729 F of the French Tax Code).

2.10 Interest

Late interest payment shall apply at the rate of 0.2% per month in arrear (set at 0.4% per month before 1st January 2018), calculated on the amount of re-assessed tax and starting as from the month during which the tax should have initially been paid. No interest is due on penalties.

Taxpayers are allowed (before the FTA sends the notice of re-assessment) to correct their errors or omissions in consideration of a reduced late interest payment rate which is equal to 70% of the ordinary late interest payment rate (Article L 62 of the French Tax Procedural Code). In that respect, taxpayers must file a complementary tax return and pay the corresponding additional taxes at the same time.

In addition, please note that the only safe harbour rules available in France relate to intra-group lending; a French borrower paying an interest rate that is equal to or lower than the “acceptable rate” (published quarterly) will not be re-assessed on that interest rate. This rate is a variable rate based on data communicated by French banks on interest rates they provide to borrowers on loans with at least a two-year maturity.

2.11 Use of most reliable information

French TP regulations and administrative guidelines do not explicitly provide for any safe harbour rules regarding benchmark studies which aim at demonstrating the arm's-length character of the transaction under review. French comparables are preferred when the tested party is French. However, regional benchmark studies and, in particular, pan-European benchmark studies are generally accepted.

2.12 Languages

The documentation shall be drafted in French. The FTA may accept an English version but can request a translation of documentation written in a foreign language.

2.13 Confidentiality

TP documentation shall be treated confidentially by the French tax administration and shall not be made available to the public.

Exceptions may apply in case of international exchange of information.

3. Standards with respect to the content of transfer pricing documentation

For financial years beginning on or after 1 January 2018, TP documentation has been reviewed in order to meet OECD requirements (BEPS action 13).

The documentation consists of two parts:

- The first part is the "master file", the content of which provides an overview of the group's activities, global TP policy and global distribution of profits. It includes the following information about the group of associated companies: organisational structure; description of the domains of activity of the multinational group; financial and tax situation of the group.
- The second part is the "local file" which consists of presenting very precise information on intra-group transactions carried out by the French entity producing the documentation (description of the entity in France; controlled transactions; financial information).

In practice, the documentation shall be made available in an electronic format (it can be presented in the form of PDF-type files, while the format "PDF Image" resulting from a scan is prohibited).

Computations must be presented in a format allowing the administration to carry out checks, sorting and classifications (e.g., excel format).

The entity's financial information in the local file needs to be sourced from the French statutory accounts and the local entity must provide the reconciliation between management accounts used for TP purposes and statutory accounts.

3.1 Master File

i. Organisational structure

— Legal and capital structure; geographic location

ii. Description of the domains of activity of the multinational group

— Significant sources of group profits

- Description of the supply chain of the five main goods and services and of any other goods and services representing more than 5% of the group's turnover - a diagram can be provided
- List and description of major service agreements between associated companies; description of the capacities of the sites; description of TP policies that are applied (in particular, the criteria used to allocate the costs of the services as well as the descriptions of the modalities retained for the invoiced services). The service agreements to disclose are those which implementation is essential for carrying out of the activity
- Description of the main geographic markets
- Synthetic functional analysis describing the main contributions of the various entities of the group in the value creation: key functions performed, significant risks assumed, significant assets used
- Description of significant corporate reorganisations and acquisitions and disposals of assets during the year

iii. Intangible assets of the multinational group

- General description of the group's strategy for the development, ownership and operation of intangible assets: location of the main research and development facilities, location of the management of research and development activities
- List of intangible assets or classes of intangible assets that are important for TP and entities that are the legal owners
- List of significant agreements between related parties relating to intangible assets: cost allocation, research service and licence agreements
- General description of potential significant transfers of intangible assets between associates (inter-company)

iv. Financial activities of the multinational group

- General description of the financing of the group, including a description of the major financing agreements concluded with independent lenders
- Identification of all members of the multinational group exercising a central treasury function for the group, including identification of countries of setting-up the relevant entities and the place of effective management
- General description of the group TP policies of financial intra-group agreements

v. Financial and tax situation of the multinational group

- Group annual consolidated financial statements for the financial year
- List and description of prior agreements on unilateral TP concluded by the group and other tax authorities' decisions on the distribution of profits between countries (including rulings)

3.2 Local File

i. Entity in France

- Description of the management structure and organisational chart of the company
- Description of the activities carried out and the strategy of the company; reorganisations; transfers of intangible assets

ii. Controlled Transactions

- Description (in particular, conditions of payment, warranties, and remunerations of potential intermediaries) of "significant transactions" with associated companies and the conditions under which they are carried out.

  A description shall be made per category of income or charge, i.e.;

  - Income: sale of goods, services, commissions, royalties, any warranties, financial guarantees, financial products/income, flows on derivatives, other income
  - Charges: purchases of goods, services, commissions, royalties on intangible assets, any warranties, financial guarantees, financial charges, flows on derivatives, other charges.
- Amounts of intra-group payments and receipts for each category of transactions
- Identification of the associated companies involved in each category of controlled transactions and their relationship with the French entity
- Copy of all important intra-group agreements concluded by the French entity, if any (or list if a large number of agreements are involved)
- Comprehensive comparability analysis and functional analysis of the French entity and associates for each category of transactions (when the conditions of exercise of the activity remain unchanged, the documentation of comparable studies may be updated every three years)
- Indication of the most appropriate TP method for each category of transactions and why this method was chosen
- Indication of the associated company that has been selected as a tested party, if any, and an explanation of the reasons for this selection
- Summary of the important assumptions that have been made to apply TP methods
- Explanation of why a multi-year analysis of TP methods has been applied (as the case may be)
- List and description of comparable free market transactions and financial indicators for independent enterprises used including a description of the methodology of research of data bases for comparable researches with specifications of the data sources.
- Description of any adjustments made to comparable transactions
- Justification of the conformity of the established transfer prices with the arm's length principle
- Summary of financial information used to calculate transfer prices
- Copy of advance binding agreements on unilateral, bilateral and multilateral TP agreements

iii. Financial information

- Annual financial accounts
- Information and breakdown showing how data used for TP can be related to current financial statements
- Summary tables of financial data relating to comparable transactions

4. Country-by-Country reporting standards

4.1 Threshold and required content

According to Article 223 quinquies C of the FTC, companies established in France have to make a declaration including the country-by-country breakdown of group profits, economic, accounting and tax aggregates, and information on the location and activity of the group's entities. This obligation applies to legal entities established in France that meet the following criteria:

- prepare consolidated accounts;
- hold or control, directly or indirectly, one or more legal entities established outside France (or have branches there);
- achieve a consolidated turnover before tax ≥ EUR 750 million;
- not to be held by one or more legal entities required to file this declaration (or similar declaration abroad).

This report must be filed in English in an electronic format within 12 months as from the end of the financial year.

The declaration (form 2258-SD) shall include:

Part 1: for each State or territory in which the group is established, the following aggregated data for the financial year in question

- Turnover resulting from intra-group transactions;
- Turnover resulting from transactions with independent parties;
- Total turnover;
- Profit or loss before income tax;
- Income taxes paid;
- Income taxes due;
- The share capital;
- Retained earnings at the end of the financial year;
- The number of full-time equivalent employees;
- Tangible assets other than cash and cash equivalents.

The data are declared in euros or in the currency used to prepare the consolidated financial statements.

Part 2: for each State or territory in which it is established

- the identity of all entities established there, including branches attached to a legal person situated in another State or territory.
- Where an entity is established in a State or territory other than that in which it is incorporated, that second State or territory shall also be mentioned.
- The nature of the main activities of each entity which shall be chosen from the following list: (i) Research and development ; (ii) Ownership or management of intellectual property rights; (iii) Purchasing or supply; (iv) Manufacturing or production ; (v) Sales, marketing or distribution ; (vi) Administrative, management or support services; (vii) Provision of services to independent parties; (viii) Internal financing of the group ; (ix) Regulated

financial services ; (x) Insurance ; (xi) Ownership of shares or other equity instruments ; (xii) Dormant activities ; (xiii) Other.

French legal entities must also indicate in their tax return whether:

- they are supposed to file the CBCR, or
- they were designated for that purpose; or
- another entity of the group will file the CBCR for the group.

4.2 Notification requirement for subsidiary companies

A legal entity established in France that is owned or controlled, directly or indirectly, by a legal entity established in a State or territory that is not on the published list of the “Participating States or Territories” (see below) and that would be obliged to file a CBCR in France if it had been established in France, must file a CBCR in France if:

- this French legal entity has been designated by the group for that purpose and has informed the FTA accordingly, or
- it cannot demonstrate that another group entity, situated in France or in a Participating State or Territory, has been designated for that purpose.

Participating States or Territories are those which meet all of the following conditions:

- have adopted a legislation providing for the filing of a CBCR that is similar to French legislation,
- have concluded with France an agreement allowing the automatic exchange of CBCR and which comply with the obligations set forth by this agreement.

Germany

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1. Introduction

1.1 Legal context

German TP documentation rules (regarding CbC reporting, cf. below) are laid down in sec. 90 (3) AO (German fiscal code) and also in the related ordinance regarding the documentation of profit allocations (Gewinnabgrenzungsauf¬zeichnungsverordnung – GaufzV). In the current versions applicable from 2017 onwards, these rules reflect the requirements of OECD-BEPS action point 13, e.g. Master Files and Local Files. Hereafter, we only comment on these currently applicable rules, although according to a legislative proposal, future changes might be expected, e.g. regarding the threshold above which a Master File is mandatory or the obligation to file the Master File for one year electronically and until the end of the following year.

Regarding details of a pre-BEPS-version of the ordinance, the Federal Ministry of Finance has published a central administrative order on administrative principles-procedures (Verwaltungsgrundsaetze-Verfahren). This order is related to outdated legal regulations from the time before the OECD-BEPS project started, as those rules did not require the distinction between Master and Local files. Thus, this order generally cannot be regarded as being based on the aforementioned OECD principles although in many respects, the former German regulations within tax law and the respective ordinance were already in line with the current OECD rules. As a consequence, the former order can still be used as a basis for interpretation of the current rules contained in sec. 90 (3) AO and the aforementioned current ordinance.

Furthermore, CbC reporting legislation was introduced in sec. 138a AO coming into effect:

- for fiscal years starting on or after 1 January 2016 regarding the primary mechanism (i.e. for MNE with German ultimate parent entities)
- one year later regarding the secondary mechanism (i.e. for other German entities).

1.2 Practical context

For fiscal years 2017 onwards, the distinction between Master files and Local files is mandatory under German law.

Regarding CbC reporting the Bundeszentralamt fuer Steuern (BZSt – Federal Central Tax Authority) published some FAQs on its homepage (www.bzst.de) with respect to several technical aspects. Regarding most practical aspects Germany simply refers to the respective OECD publications such as the user guide to the XML Scheme or the Guidance on the implementation of CbC reporting. For CbC reporting electronic filing via a specific electronic interface for which companies have to register is mandatory.

2. Formal requirements

2.1 Which taxpayers

From 2017 onwards, German law requires that the taxpayer has to prepare a Local File for business transactions involving foreign countries ("mit Auslandsbezug"), if related parties or permanent establishments are used for (in case of permanent establishment: eventually deemed) cross-border business transactions. For income other than from agriculture, trade/ business and self-employment as well as for small enterprises, these documentation requirements are deemed to be met by the provision of adequate information and already existing documents if the respective deadlines are adhered to.

In this respect, a small enterprise is defined in sec. 6 (2) GAufzV as follows:

- neither the sum of charges for the purchase/sale of goods from business transactions with related parties exceeds EUR 6 million
- nor the sum of charges for other services/supplies from business transactions with related parties exceeds EUR 600,000

during the current fiscal year. If these amounts are exceeded in one fiscal year, the exemption will not be applicable during the following fiscal year. Reciprocally, the exemption is applicable in the following fiscal year, if the respective amounts fall below the mentioned thresholds.

A Master file is mandatory from 2017 onwards if a Local file has to be prepared and the non-consolidated turnover of the entity was at least EUR 100 million in the preceding fiscal year.

CbC reporting legislation applies to entities that are part of multinational groups with a (consolidated) annual turnover of at least EUR 750 million in the preceding year. A German entity has to submit such CbC reporting if it is (a) the ultimate parent, (b) a German entity appointed by a foreign ultimate parent to produce such reporting (surrogate parent entity) or (c) a German entity whose foreign parent has not submitted a CbC report.

2.2 Aggregation of transactions

Separate documentation of each single business transaction is required. However, an aggregation is possible:

- if (a) the transactions are similar in terms of functions and risks, (b) the transactions have been divided into groups in accordance with predetermined and transparent rules and (c) if these transactions are identical or equivalent or if the aggregation is common between third parties as well, or
- if the transactions are linked in respect of their cause, or
- if the transactions are partial services/ supplies of an overall transaction and if for the appropriateness of its price, the overall transaction is more relevant than the partial service/ supply.

2.3 Deadlines (timing)

For ordinary business transactions there is no deadline for the preparation of the documentation by the taxpayer. However, if the documentation is prepared based on data or documents collected or established long after the respective reporting period, the tax authorities might challenge the documentation because it appears to have been prepared as subsequent justification, e.g. because of long-term losses incurred by one of the entities.

Regarding extraordinary business transactions (i.e. conclusions and changes of long-term agreements which have a material effect on the income derived by the taxpayer; transfers of assets in the course of a business restructuring procedure etc.), documentation has to be prepared on a timely basis, which is considered to be within six months after the end of the fiscal year in which the business transaction has taken place.

The submission of the Local Files and Master Files to the tax authorities shall only be required by the tax authorities for carrying out of a field audit. The submission shall be required by the authorities giving a period of 60 days (in case of extraordinary transactions being involved: 30 days). These terms may be extended under special circumstances.

A German ultimate parent entity is required to submit the CbC report electronically to the BZSt within one year after the respective fiscal year for which the CbC reporting is performed. For the secondary mechanism basically the same applies, i.e. a German entity not being the ultimate parent of a multinational group has to submit the CbC report for a given fiscal year within one year of the end of the relevant year. However in case a domestic entity could assume that the CbC report would be submitted in due time by the foreign ultimate entity, and if it is subsequently found that this was not done but not because of the fault of the domestic company, the domestic entity must fulfil its obligations within one month after being notified.

2.4 Materiality

The German documentation requirements regarding the Local File are not limited explicitly to business transactions with material impact on the taxpayer’s income. As a consequence, there are neither relative nor absolute limits regarding the documentation requirements. In practice, however, the tax authorities often limit their scope of investigation to business transactions with such material impact. Regarding the Master File, the ordinance states that information is to be prepared based on reasonable commercial assessment, which according to the prevailing view also implies a (non-specified) materiality threshold.

2.5 Retention of documents

Documentation has to be retained for ten years. The retention period does not expire as far and as long as the documents are of importance for taxes for which the assessment period has not yet ended.

2.6 Frequency of documentation updates

There is no explicit requirement for the frequency of updates. However, the documentation regarding Master Files and Local Files is required for each year in which the above-mentioned business transactions with foreign countries occur. Moreover, for continuous business transactions (e.g. long-term loans), the taxpayer has to collect and record information even after the conclusion of the business transaction (e.g. the conclusion of the loan agreement) in order to enable the tax authorities to investigate whether, and if so, from which point in time third parties would have adjusted the business transaction (e.g. changed the interest rate). This is especially relevant in the case of tax losses which third parties would not have tolerated, or in the case of price adjustments at the expense of the taxpayer.

The CbC reporting has to be performed for each fiscal year in which the respective preconditions (cf. “2.1. Which taxpayers”) are met.

2.7 Tax return disclosures

For fiscal years starting on or after 1 January 2017, German legislation requires a domestic enterprise/a domestic PE to disclose whether it is a German ultimate parent, a surrogate parent entity or a domestic entity included in the CbC report of a foreign parent (and if so, which parent will submit a CbC report to which tax authority).

2.8 Burden of proof

Generally, the common rules apply regarding the burden of proof. This includes the principle that if a taxpayer fails to meet his obligation to cooperate, the investigation obligations of the tax authorities increase accordingly.

Moreover,

- if a taxpayer fails to provide the documentation, or
- in case the documentation is essentially unusable or
- if the documentation of extraordinary business transactions has not been prepared on a timely basis (cf. above chapter “2.3 Deadlines (timing)”),

there is a rebuttable presumption that the taxpayer’s German income for the investigation of which the documentation should serve is higher than the declared income. If in such cases the tax authorities have to make estimates which can only be specified within certain limits (especially based on price ranges), the German tax authorities may estimate the amount most unfavourable to the taxpayer.

Even if the taxpayer submitted usable documentation to the tax authorities, the same applies if there is evidence that the taxpayer’s income were higher if he had complied with the arm’s length principle and if doubts cannot be removed because a foreign related person does not fulfil its obligation to cooperate or provide information.

2.9 Penalties

2.9.1 Administrative penalties

Unless the non-compliance with the requirement to submit usable documentation on time is excusable or if it is caused only by slight negligence on the part of the taxpayer, the following rules apply:

- If the taxpayer does not submit a Local file for a controlled transaction or in case the submitted documentation is essentially unusable, an amount of 5 to 10% of the additional income (with a minimum of EUR 5,000) will be further added to the income.
- If the taxpayer submits the mentioned documentation for a controlled transaction later than permitted, a penalty of up to EUR 1 million, but at least EUR 100 per day of delay will be levied.

For non-compliance with the requirements regarding the Master file, no specific rules apply. As a backup, the general administrative measures (such as “Verzoegerungsgeld” – fine for delay) may be applied.

Failure to file CbC reports, filing of incomplete reports or late filing will be treated as an administrative offence and the taxpayer will be fined up to EUR 10,000. In cases where the non-filing, the incomplete or late filing is considered to be caused by the taxpayer not taking due care in meeting his fiscal obligations ("leichtfertige Steuerverkuerzung"), the limit is EUR 50,000.

2.9.2 Penalties in case of a TP-adjustment

Apart from the rules mentioned above in chapter "2.9.1. Administrative penalties", there are no specific rules on penalties in case of a TP adjustment. The common rules on the consequences of income adjustments therefore apply including, for example, fines for frivolous tax evasion.

2.10 Interest

There are no specific rules for interest charged on subsequent tax payments in TP cases. As a consequence, the common rules apply, which normally means that interest is charged at a rate of 0.5% per month (generally starting 15 months after the end of the relevant calendar year). One should note that in the present economic environment characterised by low interest rates, it is currently examined by the Bundesverfassungsgericht (BVerfG – Supreme Court) whether this interest rate for subsequent tax payments of 6% p.a. is still in line with the German constitution.

2.11 Use of most reliable information

According to the German ordinance, within the documentation, the taxpayer has to use comparables as far as such data is available to him, to related parties or such data can be procured from freely accessible sources with reasonable effort at the moment at which the business transaction is agreed upon. However, there are no specific requirements in Germany as to the question whether only domestic or foreign comparables will be accepted by the tax authorities.

2.12 Languages

Generally, the Master file and the Local files have to be prepared in German. The taxpayer may apply for an exception at any time before the documentation is due for submission but no later than immediately after he has been requested by the tax authorities to submit it. With respect to extraordinary business transactions, the application has to be made at a date which still enables the timely preparation of the respective documentation (cf. above chapter "2.3. Deadlines (timing)").

While it is prescribed that entries to table 3 of the CbC reporting have to be made in English, the rest of the entries can also be made in German, although the German authorities prefer English for those parts as well.

2.13 Confidentiality

After the submission to the tax authorities, the documentation as well as the CbC reporting are protected by common German rules and thus generally are subject to confidential treatment by the German tax authorities. Exemptions relate especially to the international exchange of information e.g. under the relevant double tax treaties, the MCAA or the EU directives on administrative cooperation.

3. Standards with respect to the content of transfer pricing documentation

A. Local File content

General information on the structure of the entity and on the business / the business strategy

- Description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports including the countries in which such individuals maintain their principal offices.

- Description of the business and business strategy pursued by the local entity.

  This description should be detailed and must include an indication whether the local entity has been involved in or affected by business restructurings or transfers of intangibles in the present or preceding year. Further it must contain an explanation of those aspects of such transactions which affect the local entity.

Analysis of functions, risks, and intangibles

- Information on (a) the relevant competitive and market conditions (b) the business strategy, (c) the functions performed and risks taken by the taxpayer and his related parties in the course of the business transaction as well as their changes, (d) the contractual conditions of the business transactions and (e) the use of the relevant intangibles.

  As a new aspect compared to the version of the ordinance currently applicable, the mentioned discussion draft expressly requires a weighting of functions and risks and the used assets to be quantifiable and verifiable. Furthermore, the relevant decision-makers must be indicated in the analysis of functions and risks.

- Description of the value chain and the value contribution of the taxpayer in comparison to the related parties also involved in the business transaction.

Analysis of transfer prices

- Description of the selected method of TP and justification of the suitability of the selected method.
- Attachment of documents relating to the calculation of the transfer prices.
- Analysis of the prices and financial data of independent enterprises used for comparison (comparables) and documentation of any adjustments made.

  As a new element, the discussion draft for the update of the ordinance expressly states that in case of database studies, the search process must be traceable for the tax authority and the authorities must be granted access to the same version and data as used in the taxpayer's data base study.

B. Master File content

Basic Information on ownership, organisational and legal structure

- Graphical description of the organisational group structure (legal and ownership structure) as well as the geographical distribution of the entities of that group
- Summary of significant mergers, acquisitions, sales and restructurings.

Overview of the business

- Description of the main geographical markets for the products / services of the group
- Overview of important factors having an impact on the overall profit of the group
- Description of supply chains

  Such description should be provided for the five products and / or services of the group which generate the highest sales revenues as well as for all other products and / or services, which account for more than 5% of the group's revenues

- List and summarising description of material service agreements between entities of the group (except for agreements with R & D entities)

  The data provided should include (a) the capacity of the main facilities which provide material services, (b) a description of the TP policy adopted for the allocation of costs for those services and for the determination of the considerations to be paid for these services.

Comprehensive functional analysis

- This analysis should describe the main contributions that the individual entities make to the value creation, i.e. key functions, important risks and material assets

Intangibles, Research and Development

- Description of the group's overall strategy for intangibles

  Information is required about the development, ownership, protection and use of intangibles. It should further include the locations of the most important R & D facilities and of the facilities managing R & D activities

- List of intangibles relevant for TP purposes and of the entities which are the owners of those intangibles
- List of important agreements involving to intangibles

  This information should include cost-sharing arrangements, material research service agreements and licensing agreements.

- Specification of intra-group financial transactions

  This should comprise information on relevant financial concepts such as financial intermediation, interest rate benchmarking, cash pooling and loan guarantees.

- General description of the TP policy regarding R&D and intangible assets
- General description of all important transfers of rights to intangible assets

  This information should include the entities involved in such transfers, their countries and the considerations paid.

Financial operations

- General description of how the group is financed

  This should include the description of significant financing relationships with third parties.

- Indication of the entities performing central financial, cash or asset management functions

  This should include an indication of the law under which the entity is organised and its effective place of management.

- General description of the TP strategy for financing relationships

Attachment of consolidated financial statements (if such statements have been drafted)

List and brief description of APAs regarding TPs and international income / cost allocation

4. Country-by-Country reporting standards

German law requires the following:

Part 1: Country-by-country indication of:

- Revenue and other operating income from business transactions with (a) third parties, (b) related parties and (c) the total of (a) and (b)
- Income taxes paid in the fiscal year
- Income taxes paid or accrued in and for the tax year
- Profit/loss for the year before income taxes
- Equity
- Retained profit
- Number of employees
- Material assets.

Part 2: Country-by-Country information of all included entity's major business activities.

Part 3: Additional information necessary for understanding the data in Part 1 and Part 2.

Greece

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1. Introduction

1.1 Legal context

The legal framework prescribing the rules for Transfer Pricing (TP) documentation is contained in two bodies of law (codified laws), namely, Law 4172/2013 which constitutes the Greek Income Tax Law (ITC) and the Tax Procedures Code (4174/2013, or TPC). With the L 4172/2013, the OECD guidelines for TP are introduced as the application tool and interpretation framework. Any changes to OECD guidelines have immediate effect. The relevant authority to emanate, adopt or issue rules and guidelines is the General Secretariat of Public Revenue (GSPR). Several TP guidelines have been issued by the GSPR such as Decision 1097/2014 (as amended by Decision 1144/2014) which provides the mandatory content of the TP Documentation File (TPDF) for related party (inter-company) transactions and Decision 1284/2013 which provides guidance on Advance Pricing Agreements (APAs). The main TP Interpretation, Decision 1097/2014 provides guidance on the file structure, requiring a Master file (basic file containing information on a group of entities, common for parent and components, only when foreign companies are present in the group) and a local file (Greek file containing information on the Greek tested parties, and domestic groups) and provides guidance for the content as well.

Subsequent decisions provide guidance on the acceptable comparables database, database's edition, years to include and period of coverage, use of quartiles etc.

An additional requirement is the preparation of a summarisation table of all the tested transactions, a Summary Information Table (SIT) and for all information to be uploaded to an appropriate IT platform, containing the key points of the transactions and information on the tested parties.

1.2 Practical context

Although the existing legal framework appears to be sufficiently detailed, it lacks clarity in a number of practical issues and this is magnified by an evident lack of experience especially when it comes to complex projects involving a variety of jurisdictions. In addition, the Greek TP guidelines include domestic groups, as well, without any exception for the documentation requirements while the APA procedure is reserved only for cross-border transactions with a notable administrative cost.

2. Formal requirements

2.1 Which taxpayers

Taxpayers, who enter into a transaction with an associated entity, are required to document this transaction. The obligation exists even when the associated party is not a legal but a physical person and irrespectively for both domestic and foreign entities and for small, medium and big enterprises as well. The definition of the association is given in article 2 of L4172/2013 where association exists when there is a direct or indirect participation capable to control the management. Both the aforementioned article and subsequent ministerial circulars provided quantitative and qualitative criteria for the determination of the association status, e.g. the possession of 33% of the voting rights or the existence of dominative influence between the entities.

Persons subject to documentation requirements include taxpayers with a total value of intercompany transactions of more than EUR 200,000 or EUR 100,000, depending on whether their turnover is more or less than EUR 5 million, respectively.

2.2 Aggregation of transactions

Each transaction can be examined on an arm's-length basis. However, when transactions of common type occur, it is possible to provide documentation for this common transaction type, taking into account the characteristics of the transactions as well. In practice the transactions to be tested can be grouped into categories, by nature of transaction. Moreover, the threshold used to establish the obligation for TP documentation is examined with respect to the transaction category. An indicative typology of the transaction can be found in the guidelines for the preparation of the summarisation table to be uploaded at the end of every fiscal year.

2.3 Deadlines (timing)

For the Master and the local file, the deadline for preparation is the deadline for the annual tax returns. However, the competent authority grants one month to present the TPDF starting from the day of the formal request for audit. Notwithstanding, the additional requirement of the Summary Information Table should be uploaded within the strict deadline for the tax return.

2.4 Materiality

Once the obligation to provide TP documentation is triggered (see above par. 2.1) the taxpayer is obliged to document every transaction regardless of the amount.

2.5 Retention of documents

The statute of limitations for the assessment of TP adjustments is five years from the tax year-end in which the annual corporate income tax return was filed (containing the adjustment). Please note, under certain circumstance it is 20 years.

2.6 Frequency of documentation updates

The TPDF should contain a special chapter where the taxpayer describes all facts and circumstances justifying changes in the market conditions with respect to the previous fiscal year. The TPDF remains valid for the next fiscal year including the updates deemed as necessary. However, if the taxpayer proves that the operating conditions remained substantially unaltered, they would be authorised to keep the same comparables for a maximum period of three years.

2.7 Tax return disclosures

There are no direct disclosures in the tax returns, but as mentioned in par. 1.1, the Greek tax authorities go beyond a simple tick mark in the tax return and require from the taxpayer to declare, through the SIT, quite detailed information on all of the key points. The SIT, is to be uploaded along with the tax return, containing information on the company names, country, nomenclature used (e.g. NACE 2nd revision), VAT number, existence of tax model convention, type of transaction, amount and TP method used, risk, functions and assets.

2.8 Burden of proof

The taxpayer is obliged to provide the necessary documentation within the prescribed deadlines and the documentation should be complete and accurate in terms of content and usable information allowing the tax authority to perform recalculations. In case data is missing or if the TDPF is unusable and these inefficiencies cannot be remedied with additional information during the tax audit, the TDPF will be considered inadmissible leading to penalties. The SIT should be complete and accurate as well, and the information contained should match the TPDF, otherwise it will be considered inadmissible, leading to penalties.

2.9 Penalties

According to art. 56 of TPC 4174/2013 as amended, there are three main categories of penalties:

1. late submission of the Summary Information Table (SIT): 0.1% of the value of the tested transactions with a minimum of EUR 500 and a maximum of EUR 2,000;
2. Timely submission of the Summary Information Table (SIT) but with incorrect information: If the error or incorrectness exceeds 10% of the value of the tested transactions, then a 0.1% penalty on the value of error is calculated, with a minimum of EUR 500 and a maximum of EUR 2,000;
3. Non-submission of the Summary Information Table (SIT): 0.1% of the value of the tested transactions that should have been declared with a minimum of EUR 2,500 and a maximum of EUR 10,000;
4. Amended SIT: penalties are applicable only with strict regard to values declared and the amendment of the value exceeds EUR 200,000 compared to what was previously reported. In this case a penalty is calculated amounting to 0.1% of the tested (amended) transactions with a minimum of EUR 500 and a maximum of EUR 2,000;
5. Non-submission of the TPDF: the penalty is a one-off payment calculated in relation to the time passed from the deadline, ranging as follows:
   - from 31 – 60 days of delay: EUR 5,000
   - from 61 – 90 days: EUR 10,000;
   - over 90 days or no submission at all: EUR 20,000.

Although the penalty for TPDF with incorrect or inaccurate information is abolished, an incorrect TPDF may be considered equivalent to a non-submission.

Furthermore, when the tax authority reaches the conclusion that there is tax evasion, additional penalties and fines will be calculated as in all tax evasion cases. Also, other implications might emerge such as breaches to the anti-laundering money legislation.

2.10 Interest

The calculation of late payment interest with respect to additional taxes that emerged after the TP tax audit, follows the general rule of late payment interest which is currently set at an 8.51% year rate (0.71% monthly). Interest is not capitalised.

2.11 Use of most reliable information

The tax authority, in line with the OECD guidelines requires the use of most reliable information, without posing specific criteria. When external comparables are required, no specific TP comparables database is preferred by the tax authority. The tax authority normally focuses on the interquartile range in a transactional net margin method (TNMM) analysis.

The use of benchmarking studies must follow certain rules with regard to the period covered and the data handling. More specifically:

- When the CUP method is the selected method, the data to be used should refer to uncontrolled transactions that took place within the same period. In this case the comparables search should be executed in database version covering a period starting from two months before year-end up to the deadline for the submission of the tax returns (usually by the end of June)
- When the CUP method is not the selected method, the taxpayer should retrieve the data from the weighted average of the three years preceding the tested year

- The values of the sample must be sorted in ascending order before the construction of the quartiles
- The database version used will be binding at the level of the tax authority in case of assessment.

2.12 Languages

Greek or English are the languages to be used for the Master file. Any other official language can also be used but must be accompanied with a Greek translation. However, the Local file will be prepared in Greek.

2.13 Confidentiality

The general rule of confidentiality on the citizens' tax affairs is applied. The right to confidentiality is restricted when information is requested by other public officers, justice, or foreign tax authorities (EU Directive 2011/16).

3. Standards with respect to the content of transfer pricing documentation

3.1 Master File

To be prepared only when there is a foreign company in a Group of companies (MNE) (not required for domestic groups):

- A general description of the taxpayer's activities and strategy, including changes made in relation to the previous tax year,
- A general description of its organisational, legal and operational structure (including the Group's chart, the list of its components, permanent establishments, a description of the association relationship and the changes as compared to the previous tax year on the ownership of intangible assets, of financial transactions and taxable income of the group)
- A general description of the associated entities and/or their permanent establishments involved in the transactions to be documented,
- A general description of the transactions to be documented involving the associated entities, i.e. a general description of:
    i. the nature of the transactions (sale of goods, provision of services, financial transactions, intangible assets, etc.),
    ii. the flow of invoices; and
    iii. the amount of transactions
- A general description of the functions performed, the risks being dealt with and the changes that may exist to the operations and risks in relation to the previous tax year,
- The ownership of intangible assets (patents, trademarks, trade names, know-how, etc.) and the payment or collection of rights,
- A description of its pricing policy that explains the arm's length principle for the intra-group transactions,
- A list of cost allocation agreements, pre-approval decisions of intra-group pricing methodology and court decisions concerning group members, with respect to price setting of intra-group transactions,
- A description of the transactions carried out during the fiscal year with entities and with which the taxpayer became associated or the association was terminated with in the same tax year, before or after the association, in order to be able to verify if these transactions meet the criteria of comparability and can be used as comparative data.

3.2 Local File

- A detailed description of the taxpayer and his strategy, including changes made in comparison to the previous tax year,
- A detailed description of the transactions to be documented, including:
  i. the nature of the transactions (sale of goods, provision of services, financial transactions, intangible assets, etc.)
  ii. the flow of invoices
  iii. the amount of the transactions
  iv. a description of extraordinary transactions or events, including those arising from the transfer of operations as defined by the provisions of Article 51 of Law 4172/2013
  v. in particular in the case of the sale/purchase or transfer of intangible assets to or from a related party, additional information (relating to such transactions) for compliance with the arm's length principle, i.e. the price at which an independent entity would be willing to sell or transfer the value at which it would be prepared to acquire that intangible asset under comparable circumstances, taking into account the expected benefits and usefulness for his business
- Comparative analysis, i.e.:
  i. characteristics of the assets and services and related information on internal and/or external comparative data, if available. Special factors should be taken into account in order to justify the comparability of intangible assets and the arm's length principle such as: expected benefits, geographical constraints, transfer of exclusive rights or not, participation of the acquirer in future development
  ii. functional analysis (performing functions, assets used, business risks),
  iii. contractual terms,
  iv. economic conditions; and
  v. specific business strategies
- An explanation of the choice and method of applying the intra-group transaction pricing method(s)
- A description of the implementation of the taxpayer's policy when setting the intra-group transaction prices,
- The commitment of the taxpayer to provide any additional information relating to its intra-group transactions at the request of the Tax Administration within a reasonable time, particularly in the case of a tax audit,
- Explanations on the method of adjustments made when the taxpayer has adjusted its taxable profits in order to comply with the arm's length principle.
- A description and a detailed justification for any adjustments made to achieve comparability,
- Additional information on transactions with related parties established or having their tax domicile in non-cooperative countries, which in the case of a group will also include the balance sheet and the income statement of the associate entity/entities,
- A flow chart of transactions, including extraordinary transactions
- Copies of the contracts governing the transactions to be tested.

4. Country-by-Country reporting standards

Greece has signed the multilateral authority agreement on the automatic exchange of Country-by-Country reports, with Decision POL 1111/2018. The exchange of CbC reporting has been extended to include a list of countries with which Greece will exchange CbC reports on a mandatory basis and a list of countries with which exchange of CbC reporting will take place on a voluntary basis.

Hong Kong

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1. Introduction

1.1 Legal context

In the past, the Hong Kong Inland Revenue Ordinance ("IRO") did not contain any specific transfer pricing (“TP”) rules or legislation addressing non-arm’s-length transactions between associated enterprises. As such, the Hong Kong Inland Revenue Department ("IRD") had been relying on a number of general provisions such as Section 61 or 61A under in the IRO, non-legally binding IRD’s Departmental Interpretation and Practice Notes (“DIPN”), and with guidance from case law to deal with TP issues.

The IRD issued its DIPN No. 46 entitled "TP Guidelines – Methodologies and Related Issues" in December 2009 setting out its views and practices on the methodologies of TP in Hong Kong and related issues. DIPN 46 provides a framework of guiding principles which the IRD will follow when determining whether or not a TP adjustment is applicable. It outlines some key issues including the application of the arm’s length principle, elimination of double taxation, the rules on attribution of profits of the permanent establishment of a non-Hong Kong enterprise, the acceptance of TP methodologies, the TP documentation that taxpayers are expected to retain to support their TP arrangements, and how intra-group service fees income/expenses should be arranged in order to comply with the arm’s length principle. Similar to other DIPNs issued by the IRD, DIPN 46 does not have the force of law and is not legally binding, i.e. it does not affect a person’s right of objection and appeal to the Commissioner, the Board of Review or the Courts. Nonetheless, DIPN 46 still provides useful guidelines to taxpayers regarding what TP documentation taxpayers are expected to maintain and produce upon an enquiry, tax audit or investigation raised/conducted by the IRD.

In July 2018, the Hong Kong Legislative Council passed the Inland Revenue (Amendment) (No.6) Ordinance (“the New Ordinance”), which primarily implements the minimum standards of the Base Erosion and Profit Shifting (“BEPS”) package promulgated by the OECD and codifies the arm’s length principle into the IRO. In short, the New Ordinance empowers the IRD to make TP adjustments on income or expense items arising from non-arm’s-length transactions between associated persons that give rise to a potential Hong Kong tax advantage.

Pursuant to the New Ordinance, the IRD is empowered to adjust the profits or losses of an enterprise where the actual provision made or imposed between associated persons (associated in terms of management, control and capital) departs from the arm’s length provision and has created a Hong Kong tax advantage.

As far as TP documentation is concerned, the New Ordinance also introduced comprehensive TP documentation requirements in Hong Kong based on the OECD’s three-tiered standardised approach (i.e. Master File, Local File and CbC-Report) which are explained further below.

1.2 Practical context

As there might be some uncertainties on interpretation and practical application of the New Ordinance, it is envisaged that further guidance will be issued by the IRD through DIPN in the future. It is suggested that taxpayers in Hong Kong should keep paying attention to the development to cope with the new challenges.

2. Formal requirements

2.1 Which taxpayers

Hong Kong adopts a territorial taxation basis. The IRD has long adopted the OECD model and all enterprises that carry on a trade or business in Hong Kong (including a Hong Kong incorporated company, branch or permanent establishment) are required to meet the arm's length standard in transactions between associated enterprises.

Under the New Ordinance, the TP rules shall apply to all Hong Kong enterprises including a permanent establishment ("PE") maintained by non-Hong Kong resident persons, covering both cross-border and certain domestic transactions which involve tangible assets, financial arrangements, intangible assets and services. No thin capitalisation rules are introduced at this stage.

2.1.1 Master File and Local File

As regards TP documentation, for each accounting period beginning on or after 1 April 2018, all enterprises carrying on a trade or business in Hong Kong which engage in transactions with associated enterprises will be required to prepare the Master File and Local File for each accounting period within 9 months from the end of the accounting period. This rule can be disregarded if the company falls within one of the exemptions based on the business size or the related party transaction volume:

A) Exemption based on size of business

An enterprise which satisfies any two of the three conditions below will not be required to prepare the Master File and the Local File.

i. Total annual revenue of not more than HK$400 million;

ii. Total assets of not more than HK$300 million; and

iii. Average number of employees not more than 100.

B) Exemption based on related party transactions

If the amount of a category of related party transactions for the relevant accounting period is below a certain prescribed threshold, an enterprise will not be required to prepare a Local File for the particular category of transactions. If the enterprise is fully exempted from preparing a Local File by reason of its related party transactions of all categories are below the prescribed thresholds, it will also not be required to prepare the Master File. Specified domestic transactions are excluded from the thresholds and not required to be documented.

i. Transfer of properties (other than financial assets and intangibles): HK$220 million;

ii. Transaction of financial assets: HK$110 million;

iii. Transfer of intangibles: HK$110 million; and

iv. Any other transaction (e.g. service income and royalty income): HK$44 million.

2.1.2 CbC-Reporting

For each accounting period beginning on or after 1 January 2018, the Hong Kong ultimate parent entity of a multinational enterprise group with annual consolidated revenue of EUR 750 million (HK$6.8 billion) or above ("Reportable Group") should file the CbC-Report. The contents of the CbC-Report should follow the recommendations of the OECD. Nevertheless, a Hong Kong constituent entity will be relieved from filing a CbC-Report if the IRD can receive the report from another jurisdiction.

Moreover, as part of the CbC-Reporting requirement, every Hong Kong entity of a Reportable Group is required to make a notification containing relevant information for the IRD to determine the obligation for filing a CbC-Return (such notification must be filed with the IRD within 3 months after the end of the Hong Kong entity's accounting year-end date) unless another Hong Kong entity within the same Reporting Group has already filed the notification.

2.2 Aggregation of transactions

Based on current practice, transactions between associated enterprises with similar nature should be allowed to be aggregated for determining whether an arm's length principle is conformed.

2.3 Deadlines (timing)

For each accounting period beginning on or after 1 April 2018, the Master Files and Local Files will be required to be prepared for each accounting period within 9 months from the end of the accounting period.

The CbC-Reports will be required to be filed within 12 months after the end of the relevant accounting period commencing on or after 1 January 2018, which means that the first CbC-Reports will be filed in 2019.

2.4 Retention of documents

A Hong Kong taxpayer is required to keep its business records for a minimum of 7 years. As TP documentation is part of the records of a taxpayer, this 7-year period requirement also applies to TP documentation as stipulated in the New Ordinance.

2.5 Frequency of documentation updates

The Master Files, Local Files and CbC-Reports should be prepared for each fiscal year.

2.6 Tax return disclosures

An enterprise, including a company, branch or sole proprietary which carries on a trade or business in Hong Kong would generally need to file an annual profits tax return with the IRD. Currently, an enterprise would need to disclose in the tax return (i) whether it has conducted business with a closely connected non-resident person (whose definition is similar to non-resident associated enterprise), (ii) which jurisdiction the closely connected non-resident person is located in, and (iii) amount of fees paid or accrued to closely-connected non-resident persons.

2.7 Burden of proof

The burden of proof lies with the taxpayer in Hong Kong. Taxpayers are required to keep sufficient documentation and may be requested to justify their transfer prices and profits or losses upon an enquiry, tax audit or investigation raised by the IRD.

2.8 Penalties

2.8.1 Penalties in case of a TP-adjustment

If a taxpayer has adopted non-arm's length pricing for its related party transactions and is unable to demonstrate that it has exercised reasonable effort to determine the arm's length price for such transactions, the IRD is empowered to impose a penalty not exceeding 100% of the amount of tax undercharged. This penalty for TP matters is less than that imposed for incorrect returns and other matters under Section 82A of the IRO (i.e. 300% of the amount of tax undercharged).

2.8.2 Master file and local file

Taxpayers who fail to prepare Master File and Local File documentation without a reasonable excuse are liable for a penalty of a level 5 fine (HK$50,000) to a level 6 fine (HK$100,000).

2.8.3 CbC-Reporting

Taxpayers who fail to comply with the CbC-Reporting requirements are potentially liable for penalties from a level 5 fine (HK$50,000) to a level 6 fine (HK$100,000). In the case of an offence committed with an intention to defraud, taxpayers are also liable to a level 3 fine (HK$10,000) imprisonment for six months on summary conviction; a level 5 fine (HK$50,000) and imprisonment for three years on conviction on indictment. In the case of a continuing offence after conviction for failure to comply, a further fine of HK$ 500 will be imposed for each day of offence.

2.9 Interest

The current legislation does not specifically mention that additional interest will be imposed in the case of a TP adjustment.

2.10 Use of most reliable information

DIPN 46 provides detailed coverage on the selection of TP methods, which are similar to those contained in the OECD TP Guidelines. Acceptable TP methodologies include the traditional transaction methods (i.e. the comparable uncontrolled price method, the resale price method and the cost plus method) and the transactional profit methods (i.e. the profit-split method and the transactional net margin method).

As regards comparable data in a benchmarking exercise, no official guidance is provided by the IRD on the sources of data. Nonetheless, comparable data is generally available in various databases including the Bureau van Dijk (BvD) Electronic Publishing SA's OSIRIS database which is currently subscribed by the IRD.

2.11 Languages

Under the new TP documentation requirements, Master Files, Local Files and CbC-Reports should be prepared in either Chinese or English.

2.12 Confidentiality

The IRD will treat the TP documentation confidentially. The IRD can only exchange the TP documentation with tax authorities of another jurisdiction where there is a legal basis. There has to be a bilateral agreement (i.e. CDTA or Tax Information Exchange Agreement ("TIEA") or a multilateral agreement (i.e. the Multilateral Convention on Mutual Administrative Assistance in Tax Matters) between the jurisdictions concerned to provide the legal basis for exchange of tax information. Also, the competent authorities have to enter into a Competent Authority Agreement to allow automatic exchange of tax information. Similar to other jurisdictions, the TP documentation will never be readily available to the public.

3. Standards with respect to the content of transfer pricing documentation

The contents of Master File and Local File are similar to the standard templates published by the OECD and the required contents are set out below.

3.1 Master File

The following information should be included in the Master File.

1. Organisational structure

Chart illustrating the MNE's legal and ownership structure and geographical location of operating entities.

2. Description of MNE's business(es)

a) Important drivers of business profit.

b) A description of the supply chain for the group's five largest products and/ or service offerings by turnover plus any other products and/or services amounting to more than 5% of group turnover. The required description could take the form of a chart or a diagram.

c) A list and brief description of important service arrangements between members of the MNE group, other than research and development (R&D) services, including a description of the capabilities of the principal locations providing important services and TP policies for allocating services costs and determining prices to be paid for intra-group services.

d) A description of the main geographic markets for the group's products and services.

e) A brief written functional analysis describing the principal contributions to value creation by individual entities within the group, i.e. key functions performed, important risks assumed, and important assets used.

f) A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year.

3. MNE's intangibles (as defined in Chapter VI of the OECD Transfer Pricing Guidelines)

a) A general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management.

b) A list of intangibles or groups of intangibles of the MNE group that are important for TP purposes and which entities legally own them.

c) A list of important agreements among identified associated enterprises related to intangibles, including cost contribution arrangements, principal research service agreements and licence agreements.

d) A general description of the group's TP policies relating to R&D and intangibles.

e) A general description of any important transfers of interests in intangibles among associated enterprises during the fiscal year concerned, including the entities, countries, and compensation involved.

4. MNE's intercompany financial activities

a) A general description of how the group is financed, including important financing arrangements with unrelated lenders.

b) The identification of any members of the MNE group that provide a central financing function for the group, including the country under whose laws the entity is organised and the place of effective management of such entities.

c) A general description of the MNE's general TP policies related to financing arrangements between associated enterprises.

5. MNE's financial and tax positions

a) The MNE's annual consolidated financial statement for the fiscal year concerned if otherwise prepared for financial reporting, regulatory, internal management, tax or other purposes.

b) A list and brief description of the MNE group's existing unilateral advance pricing agreements (APAs) and other tax rulings relating to the allocation of income among countries.

3.2 Local File

The following information should be included in the Local File.

1. Local entity

a) A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices.

b) A detailed description of the business and business strategy pursued by the local entity, including an indication whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year, including an explanation of those aspects of such transactions affecting the local entity.

c) Key competitors.

2. Controlled transactions

For each material category of controlled transactions in which the entity is involved, the following information is required to be provided:

a) A description of the material controlled transactions (e.g. procurement of manufacturing services, purchase of goods, provision of services, loans, financial and performance guarantees, licences of intangibles, etc.) and the context in which such transactions take place.

b) The amount of intra-group payments and receipts for each category of controlled transactions involving the local entity (i.e. payments and receipts for products, services, royalties, interest, etc.) broken down by tax jurisdiction of the foreign payer or recipient.

c) An identification of associated enterprises involved in each category of controlled transactions, and the relationship between them.

d) Copies of all material intercompany agreements concluded by the local entity.

e) A detailed comparability and functional analysis of the taxpayer and relevant associated enterprises with respect to each documented category of controlled transactions, including any changes compared to prior years.

f) An indication of the most appropriate TP method with regard to the category of transaction and the reasons for selecting that method.

g) An indication of which associated enterprise is selected as the tested party, if applicable, and an explanation of the reasons for this selection.

h) A summary of the important assumptions made in applying the TP methodology.

i) If relevant, an explanation of the reasons for performing a multi-year analysis.

j) A list and description of selected comparable uncontrolled transactions (internal or external), if any, and information on relevant financial indicators for independent enterprises relied on in the TP analysis, including a description of the comparable search methodology and the source of such information.

k) A description of any comparability adjustments performed, and an indication of whether adjustments have been made to the results of the tested party, the comparable uncontrolled transactions, or both.

l) A description of the reasons for concluding that relevant transactions were priced on an arm's length basis based on the application of the selected TP method.

m) A summary of financial information used in applying the TP methodology.

n) A copy of existing unilateral and bilateral/multilateral APAs and other tax rulings to which the local tax jurisdiction is not a party and which are related to controlled transactions described above.

3. Financial information

a) Annual local entity financial accounts for the fiscal year concerned. If audited statements exist they should be supplied and if not, existing unaudited statements should be supplied.

b) Information and allocation schedules showing how the financial data used in applying the TP method may be tied to the annual financial statements.

c) Summary schedules of relevant financial data for comparables used in the analysis and the sources from which that data was obtained.

4. Country-by-Country reporting standards

4.1 Threshold and required content

A MNE in Hong Kong with annual consolidated revenue of EUR 750 million or above should file the CbC-Report. The contents of the CbC-Report largely follow the recommendations of the OECD as below:

a) For each jurisdiction in which the MNE is active, information should be provided in relation to the revenue, profit before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and the tangible assets other than cash and cash equivalents.

b) A description of every group entity of the MNE mentioning the tax jurisdiction of residence, and if deviant, the state under whose law the group entity is established and the main business or operations of that group entity.

c) Categorisation of main business activities of every group entity of the MNE in the relevant tax jurisdictions.

4.2 Report filing and notification requirement for subsidiary companies

Under the new TP rules, the ultimate parent entity of the MNE group is responsible for filing the CbC-Report in its jurisdiction of tax residence in normal circumstances. A Hong Kong ultimate parent company would need to file its CbC-Report with the IRD within 12 months after the end of the relevant accounting period. The IRD will automatically exchange this report with the jurisdictions in which the MNE is active and with which Hong Kong has concluded relevant agreements for automatic exchange of tax information. In line with recommendations of the OECD, there is a secondary filing mechanism and surrogate filing mechanism for special circumstances.

The IRD will be empowered to mandate a constituent of the group in Hong Kong to file the CbC-Report if:

1. The foreign ultimate parent company is not required to provide the tax authorities a report in its jurisdiction of residence; or

2. The foreign ultimate parent company is required to provide the tax authorities a report in its jurisdiction of residence, but there is no agreement between that jurisdiction and Hong Kong which provides for automatic exchange of the report.

Despite the above, the Hong Kong constituent will be relieved from filing a CbC-Report if the IRD can receive the report from another jurisdiction or another Hong Kong constituent that is authorised to file the report on behalf of the MNE.

As regards the subsidiary companies of a Reportable Group, please note that every Hong Kong entity of the Reportable Group is required to make a notification containing relevant information for the IRD to determine the obligation for filing a CbC-Return unless another Hong Kong entity within the same Reporting Group has already filed the notification. Such notification must be filed with the IRD within 3 months after the end of the Hong Kong entity's accounting year-end date.

Hungary

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1. Introduction

1.1 Legal context

Article 18 of the Act LXXXI of 1996 on Corporate Tax and Dividend Tax Act (CTA) was introduced in 2001 as the domestic codification of Article 9 of the OECD-model convention. A decree No 32/2017 of the Minister of National Economy (MoNE-decree) contains a general documentation requirement for all transactions between associated companies (both domestic and foreign) with respect to the applied Transfer Prices. According to the provisions of the MoNE-decree the documentation requirements can be met by preparing a main (master) TP file and a local one (main documentation relates to the whole group and a local file to the Hungarian entity only).

New standardised documentation requirements for multinational enterprises (MNEs) are included in the Act XL of 2017 which have been built in Act XXXVII of 2013 on International Mutual Executive Cooperation Concerning Specific Rules on Tax and Other Public Burdens. These requirements are the implementation by the Hungarian government of Action 13 of the OECD/G20-project Base Erosion and Profit Shifting (BEPS). The new documentation requirements include the submission of a Country-by-Country Report (CbC-report), for the financial years starting from 1 January 2016 or later.

1.2 Practical context

The new CbC-reporting requirements can lead to a significant administrative burden for MNEs. Although only MNEs are affected directly by the new reporting requirements, the BEPS-project will likely have an effect on all taxpayers, since the focus of the Hungarian Tax Authority (HTA) will shift more and more to TP-issues. Practice shows that many taxpayers do not meet the minimum TP requirements.

As the HTA has a very formalistic approach and penalties for failure are high, it is recommended for all taxpayers to take a critical look at their TP documentation and reporting deadlines.

2. Formal requirements

2.1 Which taxpayers

Based on article 18 para (5) of the CTA, a Hungarian taxpayer that enters into transactions with an associated enterprise is required to have TP documentation with respect to those transactions. The definition of an associated enterprise in article 4.23 means:

a) the taxpayer and the person in which the taxpayer has a majority control – whether directly or indirectly – according to the provisions of the Civil Code,

b) the taxpayer and the person that has majority control in the taxpayer – whether directly or indirectly – according to the provisions of the Civil Code,

c) the taxpayer and another person if a third party has majority control in both the taxpayer and such other person – whether directly or indirectly – according to the provisions of the Civil Code, where any close relative holding a majority control in the taxpayer and the other person shall be recognised as third parties;

d) a non-resident entrepreneur and its domestic place of business and the business establishments of the non-resident entrepreneur; furthermore, the domestic place of business of a non-resident entrepreneur and the person who maintains the relationship defined under points (a) – (c) with the non-resident entrepreneur;

e) the taxpayer and its foreign branch, and the taxpayer's foreign branch and the person who maintains the relationship defined under points (a) – (c) with the taxpayer; or

f) the taxpayer and another person if between them dominating influence is exercised relating to business and financial policy having regard to the equivalence of management.

g) In case of CFCs point (f) should be neglected, but (direct or indirect) 25% participation of shares, voting rights or profit contribution creates a relationship.

As a result, in Hungary – except for CFCs - only majority control (more than 50 % of shares or votes) or full consistency of the management creates an affiliated company. However, related companies belonging to the same CIT group are not liable for detailed TP documentation either with respect to transactions within the group (a CIT group can be established as of 1 January 2019 at the request of the taxpayer and endorsed by the HTA).

Only micro and small-sized entities are exempt of TP rules. The definition of micro and small sized enterprises follows the wording of article 2 of Annex to the 2003/361/EC Commission Recommendation.

A threshold of HUF 50 million per transaction is also exempt from the preparation of TP documentation according to article 1 para (2e) of the MoNE-decree. However, if

- the subject of the contracts is the same and conditions are similar, or differences are insignificant, or
- transactions significantly correlate with each other,

the documentation requirement can be fulfilled with a 'consolidated documentation' and the threshold of HUF 50 million should be calculated in aggregate.

Transactions involving low value-added services not exceeding HUF 150 million have a simplified documentation requirement according to article 5 para (1) of the MoNE-decree, if these services are negligible compared to net revenue (less than 5 % of total sales) or the full expenditures (not exceeding 10 % of these) of the taxpayer preparing TP documentation. Applicable profitability has to be within the 3–7% market range based on costs.

Documentation includes preparation of both main (master) and local documentation.

MNE groups with a consolidated group revenue of more than EUR 750 million need to submit a CbC report (CbCR). The first CbCR must be submitted from FY starting 1 January 2016 or later. The deadline for submitting this is 12 months after the last day of FY 2016. The global ultimate owner (GUO) is liable for the submission if it is seated in Hungary and another entity is not appointed otherwise. Hungarian group members should declare their membership and GUO, appointed by the group as responsible for CbCR entity and the last day of the FY to the HTA by the end of the consecutive year.

2.2 Aggregation of transactions

TP documentation is required for each individual transaction with associated enterprises, but if it would lead to an unreasonable administrative burden and without jeopardising comparability, preparation of consolidated TP documentation is accepted.

2.3 Deadlines (timing)

The constituent entity of an MNE group shall notify the Hungarian tax administration (HTA) no later than the last day of the reporting fiscal year of such an MNE group. The declaration shall be filed with the HTA via an electronic form based on section 43/R of Act XXXVII of 2013. The online reporting system is available and fully functioning.

The general rule is that the CbC Report is to be filed within 12 months from the last day of the financial year of the group.

The Master File has to be prepared within 12 months at the latest after the last day of the given tax year of the ultimate parent entity. On the other hand, the Local File has to be prepared before submission of the CIT return regarding a given tax year (if the fiscal year is the calendar year, the deadline for the submission is 31 May).

It is important, however, to consider that it is not the deadline but the effective submission of the CIT return which, in practice, determines the deadline for finalising the TP documentation itself. Should a performance take place based on a related-party contract, then it may be subject to TP documentation requirements, depending on any exemption rule that may apply. The documentation does not have to be submitted with the tax return but must be readily available at the request of the HTA. (The requirement is not set in the statute.) Theoretically, the TP documentation must be presented within 3 working days following a request.

2.4 Materiality

Although all transactions with associated enterprises should be supported by TP documentation above the mentioned threshold, as a general principle (article 2 para (1) of the MoNE-decree) preparation of TP documents should not result in extreme and needless costs for the taxpayer. In practice, it means that HTA can dispense, with database researches, if arm's length prices are supported by other ways, or the taxpayer applies logical simplifications. (Nevertheless, financial data of comparable companies must be updated annually, when MoNE-decree is applied.)

For example, using an expensive database for financial transactions can be ignored if public statistical figures of the Hungarian National Bank or announcements of commercial banks are used and some adjustments are made, and the value of the controlled transaction is not significant in the course of business.

2.5 Retention of documents

As a general rule, a Hungarian taxpayer is required to keep its administrative records for at least five years after the year-end of filing the tax returns. (For FY 2016 the CIT return should be submitted by 31 May 2017, so records should be kept until 31 December 2022). Since TP documentation is part of the records of a taxpayer, this almost-six-year period also applies to TP documentation. As reservations have been made to the international conventions, in case of cross-border transactions there are currently no special statutes of limitation. However, when a cross-border audit is initiated within the statutes of limitation, the HTA calls for retention of documents for an extended period.

2.6 Frequency of documentation updates

In practice, the documentation should be updated every tax year because it relates to a different fiscal year. A significant change in facts and circumstances could also lead to an update of the documentation.

Benchmarks are expected to be updated at least every three years (absent significant market changes). However, for intermediary years financial figures of comparable companies must be updated.

2.7 Tax return disclosures

Certain boxes in the annual CIT return relate to TP documents which cannot be completed properly if they are not ready (but the taxpayer is not required to disclose its TP documentation as part of the tax return filing). For example, joint (master and local) file and the CIT-base adjustment for TP purposes should be indicated in the CIT return separately.

2.8 Burden of proof

If the taxpayer keeps appropriate TP documentation and does not have an explicitly unreasonable and unsupported point of view with respect to the used transfer prices, the tax authorities must prove that the used transfer prices are incorrect. If there is no TP documentation available or there are evident shortcomings in the documentation, the tax inspector could reverse the burden of proof to the taxpayer.

2.9 Penalties

2.9.1 General

If the prepared documentation does not contain all the mandatory items listed in the checklist, or a document is missing, a default penalty is levied by the HTA of up to HUF 2 million for each of the errors per annum. In case of repeated malpractice, the maximum penalty is HUF 4 million per document and per FY. If a failure to prepare the same TP document repeatedly happens, the maximum penalty could be as high as four times the general penalty. The exact amount may depend on the type and importance of the error (an incomplete market overview or a missing tax number is “valued” less strictly than a false TP method).

Reliable taxpayers pay only half of the general penalties.

2.9.2 Penalties in case of a TP-adjustment

If the HTA makes a TP adjustment, and as a result the tax base is increased, a tax penalty is applied. The amount of the penalty is up to 50% of the tax shortage. Late payment interest is also payable in addition to the tax shortage.

2.9.3 CbC-reporting

According to section 43/S of Act XXXVII of 2013, in case of any default in filing the CbCR, i.e. non-timely, incomplete or incorrect filing, a default penalty of a maximum of HUF 20 million (approximately EUR 55,740) may be imposed by the HTA.

If a company does not substantiate prices applied in its related-party transactions with appropriate TP documentation, the HTA (in case of a tax audit) may assess a default penalty up to HUF 2 million (approximately EUR 5,574) per controlled transaction not covered by documentation or covered by

incomplete documentation. In case of a repeated infringement, the default penalty can be up to HUF 4 million (approximately EUR 11,150) per related-party contract. In case of a repeated infringement regarding the same documentation, the default penalty can be up to four times the amount levied in the first case. Rules on repeated infringement are not applicable if the time elapsed between two defaults is more than 2 years. The HTA may levy the maximum default penalty even if the TP documentation was available but was not prepared according to the relevant provisions of Hungarian legislation.

2.10 Interest

Late payment interest is 5% plus the central bank base rate (which means 5.0 + 0.9 % at present). Interest is calculated on a daily basis.

2.11 Use of most reliable information

The OECD prefers to use the most reliable information available for benchmarking analysis. Due to local comparables being hardly available or poor quality data, regional comparables are allowed. V4-region or EU28 is generally accepted.

2.12 Languages

According to the MoNE-decree (article 4 para (13)) TP documentation can be prepared in a language other than Hungarian. Nevertheless, upon request of the HTA a professional translation should be made available by the taxpayer if the used language is not German, French or English. In practice HTA demands professional translations in almost all cases.

2.13 Confidentiality

The HTA treats TP documentation confidentially. The tax authorities can only exchange TP documentation with the tax authorities of another country if there is a legal basis. This legal basis can be found in the national law, a tax treaty or a EU-directive. TP documentation is never made available to the public.

3. Standards with respect to the content of transfer pricing documentation

TP documentation standards are published in the MoNE-decree while applicable methods are determined in the CTA. The CTA also refers to the OECD TP directive and BEPS as implemented provisions. According to another guideline issued by HTA, an updated version of the OECD TP directive is applicable (OECD TP Guidelines for MNEs and Tax Administrations 2017).

Furthermore, supplementary guidelines for financial instruments (published in February 2020) should also be considered. Hallmarks for characterisation of manufacturers and distributors were released on the HTA's website in December 2019 as well.

3.1 Master File

The master (main) file contains

- general description of the business strategy of the whole group, including year-to-year changes;
- general financial and taxation position of the group based on management and other financial reports;
- structure of the group (including organigram), list of the members, their legal and operational description, including entities operating within the EU and third countries;
- general review and type of controlled transactions (i.e. supply of goods or services, development of IPs, financial transactions, including their values);
- main presentation of risks undertaken, assets invested in, functions provided and year-to-year changes;
- legal information about IPs, received or sold royalties, contribution of entities to the IPs, movements of IPs within the group;
- general TP policy applied within the group, profit centres;
- cost contribution agreements concluded among the group members, APA resolutions and judgements, if any;
- main components of value creation;
- introduction of the supply chain of the most important five products and services for the group. Every flow of goods and services should be also described, when its share exceeds 5% of total revenue;
- main geographical markets;
- introduction of financial activity within the group, including important loan agreements, concluded with independent parties;
- date of preparation of the documentation.

3.2 Local File

The minimum requirements of the local file are:

- to introduce management, organigram of the local entity, flow of decision-making process;
- to include a detailed description of the local activity, including local strategy, and M&A possibilities;
- to list local competitors;
- to indicate and identify associated companies involved in controlled transactions;
- to describe business strategy followed by the taxpayer preparing TP documentation;
- to present subject of controlled transactions (terms, conditions, values, modifications) – concluded agreement as an attachment is highly appreciated;
- to analyse characteristics of the transaction (risks, functions, assets as contributions of the taxpayer to the value chain);
- the benchmark study;
- to show local binding or non-binding rulings, APA resolutions or other official documents which relate to the local transaction, if any;
- to release TP policy, including applied method; and
- the date when TP documentation is finalised.

4. Country-by-Country reporting standards

4.1 Threshold and required content

An MNE with a consolidated group revenue of more than EUR 750 million should provide a CbCR. The report contains the following information about the MNE:

a) name of the group for each jurisdiction in which the MNE is active;

b) relevant FY;

c) for each jurisdiction: main business activity (characters are listed), the state under whose law the group entity is established, and tax jurisdiction of residence, if deviant.

Further fiscal information is required by countries about applied currency, revenue (originating from independent and related parties, total sum), earnings before tax (EBT), paid income tax, accrued income tax for the present year, registered capital, accumulated earnings, number of employees and tangible assets other than cash and cash equivalents.

The Hungarian CbC reporting model adopted the data content of the OECD template. There is a specific form for submitting CbC reports, which is only available in Hungarian and can be filed using a particular system used for HTA filings. The OECD's XML Schema standardised electronic format was not adopted.

Furthermore, at year-end the Hungarian member of a MNE group liable for CbCR must declare the name of the MNE group to which the Hungarian subsidiary belongs, and the name and jurisdiction of the group member appointed for CbCR within the group.

4.2 Notification requirement for subsidiary companies

In principle, the CbCR is provided by the ultimate parent company of the MNE in its state of residence. The state of residence will exchange the CbCR automatically with the tax authorities. A Hungarian ultimate parent company needs to provide the CbCR to the HTA. The HTA will automatically exchange this report with the jurisdictions in which the MNE is active and with which Hungary has concluded an Agreement for automatic exchange of information. (This list is maintained and updated by the Ministry of Foreign Affairs and Trade.)

The Hungarian entity is required to provide CbCR, if:

1. the foreign ultimate parent company is not obliged to provide the tax authorities a report in its state of residence; or
2. the foreign ultimate parent company is required to provide the tax authorities a report in its state of residence, but there is no Agreement between that state and Hungary which provides for automatic exchange of the report; or
3. due to a malfunction of the data exchange system the HTA calls upon the Hungarian entity for submitting CbCR; and
4. there is not any other group member completing CbCR within the EU.

This requirement by the Hungarian GUO can be prevented if the report is provided by an appointed other entity within the group, subject to the following conditions:

1. state of residence of the appointed company has adopted CbCR-system;
2. there is an Agreement between that state and Hungary to provide automatic exchange of reporting;
3. the state of residence of the appointed company is not structurally negligent in the exchange of the report;
4. the appointed company has notified its state of residence by the end of the relevant FY that it will act as an appointee for CbC reporting entity; and
5. the HTA has received a notification which group company has taken over the requirement to provide the report.

The MNE must provide the report within 12 months after the last day of the financial year of the MNE.

A subsidiary needs to notify the HTA which entity of the MNE will submit the country report on behalf of the MNE. This notification requirement applies to each entity and must to be renewed annually. The notification is made through an online webform. The deadline for submission of the notification is the last day of the applicable financial year of the MNE. For the (first) year 2016, the deadline for the notification is twelve months after the FY 2016 ends (generally 31 December 2017). Non-compliance with the notification requirement can result in severe penalties. Reference is made to paragraph 2.9.3 above.

India

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1. Introduction

1.1 Legal context

Transfer Pricing (TP) regulations in India are governed through Chapter – X of Indian Income Tax Act, 1961 and related rules which govern the International transactions with Associated Enterprises at Arm's Length Price (ALP) subject to safe harbour rules for tax purposes. It also lays down the computational provisions, documentation requirements, assessment procedures, dispute resolution mechanism, etc.

Though India is a non-member economy working with the OECD, it has been an active participant in the implementation of the BEPS initiative. It has made certain amendments since 2016 to its Transfer Pricing regime to be in line with the OECD guidelines for Multinational Enterprises and Tax Administration, which includes:

- Introduction of Country-by-Country-Reporting (CbCR) requirement for entities, being part of an International Group, and
- Prescribing the requirement to maintain master file as part of TP documentation in respect of details of global business operations and TP policies of the group entities of an International Group.

1.2 Practical context

The earlier laws required every person to maintain documents and information relating to the cross-border transactions entered into by it and certain master information relating to the enterprises of the Multinational group of which the person is a member, with which it has entered into transactions. Now, with the OECD guidelines specifying the list of information to be included in the local file and master file as a part of TP documentation (subject to meeting the threshold), the tax authorities have been empowered to frame rules to implement the same in the country.

Rule 10DA along with Forms 3CEAA and 3CEAB have been notified for maintenance of Master File. With respect to Country-by-Country (CbC)-Reporting, a new section (Section 286 of the Income Tax Act, 1961) has been introduced which mandates every Indian parent entity or alternate reporting entity or Indian constituent entity (where there is no exchange of CbC information) of an international group to furnish a report in Form 3CEAD, subject to meeting the threshold. Rule 10DB and Form 3CEAC, 3CEAD and 3CEAE are notified for reporting CbC.

The Finance Act, 2020 has expanded the scope of safe harbour rules to specifically cover determination of profit/income attributable to a business connection (i.e., a concept under Indian domestic tax law, which is perceived to be much wider than the permanent establishment (PE) rule under applicable tax treaty) or a PE (under the tax treaty) of a non-resident company in India. Taxpayers who formally concede a business connection or PE in India can opt for safe harbour rules for obtaining certainty on profit attribution to a PE in India. The amended scope of safe harbour is effective from FY starting from 1 April 2019. However, no specific safe harbour rate/margin is yet prescribed by the Indian Tax Administration for profit attribution cases.

Any taxpayer who has entered into an eligible international transaction and who wishes to exercise the option to be governed by the safe-harbour rules is required to file a Form 3CEFA and furnish it before the due date for filing the tax return for:

- The relevant FY (1 April to 31 March), in case the option is exercised only for that FY, or
- The first of the FYs, in case the option is exercised for more than one FY.

The form is in the nature of a self-declaration and needs to be signed by the person who is authorised to sign the tax return.

2. Formal requirements

2.1 Which taxpayers

Every person who has entered into a cross-border transaction with an associated enterprise will be required to maintain a local file containing all the relevant information and documents pertaining to that transaction as prescribed in Rule 10D detailed in paragraph 3.2 below. Exemption is provided to a person if the aggregate of all cross-border transactions in a year with the associated enterprises does not exceed INR 10 million (USD 136,556), subject to the condition that the onus of proof is on the taxpayer that the transactions are valued at ALP.

For maintenance of information and documents in respect of CBC reporting and Master file please refer to paragraph 3.1 and 4 below.

2.2 Aggregation of transactions

Documentation will be pertaining to each type of international transaction with an Associated Enterprise.

2.3 Deadlines (timing)

All documents relating to international transactions entered into in a financial year (1 April to 31 March) will have to be finalised and made available at least a month prior to the due date of filing the Income tax returns for that year (i.e., October 30th).

The documents would have to be furnished to the tax officer within 30 days from the date of receipt of notice to furnish the same.

Due dates for filing Master File and CbCR are tabulated in paragraph 3.1 and 4 below.

2.4 Materiality

The documentation requirement, as specified earlier, will not be applicable to those persons, the value of whose aggregate cross border transactions does not exceed INR 10 million (Approximately USD136,556). However, there is no other materiality recognition with respect to TP documentation.

2.5 Retention of documents

The documents and all information specified in the local file and master file shall be maintained and preserved for a period of 9 years from the end of the relevant financial year.

2.6 Frequency of documentation updates

Generally, documentation relating to cross-border transactions will be prepared for a financial year. If a transaction takes place for more than a year then unless there is any significant change in the factor which could influence the price of transaction, no fresh documentation will be required.

2.7 Tax return disclosures

There are no specific disclosures pertaining to TP in the tax returns except for the details of the accountant who furnishes a report under Form 3CEB and the date of issue of such report.

Form 3CEB is the format of audit report furnished to be prepared by an accountant who reports the list of cross-border transactions entered into by the taxpayer and the basis for determining the ALP. The form contains the following details

a) Basic details of the taxpayer and the relevant fiscal year in respect of which the report is furnished.

b) List of Associated Enterprises (AE), their relationship with the taxpayer and a description of their business.

c) AE-wise details of cross-border transactions – under the following categories

    i. Transactions in respect of tangible property – materials consumed, traded goods, purchase or sale of any other tangible property.

    ii. Transactions in respect of intangible property.

    iii. Transactions in respect of services.

    iv. Transactions in respect of borrowing/lending of money.

    v. Transactions in respect of guarantee.

    vi. Transactions in respect of shares and securities.

    vii. Transactions in respect of allocation/apportionment of common costs.

    viii. Transactions arising out of business reorganisation.

    ix. Any other transaction having a bearing on profits, income, losses or assets of the taxpayer.

    x. Deemed international transaction. (transaction with AE through an unrelated person)

The details contain the amount of transaction, ALP computed by the taxpayer and the method used in such computation.

2.8 Burden of proof

The primary responsibility of proving the transfer price of a transaction will be on the taxpayer during the assessment proceedings. After considering all relevant materials the Transfer Pricing Officer shall determine the ALP in relation to the international transaction and send a copy of his order to the Assessing Officer and to the Company based on which TP adjustment may be done by the Assessing Officer.

2.9 Penalties

2.9.1 General

Non-maintenance or failure to maintain documentation in the manner prescribed, or maintaining incorrect information relating to the international transaction or failure to submit the information in response to the notice calling for information, will attract a penalty of 2% of the value of all international transactions.

Non-furnishing of information in respect of the international group to the prescribed authority will attract a penalty of INR 500,000 (USD 6,828).

Failure to furnish a TP report in Form 3CEB will attract a penalty of INR 100,000 (USD 1,366).

2.9.2 Penalties in case of a TP-adjustment

A penalty to the extent of 200% on the tax impact shall be levied on account of under-reporting of income/ misrepresentation/suppression of facts.

2.9.3 CbC-reporting

Failure to furnish the report within the due date prescribed in the format will attract a penalty of INR 5,000 (USD 71) per day of default up to 30 days and INR 15,000 (USD 205) per day beyond 30 days up to the date of furnishing.

The prescribed authority may call for submitting the relevant details to verify the accuracy of information in the report furnished by issuing a notice. Failure to respond to the notice within 30 days may attract a penalty of INR 5,000 (USD 69) per day of default.

Continuing default even after an order to pay the above penalty is received, will attract a severe penalty of INR 50,000 (USD 683) per day of default from the date of order.

Providing inaccurate information in the report wilfully or failure to inform the authority after discovering the inaccuracy within 15 days will attract a penalty of INR 500,000 (USD 6,828).

2.10 Interest

Where there are primary TP adjustments to the transfer price, the excess money (difference between ALP determined in TP adjustment and transaction value) is required to be repatriated into India within 90 days from making such adjustment. Upon failure to do so, such excess money shall be deemed to be an advance made to AE and interest shall be computed thereon.

2.11 Use of most reliable information

The use of relevant comparables has always been a subject matter of litigation and is subjective in nature. There are no solid regulations prescribing the mode, source and type of information to be used as comparables.

2.12 Languages

There is no prescription as to the language to be used in the documentation by legislature. As a matter of practice, English being the common business language in India, all the documents and information are prepared and maintained in English.

2.13 Confidentiality

Though not explicitly provided in the law, there is an inherent responsibility for the authorities to use the rights given to obtain information in a rational manner. The tax authorities must ensure the confidentiality of information acquired in exercise of their powers and shall not make them available to the public.

Central Board of Direct Taxes (CBDT), the apex tax body in India, has released guidelines for all tax officers in India on ‘appropriate use’ of CbCR information.

3. Standards with respect to the content of transfer pricing documentation

3.1 Master File

Key information about the International Group's global operations including organisation structure, description of business of group, intangibles, international financial activities are required to be reported in the Master File.

Threshold, brief description and due dates of relevant forms are tabulated below:

S.No.	Form	Who is required to maintain documents and threshold for the same	Brief description	Due date
1	3CEAA	Part A – Every constituent entity, Irrespective of threshold Part B – Every constituent entity that satisfies the following 2 conditions: 1. Consolidated revenue of international group exceeds INR 500 crore and 2. Value of international transaction of constituent entity: — During the reporting accounting year as per books exceeds INR 50 crores or — Aggregate value of international transactions of the constituent entity in respect of intangibles, during the reporting accounting year, as per books of accounts, exceeds INR 10 crores	Master File	On or before 30 November (8 months from end of financial year)
2	3CEAB	Same as applicability of Form 3CEAA	Notification in case of more than one resident entities in India	On or before 31 October (7 months from end of financial year)

3.2 Local File

The information and documents to be maintained by every person having entered into international transactions are listed below:

1. Local entity

a) Details of ownership structure of the taxpayer.

b) Broad description of the business and the industry in which the taxpayer operates.

2. Controlled transactions

a) Basic details of the associated enterprises with which the taxpayer has entered into cross-border transactions.

b) Nature and terms of each transaction, details of goods transferred, or services rendered, quantum and value of each transaction.

c) Description of the functions performed, risks assumed by the parties to the transaction and the assets employed.

d) Details of the uncontrolled transactions considered for comparing with the controlled transaction, nature, terms and conditions relevant to the uncontrolled transactions.

e) A record of the analysis on comparability of uncontrolled transactions with the controlled transactions.

f) Methods adopted to determine the ALP with respect to each transaction, an explanation on the reasons for selecting the method as the most appropriate method.

g) Actual working of ALP determined, comparable data used and any adjustments made on account of differences between controlled and comparable transactions.

h) Adjustments made to taxable income on account of difference between the transaction price and ALP of the controlled transaction.

3. Financial information

a) Economic and market analyses, forecasts, budgets and any other estimates prepared by the taxpayer.

b) Relevant financial information of the taxpayer and of the associated enterprises for the determination of the ALP.

4. Country-by-Country reporting standards

4.1 Threshold and required content

CbC reporting is applicable where the turnover of International Group exceeds INR 5,500 crores during the immediately preceding accounting year. Due dates and brief description for relevant forms are tabulated below:

S.No.	Form	Who is required to maintain documents and threshold for the same	Due date
1	3CEAC	Notification form for Indian entities whose parent is a non-resident (details in paragraph 4.2 below)	31 January (10 months from the end of financial year)
2	3CEAD	CbCR - Parent or alternate reporting entity resident in India (details in paragraph 4.2 below)	31 March (12 months from the end of financial year)
	3CEAD	CbCR - Parent is not obliged to file CbCR or CbCR is being filed by a group company resident of a country with which India does not have exchange of information	Time limit not yet prescribed
3	3CEAE	Notification in case of more than one resident entity in India (details in paragraph 4.2 below)	Time limit not yet prescribed

CbC report shall contain the following:

a) The aggregate country-wise information on revenue, profit before taxes, tax payable and paid, stated capital, accumulated earnings, number of employees and tangible assets excluding cash and cash equivalents.

b) Details of constituent entities of the international group, their country of residence and incorporation.

c) Details of main business activities of the constituent entities.

4.2 Notification requirement for subsidiary companies

Every Indian company which is not the parent company for the group shall notify either whether it is the alternate reporting entity for the group or the details of the parent entity or the alternate reporting entity and its country of residence.

If the parent reporting entity is a resident in the country with which India does not have an agreement for the exchange of CbCr, or if there is a systemic failure to provide the information despite having an agreement and on communication of the same by the Indian tax authorities to the member entity in India, the Indian member entity shall be responsible for filing the report as it would have reported if it had been the parent entity for the group.

The above shall not apply if the alternate reporting entity has furnished the report on behalf of the group, subject to the conditions that:

a) The alternate reporting entity is a resident of the country with which India has an agreement for exchange of report and any systemic failure in such country has not been communicated to the entity resident in India.

b) The report has been furnished in accordance with the laws prevalent in that country for the time being.

c) The tax authorities of the respective country and India have been informed about the position.

If there is more than one constituent entity not being a parent, resident in India of the same group, the reporting responsibility will be on that entity which has been designated by the international group to report on behalf of all the Indian resident entities and such information in writing has been communicated to the Indian tax authority.

Note:
Amount in INR is converted in USD terms based on an assumed exchange rate of 1 USD = INR 73.23. The USD figures may change due to change in exchange rates.

Japan

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1. Introduction

1.1 Legal context

The transfer pricing rules are contained within Articles 66-4/66-4-2 and 68-88/66-88-2 Special Taxation Measures Law (STML), STML Enforcement Orders 39-12, 39-12-2/39-112, and 39-112-2, STML Enforcement Regulation Articles 22-10, 22-10-2 / 22-74 and 22-75, and STML Circulars 66-4-(1)-1 to 66-4-3-(8)-2, 68-88(1)-1 to 68-88(10)-1. In addition, several Commissioner Directives have been issued providing further guidance.

1.2 Practical context

Based on the recommendations of the OECD Base Erosion and Profit Shifting (BEPS) Project (Action 13: Guidance on Transfer Pricing Documentation and Country-by-Country Reporting), the Act on Special Measures Concerning Taxation was partially revised as part of the tax reform in FY2016.

All Japanese corporations and foreign corporations with permanent establishments in Japan (hereinafter referred to as "PE") that are Constituent Entities of a Multinational Enterprise group (MNE) with a total consolidated revenue of JPY 100 billion or more in the previous fiscal year must submit a Notification for Ultimate Parent Entity (NUPE) form, a Country-by-Country Report (CbC report), and a Master File to the National Tax Authority (NTA).

2. Formal requirements

2.1 Which taxpayers

Ultimate Parent Entity, a Country-by-Country Report, and a Master File:

All Japanese corporations and foreign corporations with PEs in Japan with a total consolidated revenue of JPY 100 billion (approximately EUR 750 million) or more in the previous fiscal year must submit a notification for three documents to the NTA through the online national tax return filing and tax payment system (“e-Tax”).

Local file:

Corporations engaged in the below-listed transactions with one or more foreign-related parties must prepare and archive documents considered as necessary to calculate arm’s-length prices for the controlled transactions:

- The total amount of overseas related transactions (for previous fiscal year) is JPY 5 billion or more.
- Total amount of intangible asset transactions (for previous fiscal year) is JPY 300 million or more.

2.2 Aggregation of transactions

It is necessary to calculate an arm's-length price between independent companies for each overseas related transaction.

However, it is possible to calculate an arm’s-length price as a single transaction, provided that it is deemed reasonable to calculate an arm’s-length price as a single transaction for several overseas related transactions.

For example:

- Setting a price considering a multitude of overseas related transactions belonging to the same product group or a multitude of overseas related transactions belonging to the same business segment.
- Purchasing as a single transaction an asset and a licence such as manufacturing know-how using the asset.

2.3 Deadlines (timing)

Notification for Ultimate Parent Entity:

The submission deadline is the last day of the fiscal year of the ultimate parent entity,

CbC report and Master File:

The submission deadline is no later than 1 year and 1 day after the last day of the reporting fiscal year of the ultimate parent entity.

Local File:

Regular submission deadlines are not determined. However, if the Local File is requested then it must be submitted as follows:

- Where transactions match the conditions of 2.1 above, the deadline for submitting the Local File is designated by the tax examiner and will be within 45 days of the request. The deadline for documents considered as important to calculate an arm's-length price will be within 60 days.
- Where transactions don't match the conditions of 2.1 above, the deadline for documents equivalent to the Local File is designated by the tax examiner and will be within 60 days of the request. The deadline for documents considered as important to calculate an arm's-length price will also be within 60 days.

2.4 Materiality

In principle, the NTA does not set a materiality threshold. All transactions that meet the above criteria should be supported with transfer pricing documentation.

2.5 Retention of documents

The local file should be stored for seven years from the day following the deadline of the final return at the local office which engaged in the overseas related transaction. It is not clearly defined how many years other documents (CbC-report, Master File, etc.) should be stored.

2.6 Frequency of documentation updates

As described in 2.3 above, documents with a deadline are required to be updated by the deadline. There is no explicit deadline for updating the local file. However, in practice, it is desirable to select comparative transactions and update information every year. However, if the status of the business in overseas related transactions and comparable transactions does not change, it is acceptable to review the selection of comparative transactions every three years.

2.7 Tax return disclosures

It is required to disclose schedule 17(4) (Detailed Statement Concerning Foreign Affiliated Corporations and Applied Transfer Pricing Methods) on the tax return.

2.8 Burden of proof

In Japan, the burden of proof falls with the NTA in determining whether there is a tax liability arising from transfer pricing. This is decided by considering the purpose and structure prescribed for each requirement, fairness among parties, difficulty of proof, etc.

2.9 Penalties

2.9.1 General

CbC Report and Master File:

A fine of up to JPY 300,000 may be levied if corporations fail to submit a CbC Report or Master File to the District Director by the deadline without good reason.

Notification for Ultimate Parent Entity and Local File:

There are no explicit penalty provisions.

2.9.2 Penalties in case of a TP-adjustment

Penalties are not clarified, especially in transfer pricing. It is possible for the NTA to impose additional tax on under-reporting.

2.10 Interest

Interest is not charged on penalties, but interest is payable when a refund is due to the taxpayer. The same rate used for delinquent tax is applied.

2.11 Use of most reliable information

There are no specific rules about the use of most reliable information. The comparable uncontrolled pricing method, the cost basis method, the resale price method and the cost-plus method are preferred.

2.12 Languages

Documents	Languages
CbC report	English
Master File	Japanese or English*
Other	Not specified *

* However, in cases other than written in Japanese, NTA can require corporations to submit translated text in Japanese

2.13 Confidentiality

Confidentiality of information submitted by taxpayers is protected in accordance with national laws and treaties relating to information disclosure.

3. Standards with respect to the content of transfer pricing documentation

3.1 Master File

The following information should be included in the Master File:

1. Names of Constituent Entities of the Specified MNE Group, the location of their head office or principal offices, and a chart illustrating the relationships between the Constituent Entities.
2. General description of business of Constituent Entities of the Specified MNE Group, including the following (Article 22-10-5 Paragraph 2):
   a) Sales, income, and other important sources of profit of Constituent Entities of the Specified MNE Group.
   b) Outline of the supply chain for the Specified MNE Group's five major goods, products or services (which refer to the succession of logistic processes that lead up to consumers (this also applies to c)) as well as of geographical markets in which such goods, products or services are provided.
   c) Outline of the supply chain for the Specified MNE Group's goods, products or services that represent 5% of total sales, revenues, or profits in its category or more as well as of geographical markets in which such goods, products and services are provided (excluding the items listed in b)).
   d) List of important agreements on the provision of services between Constituent Entities of the Specified MNE Group.
   e) MNE (excluding those related to research and development; this also applies to d)) and the outline of the agreements (including the outline of policy to set the amount of compensation for the provision of services, that of policy to share the amount of expenses for the provision of services, and that of the functions of major bases where services are provided).
   f) Outline of the major functions fulfilled by Constituent Entities of the Specified MNE Group when creating added value, serious risks assumed by them (possible increases or decreases in profit or loss due to factors such as fluctuations in exchange markets and market interest rates and changes in economic situations), and major roles played by Constituent Entities when creating important assets to be used and other types of value added.
   g) Outline of important business mergers, splits, transfers, and other acts involving Constituent Entities of the Specified MNE Group.
3. Outline of the Specified MNE Group's comprehensive strategy for research and development, ownership, and use of its intangible fixed assets and other intangible assets (hereinafter referred to as "Intangibles" in sections up to e) below) and the location of major facilities used for research and development of Intangibles and that of sites where such research and development are managed.
4. List of important Intangibles used for transactions between Constituent Entities of the Specified MNE Group and of Constituent Entities that possess the Intangibles.
5. List of important agreements between Constituent Entities of the Specified MNE Group on the sharing of expenses related to research and development of Intangibles, a list of important agreements on the provision of services for major research and development projects for the Intangibles, a list of important agreements on consent to use the Intangibles, and a list of other important agreements on Intangibles between Constituent Entities.
6. Outline of policy to set the amount of compensation for transactions related to R&D and Intangibles between Constituent Entities of the Specified MNE Group.

7. Names of Constituent Entities of the Specified MNE Group which are involved in the transfer of important Intangibles (including equity for the Intangibles; this also applies to the rest of this item) between them, the location of their head office or principal offices, and the content of the Intangibles transferred, the amount of compensation, and other details of the transfer between the Constituent Entities.
8. Outline of methods for Constituent Entities of the Specified MNE Group to procure funds (including the outline of important agreements on fund procurement from entities other than the Constituent Entities).
9. Names of those Constituent Entities of the Specified MNE Group which fulfil pivotal financial functions in the group and the location of their head office or principal offices (including the name of the country or territory where laws and ordinances that govern the establishment of the Constituent Entities are enacted and that of the country or territory where sites are located in which their business is managed and controlled) .
10. Outline of policy to set the amount of compensation for financing between Constituent Entities of the Specified MNE Group.
11. Profits/losses and financial conditions included in the consolidated financial statements of the Specified MNE Group (documents stating the profits/losses and financial condition of the Specified MNEs if consolidated financial statements are not available).
12. Outline of arrangement for the method to calculate the amount of compensation for transactions between Constituent Entities of the Specified MNE Group that reside in different countries and other items related to the allocation of income between such Constituent Entities if such arrangement is made only by the competent authorities in the country where one of the Constituent Entities resides.
13. Items that are useful for those listed in the items above.

3.2 Local File

The following information should be included in the Local File:

1. Documents describing the content of business, business policy, and organisational structure of corporations as stipulated in Article 66-4 Paragraph 1 of the Act (hereafter referred to as “Controlled Transactions”) and foreign-related parties related thereto.
    a) Documents describing details of assets and the content of services related to the Controlled Transactions.
    b) Documents describing items related to the functions fulfilled by corporations as stipulated in Article 66-4 Paragraph 1 of the Act and foreign-related parties related thereto (which refer to foreign-related parties as stipulated in the same paragraph; this also applies to the rest of this paragraph) in the Controlled Transactions and risks (which refer to possible increases or decreases in the profits or loss of the Controlled Transactions due to fluctuations in exchange markets and market interest rates, changes in economic situations, and other factors; this also applies to the rest of this paragraph) assumed by the corporations and the foreign-related parties in the Controlled Transactions (If, due to the restructuring of the corporations' or foreign-related parties' business (which refers to mergers, splits, transfer of businesses or important business assets, and changes in business structure for other reasons; this also applies to the rest of (b)), a change takes place as to the functions fulfilled by the corporations or the foreign-related parties in the Controlled Transactions or the risks assumed by the corporations or the foreign-related parties in the Controlled Transactions, the documents must include a description of the content of the business restructuring and that of changes in the functions and the risks).
    c) Documents describing the content of intangible fixed assets and other intangible assets used by corporations as stipulated in Article 66-4 Paragraph 1 of the Act or foreign-related parties related thereto in the Controlled Transactions.

d) Agreements related to, or documents describing the content of agreements on, the Controlled Transactions.

e) Documents describing details of the amount of compensation received or paid by corporations as stipulated in Article 66-4 Paragraph 1 of the Act from or to foreign-related parties related thereto in the Controlled transactions, the method to set the amount of compensation received or paid, and the content of negotiations about such setting, as well as documents describing the method to calculate arm's length prices (which refer to those stipulated in the same paragraph; this also applies to the rest of this article) for the amount of compensation received or paid and the content of arrangement of items related to the Controlled transactions (including other transactions closely related thereto) if such arrangement is made by the competent authorities in countries or territories other than Japan (excluding cases in which such arrangement is made by the regional commissioner of the regional taxation bureau or the district director who has jurisdiction over the place where the corporations pay income tax)

f) Documents describing details of profits/losses for corporations as stipulated in Article 66-4 Paragraph 1 of the Act and foreign-related parties related thereto in the Controlled Transactions and the process in which the amount of profits/losses is calculated.

g) Documents describing analyses of markets (including analyses of the effects of the characteristics of the markets on the amount of compensation and profits/losses in the Controlled Transactions) related to the sale or purchase of assets, the provision of services, and other transactions in the Controlled Transactions and other items related to the markets

h) Documents describing the content of business, business policy, and organisational structure of corporations as stipulated in Article 66.4 Paragraph 1 of the Act and foreign-related parties related thereto.

i) Documents describing whether there are other transactions closely related to the Controlled Transactions as well as the content of the transactions and the circumstances under which the transactions are closely related to the Controlled Transactions.

2. Documents for corporations as stipulated in Article 66.4 Paragraph 1 of the Act to calculate arm's-length prices for Controlled Transactions, including the following:

   a) Documents describing the calculation method stipulated in Article 66.4 Paragraph 2 of the Act which is selected by the corporations, important prior conditions for such selection, and the reasons for such selection as well as other documents prepared by the corporations to calculate arm's-length prices (excluding those listed in (b) to (e) below).

   b) Documents describing items related to the selection of Comparable Uncontrolled Transactions used by the corporation for the Controlled Transactions (transactions in which sellers and buyers without special relationships with each other as stipulated in Article 66.4 Paragraph 2 Item 1(a) of the Act trade inventory assets similar to those related to Controlled Transactions under similar circumstances to those for the Controlled Transactions, Comparable Uncontrolled Transactions as stipulated in Article 39.12 Paragraph 6 of the Order, Comparable Uncontrolled Transactions as stipulated in Paragraph 7 of the same article, Comparable Uncontrolled Transactions as stipulated in Paragraph 8 Item 1(a) of the same article, Comparable Uncontrolled Transactions as stipulated in (c)(1) of the same item, Comparable Uncontrolled Transactions as stipulated in Item 2 of the same paragraph, Comparable Uncontrolled Transactions as stipulated in Item 3 of the same paragraph, Comparable Uncontrolled Transactions as stipulated in Item 4 of the same paragraph, and Comparable Uncontrolled Transactions as stipulated in Item 5 of the same paragraph; this also applies to the rest of this item) (including transactions equivalent to Comparable Uncontrolled Transactions related to the similar method listed in Article 66.4 Paragraph 2 Item 1(d) of the Act, transactions equivalent to Comparable Uncontrolled Transactions related to the method listed in Article 39.12 Paragraph 8 Item 6 of the Order, and transactions equivalent to Comparable

Uncontrolled Transactions related to the method stipulated in Article 66.4 Paragraph 2 Item 2 of the Act; hereinafter referred to as "Comparable Uncontrolled Transactions" in the rest of this item) and details of the Comparable Uncontrolled Transactions (including financial information on the Comparable Uncontrolled Transactions).

c) Documents for the corporations to calculate the amount computed as one that belongs to the corporations and the foreign-related parties related thereto using the method listed in Article 39.12 Paragraph 8 Item 1 of the Order or the one listed in Item 6 of the same paragraph (limited to methods similar to the one listed in Item 1 of the same paragraph) if the method is selected by the corporations (excluding the documents listed in (b) and (e)).

d) Documents describing the reason the corporations consider several Controlled Transactions as a single one and calculate an arm's-length price for the transaction and the content of each transaction if they make such a calculation.

e) Documents describing the reason differences are adjusted for Comparable Uncontrolled Transactions (adjustments as stipulated in Article 66.4 Paragraph 2 Item 1(a) of the Act, necessary adjustments as stipulated in Article 39.12 Paragraph 6 of the Order, necessary adjustments as stipulated in Paragraph 7 of the same article, necessary adjustments as stipulated in Paragraph 8 Item 1(a) of the same article, necessary adjustments as stipulated in (c)(1) of the same item, necessary adjustments as stipulated in Item 2 of the same paragraph, necessary adjustments as stipulated in Item 3 of the same paragraph, necessary adjustments as stipulated in Item 4 of the same paragraph, and necessary adjustments as stipulated in Item 5 of the same paragraph; this also applies to the rest of this item) (including adjustments equivalent to difference adjustments for the similar methods listed in Article 66.4 Paragraph 2 Item 1(d) of the Act, adjustments equivalent to difference adjustments for the method listed in Article 39.12 Paragraph 8 Item 6 of the Order, and adjustments equivalent to difference adjustments for the method stipulated in Article 66.4 Paragraph 2 Item 2 of the Act; hereafter referred to as "Difference Adjustments" in the rest of this item) and the method to adjust such differences if such adjustments are made.

4. Country-by-Country reporting standards

4.1 Threshold and required content

Items to be reported on a country-by-country basis where the Constituent Entities of a Specified MNE Group conducts business are:

1. Amounts of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, and tangible assets other than cash and cash equivalents, as well as the number of employees.
2. Names, Tax jurisdiction of organisation or incorporation if different from tax jurisdiction of residence, and major business activity(ies) of the Constituent Entities.
3. Items that are deemed as useful for those listed above

4.2 Notification requirement for subsidiary companies

Required documents differ depending on which of the two cases below applies:

Case 1: If the Ultimate Parent Entity (or Surrogate Parent Entity) is located in Japan

a) Japanese Ultimate Parent Entity (or Surrogate Parent Entity)

b) Japanese subsidiary Corporation

c) PE.

Case 2: If the Ultimate Parent Entity (or Surrogate Parent Entity) is located in a foreign country

d) Japanese subsidiary Corporation

e) PE.

Notification		a.	b.	c.		d.	e.
Notification for Ultimate Parent Entity	In principle	○	○	○	In principle	○	○
	Exception	○ (One representative corporation)			Exception	○ (One representative corporation)	
CbC report	In principle	○	×	×	Direct Filing		
					In principle	×	×
					Local filing		
					In principle	○	○
					Exception	○ One representative corporation)	
Master File	In principle	○	○	○	In principle	○	○
	Exception	○ (One representative corporation)			Exception	○ (One representative corporation)	

Kenya

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1. Introduction

1.1. Legal context

Section 18 (3) of the Kenyan Income Tax Act ("ITA") and the Transfer Pricing ("TP") Rules, 2006 require resident entities transacting with non-resident related parties to transact at arm's-length prices. The TP Rules also detail circumstances under which an entity is considered to be related to resident entities for TP purposes and provides guidance on development of TP Policies.

Currently, Action 13 of the OECD/G20-project Base Erosion and Profit Shifting ("BEPS") has not been adopted under the TP rules. However, there are plans to overhaul the current ITA with a Draft Income Tax Bill currently awaiting to go through legislative process. The adoption of BEPS Action Points is one of the key changes expected to be included in the Draft Income Tax Bill. The Bill proposes for filing of country by country reports by parent companies or constituent entities of Multinational Enterprises ("MNEs") that are resident for tax in Kenya..

1.2. Practical context

Whereas Action 13 has not been adopted in the TP rules, the additional TP documentation recommended under the Action Point and the Draft Income Tax Bill will definitely result in a significant administrative burden for Multinational Enterprises ("MNEs") once adopted.

2. Formal requirements

2.1. Which taxpayers

The TP rules are applicable to all taxpayers with cross-border transactions with related non-resident entities.

2.2. Aggregation of transactions

TP rules in Kenya do not specify precise grounds for aggregation or itemisation of transactions for TP purposes. However, determination of arm's length price is done for individual transactions and documented as such in the TP policy.

2.3. Deadlines (timing)

The TP Rules do not provide any timelines or requirement to submit the TP policy to the Kenya Revenue Authority ("KRA") but the TP policy should be provided to the KRA on request.

There are instances where the KRA grants taxpayers a reasonable period (3 to 4 weeks) to avail TP documentation if not available.

There are no timelines for submission of the master and local file as well as Country-By-Country ("CbC") reports since Action 13 is yet to be adopted in Kenya.

2.4. Materiality

The Kenyan TP rules require all transactions with non-resident related parties to be documented in a TP Policy regardless of the transaction volumes involved. There are no provisions stipulating formal thresholds under which TP documentation is not required. However, in light of the basic principle that the administrative burden should be justified by the complexity and (tax) importance of the transaction, the more complex and material the transactions are, the more extensive the TP documentation should be.

2.5. Retention of documents

The Tax Procedures Act, 2015 (“TPA”) requires a taxpayer to retain their records for a period of five years with an exception to instances where there are ongoing tax audits or investigations. TP related documentation forms part of records to be retained and it is therefore important to retain them for a period of five years.

2.6. Frequency of documentation updates

Kenyan TP Rules do not stipulate the frequency of TP policy updates. However, it is recommended to have the TP policy reviewed and updated every few years in order to account for normal business and market developments. A significant change in the transactions and business circumstances could also lead to an update of the TP Policy.

2.7. Tax return disclosures

Taxpayers are required to disclose related parties in their annual Income Tax Self-Assessment Return.

2.8. Burden of proof

There is no guidance on burden of proof under the Kenyan TP Rules. However, provisions under the TPA and Tax Appeals Tribunal Act (“TATA”) places burden of proof on taxpayers in demonstrating the KRA’s decision is incorrect, excessive, or should not have been made or should have been made differently.

2.9. Penalties

2.9.1. General

The current TP Rules do not provide any penalties for failing to have a TP policy in place or for not availing it to KRA on time. As a practice, the KRA will request for TP documentation and where the taxpayer lacks the policy, the KRA may sometimes provide a taxpayer reasonable time to prove that his transactions are conducted at arm’s length. The TPA provides a penalty of 10% of the tax payable or about USD 1,000 (KES 100,000), whichever is higher for failing to retain, or maintain documents as required under tax laws.

2.9.2. Penalties in case of a TP-adjustment

There are currently no specific TP adjustment taxes and the Income Tax penalties of 5% of the principal tax payable will be applicable where TP adjustments are made by the KRA. However, the TPA can also consider a tax shortfall penalty of 20% of the principal tax due where the taxpayer cannot demonstrate that tax underpayment arose out of his reasonable interpretation of the tax legislation.

2.9.3. CbC-reporting

There are no penalties for failure to file the CbC reports as there are currently no legal requirements for filing of CbC reports with the KRA.

2.10. Interest

The general Income Tax interest penalties of 1% per month of the principal tax due shall be applicable for TP audits. The interest is however capped at a maximum of the principal tax due.

2.11. Use of most reliable information

The TP Rules recommends application of the most appropriate TP methods taking into account the nature of transaction, or class of transaction, or class of related persons or functions performed by such persons in relation to the transaction.

With respect to the benchmarking analysis to be made, the OECD prefers to use the most reliable information available. In this regard the BEPS-report states the following: "The requirement to use the most reliable information will usually…require the use of local comparables over the use of regional". (BEPS Action 13, p. 24-25). However, local comparables may not be sufficiently available. If local comparables are insufficiently available, regional comparables are allowed.

Due to the absence of local and regional comparables, comparables from other regions are generally accepted. However, there are instances where the KRA uses local comparables which are unavailable to taxpayers which creates tax disputes.

2.12. Languages

The TPA requires documents to be maintained in either of the official languages (that is English or Kiswahili) which includes TP documentation. The TPA empowers the Commissioner to reject documents in any language which is not an official language. It is therefore recommended to have TP documentation maintained in English or Kiswahili.

2.13. Confidentiality

The Commissioner is required to maintain utmost confidentiality of documents or information obtained from taxpayers. However, Kenyan tax law allows the Commissioner to share taxpayers' information or documents with various government authorities as well as foreign governments or international organisations having an agreement to exchange information with Kenya.

3. Standards with respect to the content of transfer pricing documentation

The Kenyan TP Rules are contained in the ITA and currently require only the formulation and maintenance of a Local TP file. The local TP file is expected to have information on the global organisation structure; description of business operations of the group entities; financial analysis; description of the controlled transactions; industry analysis; detailed functional, asset and risk analysis; and economic analysis containing the benchmarking studies.

The BEPS Action points have not been adopted. However, we anticipate adoption of BEPS Action Points in the Draft Income Tax Bill which is currently awaiting legislative process.

4. Country-by-Country reporting standards

The Kenyan TP rules as stipulated in the ITA do not contain CbC reporting standards. However, we expect the Draft Income Tax Bill once assented into law will bring forth the requirements for CbC reporting.

Korea (South Korea)

MEMBER FIRM

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1. Introduction

1.1. Legal context

Statutory rules bearing on transfer pricing (TP) documentation requirements in Korea are prescribed in Article 11 of the Law for the Coordination of International Tax Affairs (“LCITA”), which was initially introduced on 1 January 1996, and in Article 21-3 of Presidential Enforcement Decree (“PED”) of LCITA. The LCITA has been aligned with OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“OECD Guideline”) ever since its inception and major updates and/or amendments to OECD guidelines have been codified into LCITA constantly.

The LCITA was amended in order to implement the new TP documentation requirements in line with Action 13 of the OECD BEPS project (the “BEPS Action 13 Report”). On 6 April 2016, the Korean Ministry of Strategy and Finance (the “MOSF”) announced the final regulations on the local and master files, which were introduced by the BEPS Action 13 Report, going into effect as of 1 January 2016. The local and master files along with Country-by-Country Reporting (CbCR) are collectively referred to as the Combined Report of International Transaction Information (the “CRITI”). On 14 April 2016, the MOSF also issued an administrative notice setting forth detailed information as to how and by whom the local and master files may be prepared and filed. As for the CbCR, the MOSF released a proposal of details in relation to CbCR in December 2016 and introduced the final regulations in this respect on 21 March 2017.

By having these documentation requirements set forth in the BEPS Action 13 Report and enacted into Korea statutory law, South Korea has aligned with other OECD countries in the international tax arena.

1.2 Practical context

From a practical point of view, the number of MNEs meeting the new threshold set by the Korean government in connection with the BEPS Action 13 Report is relatively small compared to the number of companies engaging in cross-border intercompany transactions on a regular basis. Therefore, those MNEs subject to the new documentation regulations will bear a higher burden but the rest of companies will remain the same in terms of their compliance effort. This being said, the advent of BEPS and new documentation regulations drew lots of attention from most taxpayers in Korea and alerted taxpayers to international tax and transfer pricing issues more than ever before.

2. Formal requirements

2.1 Which taxpayers

The amended LCITA and its PED require corporate taxpayers in Korea, i.e. domestic corporations and Korea branches of foreign corporations to file both the local and master files if all of the following thresholds are met:

- Annual aggregate volume of intercompany transaction(s) exceeds KRW 50 billion; and
- Annual revenue exceeds KRW 100 billion.

In case there is more than one Korean taxpayer meeting the foregoing conditions within the same group, the regulation expressly states that any of these taxpayers is permitted to file the master file as a representative of their group.

For CbCR, when the Korean taxpayer is an ultimate parent company of its group/MNE and satisfies the following threshold, then it is required to submit CbCR to the Korean tax authorities:

- Sales revenue exceeding KRW 1 trillion (approx. EUR 780 million) per consolidated financial statements for the preceding year.

For those corporate taxpayers that do not meet the above thresholds, they still may have to declare the TP method applied to their annual tax return package if one of following requirements is met:

- Total transaction amount of goods with all foreign related parties during a given fiscal year exceeds KRW 5 billion or the total service transaction amount with all foreign related parties during a given fiscal year exceeds KRW 1 billion; or
- Total transaction amount of goods with each foreign related party during a given fiscal year exceeds KRW 1 billion or the total service transaction amount with each foreign related party during a given fiscal year exceeds KRW 200 million.

Where taxpayers meet one of the foregoing requirements, they are subject to reporting their TP method via their corporate tax return filings. This may have to be supported by TP documentation.

Taxpayers are required to submit TP documentation within sixty days from the date on which the Korean tax authorities request such information.

2.2 Aggregation of transactions

The Transactional Net Margin Method ("TNMM") is the most frequently applied TP method. TNMM should be applied on a transaction-by-transaction basis but, in practice, when it is unreasonable to measure the price or net margin on a stand-alone basis due to the close interconnection or link between transactions, taxpayers are allowed to consolidate different types of transactions to derive an arm's length price pursuant to Article 6 (8) of PED of the LCITA.

2.3 Deadlines (timing)

The LCITA requires that CRITI (Combined Report of International Transactions Information) be submitted on an annual basis, within 12 months from the last day of the month in which the end date of the business year under Article 6 of the Corporate Tax Act falls. However, the filing date for CRITI may be extended up to 1 year upon prior approval by the tax office having jurisdiction over the taxpayer.

2.4 Materiality

Please refer to 2.1.

2.5 Retention of documents

Pursuant to the Article 116 of Corporate Income Tax Law of Korea, all supporting documents to substantiate transactions, e.g. transfer pricing documentation, occurred during a given fiscal period should be maintained for 5 years from the due date of tax return filing.

2.6 Frequency of documentation updates

The Master File, Local File and CbCR must be updated every year as they relate to a particular fiscal year.

For taxpayers that do not meet the thresholds for CRITI, they may want to prepare TP documentation due to the 10% penalty waiver. In this case, the contemporaneous TP documentation should be updated with new benchmarking every two to three years, but the financial update has to be performed every year.

2.7 Tax return disclosures

Korean corporate taxpayers should attach annex form 8 (GAP) under the LCITA, which includes the amount of cross-border related party transactions by transaction type, to their annual tax return if they have transacted with overseas related parties during a given fiscal year. Also, taxpayers should attach annex form 1 to 1-3 under the LCITA, which is for the declaration of TP method applied, to their annual tax return if the amount of related party transactions with foreign related parties exceeds the threshold provided in section 2.1.

2.8 Burden of proof

If the taxpayer keeps appropriate TP documentation records and does not have an explicitly unreasonable and unsupported point of view with respect to the transfer prices used, the tax authorities must prove that the transfer prices used are incorrect. If there is no TP documentation available or there are evident shortcomings in the documentation, the tax inspector could reverse the burden of proof to the taxpayer.

2.9 Penalties

2.9.1 General

The taxpayer shall be subject to a penalty up to KRW 100 million should there be either a failure to file the CRITI partially or entirely or a falsification of the information therein.

For those taxpayers who have been imposed a penalty for the reasons above, an additional penalty of up to KRW 200 million may be imposed for failure to submit or correct CRITI within 30 days upon the request of the Korean tax authorities.

2.9.2 Penalties in case of a TP-adjustment

The penalty for under-reported tax is 10% (40% in case of fraud) of the additional assessment by the Korean tax authorities. From 1 January 2015 onwards, a 60% penalty may be applied to the additional assessment in case of fraudulent acts involving cross-border transactions.

2.9.3 Master file, Local File, CbC-reporting

The taxpayer shall be subject to a penalty of up to KRW 30 million per file (report) should there be either a failure to file the CRITI partially or entirely or a falsification of the information therein.

2.10 Interest

No interest is charged on penalties. However, there is a penalty similar to interest in concept called additional tax for unfaithful payment, which is 0.0025% per day.

2.11 Use of most reliable information

The OECD Guidelines suggest using the most reliable information available and, in line with this, as per page 24 and 25 of the BEPS Action 13 Report, they also give priority to the use of local comparables over the use of regional comparables. In Korean practice, only Korean local comparables are accepted by the Korean tax authorities and Korean taxpayers are expected to use a database called “Kisline”.

2.12 Languages

The local file must be submitted in Korean. The master file may be submitted in English, but a Korean translation must be submitted within one month.

2.13 Confidentiality

The Korean tax authorities are mandated to treat the TP documentation of the taxpayer confidentially. The tax authorities can only exchange the TP documentation with the tax authorities of other countries where there is an agreement for the exchange of tax information.

3. Standards with respect to the content of transfer pricing documentation

3.1 Master File

The following information should be included in the Master File:

1. Group's organisational structure

It should include overview of the group, group's legal ownership structure, and group's control structure.

2. Description of MNE's business(es)

General written description of the MNE's business including:

a) Important drivers of business profit.

b) Description of top five goods or services in the supply chain that exceed 5% of total sales

c) List of important service agreements between the entities within the MNE

d) Description of Geographical Markets for the Goods and Services mentioned above in b)

e) Functional analysis to explain the proportion of value-adding contribution by each entity within the MNE

f) Important business restructuring transactions, acquisition, or divestiture occurred during the fiscal year, if any.

3. MNE's intangibles (as defined in Chapter VI of the OECD Transfer Pricing Guidelines)

a) A general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management.

b) A list of intangibles or groups of intangibles of the MNE group that are important for TP purposes and which entities legally own them.

c) A list of important agreements among identified associated enterprises related to intangibles, including cost contribution arrangements, principal research service agreements and licence agreements.

d) A general description of the group's TP policies related to R&D and intangibles.

e) A general description of any important transfers of interests in intangibles among associated enterprises during the fiscal year concerned, including the entities, countries, and compensation involved.

4. MNE's intercompany financial activities

a) A general description of how the group is financed, including important financing arrangements with unrelated lenders.

b) The identification of any members of the MNE group that provide a central financing function for the group, including the country under whose laws the entity is organised and the place of effective management of such entities.

c) A general description of the MNE's general TP policies related to financing arrangements between associated enterprises.

5. MNE's financial and tax positions

a) The MNE's annual consolidated financial statement for the fiscal year concerned if otherwise prepared for financial reporting, regulatory, internal management, tax or other purposes.

b) A list and brief description of the MNE group's existing unilateral advance pricing agreements (APAs) and other tax rulings in regard to the profit allocation among countries.

3.2 Local File

The following information should be included in the Local File:

1. Summary of Submitting Local entity

a) Introduction to the submitting entity

b) Business structure and organisational chart

c) List of persons who receive management-related reporting

d) Business operation and strategy of the submitting entity

e) Main competitors.

2. Description of the Related Party Transactions

a) Current details of foreign related parties

b) Legal ownership structure of foreign related parties

c) Ownership structure

d) A description of material related transactions and the context in which such transactions take place

e) The amount of related party payments and receipts in related party transactions

f) Details of each type of related transaction and relationship among foreign related parties

g) Detail comparability analysis and functional analysis of taxpayer and foreign related party with regard to the related party transactions

h) Most appropriate TP method for each transaction type and reasons for selecting such method

i) Tested party selected and reasons for the selection

j) A summary of the important assumptions made in applying the TP methodology.

k) If relevant, an explanation of the reasons for performing a multi-year analysis.

l) A list and description of selected comparable uncontrolled transactions (internal or external), if any

m) A description of any comparability adjustments performed, and an indication of whether adjustments have been made to the results of the tested party, the comparable uncontrolled transactions, or both

n) A summary of financial information used in applying the TP methodology.

o) The result of analysis.

3. Financial information and Agreements

a) Annual local entity financial accounts for the fiscal year concerned. If audited statements exist they should be supplied and if not, existing unaudited statements should be supplied

b) Copy of existing unilateral and bilateral/multilateral APA applications and other tax rulings, if any, which the taxpayer applied to other than the local tax authorities with regard to the related party transactions described above

c) Copies of all material related party agreements executed by the Submitting Entity

d) Information and allocation schedules showing how the financial data used in applying the TP method may be tied to the annual financial statements.

4. Country-by-Country reporting standards

4.1 Threshold and required content

For CbCR, when the Korean taxpayer is the ultimate parent company of its group/MNE it is required to submit CbCR to the Korean tax authorities if it satisfies the following threshold:

- Sales revenue exceeding KRW 1 trillion (approximately EUR 780 million) per consolidated financial statements for the preceding year.

Unlike local and master files, the information contained in CbCRt is very concise and simple. In accordance with the BEPS guidance on CbCR, it should include the basic information about the entity submitting the report such as the name of the entity, business registration number, address, the name of the MNE it belongs to, etc. The key information to be included in CbCR is the Earnings Before Tax (“EBT”) figure and tax paid thereon, the number of employees, etc. in each jurisdiction in which the MNE has a business presence. Moreover, main activities or functions, e.g. R&D, procurement, manufacturing, sales, management support, etc., each constituent entity in each jurisdiction engages in or performs should be included.

4.2 Notification requirement for subsidiary companies

The reporting entity notification form is required to be submitted within six months of the fiscal year-end (e.g., for fiscal years ending 31 December, the deadline would be 30 June of the following year) by the ultimate parent company located in Korea and a domestic entity or branch whose parent company resides in a foreign country. If the parent company of the Korean corporate taxpayer resides in a country that does not require CbCR, or does not facilitate the exchange of CbCR, the Korean entity is required to submit the CbCR to the Korean tax authorities on behalf of its foreign parent company.

Mexico

MEMBER FIRM

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1. Introduction

1.1. Legal context

In Mexico, the legislation on transfer pricing is found within the Mexican Income Tax Law (“MITL”), in the Regulations of the Income Tax Law (“RITL”) and in the Federal Tax Code (“FTC”).

The new requirements for the presentation of the Annual Returns of Related Parties, which are based on Action 13 of the OECD/G20 Base Erosion and Profit Shifting Project (BEPS), are formalised in the Miscellaneous Fiscal Resolution for 2017, which includes the presentation of the Master File, Local Report and the Country-by-Country Report of the multinational enterprise (MNE) group.

1.2 Practical context

The practical application of the OECD regulations on transfer pricing is supported by the last paragraph of Article 179 of the MITL.

“For the interpretation of the provisions of this Chapter, the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations apply, approved by the Council of the Organisation for Economic Co-operation and Development in 1995, or those that replace them, insofar as they are consistent with the provisions of the Mexican Law and the treaties carried out by Mexico.”

2. Formal requirements

2.1 Which taxpayers

Pursuant to Article 76, sections IX, X and XII, all taxpayers who carry out operations with related parties, whether of foreign or domestic residency, are obliged to obtain and maintain supporting documents, with the exception of taxpayers whose income in the immediately preceding year did not exceed 13,000,000 MXN (approximately 673,000 USD), or taxpayers whose income derived from the provision of professional services did not exceed 3,000,000 MXN (approximately 155,000 USD) in that year, except those referred to by the penultimate paragraph of Article 179 of the LISR (related parties located in preferential tax regimes or tax heavens). LISR is the equivalent to the English abbreviation MITL.

For compliance purposes, under the provisions of Article 76-A, sections I and III of the Mexican Income Tax Law, when a group of taxpayers enter into transactions with related parties which meet any of the cases indicated in Article 32- H, sections I, II, III and IV of the FTC and are part of the same multinational enterprise group, they may jointly submit one single Annual Information Declaration. Any obligated taxpayer belonging to the MNE group may submit the declaration, and should select in said declaration the option of joint declaration and state the name or business name and the code in the RITL of the taxpayers who submit the declaration jointly.

For the purposes of article 76-A, first paragraph, section III, second paragraph of the MITL, the Country-by-Country report should be submitted by taxpayers when:

a) They are multinational parent companies, understood to be those that fulfil the following requirements:

1. They are residents of Mexico;
2. They have subsidiaries defined in terms of the financial information regulations, or permanent establishments, that reside or are located abroad, according to their situation;
3. They are not subsidiaries of another company resident abroad;
4. They are obliged to create, present and reveal consolidated financial statements according to the financial information regulations;
5. They report on their consolidated financial statements the results of entities residing in other countries or jurisdictions;
6. They have obtained during the immediately preceding year consolidated income for accounting purposes equivalent to or above 12 billion MXN (approximately 648 million USD). This amount may be modified by Congress for each year of the Federal Income Law.

b) They are entities resident in Mexican territory or residents abroad with a permanent establishment in the country, that have been designated by the controlling entity of the multinational business group resident abroad as responsible for providing the Country-by-Country report. The designated entity should submit by 31 December of the year following its designation, a notice to the tax authorities (SAT) according to the terms that may be established for such purposes via their general rules.

2.2 Aggregation of transactions

Obtaining and maintaining documentation supporting transactions with related parties must be done for each transaction, in accordance with the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations of the OECD.

However, when there are many similar transactions these can be evaluated jointly, provided that the taxpayer can demonstrate that the transfer prices used in connection with the aggregation of transactions were agreed upon under fully competitive conditions.

2.3 Deadlines (timing)

CbCR and Master File

- No later than 12 months after the last day of the reporting fiscal year of the MNE group (for all Mexican ultimate parent entities, and for surrogate Mexican parent entities whose holding company's or reporting entity's fiscal year ends between December and May)
- No later than 31st December of the following fiscal year after the last day of the reporting fiscal year of the MNE group (for surrogate Mexican parent entities whose holding company's or reporting entity's fiscal year ends between June and November).

Local File

No later than 31st December of the next fiscal year.

2.4 Materiality

Under Mexican TP legislation, there is no concept of materiality. All entities must obtain and maintain supporting documentation regarding TP.

2.5 Retention of documents

The SAT has a statutory limit of 5 years to request a given tax document. However, it is quite complicated to calculate exactly when the 5 years expire as it depends on whether the company submitted amended returns (in which case the 5-year period starts again), or if any of the actions taken by the taxpayer are considered to be “tax fraud”, in which case the 5-year period does not expire. Therefore, in practice, the taxpayer is required to retain the supporting documentation until requested by the SAT.

2.6 Frequency of documentation updates

The taxpayer is required to obtain supporting documentation on transactions with related parties for each fiscal year in which they have carried out such transactions.

2.7 Tax return disclosures

As a rule, corporate taxpayers must file the income tax return within 3 months following the end of the tax year. Thus, the deadline is 31 March. Those who are obliged or choose to audit their financial statements need to file by 30 June.

Natural persons need to file by 30 April of each fiscal year.

2.8 Burden of proof

In accordance with the procedures established by the SAT, when reviews of documentation of related party transactions are made, the burden of proof lies with the taxpayer and they must have solid and well-documented evidence of information regarding transactions with related parties.

2.9 Penalties

2.9.1 General

If the taxpayer fails to submit the declaration with related parties, which is submitted together with the declaration for the fiscal year, or if it is submitted with errors or omissions, the taxpayer will be penalised with a fine ranging from 77,230 MXN to 154,460 MXN, in accordance with Article 81, section XVII and Article 82, section XVII, of the FTC.

If the taxpayer does not comply with the obligation to submit the annual declarations corresponding to the Master File, Country-by-Country Report or Local Report, or if they do so in an incomplete manner, or with errors, inconsistencies or in any way other than indicated, it may result in a fine ranging from 154,800 MXN to 220,400 MXN (articles 81, section XL and 82, section XXXVII of the FTC).

2.9.2 Penalties in case of a TP-adjustment

If the tax authority determines an adjustment to the transfer price is required it has the power to collect the following:

- Tax omitted;
- Increased amounts due to inflation; and
- Surcharges, which is equivalent to applying a certain interest rate for a tax credit.

2.9.3 CbC-reporting

Under Mexican law there is no specific penalty related to the Country-by-Country Report, except as established to the delivery of the annual informative declarations.

2.10 Interest

For the purposes of the MITL, interest arising from the amount of taxpayer debts exceeding three times its stockholders' equity and derived from debts contracted with related parties residing abroad, under the terms of Article 179 of this law, shall not be deductible.

2.11 Use of most reliable information

Article 180 of the MITL establishes a priority order to apply the methods in order to obtain the highest degree of reliability in the documentation of operations between related parties; this priority order is as follows:

"Taxpayers shall first apply the method provided in Section I of this Article (Comparable uncontrolled price method), and may only use the methods set forth in Sections II, III, IV, V and VI of the Article, when the method provided in Section I is not appropriate for determining that the transactions carried out are at market prices in accordance with the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations referred to in the last paragraph of Article 179 of this law."

"For the purposes of the application of the methods provided in Sections II, III and VI (Resale Price, Cost Plus and Transactional Net Margin Method) of this article, the methodology shall be deemed to be met, if it is demonstrated that the cost and the sale price are at market prices. For these purposes, market prices are understood as prices and fees that may have been used with or among independent parties in comparable transactions or when the taxpayer has been granted a favourable decision under the terms of article 34-A of the Tax Code of the Federation. It shall be demonstrated that the method used is the most appropriate or the most reliable method according to the available information, with preference given to the methods provided in Sections II and III of this article."

There are no specific requirements on the use of comparable companies. There is no legal requirement to use local country comparable companies. Companies established in Article 179 of the Mexican Income Tax Law will be considered comparable companies.

"For the purposes of this Law, it is understood that operations or companies are comparable, when there are no differences between them that significantly affect the price or fee or profit margin referred to in the methods established in Article 180 of this law, and when such differences do exist, they are eliminated through reasonable adjustments. In order to determine such differences, the pertinent required elements, according to the method used, shall be taken into account, considering the following elements, among others…"

2.12 Languages

Verification of documentation with related parties must be in Spanish and Mexican pesos (MXN), except in the following situations.

Taxpayers required to file the Master File Report, whose content is in line with the Final Report of Action 13 of the BEPS initiative, may submit the information prepared by a foreign entity that is part of the same MNE group, as long as it is submitted by the obligated taxpayer in Spanish or English using the tool provided by the SAT for these purposes.

The information corresponding to the Country-by-Country Report may be presented in a currency other than the national currency. If the information was obtained in foreign currency and converted to national currency, the exchange rate, date of conversion and source must be indicated.

2.13 Confidentiality

Pursuant to Article 69 of the FTC, the official personnel with access to the various documentation related to the application of the tax provisions are obligated to maintain absolute discretion regarding the declarations and data provided by the taxpayers or related third parties, as well as information obtained during the verification process.

3. Standards with respect to the content of transfer pricing documentation

In accordance with Article 76-A of the MITL and the Miscellaneous Fiscal Resolution fractions 3.9.915 to 3.9.17, the BEPS declarations must contain the following information.

3.1 Annual Master Declaration of Related Parties of the Multinational Enterprise Group

Legal organisational structure of each of the business units regardless of their category of parent, holding, subsidiary, associate, affiliate, central office or permanent establishment and the structure of the capital stock ownership ratio, taking into account the percentages of share ownership of each of the entities within the multinational enterprise group, identifying each of the legal operating entities that are part of that group, and their geographical and fiscal locations.

3.2 General description of MNE group activity

1. Description of the MNE group's business model, consisting of the core business strategy and operation components that create and provide value to both clients and the company, including strategic decisions about products and services, business partners and distribution channels, as well as structure of costs and revenue streams that demonstrate the viability of the business.
2. Description of the MNE group's value generators, consisting of the conditions or attributes of the business that effectively generate significant value, which are manifested through intangibles created or utilised through comparability factors that define a competitive business advantage.
3. Description of the supply chain, i.e. the sequence of processes involved in the production and distribution of the MNE group's five principal types of products or services, as well as other types of products or services that represent more than 5% of the MNE group's total income.
4. List and description of the relevant aspects of the principal intra-group service agreements (other than research and development services), including the description of the capabilities of the main centres providing relevant services such as TP policies used to allocate the costs for services and determine the prices to be paid for the provision of intra-group services.
5. Description of the principal geographic markets where the MNE markets its main products or services, referred to in number three of this subsection.
6. Description of the main functions carried out, assumed risks and assets utilised by the various legal entities that make up the MNE.
7. Description of operations related to business restructuring, as well as the business acquisitions and disposals carried out by the MNE group in the declared fiscal year. For these purposes, a business restructuring refers to a cross-border reorganisation of financial and commercial relationships among related parties, including the termination or significant renegotiation of existing agreements.

Intangibles of the MNE group consisting of the following:

1. Description of the global strategy for the development, ownership and utilisation of intangibles, i.e. elements that are not a physical or financial asset and which may be the object of ownership or control for use in commercial activities, and whose use or transmission would be remunerated if it occurred during a transaction between independent companies in comparable circumstances, including the location of both the principal research and development centres and the management and administration of research and development of the MNE group.
2. List of intangibles or sets of the MNE group's intangibles that are relevant to TP purposes, including the name or business name of the legal owners.

3. List of principal intra-group agreements involving intangibles, including cost-sharing and research service arrangements and licences for the use of intangibles.
4. General description of TP policies on research and development and intangible assets of the MNE group.
5. Description of the principal transfers of rights to intangibles made between related parties during the declared fiscal year, including the name or business name of the entities involved, fiscal residence, and amount(s) of the fee(s) for said transfers.

Information related to the MNE group's financial activities, consisting of the following:

1. Description of how the MNE group obtains financing, including major financing agreements with independent parties.
2. For the purpose of identifying the main financing agreements with independent parties, the top five amounts of the most significant financing agreements will be considered.
3. Denomination or corporate name of the legal entities of the multinational enterprise group who perform centralised financing functions for the group, including the fiscal residence and management centre of said legal entities.
4. Description of MNE group policies on TP for finance transactions with related parties.

Financial and fiscal position of the MNE group, consisting of the following:

1. Consolidated financial statements for the declared fiscal year.
2. List and description of advance arrangements for unilateral TP and other agreements or resolutions related to the allocation of income between countries, which include the legal entities that form part of the MNE group.

3.3 Information from the Annual Informative Local Declaration of Related Parties

Information on structure and activities of the obligated taxpayer, consisting of the following:

1. Description of their administrative and organisational structure, as well as the list of individuals upon whom the local administration hierarchically depends and the country(ies) in which said individuals have their main office.
2. Detailed description of the business activities and strategies of the obligated taxpayer, including, if applicable, if they have participated in or been affected by business restructuring, whether of a cross-border or local nature, transfer of ownership, or rights to intangibles during the declared fiscal year or the prior fiscal year. For the purposes of this paragraph, an explanation of how these restructurings or transfers of property affected the taxpayer must be provided.
3. Description of the value chain of the group to which the obligated taxpayer belongs, identifying the location and participation of the obligated taxpayer in said value chain, describing at each stage of said chain the specific activities, and whether they are routine or value-added activities, and the description of the policy of allocation or determination of profits along the value chain.
4. List of the obligated taxpayer's main competitors.

Information on related party transactions consisting of the following:

1. Detailed description of the operations carried out by the obligated taxpayer with related parties residing in the national territory and abroad, including the nature, characteristics and amount by type of operation.
2. Description of the TP policies associated with each type of transaction that the obligated taxpayer carries out with related parties.

For the purposes of this rule, TP policies shall include the related information on methodology for the determination of prices in transactions between related parties whether for financial and/or tax purposes, whose formulation includes business strategies and economic circumstances, among others.

3. Description of the strategy for the development, improvement, maintenance, protection and utilisation of the intangibles of the group to which the obligated taxpayer belongs.
4. Copy in Spanish or English of the contracts entered into by the taxpayer with its related parties, applicable to transactions with related parties during the declared fiscal year.
5. Justification of the selection of the party analysed and reasons for rejection of the counterparty as a party analysed in the analysis(es) of the transaction(s) carried out by the obligated taxpayer with related parties residing in national territory and abroad, as well as the name or business name of the party analysed.
6. Analysis of the performed functions, assumed risks and assets utilised by the obligated taxpayer and by its related parties for each type of operation analysed, as well as the corresponding analysis of comparability for each type of transaction analysed, which should also include analysis of the functions of development, improvement, maintenance, protection and utilisation of intangibles carried out by the obligated taxpayer and its related party that may be a counterparty in each transaction analysed.
7. Justification of the selection of the TP method applied in the analysis(es) of the transaction(s) carried out by the obligated taxpayer with related parties residing in national territory and abroad, as well as explanation of the detail of the relevant assumptions considered in the application of said methodology.
8. Detail and justification of the use of financial information of comparable companies that covers more than one fiscal year in the analysis(es) of the transaction(s) carried out by the obligated taxpayer with related parties residing in national territory and abroad.
9. Detail of the search and selection process of comparable companies or transactions, including the source of information, list of operations or companies considered as potential comparables, with the criteria of acceptance and rejection; selection of profitability indicator(s) considered in the analysis of the transaction(s) carried out by the obligated taxpayer with related parties residing in national territory and abroad; description and detail of the application of comparability adjustments; results and conclusion(s) of the analysis(es).
The information regarding the business description of the companies considered comparable can be presented in English.
10. Financial information (segmented) of both the obligated taxpayer and/or analysed party, as well as the comparable company(ies) considered for such analysis(es).
For these purposes, the step-by-step detail of the calculation of the indicator(s) of the level of profitability will be provided for both the analysed party and each of the companies used as comparables in the analyses, including the mathematical processes utilised for each one, the formula(s), and the decimals used, clarifying if they were truncated or rounded.
11. List of unilateral, bilateral or multilateral advance pricing agreements, as well as other resolutions, in which the Mexican tax authority is not a party and which relate to any transactions carried out with related parties during the declared fiscal year, and provide copies of those created.

Financial information consisting of the following:

1. Individual and consolidated financial statements, as the case may be, corresponding to the declared fiscal year of the obligated taxpayer and/or analysed party selected; and if necessary, clarify whether they have been decreed.

2. Financial and tax information of foreign related parties that are counterparties to each transaction analysed, consisting of current assets, fixed assets, sales, costs, operating expenses, net income, taxable base and tax payment, specifying the currency in which such information is provided.

3. Financial information of the obligated taxpayer and/or selected analysed party used to apply the TP methods in the declared fiscal year.
   If segmented financial information is used, all segments that include the typologies of transactions with the obligated taxpayer and/or analysed party with related parties, whose summation matches the information in numeral 1, must be included.
   Likewise, the obligated taxpayer must identify in each segment, which transactions with related parties are included in each one of them, and explain and exemplify how the segmentation of the financial information was carried out.

4. Relevant financial information of the comparable companies utilised, as well as the sources of said information and the date of the database utilised to search for it.

4. Country-by-Country reporting standards

4.1 Threshold and required content

For the purposes of Article 76-A, Section III of the ISR Law, the Country-by-Country Information Declaration of the multinational enterprise group must contain the following information regarding the declared fiscal year of the multinational controlling entity, in aggregate form and for each country or fiscal jurisdiction:

a) Total revenue of the multinational enterprise group, disaggregating the revenue obtained with related parties and third parties. These correspond to net income, which includes income from the sale of inventory and properties, shares, services, royalties, interest, premiums and other items, but without including income from dividends.

b) Profits or losses before the ISR for the declared tax year.

c) ISR actually paid. This item corresponds to the ISR or corporate tax that the entity has caused and paid effectively in its tax jurisdiction of residence and in any other tax jurisdiction, including that related to withholdings by related parties and third parties. For these purposes, the ISR actually paid does not include the ISR that would have been covered by accreditations or reductions made under the terms of the tax provisions, except when the payment was made through compensation. For this purpose, compensation is understood as defined in Article 23 of the Tax Code of the Federation. When corporate taxes other than ISR are declared, the nature of the tax in question must be clarified in the additional information addendum.

d) Amount of ISR accrued. This item corresponds to the ISR or corporate tax caused for tax purposes of the declared fiscal year. When corporate taxes other than ISR are declared, the nature of the tax in question must be clarified in the additional information addendum.

e) Amount for accounting purposes of the accumulated profits or losses of prior fiscal years on the date of conclusion of the declared fiscal year. This amount does not include the amount for permanent establishments.

f) Amount of capital stock or equity registered and paid at the end of the declared fiscal year. This corresponds to the amount of capital stock or equity reported by the end date of the fiscal year in the tax jurisdiction in question, therefore if there were changes such as increases, decreases, updates and net of any reserve, the last amount recorded at the end the declared fiscal year must be reported. This amount does not include the amount for permanent establishments.

g) Number of employees in the declared fiscal year. This must include full-time employees. Independent contractors, i.e. self-employed persons, who participate in ordinary operational activities should be reported as employees. For this purpose, the number of employees can be declared at the end of the declared fiscal year, or, the value obtained from an annual average, which will be calculated by dividing the sum of the number of employees on the last day of each month of the fiscal year, by the number of months in the fiscal year. If other calculations are used to determine the annual average, the calculation utilised will be declared as part of the additional information.

h) Material assets. These assets correspond to the sum of the net accounting values of inventory and fixed assets, without including cash, instruments equivalent to cash, intangibles, financial assets and net receivables. For these purposes, the net accounts receivable corresponds to the result of subtracting the estimate of uncollectible accounts from the accounts receivable.

i) List of titles or corporate names of legal entities residing in each tax jurisdiction where the multinational enterprise group is present, including the identification of permanent establishments and indicating the principal business activities performed by each one, as requested in the corresponding form.

j) All relevant additional information and its explanation, if necessary, of the source and integration of the data included in the Country-by-Country Information Declaration.

Namibia

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1. Introduction

1.1. Legal context

Namibia introduced Transfer Pricing regulations on 14 May 2005 with the inclusion of Section 95A into the Namibian Income Tax Act, Act 24 of 1981 (as amended). Section 95A gives the Minister the right to:

- make adjustments where the transactions entered into between connected non-resident parties are not considered to be at arm's length; and
- disallow interest which he deems excessive where the entity is thin capitalised.

Practice 6 of 2006 (PN 2/2006), based on OECD principles, was issued in September 2006 by the Directorate of Inland Revenue. PN 2/2006 provides extensive guidance on the practical matters of application of transfer pricing (TP). The Practice Note endorses the standard TP methods recognised by the OECD Guidelines and states that the most appropriate of these will depend on the particular situation and extent of reliable data to enable its proper application.

Since implementation, there is little to no experience of regulation and policing of compliance to the legislation.

Namibia became a member of the OECD/G20 inclusive Framework on Base Erosion and Profit Shifting (BEPS) on 9 August 2019. With respect to Country–by-Country Reporting (CbCR), to date Namibia is not one of the Countries that has signed the Multilateral Competent Authority Agreement (MCAA) on CbCR. Currently there are only 3 African states that can receive CbC Reports being, South Africa, Mauritius and Seychelles. Namibia is one of the States that is part of the CbCR exchange system but is not receiving CbC reports yet.

There is an intention to implement:

- Country-by-Country Reporting
- Master and Local File
- BEPS Action 13

1.2 Tax Treaties

To date Namibia has signed double tax treaties with eleven countries: Botswana, France, Germany, India, Malaysia, Mauritius, Romania, Russia, South Africa, Sweden and the United Kingdom.

Article 7 of the OECD "Model Tax Convention on Income and on Capital" provides inter alia for the attribution of profits to a permanent establishment of an enterprise. Furthermore, Article 9 of the OECD Model Tax Convention stipulates that the arm's-length principle must be applied to commercial and financial relations between associated companies residing in the contracting states. These principles are embodied in each of Namibia's tax treaties.

1.3 Practical context

Section 95A empowers the Receiver of Revenue to adjust the consideration paid or received in respect of an international transaction between connected persons to reflect the arm's-length price for goods or services in determining the taxable income of the Namibian taxpayer.

Practice Note 2 of 2006, which is mainly based on the guidelines from OECD (relevant at that stage, 2006), requires a taxpayer to compile and have available a TP policy which documents the basis of how the entity determines prices for international transactions between connected parties.

Section 95A can, by definition, only apply between separate legal entities. The contents of PN 2/2006 will however also apply to transactions between-

- A person's head office with the branch of such person; or
- A person's branch with another branch of such person.

This is by virtue of the fact that the Practice Note encompasses and accepts the provisions of Article 7 of the OECD Model of Tax Convention applicable to the above transactions and will consider the abovementioned transactions in terms of the OECD principles stipulated in Article 7.

2 Formal requirements

2.1 Which taxpayers

Every person who has entered into a cross-border transaction with an associated enterprise is required to maintain documentation which should indicate how the price of the transaction was determined and the documentation should be sufficient to prove that the transactions were entered into at an arm's-length price.

2.2 Documentation

A taxpayer should create, refer to and retain documentation in accordance with the principles set out in Chapter V of the OECD Guidelines. Per paragraph 5.4 of the OECD Guidelines, the taxpayer's process of considering whether TP is appropriate for tax purposes should be determined in accordance with the same prudent business management principles that would govern the process of evaluating a business decision of a similar level of complexity and importance.

The gust of PN 2/2006 with respect to documentation required from taxpayers is based on the premises that each taxpayer's specific facts and circumstances differ and therefore standard documentation cannot be prescribed.

PN 2/2006 states that a taxpayer needs to demonstrate that it has developed a sound TP policy in terms of which transfer prices are determined with the arm's length principle by documenting the policies and procedures for determining those prices.

The cost and time factors spent to prepare documentation is however considered and the Practice Note states that it is not expected of taxpayers to go to such lengths that the compliance costs related to the preparation of the documents are disproportionate to the nature, scope and complexity of the international agreements entered into by taxpayers with connected persons. In these circumstances taxpayers would be required to submit abridged documentation, identifying the relevant transactions and providing details of the methodologies applied. The taxpayer should use judgement to determine the level of documentation required.

There is no threshold of revenue or profits for complying with TP legislation.

2.3 Deadlines (timing)

Neither Section 95A nor PN 2 of 2006 prescribes any dates for TP policy documents to be available. Any documents to prove arm's-length pricing of transactions should be available as evidence in the event of a price adjustment by Revenue. Tax returns are due for submission 7 months after the year-end of an entity and the adjustment by Revenue will occur on assessment of the submitted return which is accompanied by annual financial statements which includes information of any related party transactions.

2.4 Tax return disclosures

One of the benefits of the migration of Inland Revenue's database from Tax live to Integrated Tax Administration System (ITAS) in 2019 is the availability of on-line submission of tax returns. The on-line tax return on ITAS requires in Schedule 34, "Related party information" specific TP information that is required to be completed. However, it is not compulsory to complete Schedule 34 in order to submit the return.

Income tax return Schedules referring to transfer pricing:

Schedule 23 "Additional information which must be furnished" is a compulsory schedule and if not completed results in the return not being able to be submitted.

Information required in Schedule 23:

Loans and advances not in the ordinary course of business or at rates of interest below normal commercial rates

1. Nature of loan
2. Rates of interest, if any, chargeable
3. Repayment terms
4. Amount of interest
5. Incurred by the business by reason of making the loan(s)
6. Accrued to the business on the loan(s)

Schedule 28 "Amounts paid and credited to non-residents"

This schedule requires the taxpayer to state whether payments have been made or amounts credited to non-residents during the year in respect of interest, royalties or for "know-how" payments.

The following needs to be stated:

- Full name of person/company to whom amount was paid or credited
- Address of person/company to whom amount was paid or credited
- Amount paid or credited

- Purpose of payment (Interest/Royalties/'Know-how payment')
- Time of the payment
- State whether tax was withheld at the time of payment and credited
- If not tax was withheld, state reason for non-deduction

Schedule 30, 30 (a) and 32 require the taxpayer to declare the dividends, distributions and remuneration paid to shareholders, members and directors [including their spouses and children] and all three schedules require information on the citizenship of the individuals as well as address particulars in the event of non-residents.

Schedule 34 "Related party information" requires the taxpayer to provide details of all transactions entered into with related parties distinguishing between amounts received from and to related parties as well as a distinction between resident and non-resident related parties.

The Schedule requires information on the amount of transactions (total), per category, name of the related party and the method used in computing the value.

Categories of transactions:

Services

- Management and consultancy
- Technical
- Research and development
- Commission
- Marketing
- Human resource development and training
- Others (specify)

Goods

- Processed/finished goods
- Unprocessed goods
- Other (specify)

Financial

- Interest
- Loans
- Discounts
- Guarantee
- Others (specify)

Fees

- Royalties
- Rent/lease
- Licence
- Franchise
- Insurance
- Other (specify)

Others

- Reimbursement of expenses
- Cost sharing/ cost contribution arrangements
- Employment costs of expatriate staff
- Acquisition/disposal of assets
- Others (specify)

2.5 Burden of proof

The burden of proof in the event of a price adjustment and assessment by Inland Revenue will be with the taxpayer and in the event of no documentation it will be difficult for the taxpayer to object to the adjustment and subsequent assessment. PN 2/2006 however gives the assurance that the burden of proof will not be misused by *groundless or unverifiable assertions* about TP.

2.6 Penalties

With the legislation in its current state there are no specific TP penalties. In terms of the normal penal provisions of the Income Tax Act, penalties of up to 200% can be levied on any amount of tax underpaid.

2.7 Interest

There are no specific applicable interest rates but, as interest is charged on any unpaid amounts at 20% per annum the same will apply to additional tax amounts resulting from additional assessments.

2.8 Use of most reliable information

The Practice Note recognises that the determination of arm's-length consideration is not an exact science but requires judgement on the part of both the taxpayer and the assessor. It therefore states that taxpayers and the assessors need to approach each case, having due regard for the unique business and market realities applicable to each individual case.

2.9 Languages

All the documents and information should be prepared and maintained in English which is the official language of Namibia.

3 Standards with respect to the content of transfer pricing documentation

3.1 Master and Local File

The Directorate of Inland Revenue has indicated that it is working on the development of Master and Local file standards to be implemented.

4 Country-by-Country reporting standards

Namibia has not signed the Multilateral Competent Authority Agreement (MCAA) on CbCR and there are therefore no standards to adhere to. The intention is to implement it once the process of setting the standards has been concluded.

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1. Introduction

1.1. Legal context

Article 8b of the Dutch Corporation Tax Act 1969 (CTA 1969) was introduced in 2002 and is the domestic codification of Article 9 of the OECD-model convention. Article 8b CTA 1969 contains a general documentation requirement for all transactions between associated companies (both domestic and foreign companies) with respect to the applied Transfer Prices.

As of 1 January 2016 new standardised documentation requirements are included in the CTA 1969 (Articles 29b through 29h) for multinational enterprises (MNEs). These requirements are the implementation by the Dutch government of Action 13 of the OECD/G20-project Base Erosion and Profit Shifting (BEPS). These new documentation requirements include a master and local file and a Country-by-Country Report (CbC-report).

1.2 Practical context

The new documentation requirements as of 1 January 2016 can lead to a significant administrative burden for MNEs. Although (mainly) MNEs are affected by the new TP-documentation requirements, the BEPS-project has an effect on all taxpayers. The focus of tax authorities has been shifting considerably towards Transfer Pricing and the corresponding documentation. Current practice learns that many taxpayers do not meet the minimum TP-requirements. It is therefore recommended for all taxpayers to take a rigorous look at their TP-documentation.

2. Formal requirements

2.1 Which taxpayers

Based on article 8b of the CTA 1969 a Dutch taxpayer that enters into transactions with an associated enterprise is required to have TP-documentation with respect to those transactions. The definition of an associated enterprise according to article 8b of the CTA 1969 follows the wording of article 9 of the OECD-model convention.

The new documentation requirements as of 1 January 2016 with respect to the master and local file apply to any MNE with a (corporation) tax presence in the Netherlands and which is part of a group of companies with an annual group turnover that exceeds the minimum threshold of EUR 50 million. A MNE which is part of a group with a consolidated group revenue of more than EUR 750 million requires a group parent to provide the Dutch tax inspector with a CbC-report.

The new documentation requirements will be applicable to financial years starting on or after 1 January 2016.

2.2 Aggregation of transactions

The premise is that TP-documentation is required for each individual transaction with associated enterprises, but in practice this could lead to an unreasonable administrative burden. If a proper aggregation of transactions is possible, for example because there is a large number of similar transactions, the transactions can be jointly assessed. In that case it is expected from the taxpayer that he can substantiate that the used transfer prices with regard to the aggregation of transactions are at arm’s length.

2.3 Deadlines (timing)

The premise is that the TP-documentation based on article 8b of the CTA 1969 is available from the time the transaction is entered into by the taxpayer, whereby the documentation should be based upon information reasonably available at the time of the transaction. Thus, a taxpayer ordinarily should give consideration to whether its transfer pricing is appropriate for tax purposes, before the pricing is established and should confirm the arm's-length nature of its financial results at the time of filing its tax return.

If the TP-documentation is not available upon request of the tax authorities, a reasonable period (a minimum of 4 weeks - 3 months depending on the complexity of the case) is given to the taxpayer to deliver the requested documentation.

The master and local file must be included in the records before the Dutch corporate income tax return is due (standard 6 months after the end of the fiscal year, but a longer period is possible). This means that the master and local file for the fiscal year 2018 must be ready by 30 June 2019 at the earliest.

The MNE must provide the tax inspector with the CbC-report within 12 months after the last day of the financial year of the MNE. For financial years ending 31 December 2018, the CbC-report should be provided before 31 December 2019.

2.4 Materiality

In principle all transactions with associated enterprises should be supported by TP-documentation. There are no formal thresholds below which no TP-documentation is required. However, in light of the basic principle that the administrative burden should be justified by the complexity and (tax) importance of the transaction, the more complex and material the transactions are, the more extensive the TP documentation should be.

2.5 Retention of documents

A Dutch taxpayer is required to keep its administrative records for at least seven years. Since TP documentation is a mandatory record required by a taxpayer, this seven-year period also applies to TP documentation. In certain cross-border cases the tax authorities may impose an additional assessment within twelve years after the date on which the tax debt arose. It is therefore recommended to keep TP-documentation for twelve years.

2.6 Frequency of documentation updates

In practice the documentation requirements based on article 8b of the CTA 1969 should be updated every few years to account for normal business and market developments. A significant change in the facts and circumstances could also lead to an update of the documentation.

The master file, local file and CbC-report must be updated every year, because they relate to a particular fiscal year.

2.7 Tax return disclosures

Dutch (corporate) taxpayers do not have to disclose their TP documentation in the tax return. The only requirement is to select a field in the annual Dutch (corporate) tax return if a taxpayer meets the relevant documentation requirements. These requirements are that master and local file documentation should be drafted. In the Dutch local file it should be clarified that the Dutch (corporate) taxpayer was involved in a reorganisation or transfer of intangible fixed assets (including goodwill) during the financial year for which the tax return is filed or the preceding year.

Regardless of the selection of either of the options above, a Dutch taxpayer is not required to disclose its TP-documentation as part of the tax return filing.

2.8 Burden of proof

If the taxpayer keeps appropriate TP documentation on file and does not have an explicitly unreasonable and unsupported point of view with respect to the used transfer prices, the Dutch tax authorities must prove that the used transfer prices are not correct. If there is no TP documentation available or there are evident shortcomings in the TP documentation, the tax inspector could reverse the burden of proof to the taxpayer. Dutch Case law illustrates that it is difficult for a taxpayer to overcome the burden of proof.

2.9 Penalties

2.9.1 General

Dutch tax law does not provide for penalties for the mere fact that TP documentation is not available and/or is not available in a timely manner. However, for master files and local files the law defines that the availability of those documents is the responsibility of the company. If the taxpayer is required to have a master file and local file, subject to certain conditions the tax authorities can impose penalties for not meeting this obligation up to an amount of EUR 8,700.

2.9.2 Penalties in case of a TP-adjustment

In case of a TP-adjustment the penalty can be up to 100% of the TP adjustment if the TP-adjustment is a result of intentional non-compliance by the taxpayer with regard to the TP documentation.

2.9.3 CbC-reporting

If a taxpayer does not comply to deliver the CbC-report, this is regarded as a criminal offence which is subject to penalties of up to EUR 8,700 (or imprisonment). If the taxpayer's non-compliance is intentional the penalties can go up to EUR 870,000 or imprisonment. The legislator has indicated that criminal prosecution is only reserved for the most serious cases.

2.10 Interest

In case of a TP adjustment interest is due if the additional assessment is imposed after 1st July following on from the year in question. The interest rate is 8% (2020). No interest is due on penalties.

2.11 Use of most reliable information

With respect to the benchmarking analysis, the OECD prefers to utilise the most reliable information available. In this regard the BEPS report states the following "*The requirement to use the most reliable information will usually…require the use of local comparables over the use of regional.*" (BEPS Action 13, p. 24-25). However, local comparables may not be sufficiently available, as a result regional comparables are allowed.

In case of the Netherlands, (Western) European comparables are generally accepted. Although, depending on the business, it can be recommended to use reliable data from a large region.

2.12 Languages

The law does not require the documentation based on article 8b CTA 1969 to be in a specific language, but the information in the documentation should be made readily available to the Dutch tax authorities. If the documentation is not written in Dutch/English, the tax inspector can ask for a translation. It is therefore recommended that the documentation is written in Dutch or English. The Master and Local File and the CbC-report should be in Dutch or English.

2.13 Confidentiality

The Dutch tax authorities will treat the TP documentation confidentially. The tax authorities can only exchange the TP documentation with the tax authorities of another country if there is a legal basis. This legal basis can be found in national law, a tax treaty or an EU directive. The TP documentation is never available to the public.

Please note however that the content of cross-border Advance Pricing Agreements (i.e. TP rulings) can be exchanged proactively by the Dutch tax authorities without informing Dutch taxpayers. Since 1 July 2019, the Dutch tax authorities publish anonymous summaries of TP rulings.

3. Standards with respect to the content of transfer pricing documentation

The Dutch TP documentation standards are published in detail in the *Regulation on additional transfer pricing documentation requirements.* This regulation includes models for both the group's master file as for each group member's local file. These models are included in paragraphs 3.1 and 3.2.

If group turnover does not exceed EUR 50 million, the TP documentation should include the following information:

- A description of the five comparability factors of related party transactions;
- An explanation of the selected TP methodology;
- A description of the related party transactions condition and determined pricing.

Since the Dutch authorities chose deliberately not to make an extensive list of requirements for this category of Dutch taxpayers, the Dutch taxpayer can contact the Dutch tax authorities to get a ruling on whether the drafted documentation meets the minimum TP documentation requirements.

3.1 Master File

The following information should be included in the Master File:

1. Organisational structure

Chart illustrating the MNE's legal and ownership structure and geographical location of operating entities.

2. Description of MNE's business(es)

General written description of the MNE's business including:

a) Important drivers of business profit.

b) A description of the supply chain for the group's five largest products and/ or service offerings by turnover plus any other products and/or services amounting to more than 5% of group turnover. The required description could take the form of a chart or a diagram.

c) A list and brief description of important service arrangements between members of the MNE group, other than research and development (R&D) services, including a description of the capabilities of the principal locations providing important services and TP policies for allocating services costs and determining prices to be paid for intra-group services.

d) A description of the main geographic markets for the group's products and services that are referred to under b.

e) A brief written functional analysis describing the principal contributions to value creation by individual entities within the group, i.e. key functions performed, important risks assumed, and important assets used.

f) A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year.

3. MNE's intangibles (as defined in Chapter VI of the OECD Transfer Pricing Guidelines)

a) A general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management.

b) A list of intangibles or groups of intangibles of the MNE group that are important for TP purposes and which entities legally own them.

c) A list of important agreements among identified associated enterprises related to intangibles, including cost contribution arrangements, principal research service agreements and licence agreements.

d) A general description of the group's TP policies related to R&D and intangibles.

e) A general description of any important transfers of interests in intangibles among associated enterprises during the fiscal year concerned, including the entities, countries, and compensation involved.

4. MNE's intercompany financial activities

a) A general description of how the group is financed, including important financing arrangements with unrelated lenders.

b) The identification of any members of the MNE group that provide a central financing function for the group, including the country under whose laws the entity is organised and the place of effective management of such entities.

c) A general description of the MNE's general TP policies related to financing arrangements between associated enterprises.

5. MNE's financial and tax positions

a) The MNE's annual consolidated financial statement for the fiscal year concerned if otherwise prepared for financial reporting, regulatory, internal management, tax or other purposes.

b) A list and brief description of the MNE group's existing unilateral advance pricing agreements (APAs)

3.2 Local File

The following information should be included in the Local File:

1. Local entity

a) A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices.

b) A detailed description of the business and business strategy pursued by the local entity including an indication whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and an explanation of those aspects of such transactions affecting the local entity.

c) Key competitors.

2. Controlled transactions

For each material category of controlled transactions in which the entity is involved, provide the following information:

a) A description of the material-controlled transactions (e.g. procurement of manufacturing services, purchase of goods, provision of services, loans, financial and performance guarantees, licences of intangibles, etc.) and the context in which such transactions take place.

b) The amount of intra-group payments and receipts for each category of controlled transactions involving the local entity (i.e. payments and receipts for products, services, royalties, interest, etc.) broken down by tax jurisdiction of the foreign payer or recipient.

c) An identification of associated enterprises involved in each category of controlled transactions, and the relationship among them.

d) Copies of all material intercompany agreements concluded by the local entity.

e) A detailed comparability and functional analysis of the taxpayer and relevant associated enterprises with respect to each documented category of controlled transactions, including any changes compared to prior years.

f) An indication of the most appropriate TP method with regard to the category of transaction and the reasons for selecting that method.

g) An indication of which associated enterprise is selected as the tested party, if applicable, and an explanation of the reasons for this selection.

h) A summary of the important assumptions made in applying the TP methodology.

i) If relevant, an explanation of the reasons for performing a multi-year analysis.

j) A list and description of selected comparable uncontrolled transactions (internal or external), if any, and information on relevant financial indicators for independent enterprises relied on in the TP analysis, including a description of the comparable search methodology and the source of such information.

k) A description of any comparability adjustments performed, and an indication of whether adjustments have been made to the results of the tested party, the comparable uncontrolled transactions, or both.

l) A description of the reasons for concluding that relevant transactions were priced on an arm's-length basis based on the application of the selected TP method.

m) A summary of financial information used in applying the TP methodology.

n) A copy of existing unilateral and bilateral/multilateral APAs and other tax rulings to which the local tax jurisdiction is not a party, and which are related to controlled transactions described above.

3. Financial information

a) Annual local entity financial accounts for the fiscal year concerned. If audited statements exist they should be supplied and if not, existing unaudited statements should be supplied.

b) Information and allocation schedules showing how the financial data used in applying the TP method may be tied to the annual financial statements.

c) Summary schedules of relevant financial data for comparables used in the analysis and the sources from which that data was obtained.

4. Country-by-Country reporting standards

4.1 Threshold and required content

A MNE with a consolidated group revenue of more than EUR 750 million should provide the Dutch tax inspector with a CbC-report. The report contains the following information about the MNE:

a) For each state in which the MNE is active, information about the revenue, the earnings before tax (EBT), the paid income tax, the accrued income tax, the stated capital, the accumulated earnings, the number of employees and the tangible assets other than cash and cash equivalents.

b) A description of every group entity of the MNE mentioning the tax jurisdiction of residence, and if deviant, the state under whose law the group entity is established and the main business or operations of that group entity.

4.2 Notification requirement for subsidiary companies

In principle, the country report is provided by the ultimate parent company of the MNE in its state of residence. The state of residence will exchange the country report automatically with the Dutch tax authorities. A Dutch ultimate parent company needs to provide the Dutch tax inspector with the country report. The Dutch tax authorities will automatically exchange this report with the jurisdictions in which the MNE is active and with which the Netherlands has concluded an Agreement for automatic exchange of information.

The Dutch group entity is required to provide the Dutch tax inspector with the report if:

1. The foreign ultimate parent company is not required to provide the tax authorities a report in its state of residence.
2. The foreign ultimate parent company is required to provide the tax authorities a report in its state of residence, but there is no Agreement between that state and the Netherlands which provides for automatic exchange of the report.
3. The Dutch tax inspector has informed the Dutch group entity there is a structural negligence of the state of residence of the ultimate parent company.

This requirement by the Dutch group entity can be prevented if the report is provided by a surrogate ultimate parent company, subject to the following conditions:

1. The surrogate ultimate parent company is required to provide the report in its state of residence.
2. There is an Agreement between that state and the Netherlands which provides for automatic exchange of the report.
3. The state of residence of the surrogate ultimate parent company is not structurally negligent in the exchange of the report.
4. The surrogate ultimate parent company has notified its state of residence it will act as a surrogate ultimate parent company.
5. The Dutch group entity has notified the Dutch tax inspector which foreign group company has taken over the requirement to provide the report.

In this way it is ensured that the Dutch tax inspector is provided with the report, either by a Dutch taxpayer or by the tax authorities of another state.

4.3 Deadlines

The country report needs to be prepared and filed no later than 12 months after the last day of the annual accounting period of the (surrogate) foreign ultimate parent company. Please note this filing deadline also applies if the annual accounting periods of the Dutch company and (surrogate) foreign ultimate parent company do not match.

A Dutch subsidiary company needs to notify the Dutch tax authorities which entity of the MNE will submit the country report on behalf of the MNE. This notification requirement applies to each entity (whilst all Dutch subsidiary companies of the same MNE can be included in one notification). The notification can be made through an online web form. The deadline for submission of the notification is the last day of the applicable financial year of the MNE. Non-compliance with the notification requirement can result in severe penalties. Reference is made to paragraph 2.9.3 above.

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1. Introduction

1.1. Legal context

Sections 108 & 109 of the Income Tax Ordinance (ITO 2001) read with Rules 20-27 of Income Tax Rules 2002 (ITR 2002) were introduced and are the domestic codification of Article 9 of the OECD-model convention. They contain a general documentation requirement for all transactions between associated companies (both domestic and foreign companies) with respect to the applied Transfer Prices.

As of July 1, 2016 new standardised documentation requirements are included in the ITO 2001 (Section 108(3)) with complete detail in Draft rules promulgated on 5 June 2017 vide SRO 421(1)/2017. These requirements are the implementation by the Pakistan Government of Action 13 of the OECD/G20-project Base Erosion and Profit Shifting (BEPS). These new documentation requirements include a master and local file and a Country-by-Country Report (CbC-report).

1.2 Practical context

The new documentation requirements can lead to a significant administrative burden for MNEs. Although (mainly) MNEs are affected by the new TP-documentation requirements, the BEPS-project will likely affect all taxpayers since the focus of the tax authorities will shift more and more to Transfer Pricing (TP). Practice learns that many taxpayers do not meet the minimum TP requirements. It is therefore recommended for all taxpayers to take a critical look at their TP documentation.

2. Formal requirements

2.1 Which taxpayers

Based on the above legal provisions a Pakistani taxpayer that enters into transactions with an associated enterprise is required to have TP documentation with respect to those transactions. The definition of an associated enterprise in ITO 2001 follows the wording of article 9 of the OECD-model convention.

The new documentation requirements with respect to the Local File apply to transactions above PKR 50 million and a constituent entity of a MNE group with a minimum turnover of PKR 100 million shall maintain a Master File. A constituent entity of a MNE group with consolidated group revenue of more than EUR 750 million or an equivalent amount in Pakistan Rupees (PKR) should also have to provide the Pakistani tax authorities with a CbC-report.

2.2 Aggregation of transactions

The TP documentation is required for each individual transaction with associated enterprises above the minimum threshold of PKR 50 million, which cannot be regarded as a burden on the taxpayer, hence the question of aggregation does not arise.

2.3 Deadlines (timing)

The premise is that the TP documentation is available from the time the transaction is entered into by the taxpayer, whereby the documentation should be based upon information reasonably available at the time of the transaction. Thus, a taxpayer ordinarily should give consideration to whether its TP is appropriate for tax purposes before the pricing is established and should confirm the arm's-length nature of its financial results at the time of filing its tax return.

The local file must be available with the tax authorities any time after the due date of filling the Tax Return (standard 6 months after the end of the fiscal year).

The MNE group entity must provide the tax authorities the CbC-report within 12 months after the last day of the financial year of the MNE group.

2.4 Materiality

As mentioned before, all transactions above the minimum threshold of PKR 50 million with associated enterprises should be supported by TP documentation.

2.5 Retention of documents

A Pakistani taxpayer is required to keep its administrative records for at least six years. Since the TP documentation is part of the records of a taxpayer, this six-year period also applies to the TP documentation.

2.6 Frequency of documentation updates

In practice the documentation requirements based on Section 108 & 109 of the Income Tax Ordinance (ITO 2001) read with Rules 20-27 of Income Tax Rules 2002 (ITR 2002) should be updated every few years to account for normal business and market developments. A significant change in the facts and circumstances could also lead to an update of the documentation.

The master file, local file and CbC-report must be updated every year, because they relate to a particular fiscal year.

2.7 Tax return disclosures

Pakistani (corporate) taxpayers should attach Financial Accounts when filing Income Tax Returns. The Financial Accounts disclose information regarding transactions with associated companies/persons. Hence, the taxpayer is not required to disclose its TP documentation as part of the tax return filing.

2.8 Burden of proof

If the taxpayer keeps appropriate TP documentation in its records and does not have an explicitly unreasonable and unsupported point of view with respect to the used transfer prices, the tax authorities must prove the used transfer prices are incorrect.

2.9 Penalties

2.9.1 General

Failure to maintain or furnish documents by the taxpayer required to be maintained shall lead to a penalty or penalties under section 182 of the ITO 2001.

2.9.2 Penalties in case of a TP-adjustment

In case of a TP adjustment the penalty is provided under section 182 of ITO 2001.

2.9.3 CbC-reporting

The penalty for not filing is PKR 2,000 for each day of default subject to a minimum penalty of PKR 25,000.

The penalty for non-timely filing is PKR 25,000 for the first default and PKR 50,000 for each subsequent default.

The penalty for incomplete or incorrect filing is 1% of the value of transactions, the record of which is required to be maintained under section 108 and Income Tax Rules, 2002;

2.10 Interest

Default surcharge is 12% per annum.

2.11 Use of most reliable information

With respect to the benchmarking analysis to be made, the OECD prefers to use the most reliable information available. In this regard the BEPS-report states the following "T*he requirement to use the most reliable information will usually…require the use of local comparables over the use of regional.*" (BEPS Action 13, p. 24-25). However, local comparables may not be sufficiently available. If local comparables are insufficiently available, regional comparables are allowed.

2.12 Languages

The law does not require the documentation based on Section 108 & 109 of the Income Tax Ordinance (ITO 2001) read with Rules 20-27 of Income Tax Rules 2002 (ITR 2002) to be in a specific language, but the information in the documentation should be accessible to the tax authorities. If the documentation is not in English, the tax authorities can ask for a translation. In practice the tax authorities do not ask for a translation if the documentation is in English. So it is recommended that the documentation is in English.

The master and local file and the CbC-report should be in English.

2.13 Confidentiality

The Pakistan tax authorities will treat the TP documentation confidentially to the same extent that would apply if such information were provided to it under the provisions of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

3. Standards with respect to the content of transfer pricing documentation

The Pakistan TP documentation standards (drafts) are published in detail in the Regulation on additional transfer pricing documentation requirements. This regulation includes models for both the group's master file as for each group member's local file. These models are included in paragraph 3.1 and 3.2.

3.1 Master File

The following information should be included in the Master File:

1. Organisational structure

Chart illustrating the MNE's legal and ownership structure and geographical location of operating entities.

2. Description of MNE's business(es)

General written description of the MNE's business including:

a) Important drivers of business profit.

b) A description of the supply chain for the group's five largest products and/ or service offerings by turnover plus any other products and/or services amounting to more than 5% of group turnover. The required description could take the form of a chart or a diagram.

c) A list and brief description of important service arrangements between members of the MNE group, other than research and development (R&D) services, including a description of the capabilities of the principal locations providing important services and TP policies for allocating services costs and determining prices to be paid for intra-group services.

d) A description of the main geographic markets for the group's products and services that are referred to under b.

e) A brief written functional analysis describing the principal contributions to value creation by individual entities within the group, i.e. key functions performed, important risks assumed, and important assets used.

f) A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year.

3. MNE's intangibles (as defined in Chapter VI of the OECD Transfer Pricing Guidelines)

a) A general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management.

b) A list of intangibles or groups of intangibles of the MNE group that are important for TP purposes and which entities legally own them.

c) A list of important agreements among identified associated enterprises related to intangibles, including cost contribution arrangements, principal research service agreements and licence agreements.

d) A general description of the group's TP policies related to R&D and intangibles.

e) A general description of any important transfers of interests in intangibles among associated enterprises during the fiscal year concerned, including the entities, countries, and compensation involved.

4. MNE's intercompany financial activities

a) A general description of how the group is financed, including important financing arrangements with unrelated lenders.

b) The identification of any members of the MNE group that provide a central financing function for the group, including the country under whose laws the entity is organised and the place of effective management of such entities.

c) A general description of the MNE's general TP policies related to financing arrangements between associated enterprises.

5. MNE's financial and tax positions

a) The MNE's annual consolidated financial statement for the fiscal year concerned if otherwise prepared for financial reporting, regulatory, internal management, tax or other purposes.

3.2 Local File

The following information should be included in the Local File:

1. Local entity

a) A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices.

b) A detailed description of the business and business strategy pursued by the local entity including an indication whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and an explanation of those aspects of such transactions affecting the local entity.

c) Key competitors.

2. Controlled transactions

For each material category of controlled transactions in which the entity is involved, provide the following information:

a) A description of the material controlled transactions (e.g. procurement of manufacturing services, purchase of goods, provision of services, loans, financial and performance guarantees, licences of intangibles, etc.) and the context in which such transactions take place.

b) The amount of intra-group payments and receipts for each category of controlled transactions involving the local entity (i.e. payments and receipts for products, services, royalties, interest, etc.) broken down by tax jurisdiction of the foreign payer or recipient.

c) An identification of associated enterprises involved in each category of controlled transactions, and the relationship among them.

d) Copies of all material intercompany agreements concluded by the local entity.

e) A detailed comparability and functional analysis of the taxpayer and relevant associated enterprises with respect to each documented category of controlled transactions, including any changes compared to the prior three years.

f) An indication of the most appropriate TP method with regard to the category of transaction and the reasons for selecting that method.

g) Detailed information on TP methods applied including comparable searches criteria, results of searches and application of TP method;

h) Information regarding periodically updating and refreshing comparable searches and the period after which such comparable searches are updated and refreshed;

i) List of all existing unilateral and bilateral or multilateral advance pricing agreements (APAs) and copies thereof and other tax rulings to which Pakistan is not a party and which are related to controlled transactions described as aforesaid;

3. Financial information

a) Annual local entity financial accounts for the fiscal year concerned. If audited statements exist they should be supplied and if not, existing unaudited statements should be supplied.

b) Information and allocation schedules showing how the financial data used in applying the TP method may be tied to the annual financial statements.

c) Summary schedules of relevant financial data for comparables used in the analysis and the sources from which that data was obtained.

4. Country-by-Country reporting standards

4.1 Threshold and required content

A resident MNE with consolidated group revenue of more than EUR 750 million or Pakistan Rupees equivalent should provide the Pakistan tax authorities with a CbC report. The report contains the following information about the MNE:

a) For each state in which the MNE is active, information about the revenue, the earnings before tax (EBT), the paid income tax, the accrued income tax, the stated capital, the accumulated earnings, the number of employees and the tangible assets other than cash and cash equivalents.

b) A description of every group entity of the MNE mentioning the tax jurisdiction of residence, and if deviant, the state under whose law the group entity is established and the main business or operations of that group entity.

4.2 Notification requirement for subsidiary companies

In principle, the country report is provided by the ultimate parent company of the MNE in its state of residence. The state of residence will exchange the country report automatically with the Pakistan tax authorities. A Pakistani ultimate parent company needs to provide the Pakistan tax authorities with the country report. The Pakistan tax authorities will automatically exchange this report with the jurisdictions in which the MNE is active and with which the Pakistan has concluded an Agreement for automatic exchange of information.

The Pakistan group entity is required to provide the Pakistan tax authorities with the report if:

1. The foreign ultimate parent company is not required to provide the tax authorities a report in its state of residence.

2. The foreign ultimate parent company is required to provide the tax authorities a report in its state of residence, but there is no Agreement between that state and Pakistan which provides for automatic exchange of the report.

3. The Pakistani tax authorities have informed the Pakistani group entity there is a structural negligence of the state of residence of the ultimate parent company.

This requirement by the Pakistan group entity can be prevented if the report is provided by a surrogate ultimate parent company, subject to the following conditions:

1. The surrogate ultimate parent company is required to provide the report in its state of residence.
2. There is an Agreement between that state and Pakistan which provides for automatic exchange of report.
3. The state of residence of the surrogate ultimate parent company is not structurally negligent in the exchange of the report.
4. The surrogate ultimate parent company has notified its state of residence it will act as a surrogate ultimate parent company.
5. The Pakistani group entity has notified the Pakistani tax authorities which foreign group company has taken over the requirement to provide the report.

In this way it is ensured that the Pakistani tax authorities are provided with the report, either by a Pakistani taxpayer or by the tax authorities of another state.

The MNE must provide the report within 12 months after the last day of the financial year of the MNE.

A subsidiary company needs to notify the Pakistani tax office which entity of the MNE will submit the country report on behalf of the MNE. This notification requirement applies to each entity.

Peru

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1. Introduction

1.1. Legal context

The regulations related to transfer pricing (TP) are found in:

- Chapter V article 32°-A of the Income Tax Act (incorporated by article 22°, Legal Decree No. 945, 2003),
- Chapter XIX articles 108° to 119° of Income Tax Act Regulations (chapter incorporated by article 3°, Supreme Decree No. 190-2005-EF, 2005), and,
- Resolutions 014-2018 163-2018 and 264-2018 issued by the National Superintendence of Tax Administration (SUNAT).

The main objective of the resolutions is to provide guidelines to taxpayers for determining the income tax market value for transactions between related parties (either international or domestic). The income tax market value should apply to transactions performed from, to or through low or zero-tax jurisdictions (either international or domestic), and shall correspond to prices and the consideration that may have been agreed upon with or between independent parties in comparable transactions, under equal or similar conditions.

Where issues are not expressly regulated by national legislation, the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations issued by the OECD in accordance with sub-section h) article 32°-A of the Income Tax Act provide further guidance.

Following the release of the OECD's Base Erosion and Profit Shifting ('BEPS') report, Legislative Decree 1312 modified the income tax law to incorporate action No. 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting from fiscal year 2016.

1.2 Practical context

The new documentation requirements applicable from 1 January 2017 can impose a significant administrative burden on both national entities and Multinational Enterprises (MNEs). Although MNEs are affected by the new TP documentation requirements, BEPS is likely to affect all taxpayers as the focus of the tax authorities shifts more and more to TP. Our experience shows that many taxpayers do not meet the minimum TP requirements. It is therefore recommended for all taxpayers to take a critical look at their TP documentation.

2. Formal requirements

2.1 Which taxpayers

A Peruvian taxpayer that enters into transactions with related parties is required to have TP documentation with respect to those transactions. The definition of related parties can be found in chapter 6, article 24 of the Peruvian Tax Regulation.

The new local file documentation requirements, which came into effect from 1 January 2016, apply to any company that performs transactions with related parties or performed from, to or through low or zero-tax jurisdictions with annual income of 2,300 UIT (Unidad Impositiva Tributaria = in English Annual Tax Unit; 1 UIT = PEN 4,200 for 2019) PEN 9.6 million soles (approximately USD 2.8 million).

Likewise, the new documentation requirements for the Master File as from 1 January 2017 apply to any Peruvian entity or MNE which is part of an economic group, provided the Peruvian company has an annual income of 20,000 UIT: PEN 84 million soles (approximately USD 24 million).

2.2 Aggregation of transactions

In theory TP documentation is required for each individual transaction with associated enterprises, but in practice this could lead to an unreasonable administrative burden. If a proper aggregation of transactions is possible, for example, because there are a large number of similar transactions, the transactions can be jointly assessed. In this case it is expected that the taxpayer can substantiate the transfer prices with regard to the aggregation of transactions being at an arm’s-length price.

In addition, companies must undertake a test of benefit that separates: i) core business services from ii) low value-added services. The core business services must be analysed according to TP rules based on a comparison analysis, and for low value services the margin over the cost must not exceed 5%.

2.3 Deadlines (timing)

The TP documentation for a fiscal year (January to December) must be completed by June of the subsequent year. The exact submission date depends on the company tax ID number.

2.4 Materiality

The Peruvian documentation requirements have no explicit materiality levels. In practice, however, the fiscal authorities often limit their scope of investigation to business transactions having a material impact.

2.5 Retention of documents

In Peru, the required period to retain income tax documents is five years. Unfortunately, this rule does not apply for TP which does not have a specific statute of limitations date.

2.6 Frequency of documentation updates

There is no explicit requirement on how often documentation should be updated.

2.7 Tax return disclosures

No disclosures are required in the tax return.

2.8 Burden of proof

If the taxpayer keeps appropriate TP documentation records and does not have an unreasonable and unsupported point of view with respect to the transfer prices used, the tax authorities must prove the transfer prices are unreasonable. If there is no TP documentation available or there are evident shortcomings in the documentation, the tax inspector could reverse the burden of proof to the taxpayer.

2.9 Penalties

2.9.1 General

The penalty for not submitting a master file and local file and/or not providing the supporting documentation upon request by the Tax Authority, is 0.6% of net income. However, each penalty will be not lower than PEN 420 soles or higher than PEN 105,000 soles (approximately USD 120 and USD 30,000 respectively).

2.9.2 Penalties in case of a TP-adjustment

A penalty will be levied of 50% of the omitted tax. However, if the fine is paid voluntarily before being detected by the tax administration, the fine would be reduced to 10% of 50% of the omitted tax.

2.9.3 CbC-reporting

The penalty for not submitting a Country-by-Country report (CbCR) and/or not providing the supporting documentation upon request by the Tax Authority is 0.6% of net income. However, each penalty will be not lower than PEN 420 soles or higher than PEN 105,000 soles (approximately USD 120 and USD 30,000 respectively).

2.10 Interest

There are no specific rules on interest charged on subsequent TP tax payments.

2.11 Use of most reliable information

There are no specific requirements in Peru regarding the use of comparable data or whether only domestic or foreign comparables will be accepted by the fiscal authorities. Peruvian financial statements of the tested party used in the economic analysis must be in PEN denominated currency

2.12 Languages

The TP documentation must be in Spanish.

2.13 Confidentiality

The Peruvian tax authorities will treat the TP documentation confidentially. The tax authorities can only exchange the TP documentation with the tax authorities of another country if there is a legal basis. This legal basis can be found in national law or in a tax treaty. The TP documentation is never available to the public.

3. Standards with respect to the content of transfer pricing documentation

3.1 Master File

3.1.1 Organisational structure

An organisational chart that illustrates the legal organisational structure and ownership of the capital of the members of the group as well as their geographical location and jurisdiction of their domicile or residence and the denomination of the group.

3.1.2 Description of MNE's business(es)

i. The main drivers of corporate profits.

ii. A description of the supply chain of the five main products and/or services of the group in terms of revenues, as well as any other products or services that represent more than 5% of the consolidated revenues of the group. The required description may be submitted in the form of a graphic or diagram.

iii. A list and brief description of significant service agreements between members of the group, other than research and development (R&D) services, including a description of the capabilities of the main centres providing significant services and the TP policies used to allocate costs of services in order to determine the prices to be paid for them.

iv. A description of the main geographic markets where the products and/or services of the group mentioned in section (ii) are commercialised.

v. Functional analysis setting out the main contributions to value creation by each of the members of the group, i.e., the functions performed, the substantial risks assumed and the significant assets used.

vi. A description of the main corporate restructuring transactions, acquisitions and withdrawals of invested capital that have taken place during the financial year to which the informative affidavit Master Report corresponds.

3.1.3 MNE's intangibles (as defined in Chapter VI of the OECD Transfer Pricing Guidelines)

i. A general description of the group's overall strategy for the development, ownership and exploitation of intangibles, including the location of the main research and development (R&D) centres, as well as the direction and management of research and development (R+D).

ii. A list of the group's intangibles or sets of intangibles that are significant for TP purposes and of the persons, companies or entities that are their legal owners.

iii. A list of significant agreements on intangibles entered into by persons, companies or related entities, including cost-sharing agreements, principal research service agreements and the agreements on licences for the use of intangibles.

iv. A general description of the group's TP policies in relation to research and development (R&D) and intangibles.

v. A general description of the relevant transfers of intangible rights made between persons, companies or related entities during the financial year to which the informative affidavit Master Report corresponds, with indication of the corresponding remunerations, the persons, companies or entities involved and their jurisdiction of domicile or residence.

3.1.4 MNE's intercompany financial activities

i. A general description of how the group obtains funding, including significant funding agreements entered into with independent parties.

ii. Identification of the members of the group who perform a centralised financing role, indicating the country of incorporation and the effective location of management of the group.

iii. A general description of the group's TP policies regarding financing agreements between related parties.

3.1.5 MNEs financial and tax positions

i. The group's consolidated annual financial statements corresponding to the period for which the informative affidavit Master Report is submitted, if they have been prepared for financial, regulatory, internal management, tax or other purposes.

ii. A list and description of the anticipated price agreements of the members of the group.

3.2 Local File

3.2.1 Local entity

i. A description of the organisational structure.

ii. A chart of the organisation.

iii. Identification of the people on whom the management and administration of the taxpayer hierarchically depend and identification of the countries in which these people have their main offices.

iv. A detailed description of the lines, activities and business strategies of the taxpayer, indicating whether the taxpayer has been a party to or affected by business restructuring processes or the assignment of intangibles in the year for which the informative affidavit Local Report is submitted and/or in the previous year, as well as an explanation of how the restructuring and/or assignment has affected the taxpayer.

v. Identification of the main competitors.

3.2.2 Controlled transactions

i. A description of the transactions carried out, such as the acquisition of manufacturing services, purchase of goods, provision of services, loans, guarantees and licences of intangible assets, indicating the agreements or contracts governing such transactions, the obligations and rights arising therefore and the context in which they were carried out.

ii. Information relating to the test of profit, the value of the consideration and, if applicable, the reasons why they do not qualify as low value added, in the case of services.

iii. The amounts of the transactions carried out in their original and recording currency, as well as the amounts paid and collected.

iv. Identification of the counterparts in the transactions and, if applicable, of the third parties involved in these.

v. Detailed functional analysis, i.e. the functions performed, the substantial risks assumed and the significant assets used; and comparability analysis with respect to the taxpayer and its counterparties, for each one of the transactions performed.

vi. Identification of the most appropriate TP method applied for the analysis of each transaction and the reasons for the selection of such method, specifying why this method is the most appropriate to reflect the economic reality of the transaction; as well as information on the calculations and data derived from the application of the applied method.

vii. Identification of the related party selected as the party examined and an explanation of the reasons for its choice.

viii. A summary of the substantial hypotheses adopted for the application of the TP methodology.

ix. Basis to perform a multi-year analysis, if applicable.

x. A list and description of comparable transactions (internal or external), if any, information on financial indicators for independent companies that have served as the basis for the TP analysis, as well as a description of the methodology for the search for comparables and the sources from which the information is derived.

xi. A description of the comparability adjustments carried out, indicating whether such adjustments were applied to the comparable transactions, to the characteristics of the parties that perform the transactions and/or to the functions they perform.

xii. An explanation of the reasons why it is concluded that the amount of the transactions is the amount that would have been used by independent parties under the same or similar conditions, according to the chosen TP method.

xiii. A summary of the financial information used in the application of the TP methodology.

xiv. A copy of the anticipated price agreements related to the transactions under analysis.

3.2.3 Financial information

i. Annual financial statements of the taxpayer, corresponding to the fiscal year for which the informative affidavit Local Report is presented. If audited financial statements exist, they must be submitted; otherwise, unaudited financial statements will be submitted.

ii. Working papers that demonstrate how the financial data used to apply the TP method are related with the annual financial statements.

iii. Summarised appendices of the financial information of the comparables used in the analysis and the source from which they come.

The informative affidavit Local Report submitted by taxpayers who carry out transactions from, to or through low or zero-tax countries or territories must contain the minimum information indicated above.

Where the taxpayer is also obliged to submit the informative affidavit Master Report and it contains part of the information referred to in this paragraph, it shall be sufficient to refer to such affidavit, specifying which information is contained.

4. Country-by-Country reporting standards

4.1 Threshold and required content

General information relating to the amount of revenues, losses or profits (before taxes), income tax paid and earned, declared capital, undistributed earnings, number of employees and tangible assets other than cash or cash equivalents, in relation to each jurisdiction in which the multinational group operates.

4.2 Notification requirement for subsidiary companies

Identification of each member of the multinational group, indicating the jurisdiction of the domicile or residence of each one of them and the jurisdiction according to whose legislation it has been constituted, in case it is different from the jurisdiction of the domicile or residence, as well as the nature of the activity or main economic activities that they perform.

Poland

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1. Introduction

1.1 Legal context

Transfer pricing is regulated in Poland by the following acts:

Regarding legal persons (CIT) it is the Act of 15 February 1992 on corporate income tax (consolidated text, Journal of laws of 2018, item 1036, as amended) with its newly introduced Chapter 1a (Articles 11a to 11t). Documentation obligation is laid down in Division 3 (Articles 11k-11t).

Detailed provisions are presented in the regulations:

The Regulation of the Minister of Finance of 21 December 2018 on transfer pricing in the field of corporate income tax regulates:

- the manner and procedure for assessing the marketability of conducted transactions;
- determination of the taxpayer's income (loss) as a result of requalification.

The Regulation of the Minister of Finance of 21 December 2018 regarding the manner and procedure for eliminating double taxation in the case of the adjustment of profits of related entities in the field of corporate income tax determines the manner and procedure for eliminating double taxation of profits of related entities.

The Regulation of the Minister of Finance of 21 December 2018 on transfer pricing documentation in the field of corporate income tax determines a detailed scope of elements of local and group transfer pricing documentation.

The Regulation of the Minister of Finance of 17 May 2017 determining the countries and territories applying harmful tax competition in the field of corporate income tax regulates the catalogue of the list of countries and territories using harmful tax competition (a list of the so-called "tax havens").

The regulation of the Minister of Finance of 21 December 2018 regarding information on transfer prices in the scope of corporate income tax determines information and the manner of their presentation by the taxpayer to the Head of the National Revenue Administration.

Regarding natural persons (PIT), the subject of transfer pricing is regulated by the Act of 26 July 1991 on personal income tax (consolidated text, Journal of laws of 2018, item 1509, as amended) with the newly introduced Chapter 4b (Articles 23m-23zf). Documentation obligations are laid down in Division 3 (Articles 23w-23f).

Detailed provisions are presented in the regulations:

The Regulation of the Minister of Finance of 21 December 2018 on transfer pricing in the field of personal income tax regulates

- the manner and procedure for assessing the marketability of conducted transactions;
- determination of the taxpayer's income (loss) as a result of requalification.

The Regulation of the Minister of Finance of 21 December 2018 regarding the manner and procedure for eliminating double taxation in the case of the adjustment of profits of related entities in the field of personal income tax determines the manner and procedure for eliminating double taxation of profits of related entities.

The Regulation of the Minister of Finance of 21 December 2018 on transfer pricing documentation in the field of personal income tax determines a detailed scope of elements of local and group transfer pricing documentation.

The Regulation of the Minister of Finance of 17 May 2017 determining the countries and territories applying harmful tax competition in the field of personal income tax regulates the catalogue of the list of countries and territories using harmful tax competition (a list of the so-called "tax havens").

The regulation of the Minister of Finance of 21 December 2018 regarding information on transfer prices in the scope of personal income tax determines information and the manner of their presentation provided by the taxpayer to the Head of the National Revenue Administration.

It will be supplemented after the new tax act is signed by the president

1.2 Practical context

In practice, apart from legal acts, when documenting transfer pricing, it is also important to take into account abundant case-law and interpretations of regulations issued by tax authorities. The OECD indications are also important.

Another issue arises from the unstable legislation in this area. This part of the study presents legal regulations regarding transfer pricing, which were shaped by a significant amendment to the tax law. Although it comes into force at the beginning of 2019, its provisions on transfer pricing may be used (except for exemptions) for transactions carried out in 2018.

2. Formal requirements

2.1 Which taxpayers

The new regulations do not provide for the obligation to prepare a transfer pricing documentation by the taxpayer based on the revenues and costs achieved in the previous year. Related entities that have agreed transfer pricing between themselves are obliged to prepare local transfer pricing documentation for the fiscal year.

“Related entities” should be understood as:

a) entities, one of which exerts a significant influence on at least one of the other entities, or

b) entities that are significantly affected by:

   - the same other entity, or
   - a spouse, relative or a second degree relative of a natural person exercising significant influence over at least one entity, or

c) a company without legal personality and its partners, or

d) the taxpayer and their foreign facility.

Transfer pricing is understood to be the financial result of the conditions determined or imposed as a result of the existing links, including the price, remuneration, financial result or ratio.

The obligation to prepare local transfer pricing documentation applies to taxpayers:

1. who directly or indirectly make payment in favour of an entity having its place of residence, registered office or central management in a territory or country applying harmful tax competition, or

2. who conclude the articles of association not being a legal person with an entity who is and has its place of residence, registered office or central management in the territory or a country applying harmful tax competition; a joint venture agreement or other agreement of a similar nature.

Related entities who are consolidated using the full or proportional method, are required to attach to the local transfer pricing documentation also group transfer pricing documentation prepared for the financial year, if they belong to a group of related entities:

1. for whom consolidated financial statements are prepared;
2. whose consolidated income exceeded PLN 200 000 000 or its equivalent in the previous financial year.

The obligation to prepare local transfer pricing documentation does not apply mainly to controlled transactions concluded only by related entities having their place of residence, registered office or central management in the territory of the Republic of Poland, if each of these related entities jointly meets the following conditions in a fiscal year:

a) not benefiting from certain exemptions from tax;
b) not suffering a tax loss.

2.2 Aggregation of transactions

The new regulations refer to the homogeneity of transactions. The documentary thresholds described in point 2.4 are set separately for:

1. every controlled transaction of a homogeneous nature, regardless of the assignment of a controlled transaction to commodity, financial, service or other transactions;
2. cost and profit.

The value of a controlled transaction of a homogeneous nature is determined irrespective of the number of accounting documents, payments made or received and related entities with whom the controlled transaction is concluded.

When assessing whether a controlled transaction is homogeneous, the following factors are taken into account:

1. uniformity of the controlled transaction in economic terms;
2. the following comparability criteria:
   a) characteristics of goods, services or other benefits;
   b) course of the transaction, including the functions performed by entities in the transactions being compared, taking into account the assets, human capital and risk involved, and the ability of the parties to the transaction to perform a given function or incur a risk;
   c) the terms of the transaction specified in the contract, agreement or other proof documenting these conditions;
   d) economic conditions occurring at the time and place where the transaction was made;
   e) economic strategy;
3. transfer pricing verification methods;
4. other important facts and circumstances of the controlled transaction.

2.3 Deadlines (timing)

As part of the proposed changes, the deadline for submission of local transfer pricing documentation by related entities obliged to prepare it, was determined at the end of the ninth month after the end of the fiscal year. During the same period, these entities are obliged to submit to tax offices a statement on the preparation of documentation in electronic form, as well as provide the Head of the National Revenue Administration with transfer pricing information for the fiscal year.

In case of group documentation, the deadline for its inclusion in the local documentation expires at the end of the twelfth month after the end of the fiscal year.

After the abovementioned deadlines, taxpayers are obliged, at the authorities' call, submit tax documentation (local or group) within 7 days of the date of being served with the call.

The tax authority may also request a taxpayer (not being a micro-entrepreneur) to prepare and submit local transfer pricing documentation that does not include comparative analysis or compliance analysis for controlled transactions indicated by the authority, if there are circumstances indicating the probability of understating their value. The request should indicate circumstances indicating the probability of understating the value of the transaction or other events. The taxpayer is then obliged to prepare and submit tax documentation within 30 days from the date of delivery of such a request.

2.4 Materiality

Local transfer pricing documentation is prepared for transactions whose value, reduced by VAT, exceeds the following documentary thresholds in the fiscal year:

- PLN 10,000,000 – in case of a commodity transaction;
- PLN 10,000,000 – in case of a financial transaction;
- PLN 2,000,000 – in case of a service transaction;
- PLN 2,000,000 – in case of other transactions.

Transactions with so-called tax havens also have to be documented:

- Transactions leading to concluding the articles of association of company not being a legal person, or a joint venture or similar agreement in which the aggregate contributions of shareholders exceeded PLN 100,000.
- making payment in favour of an entity having its place of residence, registered office or central management in a territory or country applying harmful tax competition, if the total amount of benefits due in this year resulting from the agreement or actually paid in the fiscal year exceeds PLN 100,000.

2.5 Retention of documents

Transfer pricing documentation should be kept until the tax liability resulting from the transaction has expired. As a rule, this period is 5 years from the end of the calendar year in which the tax payment deadline has expired. If the tax loss is settled in subsequent tax years, the limitation period is 5 years from the end of the year in which the loss was deducted the last time.

2.6 Frequency of documentation updates

According to Art. 9a (2g) of the CIT Act, transfer pricing documentation regarding transactions or other events continued in the following tax year, is subject to periodic review and update, at least once a tax year, before the deadline set for filing a tax return for subsequent years.

A benchmarking study update must be carried out at least once every three years, unless a change in economic conditions is significantly affecting comparative data used in the benchmarking study. In such case Taxpayer should update Benchmarking study in year when change has occurred. Abovementioned updates are obligatory. The legal basis is Art. 9a (2h) of the CIT Act.

2.7 Tax return disclosures

Taxpayers are not obliged to attach TP-documentation as tax return disclosures but the tax authority will probably require the TP-documentation in case of tax inspection. A taxpayer is required to file an annual transfer pricing disclosure TP-R. TP-R summarises a taxpayer's transactions with related parties.

2.8 Burden of proof

Generally, the burden of proof lies with Tax Authority. Tax Authority has to prove that the controlled transactions are not in compliance with the arm's length principle. If the documentation is uncomplete, incorrect or has not been prepared at all, then Tax Authority has the right to estimate correct remuneration in controlled transaction. In such case burden of proof lies with Taxpayer who has right to prove that Tax Authority estimation is not correct.

2.9 Penalties

2.9.1. General

In case of a person who is directly obliged to prepare tax documentation on behalf of the company or to submit on its behalf a statement on the preparation of complete tax documentation, the basis of their legal liability may be the Penal and Fiscal Code (hereafter: K.K.S.). The following provisions may be applied: article 80 of K.K.S., article 56 of K.K.S. and art. 83 of K.K.S.:

- Art. 80 concerns not preparing and not providing tax documentation or preparing incomplete documentation. The maximum amount of the fine is over PLN 6 million,
- Art. 56 applies to taxpayers who submit to the tax authority declaration or statement which contains false data. This offence could also punished by imprisonment. The maximum amount of the fine is over PLN 20 million,
- Art. 83 states that anyone who will restrict or impede work of person authorised to carry out verification activities, tax control, and in particular who contrary to the request of that person, will not present documents relating to the business the penalty is fine. The maximum amount of fine is over PLN 20 million,

Criminal responsibility - according to art. 296 of the Penal Code, a act that is causing damage to the economy is punishable. This crime is punishable by imprisonment of up to 10 years;

Civil responsibility - people with overall responsibility for company liabilities (in case of capital companies members of Management Board) are also responsible for meeting the transfer pricing obligations by the taxpayer. Regulations regarding the liability of members of the management board of a limited liability company arise from art. 299 § 1 of the Code of Commercial Companies.

2.9.2. Penalties in case of a TP-adjustment

The additional tax liability in the transfer pricing terms, is to amount to 10% of the amount of unduly proved or overstated tax loss and not shown in whole or in part of the taxable income to the extent resulting from the decision.

There is also the possibility of doubling the sanction rate (20%) if the basis for determining additional tax liability exceeds PLN 15 million (in excess of this amount) or the taxpayer fails to submit tax documentation and even tripling (30%) if the amount exceeds PLN 15 million and the taxpayer will not submit transfer pricing documentation for a given transaction (unless it is supplemented by the date indicated by the tax authority, not longer than 14 days).

2.9.3. CbC-reporting

Same provisions as point 2.9.1. may apply in case in CbC-reporting. Additionally tax regulations provide fines for failure to fulfil the aforementioned obligations (maximum amount: PLN 1 million).

2.10 Interest

Interest is normally charged on tax underpaid and is calculated from the day on which the tax was originally due at a rate of 8%.

2.11 Use of most reliable information

Benchmarking study should include comparative data about entities having their registered office or board located in Poland, if the data is available to the taxpayer. In the absence of sufficient data, the taxpayer should prepare analyse of compliance of the conditions in controlled transaction with conditions that would be established between independent entities. The legal basis is Art. 9a (2c) of the CIT Act.

2.12 Languages

In the case of tax audit, the taxpayer is obliged to present, upon the Tax authority request, a translation into Polish of documentation prepared in a foreign language. This obligation results from art. 287 § 2 of the Tax Ordinance Act.

2.13 Confidentiality

Tax administration staff members are bound by Article 293 of the Tax Ordinance Act to treat all matters concerning tax administration as confidential and so transfer pricing documentation is also covered by tax secrecy provisions.

3 Standards with respect to the content of transfer pricing documentation

3.1 Master File

Group documentation should include information about a group of related entities to which the taxpayer belongs.

Group documentation includes the following elements:

a) description of the group;

b) description of significant intangible assets of this group;

c) description of significant financial transactions of this group;

d) financial and tax information of this group.

1. Organisational structure

The organisational structure is part of the Group's description. The organisational structure should be presented as a description or outline of the ownership structure of the capital group, along with providing the names and place of residence or central management of the entities.

2. Description of MNE's business(es)

This point includes a description of the subject and scope of activities carried out by the capital group, including:

a) description of the key success factors determining the competitive advantage and development opportunities of the capital group;

b) description or structure of the value chain for the five most significant, in terms of income, groups of products or services, and such product or service groups the revenues of which constitute more than 5% of consolidated revenues of the group, with the indication of the main geographic markets for these product or service groups;

c) description and a brief outline of significant intragroup agreements or arrangements for services other than R&D services, including, in particular, a description of the ability of the main service providers to provide significant intra-group services, and information on group transfer pricing policies concerning the allocation of intra-group services and pricing principles for these services;

d) brief description of the functional analysis presenting the significant share of related entities in creating the value of the group, including key functions performed by these entities as well as their key risks and assets involved;

e) information on significant restructuring transactions and transactions related to ownership changes, including takeovers, mergers, liquidations, carried out in the reporting fiscal year of the group.

3. MNE's intangibles (as defined in Chapter VI of the OECD Transfer Pricing Guidelines)

This point includes:

a) general description of the capital group's strategy regarding the creation, development, ownership and use of significant intangible assets along with information on the location of key research and development centres and the location of centres managing research and development functions,

b) list of intangible assets or their groups, important from the point of view of transfer pricing together with an indication of entities holding legal titles to these values,

c) list of significant agreements or arrangements between entities in the capital group regarding intangible assets, including cost sharing agreements, research and development and licensing agreements,

d) description of the transfer pricing policy of the capital group in the area of research and development and intangible assets,

e) general description of significant changes in the scope of control, ownership and use of intangible assets, together with an indication of the entities involved, their registered office or central management, and the remuneration or compensation paid in this respect.

4. MNE's intercompany financial activities

This point includes:

a) general description of the method of financing the business activities of the capital group, including information about significant financing agreements concluded with unrelated entities,

b) indication of entities performing functions in the field of central financing within a capital group, with an indication of their registered office and place of effective management,

c) general description of the transfer pricing policy regarding financing between related entities.

5. MNE's financial and tax positions

This point includes:

a) annual consolidated financial statement of a capital group,

b) list and brief description of the group's existing unilateral advance pricing agreements and other tax rulings relating to the allocation of income among countries.

3.2 Local File

The core of local documentation is the description of transactions or other events, including agreements on cash liquidity management services, cost sharing agreements that are made between the taxpayer, and an indication of the type and subject of these transactions or other events. The documentation also includes the data indicated below.

1. Local entity

Information about a related entity include a description of:

a) description or scheme of the organisational structure of the related entity, including a list of organisational units and the number of people assigned to these units;

b) description of the management structure of a related entity in relation to a group of related entities, including an indication of the entity, entities or decision centres to which the results are reported or which actually participate in the decision-making process by related entities;

c) description of the core activity of the related entity, including:

- the subject of the business activity,
- indication of geographical markets on which the related entity operates,
- description of the industry and the market environment in which the entity operates, with an indication of the impact of economic and regulatory conditions and an indication of key competitors,
- description of the economic strategy,
- information on transfers of economically significant functions, assets or risks affecting the related entity, carried out in the financial year or the year preceding the financial year.

2. Controlled transactions

The description of transactions, including functions, risks and assets, should include:

a) the subject and type of transaction, including the indication of relationships with other transactions;

b) information about related entities involved in a controlled transaction, including their name and registered office or central management, tax identification number, and an indication of the subject of their core business, along with information on the type of links referred to in art. 11 (1) (5) of the Act, in the financial year;

c) functional analysis of the parties to the transaction, including significant changes compared to the previous financial year, including the description of:

- functions performed by parties,
- assets invested,
- risks incurred, including the ability to bear risk;

d) the method of calculation of transfer price, along with the adopted assumptions;

e) the value of transactions in the financial year, broken down into counterparties, resulting from:

- invoices or contracts received or issued, or other documents, if invoices are not issued, and
- payments received or forwarded,

f) agreements, intra-group agreements or other documents regarding transactions;

g) agreements or tax interpretations regarding transfer pricing concluded with or issued by tax administrations of countries other than the Republic of Poland, in particular prior pricing agreements;

h) transfer pricing analysis including:

- analysis of data of unrelated entities, transactions concluded with unrelated parties or between unrelated parties recognised as comparable to the conditions established in controlled transactions, hereinafter referred to as "comparative analysis", or

- analysis demonstrating compliance of the conditions under which the controlled transaction was concluded with conditions that would be set by unrelated entities, hereinafter referred to as "compliance analysis" - where comparative analysis is not appropriate in the light of a given transfer pricing method or it is not possible to maintain due diligence.

3. Financial information

The description of financial data includes:

a) approved financial statements for the financial year, if a related entity was obliged to prepare it on the basis of accounting regulations,

b) description allowing the assignment of financial data concerning a controlled transaction to the items of the financial statements referred to in point a, or other information contained therein.

4. Country-by-Country reporting standards

4.1 Threshold and required content

Country-by-country reporting is understood as a presentation of information on entities within the group concerning their activities in individual countries.

The threshold that, if exceeded, creates the obligation to prepare the CbC-report, consists of consolidated revenues of the group, and amounts to EUR 750 million.

The detailed scope of reported information is specified in the Regulation of the Minister of Development and Finance of 13 June 2017 on the detailed scope of data to be included in the information about a group of entities and the manner of its fulfilment (Journal of laws of 2017, item 1176). The required information includes:

a) indication of the period covered by the information on a group of entities;

b) name of the group of entities;

c) identification data of entities included in the group of entities, including name, address, registered office, tax identification number;

d) information on the main types of business activities of entities included in the group of entities, broken down by their functions;

e) data, as reported by the State, regarding the activities carried out by entities comprising a group of entities including, among others, earned revenues, paid income tax, number of employees;

f) information on reported data sources and other additional information helpful in the interpretation of data.

4.2 Notification requirement for subsidiary companies

Submission of notifications is regulated by the Act on the Tax Information Exchange with Other Countries (Journal of laws of 2017, item 648, as amended).

An entity belonging to a group of entities whose consolidated revenues exceeded the threshold of EUR 750 million in the previous fiscal year and which has its registered office or central management in Poland or abroad, but conducts activities on its territory by a foreign undertaking, and submits a notification, that:

1. is a parent company, designated by this company or other company, which the state does not pass tax information on to the Polish tax authorities;
2. indicates the reporting unit and the state or territory in which information about a group of entities will be provided at the latest on the last day of the reporting financial year of a given group of entities.

Notification is made on the CBC-P Form (1) - NOTIFICATION IN THE SCOPE OF DISCLOSURE OF INFORMATION ON THE GROUP OF ENTITIES. This notification can be submitted in writing or electronically.

If the parent company comprising a group of entities with consolidated revenues exceeding EUR 750 million has its registered office or central management on the territory of Poland, it shall submit, within 12 months starting from the end of the reporting financial year, information on the group of entities drawn up on the basis of the electronic document template. The template in question is a CBC-R form (1) INFORMATION ON THE ENTITY GROUP. This notification can only be submitted electronically, using the ePUAP platform.

Portugal

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1. Introduction

1.1 Legal context

For fiscal years starting on or after 1 January 2002, Portugal has implemented detailed transfer pricing (TP) legislation that broadly follows the OECD guidelines.

Article 63 of the Corporate Income Tax (CIT) Code, complemented by Regulatory Order 1446 C/2001, published in 2001 and entering into effect as from 2002, is the domestic codification of Article 9 of the OECD model convention. Said legislation contains specific documentation requirements for all transactions between associated companies (both domestic and foreign companies).

Details on an advance pricing agreement (APA) procedure – setting out the APA submission requirements, process and fees – were implemented by Ministerial Order 620-A/2008 on 16 July 2008 and are currently laid down in Article 138 of the CIT.

In 2016 article 121-A and 121-B were introduced in the CIT code, introducing and implementing the Country-by-Country (CbC) report, in the context of Action 13 of the OECD/G20-project Base Erosion and Profit Shifting (BEPS).

Law No. 199/2019 introduced significant changes to the Portuguese TP regime, whereby “Large Taxpayers” will be required to prepare and submit TP documentation to the Portuguese tax authorities by the 15th day of the seventh month after the tax year-end.

1.2 Practical context

Since 2002, companies whose annual turnover and other operational income in the preceding year exceeded EUR 3 million are required to produce and keep contemporaneous documentation with detailed information, i.e. (i) disclosure of transactions with related parties as well as the associated amounts; (ii) copy of contracts; (iii) group TP policies; (iv) functional and economic analysis. This documentation must be prepared by the 15th day of the 7th month after the end of a fiscal year.

Taxpayers are required to confirm in their Annual Tax Return (IES) whether the TP documentation has been duly prepared and the methods used to test transfer prices. The above-mentioned deadline also applies to the submission of IES.

The CbC report must be submitted by the end of the 12th month after the end of the fiscal year it refers to, and its submission applies to fiscal years starting on or after 1 January 2016. Moreover, each member company of a multinational group must identify, by way of filing the adequate form, the reporting entity of the group by the end of the 5th month following the fiscal year-end.

2. Formal requirements

2.1 Which taxpayers

Companies whose turnover in the previous fiscal year exceeds EUR 3 million must prepare TP Documentation taking into account the requirements mentioned in point 3 below.

Additionally, all companies that enter into transactions with related entities, even if they are not obliged to prepare TP Documentation, must provide additional information as part of their Annual Tax Return.

A CbC-report is required for resident companies as follows:

- A company holding or controlling one or more entities in overseas jurisdictions and required to prepare consolidated accounts, when the consolidated turnover exceeds EUR 750 million, except if held by an entity that itself presents such a report;
- A company held or controlled by one or more overseas entities that are not required to comply with such obligations in their jurisdictions, but would be required to do so should they be resident in Portugal.

2.2 Aggregation of transactions

The premise is that TP documentation is required for each individual transaction undertaken with associated companies, but in practice this could lead to an unreasonable administrative burden, or will not be possible, as the information on comparable operations does not exist or when such information is not sufficient. If a proper aggregation of transactions is possible, for example because there is a large number of similar transactions, the transactions may be jointly assessed.

2.3 Deadlines (timing)

Documentation should be prepared (or submitted in case of a Large Taxpayer) contemporaneously and the statutory deadline to have the TP documentation ready is by the 15th day of the 7th month following the fiscal year-end. Delivery of documentation is only mandatory upon request by the Tax Authorities or if the company is considered a Large Taxpayer. The tax authorities usually give a 10 day notice for documentation submission.

A CbC report must be submitted by the end of the 12th month after the end of the fiscal year it refers to, and its submission applies to fiscal years starting on or after 1 January 2016. CbC report notification is due by the end of the 5th month following the fiscal year-end.

2.4 Materiality

In principle all transactions with associated enterprises should be supported by TP Documentation. There are no formal thresholds below which TP documentation is required. However, in light of the basic principle that the administrative burden should be justified by the complexity and (tax) importance of the transaction, the more complex and material the transactions are the more extensive the TP Documentation should be.

2.5 Retention of documents

The taxpayer is expected to maintain the TP Documentation for a period of ten years.

2.6 Frequency of documentation updates

Taxpayers are expected to prepare/update their TP documentation annually, as long as their annual net sales and other operating revenue exceed EUR 3 million.

2.7 Tax return disclosures

The main disclosure requirements at TP level are contained in annex H to the Annual Tax Return where the following information must be stated:

- Amount of transactions conducted with each of the related parties;
- Confirmation that the annual TP Documentation has been prepared on a timely basis and is currently retained by the company.

The deadline for submission of this return is the 15th day of the seventh month after the corresponding fiscal year-end. Taxpayers must state, in good faith, in that Annual Return that they have complied with their annual TP documentation requirements.

There are no specific TP returns. As mentioned above, part of the TP information is disclosed on the Annual Tax Return and part in the TP documentation containing the information required by law.

2.8 Burden of proof

If the taxpayer keeps appropriate TP documentation in its records and does not have an explicitly unreasonable and unsupported point of view with respect to the used TP policies, the tax authorities must prove that they do not comply with the arm's-length principle. If there is no TP documentation available or there are evident shortcomings in the documentation, the tax inspector may issue TP adjustments under the TP methods foreseen in the law, based on the elements and information to which the Tax Authorities have access without being required to identify the elements and information used as comparables.

2.9 Penalties

2.9.1 General

According to Article 117/6 of the General Regime of Tax Infringements (RGIT), the specific penalty in force for failure to present TP documentation within the period determined in the request made by the Portuguese Tax Authorities ranges from EUR 500 to EUR 10,000 (per year and taxpayer), plus 5% for each day of delay in fulfilling this obligation.

The same penalties apply for late submission of the CbC report.

Any inaccuracies in the information presented in the TP documentation, in the TP returns or in the CbC report are liable for a penalty of EUR 375 to EUR 22,500.

2.9.2 Penalties in case of a TP-adjustment

The tax authorities have four years to raise an additional CIT adjustment due to TP in intragroup transactions. If a TP adjustment leads to an additional tax liability, a company must pay compensatory interest to the Portuguese Tax Authorities at the yearly rate of 4% plus a fine for incorrect CIT return submission (EUR 375).

2.10 Interest

There are no specific rules on interest charged in TP adjustment cases. The general compensation rate of 4% per year is levied.

2.11 Use of most reliable information

With regard to the benchmarking analysis, the OECD prefers to use the most reliable comparable information available. Given the relatively small size of the Portuguese market, often local comparable data may not be sufficiently available. In such cases, Iberian comparable data is often used. If these prove scarce, in general, the use of European comparable data may be accepted, but the taxpayer must be in a position to corroborate the comparability of the data used.

2.12 Languages

All TP documentation must be prepared and presented in Portuguese, but other working languages may be accepted. Upon request by the tax authorities, all relevant supporting documentation written in a foreign language must be translated into Portuguese.

2.13 Confidentiality

TP documentation is drafted for the Company to which the report refers and will only have to be presented to the tax authorities if and when requested. All tax authority employees are obliged by the General Tax Law to retain confidentiality about the information presented in the TP Documentation.

3. Standards with respect to the content of transfer pricing documentation

Recent changes to the TP legal framework introducing a CbC reporting obligation and the possibility to adopt a Masterfile/Local file approach under BEPS Action 13 on TP documentation for associated enterprises have been introduced into Portuguese legislation.

Apart from the TP documentation file structure, current Portuguese legislation requires the preparation of full local TP documentation and provides for disclosure of the following information:

- A description of any special relations that exist with any entities with which commercial, financial or other transactions are carried out;
- A record of the corporate relationship by which the special relationship arose, including any documents that demonstrate a subordination or dependency relationship as mentioned above;
- A description of the activities carried out during the controlled transactions, a detailed list of amounts recorded by the taxpayer over the past three years and, where appropriate, the financial statements of the associated enterprises;
- A detailed description of the goods, rights or services involved in controlled transactions and of the terms and conditions agreed upon if such information is not disclosed in the respective agreements;
- A description of the activities performed, the assets used and the risks assumed, both by the taxpayer and the associated enterprises involved in the controlled transactions;
- Technical studies on essential areas of the business, i.e. investment, financing, research and development, marketing, restructuring and reorganisation of activities, as well as forecasts and budgets connected with the global business and business by division or product;
- Guidelines regarding the TP policy of the company, containing instructions on the methods to be applied, procedures for gathering information (particularly on internal and external comparable), analysis of the comparability of transactions, cost accounting policies and profit margins obtained;
- Contracts and other legal instruments concluded with both associated enterprises and third parties, along with any other document that may govern or explain the terms, conditions and prices under those transactions;
- An explanation of the method(s) applied to determine arm’s-length prices for each controlled transaction and the rationale for the selection;
- Information regarding comparable data used;

- An overview of business strategies and policies, particularly regarding commercial and operational risks that might have a bearing on the determination of transfer prices or the allocation of profits or losses for the transaction;
- Any other information, data or documents considered relevant for determining an arm's-length price, the comparability of transactions or the adjustments made.

The methods accepted by the tax authorities to be used in the economic analysis of comparables are:

- The comparable uncontrolled price method;
- The resale price method;
- The cost-plus method;
- The profit split method;
- The transactional net margin method;
- Other methods.

Additionally, regarding intragroup services agreements, the taxpayer must maintain the following documentation:

- A copy of the agreement;
- A description of the services covered by the agreement;
- A description of the recipient of the services;
- A description of the costs of the services and the criteria applied for their allocation.

4. Country-by-Country reporting standards

4.1 Threshold and required content

Action 13 of the OECD Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan) has been implemented through the State Budget Law for 2016. Under this law, the CbC report is required for resident companies as follows:

- A company holding or controlling one or more entities in overseas jurisdictions and required to prepare consolidated accounts, when the consolidated turnover exceeds EUR 750 million, except if held by an entity that itself presents such a report;
- A company held or controlled by one or more overseas entities that are not required to comply with such obligations in their jurisdictions, but would be required to do so should they be resident in Portugal.

For these companies, the CbC report must contain the following information:

- Gross revenue segregated by related third-party revenue;
- Earnings before CIT and other tax due on income;
- CIT due and paid;
- Share capital and equity value;
- Accumulated earnings;
- Net book value of the tangible assets;

- Number of employees;
- List of entities / branches by jurisdiction;
- Activities carried out by each entity/branch.

The CbC report must be filed by the end of the 12th month after fiscal year-end in respect of fiscal years starting on or after 1 January 2016.

4.2 Notification requirement for subsidiary companies

Any entity resident in Portugal that is part of a group that includes an entity obliged to file a CbC report is required to submit an electronic form to the Portuguese tax authorities containing the following information:

- Identification of the CbC reporting entity;
- Tax residence of such entity.

The deadline for preparation/submission of the CbC report notification is the end of the fifth month following the fiscal year-end.

Romania

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1. Introduction

1.1 Legal context

Article 11 of the Law 227/2015 regarding the Fiscal Code, as subsequently completed and amended in Government Decision 1/2016 for the approval of the norms for the application of Law 227/2015 regarding the Fiscal Code, states the obligation of the tax authorities to adjust the price of a transaction at the median value of market price (i.e. central trend on the market) when deviations from the market value are noticed.

The Romanian Fiscal Code and the related norms provide that the tax authorities should also consider the OECD Guidelines when analysing the prices applied in related-party transactions. In addition, the legislation on TP documentation requirements in Romania refers to the European Union Code of Conduct on Transfer Pricing Documentation (C176/1 of 28 July 2006).

As of 2 February 2016, new standardised documentation requirements are included in the National Agency for Fiscal Administration's (NAFA = Romanian tax authorities) Order on Transfer Pricing File (442/2016) regarding the values of transactions, the content, deadline for preparation, and conditions for the request of the TP file, and the procedures for adjustments/estimates of transfer prices.

On 13 June 2017, the Government Emergency Ordinance No. 42 (GEO 42) was published in order to implement Country-by-Country (CbC) reporting requirements in Romania, amending the Fiscal Procedure Code. The Ordinance is transposing the provisions of Directive (EU) 2016/881 dated 25 May 2016 into domestic legislation. The new CbC-reporting provisions follow the OECD Base Erosion and Profit Shifting (BEPS) Project Action 13 initiative.

1.2 Practical context

The new documentation requirements as of 2 February 2016 can lead to a significant administrative burden for MNEs. Whilst large taxpayers will or should be aware of the TP requirements and will have persons able to deal with such matters, small to medium enterprises may not have these resources and may not be aware of the requirements. They may be called upon to comply with these rules sometime in the future in the event of a tax audit. In the case of any transaction between related parties, the tax authorities may adjust/estimate the amount of the respective income or expenses of either party as necessary to the level considered to reflect the central tendency of the market (i.e., median), either in the case that the tax authorities determine that the arm's-length principle is not observed for the respective transaction or that the taxpayer does not provide to the tax authorities sufficient evidence to establish whether the arm's-length principle was observed.

The BEPS-project will likely have an effect on all taxpayers, since Romania became an associate member of the BEPS-project on 9 June 2017 when Law No 124/2017 came into force. Given that TP is currently one of the most targeted areas by the tax authorities in Romania in tax audits, participation in the implementation of the OECD BEPS action package represents an alignment with TP international practices.

2. Formal requirements

2.1 Which taxpayers

According to Article 7 point 26 of the Fiscal Code, two legal persons are related parties if:

- One legal person holds, directly or indirectly (through the shareholding of related entities) a minimum of 25% of the number/value of shares or voting rights of the other legal person, or it effectively controls the other legal person; or
- One person holds, directly or indirectly (through the shareholding of related entities) a minimum of 25% of the number/value of shares or voting rights in the two entities or the person effectively controls both legal entities.

An individual is a related party to a legal entity if he/she holds, directly or indirectly, including the shareholding of related entities, a minimum of 25% of the number/ value of shares or voting rights of the legal person, or he/she effectively controls the legal person. Two individuals are related parties if they are spouses or relatives up to the third degree.

The NAFA's Order on Transfer Pricing File (442/2016) adopted on 2 February 2016 divides the taxpayers/entities into three categories:

1. The large taxpayers that meet the annual thresholds on transactions with affiliates (EUR 350,000 for goods, EUR 250,000 for services and EUR 200,000 for interest) and have to prepare the Transfer pricing file (TPF) annually.
2. The taxpayers that do not meet the above-mentioned thresholds are classified as the medium taxpayers, if they meet the thresholds (EUR 100,000 for goods, EUR 50,000 for services and EUR 50,000 for interest) and have to prepare the TPF on the request of the fiscal authorities.
3. All the other taxpayers do not have to prepare a TPF, but have to comply with the arm's-length principle with respect to their related party transactions.

The new documentation requirements as of 2 February 2016 are applicable for the Transfer Pricing Files prepared for the financial years starting in 2016.

2.2 Aggregation of transactions

The aggregation of transactions is not defined by domestic law. Basically, a separate analysis of each single business transaction is necessary, but in practice this could lead to an unreasonable administrative burden.

2.3 Deadlines (timing)

The Transfer Pricing File for the taxpayers, described above at 2.1., point 1, has to be submitted within 10 calendar days of the request made by the fiscal authorities. However, the request cannot be made earlier than 10 calendar days after the due date of submitting the profit tax return (generally March 25 of next year).

For the medium taxpayers described above at 2.1., point 2, the Transfer Pricing Files should be presented upon request made by the fiscal authorities. The time limit for presenting the Transfer Pricing Files to the fiscal authorities is between 30 and 60 calendar days, with a one-off extension option, upon a request in writing of taxpayers/payers, to extend the time limit of presentation for a maximum additional 30 calendar days.

According to the new provisions, a Romanian tax-resident entity that is either:

- the ultimate parent of an MNE with a consolidated revenue of EUR 750 million and above; or
- an entity that is required to prepare consolidated financial statements of the MNE

must file a CbC report with the Romanian tax authorities within 12 months of the last day of the reporting fiscal year of the MNE.

2.4 Materiality

In principle, all transactions with associated enterprises should be supported by proper documentation, even if they are below the thresholds set for TP documentation. If these thresholds are not met, medium and small taxpayers do not have to prepare the TP documentation at all, but they have to provide supporting documents that attest the compliance with the arm's-length principle, in case of a tax inspection, according to the effective provisions of the general accounting and fiscal regulations.

2.5 Retention of documents

According to general accounting and fiscal regulations, a Romanian taxpayer must keep its accounting and fiscal documentation for at least ten years. Since the TP documentation is part of the fiscal documentation of a taxpayer, this ten-year period also applies to the TP-documentation.

2.6 Frequency of documentation updates

From 2016, the annual obligation for the preparation of the TP file is applicable only to taxpayers that engage in intragroup transactions exceeding certain thresholds, as described above at 2.1.,point 1. There is no legal binding regulation with regard to updating TP documentation, but the threshold on transactions should be analysed annually and, if the threshold is reached, new TP documentation should be prepared for that year.

A CbC-report must be submitted every year, as it relates to a particular fiscal year, if the conditions described at 4.1 below are adhered to.

2.7 Tax return disclosures

Romanian (corporate) taxpayers are not required to disclose their TP documentation as part of the tax return filing. The tax return does not include any information relating to transactions carried out with affiliated parties. However, this information is included in the taxpayer's notes to the financial statements. The TP documentation should be submitted separately upon request to the fiscal authorities, under the conditions mentioned above (see point 2.3).

2.8 Burden of proof

If the taxpayer keeps appropriate TP-documentation records and does not have an explicitly unreasonable and unsupported point of view with respect to the transfer prices employed, the tax authorities must prove that the used transfer prices are not in adherence to the arm's-length principle. If there is no TP-documentation available or the documentation is incomplete or inaccurate, the tax inspector could transfer the burden of proof to the taxpayer.

2.9 Penalties

2.9.1 General

Taxpayers failing to provide TP documentation to the tax authorities upon request are sanctioned with a penalty between RON 12,000 and RON 14,000 for large and medium taxpayers, respectively, and between RON 2,000 and RON 3,500 for small taxpayers.

2.9.2 Penalties in case of a TP-adjustment

Transfer price adjustments/estimates to a company's profits are subject to 16% corporate income tax and late payment interest and penalties. A penalty is applied for late payment of the additional corporate income tax assessed, at a rate of 0.01% per day of delay. In addition, for tax liabilities due starting from 2016 onwards, penalties for failure to report (currently 0.80% per day) would also be applicable. If this type of penalty is applicable, then it is a substitute for the late payment penalty (only one type of penalty can be applied). If the tax claims are paid within a specific time period after the tax decision assessing the tax liabilities is issued, then this penalty is reduced by 75%. However, if the tax liabilities are the result of tax evasion, then this penalty is increased by 100%.

2.9.3 CbC-reporting

According to GEO 42, there are monetary penalties where an entity fails to report the information in a complete, timely and accurate manner of up to RON 30,000 – 50,000, or that could be triggered when a Romanian entity fails to report the required information of up to RON 70,000 – 100,000.

2.10 Interest

In case of a TP-adjustment interest is due if the additional assessment is imposed after the corporate income tax for the year in question is due. Interest is applied for late payment of the additional corporate income tax assessed, at a rate of 0.02% per day of delay.

2.11 Use of most reliable information

With regard to the benchmarking analysis to be made, the NAFA Order 442/2016 provides that: "The comparability analysis will take into account the territorial criteria in the following order: national, European Union, pan-European, international".

2.12 Languages

The TP documentation has to be prepared in Romanian. If the TP documentation is prepared in a foreign language, it should be translated and provided to the tax authorities in Romanian (including any other documents to be attached to the TP documentation, as formally requested by the Romanian TP regulations, e.g., intercompany agreements).

The template and the content for the CbC-report, including the notification template, have been published by the National Agency for Fiscal Administration Order as per the Emergency Ordinance No. 42/ 2017 dated 9 June 2017.

The new legislation provides that the CbC-report could be exchanged by the Romanian tax authorities with other member states in Romanian or in any other official language of the European Union.

2.13 Confidentiality

The Romanian tax authorities will treat the TP-documentation confidentially. The tax authorities can only exchange the TP documentation with the tax authorities of another country if there is a legal basis. The TP documentation is never available to the public.

3. Standards with respect to the content of transfer pricing documentation

In Romanian legislation, a three-tiered approach to documentation has not been introduced yet but the TP documentation must have two parts:

- A description of the group/information on the group (meaning the activity of the group, the entities with their description and place of carrying on their activity, the functional analysis, the most important transactions, etc.); and
- A description of the company/information on the company (activity, related-party transactions, functional analysis, economic comparability, conclusions)

In addition, the TP documentation should comply with the prescribed format as warranted by the NAFA Order 442/ 2016.

3.1 Information about the group

1. The organisational, legal and operational structure of the group (list of all entities within the group, including the permanent establishments and their identification data), the geographical location of the component entities specifying the shareholdings at the level of the group, during the period for which the TP documentation file has been prepared;
2. An overview of the group's activities, its business strategy, including the changes in the business strategy within the period for which the TP documentation file has been prepared;
3. A description of any TP policy at the level of the group, if the case;
4. A general description of transactions carried out between related parties;
5. A general description of functions performed, risks assumed and assets employed in the transactions carried out between related parties (functional analysis), including the changes in the functional profile of the entities within the group, during the period for which the TP documentation file has been prepared;
6. A general description of functions performed, risks assumed and assets employed, at the level of the group, that contribute significantly and definitively to the value-adding processes undertaken, taking into consideration each entity which is part of the group;
7. A description of owners of intangibles and property rights pertaining within the group (patent, licence, trade name, brand, logo, knowhow, etc.), if the case;
8. A general description of TP policy regarding financial arrangements (intra-group financing services) between related parties, if the case;
9. A description of any business restructuring within the group, during the period for which the TP documentation file has been prepared;
10. A general description of research and development activities within the group, if the case;
11. A description of advance pricing arrangements (APAs) entered into by the taxpayer or by other entities which are part of the group, except for those issued by the National Agency for Tax Administration.

3.2 Information about the taxpayer

1. The organisational, legal and operational structure of the taxpayer (a list of its related parties, including their permanent establishments and identification data), the geographical location of the related parties, specifying the direct and indirect affiliation relations of the taxpayer, during the period for which the TP documentation file has been prepared, highlighting the occurred changes;
2. A general description of activities performed by the taxpayer, and the business strategy, including any changes within the business strategy during the period for which the TP documentation file has been prepared;

3. A general description of transactions carried out between each related party as well as the context surrounding them;
4. A description of the TP policy established at the level of the taxpayer;
5. A description of the implementation procedure when applying the TP methodology for the transactions carried out between the taxpayer and its related parties;
6. A description of research and development activities at the level of the taxpayer, if the case;
7. A general description of the TP policy regarding the intra-group financing services of the taxpayer with related parties, along with the presentation of financing agreements concluded both with related parties and independent lenders, if the case;
8. A description of the agreements concluded between the taxpayer and its related parties, regarding cost contribution arrangements;
9. A description of intra-group transactions relating to the provision of services, detailing the allocation keys, if the case, describing the services which have a significant and definitive contribution to the value-adding processes undertaken;
10. Presenting the main outlets for tangible goods delivery/services provision of the taxpayer with its related parties;
11. A description of transactions related to any business restructuring that involve the taxpayer during the period for which the TP documentation file has been prepared;
12. A detailed description of the transactions carried out with related parties: a) flow of transactions; b) invoicing flow; c) amount of transactions carried out with the related party/parties; d) amount of payments/receipts associated with each transaction performed by the taxpayer with each related party.
13. A detailed presentation of the functional analysis and comparability analysis:
    a) characteristics of tangible and intangible goods or services, including the financing services subject to the transaction/transactions with related parties;
    b) specific business strategies (e.g. market penetration strategies, extraordinary events, etc.);
    c) functions performed, risks assumed and assets employed by the taxpayer and by the related party/parties within the transaction(s) carried out;
    d) contractual terms of the transaction(s), with attached copies of the contracts/agreements acting as legal framework of the transaction(s) carried out with related parties;
    e) particular economic circumstances of the transaction(s);
    f) comparability analysis: information regarding the external or internal comparable transactions (description of search strategy for comparable companies and of the information sources, presenting the values of the financial indicators used for the comparability analysis, a description of possible comparability adjustments that were made, presenting the comparable entities list as well as the list of rejected entities from the comparable sample as a result of the manual search, with the provision of the rejection reasons, etc.). Justification of the arm's-length principle shall be based on reasonable availability of data for the taxpayer at the moment of the identification/preparation of the TP documentation, by presenting documents which support the justification;
    g) presentation of critical assumptions that formed the basis for establishing the TP policy;
    h) presentation of reasons for using a multiannual or annual analysis of data, if the case;

14. A description of the method used for determining the transfer prices for each transaction and validation of the selection criteria; if using TP methods that involve the selection of the tested party, the rationale for its selection shall be presented;

15. Presentation of unilateral or bilateral/multilateral advance pricing agreements (APAs), related to the transaction(s) carried out, for which the National Agency for Tax Administration does not take part;

16. A description of other relevant information for the taxpayer.

4. Country-by-Country reporting standards

4.1 Threshold and required content

According to the new provisions, a MNE with a consolidated group revenue of more than EUR 750 million should submit a CbC-report. The report contains the following information about the MNE:

a) For each tax jurisdiction in which the MNE is active, information about the revenue, the earnings before tax (EBT), the paid income tax, the accrued income tax, the stated capital, the accumulated earnings, the number of employees and the tangible assets other than cash and cash equivalents.

b) A description of every group entity of the MNE mentioning the tax jurisdiction of residence, and if different, the state under whose law the group entity is established and the main business or operations of that group entity.

4.2 Notification requirement for subsidiary companies

Romanian legislation also provides for filing of the CbC report by a surrogate parent entity, i.e. a Romanian tax-resident entity may be appointed by the MNE group to file a CbC-report in Romania on its behalf.

In addition, other Romanian resident entities (other than the parent company of the group) will be required to file a CbC-report if one of the criteria below is met:

- The ultimate parent entity of the group does not have the obligation to file a CbC report in its own jurisdiction of tax residence;
- The jurisdiction in which the ultimate parent entity is resident for tax purposes has a current international agreement to which Romania is party but does not have a qualifying competent authority agreement in effect to which Romania is party;
- There is a persistent failure in the automatic exchange procedure with the competent authority of the ultimate parent company required to file the CbC report.

The MNE must provide the report within 12 months after the last day of the financial year of the MNE. The legislation will apply to fiscal years beginning on or after 1 January 2016.

All Romanian resident entities part of MNE groups have to notify the Romanian tax authorities if they are the ultimate parent, the surrogate parent or if another Romanian resident entity is required to file the CbC report. Alternatively, the Romanian resident entity has to notify the Romanian tax authorities regarding the identity of the MNE member filing the CbC report and its residency.

According to the new law, this notification is due by the last day of the MNE group's reporting fiscal year, but no later than the deadline for filing a tax return for the respective constituent entity for the preceding fiscal year.

Non-compliance in relation to CbC reporting can result in penalties. Reference to be made to paragraph 2.9.3 above.

Russia

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1. Introduction

1.1 Legal context

In Russia the transfer pricing (TP) and tax control of related party transactions are governed by Chapter V.I of the Russian Tax Code as from 2012.

Russia is not a member of the OECD. The Russian Federation is therefore not legally obliged to follow OECD guidelines. Nevertheless, the OECD Transfer Pricing Guidelines are used as recommendations. Russian TP legislation in general is similar to OECD TP principles, but some differences should be noted. Russian TP rules apply not only to international transactions, but also to domestic ones.

Russia has implemented legislation to give effect to Country-by-Country Reporting (CbCR) as per Action 13 of the OECD BEPS Plan. The legislation came into effect in 2018.

1.2 Practical context

TP rules apply to so-called controlled transactions between related parties. Taxpayers need to prove the arm's-length nature of their transactions. Larger taxpayers can enter into Advance Pricing Agreements (APAs) with the tax authorities regarding the determination of prices and application of pricing methods in controlled transactions. Such agreements shall be valid for no longer than three years.

If transactions between related parties are not carried out on an arm's-length basis, the results of said transactions are adjusted for tax purposes. Taxpayers are obliged to provide the tax authorities with TP documentation regarding controlled transactions. Such documentation is supposed to prove that the applied price complies with the arm's-length principle. It should contain data about the activities of the taxpayer and other parties to the transaction, description of the transaction (its terms), functions, risks and assets analysis, TP methods, comparitive analysis, etc. These requirements have been supplemented with requirements to provide Country-by-Country reports as from 2018 (three-tier documentation).

Only the Federal Tax Service may review controlled transactions. Territorial tax authorities are not allowed to review such transactions. It should also be noted that although non-controlled transactions are not allowed to be controlled under TP rules, in practice territorial tax authorities often review prices of non-controlled transactions using the so called concept of unjustified tax benefit. This concept implies that even non-controlled prices may be reviewed if the tax authority establishes that taxpayers abused tax legislation in order to obtain a tax benefit without real economic purpose of a transaction.

2. Formal requirements

2.1 Which taxpayers

Controlled transactions are:

1. Related party transactions (as defined in the Russian Tax Code). Russian TP rules apply both to internal (between Russian parties, e.g. if counterparties use different income tax rates) and external (with foreign party) transactions. As from 2019 the total sum of controlled transactions between Russian companies must exceed RUB 1 billion. per year.
2. The following non-related party transactions (as from 2019 are controlled if the sum of revenues between parties exceeds RUB 60 million. per year):
   - related party transactions concluded through independent intermediaries;
   - foreign trade transactions for the following commodities traded on global stock exchanges (oil, ferrous and non-ferrous metals, precious metals and stones, mineral fertilisers);
   - transactions with persons and companies registered in offshore zones (tax havens). The list of such states is designated by the Russian Ministry of Finance.

Taxpayers who enter into transactions with related parties (controlled transactions) are obliged to file the respective notification to the tax authority on an annual basis. The controlled transaction notification and its completion procedure are approved by the Russian Federal Tax Service. Also, the tax authority may request documents proving the pricing procedure and the market level of prices in controlled transactions.

A three-tiered documentation (CbCR) requirement has been implemented into the Russian Tax Code in accordance with OECD recommendations.

Russian taxpayers who are members of a multinational enterprise (MNE) group and whose total revenue for the preceding fiscal year was at least RUB 50 billion are required to submit annual CbC reports to the Russian tax authorities. The CbC reporting requirements apply retroactively from 1 January 2017. Taxpayers are allowed to voluntarily file CbC reports in Russia for the 2016 reporting period.

2.2 Aggregation of transactions

Aggregation of transactions is allowed in certain cases but in practice, the tax authority often challenges such aggregation. To aggregate transactions, the goods (services) must be identical (similar) and certain other requirements must be met.

2.3 Deadlines (timing)

According to the applicable Russian Tax Code provisions:

1. The controlled transaction notice should be filed on or before 20th May of the year immediately following the calendar year when the controlled transactions were concluded.
2. The TP documentation, proving the arm's-length principle, for a particular transaction (group of transactions) is provided on request of the tax authority. Documents may not be requested from the taxpayer before 1st June of the year immediately following the calendar year when the controlled transactions were entered into. Documents shall be provided by the taxpayer within 30 days from the request.

CbCR provisions require to file additional reports:

1. Taxpayers participating in a MNE group (constituent entities) must file the notice of participation in the MNE to the tax authority within 8 months from the end of the reporting year for the parent company (see hereafter chapter 4.2).
2. The CbC-Report is filed by the parent company of the MNE group (Ultimate Parent entity, if it is a Russian tax resident) or its authorised participant (which is a tax resident of the Russian Federation, Surrogate parent entity) within 12 months from the end of the reporting year for which the consolidated statements of the group are filed. Also the tax authority in established cases may send a request to the Russian company participating in the MNE group for provision of the CbC-Report, in which case the CbC report must be provided within three months (see hereafter chapter 4.2).
3. The Master file is provided by the taxpayer on request of the tax authority within three months. The Local file is also provided on the separate request of the tax authority and must be provided within 30 days from the request.

2.4 Materiality

The general provision of the Russian Tax Code is that controlled transactions are transactions between related parties. However, there are some materiality thresholds. In particular, as from 2019, transactions between Russian companies are recognised as controlled transactions only if total income from transactions between them during the calendar year exceeds RUB 1 billion. It should be noted that not all the transactions between Russian parties can be qualified as controlled but only those specified by the Tax Code (e.g. if Russian parties use different income tax rates, different tax regimes, etc.).

Related party transactions where one party is not a Russian tax resident are controlled if total income from transactions between them during the calendar year exceeds RUB 60 million.

The Russian Tax Code contains a general recommendation to the taxpayer that the degree of detail and comprehensiveness of the documents presented to the tax authorities shall be proportionate to the degree of complexity of the transaction and the manner in which the transaction price is determined.

2.5 Retention of documents

General provisions of the Russian Tax Code establish that taxpayers are obliged to maintain for four years the accounting data and documents required for tax assessment and payment, in particular, documents evidencing the generation of revenue, costs incurred and tax payments. If there is a loss and a company wants to carry it forward, the tax authority usually requires the company to retain corroborating documents not less than four years after the period the loss was carried forward to.

2.6 Frequency of documentation updates

The Russian Tax Code does not contain specific provisions concerning the procedure for, and frequency of, updating TP documentation.

However, as the controlled transaction notification is filed annually and information on the transactions entered into in a certain calendar year is requested in the course of the tax audit, the recommendation is that the taxpayer should update information on intra-group transactions annually. In practice, it is recommended to review documentation each year to update for any changes in business and market developments. A significant change in the facts and circumstances would lead to a more detailed update of the documentation.

Notification on controlled transactions must be prepared annually.

The CbC-reports, master file, local file and relevant notifications to the tax authorities should also be completed annually.

2.7 Tax return disclosures

TP documentation on controlled transactions is not part of the tax statements. The mere entering into controlled transactions is not disclosed in the income tax return. However, a special report form (the controlled transaction notification) is filed with the tax authority every year.

If prices in related party transactions do not comply with the arm's-length principle, resulting in the understatement of taxes, the taxpayer is allowed to adjust the taxable base and tax amounts in the annual tax return for the respective tax. The information that identifies the transaction, with respect to which the taxpayer adjusted the taxable base and the tax amount, is shown in explanations to the tax returns as well as in TP documentation.

2.8 Burden of proof

When the tax authority implements control procedures in connection with related party transactions, the general rule is that the burden of proof is on the tax authority. For instance, if the taxpayer in assessing revenues in related party transactions reasonably applied one of the methods specified in the Russian Tax Code, the tax authority should apply the same method during the audit. Application of another method is only possible if the tax authority proves that the method the taxpayer applied does not enable one to determine if the conditions of the controlled transaction are comparable with those of arm's-length transactions.

However, if a taxpayer did not submit the requested documents on controlled transactions or if the submitted documents are clearly insufficient and unreasonable, the tax authority may apply its own more suitable method in the course of its audit. In future, the burden of challenging conclusions and additional tax amounts based on the tax audit shall pass onto the taxpayer.

2.9 Penalties

2.9.1 General

According to the Russian Tax Code non-provision of the controlled transaction notification when due, or provision of a notification containing unreliable information, entails a RUB 5,000 penalty.

If a taxpayer does not provide documentation proving that prices are in compliance with the arm's-length principle on the tax authority's request, the penalty is RUB 200.

2.9.2 Penalties in case of a TP-adjustment

If the tax audit reveals that the prices in related party transactions (controlled transactions) do not correspond to those in arm's-length transactions, which resulted in underpayment of taxes, the penalty is 40% of the underpaid tax amount but not less than RUB 30,000. The taxpayer shall be released from this liability if the documentation, proving that prices are in compliance with the arm's length principle, is provided upon request of the tax authority.

2.9.3 CbC-reporting

Penalties for non-submission of the notice of participation, CbC report, master file or local file are much higher:

1. Non-submission of the notice of participation in a MNE group or submitting a notice with unreliable information – RUB 50,000 penalty.

2. Non-submission of the CbC report, Master file or Local file upon request of the tax authority and when due – RUB 100,000 penalty for each document.

The penalties discussed above will not apply until tax year 2020 except for the Local file.

2.10 Interest

If in connection with the non-market compliant level of prices in controlled transactions the taxpayer adjusts the taxable base and the tax amount and pays the shortfall in taxes on or before the profit tax payment date for the respective tax period, then no penalty interest is imposed.

There are no specific rules on interest charged on subsequent tax payments in TP cases. Interest is normally charged on underpayment of tax. If the assessment of the taxable base and underpayment of taxes were revealed during a tax audit, the general provisions of the Russian Tax Code impose penalty interest for the untimely payment of taxes at a rate of 1/300 of the re-financing rate of the Russian Central Bank applicable at that time for each day of delay for the first 30 days of delay and at a rate of 1/150 as from 31st day of delay.

2.11 Use of most reliable information

The Russian Tax Code does not contain specific provisions on the detailed content and sources of information used for analysis. Apart from information on specific deals, also information in the public domain, on the established level of the market prices and stock exchange quotations, as well as data of information and pricing agencies can be used. The tax authorities recommend that links to documents and other information sources should be added to TP documentation on controlled transactions.

2.12 Languages

Under the general provisions of the Russian Tax Code, the statements, information and documents are filed to the tax authorities in Russian.

The CbC-Report may be filed in a foreign language, if the parent company of a MNE group is not a Russian tax resident.

2.13 Confidentiality

According to the general provisions of the Russian Tax Code, any information on a taxpayer received by the tax authorities constitutes a tax secret (except for certain information expressly stated in law).

The competent authority is entitled to transfer CbC-Reports to competent authorities of foreign countries as part of the automatic exchange of information allowed under multinational treaties to which Russia is a party.

3. Standards with respect to the content of transfer pricing documentation

3.1 Master File

The first reporting period is 2017.

1. Organisational structure

Information on the ownership structure of the MNE group, listing the persons who are participants and the countries where they operate (as a chart).

2. Description of MNE group's business(es)

General description of business of the group of companies, including:

a) The main factors influencing the financial performance;

b) A description of the supply chain and the main suppliers of manufactured products and services for the largest products/services (determined by revenue);

c) List and summary of the main intra-group service contracts, including the description of functional options of the main group participants involved in provision of these services and pricing approaches as part of the provided services of the group;

d) A summary functional review of business of the group participants that influence the financial performance, in particular, description of the main performed functions, the assets in use, and the economic (commercial) risks undertaken;

e) Information on the main transactions related to the restructuring of business, and the purchase and disposal of assets in the fiscal year under review.

3. MNE group's intangibles

a) A description of the group's strategy on development, possession and use of intangibles, in particular, location of the main R&D centres and their management;

b) A description of intangibles having a material impact on the pricing and the list of group participants holding such assets;

c) A list of contracts related to intangibles as concluded between the group's participants;

d) A general description of the pricing method related to development, ownership and use of intangibles;

e) A general description of transactions involving the transfer of rights to intangibles between the group participants in the reporting period, indicating such participants and the remuneration for such transfers.

4. MNE group's intercompany financial activities

a) A summary of the group's financing system (including financing raised from persons other than group participants);

b) An indication of the participants who act in the interest of the other participants of the group, including the countries (territories) that are the place of registration of such participants and their place of management;

c) A general description of the pricing method related to financing of the group's participants.

5. MNE group's financial and tax positions

a) Consolidated financial statements for the last reporting period (if not available, any consolidated statements for management, tax and other purposes);

b) A list and summary of pricing agreements and tax rulings from competent authorities, applied in transactions between the group participants and related to revenue allocation between states.

3.2 Local File

The procedure for preparing these documents is to a certain extent described in Chapter V.1 of the Russian Tax Code. Documents shall be a set of documents or single document drafted in a free format and containing the following information (these are in fact common requirements to TP documentation regarding controlled transaction (or group of transactions)):

1. On the taxpayer's business related to this transaction:

a) The list of persons who entered into the controlled transaction, a description of the controlled transaction, its conditions, including description of the pricing method

b) The functions of parties to the transaction, the assets in use, and the economic (commercial) risks undertaken.

2. Information on TP methods:

a) Substantiation of the reasons for selection of the method being used;

b) Indication about the information sources used;

c) Calculation of the market price interval (profitability range) for the controlled transaction, with description of approach, and selection of the comparable transactions used;

d) Amount of received revenue (profit) and/or total incurred costs (losses) resulting from the controlled transactions;

e) Adjustments of the taxable base made by the taxpayer and amounts of tax (or losses) etc.

For Russian companies participating in a MNE group, for which total revenue meets the established criterion (RUB 50 billion, see chapter. 4.1 hereafter), the Local file should additionally contain the following information (the first reporting period is 2018):

1. Local entity

a) Information on the taxpayer's management structure, as well as on other persons to whom the management reports are to be filed and countries (territories) where such persons carry out their core lines of business;

b) Information on the taxpayer's operations and market strategy, as well as information on conducted restructuring and transfer (receipt) of intangibles;

c) Existing market competition level (main competitors, consumers of manufactured products, suppliers of raw and materials) and the impact of particular features of the competitive environment on pricing processes.

2. Controlled transactions

a) Description of reasons based on which it was concluded that the price used in the controlled transaction meets the market price;

b) Description of adjustments made to align the transaction conditions;

c) Copies of material intra-group agreements that influence the pricing in controlled transactions;

d) Copies of pricing agreements, tax explanations of competent authorities, applied in transactions between the group participants related to the controlled transactions under review.

3. Financial information

a) Auditor's report on the financial statements (accounts) of the taxpayer for the most recent reporting period, if any.

4. Country-by-Country reporting standards

The first reporting period is 2017. Taxpayers are allowed to provide CbC reports for 2016.

4.1 Threshold and required content

The requirement to submit a CbC-Report (also to prepare a Master file and expanded Local file) applies to taxpayers being participants of a global group of companies (MNE group), for which the overall revenue according to consolidated financial statements for the preceding fiscal year exceeds RUB 50 billion, if the parent company of the group is a Russian tax resident.

If the parent company of the MNE is not a Russian tax resident, the threshold provided in legislation of the foreign country where the parent company is tax resident is used.

The CbC-Report shall contain information on:

1. the overall income/revenue from transactions for the reporting year, in particular including a breakdown of the overall amount of income/revenue for transactions with group participants and total income/revenue from transactions with other persons;
2. the pre-tax profit/ loss for the reporting year (before income tax);
3. income tax paid in the reporting period;
4. assessed income tax for the reporting period;
5. share capital as of the reporting year-end date;
6. accumulated profit (retained earnings) as of the reporting year-end date;
7. headcount for the reporting year;
8. tangible assets as of the reporting year-end date;
9. identity information for each MNE group participant, indicating the State according to the laws of which such participant was established, the State of its tax residency and the core lines of business of each group participant.

The CbC Report is submitted to the tax authority in the established electronic format.

4.2 Notification requirement for subsidiary companies

As for subsidiaries operating in Russia which are part of MNE groups (constituent entity) and whose overall revenue exceeds the established RUB 50 billion threshold, there is a requirement to file a notice of participation in the MNE group, which contains the following information:

1. Name and identity data of the taxpayer being a participant in a global group of companies;
2. Information on whether or not the taxpayer that files the notice is a parent company (ultimate parent entity) or an authorised participant (Surrogate parent entity) in a MNE group;
3. Name and identity data of the parent company and the State of its tax residency;
4. Name and identity data of any other participant (constituent entity) that has filed a CbC-Report, being an authorised participant (Surrogate parent entity) in a global group of companies, and the reasons substantiating its right to file a CbC-Report;
5. The date of the last day of the period for which the consolidated financial statements are prepared.

As per the general rule, the CbC-Report is filed by the parent company of the MNE group or its authorised participant (Surrogate parent entity). However, a tax authority may require that a Russian taxpayer (which is a group participant) files this report in certain cases as specified in the Russian Tax code (e.g. if the parent entity of a MNE group is not a tax resident of Russia and the Russian tax authority did not receive the CbC report from another country's tax authority).

Slovakia

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1. Introduction

1.1 Legal context

Corporate income tax

Income tax in the Slovak Republic is governed by Act 595/2003 Coll. on Income Tax, as amended. Section 17(5) of the Act states that differences between prices agreed in related party business transactions includes differences reducing taxable income which are caused by what can be translated as "off-market transfer pricing".

Section 18 of the Income Tax Act requires compliance with the arm's-length principle in related party transactions and the use, in particular, of methods based on either a comparison of prices (comparable uncontrolled price method, resale price method and cost plus method) or methods based on a comparison of profits (profit split method and transactional net margin method).

Related parties are defined in the Income Tax Act, specifically in Sections 2(n) and 2(r), as a close person or a person with economic, personal or other ties, or are included in consolidated returns. All controlled transactions by both non-resident related parties, as defined by Section 2(r) and related parties within The Slovak Republic are tested for such compliance.

Taxpayers are required to maintain TP documentation that covers controlled transactions and describes the valuation method used in these transactions, with the content and scope of such TP documentation defined by the Minister of Finance of the Slovak Republic in Guidance MF/019153/2018-724.

Value added tax

Value added tax charged in the Slovak Republic is governed by Act 222/2004 Coll., as amended, with Section 22(8) specifically providing rules for mark-to-market. When goods or services are supplied by related parties, the taxable amount is determined by open market value.

Tax Code

An important rule regarding tax audits is contained in Section 3(6) of the Tax Code, Act 563/2009 Coll. on Tax Administration, where the tax authorities will not take artificial arrangements into consideration which do not reflect economic reality and whose only purpose is to obtain a tax advantage.

Country-by-Country reporting

The Slovak Republic has implemented Council Directive (EU) 2016/881, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. The implemented EU Directive is a tool for combating tax evasion and aggressive tax planning.

Implementation of the Directive is provided in Slovak Act 43/2017 Coll., amending Act 442/2012 Coll. on International Assistance and Cooperation by the Tax Authority. This Act requires multinational enterprise (MNE) groups to provide Country-by-Country (CbC) reporting annually.

Double taxation treaties

The Slovak Republic is a signatory to a total 70 double taxation treaties, including in particular all EU and OECD countries. These double taxation treaties have been drafted on the basis of the OECD Model Tax Convention on Income and on Capital, so also Article 9 – Associated Enterprises with regard to the arm's- length principle.

1.2 Practical context

Whenever the tax authorities conduct a tax audit, they will review whether the method and calculation of TP differences is correct and based on the arm's-length principle. In any tax audit announced after the tax period has ended and the tax return has been filed, taxable entities will be required to submit TP documentation within 15 days of having received notice of the audit.

In practice, the Slovak tax authorities will require taxpayers to produce evidence of their TP policies, so it is advisable for TP documentation to have been prepared in advance to support the taxable entity's assertions.

2. Formal requirements

2.1 Which taxpayers

All undertakings are obliged to prepare TP documentation. This includes natural persons, legal entities and permanent establishments in the Slovak Republic (related parties as defined in Section 2(n) and 2(r) of the Income Tax Act).The public sector (national, municipal and city governments) is only required to prepare TP documentation to a limited extent. Controlled transactions are defined as transactions between related parties. TP documentation must cover all domestic controlled transactions as well as foreign controlled transactions.

Controlled transactions are defined in Section 2(ab) of the Income Tax Act as transactions between associated enterprises, in the meaning of a legal relationship or other similar relationship between two or more related parties as defined by Section 2(n) and 2(r), at least one of whom is either a taxpayer with income defined under Section 6 or a taxable income generating legal person (income from business activities or disposal of property).

2.2 Aggregation of transactions

TP documentation is prepared for each material transaction either separately or as an aggregation of controlled transactions. Controlled transactions are aggregated for several controlled transactions with the same related party in the following cases:

a) When they are of the same type and concluded under comparable conditions;

b) When they are closely interconnected and interdependent; or

c) When they are comparable in terms of the assets used, functions and risks

TP documentation is prepared for an aggregation of controlled transactions whenever it provides a more reliable picture of the valuation methods used. TP documentation should also indicate the reasons for aggregating the controlled transactions.

2.3 Deadlines (timing)

TP documentation should be pre-prepared prior to the start of the tax period so that over the course of the year controlled transactions are measured with respect to the arm's-length principle. Data for the current year can be refined (e.g. with a determination of materiality and of the structure and volume of controlled transactions) to consider subsequent events after the close of the tax year.

The tax authorities are allowed under Section 18(11) of the Income Tax Act to request TP documentation even after the deadline for filing tax returns for the tax period ended – normally three calendar months after the end of the tax period covered in the submitted TP documentation or after the extended deadline for submitting the tax return.

2.4 Materiality

Materiality is defined in words and numbers. Section 17(9) of Act 431/2002 Coll. on Accounting, as amended, considers information to be material if its absence could affect the decision-making of a person using the information.

In practice, materiality is quantified as 1% of turnover, 0.5% of net income or 0.5% of total assets, or all three indicators in conjunction. Materiality is set for each taxable entity individually in such a way as to logically justify it.

2.5 Retention of documents

Section 35 of the Accounting Act generally sets the basic retention period for financial statements and accounting documents at ten years. Section 69 of the Tax Code permits tax audits to be conducted by the authorities for ten years (5 + 5 years) after the filing of the year's tax return. Finally, Section 76 of the Value Added Tax Act also requires documents pertaining to VAT to be retained for ten years. For these reasons, TP documentation should be retained for ten years, too.

2.6 Frequency of documentation updates

The tax period is technically the same as the calendar year; therefore TP documentation is prepared independently for each tax period (either the calendar year or the entity's fiscal year). In the absence of new facts affecting the valuation of controlled transactions, information from the previous tax period can be used in preparing new TP documentation.

2.7 Tax return disclosures

The deadline for filing tax returns for the current year is March 31st of the following year. Any taxable entity can ask for a three-month extension of the deadline with a simple notice to the tax authorities, with no need to undergo any consent procedures. The extension can even be up to six months if there is income from foreign sources.

Tax returns include information about related party transactions, which are entered in Table 1 of the return. This table shows the volume of related party transactions by transaction type.

2.8 Burden of proof

The burden of proof is on the taxable entity to prove to the tax authorities the data it declares on its tax return. TP documentation is in essence precautionary evidence that the valuation of controlled transactions is consistent with the arm's-length principle.

Tax audits are conducted by the tax authorities on a specific taxable entity, which has the burden of proof during such audits. It is recommended for TP documentation to be prepared separately for each specific legal entity. Clearly, the same transaction between different legal entities should be described and justified to reflect a transaction between a seller and buyer that are related parties.

2.9 Penalties

Two types of penalties are levied for incorrect information provided on a tax return: the penalty itself and interest on tax arrears. In The Slovak Republic, the penalty is 10% of subsequently assessed tax and interest is charged at a rate of 15% per annum on the amount of tax paid late. The tax authorities can forgive penalties at the taxable entity's request and for legitimate reasons, such as if there is a risk of economic collapse due to the assessed tax or if the error was caused by complicated or unclear tax regulations.

2.9.1 General

Sections 154 and 155 of the Tax Code provide for a general civil fine ranging from EUR 60 to EUR 3,000 for failure to comply with any non-pecuniary obligation under tax law. This fine can also be imposed for failure to submit TP documentation as such a duty is provided in Section 18(1) of the Income Tax Act.

2.9.2 Penalties in case of a TP-adjustment

No separate penalties are provided for TP adjustments. The penalties presented in the above sections 2.9 and 2.9.1 would apply in the same way to TP adjustments.

2.9.3 CbC-reporting

The Slovak Republic has implemented the relevant European directives covering CbC-reporting into its laws concerning international assistance and cooperation in tax administration (see 1.1). The law requires MNE groups to provide CbC-reporting annually which, among other things, contains information enabling an overview of the amount of taxes paid in individual countries.

Ultimate parent entity means a constituent entity of a MNE group that owns directly or indirectly a sufficient interest in one or more other constituent entities and is required to prepare consolidated financial statements in its jurisdiction of tax residence (and is not included in any higher-level consolidation). Any ultimate parent entity that is tax resident in the Slovak Republic will file CbC reporting with the Financial Directorate within twelve months of the final day of the MNE group’s reported financial year.

Surrogate parent entity means a constituent entity which has been appointed by an MNE group as a sole substitute for the ultimate parent entity to file CbC-reporting in the jurisdiction of tax residence if the ultimate parent entity is not obliged to do so.

Constituent entity means a separate legal entity in a MNE group that is either included in the consolidated financial statements or would be so included there if it were not excluded on the grounds of size, and permanent establishments or business units for which separate financial statements are prepared. A constituent entity with tax residence in the Slovak Republic is required to inform the Financial Directorate of whether it is an ultimate parent entity, surrogate parent entity or a constituent entity, at the latest by the deadline for filing its tax return for the reported tax year.

The automatic exchange of information will operate with the Financial Directorate forwarding CbC-reporting to the jurisdiction of tax residence for the constituent entity and will receive CbC-reporting from individual member states of the European Union.

The tax authorities are not allowed to adjust the taxable income due to a breach of TP principles solely based on information in CbC-reporting provided by individual countries. Information from CbC-reporting will not be disclosed and will be used mainly for selecting companies for tax audits, so TP documentation should be available as a preventive measure to cover against a possible tax audit.

The tax authorities will levy a fine of up to EUR 10,000 for failure by a taxable entity liable for tax in the Slovak Republic to submit CbC-reporting and a fine of up to EUR 3,000 for failure by such an entity to inform the tax authorities that it is a constituent entity in an MNE group.

Ultimate parent entities and surrogate parent entities are required to submit first-time CbC-reporting to the Ministry of Finance after 28 February 2017 for the MNE group’s financial year beginning during the 2016 calendar year.

Only those multinational enterprise groups that meet the threshold of consolidated revenue for the MNE group of at least EUR 750 million are required to submit CbC-reporting.

2.10 Interest

There are no separate interest penalties provided to cover TP documentation. The penalties presented in the above sections 2.9 and 2.9.1 would apply in the same way with respect to interest.

2.11 Use of most reliable information

TP documentation is prepared to reflect the arm's-length principle, using the valuation methods provided by Slovak law – methods based on either a comparison of prices (comparable uncontrolled price method, resale price method and cost plus method) or methods based on a comparison of profits (profit split method and net trading margin method) or other methods that follow the arm's-length principle (such as the transactional net margin method – proving costs are covered with a margin reasonable for the sector). Taxable entities preferably use whatever method ensures compliance with the arm's-length principle.

The arm's-length principle is established on a comparison of conditions agreed in controlled transactions between related parties with terms that would have been agreed between independent entities in comparable transactions under comparable circumstances in relevant periods.

Comparison takes the activities performed by the comparators into account, in particular production, assembly, research and development, purchasing and sales, and the like, as well as the range of business risks, the properties of the asset or service being compared, negotiated terms, the economic environment of the market and business strategy. Conditions are comparable if there is no significant difference between them or if the effect of these differences can be eliminated.

2.12 Languages

Section 18(11) of the Income Tax Act requires primary use of the national language (Slovak) in TP documentation to be submitted to the tax authorities. However, both the tax authorities and the Financial Directorate allow TP documentation to be submitted in another language at the request of the taxable entity.

2.13 Confidentiality

Tax administration staff members are bound by Section 11 of the Tax Code to treat all matters concerning tax administration as confidential and so TP documentation is also covered by tax secrecy provisions. The Penal Code defines threats to tax secrecy as a criminal act. Access to tax returns and other documents covered by tax secrecy is only made available to other entities or persons that have received written permission from the taxable entity.

Tax returns are not accessible to the public and subject to tax confidentiality, where another entity or person is only allowed to view the return with the written consent of the taxable entity. Documents which are accessible to the public are financial statements, annual reports and the auditor's report.

3. Standards with respect to the content of transfer pricing documentation

Tax entities have a legal obligation to provide TP documentation. Mandatory content of TP documentation is provided in Ministry of Finance Guidelines (see 1.1); compliance with such mandatory content is recommended, particularly concentrating on the selection of an appropriate valuation method and the justification for it, while TP documentation should not include unnecessarily extensive theoretical material.

3.1 Master File

1. Organisational structure

Aggregate related parties are required to be identified and this information should additionally describe property and personal connections. This should be a transparent organisational chart and summary of ownership among the group of related parties.

There are three levels of TP documentation prescribed In the Slovak Republic based on the scope of information provided: brief, general and full. The scope of the documentation is defined in particular by the size and risk of the dependent transaction. Full documentation is kept, as an example, of the cross-border controlled transactions of a company whose financial statements are prepared under International Financial Reporting Standards (IFRS), of cross-border transactions whose aggregate annual value is greater than EUR 10 million and of controlled transactions with a taxpayer residing in a non-contracting state.

General documentation is kept of cross-border controlled transactions if the company has total revenues greater than EUR 8 million and for cross-border controlled transactions whose aggregate annual value is greater than EUR 1 million.

Brief documentation is kept of the controlled transactions of an audited company and of the controlled transactions of individual entrepreneurs, unless they are required to keep full or general documentation. Brief documentation is the least administratively burdensome as the form is only three pages long.

2. Description of MNE's business(es)

General TP documentation in the Master File must identify the individual MNE members including their legal forms, describe the MNE's organisational and ownership structure and provide a general description of the MNE's method of financing.

In the case of full TP documentation, the Master File must additionally describe the MNE group's business activities and commercial strategy, especially profitability factors, the MNE's most important markets and services, positions, risks and assets of group members, agreements on centralised services, and also describe the group's financing and include the MNE's consolidated financial statements. Any other information that contributes toward proving compliance with the arm's-length principle should also be in the Master File.

3. MNE's intangibles (as defined in Chapter VI of OECD Transfer Pricing Guidelines)

Assets which the related party uses for the purpose of a controlled transaction are required to be included in TP documentation, and as such also intangible assets if they exist.

4. MNE's intercompany financial activities

TP documentation also must include a description of the related party's business activities in which it engages for the purpose of a controlled transaction, hence also financial activities such as providing credit, if the related party does so.

5. MNE's financial and tax positions

MNE financial and tax positions are only presented if this information contributes toward clarifying the arm's-length principle in the valuation of controlled transactions.

3.2 Local File

1. Local entity

General TP documentation in the Local File must identify the local entity including its legal form, describe its organisational and ownership structure, business activities and commercial strategy, and for each transaction describe the transaction and its financial value, include a copy of the contract, an analysis of functions, risks and assets, and a description of the local entity's TP system (especially the method selected and the rationale behind it).

In the case of full TP documentation, the Local File must additionally describe the local entity being subject to the direction and control of the group, transfer of intangible assets within the group and include, for every controlled transaction, the valuation technique used, comparative transactions,, a description of comparability, the rationale behind the valuation and the financial information used.

2. Controlled transactions

Controlled transactions are all transactions (e.g. merchandise, services, interest, licences) between two enterprises that are associated enterprises with respect to each other. In Slovak law these are both related parties in the jurisdiction of tax residence and non-resident entities. TP documentation must include a list of controlled transactions.

3. Financial information

A local taxable entity provides financial information in its TP documentation only if this information contributes toward clarifying the arm's-length principle in the valuation of controlled transactions. In practice, this information is often calculated from the financial statements, which is subsequently used in the comparability analysis. For instance, cost-effectiveness (profits to costs) or sales margins (sales revenue to cost of sales).

4. Country-by-Country reporting standards

4.1 Threshold and required content

Only those multinational enterprise groups that meet the threshold of consolidated revenue for the MNE group of at least EUR 750 million are required to submit CbC-reporting.

CbC-reporting consists of the following mandatory data: aggregated amounts of revenue, income before tax, income tax paid, current tax, registered capital, retained earnings or accumulated losses, number of employees and tangible assets other than cash and cash equivalents for every country of tax residence in which the MNE group operates, and includes the currency in which these amounts are expressed. In addition, CbC-reporting includes a list of core entities by country of establishment and the nature of their principal economic activities.

4.2 Notification requirement for subsidiary companies

Subsidiaries established in the Slovak Republic are required to notify the Financial Directorate of the Slovak Republic about CbC-reporting.

South Africa

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1. Introduction

1.1 Legal context

Transfer Pricing ("TP") in South Africa is governed in terms of section 31 of the South African Income Tax Act No. 58 of 1962 and various regulations issued since October 2016.

Though South Africa is a non-member economy working with OECD, it has been an active participant in the implementation of the BEPS initiative. South Africa has made certain amendments since 2016 to its TP regime to be in line with the OECD guidelines for Multinational Enterprises (MNE) and Tax Administration, which includes:

- Introduction of Country-by-Country-Reporting (CbCR)-Requirement for the ultimate parent entity (UPE) being SA resident that is part of an MNE Group
- Prescribing the requirement to maintain a master file (generally applicable to the (UPE) as part of TP documentation
- Prescribing the requirement to maintain a local file and the specific documentation required to be included in the local file as well as other supporting documentation required to be maintained.

1.2 Practical context

The laws prior to the 2016 amendments required every company to maintain documents and information relating to the cross-border transactions entered into by it and certain master information relating to the enterprises of the Multinational group of which the person is a member, with which it has entered into transactions.

Now that the law has been aligned with the OECD guidelines a taxpayer is required to maintain and submit the local file and master file which is compiled in accordance with a specified list of information that is mandatory to be included in the file as a part of TP documentation. This list of specified information is subject to the company meeting the specified threshold of ZAR 100 million of potentially affected transactions.

2. Formal requirements

2.1 Which taxpayers

Every company who has entered into a cross-border transaction with a connected person will be required to maintain a local file containing all the relevant information and documents pertaining to that transaction. For years of assessment commencing on or after 1 January 2021, this is extended to transactions between associated persons which includes companies that do not fall within the connected person definition but have common control/management.

Exemption from documentation submission is provided to a person where the aggregate of all cross-border transactions in a year with the connected person/associated enterprises does not exceed ZAR 100 million, subject to the condition that the onus of proof remains with the taxpayer that the transactions are valued at arm's length.

For maintenance of information and documents in respect of CBC reporting and Master file please refer to paragraphs 3.1 and 4 below.

2.2 Aggregation of transactions

Documentation will be pertaining to each type of international transaction with a connected person or associated enterprise. Set-off of amounts is not permitted in the determination of the aggregate transactions.

2.3 Deadlines (timing)

All documents relating to the international transactions entered into in a financial year have to be finalised and made available at least by the due date of filing the income tax returns for that year (i.e. 12 months from the end of financial year).

Due dates for filing Master File and CbCR are tabulated in paragraphs 3.1 and 4 below.

2.4 Materiality

The documentation requirement, as specified earlier, will not be applicable to those persons, the value of whose aggregate cross-border transactions does not exceed ZAR 100 million. However, there is no other materiality recognition with respect to TP documentation.

2.5 Retention of documents and prescription/statute of limitations

Section 29 of the TAA requires that a person keeps the records, books or account or documents for a period of 5 years from the date of submission of the return or, where a return is not required, for a period of five years from the end of the relevant tax period.

This general rule of 5 years will also apply to the documents and all information relating to the local file and master file to be maintained for a period of 5 years from the date of submission of the tax return for the relevant period.

Section 99 of the TAA stipulates that an assessment would generally prescribe after 3 years of the date of assessment. This period may however be extended by a further 3 years where the South African Revenue Authority ("SARS") issues a notice at least 60 days before the expiry of the initial 3-year period.

The assessment remains open for an indefinite period where the full amount of tax chargeable was not assessed due to:

- fraud;
- intentional or negligent misrepresentation;
- intentional or negligent non-disclosure of material facts; or
- the failure to submit a return or, if no return is required, the failure to make the required payment of tax.

Alternatively, the taxpayer can agree for the assessment not to have prescribed if such agreement was reached prior to the expiry of the limitation period.

2.6 Frequency of documentation updates

Generally, documentation relating to cross-border transactions will be prepared for a financial year. If a transaction takes place for more than a year then unless there is any significant change in the factors which could influence the price of transaction, no fresh documentation will be required. It is however recommended that TP documentation be contemporaneous and updated at least every 3 years.

2.7 Tax return disclosures

The first page of the tax return contains a questionnaire which is utilised to customise the contents of the tax return. This questionnaire includes a request for the taxpayer to confirm the following information:

- Is the taxpayer part of an MNE group
- Does the taxpayer have affected transactions in excess of ZAR 100 million.

Where these questions are answered in the affirmative, additional information in respect of the ultimate holding company details and group turnover are requested. In addition, a TP section is created in the return which entails various detailed questions relating to the affected transactions, one of these questions being a confirmation that the taxpayer has TP documentation that supports the pricing policy that is applied to each affected transaction.

2.8 Burden of proof

The primary responsibility of proving the transfer price of a transaction will be on the taxpayer. Where a TP audit is conducted by SARS and after considering all relevant materials the Transfer Pricing auditor determines the arm's-length price ("ALP") in relation to the international transaction differs to the price determined by the taxpayer then a TP adjustment by means of an additional assessment is raised. This assessment must then be disputed by the taxpayer through the formal objection and appeals process.

2.9 Penalties

2.9.1 General

The Tax Administration Act No. 28 of 2011 ("TAA") provides for penalties where a taxpayer defaults by failing to submit a return or submits an incorrect return. This can be applied to the failure to submit TP documentation.

Section 210 of the TAA states that where SARS is satisfied that a taxpayer failed to comply with a tax obligation in terms of a tax Act and which is listed in a public notice issued by SARS, a monthly penalty must be imposed in accordance with the table below:

Fixed amount penalty table

Item	Assessed loss or taxable income for "preceding year" (ZAR)	Penalty (ZAR)
(i)	Assessed loss	250
(ii)	0 – 250,000	250
(iii)	250,001 – 500,000	500
(iv)	500,001 – 1,000,000	1,000
(v)	1,000,001 – 5,000,000	2,000
(vi)	5,000,001 – 10,000,000	4,000
(vii)	10,000,001 – 50,000,000	8,000
(viii)	Above 50,000,000	16,000

Section 211(2) of the TAA states that where a person fails to remedy the non-compliance within a month the amount of the penalty increases automatically by the same amount each month, or part thereof.

Where the default has resulted in an underpayment of taxes percentage-based penalties in terms of section 213 of the TAA may also be imposed as well as understatement penalties in terms of sections 221 to 223 of the TAA.

2.9.2 Penalties in case of a TP-adjustment

Where a TP adjustment is raised, it is likely that SARS have regarded your tax liability as being understated.

Section 221 of the TAA defines an "Understatement" to mean any prejudice to the SARS or the fiscus as a result of:

a) the failure to submit a return required under a tax Act or by the Commissioner;

b) an omission from a return;

c) an incorrect statement in a return; or

d) if no return is required, the failure to pay the correct amount of tax; or

e) an impermissible avoidance arrangement.

Therefore, the abovementioned fixed amount penalty, percentage-based penalty as well as the understatement penalty can apply where a TP adjustment is raised. The understatement penalty would apply in accordance with the table below and SARS determination of the taxpayer's behaviour and category of default.

Understatement penalty table

Item	Behaviour	Standard Case	If obstructive, or if it is a 'repeat case'	VDP* after notification of an audit or criminal investigation	VDP* before notification of an audit or criminal investigation
(i)	Substantial understatement**	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing the return	25%	50%	15%	0%
(iii)	No reasonable grounds for 'tax position' taken	50%	75%	25%	0%
(iv)	'Impermissible avoidance arrangement'	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

* VDP – Voluntary Disclosure Programme

** - Substantial understatement – where the prejudice to SARS exceeds the greater of 5% of the amount of tax properly chargeable or refundable under a tax Act for the relevant tax period or ZAR 1 million.

2.9.3 CbC-reporting

The failure to adhere to CbC-reporting would be regarded a default in rendering a return and accordingly the fixed amount penalties disclosed under 2.9.1 will apply.

2.10 Interest

Where it is determined that there has been a shortfall of taxes paid interest at the prescribed rate will apply to the shortfall. The prescribed rate is adjusted in accordance with amendments made in terms of the Public Finance and Management Act 1 of 1999. These rates are published on the SARS website. As at 1 September 2020, the applicable prescribed rate is 7.25%.

2.11 Use of most reliable information

Whilst SARS prefers the use of local comparables, the lack of available information in this regard makes it quite difficult. The use of relevant comparables has always been a subject matter of litigation and is subjective in nature. There are no solid regulations prescribing the mode, source and type of information to be used as comparables.

2.12 Languages

There is no prescription as to the language to be used in the documentation by legislature. In terms of section 33 of the Tax Administration Act, information is required to be maintained in one of the official languages of South Africa. South Africa has 11 official languages. As a matter of practice, English being the common business language in South Africa, all the documents and information are generally prepared and maintained in English.

2.13 Confidentiality

In terms of sections 69 of the TAA, SARS officials are compelled to uphold the confidentiality of taxpayers' information, except under specific legal circumstances which do not apply to the office of the Public Protector.

There are, however specific provisions that allow "taxpayer information" to be disclosed to a person who is not a SARS official. These circumstances can fall into five categories:

- A SARS official can divulge taxpayer information in order to administer a Tax Act.
- In terms of a court order.
- If a taxpayer gives written consent.
- Where another Act expressly overrides the TAA confidentiality provisions in terms of section 69(2)(b) of the TAA.
- Where certain persons and entities are specifically identified in terms of section 70 of the TAA.

The following Acts contain provisions that expressly override the tax confidentiality provisions:

- Section 9 of the Drugs and Drug Trafficking Act, 1992
- Section 37 of the Financial Intelligence Centre Act, 2001; and
- Section 71 of the Prevention of Organised Crime Act, 1998.

3. Standards with respect to the content of transfer pricing documentation

3.1 Master File

In accordance with the recommendations of the OECD, a master file provides tax administrations with high-level information regarding the MNE's global business operations and TP policies. The Master File is expected to provide an overview of an MNE's global business model, specifically covering the following aspects:

- organisational structure
- description of the various businesses
- intangibles used in the businesses
- intercompany financial transactions
- financial and tax positions.

Public notice 1117 issued on 20 October 2017, stipulates that returns, which include a Master File, must be submitted in the form and containing the information specified in the SARS Business requirement Specification (BRS) CbC and Financial Data Reporting document.

Appendix 2 of the BRS CbC and Financial Data Reporting document outlines the requirements for completion of the Master File and follows the format for reporting of annex I to chapter V of the OECD/G20 BEPS Action 13 Report as a model for the Master File.

The Master File must be submitted using the SARS e-filing platform.

Public notice 1117 goes on further to state that a taxpayer must file a master file where:

- An MNE Group is required to submit a CbC Report in South Africa, subject to certain exceptions.
- In the case of a MNE that is not required to submit a CbC Report, there is still a filing obligation where the resident taxpayer meets the threshold for local TP documentation and a master file that substantially conforms with Annex I to Chapter V of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 is prepared by any other entity within the Group.

3.2 Local File

1. Introduction

In accordance with the recommendations of the OECD, the local file provides more detailed information relating to specific intercompany transactions. The information required in the local file supplements the master file and assists in meeting the objective of assuring that the MNE entity has complied with the arm's-length principle in its material TP positions affecting a specific jurisdiction.

The local file covers the following aspects:

- local entity
- controlled transactions
- financial information

In accordance with Public notice 1334 issued on 28 October 2016, a person must keep the records specified if the person:

a) has entered into a potentially affected transaction; and

b) the aggregate of the person's potentially affected transactions for the year of assessment, without offsetting any potentially affected transactions against one another, exceeds or is reasonably expected to exceed ZAR 100 million.

The local file must be submitted using the SARS e-filing platform.

2. Information on transactions

A person referred must keep the following records in respect of any potentially affected transaction that exceeds or is reasonably expected to exceed ZAR 5 million in value:

a) The nature and terms (including pricing policy) of the potentially affected transactions entered into by the person with each connected person;

b) Copies of any contracts or agreements related to the potentially affected transactions entered into by the person with each connected person, if such contracts or agreements were prepared in the ordinary course of business;

c) Any other governance and regulatory documents, such as complete board minutes and South African Reserve Bank applications and approvals, relevant to the potentially affected transactions;

d) An indication of which party to the potentially affected transaction is the tested party, if applicable, and an explanation of the reasons for the party's selection;

e) With respect to the tested party:

    i. a detailed allocation of revenues, costs, expenses and profits between its connected person transactions and independent person transactions, including records of the application of the TP policy and documents showing how the financial data used in applying the TP method reconciles to the annual financial statements; or

    ii. If the financial data for the purposes of subparagraph (i) cannot be directly allocated, an explanation supporting the allocation rationale and documentation that demonstrates how the allocation was carried out;

f) Where a tested party is tax resident outside South Africa, such documents as evidence the functional and risk classification of the tested party, which include:

   i. a description of the business (including the type of business, details of the specific business, an organogram showing the title and location of staff involved in the affected transaction and external market conditions) and the plans for the principal trading operations (including the business strategy);

   ii. contracts between the tested party and its customers and suppliers; and

   iii. commercial invoices between the tested party and its customers and suppliers that are relevant to the potentially affected transaction;

g) A description of the functions performed, risks assumed and assets employed by the person and the connected persons involved in the potentially affected transaction;

h) A description of the intangible assets involved in the potentially affected transaction, and their influence on the functional and risk classification of the tested party;

i) Operational flows including information flow, product flow, and cash-flow of the potentially affected transactions;

j) The comparable data and methods considered and used for determining the arm's-length return and the analysis performed to determine the transfer prices or the allocations of profits or losses or contributions to costs, as the case may be, in respect of the potentially affected transactions, including:

   i. A list and description of selected comparable uncontrolled transactions (internal or external), if any, and information on relevant financial indicators for independent enterprises, if any, relied on in the analysis, including a description of the comparable search methodology;

   ii. Summary schedules of relevant financial data for any other comparables used in the analysis and the sources from which the data was obtained;

   iii. If relevant, an explanation of the reasons for performing a multi-year analysis;

   iv. i Any comparability adjustments made and the reasons for making such adjustments;

k) The assumptions, strategies, policies and price negotiations, if any, that influenced the determination of the transfer prices or the allocations of profits or losses or contributions to costs, as the case may be, in respect of the potentially affected transactions;

l) Details of the adjustments, if any, made to transfer prices to align them with the arm's-length return determined under section 31(2) of the Income Tax Act and consequent adjustment made to the total income or expenses for tax purposes;

m) With respect to potentially affected transactions that are financial assistance transactions, the following records:

   i. A summary of financial forecasts which are contemporaneous with the financial assistance transactions in question, projected as far as is meaningful in relation to the period of the funding transactions, including a clear picture of the expected levels of interest cover, gearing or other relevant measures over the forecast period;

   ii. An analysis of the financial strategy of the business, including how capital is allocated and the relationship between capital and cash-flows from operations and any changes relating to the financial assistance transactions and details regarding principal cash flows and the sources of repayment of debt;

n) With respect to potentially affected transactions that are financial assistance transactions with a term exceeding 12 months, the following additional records:

    i. A description of the funding structure which has been or is in the process of being put in place, including the dates of transactions, a clear statement of the source of the funds (immediate and ultimate), reasons for obtaining the funds, how the funds were or will be applied (the purpose of the financial assistance) and the repayment terms;

    ii. A group structure covering all relevant companies and clearly setting out any changes to the structure taking place over the course of the financial assistance transactions;

    iii. Copies of the financial statements and management accounts prepared most recently before the point in time the financial assistance is obtained and after the financial assistance has been granted; and

o) Copies of existing unilateral, bilateral and multilateral advance pricing agreements (APAs) and other tax rulings to which SARS is not a party and which are related to the potentially affected transactions.

3. Financial information – structure and organisation

A person must keep the following records:

a) A description of the person’s ownership structure, with details of shares or ownership interest in excess of 10% held by the person or therein by other persons as well as a description of all foreign connected persons with which that person is transacting and the details of the nature of the connection;

b) The name, address of the principal office, legal form and jurisdiction of tax residence of each of the connected persons with which a potentially affected transaction has been entered into by the person; and

c) The person's business operation summary, including:

    i. a description of the business (including the type of business, details of the specific business and external market conditions) and the plans for the principal trading operations (including the business strategy);

    ii. an organogram showing the title and location of the senior management team members;

    iii. major economic and legal issues affecting the profitability of the person and the industry;

    iv. a description of any business restructurings or intangibles transfers that the person has been affected by or involved in;

    v. the person’s market share within the industry, analysis of relevant market competition environment and key competitors;

    vi. the key value drivers identified by available industry research findings or reports;

    vii. industry policy or industry incentives or restrictions affecting the person’s business;

    viii. the role of the person, as well as the connected persons referred to in subparagraph (b), in the group’s supply chain.

4. Country-by-Country reporting standards

These Regulations are effective for Reporting Fiscal Years of MNE Groups beginning on or after 1 January 2016. The Country-by-Country Report required by these Regulations must be filed no later than 12 months after the last day of the Reporting Fiscal Year of the MNE Group.

4.1 Threshold and required content

Public notice 1598 issued on 23 December 2016, stipulates that for years of assessment commencing 1 January 2016, the ultimate parent company of a MNE group that is tax resident in South Africa will be required to file a country-by-country (CbC) report to SARS. The threshold for reporting to SARS is a consolidated MNE group turnover of at least ZAR 10 billion (or EUR 750 million) in the fiscal year prior to the year in which the CbC report must be submitted.

Where the ultimate parent company is not tax resident in South Africa, the SA tax resident company which forms part of the MNE group must inform SARS of the identity and tax residency of the reporting entity within 12 months. In certain instances the SA company may still be required to submit a CbC report to SARS. In the case of reporting by a company that is not the ultimate parent company the threshold for reporting to SARS is a consolidated MNE group turnover of at least EUR 750 million in the fiscal year prior to the year in which the CbC report must be submitted.

A CbC report must contain the following information:

- Aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE Group operates;
- An identification of each Constituent Entity of the MNE Group setting out the jurisdiction of tax residence of such Constituent Entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such Constituent Entity is organised, and the nature of the main business activity or activities of such Constituent Entity.

The CbC report must also contain the information set out in, and apply the definitions and instructions contained in, the standard template set out in “Annex III to Chapter V” set out in the OECD/G20 Base Erosion and Profit Shifting Project Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report.

4.2 Notification requirement for subsidiary companies

Where a Constituent Entity of an MNE Group that is resident for tax purposes in South Africa is not the Ultimate Parent Entity nor the Surrogate Parent Entity, it must notify SARS of the identity and tax residence of the Reporting Entity, no later than 12 months after the last day of the Reporting Fiscal Year of such MNE Group.

Spain

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1. Introduction

Spain is an OECD member country and its transfer pricing (TP) rules follow the arm's-length principle, the OECD Guidelines, and the work of the European Union Joint Transfer Pricing Forum.

Spanish tax authorities: Agencia Estatal de la Administración Tributaria (State Agency of Tax Administration, or AEAT) and Dirección General de Tributos (Directorate General of Taxation, or DGT).

Spanish Tax Law: Corporate Income Tax Law (CITL).

1.1 Legal context

Currently, Spanish TP regulations are governed by Law 27/2014 Article 18, approved on 27 November 2014, which entered into force for tax periods starting on and after 1 January 2015. In addition, documentation requirements are included in Articles 13 to 16 of the Corporate Income Tax Regulation (CITR), published by Royal Decree 634/2015, approved on 10 July 2015. These regulations setting forth new informational requirements are applicable for periods starting on and after 1 January 2016.In a later stage, Royal Decree 1074/2017, published on 29 December 2017, has provided some clarification regarding Country-by-Country information.

The current requirements are the implementation by the Spanish government of Action 13 of the OECD/G20 – project Base Erosion and Profit Shifting (BEPS), which regulates the need for a Country-by-Country Report (CbC Report) in addition to the Master File and Local File.

General TP documentation requirements were introduced in Spain in 2006 (Law 36/2006), applicable for tax periods starting on and after 1 January 2006. Prior documentation requirements have mainly stated the obligation for any taxpayer, subject to the CITL, to prepare and make available to the Tax Administration TP documentation reflecting that intragroup transactions (with domestic and foreign companies) were performed in accordance with the arm's-length principle.

Earlier TP documentation requirements were introduced by Royal Decree 1793/2008, applicable to intercompany transactions performed as from 19 February 2009. It referred to the content of the Master file and the Local file. Later on, Royal Decree 897/2010 and Royal Decree Law 13/2010 introduced certain amendments for exemptions to TP documentation requirements. Those rules have governed the period from February 2009 to December 2015, which have reached the statute of limitations under the Spanish tax regime.

1.2 Practical context

CbC Reporting is mandatory for groups with a global turnover exceeding EUR 750 million. Spain has signed the Multilateral Competent Authority Agreement (MCAA) for the automatic exchange of CbC Reports.

2. Formal requirements

2.1 Which taxpayers

Based on Article 18.3, letter d, CITL, TP documentation is required if the local taxpayer carries out related transactions (both domestic and international) of a total value exceeding EUR 250,000. Article 18 defines the nature of related parties (persons and entities), where the related-party connection for partners or shareholders is defined as at least 25%.

Transactions within the same consolidated tax group are exempt, as well as others listed by Article 18.3 letter a, CITL.

2.2 Aggregation of transactions

TP documentation is theoretically subject to direct/individual analysis. However, an aggregation of transactions is possible in case of similar transactions (in terms of functions, risk, products), if the transactions are linked (by an apparent reason), etc.

2.3 Deadlines (timing)

TP documentation should be made available to the Tax Administration by the filing deadline for the Corporate Income Tax Return. (i.e. for tax periods ending 31 December, the deadline is 25th July of the next fiscal period).

Regarding the CbC Report, the completion deadline is before the end of the fiscal year for which the information is being prepared (Form 231).

In case of an informative return on related-party transactions and on transactions and situations relating to countries or territories classified as tax havens (Form 232), the deadline is on the 11th month after the end of the tax year to which the information refers.

2.4 Materiality

In principle, all transactions with associated enterprises should be supported by TP documentation if the company exceeds the abovementioned threshold of EUR 250,000.

In practice, the tax authorities often focus their scope of investigation on business transactions with a material impact (i.e. management services expenses, royalties, among others).

2.5 Simplified Local documentation

In cases where the amount of revenue is less than EUR 45 million, according to Article 18.3 CITL and 16.4 CITR, simplified local documentation should include:

a) General description of the nature, characteristics and amount of the controlled transactions.

b) Name and surname, or business name, tax address and tax identification number of the taxpayer as well as the related person or related-party entities regarding the intercompany transaction.

c) Identification of the TP method selected.

d) The set of comparables and the value or range of values provided by them.

2.6 Retention of documents

In general, Spanish corporate taxpayers are required to keep TP documentation for at least four years. However, ff corporate tax losses of previous years are offset, this period may be extended to 10 years. The retention period begins the day after the end of the due period to present declaration or self-assessments, corresponding to the fiscal year in which the right to offset was generated (Article 26.5 CITL).

2.7 Frequency of documentation updates

TP documentation must include all transactions undertaken during the entire fiscal year (usually, from 1 January until 31 December). If the documentation prepared for a single fiscal year is still valid for subsequent periods, new TP documentation is not required. Updates must be made when necessary.

The CbC Report must be updated annually.

2.8 Tax return disclosures

For tax periods starting on and after 1 January 2016 this information will be presented in a separate form (Form 232). In case of Basque Country Legislation, Form 232 is in force for tax periods starting as from 1 January 2017.

2.9 Burden of proof

In Spain, there is a time split regarding the burden of proof:

- For fiscal years before 1 December 2006, the burden of the proof was on the Tax Administration to determine and justify that the transactions undertaken were not performed at market value and hence did not comply with the arm's-length principle.
- For fiscal years after 1 December 2006, the burden of the proof is now on the company in order to argue that its operations have been performed at market value and therefore comply with the arm's-length principle.

2.10 Penalties

For fiscal periods between 2009 and 2014:

- If the tax authorities do not make a TP adjustment, a tax penalty of EUR 1,500 per item or EUR 15,000 per group of omitted or misleading documentation items may be imposed.
- When the tax authorities adjust the pricing of a transaction, penalties may be up to 15% of the gross adjustment. The penalty will be a minimum of double that which would be applied if the documentation is lacking or incomplete and no adjustment was made.

For fiscal periods as from 2015, specific penalties are included in legislation (Article 18.13 CITL), which are derived from not having correct documentation or not applying the arm's-length principle (i.e., operations are not performed at market value):

- Per instance, a penalty of EUR 1,000 is imposed if a tax adjustment does not take place.
- Penalties per group of omitted, inaccurate or false facts are at EUR 10,000.
- When the tax authorities adjust the pricing of a transaction, penalties may be up to 15% of the gross adjustment.

Tax regulations also consider the applicability of "secondary adjustments" in those transactions where both values will have a tax treatment that corresponds with the nature of the realised profit.

2.11 Interest

Article 19 CITR states that interest charges on TP adjustments are calculated from the end of the due date for filing of self-assessments in the period in which the related party transactions occurred, or if the regularisation gave place to devolution and the self-assessment was presented out of time from the date of the ex-temp presentation of the self-assessment.

Interest will be calculated until the date on which the interest payment is made.

2.12 Use of most reliable information

With respect to the benchmarking analysis, the OECD prefers to use the most reliable information available ("…usually…require the use of local comparable over the use of regional". BEPS Action 13, p. 24-25). The Spanish Tax authority has not expressed a preference towards the use of local comparables in a benchmarking study and Spanish or pan-European comparables are accepted. Secret comparables are not used by the tax authority. The AEAT uses the pan-European Amadeus/Catalyst TP database and external comparatives in analysing transfer prices.

2.13 Languages

There is no specific rule regarding the language of TP documentation. If provided in English, a Spanish translation could be requested during a tax audit.

2.14 APA

Unilateral, bilateral, and multilateral Advance Pricing Agreements (APAs) can be negotiated with the tax authorities. There is no filing fee.

The new regulations have extended the validity term to a six-year period (under prior regulations, this was four years). The six-year period could include the previous year, when the time limit for filing the tax return has not yet expired, the current year and the next four years.

2.15 Confidentiality

The Spanish tax authorities will treat TP documentation confidentially and can only exchange TP documentation with the tax authorities of another country if there is a legal basis. This legal basis can be found in domestic law, a tax treaty or an EU-directive. The TP documentation is never made available to the public.

3. Standards with respect to the content of transfer pricing documentation

Spanish TP documentation standards are incorporated in articles 13-16 CITR. The CITR specifies the documentation requirements for the group and the local entity in articles 15 and 16 respectively, while the standards regarding the CbC Report are detailed in articles 13 and 14.

The regulations for new informational documentation requirements are applicable for periods starting from 1 January 2016.

3.1 Master File

The following information should be included in the Master File:

1. Information about the structure and organisation of the group:

1. General description of the organisational, legal and operative structure of the group, as well as any relevant changes in them.
2. Identification of the different entities belonging to the group.

2. Information about the group activities:

1. A description of the main activities of the group, as well as a description of the main geographic markets in which the group operates, its main profit sources and the supply chain of those goods and services representing at least 10% of net business turnover of the fiscal year.
2. A general description of the functions performed, risks assumed and main assets used by the group entities, including changes in comparison to the previous fiscal year.

3. A description of the group's TP policy including the price fixing method(s) adopted by the group.
4. A list and brief description of the cost sharing agreements and of the relevant services agreements between group entities.
5. A description of the business restructuring transactions, acquisitions or divestitures occurring during fiscal year.

3. Information about the group's intangible assets:

1. A general description of the group's overall strategy for the development, ownership and exploitation of intangibles, including location of main R&D facilities where activities are made, as well as their addresses.
2. A list of the group's relevant intangibles for TP purposes and which entities legally own them, as well as a general description of the group TP policy related to them.
3. The amount of the intercompany transactions, involving intangibles, identifying the associated enterprises related to intangible and their tax residence territories.
4. A list of agreements between the group entities related to intangibles, including cost contribution agreements, principal research services agreements and licence agreements.
5. A general description of any relevant transfer of interest in intangibles among associated enterprises carried out during the fiscal year concerned, including the entities, countries and compensation involved.

4. Information about the financial activity

1. A general description of how the group is financed, including the main financing agreements subscribed with non-related persons or entities.
2. The identification of any member of the Multinational Enterprise (MNE) group that provides a central financing function for the group, including the country under whose laws the entity is organised and the place of effective management of those entities.
3. A general description of MNE group TP policies, related to financing agreements between associated entities.

5. Financial and fiscal situation of the group

1. The MNE's annual consolidated financial statements for the fiscal year concerned, whether prepared for mandatory reasons or voluntary purposes.
2. A list and brief description of MNE group existing unilateral advance pricing agreements (APAs) and any other tax ruling regarding the allocation of income between countries.

3.2 Local File

The following information should be included in the Local File:

1. Information about the taxpayer:

1. A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports about the evolution of the taxpayer's activities, indicating the countries or territories in which those have their tax residence.
2. A description of the taxpayer's business activities, its business strategy and, if appropriate, including an indication whether the local entity has been involved in or affected by business restructuring or intangibles transfers in the fiscal year.
3. Main competitors.

2. Information about controlled transactions:

1. A detailed description of the nature, characteristics and amount of the controlled transactions.
2. An identification (name, business name, tax address and tax identification number) of the taxpayer as well as the related persons or related-party entities regarding the intercompany transaction.
3. A detailed comparability analysis, in terms of Article 17 of this Regulation.
4. A description of the TP method selected, including the reasons for selecting that method, its application process, the set of comparables, and the value or range of values provided by them.
5. If applicable, information regarding the expenses sharing criteria linked to services jointly rendered in benefit of various related-party persons or entities, as well as the corresponding agreements, if any, and the cost sharing agreements in terms of Article 18 of this Regulation.
6. A copy of existing unilateral advance pricing agreements (APAs) and any other tax ruling regarding the related-party operations described above.
7. Any other relevant information at the taxpayer's level, that have been used to determine the valuation of its related-party operations.

3. Economic-financial information of the taxpayer:

1. The taxpayer's annual financial statements.
2. Reconciliation between the financial information used in applying the TP methodology and the annual financial statements, if necessary and relevant.
3. The financial information of the set of comparables and the source they come from.

3.3 Special considerations – Spanish case

- Spanish Permanent Establishments (PEs) of foreign resident taxpayers are also obliged to prepare a Local file in Spain (Article 13.2.b CITR).
- The tax authority normally focusses on the interquartile range in a transactional net margin method (TNMM) analysis.
- Other generally accepted methods and valuation techniques (distinct from the transactional gross and net margin methods), that are in line with the arm's-length principle, can be applied. (Article 18.4 CITL)
- It must be noted that the Master File requirements will not be compulsory to those groups with a net turnover below EUR 45 million (Article 18.3 CITL and Article 16.4 CITR). If applicable, the specific documentation will contain the following simplified content:
  a) A detailed description of the nature, characteristics and amount of the controlled transactions.
  b) An identification (name, business name, tax address and tax identification number) of the taxpayer as well as the related persons or related-party entities regarding the intercompany transaction.
  c) Identification of the TP method selected,
  d) The set of comparables, and the value or range of values provided by them.
- In addition, there is a separate regulation for taxpayers complying with article 101 CITL (small companies with a turnover of less than EUR 10 million). In this case, they should present standardised documentation (Article 16.4 CITR).

4. Country-by-Country reporting standards

The new CITR (2015) introduced a requirement for information for those company groups whose consolidated group turnover exceeds EUR 750 million. According to Article 14 CITR, the CbC Report must include:

1. Information regarding gross group income, with separate information between the related-party entities and third-party ones.
2. The Earnings Before Interest and Taxes (EBIT) or results or other with similar nature or concept.
3. The Corporate Income Tax paid (or other with similar nature or concept), including withholding payments.
4. The accrued Corporate Income Tax (or other with similar nature or concept), including withholding payments.
5. The amount of equity and other undistributed results at the end of the fiscal year.
6. The average number of employees.
7. Material assets and real estate investments other than treasury and accounts receivable.
8. A list of resident entities, including permanent establishments, and main activities undertaken by each of them.
9. Other information that is considered relevant and an explanation, where appropriate, of the information included.

For a summary of the TP documentation requirements in Spain, please see the following table:

Turnover (EUR million)	Country-by-Country Report	Master File	Local File	Simplified Local documentation	Standardised documentation
<10					X
10 to 45				X	
45 to 750		X	X		
>750	X	X	X		

Switzerland

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1. Introduction

1.1 Legal context

On 23 November 2016, the Federal Council adopted an approach based on the multilateral agreement on the exchange of Country-by-Country reports and with adherence to the Federal Act, ensuring an effective implementation. The Multilateral Competent Authority Agreement on the Exchange of Country-by-Country ("CbC") Reports ("CbCR"), and the Federal Act on the International Automatic Exchange of CbCRs, of Multinational Enterprises ("MNE") were adopted by Parliament during the summer of 2017. Given that a referendum was not called on these proposals, the Federal Council decided during its meeting which was held on 17 October 2017 to bring the law and agreement into force by December 2017. Many Qualifying MNEs operating in Switzerland are producing CbC reports from tax year 2018 onwards. As a result, Switzerland and its partner states are exchanging CbC reports as from year 2020.

The legislation in force does not adopt the three-tiered approach to TP documentation consisting of a master file, local file and CbCR. Currently, it is permitted that only CbCR is required to be submitted.

Switzerland does not currently have any other TP requirements and does not plan to make TP documentation compulsory in the future. However they are expected to monitor the situation.

1.2 Practical context

The minimum consolidated turnover threshold for the affected Swiss MNE equals to EUR 750 million (cf. 2.1 for further details).

Currently, it is not anticipated that Switzerland will implement other recommendations included in the BEPS Action 13 Report, such as the preparation of the TP Master file and Local file. However, Swiss MNEs are well-advised to protect their intercompany arrangements by establishing and maintaining appropriate TP documentation.

Those CbCRs which have been voluntarily submitted by MNEs for tax years prior to 2018 are to be exchanged by the Swiss Federal Tax Administration (SFTA) with competent tax authorities of the partner jurisdictions as from 2018.

2. Formal requirements

2.1 Which taxpayers

The legislation in force requires Swiss-parented multinational entities (MNEs) with annual consolidated group revenue of the equivalent of EUR 750 million (CHF 900 million) or more to submit the first CbCR for fiscal years beginning on or after 1 January 2018.

Under the following circumstances, Swiss group entities (other than Swiss-parented MNEs) would also be obliged to file CbCRs:

- The jurisdiction in which the ultimate parent entity is resident for tax purposes does not have a qualifying competent authority agreement in effect to which Switzerland is a party for filing the CbCR for the reporting fiscal year.
- There has been a systemic failure of the jurisdiction of tax residence of the ultimate parent entity and the SFTA has notified the relevant Swiss taxpayer.
- The Swiss company was elected (by the MNE Group) as a substitute for the ultimate parent company and acts as ‘Surrogate Parent Entity’ for CbC-reporting purposes.

2.2 Deadlines (timing)

The CbCR must be submitted by the Swiss taxpayer to the SFTA within 12 months of the group’s financial year-end. Thus, the CbCR for 31 December 2018 year-ends must have been submitted on 31 December 2019 at the latest. Hence, Swiss CbC reporting exchange has been/will be conducted with the relevant partner states as from 2020 and Switzerland will be able to receive such reports from then at the latest. The on-going updated list of the partner countries can be found here: **https://www.sif.admin.ch/sif/en/home/multilateral/steuer_informationsaust/automatischer-informationsaustausch/cbcr.html**.

2.3 Penalties

Under the law in force, failure to provide the CbCR or providing an incorrect or incomplete CbCR would trigger a penalty of up to TCHF 250. In addition, penalties of up to TCHF 50 could be imposed for non-cooperation with the SFTA during the CbC reporting examination process.

2.4 Languages

The Swiss country-specific report will have to be prepared in either German, French, Italian or English. Financial information must be stated in one single currency, either Swiss francs or the foreign functional currency adopted by the MNE.

3. Standards with respect to the content of transfer pricing documentation

The minimum standard only concerns the CbCRs and their automatic annual exchange. Preparation of the master and local files is not covered.

4. Country-by-Country reporting standards

The CbCR has to be submitted as an XML-file to the SFTA (via portal: **https://eportal.admin.ch/start**) and to most other tax authorities. On 24 and 30. June 2020 Switzerland has published technical respectively user guides for tax administrations and taxpayers (**https://www.estv.admin.ch/estv/de/home/internationales-steuerrecht/fachinformationen/cbcr/datenuebermittlung.html**).

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1. Introduction

1.1 Legal context

Article 39 of the Ukraine Tax Code regulates transfer pricing (TP) issues and requires that some transactions are recognised as “controlled transactions” (CTs). CTs are subject to control by the tax authorities and must be performed according to the arm’s-length principle.

The 2020 Ukrainian Tax Reform introduced innovations in Ukrainian TP-regulations. In particular, are new to Ukraine the Master File, CBC report and Notice of membership to a multinational enterprise (MNE) group. Also, the criteria for related parties were revised, shareholding requirements were increased from 20% to 25% and new penalties got implemented. The goal of said amendments is alignment with the international approach and best practices.

1.2 Practical context

Ukrainian companies need to review and confirm whether their transactions meet the threshold specified in the Ukraine Tax Code (both from a quantitative and qualitative perspective) and if so, they need to file a report on CTs and prepare thorough TP documentation (in Ukrainian or supported by a translation) to confirm that the arm’s-length principle has been applied to said transactions.

Furthermore, as from the 2020 reporting period, taxpayers that are members of a MNE group and meet specific criteria have to file a Notice of membership to a MNE group, provide a Master File (upon request of the Ukrainian tax authorities) and/or provide a Country-by-Country (CBC) report.

2. Formal requirements

2.1 Which taxpayers

The following business transactions carried out by Ukrainian taxpayers are deemed to be controlled (if they have an influence on the corporate income tax base):

- Transactions with non-resident related parties;
- International transactions on the sale of goods and/or services through non-resident commission agents;
- Transactions with non-residents that do not pay CIT and/or are not tax residents of the country where they are registered as legal entities and are incorporated under specific legal forms (the list of such legal forms of non-residents has been approved by the Cabinet of Ministers. This list currently includes 104 specific legal forms from 26 countries);
- Transactions with non-residents (both related and non-related parties) registered in a jurisdiction listed by the Cabinet of Ministers (the full list of low tax jurisdictions now includes 79 jurisdictions), i.e.:
  - a state (territory) where the income tax rate is lower than in Ukraine by at least 5 percentage points;

- — a state which is not a party to international agreements with Ukraine containing provisions on information of exchange;
- — a state, where the respective agencies do not provide for timely and full exchange of tax and financial information at the request of tax agencies;

- Business transactions (including intrafirm settlements), between a non-resident and its permanent representative office in Ukraine.

2.2 Aggregation of transactions

Criteria for grouping several CTs for TP purposes are also prescribed. The principle of grouping allows to unifiy several CTs (to confirm that the arm's-length principle has been applied), subject to the following conditions: such transactions are interconnected or they are a continuation to each other or have a continuous or regular nature.

Such transactions may include, but are not limited to:

- purchase (sale) of goods/services under long-term agreements (in particular those performed throughout the entire reporting period);
- transmission (receipt) of rights for the use of different intangibles associated with one particular good/service;
- purchase (sale) of a series of closely related products (product group) and/or services;
- purchase (sale) of different goods/services, provided that one good/service, or a group thereof, creates demand for the other good/service, or a group thereof.

2.3 Deadlines (timing)

The deadline for submission of the report on CTs and Notice of membership to a MNE group is 1st October of the year following the reporting year.

TP documentation should be submitted upon request of the Ukrainian tax authorities within 30 days.

The Master File should be submitted upon request of the Ukrainian tax authorities within 90 days. The Country-by-Country (CbC) report should be submitted within 12 months after the final day of the MNE group's reported financial year.

The tax authorities have the right to audit CTs and request TP documentation to be presented for review for a period of 2,555 days (seven years) following the date of submission of the report on CTs. The duration of an audit should not exceed 18 (general term) or 30 months (specific term).

2.4 Materiality

Transactions stated above (except for transactions between a non-resident and its permanent representative office in Ukraine) are treated as CTs, if both of the following conditions are met:

- The annual income of a taxpayer from any activities, defined in accordance with the accounting standards, exceeds UAH 150 million (net of indirect taxes) for the reporting year;
- The volume of such transactions of the taxpayer with one counterparty, as defined under the accounting standards, exceeds UAH 10 million (net of indirect taxes) for the reporting year.

Transactions between a non-resident and its permanent representative office in Ukraine are treated as CTs, if the volume of such transactions, as defined under the accounting standards, exceeds UAH 10 million (net of indirect taxes) for the reporting year.

2.5 Retention of documents

The documents and information concerning CTs and TP must be retained for 2,555 days (seven years).

2.6 Frequency of documentation updates

Taxpayers engaged in CTs must prepare and retain TP documentation for each reporting period.

However, TP documentation, presented upon request of the tax authorities must contain all information as set by the Ukraine Tax Code as per the date of receipt of said request, i.e. the documentation must be updated before presentation to the tax authority.

2.7 Tax return disclosures

Taxpayers engaged in CTs during a reporting year must file a report on CTs by 1st October of the year following the reporting year. The report on CTs must contain information on all CTs, performed during the reporting period.

Also, taxpayers must complete a special enclosure to the corporate income tax return to disclose any TP adjustments.

2.8 Burden of proof

The burden of proof formally falls on the tax authorities. However, the taxpayer must provide the tax authorities with all the required TP documentation in order not to give the tax authorities reason to adjust the tax base.

Prices under CTs are assumed not to be at arm's length, unless otherwise proved by the taxpayer. Companies must also prove that the commercial and economic conditions of a CT are comparable to those for transactions between non-related parties. The burden of proof therefore shifts from the tax authorities to taxpayers engaged in CTs.

If the Ukrainian tax authorities undertake an audit of a CT, they are required to use the same price determination methods as the taxpayer has used to determine the price payable in relation to the transaction.

If the tax authorities can prove that the method of calculation used by the taxpayer did not allow the taxpayer to correctly determine the price payable in relationship to the CT; then they will be able to challenge the method chosen by the taxpayer and to use an alternative method to calculate the arm's-length price.

2.9 Penalties

2.9.1 General

Penalties are based on notional units known as a "subsistence minimum for an employable person" (SM) as of 1st January of the reporting year. SM as per 1 January 2020 is UAH 2,102 (about USD 89) per month.

Non-compliance	Penalty
Non-submission of Report on CTs or Master File	300 SM (f.e., in 2020 – UAH 630,600)
Failure to submit TP documentation	3% of amount of CT for which no documentation was submitted, but not more than 200 SM (f.e., in 2020 – UAH 420,400)
Failure to submit Report on CTs, Master File or TP documentation upon expiration of 30 calendar days following the last day of the deadline for payment of penalties for non-submission	5 SM (f.e., in 2020 – UAH 10,510) for each calendar day of non-submission after expiration of 30 calendar days, but not more than 300 SM (f.e., in 2020 – UAH 630,600)

Non-compliance	Penalty
Failure to declare a CT in Report on CTs	1% of amount of CT that was not declared in the report but not more than 300 SM (f.e., in 2020 – UAH 630,600)
Non-submission of clarify Report on CTs upon expiration of 30 calendar days following the last day of the deadline for payment of penalties	1 SM (f.e., in 2020 – UAH 2 102) for each calendar day of non-submission after expiration of 30 calendar days, but not more than 300 SM (f.e., in 2020 – UAH 630,600)
Delayed submission of Report on CTs	1 SM (f.e., in 2020 – UAH 2,102) for each calendar day of delay but not more than 300 SM (f.e., in 2020 – UAH 630,600)
Delayed submission of TP documentation	2 SM (f.e., in 2020 – UAH 4,204) for each calendar day of delay but not more than 200 SM (f.e., in 2020 – UAH 420,400)
Delayed submission of Master File	3 SM (f.e., in 2020 – UAH 6,306) for each calendar day of delay but not more than 300 SM (f.e., in 2020 – UAH 630,600)

* As per 1 January 2020: USD 1 = UAH 23.67

2.9.2 Penalties in case of a TP-adjustment

If the tax audit reveals that the terms of a CT differ from the arm's-length principle, resulting in erroneous calculation of taxable income and/or understatement of tax, the tax authority adjusts the price of said CT and tax liabilities.

If the tax authority charges additional tax liabilities, a penalty of 25% of said additionally charged tax liability shall be applied to the taxpayer.

Simultaneously, the taxpayer has the right to make a self-adjustment without incurring any penalties and fines until 1st October of the year following the reporting year (if later – 3% penalty of the amount of adjustment).

2.9.3 CbC-reporting

CbC-reporting penalties are also based on notional units known as a "subsistence minimum for an employable person" (SM) as of 1st January of the reporting year. SM as per 1 January 2020 is UAH 2,102 (about USD 89) per month.

Infringement of CBC-reporting will result in the following fines.

Non-compliance	Penalty
Non-submission of CbC report	1,000 SM (f.e., in 2020 – UAH 2,102,000)
Non-submission of Notice of membership to MNE group	50 SM (f.e., in 2020 – UAH 105,100)
Failure to submit CbC report or Notice of membership to MNE group upon expiration of 30 calendar days following the last day of the deadline for payment of penalties for non-submission	5 SM (f.e., in 2020 – UAH 10,510) for each calendar day of non-submission after expiration of 30 calendar days, but not more than 300 SM (f.e., in 2020 – UAH 630,600)
Failure to declare a member of MNE group in CbC report	1% of undeclared member`s income of CT that was not declared in the report but not more than 1,000 SM (f.e., in 2020 – UAH 2,102,000)

Non-compliance	Penalty
Submitting inaccurate information in CBC report	200 SM (f.e., in 2020 – UAH 420,400)
Submitting inaccurate information in Notice of membership to MNE group	50 SM (f.e., in 2020 – UAH 105,100)
Delayed submission of CBC report	10 SM (f.e., in 2020 – UAH 21,020) for each calendar day of delay but not more than 1,000 SM (f.e., in 2020 – UAH 2,102,000)
Delayed submission of Notice of membership to MNE group	1 SM (f.e., in 2020 – UAH 2,102) for each calendar day of delay but not more than 100 SM (f.e., in 2020 – UAH 210,200)

* As per 1 January 2020: USD 1 = UAH 23.67

2.10 Interest

No specific guidance is available.

2.11 Use of most reliable information

Taxpayers and tax authorities use the sources of information, containing data, which make it possible to compare commercial and financial terms of controlled and non-controlled transactions, in particular:

- Information on comparable non-CTs of the taxpayer and information on comparable non-CTs of its counterpart – a party of CT with non-related parties;
- Any information sources, containing public information and provide information on CTs and parties;
- Other sources of information, where a taxpayer may get information in compliance with current Ukrainian legislation, which present information on CTs and parties, if the taxpayer presents this information to the tax authorities;
- Information, received by a controlling agency under international agreements of Ukraine.

The tax authorities must use the same sources of information used by the taxpayer for preparation of TP documentation if it cannot prove that the use of other sources of information makes it possible to get a better level of comparability of commercial and financial terms of transactions compared.

State authorities are not entitled to use information which is not publicly available to compare the conditions of CTs with the conditions of non-CTs (including information available only to state authorities).

2.12 Languages

TP documentation and the Master File must be provided in Ukrainian. If TP documentation contains documents in foreign languages the taxpayer is obliged to provide the tax authorities with a translation into Ukrainian (certification of the authenticity of the translation is not required).

2.13 Confidentiality

General rules apply. No specific guidance is available.

3. Standards with respect to the content of transfer pricing documentation

3.1 Master File

The Ukrainian tax authorities have the right to request a taxpayer/member of the MNE group for the Master File if the consolidated income of the MNE group for the preceding financial year is the equivalent of EUR 50 million or more.

The Master File is a single document or several documents of an arbitrary format, containing the following information:

- Organisational structure of the MNE group (graphic presentation) stating the members of the MNE group, their organisational and legal form, structure of ownership (stating the shares), countries and territories, where the members operate;
- General description of business of the MNE group, including but not limited to key factors affecting financial performance of the MNE group; description of chains of supply and pricing principles for major products (goods, services); a list and summary of significant contracts on services (works) between members of the MNE group; short functional analysis of activities of members of the MNE group significantly affecting financial performance of the group; information on major business restructuring agreements during the financial year;
- Intangible assets, used by the MNE group, including: description of development strategy; list and description of intangible assets significantly affecting the pricing; list of major agreements related to intangible assets made between members of the MNE group; MNE group TP-policy description; description of significant transactions on transfer of intangible assets between members of the MNE group during respective finance year, etc.;
- Financial activities of the MNE group, i.e. general description how the group is financed, stating all members of the MNE group engaged in centralised intragroup financial activities in the interests of group members; general description of TP policy for financing of members of the MNE group;
- Consolidated financial statements of the MNE group for the latest finance year; if such statements are not available, any other consolidated statements prepared for management, fiscal or other purposes;
- List and summary of valid advance pricing agreements (APAs).

3.2 Local File

Local File – TP documentation – is a single document or several documents of an arbitrary format, containing the following:

- Comprehensive information about parties of CTs and taxpayer`s related parties, including information on taxpayer`s beneficiaries, entities which are owned 25% or more by the taxpayer (either directly or indirectly) and information on owners of 25% or more in the taxpayer (either directly or indirectly);
- Information about the group (parent company and subsidiary companies), including: structure, description of activities, group TP-policies, information on entities which the taxpayer provides with local management reports (names of the countries in which these entities hold their head offices);
- Description of the management structure of the taxpayer, its organisational structure scheme, number of employees;
- Description of business and strategy of business, implemented by the taxpayer, in particular, economic terms of business, analysis of respective markets of goods (works, services), where the taxpayer operates, major competitors;

- Information about the taxpayer's participation in business restructuring or transfer of intangible assets during the reporting or preceding year, with an explanation of the aspects of those operations that had or still have an impact on the operations of the taxpayer;
- Description of the CTs, including the supply chain of goods (works, services) in CTs (value creation);
- Description of goods (work, services), including physical characteristics, quality and reputation in the market, country of origin and manufacturer, trademarks, etc. Description of purchase of services (works), intangible assets or items other than goods, should have substantiation of economic feasibility and business purpose of its purchase;
- Information about the payments actually made in the CTs (amounts and currency of payment, date, payment documents);
- Factors that impact the price, in particular business strategies of the parties (if any);
- Functional analysis of the CTs: information on the functions of CTs' parties, an asset which they used and which are associated with such CT, and economic (commercial) risks taken into account by such persons in the implementation of the CT;
- Economic and comparative analysis: amount of income or expenses, profitability level; TP method applied, its substantiation; information about and approach to selection of comparable data and sources of information; substantiation of use of information for several tax periods (years) during calculation of profitability range and calculation of average weighted profitability index (if any); profitability level calculation of the arm's-length price or profitability range; description and calculation of adjustments of terms in a controlled and comparable transaction (if any) etc.;
- Information about self-adjustments of tax base and tax amount made by the taxpayer (if any);
- If taxpayer is a member of MNE group: copies of significant intragroup agreements that affect pricing in CTs and copies of advance pricing agreements (APAs);
- Copies of auditor's report for the appropriate period and copies of the contracts on CTs.

4. Country-by-Country reporting standards

4.1 Threshold and required content

A Ukrainian resident taxpayer, member of the MNE group, must file a CbC report to a tax body, if both of the following conditions are met:

- Total consolidated income of MNE group, where the taxpayer is a member, for the preceding financial year is EUR 750 million or more, and
- One of the following is present:
  - taxpayer is a parent company of MNE group;
  - parent company of the MNE group authorises Ukrainian resident taxpayer to file CbC report;
  - laws of the domicile of the parent company of the MNE group do not require filing of CbC report by the MNE group, and the parent company does not authorise other member of the MNE group to file CbC report in other jurisdiction where the CbC report is required;

— there is an international agreement between Ukraine and respective jurisdiction of domicile of the parent company of the MNE group or other member of the group authorised by the parent company to file CbC report, and the agreement provides for exchange of fiscal information, while rules of exchange by CbC reports are not set yet, or there are facts of systematic non-compliance with these rules.

The CbC report contains information on each jurisdiction where a member of the MNE group is registered, or where the MNE group operates, including, but not limited to the following:

- State (territory), where a member of the MNE group was founded, and state (territory) of its residence;
- Total income (revenue) for financial year, covered by CbC report, including income (revenue) under contracts with the members of the MNE group and related parties, and income (revenue) under contracts with non-related parties;
- Profit (loss) before taxes, accrued and paid corporate income tax or a similar tax, number of employees for the year covered by CbC report;
- Share capital (registered capital), retained income (accumulated loss), carrying amount of tangible assets as at the closing date of financial year, covered by CbC report;
- Major businesses of the members of the MNE group.

The CbC report is prepared for the financial year, set by the parent company of the MNE group, and it may differ from the calendar year.

The CbC report needs to be filed in Ukraine not earlier than 2021 financial year.

4.3 Notification requirement for subsidiary companies

Taxpayers, engaged in CT during a reporting year, must file Notice of membership in parent company to respective Ukrainian tax authorities.

Notice of membership in MNE group should contain the following:

- Information on parent company of the MNE group, where a taxpayer is a member, i.e. the name, country (territory) of residency, registration address, registration number(s) of the parent company in the country (territory) of its registration, taxpayer code(s) of the parent company in the country (territory) of its registration;
- Information on a legal entity – member of the MNE group, authorised to submit CbC report of the MNE group where the taxpayer is a member, if any, i.e. the name, country, territory of tax residency, registration address, registration number(s) of the authorised entity, taxpayer code(s) in the country (territory) of its registration, or information that the MNE group does not have to submit CbC report in accordance with laws of other countries;
- Closing date of a financial year, covered by consolidated financial statements of the MNE group, or, if such statements are not prepared, closing date of a financial year in accordance with internal regulations of the parent company of the MNE group;
- Information on total consolidated income of the MNE group for the preceding financial year.

Ukrainian taxpayers will have to file a Notice of membership to parent company for the first time in 2021 to cover 2020.

United Kingdom

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1. Introduction

1.1 Legal context

The UK's current transfer pricing (TP) rules are contained in the Taxation (International and Other Provisions) Act 2010 (TIOPA 2010), Part 4.

The UK is a member of the OECD and prescribes to the OECD Guidelines. UK TP legislation explicitly requires that the TP rules should be interpreted so as to ensure consistency with the OECD Guidelines (in July 2017, the OECD released the 2017 edition of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.). Treasury assent is required in order for the UK legislation to incorporate each new edition of the Guidelines. An order was granted in March 2018 to mean the 2017 guidelines will apply to all accounting periods beginning on or after 1 April 2018.

The UK government has implemented legislation to give effect to Country-by-Country Reporting (CbCR) as per Action 13 of the OECD/G20-project Base Erosion and Profit Shifting Plan (BEPS). The legislation is contained in Finance Act 2015 section 122, Statutory instrument 2016 No 237 and Statutory instrument 2017 No 497. Further details on the CbCR-rules are detailed below.

The MLI entered into force for the UK on 1 October 2018 and began to have effect in the UK for UK tax treaties from:

- 1 January 2019 for taxes withheld at source;
- 1 April 2019 for Corporation Tax;
- 6 April 2019 for Income Tax and Capital Gains Tax.

The date which individual UK tax treaties are modified by the MLI depends on the date our treaty partners deposit their own instruments of ratification, acceptance or approval.

1.2 Practical context

Her Majesty's Revenue and Customs (HMRC) are the taxing authority in the UK.

HMRC publish guidance on its interpretation of the TP rules on its website. The guidance is contained in the international tax manual as well as technical notes. The UK does not have a rulings process for TP outside of an APA.

At present the UK has not implemented any specific legislation to require the Masterfile and Countryfile form of documentation as per Action 13 BEPS.

The UK requirement therefore remains unchanged and taxpayers must have documentation to confirm compliance with the arm's-length principle. HMRC has published guidance on the type of documentation that it would expect a taxpayer to keep including primary accounting records, tax adjustment records and evidence of compliance of the arm's-length principle.

It should be noted that HMRC refer taxpayers to OECD TP documentation guidance as an example of best practice documentation.

2. Formal requirements

2.1 Which taxpayers

The UK TP rules require that transactions made or imposed between parties by means of a transaction or series of transactions are consistent with the arm's-length principle, where otherwise there would be a UK tax advantage. The rules are widely drafted and are intended to cover almost every kind of transaction, including UK to UK transactions.

There is an exemption from the UK transfer rules for small and medium sized enterprises (SMEs). The definition of an SME is a modification of the European recommendation (2003/361/EC). An entity qualifies as either small or medium if it meets the staff headcount ceiling for that class and one (or both) of either the annual turnover limit or the balance sheet limit which are contained in the following table:

		And less than one of the following limits:	
Enterprise	**Maximum number of staff**	**Annual turnover**	**Assets**
Small	50	EUR 10 million	EUR 10 million
Medium	250	EUR 50 million	EUR 43 million

The limits must be calculated with reference to the whole group of associated enterprises and not the UK entity alone.

There are some exceptions, the main one being the SME exemption does not apply to transactions with parties in non-qualifying territories (countries where there is no UK double tax treaty with appropriate non-discrimination article).

The CbCR-requirements apply to UK entities that are part of a multinational enterprise (MNE) with a consolidated group revenue of at least EUR 750 million or more for an accounting period commencing on or after 1 January 2016. The CbC-report must be filed in respect of the accounting period immediately following that in which the threshold requirement is met.

2.2 Aggregation of transactions

HMRC guidance refers to OECD guidelines when considering whether aggregation of transactions is possible. Aggregation may be accepted if the taxpayer can demonstrate that at arm's length a trader would do the same.

2.3 Deadlines (timing)

Evidence to support an arm's-length price should be available when the relevant tax return is submitted to HMRC. The documentation does not need to be submitted with the tax return but should be available should HMRC later request it.

If the TP documentation is not available upon request of the tax authorities, a reasonable period is given to the taxpayer to deliver the requested documentation. Failing to provide the documentation may have penalty implications (see below).

If the UK entity is required to file a CbC-report, it must file the report within twelve months of the end of the relevant accounting period. There is also a notification requirement, requiring a UK entity in each MNE group to submit an annual notification to HMRC, stating which entity in the MNE group will file the CbC-report. To avoid penalties the notification to HMRC must be made by the end of the period being reported.

2.4 Materiality

In principle, all transactions with associated enterprises should be supported by TP documentation. There is no de-minimis level below which documentation would not be required.

In practice, however, HMRC often limit their scope of enquiry to transactions with material impact. For example, HMRC have expressed that they have no desire to tie up resources investigating UK-to-UK transactions where the tax risk is low.

HMRC have confirmed they will accept the simplified method of determining the ALP for low value-added services going forwards.

2.5 Retention of documents

HMRC require companies to keep records for six years from the end of the last company financial year they relate to, or longer in certain circumstances such as when a tax return has been filed late or there is an ongoing tax enquiry.

2.6 Frequency of documentation updates

Contemporaneous TP documentation is required for each accounting period and evidence should be available to support the arm's-length price included in a tax return. In practice, a light touch review should be undertaken each year to update the documentation for any changes in the business and market developments. A significant change in the facts and circumstances would merit a more detailed update of the documentation.

The CbC-reports and relevant notifications to HMRC should be completed each year.

2.7 Tax return disclosures

There are no tax return disclosure requirements or TP-specific returns. UK entities are required to self-assess their compliance with the arm's-length principle in filing tax returns. Where an entity would have lower taxable profits or greater allowable losses calculated using their accounting records than if calculated on arm's-length terms then they must identify and make TP adjustments when submitting their tax returns.

2.8 Burden of proof

In the UK, the burden of proof that inter-company transactions follow arm's-length principles is the responsibility of the taxpayer through the submission of their self-assessment return.

Where HMRC consider there has been a UK tax advantage resulting in lost revenue, the burden of proving that this was a result of the taxpayer's negligence or carelessness falls on HMRC.

2.9 Penalties

2.9.1 General

A penalty of up to GBP 3,000 can be levied if the company fails to keep and preserve accurate records. Additional penalties may be charged for false or misleading statements made in connection with an application for an advanced pricing agreement (APA).

2.9.2 Penalties in case of a TP-adjustment

The general self-assessment rules relating to the imposition of penalties for incorrect returns apply to errors in a return that relate to TP. The level of penalty depends on whether the error is careless or deliberate. The penalties are tax geared at up to 100% of the potential lost revenue figure.

Where a company is loss-making, a penalty may be charged of up to 10% of any TP adjustment which HMRC makes in respect of the losses.

HMRC have stated that where an 'honest and reasonable' attempt to comply with the arm's-length standard has been made, they will not seek to levy penalties on the taxpayer.

2.9.3 CbC-reporting

Failure to notify HMRC or to submit a CbC-report will result in an automatic penalty of GBP 300. If a penalty is assessed and the failure to submit continues, then the entity is liable to a further penalty for each subsequent day on which the failure continues, of an amount not exceeding GBP 60 a day. A tribunal can increase this penalty to GBP 1,000 per day.

If inaccurate information is provided to HMRC, and this was known at the time provided or the inaccuracy is discovered and no reasonable steps to inform HMRC are taken, then a penalty of up to GBP 3,000 may be levied.

Notice of an appeal against any penalties must be given in writing within 30 days.

2.10 Interest

There are no specific rules on interest charged on subsequent tax payments in TP cases. Interest is normally charged on tax underpaid and is calculated from the day on which the tax was originally due at a rate of 3.25%.

2.11 Use of most reliable information

UK legislation closely follows the OECD guidance on comparability. This generally consists of both UK comparables and pan-European searches. However, there are no specific requirements and as such relevant global, regional or non-UK transfer pricing reports may be accepted.

2.12 Languages

The TP documentation must be provided in English.

HMRC have not specified a language in respect of CbC reporting, however it is anticipated that HMRC expect reporting to be in English.

2.13 Confidentiality

HMRC are bound by confidentiality considerations in respect of information obtained through TP. The tax authorities can only exchange the TP documentation with the tax authorities of another country if there is a legal basis such as through a tax treaty, an EU-directive or international exchange of information agreement. The TP documentation is never available to the public.

There is no UK requirement for CbC-reports to be made publicly available. However, the legislation contains enabling provisions which give the Treasury powers to issue regulations requiring groups to publish CbC-reporting information in the future.

3. Standards with respect to the content of transfer pricing documentation

At present the UK has not implemented any specific legislation to require the Masterfile and Countryfile form of documentation as per Action 13 BEPS. It should be noted that HMRC refer taxpayers to OECD TP documentation guidance as an example of best practice documentation.

HMRC has published guidance on the type of documentation that it would expect a taxpayer to keep including primary accounting records, tax adjustment records and evidence of compliance of the arm's-length principle. Documentation relating to evidence of compliance with the arm's-length principle is to follow the OECD Guidelines.

HMRC TP specialists do have some guidance which is published on the HMRC website on the types of information to request from taxpayers. This list is reproduced here:

- Identification of relevant connected party transactions, with details of products or services provided
- A group structure globally and for the UK
- An overview of the activities and recent history of the business
- Details of the products and/or services provided
- Documents which the business has prepared for CTSA (corporation tax self-assessment) TP requirements, including any TP reports with details of any comparability studies and of any searches for comparables
- Any further evidence the business has of arm's-length pricing
- The business's own TP manual or policy document(s)
- Details of the TP methodologies including clear details of how the prices are calculated and of the impact this has on the parties' profit levels
- A functional analysis detailing the functions performed by the parties to the transactions, the assets used and risks assumed by each
- An outline of the key transactional flows in the business, both internally and with third parties, together with a discussion of contractual terms
- A volume breakdown of relevant intercompany transactions
- Accounts for all parties relevant to the transactions (wherever located) with a segmental split of the relevant figures where appropriate
- Agreements and contracts governing the transactions
- Details of the main profit generating activities and assets in the group together with details of where they are located
- Details of the key intellectual property used in the business, the entities which have developed or acquired it and currently own and use it, and of any payments related to it
- Details of the intra-group funding arrangements

4. Country-by-Country reporting standards

4.1 Threshold and required content

There is a requirement for UK headed MNEs with a consolidated group revenue of more than EUR 750 million to provide HMRC with an annual CbC report for accounting periods commencing on or after 1 January 2016. The CbC-report must be filed in respect of the accounting period immediately following that in which the threshold requirement is met.

When the accounting period of an MNE group is less than 12 months the EUR 750 million should be reduced proportionately. Where the MNE's accounts are not prepared in EUR the equivalent of the reporting currency using the average exchange rate for the accounting period should be used.

A UK entity for the purposes of these rules is an entity which is resident in the UK for tax purposes or has a UK permanent establishment. The rules also apply to partnerships with the jurisdiction of tax residence being treated as the jurisdiction in which the partnership is formed and organised.

4.2 Notification requirement for subsidiary companies

The entity which must notify HMRC and the entity which will file the report will depend on where the ultimate group parent company is resident.

Ultimate parent

A UK ultimate parent company needs to provide HMRC with a country report. HMRC will automatically exchange this report with the jurisdictions in which the MNE is active and with which the UK has concluded an agreement for automatic exchange of information.

As such, in this circumstance the UK ultimate parent entity must also notify HMRC that it is responsible for filing the report and provide the names and unique tax reference numbers for all UK subsidiaries.

Overseas parent company

Under OECD principles, the CbC report is provided by the ultimate parent company of the MNE in its state of residence. The state of residence should exchange the country report automatically with other tax authorities. Where the MNE is resident in a country that doesn't require CbC reporting or doesn't exchange reports with HMRC in accordance with an effective multilateral competent authority agreement, the top UK entity in the MNE will also be required to file a report in respect of its sub-group.

Where the ultimate parent company is overseas there is a separate notification required. A UK entity in each MNE group is required to submit an annual notification to HMRC stating which entity in the MNE group will file the CbC-report and what jurisdiction it operates in. The notification should also include details of the names and the tax reference numbers of all the UK tax resident companies.

Voluntary filing

An entity which is not the ultimate parent of the group may file a CbC report on behalf of the MNE if the entity is UK tax resident, is authorised by the ultimate parent entity of the group to file a CbC report on behalf of it and the parent has notified HMRC of that authority in writing on or before the filing deadline.

Exceptions

There are two main exceptions from CbC reporting.

The first exemption applies where:

- before the filing deadline a member of the MNE has filed a CbC report in respect of the period, and

- that report includes the information required to be contained in the United Kingdom report.

Provided that before the filing deadline HMRC are provided with details of the entity which has filed the report and the date the report was filed then no further UK report is required.

The second exemption applies where:

- an entity has filed a report in a jurisdiction other than the UK and
- the report is the equivalent of a CbC report and
- includes the information required to be contained in the UK report and
- the appropriate authority of the jurisdiction in which the report was filed has entered into an exchange arrangement with HMRC and
- HMRC has not notified the UK entity that the arrangements are not operating effectively.

Again, providing that the UK entity provides details of the entity that filed, the jurisdiction in which the report was filed and the date the report was filed then no UK report should be required.

Notification format

All UK entities are required to make a notification. One entity can report on behalf of others, but in these circumstances, it remains the obligation for every entity to provide details of the entity providing the notification.

HMRC require that notification must be made under a prescribed spreadsheet format available on their website. Notification must be made to a group's customer relationship manager (where one is assigned) and by email to **notification.cbcfiling@hmrc.gsi.gov.uk**. If notification is not received in the specified format it will be treated as having not been filed.

Required content of report

The report must contain the following information about the MNE in respect of each tax jurisdiction in which they do business:

- The amount of revenue, profit before income tax and income tax paid and accrued
- The total employment, capital, retained earnings and tangible assets.

MNEs are also required to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of business activities, within a selection of broad areas, which each entity engages in.

Requesting information

The legislation stipulates that before the reporting deadline the UK entity must request from the ultimate parent all the filing information it would need to file a CbC report before the deadline and if receives files the information.

If the UK entity does not receive the information before the filing deadline, it must notify HMRC in writing that it has not provided this information and file a UK only report.

Anti-avoidance provisions

Anti-avoidance provisions apply where the MNE enters into any arrangements where the main purpose of one of the main purposes is to avoid any obligation under these regulations. Under these circumstances then the provisions have effect as if the arrangements had not been entered into.

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1. Introduction

1.1 Legal context

Section 482 of the Internal Revenue Code ("IRC") of 1986 ("Section 482") outlines the regulatory guidance for intercompany transactions among members of multinational enterprises ("MNEs"). Section 482 allows the United States ("U.S.") Treasury to prevent the evasion of taxes or to reflect the income of U.S. members of MNEs and provides that income related to intangible property transactions be commensurate with the income attributable to the intangible. The basis to ensure that the intercompany transfer price for goods, services and intangible property clearly reflect income for U.S. Federal Tax purposes in Section 482 is the arm's-length standard.

Section 6662 of the IRC and the regulations thereunder ("Section 6662 Regulations") outlines the ten transfer pricing documentation requirements and the penalty regime that may be imposed for large TP adjustments.

1.2 Practical context

The U.S. has not enacted the Master File nor the Local File as most of the elements of both are already covered in the existing Section 482 of the IRC and Section 6662 Regulations. Despite that, the U.S. Treasury has enacted Country-by-Country ("CbC") reporting and has created Form 8975 and Schedule A ("Form 8975") so that MNEs headquartered in the U.S. may file the CbC-report alongside of the federal tax return. As a result, the U.S. Treasury is negotiating information sharing agreements with all tax treaty partners to eliminate the need for secondary filings in other tax jurisdictions.

2. Formal requirements

2.1 Which taxpayers

TP documentation must be maintained in any case of two or more organisations, trades, or businesses owned or controlled directly or indirectly by the same interest, with controlled transactions between these related entities. Controlled transactions may include tangible property, intangible property, loans, and/or services to or from foreign affiliates in exchange for payment. These transactions must be at a price that is consistent with an arm's-length price.

Effective 30 June 2016 annual CbC-reporting is required for all U.S.-parented MNE groups with annual revenue for the preceding reporting period of USD 850 million or more by filing of Form 8975.

2.2 Aggregation of transactions

Treasury Regulation Section 1.482-1(f)(2)(i) of the IRC provides that multiple transactions (generally within the same product grouping) may be aggregated when they are so interrelated that it is necessary to view them as a whole. Treasury Regulation Section 1.482-1(f)(2)(ii) of the IRC provides that controlled transactions will be evaluated based on the structure of the actual transaction, and will not be treated as if the transaction had been structured differently. However, alternatives may be considered that were available to the taxpayer in determining whether the terms of the controlled transactions would be acceptable to an uncontrolled taxpayer faced with similar alternatives.

2.3 Deadlines (timing)

Contemporaneous TP documentation is recommended for taxpayers to avoid penalties under the Section 6662 Regulations. The existence of this documentation need not be either disclosed on, or provided with the taxpayer's federal tax return, but the documentation must be complete as of the date of the federal tax return filing. Taxpayers must submit TP documentation to the IRS within 30 days of a formal Information Document Request to avoid penalties.

Intercompany transactions with foreign affiliates need to be disclosed on Forms 5471, 5472, 8858, and 8865 which are filed with the federal income tax return. The deadline for corporate federal income tax returns is the 15th day of the fourth month following the close of the tax year (April 15 for calendar-year taxpayers). Corporate taxpayers may request an automatic six-month extension of time to file which will extend the deadline six months (October 15 for calendar-year taxpayers). The deadline for partnership federal income tax returns is the 15th day of the third month following the close of the tax year (March 15 for calendar-year taxpayers). Partnerships may also request an automatic six-month extension (extended deadline of September 15 for calendar-year taxpayers). As mentioned above, Form 8975 is required to be filed with a U.S.-based taxpayer's federal tax return. States typically follow the federal deadlines for filing tax returns. However, there might be some exceptions.

2.4 Materiality

There are no formal thresholds recommended for contemporaneous documentation to be maintained by taxpayers with controlled transactions. However penalties described in Section 6662(e) of the IRC apply wherever there is an underpayment of tax attributable to a valuation misstatement, subject to certain thresholds. In any year, no penalty is imposed under these rules unless the underpayment of tax attributable to all valuation misstatements exceeds a dollar limitation of USD 5,000 in the case of an individual, S corporation, and personal holding companies or USD 10,000 in the case of a C corporation (Section 6662(e)(2)).

Filing Form 8975 is required by the ultimate parent entity of a U.S. MNE group with annual revenue for the preceding reporting period of USD 850 million or more.

2.5 Retention of documents

Retention of TP documents is three to six years from the filing date of the associated tax return. A general statute of limitations applies in the U.S. which is three years from the later of either the tax return due date or the date the return was actually filed. The statute is extended to six years for substantial understatements of income and indefinitely if there is fraud.

2.6 Frequency of documentation updates

TP documentation should be updated annually to account for normal business and market developments. If the facts have not significantly changed, previous documentation can be relied upon. Form 8975 must be filed annually, if applicable.

2.7 Tax return disclosures

Tax Forms 5471, 5472, 8858, 8865, and 8975 require disclosure details on controlled transactions with foreign entities. If a company enters into a cost sharing arrangement as defined under Treasury Regulation Section 1.482-7(k)(4), it requires a controlled participant to file a cost sharing statement with the IRS within 90 days after the first occurrence of intangible development costs, and to make specified disclosures on its annual tax return.

Regulations issued in 2010 require taxpayers to also disclose their uncertain tax positions ("UTPs") on Schedule UTP. Undocumented or uncertain controlled transactions are considered UTPs for the purposes of this schedule. On this schedule taxpayers must provide details such as the ranking of the positions by the size of their reserves and descriptions of the tax positions. As of 2014, the UTP disclosures are required by corporations with assets of USD 10 million or more.

2.8 Burden of proof

For penalty avoidance purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained certain documentation that substantiates the taxpayer's assertion that is has reasonably concluded that, given the available data and the applicable pricing methods, the method and its application provided the most reliable measure of arm's-length result under the principles of the best-method rule.

2.9 Penalties

2.9.1 General

There is no penalty for failure to have documentation if there is no adjustment. While the existence of a contemporaneous documentation report will not guarantee that a TP penalty will not be assessed, it will help a U.S. taxpayer to minimise or avoid penalties if a TP adjustment is assessed.

2.9.2 Penalties in case of a TP-adjustment

Per Section 6662, taxpayers may be liable for either a 20% or 40% penalty for an underpayment of tax attributable to a substantial or gross valuation misstatement, respectively (Section 6662(a) and Section 6662(h)). The penalties are calculated as a percentage of the total TP adjustment. In addition, the IRS may apply a penalty to an asset valuation misstatement. (Section 6662(e)).

2.9.3 CbC-reporting

The U.S. Treasury enacted CbC reporting for fiscal years ending after 1 January 2017 and created Form 8975 for U.S.-based MNEs to file with their tax returns. Penalties under Section 6038(b) of the IRC may apply for failure to report the information required on the form.

2.10 Interest

Because the penalties described in Section 6662 Regulations are an addition to tax, underpayment interest accrues on the penalty in the same manner as on the tax itself. The interest rate on such underpayment is established under Section 6621(a)(2) of the IRC and is the sum of the Federal short-term rate plus three percentage points.

2.11 Use of most reliable information

The arm's-length result of a controlled transaction must be determined under the method that, under the facts and circumstances, provides the most reliable measure of an arm's-length result. There is no strict priority of methods, and no method will invariably be considered to be more reliable than others. An arm's-length result may be determined under any method without establishing the inapplicability of another method, but if another method subsequently is shown to produce a more reliable measure of an arm's-length result, such other method must be used ("Best-Method approach").

Data based on the results of transactions between unrelated parties provides the most objective basis for determining whether results of a controlled transaction are arm's length. The relative reliability of a method based on the results of transactions between unrelated parties depends on the degree of comparability between the controlled transaction or taxpayers and the uncontrolled comparables, taking into account the factors described in Treasury Regulation Section1.482-1(d)(3).

2.12 Languages

Documentation is required to be in English and cannot be submitted in any other language.

2.13 Confidentiality

The IRS will treat the TP documentation confidentially. All information received will be treated confidentially and prohibit any parties from using any of the information other than for the administration of taxes. Confidentiality should be maintained even when disclosure is required for public court proceedings or judicial decisions. Taxpayers' information should only be disclosed to the extent needed for the court or judicial decisions.

With respect to the information provided on Form 8975, the CbC-Report will be exchanged under bilateral Competent Authority arrangements for the exchange of CbC-Reports between the U.S. and applicable foreign jurisdictions.

3. Standards with respect to the content of transfer pricing documentation

The regulations associated with U.S. TP documentation do not require taxpayers with controlled transactions among foreign affiliates to maintain a Master File and/or a Local File as defined in the OECD guidelines. However, the documentation required under Section 6662 requires similar information to the information in the Master File and Local file. The information required under Section 6662 is as follows:

- An overview of the taxpayer's business, including economic and legal factors that affect pricing of its property or services. *Treasury Regulation Section 1.6662-6(d)(2)(iii)(B)(1).*
- A description of the taxpayer's organisational structure, including all related parties whose activities are relevant to TP. *Treasury Regulation Section 1.6662-6(d)(2)(iii)(B)(2).*
- Any document explicitly required by the regulations under section 482 (e.g., documentation of non-routine risks, cost sharing agreements, etc.). *Treasury Regulation Section 1.6662-6(d)(2)(iii)(B)(3).*
- A description of the method selected and the reason why it was selected. *Treasury Regulation Section 1.6662-6(d)(2)(iii)(B)(4).*
- A description of the alternative methods that were considered and an explanation of why they were not selected. *Treasury Regulation Section 1.6662-6(d)(2)(iii)(B)(5).*
- A description of the controlled transactions (including terms of sale) and any internal data used to analyse them. *Treasury Regulation Section 1.6662-6(d)(2)(iii)(B)(6).*
- A description of the comparables used, how comparability was evaluated, and what adjustments were made. *Treasury Regulation Section 1.6662-6(d)(2)(iii)(B)(7).*
- An explanation of the economic analysis and projections relied on in developing the method. *Treasury Regulation Section 1.6662-6(d)(2)(iii)(B)(8).*
- A description or summary of any relevant data that the taxpayer obtains after the end of the year and before filing a tax return. *Treasury Regulation Section 1.6662-6(d)(2)(iii)(B)(9).*
- An index of principal and background documents. *Treas. Reg. § 1.6662-6(d)(2)(iii)(B)(10).*

In several pronouncements, including FAQs published in 2020, the IRS has made it very clear that it will be increasing its scrutiny of TP arrangements to determine whether they are adequate and reasonable.

A TP documentation should include the following aspects that can help avoid or limit audits, while thin or non-existent documentation will encourage greater scrutiny.

- A full explanation of the data used in the analysis.
- A "self-assessment" to anticipate questions from the IRS and proactively address those questions.
- A description of business risks of the transactions and how these risks were allocated among controlled participants.
- Adequate and reasonable justification for the comparable companies selected to demonstrate to the IRS that arm's-length prices were used.
- The functional and risk analysis for each transaction.
- A description of the challenges of the analysis, e.g., allocate losses among controlled participants.
- An intercompany transaction summary at the beginning of the TP documentation.

4. Country-by-Country reporting standards

4.1 Threshold and required content

For fiscal years beginning on or after 30 June 2016, certain U.S. persons that are the ultimate parent entity of a U.S. MNE group with annual revenue for the preceding reporting period of USD 850 million or more are required to file Form 8975. Form 8975 is used by filers to annually report certain information with respect to the filer's U.S. MNE group on a CbC-basis. The filer must list the U.S. MNE group's constituent entities, indicating each entity's tax jurisdiction (if any) country of organisation and main business activity, and provide financial and employee information for each tax jurisdiction in which the U.S. MNE does business. The financial information includes revenues, profits, income taxes paid and accrued, stated capital, accumulated earning, and tangible assets other than cash.

4.2 Notification requirement for subsidiary companies

There are no notification requirements for subsidiary companies as Form 8975 must be filed with the IRS with the income tax return of the ultimate parent entity of a U.S. MNE group. There is no secondary filing requirement for U.S. subsidiaries of foreign ultimate parent entities.

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right size
right solutions

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