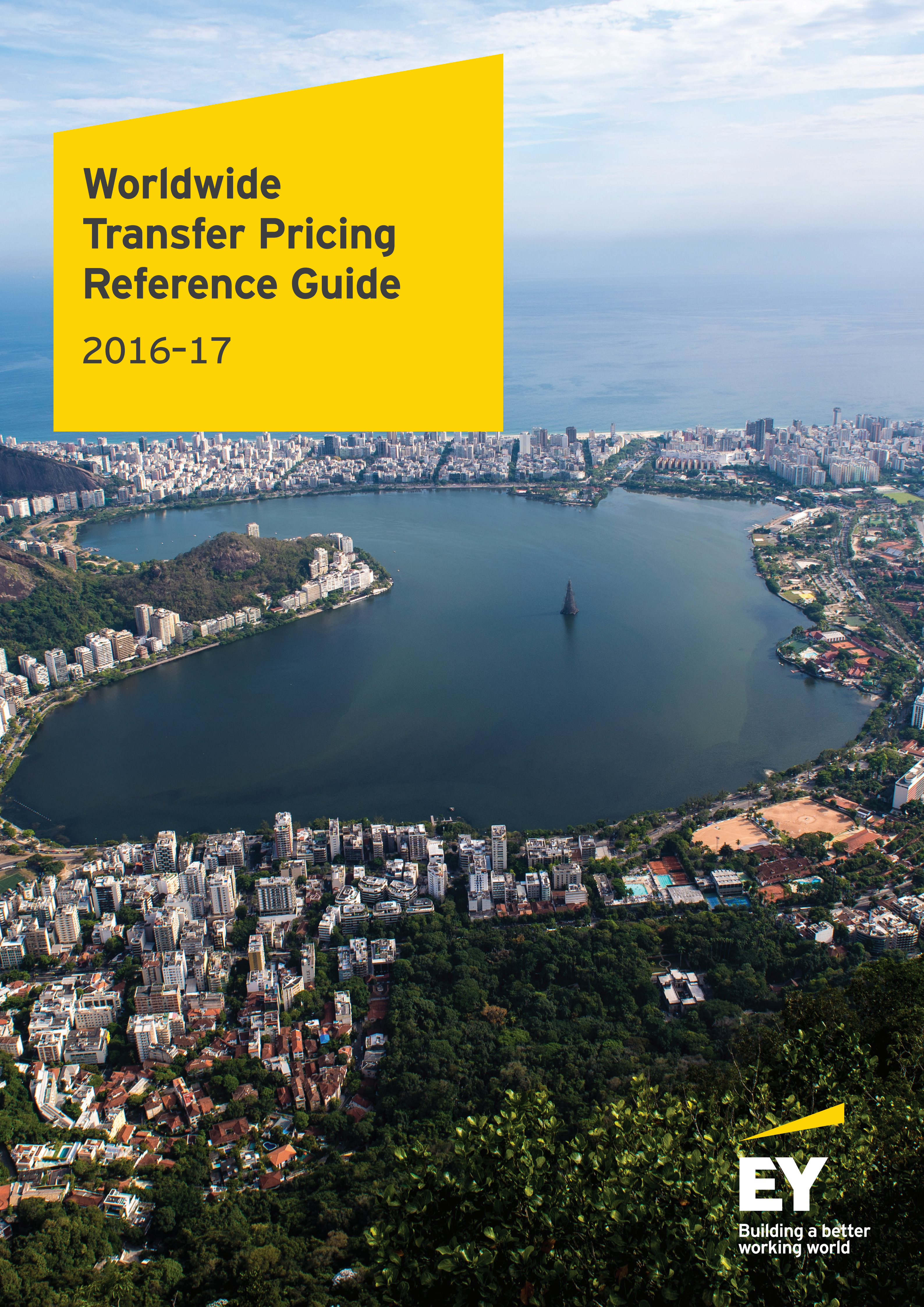
Worldwide Transfer Pricing Reference Guide

2016–17



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Worldwide Transfer Pricing Reference Guide

Transfer Pricing rules and regulations around the world continue to grow in number and in complexity. Practitioners need to have current knowledge of a complex web of country tax laws, regulations, rulings, methods and requirements.

The EY *World Transfer Pricing Global Reference Guide* is a tool designed to help international tax executives quickly identify transfer pricing rules, practices and approaches. These must be understood in order for a company to carry out both compliance and planning activities. The information included in the guide now covers 118 countries and territories in which EY offers Transfer Pricing services. Countries appearing in the guide for the first time are: Belarus, Cape Verde, Madagascar, Malawi and Zambia.

The transfer pricing global reference guide is meant to provide an overview for the covered jurisdictions regarding their transfer pricing tax laws, regulations and rulings; Organisation for Economic Co-operation and Development (OECD) guidelines treatment, priorities and pricing methods; penalties; the potential for relief from penalties; documentation requirements and deadlines; statute of limitations; required disclosures; transfer pricing-specific returns; frequency of tax audits and transfer pricing scrutiny by the tax authority; and opportunities for advance pricing agreements (APAs).

In 2015, the OECD released final reports on all 15 focus areas in its Action Plan on Base Erosion and Profit Shifting (BEPS). In an accompanying explanatory statement, the OECD described the next steps in its work on BEPS, including additional work on technical matters and plans for monitoring with respect to the implementation of the BEPS recommendations.
In conjunction with the release of the reports, the OECD held a press conference followed by a technical briefing, both by webcast, to provide an overview of the final BEPS output. There has been continued updates on the action items. We have covered the reaction to the finalized Actions 8 through 10 at the time of publication.

EY have compiled a series of tax alerts and webcasts that help unravel some of the details behind the BEPS actions. Use the link below to follow and track the latest developments that may be relevant.

EY on BEPS

A web-based version of this publication can be found at ey.com. Please check this web page periodically for late-breaking country developments.

For a more detailed discussion of any of the country-specific transfer pricing rules, or to obtain further assistance in addressing and resolving intercompany transfer pricing issues, please contact your local EY office or the relevant jurisdiction contact listed at the back of this brochure.

Please note the availability of other transfer pricing materials such as survey reports that share views of tax authorities and tax directors (ey.com). EY also annually produces: *The Worldwide Corporate Tax Guide*; *The Worldwide Personal Tax Guide*; and *The Worldwide VAT, GST and Sales Tax Guide*.

The content is correct as of 15th August 2016 unless otherwise noted. This publication should not be regarded as offering a complete explanation of the tax matters referred to and is subject to changes in the law and other applicable rules.

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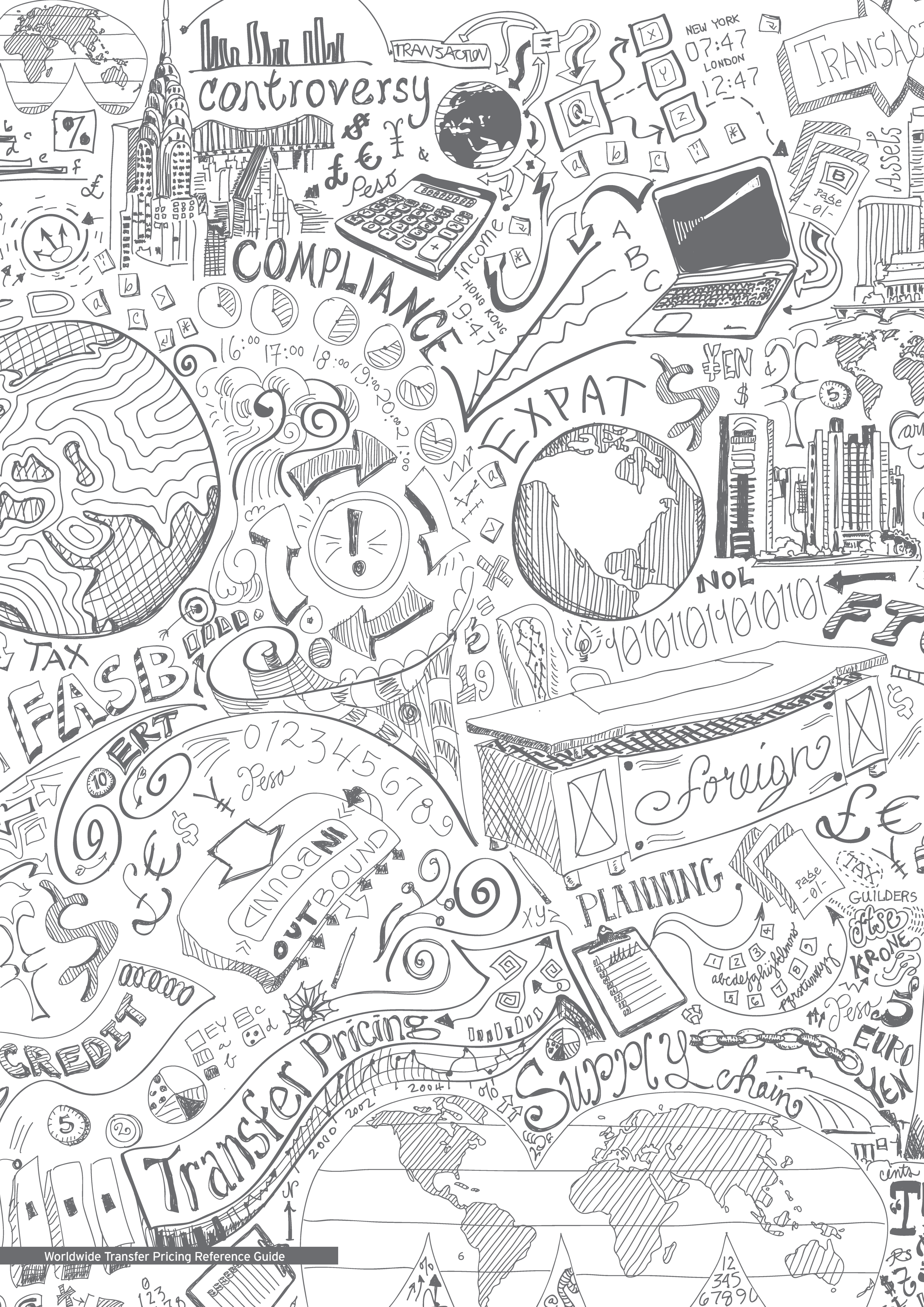

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Legend

Taxing authority and tax law: name of taxing authority and statutory provisions currently in effect in each jurisdiction.

Relevant regulations and rulings: current transfer pricing rules and regulatory provisions in effect in each jurisdiction.

OECD Guidelines treatment: consideration given by the taxing authority to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

Documentation requirements: governing tax authority requirements or recommendations that taxpayers prepare and maintain written documentation to confirm that the amounts charged in related-party transactions are consistent with the arm's-length standard.

Priorities/pricing methods: transfer pricing methods allowed, as well as the priority of each method.

Return disclosures/related-party disclosures: information on disclosures required from taxpayers regarding related-party transactions.

Transfer pricing-specific returns: these include any transfer pricing-specific forms required to be filed within the jurisdiction.

Documentation deadlines: deadline for preparing transfer pricing documentation.

Transfer pricing penalties: discussion of potentially applicable transfer pricing penalties if a taxpayer is determined not to be in compliance with the rules imposed by the taxing authority.

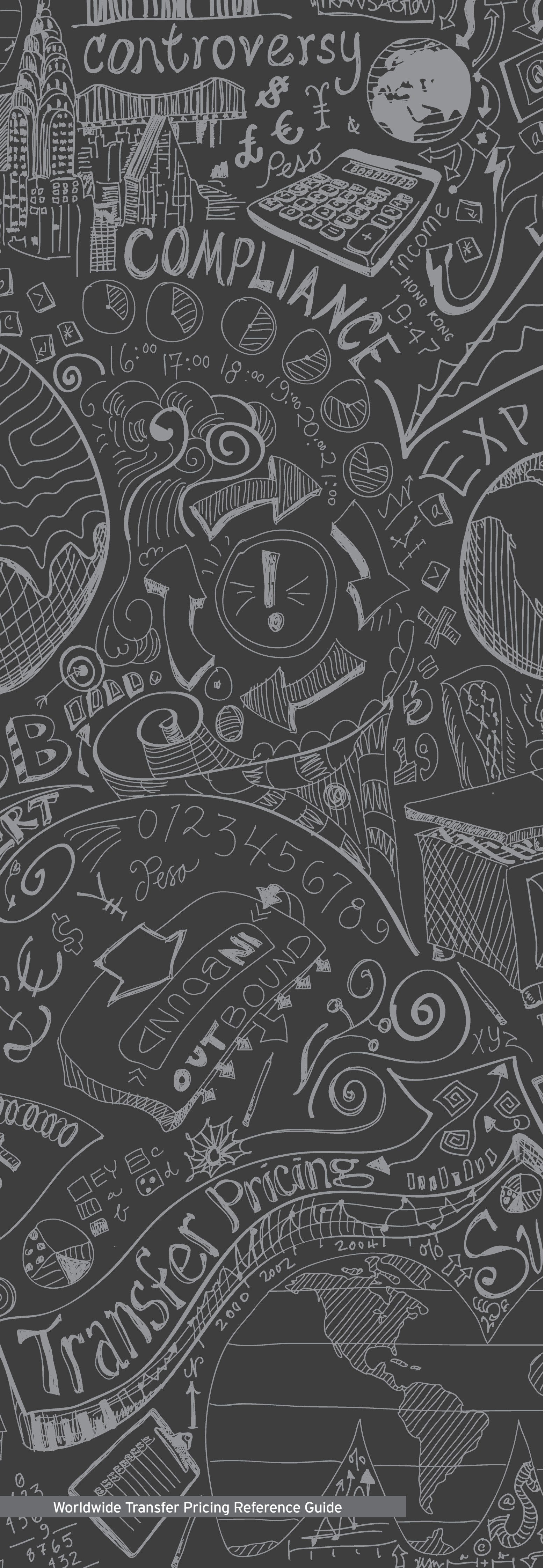
Penalty relief: potential ways in which penalties may be reduced or avoided.

Statute of limitations on transfer pricing assessments: discussion of the applicable statute of limitations regarding transfer pricing examination and assessments.

Frequency of tax audits/transfer pricing scrutiny: discussion of the level of frequency of the tax authority subjecting taxpayers to general audits, scrutinizing related-party transactions and challenging the transfer pricing methodology employed. This is based on the past experience of our local tax professionals and is not a forward-looking prediction.

APA opportunity: discussion of the possibility of obtaining an advance pricing agreement with the tax authority.

Impact of new OECD BEPS Action 8-10 guidelines: discussion on how a jurisdiction will apply the amended OECD Guidelines that were updated with the BEPS Action 8-10 reports.



Glossary of terms

APA (Advance Pricing Agreement)
An agreement between a tax authority and an MNE about the determination of the appropriate transfer pricing method to be used for pricing intercompany transactions. APAs may be unilateral, bilateral (two governments) or multilateral (three or more governments).

Arm's-length principle
The standard adopted by the OECD and in many jurisdictions, which mandates that the result related parties obtain from an intercompany transaction approximates the result that uncontrolled parties would have obtained had they undertaken the same transaction under the same circumstances.

BEPS (Base Erosion and Profit Shifting)
On 12 February 2013 the OECD released its report *Addressing Base Erosion and Profit Shifting* followed by the release of an Action Plan on 5 Oct 2015. Thus, the OECD aims to develop approaches for addressing government concerns about multinational companies (MNCs) reducing their tax liability through BEPS activity.

CbCR (Country-by-Country Reporting)
CbCR is part of the OECD's BEPS Action Plan 13. MNCs are required to provide the country-by-country reporting (CbCR) report that provides information on their global allocation of income, economic activity and taxes paid among countries.

CFC (Controlled Foreign Corporation)
A subsidiary and member of a MNE group.

CPM (Comparable Profits Method)
A method that, under US regulations, is used to determine an arm's-length consideration for transfers of tangible property, intangible property and services transactions. If the reported operating income of the tested party is not within a certain range, an adjustment will be made. In effect, this method requires a comparison of the operating income that results from the consideration actually charged in a controlled transfer with the operating income of similar taxpayers that are uncontrolled.

CSA (Cost Sharing Agreement) or CCA (Cost Contribution Arrangement)
A framework agreed among enterprises to share the costs and risks of developing, producing or obtaining assets, services or rights and to determine the nature and extent of the interests of each participant in the result of the activity of developing, producing or obtaining those assets, services or rights.

CUP method (Comparable Uncontrolled Price)

A transfer pricing method that compares the price for property or services in a controlled transaction with the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.

ETR (Effective Tax Rate)
The percentage obtained by dividing the taxpayer's tax liability by his or her total taxable income. This reflects the rate at which a taxpayer would be taxed if his or her tax liability were taxed at a constant rate rather than progressively.

EU (European Union)
The European Union currently consists of 28 Member States.

EUJTPF (EU Joint Transfer Pricing Forum)
The EU Joint Transfer Pricing Forum consists of representatives of governments and the private sector, which advise and consult on transfer pricing issues.

FTE (Full-Time Equivalent)
Used in this survey to indicate the number of resources employed by tax authorities to undertake transfer pricing reviews in their jurisdictions.

GAAP (Generally Accepted Accounting Principles)
The rules and practices required to be followed in certain jurisdictions for keeping financial records and books of account.

MNE (Multinational Enterprise)
A member of a related group, that carries on business directly or indirectly in two or more countries.

MAP (Mutual Agreement Procedure)
A dispute resolution process found in Article 25 of the OECD Model Tax Convention, as well as in various double tax conventions. MAP is a government-to-government process of negotiation to resolve matters of taxation not in accordance with the particular tax treaty and to attempt to avoid double taxation.

OECD (Organisation for Economic Co-operation and Development)
An intergovernmental organization, based in Paris, formed to foster international trade and economic development. The OECD has 34 member states. Among its many concerns are the removal of tax barriers to the free flow of goods and services and the avoidance of double taxation of income or profits. The OECD has developed guidelines and a model tax convention; see below.

OECD Guidelines
Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, the latest edition of which was published by the OECD in 2010. The OECD Guidelines endorse the arm's-length principle and consist of a statement of principles rather than a set of specific rules to be applied.

OECD Model Tax Convention
Model Tax Convention on Income and Capital, last published by the OECD in September 2010. The Model Tax Convention is to be used by member states in negotiations of bilateral double tax treaties. The OECD also provides commentary on the interpretation of the Model Tax Convention and states that member countries should follow this commentary, subject to their expressed reservations thereon, when applying and interpreting their double tax treaties.

PLI (Profit Level Indicator)
Ratio that measures the relationship between an entity's profits and the resources invested or costs incurred to achieve that profit. Refer above to CPM for further discussion of their application.

PATA (Pacific Association of Tax Administrators)
An association of the tax administrations of Australia, Canada, Japan and the United States formed to foster cooperation and the exchange of information among them. PATA has published guidance on APAs, MAPs and documentation requirements.

TNMM (Transactional Net Margin Method)
The transactional net margin method is a profits-based method that compares the profitability of an MNE member with the profits of comparable entities undertaking similar transactions. The CPM in the United States is similar to TNMM.

Albania

Taxing authority and tax law

Tax authority: General Directorate of Taxes (GDT)

Tax law: Income Tax Law

Relevant regulations and rulings

Tax laws and ministerial instructions:

- Law No. 8438 on Income Taxes, as amended (Income Tax Law), dated 28 December 1998
  - Article 2, Section 4, items (a) and (b) create a new definition of "related-party" for corporate income tax purposes.
  - Effective 4 June 2014, Articles 36-36/7 were introduced, providing a more comprehensive regulatory framework on international transfer pricing, aligned with the OECD Transfer Pricing Guidelines of 2010 (OECD TPG 2010).
  - Article 36/5 introduces transfer pricing documentation requirements for the first time.
- Law No. 9920 on Tax Procedures in the Republic of Albania (Tax Procedures Law), dated 19 May 2008
  - Article 115/1 addresses penalties related to transfer pricing.
- Double taxation treaties enacted by Albania

The Ministry of Finance issued Instruction No. 16, dated 18 June 2014, for the implementation of the new transfer pricing legislation, providing further guidance on the application of the arm's-length principle and the preparation of the transfer pricing documentation.

The Ministry of Finance issued Instruction No. 9, dated 27 February 2015, introducing specific rules and procedures on the implementation of the APAs.

OECD Guidelines treatment

The arm's-length principle under the Albanian transfer pricing legislation and instruction is in line with the provisions of Article 9(1) of the OECD Model Tax Convention on Income and on Capital (2010) and those as referred to in the OECD Transfer Pricing Guidelines (TPG) 2010.

Specific reference to the OECD TPG 2010 is made with respect to the "arm's-length principle" definition, the recommendation to use in the comparability analysis, the nine-step process of the OECD TPG 2010 in the search for comparables and the preparation of the transfer pricing documentation, which should be in line with the EU Code of Conduct on transfer pricing documentation for associated enterprises. No specific guidance on business restructurings has been issued to date. However, the tax authority should generally follow the OECD guidance.

However, when the OECD TPG 2010 and Albanian Income Tax Law and Instructions differ or conflict, the Albanian Income Tax Law and Instructions shall prevail.

Documentation requirements

Documentation requirements are stipulated in Article 36, Paragraph 5, of the Income Tax Law. Further guidance on the documentation deadlines, content and form is provided in Instruction No. 16, "On Transfer Pricing," dated 18 June 2014.

The transfer pricing file, consisting of the "master file" and the "country file," is considered to satisfy the requirements of Albanian legislation when it is prepared in line with the Code of Conduct on transfer pricing documentation for associated enterprises in the EU and the annex thereof and is approved by Resolution 2006/c176/01 of 27 June 2006 of the EU Council.

Transfer pricing documentation should contain:

- An overview of the taxpayer's business operations and organization chart
- A description of the group's corporate organization structure, of which the taxpayer is a member, and the group's operating structure
- A description of the controlled transaction, including analysis of the comparability factors and details of applied transfer pricing policies
- An explanation of the most appropriate transfer pricing method selected and, where relevant, of the financial indicator
- A comparability analysis, including a description of the process carried out to identify comparable uncontrolled transactions, an explanation of the basis for the rejection of any potential internal comparable uncontrolled transactions, a description of the comparable uncontrolled transactions, an analysis of the comparability of the controlled transactions and the comparable uncontrolled transactions, and information on any comparability adjustments made
- An explanation of any economic analysis and projections relied upon
- Conclusions on whether the conditions of the controlled transactions are consistent with the arm's-length principle, including details of any adjustments made to ensure compliance
- Details of any APAs or similar arrangements in other countries applicable to the controlled transactions
- Any other information that may have a material impact on the determination of the taxpayer's compliance with the arm's-length principle, with respect to the controlled transactions

Priorities/pricing methods

Under the current legislative framework, all transfer pricing methods advocated by the OECD Guidelines are acceptable — namely, CUP, resale price, cost-plus, TNMM and profit split.

Where it can be proved that none of the approved methods can be reasonably applied, taxpayers are allowed to use other, more appropriate methods. Preference is given to the best method providing the most reliable results.

Return disclosures/related-party disclosures

Taxpayers are required to report all controlled transactions annually by filing a Controlled Transaction Notice if the aggregate value of their controlled transactions exceeds ALL50 million.

When determining the annual aggregate transaction value, taxpayers should take into account all intercompany transaction amounts (i.e., without offsetting credit and debit values).

The notice contains information on the nature of intercompany transactions per counterparty, the value thereof, the transfer pricing method applied and whether transfer pricing documentation exists. Furthermore, there are listed transactions for no consideration and business restructurings, including reallocation of functions, assets or risks, and changes in the group legal structure.

The notice should be submitted by 31 March of the following year.

Transfer pricing-specific returns

Albania does not require a separate return for related-party transactions.

Documentation deadlines

There is no specific deadline, as there are no contemporaneous documentation requirements.

Documentation must be submitted within 30 days upon receipt of the tax authority's request, which can be initiated at any time after the filing due date of the income tax return (i.e., 31 March of the following year).

The submitted documentation may be in English or Albanian. If it is in English, it should be accompanied by a notarized translation into Albanian, which should be provided within 30 days of the tax authorities' request for translation.

Transfer pricing documentation should be updated annually. However, taxpayers with a turnover of less than ALL50 million that use external comparable data can use the same data for three consecutive fiscal years, provided there have been no material changes in the conditions of the controlled transactions, the comparability of the external data and the relevant economic circumstances.

Transfer pricing penalties

Failure to file the Controlled Transaction Notice (explained above) is subject to a penalty of ALL10,000 for each month of delay.

Transfer pricing adjustments in which no documentation has been made available trigger late payment penalties of 5% of the additional income tax liability assessed for each month of delay, capped at 25% thereof, as well as default interest.

Penalty relief

Taxpayers that have submitted the transfer pricing documentation in a timely manner (i.e., within 30 days upon receipt of the tax authorities' request) shall be relieved from penalties in the case of a transfer pricing adjustment, and they will be liable to pay only the additional tax liability and default interest.

In principle, the tax administration bears the burden of proof to substantiate on what grounds they consider that the transfer prices applied are not in line with the arm's-length principle. However, when the taxpayer has prepared documentation and makes it available to the tax authorities, the burden of proof shifts to the taxpayer.

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments is five years from the date the related corporate income tax return is filed.

When a taxpayer becomes subject to a penal court proceeding concerning its tax liabilities, the tax authorities' rights to make a tax reassessment on the matter at issue in the proceeding are not prescribed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit in Albania is high for domestic and foreign groups of companies. Usually, a tax audit covers the last three to four years. In light of the transfer pricing rules that became effective on 4 June 2014, and especially due to the newly introduced documentation requirements, transfer pricing issues are expected to continue to attract significant attention in tax audits, and we anticipate that transfer pricing tax audits will increase rapidly.

The tax administration is unlikely to challenge the methodology applied. In principle, in examining the arm's-length character of a transaction, the tax administration should use the same transfer pricing method applied by the taxpayer, to the extent that it is the most appropriate one for that transaction.

APA opportunity

Taxpayers that undertake controlled transactions exceeding in aggregate the value of ALL4,2 billion for the proposed period of application are eligible to apply for unilateral, bilateral and multilateral APAs with no rollback option. Exceptions to the aggregate transaction value threshold are cases of high complexity and of high commercial and economic value to the Republic of Albania. The maximum proposed period of the APA is five years unless the APA is bound to a governmental agreement ratified by law. The instruction on APAs provides management procedures, disclosure requirements and detailed guidance regarding the submission and processing of APA requests.

Impact of new OECD BEPS Action 8-10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Algeria

Taxing authority and tax law

Tax authority: generally referred to as the Algerian tax authorities or Direction des Grandes Entreprises (DGE) (large-sized taxpayers' direction)

Tax law: Algerian Direct Tax Code — Algerian Tax Procedure Code

Relevant regulations and rulings

The matter of transfer pricing is principally governed through:

- Article 141 bis of the Algerian Direct Tax Code
- Article 192 of the Algerian Direct Tax Code
- Article 20 ter of the Algerian Tax Procedure Code
- Article 169 bis of the Algerian Tax Procedure Code

A decree, dated 12 April 2012, drew up a list of entities obligated to provide transfer pricing documentation and listed its content.

OECD Guidelines treatment

The OECD Guidelines inspired the Algerian legislation on transfer pricing. However, specifications about how they work together in practice are not provided explicitly.

Documentation requirements

According to Article 04 of the decree dated 12 April 2012, the transfer pricing documentation must contain:

- Basic documentation of general information concerning the group, including:
  - A general description of the activity performed, including changes that occurred during the fiscal year
  - A description of the organizational structure and the nature of the relations that link the foreign company or the Algerian company to the other Algerian company (such as organizational chart, direct and indirect capital ties, voting rights, shareholders' agreement, business flows)
  - A general description of the functions performed, risks incurred and assets of each related company
  - A general description of the group's transfer pricing policy
- Company-specific documentation:
  - A description of the company, the activities it performs and the nature of the transactions it is engaged in, including changes that have occurred during the fiscal year
  - A description of the transactions performed with other related companies, including the nature of the flows and their amounts (including royalties); this information may be presented globally by transaction type
  - Copies of the statutory auditors' annual reports and the financial statements for the fiscal year concerned in the documentation
  - A list of the main intangible assets held in relation to the company (such as patents, trademarks, trade names and know-how)
- Copies of all agreements between the companies concerned

- Financial information, overhead and administrative expenses, and research and development costs
- Description and justification of the arm's-length nature of the transfer pricing method chosen (OECD standards)

Companies concerned about the documentation requirement may submit any other documentation likely to provide clarification to the administration.

The entities concerned are required to provide the following information:

- *De jure* or *de facto* legal entities or groups of legal entities working in the field of hydrocarbon activities and their subsidiaries, as provided by law
- Joint stock companies and partnerships that have opted for the tax regime for joint stock companies whose sales at the close of the financial year are greater than or equal to DZD100 million
- *De jure* or *de facto* groups of companies in which the annual sales of any one of the member companies are greater than or equal to DZD100 million
- Companies established in Algeria that are members of foreign groups (regardless of the Algerian tax regime applied)

Priorities/pricing methods

Algerian transfer pricing legislation and practices are recent. The Algerian transfer pricing legislation does not provide any official transfer pricing method, but the Algerian tax authorities issued guidelines in 2010 referring to the OECD methods. In theory, all OECD methods could be accepted, subject to justification, but in practice, the Algerian tax authorities are focused on an approach based on comparability.

Based on our understanding, Algerian tax authorities are developing a project to gather financial databases for benchmarking purposes.

Algerian transfer pricing rules apply for both cross-border transactions and domestic transactions with related parties.

Return disclosures/related-party disclosures

In the framework of a tax audit, tax inspectors are entitled to audit possible infringement of the arm's-length principle with related parties (intercompany transactions) — as in, the existence of a commercial or financial relationship that differs from those that would be made between independent enterprises.

Transfer pricing–specific returns

Not applicable.

Documentation deadlines

The transfer pricing documentation must be filed at the DGE with the annual tax return (no later than 30 April every year).

Companies not listed in the "Document requirements" section above have to prepare the same documentation to justify the transfer pricing policy in the framework of a tax audit.

Algeria (continued)

Transfer pricing penalties

If a company provides incomplete transfer pricing documentation or no documentation at all when filing its return, the tax administration is entitled to send a formal notice asking for it to be completed or provided within 30 days. The penalty for not doing so can be DZD500,000. In the case of a reassessment, an additional specific penalty amounting to 25% of the amounts deemed transferred might also apply.

Penalty relief

No specific penalty relief is applicable to transfer pricing, but general penalty relief could apply in the framework of a transaction (*remise conditionnelle*) procedure provided by the Algerian Tax Procedure Code, under certain conditions.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is the same as for all Algerian corporate tax assessments (i.e., four years following the year for which the tax is due).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit in Algeria is high for domestic and foreign companies. Usually, a tax audit covers a three- to four-year period on a continuous basis.

Tax audits and tax reassessments related to transfer pricing are more and more frequent. Field auditors are not always familiar with transfer pricing concepts, and the adjustments sometimes are not only grounded in the OECD Guidelines. It is also worth mentioning that, currently, there are no local public financial databases.

APA opportunity

The Algerian tax legislation does not provide a specific APA procedure. However, a binding tax ruling procedure was introduced in the Algerian Tax Procedure Code recently (for companies eligible for the DGE), and in theory, it could cover transfer pricing.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Angola

Taxing authority and tax law

Taxing authority: Angola Ministry of Finance/General Tax Administration (*Administração Geral Tributária*)

Tax law: Industrial Tax Code (*Código do Imposto Industrial*)

Relevant regulations and rulings

Presidential Decree 147/13 of 1 October 2013 — specifically Section II and Articles 10–13 (Statute of Large Taxpayers) — and Article 50 of Law 19/14 of 22 October, approving the Industrial Tax Code, provide guidance on transfer pricing regulations. The Angolan transfer pricing regime applies to so-called "large taxpayers" that have a turnover in excess of AOA7 billion. The latest Large Taxpayers' List, released in Order 599/14 of 24 March 2014, includes 486 companies to which transfer pricing rules apply. In addition, the Order also establishes that, apart from the companies listed as large taxpayers, large government-owned companies, financial institutions, oil and gas, and diamond companies, as well as telecommunications companies, are, by nature, large taxpayers and therefore subject to the Statute of Large Taxpayers and to the transfer pricing rules established therein.

Both Article 50 of the Industrial Tax Code (which establishes the general framework for application of the arm's-length principle) and Article 11 of the Statute of Large Taxpayers clearly define all cases of legal control that create a situation of related parties for transfer pricing purposes.

In this regard, the concept of special relations is as follows:

(i) When the directors or managers of a company, as well as their spouses, ascendants and descendants, directly or indirectly have an ownership interest of 10% or more in the capital or the voting rights of the other entity

(ii) When the majority of the members of the board of directors or management are either common or distinct but related by marriage, non-marital partnership or direct kinship

(iii) When one of the entities has contractual control of the other

(iv) When the companies have a relationship of control or cross-ownership or contractual subordination contract, peer group or equivalent situation following the terms of company law

(v) When commercial relations between the two entities represent more than 80% of the volume of operations

(vi) When one finances the other, to the extent of more than 80% of its credit portfolio

OECD Guidelines treatment

OECD Guidelines are not adopted in the local transfer pricing regulations because Angola is not an OECD member country, although certain OECD language is included in the transfer pricing regulations enacted.

The arm's-length principle applies to all related-party transactions.

Angola (continued)

Documentation requirements

For the first time in Angola, qualifying taxpayers have documented their transfer pricing policy with respect to the intragroup transactions performed during fiscal year 2014. Angola's new transfer pricing documentation rules are included in the Statute of Large Taxpayers. The obligation to prepare and file the transfer pricing report with respect to the intragroup transactions performed during fiscal year 2014 — because of the late release of the Large Taxpayers' List on 24 March 2014, there was a postponement of the obligation to prepare documentation, initially foreseen with respect to intragroup transactions performed during fiscal year 2013 — was further clarified with the release of Circular 12/DLT/DNI/2014.

The requirement to prepare and submit transfer pricing documentation applies to all companies included on the Large Taxpayers' List published on 24 March 2014, large government-owned companies, financial institutions, oil and gas, and diamond companies, as well as telecommunications companies and companies reporting annual revenue in excess of AOA7 billion.

The transfer pricing file must be prepared on an annual basis and detail the relationships and prices established by the large taxpayers with their respective associated enterprises.

All commercial transactions, such as those involving goods, rights or services, and financial operations, are included and therefore are subject to documentation.

Under the Angolan transfer pricing legislation, the report has to be prepared according to the following structure:

(a) Summary

(b) Macroeconomic environment

(c) Presentation of the entity

(d) Functional analysis of the entity

(e) Identification of the related-party operations

(f) Economic analysis of the related-party operations

The Angolan law requires that all documents submitted to the tax authorities must be written in or translated into Portuguese.

Priorities/pricing methods

The new Angolan transfer pricing legislation, applicable to large taxpayers, only foresees the application of the so-called "traditional transactional transfer pricing methods," namely the CUP, resale price and cost-plus methods.

Return disclosures/related-party disclosures

No related-party detailed information is disclosed to the General Tax Administration, other than the submission of an entity-specific transfer pricing file, when applicable.

Transfer pricing-specific returns

Not applicable.

Angola (continued)

Documentation deadlines

The transfer pricing file must be prepared and submitted to the General Tax Administration within six months of the fiscal year-end (typically, companies in Angola have a fiscal year aligned with the calendar year).

Transfer pricing penalties

The General Tax Administration notifies large taxpayers that failed to file transfer pricing documentation for the payment of a tax fine under the General Tax Code (namely No. 2 of Article 198), ranging from AOA10,000 to AOA50,000. Existing notifications indicate that the maximum amount of the range is being applied. The application of penalties in this regard will imply a reputational risk to the taxpayer, as it will be considered "noncompliant."

Moreover, noncompliance with transfer pricing documentation requirements will result in such taxpayers being forbidden from performing capital operations, current invisible transactions (payments for services and intangibles) or trading operations that, according to the exchange control regulations presently in place, require an intervention from the National Bank of Angola. In practice, it may completely block the day-to-day activity of any taxpayer whenever its legal name is communicated by the General Tax Administration to the National Bank of Angola with the specification of noncompliance with tax obligations.

For large taxpayers, the lack of compliance with the transfer pricing documentation requirements should also prevent the application of rights foreseen in the corresponding statute, namely the possibility to pay the industrial tax at the Large

Taxpayers Office, to have a closer relationship with the tax administration via the appointment of two inspectors who will deal with the taxpayer's day-to-day questions and to pay tax debts in installments.

The most important implication of the most recent transfer pricing rules enacted in Angola was the shift of the burden of proof to the taxpayer, which is now required to produce contemporaneous documentation to sustain the transfer prices applied to transactions performed with associated enterprises. If the tax authorities deem that a certain amount charged in a related-party context to an Angolan taxpayer is not consistent with the arm's-length principle, the Angolan tax authorities will propose an adjustment to the price of a given transaction and assess additional tax, penalties and compensatory interest. The tax authorities are allowed to open an audit and perform transfer pricing adjustments regarding the last five fiscal years.

If a transfer pricing adjustment is made, a penalty equivalent to 35% of the additional tax will be applied, plus delay interest at the non-compounded rate of 1% per month (or 12% per year).

With respect to correlative adjustments, they are only foreseen in the Industrial Tax Code for adjustments performed in relation to transactions involving Angolan taxpayers, as the country has not yet signed any double tax treaty. The current transfer pricing legislation does not provide for cross-border correlative adjustments.

Penalty relief

Not applicable.

Angola (continued)

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing assessments is 5 years from the last day of the tax year-end or 10 years in case of tax infringement.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

No detailed information is currently available about the level of audit risk that exists in the transfer pricing environment. Because the respective legislation (Presidential Decree 147/13 of 1 October 2013 and Law 19/14 of 22 October) was enacted only few years ago, no patterns of audit risk have yet been established.

However, despite the law's early stage, transfer pricing audits are expected to increase, as the subject becomes more prominent on the radar of the government and Angolan tax authorities.

APA opportunity

Not yet foreseen.

Impact of new OECD BEPS Action 8–10 guidelines

On one hand, Angola is not an OECD member country; however, on 30 June–1 July 2016 during an OECD/G20 meeting devoted to the new inclusive framework to tackle BEPS, Angola formally joined the framework and has committed to implement the BEPS package.

Considering this, it is important to monitor further developments in this area.

Argentina

Taxing authority and tax law

Taxing authority: Internal Revenue Service (*Administración Federal de Ingresos Públicos*, or AFIP)

Tax law: Income Tax Law (ITL) and Regulations

Relevant regulations and rulings

Regulations currently in effect:

- AFIP Dirección General Impositiva (DGI) Regulation No. 1,122 (published 31 October 2001, but applicable for fiscal years beginning on 31 December 1999 or later) applies, as amended by several regulations: No. 1,227/02, No. 1,296/02, No. 1,339/02, No. 1,590/03, No. 1,663/04, No. 1,670/04, No. 1,918/05, No. 1,958/05, No. 1,987/05, No. 3,132/11, No. 3,149/11, No. 3,476/13, No. 3,573/13, No. 3,576/13 and External Notes No. 6/05 and No. 1/08.
- Binding tax rulings for general application are not provided.
- Opinions from the tax authority are scarce and nonbinding.

OECD Guidelines treatment

Argentina is not an OECD member country, and the OECD Guidelines are not referenced in Argentina's ITL and Regulations.

However, the tax authority usually recognizes the OECD Guidelines in practice, as long as they do not contradict the ITL and Regulations. Several first-level court cases also recognize the use of the OECD Guidelines, insofar as they do not contradict the ITL and Regulations.

Documentation requirements

Transfer pricing regulations require extensive contemporaneous documentation. Furthermore, taxpayers are required to file an annual transfer pricing study for all transactions with related parties, deemed related parties and independent parties located in tax havens.

Taxpayers are required to keep and eventually submit all of the documents evidencing that prices, amounts received and profit margins have been established on an arm's-length basis.

Priorities/pricing methods

The ITL does not prioritize methods; Regulation No. 1,122/01 articulates the best-method rule.

The tested party must be the local entity (i.e., the entity based in Argentina). The taxpayer selects the most appropriate method, but the AFIP may oppose the selection. Pursuant to the ITL, the accepted methods for transactions with related parties and tax havens are CUP, resale price, cost-plus, profit split and TNMM.

The use of an interquartile range is mandatory. Unless there is evidence to the contrary, the market price must be used for tangible goods transactions with both related and independent parties where there is an international price in a transparent market.

Argentina (continued)

For transactions involving grains, oleaginous products, other soil products, oil and gas, and all other goods with well-known prices in transparent markets, and where the local company operates through international intermediaries that are not the final consignees of the goods, the applicable price is the prevailing price in the respective market on the day when the loading of the shipment is finished (or it is the agreed-upon price, if higher than the market price). This method may not apply, however, if the local exporter can prove the substance of the operations of the consignee abroad following certain specific tests included in the regulations. The AFIP has the power to limit the application of this method or extend it to other transactions, depending on the circumstances.

Export and import transactions with independent parties not located in tax havens are subject to information requirements if the annual amount of the transaction exceeds ARS1 million, or if the transactions are exports and imports of commodities. The requirements depend on different annual transaction amounts and, in some cases, may include calculations of profit margins.

Return disclosures/related-party disclosures

Taxpayers are required to file the following documentation with the AFIP:

- An annual transfer pricing study
- Audited financial statements for the fiscal year, in case they have not already been filed before
- An independent certified public accountant's certification of certain contents of the transfer pricing study
- Transfer pricing-specific returns

Transfer pricing-specific returns

Taxpayers are required to file the following transfer pricing-specific returns with the AFIP:

- Annual Form 743
- Annual Form 969
- Form 742 (for the first six-month period of each fiscal year)
- Semiannual Form 741 (for commodities exports and imports with independent parties not located in tax havens)
- Annual Form 867 (for other exports and imports with independent parties not located in tax havens)
- Annual Form 4501 (for the digital filing of the transfer pricing study and certified public accountant's certification)
- Monthly Form 968 (transaction with local related parties)

Documentation deadlines

The transfer pricing documentation must be ready to be filed with the AFIP by the date that the corresponding transfer pricing return filings are due. An annual transfer pricing study, financial statements, Form 4501 and certification must be filed with the tax authority by the beginning of the eighth month after the end of the fiscal year.

The annual transfer pricing return must also be filed by the beginning of the eighth month after the close of the fiscal year. However, transfer pricing adjustments must be recognized as of the date the income tax return is due (i.e., the fifth month after the fiscal year-end). The semiannual returns must be filed by the end of the fifth month after the end of the relevant six-month period. The annual return for export and import transactions with independent parties not located in tax havens must be filed by the end of the seventh month after the end of the fiscal year.

Additionally, Form 969 must be filed annually, within 15 days of the income tax return deadline.

Finally, Form 968 must be filed the last business day of the following month to be informed.

Transfer pricing penalties

For late filing of tax returns containing international transactions involving the export or import of goods with independent parties, the taxpayer will be fined ARS9,000. For late filing of tax returns concerning other international transactions, the taxpayer will be fined ARS20,000. For penalties related to late filing or lack of filing, it does not matter whether the transactions were at arm's-length.

For noncompliance with the formal duties of furnishing information requested by the AFIP, the taxpayer faces fines of up to ARS45,000. The same applies to failure to keep vouchers and evidence of prices in files on hand and failure to file tax returns upon request. If tax returns are not filed after the third request, and the taxpayer has income amounting to more than ARS10 million, the fine is increased from ARS90,000 to ARS450,000. Interest accrues on unpaid tax balances (as of 1 January 2011, the rate is 3% on a monthly basis and 4% upon lawsuit filing).

For unpaid taxes related to international transactions, the taxpayer is fined 100% to 400% of the unpaid tax. This fine has different levels, depending upon the level of compliance with the formal duties related to the control of taxes derived from international transactions. Penalties for fraud are 2 to 10 times the unpaid taxes.

Criminal tax law stipulates imprisonment for two to six years if the unpaid tax exceeds ARS400,000 for each tax and fiscal year. If the unpaid tax exceeds ARS4 million, the prison term will increase, ranging from three-and-a-half years to nine years.

Penalty relief

Concerning underpayment and fraud, if the non-recidivist taxpayer voluntarily amends the tax returns before receiving a special notice (or vista) from the AFIP, the penalty is reduced to one-third of the minimum fine. If the tax returns are amended within 15 days of receiving the notice, the penalty is reduced to two-thirds of the minimum fine. If the non-recidivist taxpayer accepts the adjustments assessed by AFIP and pays the amounts due, the penalties are set at the minimum. If the taxes due do not exceed ARS1,000 and are paid voluntarily, or within 15 days from the special notice, then no penalty shall be applied.

Statute of limitations on transfer pricing assessments

The general statute of limitations for federal tax matters is 5 years for registered and registration-exempt taxpayers and 10 years for unregistered taxpayers. These periods begin on 1 January following the year in which the tax return is due.

The moratorium regime in place during calendar year 2009 and the voluntary declaration of the foreign exchange holding regime in place during calendar year 2013 added one additional year each to the statute of limitations period for certain fiscal years. The taxpayer must keep the transfer pricing documentation on hand and provide it upon AFIP's request for up to five years after the period established by the statute of limitations.

Argentina (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general can be considered high; meanwhile, the chance of a transfer pricing review during such an audit is estimated as medium. Nevertheless, once transfer pricing has become a topic of the audit, the likelihood of the tax authority challenging the taxpayer's transfer pricing methodology is high.

In addition, trial-level court cases are being published. In most cases, the taxpayers' positions have prevailed, but a few have been in favor of the tax authority. In addition, some second-level court cases are also being published. The tax authority will likely try to increase revenue and strictly enforce penalties with companies that are not complying with transfer pricing requirements.

Recently, the tax authorities have focused on transactions involving the importation of goods from a principal located in a jurisdiction different from where the goods were manufactured, causing a price difference because of the value added by the intermediate company. Further scrutiny and foreign trade controversy are expected with regard to transfer pricing, customs and foreign exchange control issues under the argument of "tax planning harmful to foreign trade."

APA opportunity

Currently, APAs are not specifically addressed.

Impact of new OECD BEPS Action 8–10 guidelines

Although OECD rules are not mandatory in Argentina, there is a tendency in court cases to consider the OECD Guidelines as interpretative of or complementary to the Argentine Transfer Pricing Regulations. Additionally, tax authorities tend to use the OECD Transfer Pricing Guidelines when there are no specific provisions in the Argentine Transfer Pricing Regulations. So from a practical point of view, recent OECD developments are likely to affect the transfer pricing analyses of Argentine companies. Formally, there have been no changes in local transfer pricing rules based on these developments.

Armenia

Taxing authority and tax law

Taxing authority: Ministry of Finance

Tax law: Income Tax Law

Relevant regulations and rulings

Currently, Armenia does not have local transfer pricing regulations but does have double tax treaties with 43 countries that contain an article that resembles Article 9 of the OECD Model Treaty (on associated enterprises).

OECD Guidelines treatment

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Not applicable.

Penalty relief

Not applicable.

Armenia (continued)

Statute of limitations on transfer pricing assessments

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Not applicable.

APA opportunity

Not applicable.

Impact of new OECD BEPS Article 8–10 guidelines

Not applicable.

Australia

Taxing authority and tax law

Taxing authority: Australian Taxation Office (ATO)

Tax law: Income Tax Assessment Act 1936, Income Tax Assessment Act 1997 and Tax Administration Act 1953

Relevant regulations and rulings

Australia's transfer pricing law is contained in:

- Division 13 of Part III of Income Tax Assessment Act 1936 (ITAA 1936)
- Subdivisions 815-A, B, C, D and E of the Income Tax Assessment Act 1997 (ITAA)
- Subdivision 284-E of the Tax Administration Act 1953 (TAA)
- Relevant provisions of double tax treaties

Applicability of legislation

Division 13 was enacted in 1982 and applies to income years that commenced before 1 July 2013. Division 13 applies at the discretion of the Commissioner of Taxation (Commissioner) and cannot be self-assessed.

Subdivision 815-A was enacted in 2012 and applies to income years commencing between 1 July 2004 and 30 June 2013. It operates concurrently with Division 13 for transactions with related parties in countries that have a double taxation agreement with Australia. Subdivision 815-A applies at the Commissioner's discretion and cannot be self-assessed.

Subdivisions 815-B, C and D apply to taxpayers with income years commencing on or after 1 July 2013. The Commissioner can apply Subdivisions 815-B, C and D, and taxpayers must self-assess them.

Overview of current legislative framework

Subdivisions 815-B, C and D were enacted in June 2013 and introduced important changes to the transfer pricing rules, including:

- A self-assessment regime, effectively requiring public officers to determine whether the taxpayer has received a transfer pricing benefit to satisfy their duties in signing off on the tax return. In extreme cases, the public officers may be liable for penalties if they do not discharge this responsibility.
- Penalty regime linked to documentation. The preparation of transfer pricing documentation is not compulsory. However, failure to prepare documentation contemporaneously in accordance with the new rules prevents the taxpayer from establishing a reasonably arguable position (RAP). This will typically prevent the taxpayer from accessing lower penalties if the taxpayer receives a transfer pricing adjustment that increases its tax liabilities in Australia. A failure to prepare contemporaneous documentation cannot be remedied at a later point in time.
- Extensive reconstruction provision. Subdivisions 815-B through D provide the ATO with extensive powers in relation to examining the actual commercial and financial relations between a taxpayer and its international related parties and substituting them with what the ATO considers a better reflection of arm's-length commercial and financial relations. These substituted transactions then form the basis for determining the arm's-length conditions. This provision must also be self-assessed by the taxpayer.
- Compliance with the arm's-length principle is assessed on the alignment of the taxpayer's actual conditions with arm's-length conditions. Conditions are defined broadly to encompass all pricing and non-pricing aspects relevant to the economic substance of the business and its international arrangements. This effectively gives rise to a "double test," where taxpayers have to assess the overall commerciality of their arrangements as well as the pricing of individual transactions.

Australia (continued)

Subdivision 815-C provides specific rules for permanent establishments to make certain that the amount brought to tax in Australia by entities operating permanent establishments is not less than it would be if the permanent establishment was a distinct and separate entity operating independently. The rules and requirements contained in Subdivision 815-C apply in broadly the same manner as those contained in Subdivision 815-B. Subdivision 815-C does not fully align with the OECD guidance and requires an allocation of actual revenue and expenses.

Subdivision 815-D applies to partnerships and trusts using an analogous approach as found in Subdivisions 815-B and 815-C.

Recent changes — implementation of OECD BEPS actions

In response to the OECD BEPS project, Australia has enacted or is in the process of enacting implementation measures for Actions 8 through 10 and 13.

Implementation of Actions 8–10

The implementation of Actions 8–10 is expected to take place through the inclusion of the 2016 OECD Guidelines as a reference document relevant for the determination of arm's-length conditions. The regulations giving effect to this inclusion were expected to be issued in the first half of calendar-year 2017 and are expected to apply from 1 July 2016 onward.

Implementation of Action 13

Action 13 has been implemented in Australia through inclusion in Subdivision 815-E of the ITAA. Consistent with Action 13, this subdivision requires significant global entities (SGEs) to prepare a CbCR, master file and local file for years starting on or after 1 January 2016 unless an exemption applies. A taxpayer is an SGE if the global revenue (turnover) of the global group it forms part of exceeds AUD1 billion.

Further draft administrative guidance has been provided by the ATO in relation to the content of the Local File, the form of the Local File, what constitutes an agreement for Local File purposes and exemptions. The following overview of the implementation is based on the legislation and our understanding of the administrative guidance either released formally by the ATO, or discussed with the ATO in consultative discussions. It is subject to change:

CbCR

The content and format of the CbCR as required in Australia are consistent with Action 13.

Unless an exemption applies, the CbCR must be lodged within 12 months of the end of the taxpayer's financial year. The CbCR can be lodged by the local taxpayer or by the ultimate parent or a surrogate if the CbCR is subject to an automatic exchange of information with the country in which that entity is resident.

Exemptions for the CbCR can be provided by the ATO upon written request in certain circumstances. This includes the ability to request a temporary exemption for SGEs that are not required to lodge a CbCR in the country of residence of the ultimate parent.

Master file

The content and format of the master file as required in Australia are consistent with Action 13.

Unless an exemption applies, the master file must be lodged within 12 months of the end of the taxpayer's financial year. The master file must be lodged by the taxpayer through the Local File form, as there is currently no automatic exchange of information provision that applies to the master file. If there are multiple Australian taxpayers, the master file can be filed by one on behalf of all.

Australia (continued)

Local file

The local file differs significantly in form and content from what we are seeing in most countries. Importantly, it is a form that requires provision of source data rather than a local transfer pricing report. The requirements for the local file are included in the attached high level design and include the provision of transactional information on all related-party dealings, the transfer pricing method used by each party engaged in the transaction and agreements.

The ATO's objective is to gather large amounts of data and then data mine this.

The local file must be lodged by each taxpayer in the approved form (an XML schema). This schema is not provided by the ATO, meaning that taxpayers will have to build a lodgement tool, subscribe to a commercial tax lodgment program or use a tax agent to lodge the Local File.

The local file must be lodged by each local taxpayer within 12 months of its year-end. However, there is an administrative concession that allows taxpayers to lodge Part A of the Local File instead of the separate International Dealings Schedule (IDS — see "Return disclosures/related-party disclosures" section). If a taxpayer wants to use the concession, the local file must be lodged with the tax return, which is typically due 6 months and 15 days after the year-end.

Interaction with other filings and transfer pricing documentation

The CbCR, master file and local file are additional filing requirements and do not replace the existing IDS or transfer pricing documentation requirements.

Unless a taxpayer lodges Par A of the Local File with the Tax Return, the IDS (see "Return disclosures/related-party disclosures" section for further detail) must be lodged with the tax return. The IDS contains information on related-party dealings, countries in which the counterparties are resident and documentation disclosures.

In addition, transfer pricing documentation (see "Documentation required" section for further detail), this will still need to prepared and available to the taxpayer at the time of lodging the tax return if a taxpayer is seeking to achieve penalty mitigation. Given that there is some overlap with parts of the local file, taxpayers may find it more efficient to complete both the local file and transfer pricing documentation before lodgment of the tax return.

All Australian transfer pricing provisions are one-directional and apply only to increments in a taxpayer's tax liability. Subdivision 284-E outlines transfer pricing documentation requirements for taxpayers for whom Subdivisions 815-B or C apply.

The ATO has published the following transfer pricing rulings and practice statements (PS) in relation to the current transfer pricing legislation:

- PS LA 3672: When an entity will be liable for a transfer pricing penalty and how the penalty is assessed
- PS LA 3673: Guidance for transfer pricing documentation
- TR2014/8: Transfer pricing documentation requirements
- TR2014/6: Relevance of actual commercial or financial relations in the identification of arm's-length conditions
- PS LA 2015/4: Advance pricing arrangements
- The high level design for the local file — HLD3 — is neither a PS LA nor a ruling but provides guidance in relation to the content of the local file for Australian purposes.

PS LA 3672, PS LA 3673 and TR2014/8 cover transfer pricing documentation and penalties when applying the new transfer pricing law. TR2014/6 sets out the Commissioner's views on the application of the reconstruction provision as well as its interaction with other sections of Subdivision 815-B and the OECD Guidelines.

Australia (continued)

PS LA 2015/4 was released on 23 July 2015. This practice statement sets out the new process to be followed by ATO officers, including a "whole-of-code review" for any taxpayers that seek to enter into the APA program or renew an already existing APA.

While not technically a practice statement or ruling, the ATO has also issued guidance that allows the application of simplified transfer pricing record-keeping for small taxpayers, distribution entities, certain types of services and small loans under certain circumstances.

The ATO has also published a large number of transfer pricing rulings and other guidance in the form of tax determinations practice statements and booklets in relation to the historical transfer pricing legislation. This guidance, which is relevant for years starting before 1 July 2013, includes:

Taxation rulings (TRs) in relation to historical transfer pricing legislation

- TR92/11: Loans
- TR94/14: Application of Division 13
- TR97/20: Methodologies
- TR98/11: Documentation
- TR98/16: Penalties
- TR1999/1: Services
- TR2000/16: Relief from Double Taxation
- TR2001/11: Permanent Establishments
- TR2001/13: Interpretation of Australia's Double Tax Agreements
- TR2002/2: Meaning of Arm's-length for the Purposes of §47A(7) Dividend Deeming Provisions
- TR2002/5: Definition of Permanent Establishment
- TR2003/1: Arm's-Length Debt Test
- TR2004/1: Cost Contribution Arrangements
- TR2005/11: Branch Funding for Multinational Banks
- TR2007/1: Consequential Adjustments
- TR2010/7: Interaction of Transfer Pricing and Thin Capitalization Provisions
- TR2011/1: Transfer Pricing Implications of Business Restructures

Taxpayers should take care when relying on the rulings listed above and other guidance listed below for years starting on or after 1 July 2013, as the operation of the legislation has changed and the ATO's interpretation is likely to evolve.

Tax determinations (TDs):

TD2002/20: Film Production Companies and the Impact of the Tax Offset Scheme

TD2002/28: Foreign Bank Election to Not Apply Part IIIB of the Income Tax Assessment Act (1936)

TD2007/1: Market Value of Goodwill of an Entity That Becomes a Member of a Consolidated Group

TD2014/14: Income Tax Deductibility of Payments Made by Australian Companies to Foreign Subsidiaries

Australia (continued)

ATO booklets:

- *Concepts and Risk Assessment*
- *Applying the Arm's-Length Principle*
- *Advance Pricing Arrangements, Documentation*
- *Risk Assessment for Small to Medium Businesses*
- *Dependent Agent Permanent Establishments*
- *Marketing Intangibles, Business Restructuring — discussion paper on application of Australia's transfer pricing rules*
- *ATO Discussion Paper on Intra-group Finance Guarantees and Loans — application of Australia's transfer pricing and thin capitalization rules*

Assessment and adjustment of transfer prices

Subdivisions 815-B, C and D operate on a self-assessment basis. They require public officers to assess whether the taxpayer received a transfer pricing benefit. Broadly, a transfer pricing benefit is received when an entity's taxable income or withholding tax payable is less than it would have been had the arm's-length conditions operated. A transfer pricing benefit also arises when the entity's tax loss is greater than it would have been had the arm's-length conditions operated. Where a taxpayer receives a transfer pricing benefit, the arm's-length conditions replace the actual conditions to determine its Australian taxable income.

Following the self-assessment, the Commissioner, through the ATO, can raise adjustments when he believes that the self-assessed position still contains a transfer pricing benefit.

For years covered by the historical Division 13 and/or Subdivision 815-A, the Commissioner is the only person able to make an assessment of the arm's-length consideration of the taxpayer's transactions. In addition, the Commissioner can substitute an arm's-length amount of consideration only when a taxpayer has received less than an arm's-length amount or has paid more than an arm's-length amount.

Reconstruction of transactions

Subdivision 815-B adopts a substance-over-form approach toward transactions. It requires the taxpayer to follow the economic substance of a related-party arrangement where the economic substance does not match the legal form.

In addition, it requires the taxpayer to perform a commerciality test. Under this test, taxpayers must replace the actual commercial or financial relations if independent parties "would not have entered into the actual arrangement but instead would have entered into a different arrangement" or "would not have entered into an arrangement at all." Notably, the reconstruction provisions go further than those within the 2010 OECD Guidelines, which apply only if the uncommercial transaction also practically impedes the tax authority from determining the appropriate transfer price. This second leg is not included in Subdivision 815-B. The ATO is expected to interpret the reconstruction provision broadly and could, for instance, seek a reconstruction of the arrangement to align transfer pricing adjustments in accordance with what the Commissioner considers to be commercially realistic behavior and outcomes, even where comparable and reliable CUP information is available.

In addition, the ATO can apply the general anti-avoidance provisions to reconstruct or disregard a transaction where the dominant purpose of a "scheme" is to avoid or reduce the taxpayer's tax liability.

The ATO has also expressed the view that it can change individual elements of the actual arrangement outside the reconstruction provisions to improve comparability. For example, the ATO may seek to disregard certain terms of a transaction if these are not observed between independent parties. The ATO considers that this approach is a "repricing" of a transaction rather than a reconstruction. We disagree with this interpretation and would regard any change in the actual transaction as a reconstruction. It remains to be seen which view would prevail in a legal challenge.

Multinational Anti-Avoidance Law and Diverted Profits Tax

Similar to the UK, Australia has enacted further anti-avoidance provisions to deal with BEPS risks.

This includes the Multinational Anti-Avoidance Law (MAAL), which applies in situations in which:

- Sales are made by an overseas entity to an Australian customer.
- An Australian entity is involved with the sales process (e.g., by managing the customer relationship on a day-to-day basis) but does not constitute a permanent establishment.

In addition, exposure draft legislation was released in late 2016 which further expands the general anti-avoidance provisions through the Diverted Profits Tax (DPT). This expansion is expected to apply for years starting on or after 1 July 2017. The DPT is a punitive regime that levies tax at 40% without the ability to offset tax suffered overseas and once enacted will apply where:

- An Australian taxpayer transacts with an overseas related-party.
- There is a principal purpose of obtaining a tax benefit or a tax benefit and a reduction in an overseas tax liability.

There are three exclusions from the DPT:

- The Australian entity (including its economic group) has a turnover of less than AUD25 million.
- The tax paid overseas in relation to the transaction is 80% or more than the reduction in the Australian tax liability. The tax paid also reflects the impact of potentially available losses or tax incentives, i.e., if the overseas entity does not pay tax or a reduced amount of tax due to losses or incentives, this reduced amount forms the basis for assessing the 80%.
- The profit of each of the entities connected to the transaction is consistent with its economic substance as reflected by 'active activities'.

OECD Guidelines treatment

The court case Commissioner of Taxation v. SNF (Australia) Pty Limited [2011] FCAFC 74, decided under Division 13, rejected the OECD Guidelines as relevant when interpreting Division 13 and rejected the Commissioner's use of the TNMM.

In response to this court case, transfer pricing provisions were released: Subdivision 815-A was released in 2012 and Subdivisions 815-B, C and D were released in 2013. These provisions refer directly to the 2010 OECD Guidelines as relevant guidance for the interpretation of the provisions. The recent Federal Budget mentions that the reference in relation to Subdivision 815-B, C and D will be updated to reference the 2016 OECD Guidelines with retrospective effect for years starting on or after 1 July 2016.

Documentation requirements

The preparation of transfer pricing documentation is not compulsory. However, taxpayers that do not prepare contemporaneous transfer pricing documentation that meets the specific requirements set out in Subdivision 284-E are precluded from establishing a RAP in the event of a transfer pricing adjustment. This will typically result in larger penalties if the taxpayer receives a transfer pricing adjustment that increases its tax liabilities in Australia.

Australia (continued)

- To satisfy Subdivision 284-E, it is required that the documentation:
  - Be prepared contemporaneously (i.e., before the time by which the taxpayer lodges its income tax return)
  - Be prepared in English, or readily accessible and convertible into English
  - Explain the particular way in which the relevant transfer pricing provisions apply (or do not apply) to the taxpayer's international related-party dealings
  - Explain why the application of the transfer pricing provisions to the taxpayer's international related-party dealings in that way best achieves the consistency with the relevant guidance materials[1] (e.g., 2010 OECD Guidelines)
  - It also requires that the documentation allows actual conditions, arm's-length conditions, comparable circumstances and the result of the application of the subdivision to be readily ascertained

The ATO further recommends that taxpayers answer the following five questions in their documentation:

1. What are the actual conditions that are relevant to the matter?
2. What are the comparable circumstances relevant to identifying the arm's-length conditions?
3. What are the particulars of the methods used to identify the arm's-length conditions?
4. What are the arm's-length conditions, and is/was the transfer pricing treatment appropriate?
5. Have any material changes and updates been identified and documented?

The manner in which Subdivision 815-B operates implies that historical documentation and global documentation that are prepared without specific regard to the Australian legislation are unlikely to be sufficient to establish a RAP to mitigate penalties.

For completeness, the documentation requirements will not be met by only completing a local file as described under the recent developments above.

Priorities/pricing methods

The legislation requires taxpayers to adopt the "most appropriate" transfer pricing method and refers to the OECD Guidelines in this regard. Methods include traditional transaction methods (CUP, resale price and cost-plus) and traditional profit-based methods (profit split and TNMM).

Return disclosures/related-party disclosures

The ATO requires an International Dealings Schedule (IDS) to be filed with the tax return. It requires taxpayers to disclose:

- Details of restructuring events involving international related parties (Question 17, which must be completed regardless of the quantum of the transactions)
- Dealings with branch operations (Question 18, which must be completed regardless of the quantum of the transactions)

In addition, if the aggregate amount of transactions or dealings with international related parties, both revenue and capital in nature, is greater than AUD2 million, the following information must be disclosed:

- Top three transactions (individually) and other transactions (combined) for the top three specified "low-tax" jurisdictions (Question 3)
- The top three transactions and other transactions for the top three non-specified jurisdictions (Question 4). Historically, the list of specified countries predominantly focused on tax havens; however, the list was recently expanded to include Hong Kong, Ireland, Luxembourg, Singapore, Switzerland and the Netherlands.

[1] Guidance materials are outlined in §§ 815-135 and 815-235.

- For all international related-party transactions (Questions 5 through 13):
  - Type of transaction, e.g., royalties, intercompany loans, technical services, administrative services
  - The quantum per type of transaction
  - The percentage of transactions of each type covered by contemporaneous documentation that has been prepared in accordance with the four-step process (transfer pricing documentation does not need to be lodged with the tax return)
  - Transfer pricing methodologies selected and applied for each international related-party transaction type
  - Information on transactions for no payment or nonmonetary payment, share-based employee remuneration and cost contribution arrangements (Questions 14 through 16)

In addition to the transfer pricing disclosures, the IDS captures information on interests in foreign companies or foreign trusts, permanent establishments and thin capitalization. Separate thresholds apply for these disclosures.

As an administrative concession, the ATO is looking to waive the requirement to lodge parts of the IDS where taxpayers complete and lodge the local file with the tax return.

Transfer pricing-specific returns

There is no specific return, apart from the schedule to the tax return described above.

Documentation deadlines

Under the current transfer pricing legislation, any transfer pricing documentation must be contemporaneous, which means it needs to be completed when the tax return is lodged. A failure to meet this requirement results in an inability to have a RAP. This cannot be rectified at a later point in time.

Transfer pricing penalties

Three types of penalties could apply when the ATO adjusts transfer prices: (1) a penalty for a scheme shortfall, (2) a penalty for the failure to take reasonable care and (3) a penalty for a false and misleading statement made by the taxpayer. Each of these is explained in more detail below. All penalties can apply to the same transaction. Draft guidance on the assessment of transfer pricing penalties under the new rules is set out in PS LA 3672.

Penalties for scheme shortfalls

Where the Commissioner has determined that a taxpayer has received a scheme benefit, which includes all transfer pricing adjustments, a penalty can be applied. The level of penalty will vary depending on whether the sole dominant purpose of the arrangement is to obtain a transfer pricing benefit and whether the taxpayer can establish a RAP.

Under Division 13 or Subdivision 815-A, the taxpayer may have a RAP "if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect or is more likely to be correct than incorrect." As such, the mere existence of transfer pricing documentation does not guarantee that the taxpayer will be able to establish a RAP.

The same criteria apply in the context of Subdivision 815-B. However, transfer pricing documentation also needs to exist when the tax return is lodged, and it must meet the prescribed requirements in order for a taxpayer to attempt to establish a RAP.

The penalty rates if no RAP can be established are typically 25% to 50% of the shortfall amount. The shortfall amount can broadly be defined as underpaid tax.

Penalties for failure to take reasonable care

Additional penalties apply where the Commissioner makes an adjustment that results in a tax shortfall and the taxpayer has failed to take reasonable care. The level of the penalty varies depending on whether the taxpayer has failed to take reasonable care (25% of the shortfall amount), has acted recklessly (50%) or has had intentional disregard of the relevant rules (75%). Penalties for SGEs are doubled.

Penalties for false and misleading statements

Where the Commissioner determines that a taxpayer has made a false or misleading statement, a penalty will apply. The level of the penalty varies depending on whether the taxpayer has failed to take reasonable care, has acted recklessly or has had intentional disregard for the relevant rules. The penalties range from 20 to 60 penalty units[2] per statement and apply regardless of whether a shortfall resulted.

Penalties for significant global entities

Scheme shortfall penalties, penalties in relation to the failure to take reasonable care and penalties for false and misleading statements are doubled for Significant Global Entities.

Other penalties

Penalties for Failure to lodge on time

Consistent with announcement in the May 2016 budget, draft legislation was released in December 2016 to increase late lodgment penalties for SGE 100-fold. This means that the penalty for late lodgment for an SGE will increase to AUD90,000 for lodgments that are less than 28 days and increases to AUD450,000 for lodgments that are 112 days late or more.Lodgement penalties apply to a range of forms including the Tax Return, IDS, CbCR, Master File and Local File.

Penalties in relation to sales made by an overseas entity directly to an Australian customer

A 100% penalty applies in situations in which tax is underpaid as the result of applying the specific anti-avoidance provision for sales being made by an overseas entity to an Australian customer where an Australian affiliate of the selling entity is involved.

Public officer liability

As a part of the self-executing nature of the new transfer pricing legislation, the onus is also on the public officer to confirm that actual conditions are consistent with arm's-length conditions before signing the income tax return. If the conditions do not align and a transfer pricing benefit has been received, the business must adjust its taxable income, tax losses or other tax attributes.

As part of the income tax return process, the public officer of a company is required to declare that the information contained within the tax return is not false or misleading.

Where the ATO determines that a public officer has made a false or misleading statement on the income tax return, the public officer may be personally liable for penalties and could be subject to criminal prosecution. Further, the ATO can theoretically hold the public officer liable for the penalties imposed on the company for lack of reasonable care or not having a RAP; however, it would be unusual for the ATO to do so.

[2] Penalty units are used to define the amount payable for fines for many offenses in Australia. One penalty unit is currently AUD180.

Shortfall interest charge (SIC)

For 2004–05 and later income years, a SIC applies to any amount of tax shortfall from the day on which income tax under the first assessment for that income year was due and payable to the day on which the Commissioner gave notice of an assessment. The SIC applies regardless of whether the taxpayer is liable for any shortfall penalty.

Penalty relief

Where the taxpayer has contemporaneous documentation (i.e., prepared prior to, or at the time of, filing the company's annual tax return and International Dealings Schedule) to support a RAP, the penalty may be reduced.

In addition, penalties will be reduced by 20% for voluntary disclosure after notification of an audit, or by 80% for voluntary disclosure before notification of an audit.

A taxpayer with an APA will typically not incur penalties. Exceptions to this include non-arm's-length dealings that are not covered by the APA, or for noncompliance with the terms and conditions of the APA.

Commissioner's discretion to remit penalties

Under PS LA 2008/18, the Commissioner may impose penalties for both a scheme shortfall and a false or misleading statement, but it has the discretion to remit the penalty in part or in total. The practice statement provides some very restrictive examples in which penalties are to be remitted. In relation to penalties in relation to failure to have a reasonably arguable position, given the specific nature of Subdivision 284-E, it would seem unlikely that the Commissioner would remit penalties in the future unless the prescribed documentation exists.

Statute of limitations on transfer pricing assessments

Under Subdivisions 815-B, C and D, amendments can be made within seven years following the date on which a notice of assessment is issued to the taxpayer.

Historically, there has been no statute of limitations with respect to transfer pricing adjustments. The tax legislation applicable for financial years starting before 1 July 2013 specifically empowers the Commissioner to make amendments to tax assessments in any year for transfer pricing adjustments under Division 13. As such, years starting before 1 July 2013 remain open to challenge indefinitely.

Adjustments can be made under Subdivision 815-A for any financial years starting between 1 July 2004 and 30 June 2013 (inclusive). Similar to Division 13, there is no limitation on when adjustments can be made.

In addition, some of Australia's double tax agreements, including those with New Zealand and Japan, specify time limits for adjustments.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In determining whether an Australian taxpayer's transfer pricing arrangement should be reviewed or audited, the ATO generally considers the size and nature of the related-party dealings, the quality of any transfer pricing documentation and whether the taxpayer's results appear to be commercially realistic. The ATO has developed a sophisticated risk engine that considers these factors, along with other financial and industry data, to determine which taxpayers to review. Related-party transactions undertaken in connection with the following may receive particular attention by the ATO:

Centralized business models with activity in low-tax jurisdictions, including principals, marketing hubs and procurement companies in low-tax jurisdictions

Australia (continued)

- Low levels of profitability, or losses
- Financing arrangements, including interest-free loans, interest-bearing loans and guarantee fees
- Companies undergoing supply chain restructurings
- Business restructuring (particularly where profitability is reduced, or valuable Intangible property is transferred)
- Transactions with recognized tax haven jurisdictions
- Royalties
- Intangibles (both Australian and foreign-owned)
- Management services

The likelihood of an annual tax audit in Australia would be assessed as medium in general. However, if taxpayers exhibit the risk factors indicated above, the likelihood of a review or audit increases significantly. In addition, if the taxpayer enters into a material level or percentage of international related-party transactions, the likelihood that transfer pricing would be reviewed as part of any general tax audit is very high.

More recently, the ATO has also been focusing on BEPS scenarios and has started to issue questionnaires to taxpayers. The risk of review for companies with these structures can be considered high.

APA opportunity

On 23 July 2015, the ATO released its revised policies and procedures for the APA program, PS LA 2015/4, which is administratively binding on the ATO. The practice statement reinforces the ATO's stated commitment to maintaining the APA program as an effective part of Australia's transfer pricing regime.

The practice statement contains more detail on the ATO processes and includes references to a "whole-of-code" review of taxpayers before they are accepted into the APA. Such a review includes analysis of non-transfer-pricing-related tax issues, such as historical IP transfers, intercompany financing, permanent establishments and thin capitalization.

While maintaining the commitment to APAs in the "right circumstances," the ATO has become more selective in accepting taxpayers into the APA program. The landscape continues to evolve, and taxpayers considering an APA would be well-advised to check the latest state of play with their advisors before approaching the ATO.

Impact of new OECD BEPS Action 8–10 guidelines

The OECD Guidelines were updated as part of actions 8-10 of the OECD BEPS project. It is anticipated that the updated OECD Guidelines will be introduced into the Australian legislation with retrospective application from 1 July 2016.

Austria

Taxing authority and tax law

Taxing authority: Ministry of Finance (MF)

Tax law:

- Income Tax Act and Income Tax Guidelines
- Corporate Income Tax Act and Corporate Income Tax Guidelines
- Federal Tax Code (FTC)
- Double taxation treaties enacted by Austria
- Transfer Pricing Documentation Law (TPDL) and the related regulation for implementation of the law — applicable for fiscal years starting on or after 1 January 2016
- Criminal Tax Law (CTL)

Relevant regulations and rulings

- Transfer Pricing Guidelines (BMF-010221/2522-IV/4/2010, 28 October 2010)
- TPDL and the related regulation for implementation of the law
- Section 6 (6), Income Tax Act
- Sections 8 and 12 (1) 10, Corporate Income Tax Act
- Income Tax Guidelines 6.13.3, 2511-2513
- Corporate Income Tax Guidelines 14.8.2, 1147
- Sections 115, 119, 124, 131 and 138, Federal Tax Code (FTC)
- Section 118, FTC regarding unilateral APAs
- Section 49b, CTL
- Several opinions (public rulings called Express Answering Service) published by the MF regarding selected transfer pricing issues

OECD Guidelines treatment

As an OECD member country, Austria recognizes the OECD Guidelines.

According to the Austrian Transfer Pricing Guidelines, the arm's-length principle contained in the income tax law has to be construed in line with the OECD Guidelines and any updates thereto.

In addition to the OECD Guidelines, the tax authorities also observe the OECD Report on the Attribution of Profits to Permanent Establishments (AOA), although the AOA is currently not fully applicable, as none of Austria's current double tax treaties include the new Article 7. The Austrian tax authorities are fully aware of and recognize the OECD BEPS developments (e.g., BEPS Action 13 was considered as basis for the implementation of the TPDL).

The Austrian Transfer Pricing Guidelines were released in the form of a ministerial decree. They are binding on the Austrian tax authorities but are not binding on Austrian courts or taxpayers.

Documentation requirements

The TPDL stipulates an obligation to prepare transfer pricing documentation and follows the three-tier documentation approach (master file, local file, CbC report). The obligation to prepare transfer pricing documentation depends on the turnover generated by the multinational group or the local constituent entity:

- A CbC report has to be prepared if the total turnover generated by the multinational group stated in the consolidated annual financial statements of the previous fiscal year amounts to at least EUR750 million. The term "turnover" should be understood as the sum of revenues generated from activities on the market.
- The master file and local file have to be prepared by constituent entities resident in Austria if their turnover in the previous two fiscal years exceeded EUR50 million in each year. The obligation to prepare the master and local files ceases in a given year if the turnover of the constituent entities is below EUR50 million for two previous consecutive years.
- Constituent entities resident in Austria that do not exceed the stipulated turnover threshold have to file a master file if a group entity resident in another state is required to prepare a master file according to the respective domestic law of its resident state.
- Furthermore, the TPDL clarifies that documentation obligations existing in addition to the TPDL (e.g., accounting and filing obligations according to the FTC) are not affected by the TPDL.

Considering the above, in case an Austrian constituent entity does not exceed the turnover threshold, the other recitals need to be considered. Based on these, the Austrian constituent entity may on the one hand be obligated to file a master file on request of the Austrian tax authorities if a master file has to be prepared by another group entity according to the respective local regulations. On the other hand, the Austrian tax authorities can still request (additional) information necessary to assess the arm's-length nature of intercompany transactions in the course of a tax audit. Consequently, even if the TPDL does not apply, transfer pricing documentation has to be prepared anyway.

Obligation to file a CbC report

According to the TPDL, basically, if a multinational group's ultimate parent entity is resident in Austria, it has to file a CbC report with the competent Austrian tax office if the multinational group meets the global turnover threshold. Moreover, the TPDL stipulates that a constituent entity resident in Austria that is not an ultimate parent entity may act as a surrogate parent entity under specific circumstances and would consequently be obligated to file a CbC report in Austria (see below).

Every ultimate parent entity resident in Austria or every surrogate parent entity that has to file a CbC report in Austria must inform the competent tax office about its obligation to prepare a CbC report by the last day of the fiscal year for which a CbC report is filed. Additionally, the TPDL stipulates that a constituent entity resident in Austria needs to inform the competent tax office about the identity and residence of the reporting entity by the last day of the fiscal year for which a CbC report is filed if the Austrian constituent entity is neither the ultimate nor the surrogate parent entity. Therefore, if the fiscal year of an entity is the calendar year, the competent tax office has to be informed by 31 December 2016 for the first time.

A constituent entity resident in Austria can act as a surrogate parent entity and file a CbC report in Austria if one of the following conditions applies:

- The ultimate parent entity is not obligated to file a CbC report in its jurisdiction of tax residence.
- There is no qualifying competent authority agreement on the exchange of CbC reporting in force with the ultimate parent entity's state of residence at the moment when the CbC report is to be filed (12 months after CbC reporting year-end).
- There has been a systemic failure of the ultimate parent entity's state of residence (i.e., there is a qualifying agreement in place, but the exchange of information was suspended or the other contracting state failed to automatically transmit CbC reports).

Austria (continued)

The competent tax office has to officially designate by notice a constituent entity resident in Austria as the surrogate parent entity, if by the last day of the fiscal year covered by the CbC report one of the above requirements is fulfilled, no other Austrian constituent entity has notified its competent tax office that it will act as a surrogate parent entity and no other Austrian constituent entity was officially designated by notice as the surrogate parent entity.

The competent tax office does not have to officially designate a constituent entity resident in Austria as the surrogate parent entity if another constituent entity of the multinational group, which is not resident in Austria, filed a CbC report in its jurisdiction of tax residence and — if resident outside the EU — the following conditions are met:

- The resident state of the surrogate parent entity requires filing of the CbC report in line with the requirements of the Austrian TPDL.
- By the time the CbC report is due (12 months after CbC reporting year-end), a qualifying agreement between the responsible authorities is in effect.
- There is no systemic failure regarding the exchange of information.
- The surrogate parent entity has timely informed its state of residence about its obligation (by the last day of the fiscal year that the CbC report covers).
- The Austrian competent tax office received information about the identity and the residence of the surrogate parent entity by the last day of the fiscal year for which a CbC report is to be filed.

The surrogate parent entity needs to request all information from the ultimate parent entity that is necessary to fulfill its reporting obligation. If the ultimate parent does not provide the information, the surrogate parent entity needs to inform the competent tax office and file a CbC report including the information available.

Content of the CbC report

To ensure a standardized reporting format, three tables (Appendices 1 to 3) are attached to the TPDL as templates for the CbC report. These tables correspond to the tables provided in the OECD report on BEPS Action 13 and the EU directive on the automatic exchange of information.

Content of the master file and local file

The TPDL does not define the exact content of the master and local files. However, it is stipulated that the master file has to provide comprehensive information on the whole group and specifically include:

- Organizational structure of the multinational group
- Description of the multinational group's business
- Documentation of multinational group's intangibles
- Documentation of the intercompany financial activities
- Documentation of multinational group's financial and tax positions

The local file has to provide specific information on the business activities and transactions of the local constituent entity and specifically include:

- Description of the local constituent entity
- Documentation of material controlled transactions
- Financial Information

The TPDL enables the Finance Minister to issue a regulation further determining the content of the documentation. The regulation was published in the Federal Law Gazette on 21 December 2016. The content requirements stipulated in the regulation correspond to the suggestions specified in Annexes I and II to Chapter V of the OECD Transfer Pricing Guidelines contained in the BEPS Action 13 report.

Language

The TPDL stipulates that the entire documentation has to be prepared in a language officially permitted for tax proceedings (typically German) or English. The TPDL enables the Finance Minister to issue a regulation determining that certain parts of the CbC report need to be prepared in English.

Priorities/pricing methods

Based on the OECD Guidelines and the Austrian Transfer Pricing Guidelines, the MF accepts the CUP, resale-minus, cost-plus, TNMM and profit split methods.

The MF follows the replacement of the hierarchy of transfer pricing methods, according to the 2010 update of Chapters I to III of the OECD Guidelines. Particularly, the TNMM and the profit split method are no longer considered methods of last resort. According to the Austrian Transfer Pricing Guidelines, the method that provides the highest degree of certainty for the determination of an arm's-length transfer price has to be selected.

Return disclosures/related-party disclosures

No specific continuous disclosure is required in the annual tax return.

In case of a tax audit, the auditors usually ask for a description of major related-party transactions, as well as disclosure of all contracts in place with related parties and transfer pricing studies available. In an increasing number of cases, an extensive transfer pricing questionnaire is discussed.

Transfer pricing-specific returns

No transfer pricing-specific returns have to be filed along with the annual tax returns.

Documentation deadlines

The CbC report has to be filed electronically with the competent tax office within 12 months after the end of the respective fiscal year (via FinanzOnline). Both the master file and the local file have to be submitted upon the request of the competent tax office within 30 days after the constituent entity files its tax return (i.e., the earliest deadline for the submission of the master file and the local file is 30 days after filing the tax return of the respective year).

The required documentation (the master file and local file, as well as the CbC report) generally has to be prepared for fiscal years starting from 1 January 2016. In cases where a constituent entity was officially designated by notice as the surrogate parent entity for submission of the CbC report, the submitted information can refer to fiscal years starting from 1 January 2017.

Austria (continued)

Before implementation of the TPDL, transfer pricing documentation (master file and local file) was usually requested by the competent tax auditor at the beginning of a tax audit. A submission deadline was determined, which could vary greatly from case to case (e.g., from only one week to several weeks). Upon the tax auditor's consent, an extension of the deadline was possible. Based on the TPDL, the deadline for submission of the TPDL will be 30 days (whenever requested by the tax authorities or tax auditor). An extension of the deadline should still be possible.

Transfer pricing penalties

There is currently only one specific regulation dealing with transfer pricing penalties in Austria.

Section 49a of the CTL stipulates that anyone who does not file the CbC report in time or does not file or incorrectly files the required items in the tables in Appendices 1 to 3 of the TPDL due to intent commits a tax offense. The CTL stipulates penalties of up to EUR50,000 for intent and up to EUR25,000 for gross negligence. While penalties are to be imposed, legal prosecution (by courts) for such tax offenses is excluded by the CTL.

No specific penalties are stipulated by law if the master file and local file are not filed within the 30-day deadline or if content requirements are not fulfilled. However, as it was before the implementation of the TPDL, a lack of documentation increases the risk that the tax authorities will regard a transaction as noncompliant with the arm's-length criterion, which also increases the risk of a transfer pricing adjustment.

If the taxable income is increased because the arm's-length criterion has not been met, nondeductible late-payment interest in the amount of 2 percentage points above the base rate (published by the European Central Bank) is levied on the corporate income tax payments for any additional prior year for up to 48 months.

Penalty relie

There are no relief provisions available.

If the taxpayer provides insufficient documentation, the tax authorities nonetheless are obliged to base their consideration upon such documentation.

Late-payment interest will become due on any corporate income tax payments for an additional prior year, regardless of whether the documentation is sufficient.

Statute of limitations on transfer pricing assessments

The statute of limitations on a transfer pricing adjustment is usually six years after the end of the calendar year in which the relevant fiscal year ends. The term may be extended up to 10 years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Tax authorities regularly examine related-party transactions and transfer prices charged. There is a clear trend toward increased awareness of transfer pricing problems among tax auditors.

In general, the likelihood of an annual tax audit (i.e., every fiscal year being examined) is high, and transfer pricing is highly likely to be reviewed as part of that audit. The likelihood that the transfer pricing methodology will be challenged can be characterized as medium to high, depending on the specific circumstances of the case.

Austria (continued)

APA opportunity

Based on Section 118 of the FTC, it is possible to apply for a unilateral, binding, appealable advance ruling issued by the competent tax office on the tax treatment of a particular (but yet-to-occur) transfer pricing issue. The fee for such a unilateral APA is up to EUR20,000.

Under specific circumstances, it is possible to ask the Austrian tax authorities to participate in negotiations of a bilateral or multilateral APA on the basis of Article 25 (3) of the respective double tax treaty.

Impact of new OECD BEPS Action 8–10 guideline

Generally, the most recent version of the OECD Transfer Pricing Guidelines is applied by the Austrian tax authorities (see section "OECD Guidelines treatment"). In this regard, Section 15 of the Austrian Transfer Pricing Guidelines states that because of the congruence between the international and national arm's-length principle, the OECD Guidelines do not only serve as interpretative guidance for the interpretation of Article 9 of the OECD Model Tax Treaty but are also of high importance for the interpretation of the arm's-length principle defined in Section 6 (6) of the Income Tax Act. According to the Austrian Transfer Pricing Guidelines, the congruence between the international and national arm's-length principle needs to be dynamically interpreted (i.e., new developments regarding the OECD Guidelines also need be applied when interpreting Section 6 (6) of the Income Tax Act).

Bahrain

Taxing authority and tax law

Taxing authority: Ministry of Finance

Tax law: The Income Tax Law (ITL), ratified by the Amiri Decree No. 22/1979

Relevant regulations and rulings

Currently, there are no transfer pricing regulations and rulings in Bahrain. However, Bahrain has entered into double taxation treaties (DTTs) with approximately 44 countries that contain an article that resembles the OECD's Article 9 Model Treaty (on associated enterprises).

Bahrain has DTTs in force with Algeria, Austria, Barbados, Belarus, Belgium, Bermuda, Brunei, Bulgaria, China, Cyprus, Czech Republic, Egypt, Estonia, France, Georgia, Hungary, Iran, Ireland, Isle of Man, Jordan, South Korea, Lebanon, Luxembourg, Malaysia, Malta, Mexico, Morocco, Netherlands, Pakistan, Philippines, Portugal, Seychelles, Singapore, Sri Lanka, Syria, Sudan, Tajikistan, Thailand, Turkey, Turkmenistan, the United Kingdom, Uzbekistan and Yemen.

Bahrain has also entered into DTTs with Bangladesh that are not yet in force.

Bahrain has initiated discussions on entering into DTTs with Guernsey, Hong Kong, Jersey, Kyrgyzstan, Liechtenstein, Spain and Switzerland.

OECD Guidelines treatmen

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Not applicable.

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Not applicable.

APA opportunity

Not applicable.

Impact of new OECD BEPS Action 8–10 guidelines

Not applicable

Bangladesh

Taxing authority and tax law

Taxing authority: National Board of Revenue (NBR)

Tax laws:

- Income Tax Ordinance, 1984
- Income Tax Rules, 1984

Relevant regulations and rulings

- Sections 107A to 107J of the Income Tax Ordinance, 1984
- Rules 70 to 75A of the Income Tax Rules, 1984
- The transfer pricing regulations in Bangladesh became effective from 1 July 2014 by the Finance Act 2014. These regulations were originally introduced in the Finance Act 2012.

The pricing of any income or expense arising from international transactions between associated enterprises will need to be determined with regard to the arm's-length principle using methods prescribed under Bangladeshi transfer pricing legislation. Associated enterprises are enterprises for which more than 25% voting power is held by the other or a common parent holds more than 25% of voting power in both such enterprises. Apart from this, following are other criteria's to cover specific scenario:

(a) Cumulative amount of borrowing from the related-party constitutes more than 50% of the book value of total assets of lender

(b) Cumulative amount of guarantee provided constitutes more than 10% of the book value of the total borrowings of the entity in favor of whom guarantee has been issued

(c) Appointment of members in the board of directors/executive director by the other enterprise

(d) Same person appoints members in the board of directors/executive director in both the enterprises

(e) One enterprise has the practical ability to control the decision of the other enterprise

Transfer pricing provisions are applicable to the following types of transactions between associated enterprises, with at least one of them being a nonresident:

- Purchase, sale or lease of tangible or intangible property
- Provision of services
- Lending or borrowing money
- A mutual agreement or arrangement for cost allocation/apportionment
- Any other transaction having a bearing on the profits, income, losses, assets, financial position or economic value of such enterprises

Transactions with a third party will be deemed transactions between associated enterprises if the third party has a prior agreement with the associated enterprise, or if the terms of the relevant transaction are determined in substance between the third party and the associated enterprise. "Enterprise" means a person or a venture of any nature and also includes a permanent establishment of such person or venture.

OECD Guidelines treatment

Bangladeshi legislation is broadly based on the OECD Guidelines.

Five of the six methods prescribed in the legislation to compute arm's-length prices are in conformity with the OECD Guidelines.

Documentation requirements

A. Transfer pricing documentation

A list of mandatory documents is detailed in Rule 73. The categories of documentation required are:

- Profile of the multinational group, including the consolidated financial statements of the group
- Profile of each member of the group, including business relationships between each member
- Profile of each associated enterprise, including tax registration numbers and financial statements of any associated enterprise operating in Bangladesh
- Information on economic and market analyses, forecasts, budgets, or any other financial estimates
- Business description
- The nature and terms (including prices) of international transactions
- Description of functions performed, risks assumed and assets employed
- Record of any financial estimates
- Record of comparability evaluation
- Description of methods considered
- Reasons for selection of method
- Details of transfer pricing adjustments
- Any other information or data relating to the associated enterprise that may be relevant for determination of the arm's-length price

The above documentation requirements shall not be applicable in the case of a taxpayer whose aggregate value of international transactions entered into during a financial year, as recorded in the books of accounts, does not exceed BDT30 million.

B. Statement of International Transactions

Under Section 107EE of the Income Tax Ordinance, every person who has entered into an international transaction shall file a Statement of International Transactions along with the tax return. The format is prescribed in Rule 75A of the Income Tax Rules duly signed by the taxpayer. Further, there is no threshold for filing.

C. Accountant's report

Under Section 107F of the Income Tax Ordinance , the Deputy Commission (DC) may, by notice in writing, require a taxpayer who has entered into international transactions, the aggregate value of which exceeds BDT30 million, to furnish the report certified by a Chartered Accountant or cost accountant within the time and format as prescribed.

Bangladesh (continued)

Priorities/pricing methods

Bangladeshi legislation prescribes the following methods: CUP, resale price method, cost-plus, profit split, TNMM and any other method.

Where it can be demonstrated that none of the first five methods can be reasonably applied to determine the arm's-length price for an international transaction, Section 107C allows the use of any other method that can yield a result consistent with the arm's-length price.

To determine a comparable uncontrolled transaction, Rule 71(3) provides that data pertaining only to the relevant financial year should be used. However, the rule permits the use of data before the relevant financial year if it can be substantiated that such data bears facts that could influence the analysis of comparability.

Return disclosures/related-party disclosures

No specified disclosures, other than the ones prescribed above, are required to be filed with the income tax return.

Transfer pricing-specific returns

Under Section 107F, an accountant's report certifying that the documents and information maintained by a taxpayer are in line with the transfer pricing regulations of Bangladesh is required to be provided by taxpayers entering into a transaction in which the aggregate value of the books of accounts exceeds BDT30 million.

Documentation deadlines

A. Transfer pricing documentation

There is no statutory deadline to submit the transfer pricing documentation. However, it needs to be prepared and maintained by every taxpayer contemporaneously. During a transfer pricing audit, the tax officer can request that the documentation be submitted.

B. Statement of International Transactions

This statement needs to be filed by every taxpayer, along with the tax return. Hence, the due date for filing the tax return is also the due date for filing the statement.

C. Accountant's Report

The accountant's report under section 107F needs to be filed within the time specified in the notice issued by the Tax Officer. The report needs to certify that the documents/information submitted, in response to the notice issued by the tax officer, are authentic.

Bangladesh (continued)

Transfer pricing penalties

- For failure to keep, maintain or furnish any information or documents as required by Section 107E, the taxpayer is imposed a penalty not exceeding 1% of the value of the international transaction.
- For a failure to comply with the notice or requisition under Section 107D of the ordinance by the Deputy Commissioner of Taxes, the taxpayer faces a penalty not exceeding 1% of the value of the international transaction.
- For a failure to file a Statement of International Transactions, there is a penalty of 2% of the value of the international transaction under Section 107H of the Income Tax Ordinance.
- For not furnishing an accountant's certificate, the taxpayer is fined an amount not exceeding BDT300,000.

Penalty relief

No penalty relief regulation has been provided to date.

Statute of limitations on transfer pricing assessments

Where a transfer pricing assessment has been initiated, no order of assessment shall be made after three years have passed from the end of the assessment year in which the income was first assessable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Since the transfer pricing provisions have been made effective from 1 July 2014, the likelihood of scrutiny may be low in the initial years, as there is no precedent to substantiate the nature of risks.

APA opportunity

Bangladesh does not have a formal APA program.

Impact of new OECD BEPS Action 8–10 guidelines

Since Bangladesh is not a signatory to OECD or a G20 member country, BEPS initiative has not been made applicable in Bangladesh.

Belarus

Taxing authority and tax law

Taxing Authority: Ministry of Taxes and Duties of the Republic of Belarus (MTD)

Tax Law: Tax Code of the Republic of Belarus

Relevant regulations and rulings

Article 30-1 of the Tax Code sets Transfer Pricing regulations in Belarus.

Transactions subject to transfer pricing control are as follows:

- Transactions related to sale/purchase of immovable property and housing bonds

Both domestic transactions and cross-border transactions are subject to transfer pricing control. No threshold is set for such transactions.

- Transactions with related parties or residents of offshore jurisdictions. This group includes transactions related to:
  - Foreign trade with related parties or residents of offshore jurisdictions (hereafter — "offshore residents"), according to the list approved by the President of the Republic of Belarus
  - Foreign trade with related parties or residents of offshore zones with the involvement of independent intermediaries with no substantial functions (hereafter — "intermediary transactions")
  - Transactions with Belarusian related parties (including intermediary transactions) that are exempt from taxation due to application of special taxation regimes or similar

Transactions listed above are controlled only if their value with each counterparty exceeds BYN100,000 (approximately EUR50,000) for a calendar year (excluding indirect taxes).

- Large transactions

Foreign trade transactions (1) of large taxpayers or (2) with strategic goods are considered as subject to transfer pricing control if their value with each counterparty exceeds BYN1 million (approximately EUR490,000) for a calendar year (hereafter — "large transactions").

The list of large taxpayers is published by the Ministry of Taxes and Duties of the Republic of Belarus. The list of strategic goods is published by the Government of the Republic of Belarus and includes, among others, oil and petroleum products, potassium chloride and timber.

OECD Guidelines treatment

Belarusian law is generally in line with the OECD Guidelines. However, Belarus is not an OECD member country and Belarusian transfer pricing rules do not refer to the OECD Guidelines. Practical application of transfer pricing rules may therefore be different from the OECD Guidelines.

Documentation requirements

The following requirements apply:

- Full-scope transfer pricing documentation is to be prepared with respect to large transactions.
- Limited-scope transfer pricing documentation ("economic justification" of intercompany pricing) is to be prepared with respect to other transactions.
- Local transfer pricing documentation should contain the following information:
  - Comprehensive information about related parties
  - Information about the group (structure, description of activities, group transfer pricing policies)
  - Description of the transaction (contractual terms and conditions)
  - Description of goods (work, services), including physical characteristics, quality and reputation in the market, country of origin and manufacturer, and trademarks
  - Factors that impact the price
  - Functional and risk analysis
  - Economic analysis (transfer pricing method applied, its substantiation, amount of income or expenses, profitability level, calculation of the arm's-length price and profitability range, approach to selection of comparables, sources of information)

"Economic justification" of applied price represents a shortened version of the transfer pricing documentation and should only cover:

- Information about related parties
- Description of the transaction (contractual terms and conditions)
- Description of goods (work, services), including physical characteristics, quality and reputation in the market, country of origin and manufacturer, and trademarks
- Economic analysis (transfer pricing method applied, its substantiation, amount of income or expenses, profitability
- level, calculation of the arm's-length price and profitability range, approach to selection of comparables, sources of information)
- Transfer pricing documentation/"economic justification" must be available in Russian or Belarusian

Priorities/pricing methods

The Belarusian transfer pricing rules comprise five methods to be applied in a strict hierarchical order:

- CUP method
- CPM
- Resale price
- TNMM
- Profit split

The CUP method prevails, whereas the profit split is a method of last resort.

Belarus has very limited information available for comparability analysis. The legislation requires searching for local comparable data, although there is a lack of local databases available in the market. At the same time, the law allows tax authorities to use secret comparables (customs information, peers analysis, etc.).

Belarus (continued)

Return disclosures/related-party disclosure

Effective from 1 July 2016, taxpayers are required to inform the tax authorities about their controlled transactions undertaken during a respective tax period — a calendar year.

Details of controlled transactions should be reported to the tax authorities on a monthly basis. The general deadline is the fifth day of the month following the reporting month, while in particular cases it can differ. The reporting has to be done on a transaction-by-transaction basis by means of electronic VAT invoices (*schet-factura*) that need to be filed through a web portal of the Ministry of Taxes and Duties.

Transfer pricing-specific returns

Belarusian transfer pricing rules require submission of information disclosing controlled transactions of a taxpayer on an ongoing basis (at least monthly) regardless of whether the volume of transactions exceeds the established thresholds or not. Please refer to the section above for more details.

Documentation deadlines

Taxpayers are required to present transfer pricing documentation or "economic justification" upon request of the tax authorities no later than:

- 10 working days from the request for a desk tax audit
- 5 working days from the request for a field tax audit

Taxpayers are usually notified about an upcoming field tax audit no earlier than 180 days before the audit. Such notification is not practiced for a desk tax audit.

Transfer pricing penalties

- Belarusian law does not envisage any special penalties for violation of transfer pricing rules.
- Penalties will be imposed if a taxpayer's income is adjusted as a result of a tax audit, and if the taxpayer did not provide the transfer pricing documentation supporting the prices in a controlled transaction.
- Notwithstanding, the penalty for non-submission of required documents (including electronic VAT invoices with information about controlled transactions) is up to 30 basic amounts (up to BYN630).
- The penalty of 20% on the additional tax payable is also applied.

Penalty relief

Penalties cannot apply if a taxpayer has adjusted its tax return and paid outstanding tax liability before a tax audit.

Statute of limitations on transfer pricing assessments

The general rule is that the tax authority may audit a taxpayer for any number of years that are not covered by a prior tax audit. As a rule, the average periodicity of tax audits is five years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transfer pricing matters in controlled transactions are not subject to special transfer pricing audits and are controlled within general tax audits.

The average frequency of tax audits is five calendar years.

The likelihood of the transfer pricing methodology being challenged during an audit is currently unknown because of the novelty of the legislation and absence of practical experience in Belarus.

However, despite its early stage, transfer pricing audits are expected to increase in frequency, as transfer pricing is a top priority for the Belarusian tax authority.

APA opportunity

Currently, no APA opportunities are foreseen.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Belgium

Taxing authority and tax law

Taxing authority: Belgian Administration of Direct Taxes, which is part of the Federal Public Service Finance

Tax law: Belgian Income Tax Code (ITC)

Local GAAP: Belgian GAAP

Relevant regulations and rulings

No separate transfer pricing code exists in Belgium. Transfer pricing rules and regulations are embedded in the Belgian ITC. The arm's-length principle was formally embedded into the Belgian ITC on 21 June 2004, through the introduction of Article 185, § 2 of the Belgian ITC (entered into force on 19 July 2004). This article's wording is similar to that of Article 9, §§ 1 and 2 of the OECD Model Tax Convention. Transfer pricing documentation rules are embedded into the Belgian ITC through the law of 1 July 2016, applicable for financial years starting on or after 1 January 2016. These rules include obligations for country-by-country reporting (CBCR), master file and local file. Specific to the Belgian approach, there is the requirement to complete specific transfer pricing forms that need to be appended to the corporate income tax return.

In addition, other provisions of the Belgian ITC directly or indirectly relate to transfer pricing, in Articles 26; 49; 54; 55; 79; 198, 10°; 207; 307, § 1, s. 3; 344; and 345. These articles address items such as granted and received abnormal and gratuitous benefits (indirectly embodying the arm's-length principle), tax deductibility of expenses, nondeductibility of non-reported or insufficiently supported payments to tax havens, and avoiding profit shifting. The law of 23 December 2009 introduced a related tax deduction denial for payments to tax havens that are not reported or that are lacking underlying bona fide business purposes (Article 198, §1, 10° of the Belgian ITC).

The general provisions of the Belgian ITC — for instance, those regarding penalties and late interest payments — also generally apply to transfer pricing matters. The law of 1 July 2016 also introduced specific penalties applicable to the noncompliance with the transfer pricing documentation rules.

The Royal Decree of 10 August 2009 requires Belgian companies to provide certain additional information regarding transfer pricing in the notes or annex section of their statutory annual accounts.

Furthermore, Belgium has implemented a regime that provides, for tax purposes, a deduction on risk capital (i.e., qualifying equity), also known as a "notional interest deduction."

Another tax incentive ("innovation regime") allowing a tax deduction equal to 85% of the net income derived from the use of patents or certain other qualifying IP (e.g., software, Plant Variety Rights (PVRs), market authorization rights) is envisaged to replace the previously existing patent income deduction (PID) regime. This new innovation regime is expected to be introduced with retroactive effect as from 1 July 2016 and will coexist with the previously existing PID during a five-year transitory period. Under this optional transitory regime, taxpayers will have the right to continue to apply the 80% patent income deduction until 30 June 2021 with regard to income derived from: (i) patents that have been obtained before 1 July 2016 and for which the "old" PID regime has already been applied and (ii) patents that have been applied for before 1 July 2016 but are only effectively obtained after that date.

The new innovation regime will be in line with the rules included within the framework of Action 5 of the OECD BEPS project. The final text of the law regarding the new innovation income is not yet available. However, it is envisaged that the new regime will (i) broaden the scope of the deduction to include, in addition to patents, software, etc., (ii) apply to the net amount of qualifying IP income and (iii) include income from qualifying IP assets only if the taxpayer has incurred qualifying expenses by itself relating to the development of those IP assets ("nexus approach"), etc. The applicable deduction rate is envisaged to increase to 85%. As a result of this deduction, qualifying income will be subject to an effective tax rate of 5.1% or less.

A modification of another measure included in Article 228, § 3 of the Belgian ITC, the "catch-all" clause, is currently under discussion by the Belgian Government. The clause imposes a withholding tax on Belgium-sourced income of nonresidents, which would have been taxable if the income were received by residents (in both treaty and non-treaty situations).

More specifically, as per the new draft version of Article 228, § 3 of the Belgian ITC, a wage withholding tax of (net) 16.5% is due on profits and benefits, which are not already considered as taxable in Belgium in the other provisions of the Belgian ITC applicable to nonresident taxpayers, from services provided by a nonresident to the following recipients:

- An individual tax resident, in the framework of a professional activity producing profits or benefits
- A taxpayer subject to corporate tax
- A legal entity
- A Belgian establishment

The tax will only apply to the extent that:

- The income is taxable in Belgium according to a tax treaty

Or

- If no tax treaty exists, the taxpayer does not prove that the income has been effectively taxed in the beneficiary's residence state

The scope of the catch-all clause will be narrowed, as it will only be applicable when the service provider has a direct or indirect link of mutual dependence with the recipient of the service. Regarding the interpretation of "direct or indirect link of mutual dependence," the explanatory notes refer to Article 26 of the Belgian ITC (abnormal and gratuitous benefits) and stipulate that this can constitute both legal and economic control.

The scope of the catch-all clause is also further limited to income that constitutes profits or benefits from the provision of services (thus excluding the supply of goods). However, the "*de minimis regime*," whereby wage withholding tax is only due on the gross amount exceeding EUR38,000 per service provider per year, will be withdrawn.

Moreover, the services under review must be supplied to a Belgian legal entity or a natural person (resident) acting in the course of his or her professional activities. The new catch-all provision, therefore, can no longer be applicable to services provided to an individual who does not act within the framework of his or her professional activity.

The new clause is expected to apply as from 1 July 2016.

The tax administration has also issued various guidelines directly dealing with transfer pricing:

- Administrative guidelines about the offensive aspects of transfer pricing, issued in 1999
- Administrative guidelines about the defensive aspects of transfer pricing, issued in 2000 and 2003
- Administrative guidelines providing the tax authority's view of the interpretation of Article 185, § 2 of the ITC, introducing the arm's-length principle into the Belgian tax law, issued in July 2006
- Administrative guidelines regarding the formal creation of a transfer pricing audit team within the tax authority, issued in July 2006
- Administrative guidelines about transfer pricing documentation, the transfer pricing code of conduct and transfer pricing audits, issued in November 2006

OECD Guidelines treatment

In its administrative guidelines, the tax authority indicates that taxpayers generally should follow the guidance mentioned in the OECD Guidelines to implement the arm's-length principle (as embedded in Article 185, § 2). Although no formal confirmation as to the applicable version of the OECD Guidelines has been made by the tax authority, in practice, it is generally considered that the most recent version is applicable in Belgium. While Belgium considers its transfer pricing laws and regulations to be wholly consistent with the OECD Guidelines, through historical practice coupled with case law, as is done in many other countries, the Belgian interpretation of certain transfer pricing elements may differ from other countries' interpretation.

The new transfer pricing legislation is generally in line with the three-tiered approach of Action 13 of the OECD BEPS project.

Documentation requirements

While historically no legislative guidance regarding the nature and content of transfer pricing documentation existed in Belgium, other than what was included in the 1999 administrative guidelines (which state that documentation should demonstrate that the taxpayer's pricing complies with the arm's-length principle to avoid an in-depth transfer pricing audit), the law of 1 July 2016 introduced formal transfer pricing documentation requirements.

The new legislation is generally in line with the three-tiered approach of Action 13 of the OECD BEPS project, introducing CbCR (Form 275 CBC), the master file (Form 275 MF) and the local file (Form 275 LF) obligations. Belgian companies and establishments will have to comply with these new requirements for financial years starting on or after 1 January 2016, if they exceed certain thresholds. Every Belgian group entity/establishment that is a member of a multinational group of companies will be required to prepare a master file and a local file when one of the following criteria is met or exceeded in its statutory financial accounts in the prior year:

- Gross operating and financial income equal to or exceeding EUR50 million (excluding nonrecurring items)
- Balance sheet total equal to or exceeding EUR1 billion

Or

- Average annual number of employees of 100 in full-time equivalents (FTEs)

With respect to the master file obligations, the Belgian legislation generally follows the OECD requirements. A company's master file should contain an overview of the multinational group of companies, including the nature of its business operations, its intangible assets, the intercompany financial activities, consolidated financial and tax position of the group, transfer pricing policy, worldwide allocation of income and economic activities. The master file should be submitted to the Belgian tax authority within 12 months after the end of the financial year.

The local file should list general information on the local entity. A form detailing transaction-specific information, transfer pricing analyses, comparability studies and other information must also be prepared and attached to the tax return. This detailed form is required only for the business units of the Belgian entity of which the cross-border transactions exceed an amount of EUR1 million in the last accounting year. The local file should be submitted with the tax return. It is expected that this obligation will be applicable for financial years starting on or after 1 January 2016.

Therefore, companies exceeding the abovementioned thresholds need to submit mandatory transfer pricing forms with their corporate income tax return:

- General Form: Parts 1 and 3 of the local form would be applicable as of financial years starting after 1 January 2016
- Detailed Form: Part 2 of the local form would be applicable as of financial years starting after 1 January 2017

The final form and requirements for accounting year 2016 are expected to be confirmed soon.

Belgium (continued)

With respect to the CbCR obligations, the Belgian CbCR legislation generally follows the OECD requirements and is mandatory for Belgian companies/establishments that are part of a multinational group of companies with a consolidated group turnover equal to or exceeding EUR750 million. CbCR should contain the following information for each country where entities of the group operate: gross income, profit/loss before tax, income tax paid, accrued income tax, the nature of the group entities' core business operations and other measures of economic activity. In addition, the activities of all entities in each country should be disclosed.

The Belgian company/establishment must notify the Belgian tax authority of the name of the entity and the country of its tax residence that will submit the CbCR before the end of the financial year. The CbCR form must be submitted to the Belgian tax authority within 12 months from the last day of the financial year. To ensure that the Belgian tax authority has access to this CbCR, a Belgian group entity that is not the ultimate parent company of the multinational group of companies should also file a CbCR with the Belgian tax authority in one of the following cases:

- The ultimate parent company is not obliged to submit a CbCR in its country of residence.
- The ultimate parent company is obliged to submit a CbCR, but there is no automatic exchange of CbCR between Belgium and the country of residence of the ultimate parent company.
- The ultimate parent company is obliged to submit a CbCR, and there is an automatic exchange of CbCR, but because of systematic failure, no effective exchange of information does take place.

In these three cases, the group can decide to appoint a so-called surrogate parent entity to comply with these requirements. A Belgian group entity will need to notify the Belgian tax authority, whether it is the ultimate or surrogate group company, or, in case it is not, the identity of the ultimate or surrogate group entity (including the identification of its tax residency).

The information contained in the CbCR will be automatically exchanged with EU Member States or other concerned tax authorities according to the stipulations provided by the relevant international instruments (Multilateral Convention on Administrative Assistance in Tax Matters, bilateral tax conventions or Tax Information Exchange Agreements [TIEAs]).

When the CbCR is filed in Belgium, it should be prepared on a specific form in one of the Belgian official languages (i.e., Dutch, French or German), or in English (considering that a translation might be requested).

Finally, with respect to companies not exceeding the abovementioned thresholds but having intercompany transactions, the old guidance issued by the Belgian tax authority remains applicable. In this respect, the 1999 guidelines recommend that documentation includes, at a minimum:

- Activities of the group, including competitive position, level of market, economic circumstances and business strategies
- Identification and characterization of intercompany transactions and contractual relationships among affiliates
- Functional analysis, including an overview of the functions, risks and intangibles
- Economic analysis sections regarding the transfer pricing methods used

Priorities/pricing methods

In principle, taxpayers are free to choose any OECD transfer pricing method as long as it results in arm's-length pricing for the transaction. But conceptually, transaction-based methods are often preferred over profit-based methods.

Formally, taxpayers are not required to use more than one method or demonstrate that multiple methods were considered, but such documented reviews strongly support their position to apply a particular method upon an audit.

In this respect, the evolving guidance from the OECD should also be considered.

Belgium (continued)

Return disclosures/related-party disclosure

As mentioned above, specific tax disclosure requirements exist when filing the tax return, including the local file mandatory transfer pricing forms (the master file and CbCR do not have to be filed with the tax return).

In addition, the reporting requirement introduced through Article 307, § 1, s. 3 of the Belgian ITC relates to payments of more than EUR100,000 per taxable period made by resident or nonresident entities (Belgian permanent establishments) to persons established in tax havens on or after 1 January 2010, whereby tax havens are defined with reference to a "blacklist" determined through a Royal Decree (it currently contains about 30 jurisdictions that either do not levy corporate income tax or have a nominal corporate income tax rate that is lower than 10%). A mandatory form (No. 275 F) for reporting direct or indirect payments to persons established in tax havens is to be attached to the tax return. Failure to report payments results in nondeductibility of such payments. In addition, these tax deductions are acceptable only when proof is presented by the Belgian taxpayer that these payments relate to actual and bona fide transactions at arm's-length with persons other than artificial constructions.

Furthermore, the Belgian accounting rules introduced through the Royal Decree of 10 August 2009 require that companies provide certain additional information that relates to transfer pricing in the notes or annex section of their statutory annual accounts, as follows:

- Companies must provide information regarding the nature and business purpose of their relevant, off-balance sheet arrangements; if underlying risks and benefits are considered material; and when the disclosure is necessary to correctly assess the financial position of the company. This requirement is applicable in cases of intragroup guarantees, pledges, factoring liabilities, transactions with special-purpose entities (whether transparent or not) and offshore entities.
- Companies must disclose their material transactions with affiliated parties that are considered not to be at arm's-length. Depending on the type of company, a different scope of information is to be provided, ranging from merely listing such transactions to mentioning the amounts involved, alongside all other information necessary for a correct view of the company's financial position.

While this rule is not included in the Belgian Tax Code, it creates a requirement for the relevant entities to review and document the arm's-length nature of their intercompany transactions. Noncompliance may result in director liability. In addition, any such disclosures are an excellent source of information to initiate a (targeted) transfer pricing audit.

Transfer pricing-specific returns

There are specific transfer pricing returns in Belgium, including CbCR and the master file, both of which have to be filed, at the latest, 12 months after the last day of the financial year to which they relate.

In addition, companies that are part of a multinational group of companies subject to CbCR also have to notify the Belgian tax authority of the name of the entity and the country of its tax residence that will submit the CbCR before the end of the (financial) year.

Documentation deadlines

As mentioned above, in accordance with the draft legislation:

- The master file should be submitted to the Belgian tax authority within 12 months after the end of the financial year.
- The local file should be submitted with the tax return.

This obligation is applicable for financial years starting on or after 1 January 2016.

Furthermore, upon a tax audit, the Belgian tax authority can request additional information in view of verifying the transfer pricing documentation and its contents so as to ascertain the correctness of the taxable income. A taxpayer has, in principle, only one month to provide such information. For valid reasons, the one-month period can be extended.

Transfer pricing penalties

In accordance with the new transfer pricing legislation, failure to submit the CbCR, master file or local file will result in an administrative penalty ranging from EUR1,250 to EUR25,000. This penalty will apply as of the second infringement. Furthermore, noncompliance with the new transfer pricing documentation obligations increases the likelihood of a transfer pricing audit.

In addition, the absence of the mandatory transfer pricing documentation required to be filed with the tax return (local file transfer pricing forms) results in an incomplete or inaccurate tax return, which may lead to the reversal of the burden of proof.

The general tax penalty framework applies to transfer pricing adjustments. These penalties vary from 10% to 200% (in exceptional cases) of additional tax. The rate depends on the degree of intent to avoid tax or the degree of the company's gross negligence.

Furthermore, for late payments, interest is due on additional tax assessments (including assessments resulting from a transfer pricing adjustment).

Penalty relief

With respect to the application of the general tax penalty framework, although the burden of proof of non-arm's-length pricing lies principally with the tax authority, the taxpayer needs to provide all information necessary to allow the tax authority to verify the company's tax position.

Therefore, because additional tax assessments largely depend on the degree of intent to avoid taxes or on the company's gross negligence, penalties may be reduced or eliminated if the taxpayer can demonstrate its intent to establish transfer prices in accordance with the arm's-length principle, which would generally be the case through the availability of detailed local documentation reports.

Statute of limitations on transfer pricing assessments

The general rules regarding the statute of limitations apply to transfer pricing assessments. Therefore, the tax authority is entitled to make additional assessments for a period of three years, starting from the closing of the accounting year.

However, in the case of fraud being considered, the tax authority has the right to adjust the income during a seven-year period, provided that the taxpayer received prior notice of serious indications of fraud. In case of tax losses, the statutes of limitations do not run until these tax losses are effectively used to offset taxable income. Some other exceptional statutes of limitations also exist for specific situations.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In Belgium, the likelihood of a tax audit may be regarded as medium to high.

Interest in transfer pricing has increased since the first circular letter on transfer pricing was issued in 1999. After the arm's-length principle was introduced in legislation in 2004, and a special transfer pricing audit team was organized in 2006, the focus on transfer pricing increased significantly. To drive a consistent and experienced approach, local tax audit teams are expected to inform the transfer pricing audit team about every transfer pricing investigation they perform.

The transfer pricing audit team has expanded significantly since its creation, and it is using data-mining techniques to select taxpayers for in-depth transfer pricing audits. It should be expected that information coming from the CbCR, master file and local file will also be used for the identification of companies to be audited. The Belgian tax authority initiates hundreds of detailed transfer pricing audits each year. Currently, the initial step of the audit process is typically a standardized questionnaire; a very detailed and case-specific review usually is performed in later stages. In practice, a transfer pricing audit is often triggered by situations such as:

Belgium (continued)

- Structural losses
- Business reorganizations
- Migration of businesses
- The use of tax havens or low-tax-rate countries
- Back-to-back operations
- Circular structures
- Invoices for services sent at the end of the year (i.e., management services)

In particular, business restructurings attract specific attention, as well as intangibles related and financial transactions, for example.

Occasionally, the transfer pricing audit team participates in cross-border transfer pricing audits (e.g., with respect to business restructurings), which are held jointly with the tax authorities of (mostly) neighboring countries.

In addition to this special team's increased audit activity, tax field inspectors are also increasing their focus on transfer pricing during general tax audits. This is the case regardless of whether dedicated transfer pricing inspectors support the tax inspectors.

APA opportunity

The 2003 corporate tax reform introduced a general (unilateral) ruling practice (also covering APAs) under the Belgian tax law. Additional guidance in this respect is provided through various royal decrees.

The Service for Advance Decisions became an autonomous department as of 1 January 2005 as a result of the law of 21 June 2004. More than 100 specialists in various domains of taxation, including transfer pricing, assist the committee. This service has made the ruling process more flexible and shortened the decision period, which is usually two to six months from the filing date in the case of unilateral APAs. This committee is also able to rule on corresponding downward profit adjustments. While APAs are provided on an individual and fact-specific basis, they are published anonymously, allowing for an understanding of the latest positions of the Service for Advance Decisions.

In addition, Belgium taxpayers may request bilateral or multilateral APAs. The central tax authorities handle this process through the Service for Internal Affairs, supported by the Service for Advance Decisions.

Impact of new OECD BEPS Action 8–10 guidelines

In its administrative guidelines, the tax authority indicates that taxpayers generally should follow the guidance mentioned in the OECD Guidelines to implement the arm's-length principle (as embedded in Article 185, § 2). Although no formal confirmation as to the applicable version of the OECD Guidelines has been made by the tax authority, in practice, it is generally considered that the most recent version is applicable in Belgium. While Belgium considers its transfer pricing laws and regulations to be wholly consistent with the OECD Guidelines, through historical practice coupled with case law, as is done in many other countries, the Belgian interpretation of certain transfer pricing elements may differ from other countries' interpretation. Therefore, it should be expected that the Belgian tax authority will follow the revised guidance and on occasions also argue it to be applicable to transactions entered into before 23 May 2016.

Bolivia

Taxing authority and tax law

Taxing authority: Internal Taxes Service (*Servicio de Impuestos Nacionales*)

Tax law: Bolivian Tax Code and double taxation treaties

Relevant regulations and rulings

The transfer pricing regime has been enforced from fiscal year 2015 as per:

- Act Nos. 516 and 549
- Supreme Decree No. 2227
- Normative Resolution No. 10-0008-15

OECD Guidelines treatment

OECD rules are not expressly accepted, but the current transfer pricing regime is based on the OECD Guidelines.

Documentation requirements

Transfer pricing documentation is required by law, so taxpayers must fulfill a transfer pricing report within the Corporate Income Tax (CIT) due dates.

Based on Act No. 843 and Supreme Decree No. 2227, the required documents are:

- An overview of the taxpayer and complete details of related parties
- A description of transactions with related parties
- A description of pricing procedures between related parties
- An overview of the taxpayer from commercial and industrial points of view

Priorities/pricing methods

The best method must be used (CUP, resale price, cost-plus or TNMM). For commodities, the price in transparent markets must be used.

Return disclosures/related-party disclosures

Not defined; Normative Resolution No. 10-0008-15 of April 2015 does not describe them.

Bolivia (continued)

Transfer pricing-specific returns

Form 601.

Documentation deadlines

Depending on the tax year-end and the line of business, the due date is 120 days after the following dates:

Line of business	Tax year-end
Industry (including oil and gas)	31 March
Agriculture and agribusiness	30 June
Mining	30 September
All other businesses	31 December

Transfer pricing penalties

USD1,472 for not filing transfer pricing information or tax returns and USD736 for uncompleted filing.

Penalty relief

No defined procedures.

Statute of limitations on transfer pricing assessments

A general statute of limitations applies in Bolivia. Until August 2012, the statute of limitations was four years, calculated from 1 January of the next year the tax payment was due. In September 2012, Act No. 291 (modification of Article 59 of the Bolivian Tributary Code) was issued, modifying the statute-of-limitations rules, according to:

- 4 years in 2012
- 5 years in 2013
- 6 years in 2014
- 7 years in 2015
- 8 years in 2016
- 9 years in 2017
- 10 years in 2018

The last change of this rule was established in June 2016 with Act No. 812, which modifies the statute of limitations to 8 years.

Furthermore, transfer pricing audits can be performed within a period of two years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There is no experience regarding this, as the transfer pricing regime is being enforced from fiscal year 2015.

APA opportunity

This is not defined in the current law.

Impact of new OECD BEPS Action 8–10 guideline

Bolivia is not formally aligned to the OECD Guidelines because it is not a member country of the OECD. Consequently, it is not expected that these guidelines will be applicable in Bolivia; however, it will be important to monitor further developments in this area.

Brazil

Taxing authority and tax law

Taxing authority: Department of Federal Revenue of Brazil (*Receita Federal*)

Tax law: Internal Revenue Code by Decreto 3.000, 26 March 1999 (RIR99) and Law 9.430/1996 with amendments of Law 12.715/2012 and Normative Instruction (IN) 1.312/2012

Relevant regulations and rulings

- Law No. 9.430/1996, enacted 27 December 1996 and amended by Law 12.715/2012, introduced transfer pricing rules in Brazil by providing three methods for imports and exports of assets, goods and services.
  - Imports:
    1. Comparable independent price method (PIC), defined as the weighted-average sales price for similar products or services for unrelated parties or between unrelated parties
    2. Resale price minus gross profit method (PRL), defined as the weighted-average sales price minus certain adjustments, less a statutory gross profit margin
    3. Production cost-plus profit method (CPL), defined as the weighted-average actual costs incurred during the year to produce the same or similar products or services, plus taxes and a gross profit markup of up to 20%
  - Exports:
    1. Export sales price method (PVEx), defined as the weighted-average sales price for other customers or between unrelated parties during the same year
    2. Resale price method, defined as the weighted-average sales prices in the country of destination under similar payment terms, minus taxes imposed by that country and a gross profit margin of 15% (PVA) for wholesale or 30% (PVV) for retail
    3. Purchase or production cost method (CAP), defined as the weighted-average cost of acquisition or production increased by taxes and duties imposed by Brazil, plus a gross profit markup of at least 15% on the sum thereof
- Normative Instruction 243/2002 provided the most relevant interpretations and was valid until Normative Instruction 1.312/2012 was issued in 2012, with further amendments by Normative Instructions 1.321/2013, 1.322/2013, 1.395/2013, 1.431/2013 and 1.498/2014.
- Federal Law 12.715/2012, published on 17 September 2012, introduced significant changes to the Brazilian transfer pricing rules. Among the changes, the amendments included:
  - Imports:
    - Introduction of a minimum requirement of 5% for applying the Brazilian PIC with internal comparables on imports
    - New minimum statutory gross profit margin of 20%, 30% or 40%, which is required when applying the PRL method for the import of goods, services or rights, depending on the company's industry sector
      - 40% profit margin for industry sectors:
        - Pharma chemicals and pharmaceutical products
        - Smoke products
        - Optical, photographic and cinematographic equipment and instruments
        - Machines, apparatuses and equipment for dental, medical and hospital use
        - Extraction of oil and natural gas and derivative products

Relevant regulations and rulings (continued)

        - 30% profit margin for industry sectors:
            - Chemical products
            - Glass and glass products
            - Pulp, paper and paper products
            - Metallurgy
        - 20% profit margin for:
            - Other industry sectors
    - Free on board (FOB) price as basis for PRL calculation
- Transfer pricing methods for commodities:
    - Intercompany imports and exports of commodities will have to be tested using PCI (quotation on imports) and PECEX (quotation on exports), respectively. Additionally, the law authorizes the Brazilian tax authorities to determine what will be considered as commodities and which commodity exchange should be recognized for applying the newly introduced methods.
    - Safe-harbor rules no longer apply for importing and exporting commodities.
- Procedural changes:
    - The previously selected transfer pricing methodology can't be changed once the tax inspection has been initiated, unless the tax authorities disqualify the method.
- In December 2012, Law 12.766/2012 introduced further changes to the Brazilian transfer pricing rules for interest paid to related parties.
    - When calculating the maximum amount of deductible expenses and minimal revenue arising from interest subject to transfer pricing regulations, taxpayers should observe the following:
        - In case of transactions in US dollars (USD) at a fixed rate, the parameter rate is the market rate of the sovereign bonds issued by the Brazilian Government on the external market, indexed in USD.
        - In case of transactions in Brazilian reals (BRL) at a fixed rate, the parameter rate is the market rate of the sovereign bonds issued by the Brazilian Government on the external market, indexed in BRL.
        - In case of transactions concluded abroad in BRL at a floating rate, the Brazilian Ministry of Finance will determine the parameter rate, and for all other cases, the parameter rate is LIBOR.
- Normative Instruction (IN) 1.312/2012 was also published in December 2012, and it consolidates Brazil's transfer pricing legislation and revokes all previous Normative Instructions related to transfer pricing (including IN 243/2002). Moreover, IN 1.312/2012 provides guidance on the application of the new Law 12.715/2012 and how to exercise the power to determine certain rules, where the law provides the authority.
- On 18 January 2013, the Brazilian tax authorities issued IN 1.321/2013 and IN 1.322/2013, which provided further guidance on issues related to the recently enacted changes to the Brazilian transfer pricing rules.
    - Interest-bearing intercompany agreements:
        - Intercompany agreements entered into before 31 December 2012 will follow the previous rules (Law 9.430/1996), whereby the interest paid or received by Brazilian taxpayers with registration with the Brazilian Central Bank is not subject to transfer pricing rules. If the agreement is not registered, then taxpayers will be subject to the limitation of LIBOR for deposits in USD for six months plus 3%.

Brazil (continued)

    - Intercompany agreements entered into as of 1 January 2013 or after will be subject to the new Law 12.766/2012, which differentiates interest rates depending on the underlying currency of each agreement and also allows for a variable spread to be issued by the Brazilian Ministry of Finance. Please note that the renewal or renegotiation of existing agreements should be considered as a new transaction that is therefore subject to the new regulations.
    - Brazilian taxpayers that opt to apply the new transfer pricing rules of Law 12.715/2012 should then be subject to the limitation of six-month USD LIBOR plus a spread of 3%, regardless of the registration with the Brazilian Central Bank. This interpretation is not included in the law and is therefore subject to different interpretations.
- On 2 August 2013, the Brazilian Ministry of Finance issued Ordinance 427/2013, which provided the interest rate spread that was mentioned but not specified in Law 12.766/2012. Now the annual spread depends on the Brazilian taxpayer's position on the loan, as follows:
  - Brazilian entity as the borrower — Starting on 1 January 2013, the spread should be no more than 3.5%.
  - Brazilian entity as the lender — From 1 January 2013 to 1 August 2013, no interest rate spread is required on the transaction. Starting on 2 August 2013, the spread is required to be no less than 2.5%.
  - As specified in IN 1.322/2013, intercompany agreements entered into as of 1 January 2013 or after will be subject to the new Law 12.766/2012, whereas agreements previously entered into and registered with the Brazilian Central Bank will be grandfathered by the previous rules and will not be subject to the new requirements. Please note that the renewal or renegotiation of existing agreements should be considered as a new transaction and therefore be subject to the new regulations.
- IN 1.395/2013 provided further guidance regarding the application of the PCI and PECEX methods, as follows. It:
  - Defined that commodities subject to the application of the PCI and PECEX methods are products listed in Appendix I and products traded in the commodities and futures exchanges are listed in Appendix II.
  - Established the possibility of adjustments in relation to variations of quality, features and content of the substance of the product sold.
  - Established that in the absence of a quotation on the transaction date, the quotation to be used is the latest one available. In addition, in case it is not possible to identify the transaction date, the date to be used is that of the import documentation or the product ship date for export purposes.
  - Established that, in the absence of a quotation for the goods in the commodities and futures exchanges (Appendix II), the prices of the imported and exported goods should be compared with those provided by the internationally recognized research institutions (Appendix III).
- IN 1.498/2014 brought back some commodities (copper, iron, tin, manganese) to Appendix I that had been removed by IN 1.395/2013 and added new commodities (lead, nickel, zinc, cobalt) to the list.
- In October 2013, the General Coordination of Taxation (COSIT) issued an administrative ruling (binding only for the taxpayer requesting the ruling)[1] advising taxpayers and tax auditors on the Corporate Income Tax (CIT) and PIS/COFINS rules applicable to shared services costs and expense apportionment.
  - Deductibility guidelines on shared services costs and expenses
  - The COSIT ruling[2] standardizes the Brazilian tax authorities' interpretation of CIT and PIS/COFINS rules applicable for shared services reimbursement.
  - The ruling increases taxpayers' comfort level to execute cost-sharing agreements, clarifying that it is possible to concentrate, in a sole entity, on expenditures control related to core support services (e.g., human resources, accounting, legal).

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[1] COSIT Conflict Resolution No. 23/2013 of 14 October 2013.

[2] COSIT Conflict Resolution No. 23/2013 of 14 October 2013.

Brazil (continued)

- The ruling explains that the expenditures may later be apportioned to the group of entities that benefit from the services. It also clarifies that the deduction of said expenditures for CIT purposes is possible as long as the expenditures are:
  - Considered necessary, normal and usual for the group entities' business
  - Paid and properly supported by any available documentation
  - Calculated based on reasonable and rational apportionment criteria, previously set forth in a formalized instrument signed by the parties
  - Related to the actual expenditures incurred by each company, consistent with the global price paid by the goods or services acquired by the shared services center
- It should be mentioned that all companies should keep proper bookkeeping of all the acts directly related to the expenditures' apportionment.
- Additionally, the Brazilian tax authorities now recognize that reimbursements paid in accordance with the above provisions should not be considered as taxable revenues for PIS/COFINS purposes at the shared services-center level, provided that no markup is included in the portion paid by each company.

OECD Guidelines treatment

Brazil's transfer pricing rules deviate significantly from international standards, including the OECD Guidelines, as there are no profit-based methods and the concept of a functional and risk analysis is not included.

Intercompany transactions need to be documented on a strict transactional basis, and fixed statutory profit margins apply. The local entity will have to document its compliance with at least one of Brazil's statutory transactional methodologies (PIC, resale-minus (PRL) or cost-plus) for each imported (or exported) product, service or right.

Documentation requirements

Brazilian taxpayers are required to document their international intercompany transactions annually.

The corporate income tax return (DIPJ), replaced by an electronic income tax return (ECF) beginning in 2014, contains five specific forms that require taxpayers to disclose detailed information regarding their main intercompany import and export transactions.

As part of these contemporaneous documentation requirements, taxpayers need to disclose the total transaction values of the most traded products, services or rights; the names and locations of the related trading partners; the methodology used to test each transaction; the calculated benchmark price; the average annual transfer price; and the amount of any resulting adjustment.

Given the detailed transactional focus of the Brazilian regulations and the absence of any basket approach, taxpayers are required to document their transfer prices by each product, service and right. For products, the taxpayer should document each product using the company's internal product codes used for inventory management purposes and not the much broader fiscal nomenclature used for customs and indirect tax purposes.

Taxpayers are expected to have the calculations and documentation necessary to support the information filed as part of the annual tax declaration, and it should be ready for the tax authority to potentially inspect when the declaration is filed (i.e., usually at the end of June of the following calendar year).

Brazil (continued)

Priorities/pricing methods

As a first step in the transfer pricing documentation process, Brazilian companies importing from abroad usually apply the Brazilian PRL method (*Método do Preço de Revenda menos Lucro*) to document a company's transfer prices.

The PRL method is the starting point for most importers, mainly because the method relies entirely on import cost, local production cost and resale price information available in Brazil, relieving the company of the burden of soliciting data from its foreign related suppliers. This approach provides an estimate of the Brazilian taxpayer's potential transfer pricing exposure. As a second step, because the Brazilian transfer pricing regulations do not have a most-appropriate-method concept, taxpayers often apply one of the two other methods to reduce the potential transfer price exposure. Taxpayers may choose whichever method suits them best. This approach provides taxpayers with the opportunity to focus on those products and transactions that generate the highest adjustments under the PRL method and then apply one of the alternative methodologies (i.e., CPL or PIC for each of these products or transactions, reducing or avoiding the adjustment). The other methods often are more favorable, as the result is more likely to be in line with international expectations. The only condition is that taxpayers must be able to document the chosen method properly. The Brazilian tax authorities usually challenge the application of the CPL and PIC methods; consequently, it is crucial for the Brazilian taxpayer to prepare robust documentation to support the application of the PIC and CPL methods.

Brazilian companies exporting abroad — except for commodities under the new rules — often apply the safe-harbor rules to avoid applying additional transfer pricing methods. Exports are exempt from applications of the transactional transfer pricing rules if they meet one of the three safe harbors, which apply (1) to small exports, compared with the overall business (less than 5% of revenue is exported to parties located outside Brazil, related and unrelated), and/or (2) when the net profit from exports on a three-year average is at least 10% and, also, the intercompany export transactions cannot exceed 20% of total net export transactions, and the last approach is (3) when the average price of exports is at least 90% of the average domestic sales price. If a safe harbor is not met, usually the cost-plus method or the Brazilian resale-minus method is applied.

For transactions of products considered to be commodities, the safe harbor is not applicable.

For intercompany import and export transactions, no adjustment will be required as long as the actual transfer price does not exceed the determined transfer price by more than 5% (divergence margin). However, in the case of commodity imports and exports (PCI and PECEX methods), the divergence margin is reduced to 3%.

It is important to note that, under the new rules introduced by Law 12.715/2012, the taxpayer is bound to the transfer pricing method chosen, and a change of method during a tax audit is accepted only for years 2012 onward if the tax auditor applies a different method.

Return disclosures/related-party disclosures

The transfer pricing adjustments must be effectuated in December and reflected in the annual income tax return (usually due in June of the next calendar year), at which time the company will also have to disclose the transfer pricing methods chosen and any related information.

Transfer pricing-specific returns

The ECF contains five specific forms that require taxpayers to disclose detailed information regarding their main intercompany import and export transactions. For more information, refer to the "Documentation requirements" section above.

Brazil (continued)

Documentation deadlines

The contemporaneous documentation required as part of the ECF usually has to be filed by the end of June of the following calendar year.

Taxpayers are expected to have the detailed calculations and documentation necessary to support the information filed as part of the ECF ready for potential inspection as of the declaration's filing date.

Transfer pricing penalties

Because there are no special penalties for transfer pricing, general tax penalties are applicable.

The amount of the penalty may be up to 20% of the omitted tax (or 0.33% per day) if the taxpayer pays the related taxes late but before an audit. Meanwhile, if the tax authority assesses the taxpayer as part of a transfer pricing audit, the applicable penalties may range from 75% to 225% of the omitted taxes.

Penalty relief

Currently, no penalty relief is available.

Statute of limitations on transfer pricing assessments

A general statute of limitations applies, which is five years from the first day of the following fiscal year. In case of filing amended tax returns, the statute starts with the filing of the latest amended return.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

To expedite audits in Brazil's data-intensive transfer pricing documentation environment, Brazilian audit teams have been equipped with new computers and specialized software applications, including internally developed systems capable of analyzing and auditing large volumes of accounting and transaction data.

The Brazilian tax authority expects the International Affairs Special Office (DEAIN) and the regional audit groups to continue to increase their numbers of specialized transfer pricing auditors. It is believed that the DEAIN and the regional transfer pricing auditors are becoming increasingly sophisticated in their audit approaches as they grow in number and develop experience.

Although large companies are more likely to be audited than small ones, the likelihood of general tax audits in Brazil is generally characterized as medium. The likelihood of transfer pricing being reviewed as part of an audit is also characterized as medium, as is the likelihood of a challenge of the transfer pricing methodology. For certain industries — e.g., automotive, pharmaceutical, chemical, oil and gas, and intragroup services into Brazil (services, cost allocations) — the likelihood of a transfer pricing audit is high. The risk of a transfer pricing audit is high if the tax authorities identify inconsistencies in the information filed electronically (e.g., customs declaration, financial statements and other filing requirements, such as SISCOMEX/SISCOSERV).

Brazil (continued)

APA opportunity

Currently, there is no opportunity to pursue an APA.

In certain cases, unilateral rulings on the interpretation of law, not on the actual price to be applied, are possible.

Under Law 9.959, taxpayers may request altering the fixed statutory profit margins. However, nothing has been granted to date, due to the formal limitations imposed. The current Law 12.715/2012 also provides the possibility to apply for alternative profit margins, but no regulations have been issued yet.

Impact of new OECD BEPS Article 8–10 guidelines

The Brazilian transfer pricing documentation approach follows statutory margins on a transaction-by-transaction basis, which requires fundamentally different documentation, compared with the OECD transfer pricing documentation. The Brazilian tax authorities gather data from multiple sources to verify and audit a taxpayer’s transactions. These include numerous databases, which track the importation and exportation transactions occurring in Brazil. The inclusion of information sharing with other countries would not benefit the Brazilian tax authorities, given the focus of the transfer pricing rules on fixed, predetermined profit margins. In the short term, Brazil is unlikely to amend its transfer pricing rules as a result of the OECD’s report on BEPS.

Bulgaria

Taxing authority and tax law

Taxing authority: National Revenue Agency (NRA)

Tax laws: Corporate Income Tax Act (CITA), Tax and Social Insurance Procedure Code (TSIPC), double taxation treaties

Relevant regulations and rulings

- CITA, promulgated in the State Gazette (SG) Issue 105, 22 December 2006
- TSIPC, promulgated in SG Issue 105, 29 December 2005
- Ordinance N 9, 14 August 2006 (Ordinance N 9), about methods for determining market prices, promulgated in SG Issue 70, 29 August 2006
- Double taxation treaties enacted by Bulgaria

Bulgarian tax legislation does not explicitly articulate the arm's-length principle. According to Article 15 of the CITA, when related parties enter into transactions whose commercial and financial terms differ from those of unrelated-party transactions, resulting in a different taxable base than what would have been achieved in unrelated-party transactions, the tax authorities will adjust the taxable base accordingly.

Furthermore, under Article 16 of the CITA, when one or more transactions, including between unrelated parties, have been concluded under terms in which the fulfillment leads to lower or no taxation, the taxable base will be determined without taking notice of these transactions, certain terms or their legal form. Instead, the taxable amount that will be considered would be obtained in a market-customary way of the relevant type at market prices and is intended to achieve the same economic result without leading to lower or no tax.

The methods applied in determining the arm's-length prices have been introduced by the TSIPC and Ordinance N 9.

The NRA released its Manual on Transfer Pricing Audits (the Manual) in 2008. By introducing a chapter on transfer pricing documentation requirements in the Manual early in 2010, the NRA approved the documents that transfer pricing auditors would require during their investigations.

The Manual is binding on tax auditors. However, it is not technically part of the law. Nevertheless, it is in the taxpayers' interest to comply with the Manual, because it defines what the NRA usually requires during a transfer pricing audit. Compliance with the Manual is expected to significantly narrow the scope of disputes over transfer pricing matters during tax audits.

OECD Guidelines treatment

In general, the Bulgarian transfer pricing requirements follow the OECD Guidelines. However, the 2010 version of the OECD Guidelines, in which the hierarchy of methods is abolished, has not yet been introduced in the local transfer pricing legislation.

Furthermore, Bulgarian transfer pricing rules do not explicitly deal with business restructuring.

Documentation requirements

Taxpayers bear the burden of proof regarding the arm's-length nature of the controlled price and must present all relevant evidence. If the taxpayer provides a transfer pricing documentation file, the tax authorities will be obliged to follow the approach or method used by the taxpayer to establish the transfer price. If they disagree with the transfer price applied, they should come up with evidence of the market price they consider appropriate, based on any readily available public information.

Bulgaria (continued)

Based on the Manual, the documentation should contain information about:

- Presentation of the group:
  - Legal, functional, finance and management organization of the group (legal, functional, finance and management organizational charts of the group)
  - Economic role of the divisions within the group
  - Allocation and financing of intellectual property
- Knowledge of the controlled company and its activity:
  - Object of the activity and market of the company (an economic analysis of the market, including structure, size, competitors, development, success factors and risks)
  - Functional analysis of the company
  - Use of intellectual property
  - Financing of the enterprise
- Analysis of associated transactions:
  - Presentation of the selected economic model with an explanation of the specific strategy of the enterprise (for example, the penetration policy to gain a share of a particular market)
  - Presentation of the associated transactions, including objects of transactions, distribution, services, financial transactions, contracts, countries involved, special terms and conditions
- Functional analysis:
  - Who plays what role in an associated transaction and an analysis of functions, risks and assets of each party in the transaction
  - Analysis of methods and a presentation of the transfer pricing method used
  - Economic and financial analysis of the transaction, including profits, analysis of the market, nature of the financial terms and conditions

The Manual recommends that taxpayers have the transfer pricing master file at their disposal and that the file contains information on a group level, as well as a country-specific file prepared in Bulgarian for each tax year, which is updated annually.

Priorities/pricing methods

Under Bulgarian transfer pricing legislation, one of the following methods should be applied to determine the market price:

- CUP
- Resale price or cost-plus
- Profit split or TNMM

The TSIPC introduced the methods applicable for determining the arm's-length price, while Ordinance N 9 regulates the order of consideration, and applying the traditional transfer pricing methods is preferred. Moreover, the CUP method is considered the most direct and reliable measure of an arm's-length price for controlled transactions. The TNMM and profit split methods are used only in cases in which applying the traditional methods produces an unsatisfactory result.

Bulgaria (continued)

Return disclosures/related-party disclosures

Related-party transactions falling within the scope of Article 15 of the CITA could be disclosed in the annual tax return.

Furthermore, taxpayers are required by the National Accounting Standards (as well as by the International Accounting Standards) to disclose in their financial statements relationships between related parties, regardless of whether there have been transactions between them, as well as the related-party transactions.

Bulgarian tax legislation provides for quite a broad definition of "related parties." For instance, for accounting purposes, related parties should be parties where one exercises control over the other, whereas for tax purposes, parties will be related not only in the case of control, but also even in a case where one of the parties holds directly 5% of the voting shares of the other party.

Under Bulgarian legislation, the following are considered related parties:

- Spouses
- Certain types of relatives
- Employers and employees
- Shareholders and partners
- Persons where one of them participates in the management of the other or its subsidiary
- Persons in whose management or controlling body participates one and the same person (legal or natural person), including cases when the natural person is a representative of another person
- A company and a person, where the person owns directly more than 5% of the company's shares with voting rights
- Persons where one of them exercises "control" over the other
- Persons whose activity is controlled by a third person or its subsidiary
- Persons exercising joint control over a third person or its subsidiary
- Persons where one of them is a commercial representative of the other
- Persons where one of them has made a donation to the other
- Persons who participate (directly or indirectly) in the management, the control or the capital of another person or persons, thus being able to negotiate terms different from the regular ones
- A Bulgarian taxpayer or shareholders of a Bulgarian taxpayer and an entity established in or controlled from a blacklisted tax jurisdiction
- Control, under the definition provided by the legislation, is present when the controlling party meets *one* of the following criteria:
- Owns directly or indirectly, or under an agreement with another person, more than half of the votes at the general meeting of another person
- Has the possibility to determine directly or indirectly more than half of the members of the managing or controlling body of another person
- Has the possibility to manage, including through or together with a subsidiary, in accordance with a particular statute or contract, the activity of another person
- As a shareholder or a partner in an entity, controls independently, in accordance with a deal made with other partners or shareholders of the same entity, more than half of the votes at the general meeting of this entity
- Can by other means exert decisive influence over the decision-making, with respect to the activity of the entity

Transfer pricing-specific returns

Effective from 1 January 2014, taxpayers are required to submit as part of their annual corporate income tax package summarized information about transactions with domestic and nonresident related parties, as well as with offshore companies.

Documentation deadlines

Under the Bulgarian transfer pricing rules, taxpayers involved in controlled transactions are not obligated to file their transfer pricing documentation with the NRA. Transfer pricing documentation is submitted to the tax authorities only upon request (e.g., during a tax audit or tax documentation review when a tax refund or tax relief under a double tax convention is claimed). In the course of a transfer pricing audit, the tax authorities could request documents and information within a certain period. The information requested usually concerns the group's structure, the audited company and its activities, analysis of transactions involving related parties, the functions performed in relation to those controlled transactions, and proof and a written explanation with regard to the transfer pricing methods applied, among others. It is time-consuming to prepare and present the required documentation according to the NRA's requirements. Therefore, the NRA's time limit (i.e., usually 14 days) is unlikely to be sufficient. For that reason, taxpayers are encouraged to have their transfer pricing documentation available and prepared in compliance with the NRA's guidelines.

Transfer pricing penalties

If the taxpayer fails to provide documentation when requested by the tax authorities, a fine for not cooperating could be imposed. However, this fine is insignificant (i.e., in the range of BGN250 to BGN500, or approximately EUR128 to EUR256). Therefore, the main consequence for the entity would be the adjustment of its taxable profit if the tax auditors conclude that the price applied in controlled transactions is not at arm's-length.

Furthermore, a taxable person involved in a "hidden profit distribution" 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 nondeductible for corporate income tax purposes. In addition, the expense would 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
  - In excess of market price levels
- Accrued interest costs on debt financing if at least three of the following criteria are met:
  - The loan principal exceeds the equity of the borrower as of 31 December of the preceding year
  - The repayment of the principal or the interest on the loan is not limited by a fixed time period
  - The loan repayment or interest payment depends on whether the borrower ended on a profit position
  - The repayment of the loan depends on satisfaction of other creditors' claims or on payment of dividends

Bulgaria (continued)

Penalty relief

A voluntary disclosure of hidden profit distribution relieves taxpayers of the administrative penalty, which is 20% of the hidden profit. This allows taxpayers to self-adjust any overpriced group transactions with no threat of penalties.

Statute of limitations on transfer pricing assessments

In Bulgaria, documentation may be required for any open tax year, as well as for tax obligations not covered by the statute-of-limitations period. As a general rule, the statute-of-limitations period for corporate income tax is five years from the year following the year of expiration of the statutory term granted for filing corporate income tax returns.[1]

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as low. The likelihood that transfer pricing will be reviewed as part of that audit is characterized as high, and the likelihood that the transfer pricing methodology will be challenged is characterized as medium.

APA opportunity

No binding ruling or APA opportunities are currently applicable.

Taxpayers are allowed to file a request for a written opinion from the NRA or the Minister of Finance on the interpretation and application of the tax law with regard to a specific tax issue. However, the value of the position of the tax authorities on a particular tax aspect is very limited, because the tax authorities refuse to provide any opinion about transactions that have not yet been structured and documented.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

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[1] The Bulgarian statutory term for both filing the annual corporate income tax return and remittance of the amount due is 31 March of the following year. Thus, for example, fiscal year 2011 is open for tax audits until the end of fiscal year 2017, because the corporate income tax return for fiscal year 2011 should have been filed by 31 March 2012.

Cameroon

Taxing authority and tax law

Tax authority: General Director of Taxation

Tax law: General Tax Code

Relevant regulations and rulings

Circular on the Finance Law by the General Director of Taxation

Article 18-3 of the New Finance Law 2014 specifies the documentation requirements.

OECD Guidelines treatment

The OECD Guidelines on transfer pricing may be relied upon to determine the arm's-length nature of international transactions, and supporting documentation should be prepared.

Documentation requirements

Article 18-3 of the New Finance Law 2014 stipulates that:

"Companies falling under the Department in charge of large enterprises shall also submit within the same deadline and using the form provided by the Administration, the statement of shares which they own in other companies where such shares do not exceed 25% of their share capital. They shall attach a detailed statement of transactions with the companies which control them or which are under their control, be they in Cameroon or abroad. For the application of this provision, the notion of control must be understood as used in Article M 19 (a) (2) of the Tax Procedures Manual."

The documents to be submitted, along with the annual tax return, are:

- A statement of ownership in other companies if the ownership exceeds 25% of their share capital. The statement should be accompanied by:
  - General information about the related parties of the group:
    - A general description of the activity carried out, including the changes that occurred during the year audited
    - A general description of the legal and operational organizations of the companies within the group of consolidated companies, including identification of related companies engaged in transactions with the company
    - A general description of the functions performed and risks assumed by the related companies, as they affect the company
    - A list of key intangible assets, including patents, trademarks, trade names and know-how related to the company
    - A general description of the transfer pricing policy of the group
  - Specific information concerning the company audited:
    - A general description of the activity carried out, including the changes that occurred during the year audited
    - A description of the transactions with the related companies, including the nature and amount of transfers, including royalties
    - A list of cost-sharing agreements and, if applicable, a copy of the preliminary agreements on transfer pricing and rescripts relating to the determination of transfer prices affecting the results of the company

- A presentation of the method for determining transfer prices in accordance with the arm's-length principle, including an analysis of the functions performed, assets used and risks assumed, and an explanation of the selection and application of the method used
- An analysis of the benchmarks considered relevant to the company when the chosen method requires it

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Taxpayers must disclose related-party transactions. Indeed, the provisions of Article 18-3 indicate that a company must provide a description of transactions with other affiliates, including the nature and amount of flows, such as fees. These disclosures are to be included in the transfer pricing documentation submitted with the return.

Transfer pricing-specific returns

There are no specific templates for transfer pricing documentation, but the tax administration provided a template that relates to a specific declaration of information form that must be filed when submitting the report.

Documentation deadlines

The transfer pricing documentation must be submitted each year, along with the annual tax return, no later than 15 March for companies under the department in charge of large enterprises.

Transfer pricing penalties

There are no specific rules for transfer pricing adjustments, but all tax adjustments are generally subject to interest and penalties.

Penalty relief

In case of partial or total failure to submit the required documentation, a notice to provide or complete the documentation will be served to the company within 30 days from the documentation submission deadline. This notice should remind the taxpayer of the penalties in case of failure to reply, including adjustments based on information available to the authority.

The taxpayer should make all attempts to submit the transfer pricing documentation within the provided deadline of 15 March of each year, except if the company obtains an extension of the deadline from the relevant authorities.

Statute of limitations on transfer pricing assessments

There is no statute of limitations specific to transfer pricing matter issues. Nonetheless, pursuant to Section M34 of the *Cameroonian Tax Procedure Handbook*, the tax authorities may correct the statute of limitations applicable to total or partial omissions up to the end of the fourth year after the one in which the taxes were due. Thus, this limitation period should be applicable to transfer pricing assessments as well.

Cameroon (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is high. The likelihood that transfer pricing will be reviewed as part of that general tax audit is also high. The likelihood that the transfer pricing methodology will be challenged is low.

APA opportunity

The relevant tax law in Cameroon is silent on APAs. However, before a contract is concluded or a transaction is performed, a taxpayer can request a tax ruling (*rescrit fiscal*) from the tax authorities to get their position on the potential tax implications.

Impact of new OECD BEPS Action8-10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Canada

Taxing authority and tax law

Taxing authority: Canada Revenue Agency (CRA)

Tax law: Section 247 of the Income Tax Act (Canada) (ITA) received Royal Assent on 18 June 1998 and is generally applicable to taxation years that began after 1997. It constitutes Canada's transfer pricing legislation and deals with the determination of transfer pricing adjustments; the re-characterization of transactions, penalties, records and documents required to be made or obtained; contemporaneous documentation requirements and timing of provisions to the minister, when requested; ministerial discretion regarding acceptance of downward tax adjustment requests; and the application of withholding tax to transfer pricing adjustments. For transactions after 28 March 2012, new §§ 247(12) to (15) were added to the transfer pricing provisions to streamline and rationalize the withholding tax implications of transfer pricing adjustments.

Relevant regulations and rulings

The CRA does not set out its views and positions on transfer pricing issues by a legal doctrine or by providing detailed examples. The CRA prefers to outline its views in general principles.

It provides its administrative interpretations and guidance with respect to § 247 and its application through the release of Information Circulars (IC), Transfer Pricing Memoranda (TPMs) and pronouncements at public conferences, symposia and conventions. ICs usually address major subjects from a general perspective, while TPMs typically provide supplementary, detailed explanations and guidance on specific issues related to the major subject.

The CRA's current key pronouncements on transfer pricing are:

- IC87-2R, International Transfer Pricing, 27 September 1999
- IC94-4R, International Transfer Pricing: Advance Pricing Arrangements (APAs), 16 March 2001
- IC94-4R (Special Release), Advance Pricing Arrangements for Small Businesses, 18 March 2005
- IC71-17R5, Guidance on Competent Authority Assistance Under Canada's Tax Conventions, 1 January 2005

OECD Guidelines treatment

While no mention is made of the OECD Guidelines in § 247 of the ITA, the legislative provision is intended to reflect the arm's-length principle as set out in the OECD Guidelines. The CRA has also endeavored to harmonize its administrative guidance and approach to transfer pricing with the OECD Guidelines. As noted in IC87-2R, the "circular sets out the Department's views on transfer pricing and also provides the Department's position with respect to the application of the OECD Guidelines."

When dealing with transfer pricing issues domestically, the relevant Canadian statutory provisions are relied upon. The CRA's related ICs and other administrative guidance are considered instructive but not binding. The OECD Guidelines and other OECD reports are not formally recognized as authoritative; however, courts and other dispute resolution channels (e.g., competent authorities) will usually consider the OECD's international principles and standards in reaching a decision.

Documentation requirements

Subsection 247(4) of the ITA requires a taxpayer to have records or documents that, at a minimum, provide a complete and accurate description, in all material respects, of the following items:

- The property or services to which the transaction relates
- The terms and conditions of the transaction and their relationship, if any, to the terms and conditions of the transaction entered into between the persons or partnerships involved

- The identity of the persons or partnerships involved in the transaction, and their relationship at the time the transaction was entered into
- The functions performed, the property used or contributed, and the risks assumed by the persons or partnerships involved in the transaction
- The data and methods considered and the analysis performed to determine the transfer prices, the allocations of profits or losses, or contributions to costs of the transaction
- The assumptions, strategies and policies, if any, that influenced the determination of the transfer prices, the allocations of profits or losses, or contributions to costs of the transaction

In addition, although its views are not law, IC87-2R notes that the CRA expects a taxpayer's documentation to include certain additional information (e.g., details of cost contribution arrangements, translations of foreign documents and other general guidance).

TPM-09 sets out the CRA's views of the meaning of "reasonable efforts" under § 247 of the ITA. In practice, TPM-09 has not significantly enhanced clarity with respect to the reasonable-efforts standard and thereby the potential application of transfer pricing penalties.

Priorities/pricing methods

The CRA accepts the transfer pricing methods recommended in the OECD Guidelines when such methods are applied correctly and result in an arm's-length price or allocation. The transfer pricing methods specified in IC87-2R include CUP, resale price, cost-plus, profit split (residual and contribution) and TNMM.

Traditionally, the CRA considered that, even though § 247 does not so stipulate, the above-noted transfer pricing methods form a natural hierarchy, with the CUP method providing the most reliable indication of an arm's-length transfer price or allocation and the profit split method providing the least reliable indication. Traditionally, the CRA did not require or impose a "best method" rule.

The CRA believes that the most appropriate method to be used in any situation will be that which provides the highest degree of comparability between transactions, following an analysis of the hierarchy of methods.

In 2012, following the 2010 revisions to the OECD Guidelines, which it endorsed, the CRA published TPM-14. While not wholly abandoning the concept of a natural hierarchy of methods, it indicated that accepting the preferred method in a particular circumstance would depend on the degree of comparability available under each of the methods and the availability and reliability of the data.

Return disclosures/related-party disclosures

Taxpayers are required to file a T106 information return annually, reporting the transactions undertaken with non-arm's-length nonresidents during the taxation year. The T106 is a separate information return, but it is usually filed together with the corporate tax return (although there are separate penalties if the T106 information return is filed late). Data from the T106 is entered into a CRA database and is used to screen taxpayers for international tax audits.

Transfer pricing–specific returns

The T106 returns referred to above are essentially transfer pricing returns.

Documentation deadlines

Taxpayers must prepare or obtain records and documents that provide a description that is complete and accurate in all material respects of the items listed in Subsection 247(4) of the ITA, and such documentation must exist as of the tax filing due date. For corporations, such documentation must exist six months after the year-end. For partnerships, the due date is five months after the year-end.

Canada (continued)

Taxpayers must provide documentation to the CRA within three months of the issuance of a written request under Subsection 247(4).

Transfer pricing penalties

Subsection 247(3) of the ITA imposes a penalty of 10% of the net upward transfer pricing adjustments. These penalties are applicable if such adjustments exceed the lesser of 10% of the taxpayer's gross revenue for the year or CAD5 million, and if the taxpayer has not made reasonable efforts to determine and use arm's-length transfer prices.

As set out in TPM-13, all proposed reassessments involving potential transfer pricing penalties are required to be referred to the Transfer Pricing Review Committee (TPRC) for review and recommendation for final action. The TPRC, after considering the facts and circumstances and the taxpayer's representations, will conclude whether a transfer pricing penalty is justified.

A taxpayer will be deemed not to have made reasonable efforts to determine and use arm's-length transfer prices or allocations unless the taxpayer has prepared or obtained records or documents that provide a description that is complete and accurate, in all material respects, for the items listed in Subsection 247(4) of the ITA (see "Documentation requirements" section above), and such documentation exists as of the tax filing due date. For corporations, such documentation must exist six months after the year-end. For partnerships, the due date is five months after the year-end. Further, a taxpayer will be deemed not to have made reasonable efforts to determine and use arm's-length transfer prices or allocations if the taxpayer does not provide the records or documents to the CRA within three months of the issuance of a written request to do so.

Transfer pricing-related penalties are assessed without reference to the taxpayer's income or loss for the relevant reporting year and are not tax-deductible.

Penalty relief

If a taxpayer is deemed to have made reasonable efforts to determine and use arm's-length transfer prices or allocations with respect to adjusted, non-arm's-length transactions, no penalty is assessed. No transfer pricing penalties under Subsection 247(3) of the ITA should arise with respect to transactions covered by an APA, as long as the APA remains in effect and the taxpayer complies with its terms and conditions.

When the CRA has reassessed a transfer pricing penalty and the Canadian competent authority and relevant foreign counterpart negotiate a change to the amount of the transfer pricing adjustment, the CRA will adjust the amount of the Canadian transfer pricing penalty accordingly. If the result of the change is that the adjustment no longer exceeds the penalty threshold, the penalty is rescinded.

Statute of limitations on transfer pricing assessments

Under Subsection 152(4) of the ITA, the minister ordinarily cannot reassess a taxpayer after the normal reassessment period, as defined in Subsection 152(3.1) of the ITA. For most multinational taxpayers, that period is four years beginning after the earlier of the day of mailing a notice of an original assessment for the year or the day of mailing an original notification that no tax is payable for the year. The time limit applies unless the taxpayer has made misrepresentations, committed fraud or filed a waiver, in which case the minister may reassess a taxpayer at any time.

With respect to transactions involving non-arm's-length dealings with nonresidents, the reassessment period is extended by an additional three years, i.e., to seven years. This time period may be further extended if the taxpayer provides the CRA with a waiver (authorization from the taxpayer to the CRA to waive the time limit for reassessment). The taxpayer may provide waivers within the seven-year extended reassessment period. A number of Canada's tax treaties restrict the time for Canada to make an adjustment to a period less than the seven years allowed under the ITA.

Canada (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The CRA continues to receive additional funding for its audit of international activities to focus its audit resources on the examination of international transactions, especially transfer pricing.

For large corporations, the likelihood of an annual tax audit is high, as is the likelihood of transfer pricing being reviewed as part of the audit. The likelihood of a transfer pricing methodology being challenged, if transfer pricing comes under audit, is also high.

Per TPM-05R, it is mandatory for CRA auditors to issue a formal written request to the taxpayer for transfer pricing documentation upon commencement of the audit, or as soon as cross-border, non-arm's-length transactions with nonresidents are identified during the course of an audit. This request triggers the three-month window to provide the contemporaneous documentation.

The CRA has in recent years implemented a risk-rating approach called the Approach to Large Business Compliance, under which taxpayers are risk rated as "high," "medium" or "low" risk depending on the nature of transactions undertaken, past audit results and the taxpayer's governance structure. Higher risk ratings will prompt broader compliance actions by the CRA.

APA opportunity

The CRA launched its APA program in July 1993. As set out in IC94-4R, it allows taxpayers to pursue unilateral, bilateral or multilateral APAs. In addition, the CRA has made a small-business APA program available to Canadian taxpayers under certain conditions. The CRA charges taxpayers only travel costs it incurs in the completion of an APA.

An APA request can cover a taxation year if the request is made before the filing due date for that year. TPM-11 discusses the CRA policy with respect to rolling an APA back to prior years, with the main limitation being that APAs may not be rolled back to years for which a request for contemporaneous documentation under § 247 has been issued. Effectively, this means that APAs cannot be rolled back to taxation years that are currently undergoing a transfer pricing audit.

Impact of new OECD BEPS Action 8–10 guidelines

There is no explicit reference to the OECD in the Canadian legislation. The CRA follows the arm's-length principle and states that it follows the OECD Guidelines; however, no public statement has been made as to how BEPS may change the CRA's administrative practices.

Below, we have included the available information on how Canada is treating the topic of country-by-country reporting (CbCR), which the OECD addressed in Action 13 of its BEPS project.

Canada's federal Government is undertaking an effort to introduce legislation to strengthen pricing documentation by introducing CbCR for large multinationals. Budget 2016 confirms that the measure will only apply to MNEs with total annual consolidated group revenue of EUR750 million or more (in CAD equivalent).

Where such an MNE has an ultimate parent resident in Canada, it will be required to file a country-by-country report with the CRA within one year of the end of the fiscal year to which the report relates. A Canadian-resident subsidiary may also have a filing obligation where the ultimate parent company is a resident of a country that does not require CbCR, or if the CRA is not able to obtain the information through its information exchange network.

A Canadian subsidiary resident in Canada may also have a filing requirement if the entity is a designated "surrogate." Reporting will be required for taxation years that begin after 2015. First exchanges between jurisdictions of country-by-country reports are expected to occur by June 2018. Before any exchange with another jurisdiction, the CRA will formalize an exchange arrangement with the other jurisdiction and will ensure that it has the appropriate safeguards in place to protect the confidentiality of the reports. It is expected that the draft legislation, which will be released for comments in the coming months, and the information required will be consistent with the OECD's Action 13 final report released in 2015.

Budget 2016 did not provide any comments on penalties for inaccurate information or failure to file. It also did not include a proposal to change the transfer pricing documentation requirements in relation to both the master file and local file documentation standards.

Cape Verde

Taxing authority and tax law

Taxing authority: National Directorate of State Revenues (*Direcção Nacional de Receitas do Estado*)

Tax law: Corporate Income Tax Code (Código do Imposto Sobre o Rendimento Das Pessoas Colectivas — LEI 82/VIII/2015); General Tax Code (Código Geral Tributário — LEI no. 37/IV/1992 of 28 January)

Relevant regulations and rulings

Articles 65 and 66 of the Corporate Income Tax Code (CITC) define the arm's-length concept, the eligible transfer pricing methods, the special relations definition and declarative requirements.

Ministerial Order no. 75/2015, published by Cape Verde's Financial and Planning Ministry on 31 December 2015 (TP Ministerial Order), introduced:

- General rules and scope of application of transfer pricing rules
- The methods for the determination of transfer prices in line with the arm's-length principle
- Comparability criteria
- Cost-sharing agreements
- Intragroup services agreements
- Documentation requirements
- Corresponding adjustments procedure

OECD Guidelines treatment

The OECD Guidelines have been adopted in the newly released regulations despite Cape Verde not being an OECD member country. The TP Ministerial Order refers to the arm's-length principle as the guiding standard as developed and discussed by the OECD and refers to the OECD Guidelines as a source of high importance in transfer pricing matters.

Documentation requirements

According to the TP Ministerial Order, taxpayers must maintain information and documentation regarding the policy adopted in the determination of transfer prices on an annual basis, requiring the following taxpayers to prepare a transfer pricing documentation file:

- Entities classified as "Large Taxpayers" — as defined by Ministerial Order no. 55/2013 of 14 November 2013, entities with a turnover greater than CVE200 million (approximately USD2.05 million as of August 2016), or with a global value of paid tax greater than CVE15 million (approximately USD154,000 as of August 2016) — or entities with a high level of risk associated (the concept of a high-risk entity has not been specifically defined in Ministerial Order no. 55/2013 and therefore remains unclear for now)
- Entities benefiting from the privileged taxation regime, as defined in the General Tax Code
- Permanent establishments of nonresident entities
- Entities designated that the tax authorities have indicated for this purpose

According to the TP Ministerial Order, the transfer pricing documentation shall include:

- Description and characterization of the related-party status
- Characterization of a taxpayer's activity and that of the related parties with which it engages in transactions and all intercompany

- transactions (volumes, terms and conditions) for the year under analysis, as well as for the previous two years, or for the period during which they have been occurring (if less than three years)
- Detailed identifications of goods, rights or services that are subject to the controlled transactions and of the terms and conditions established, whenever this information does not result from signed agreements
- Description of the functions performed, assets used and risks borne by the taxpayer and the related parties involved in the intragroup transactions
- Guidelines with respect to the application of transfer pricing policies regardless of its form and designation, which contain instructions namely about the methodologies to use, the procedures for information gathering (especially information on internal comparables), comparability analysis, internal policies on cost structuring and profit margin used
- All intercompany agreements and unrelated-party agreements, including information on delivery terms, any supplemental activities involved (e.g., after-sale services, warranty services, technical assistance), explicit description of prices in controlled transactions and details about mechanisms used for the price definition, duration of contracts (and renovation policy), any penalties foreseen in the agreements, etc.
- A description of the method or methods used for the determination of the arm's-length price in every controlled transaction together, with reasons for choosing the most appropriate method
- Information about comparable data used, and specifically when using third-party market research data, the justification of selection, in the cases where relevant, the technical credits of the studies and the sensitivity and safety analysis
- Other relevant information

Priorities/pricing methods

Article 65 of the CITC, together with Articles 7–11 of the TP Ministerial Order, defines that all five widely accepted methods recognized among transfer pricing administrators and practitioners are acceptable under the local regulations. Namely, these methods are CUP, resale price, CPM, profit split and TNMM.

It is foreseen that the most appropriate method should be applied to a controlled transaction or to a series of transactions to determine whether those transactions comply with the arm's-length principle.

This principle reflects a "best method" rule. This implies that a taxpayer is expected to use the method or methods most suitable to each case, explaining not only the reason a certain method is considered as the most appropriate to test whether the controlled transactions comply with the transfer pricing rules, but also why other methods are rejected.

Moreover, according to Article 5 of the TP Ministerial Order, the traditional transfer pricing methods have a priority when the most appropriate method is selected for defining the arm's-length price in a controlled transaction. This means that the profit split method and the TNMM can only be applied when it is demonstrated that the traditional methods are impossible to be applied.

Return disclosures/related-party disclosures

The main disclosure requirements at this level are contained in the Annual Tax and Accounting Information Return *(Declaração annual de informação contabilística e fiscal)*, in which a taxpayer should, on a yearly basis:

- Identify the related entities
- Identify and declare the amount of transactions conducted with each of the related parties
- Declare if it has organized, by the time the transactions took place, and maintains, the documentation relating to the transfer prices applied

The deadline for the submission of such return corresponds to the end of the seventh month after the corresponding tax year-end.

Cape Verde (continued)

Transfer pricing-specific returns

There are no specific transfer pricing returns for financial transactions, only specific transfer pricing fields in the Annual Tax and Accounting Information Return.

Documentation deadlines

In the absence of provisions covering the deadline to prepare transfer pricing documentation, it is reasonable to assume that it corresponds to the deadline of submission of the Annual Tax and Accounting Information Return: the end of the seventh month after the corresponding tax year-end.

Transfer pricing penalties

There are no specific transfer pricing penalties provided in the transfer pricing regulations in Cape Verde, which is why general rules for tax penalties apply (i.e., Chapter VI, "Tax Offenses," of the General Tax Code of Cape Verde).

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

The statute of limitations period in Cape Verde is five years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There are no specific rules regarding tax audit procedures in Cape Verde. No information is currently available about the level of audit risk that exists in the transfer pricing environment. Since the law was recently enacted, no patterns of audit risk have yet been established.

APA opportunity

Not applicable.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position yet; however, it will be important to monitor further developments in this area.

Chile

Taxing authority and tax law

Taxing authority: Internal Tax Service (*Servicio de Impuestos Internos, or SII*)

Tax law:

- Chilean taxation rules are established in the Income Tax Law (ITL), enacted in 1974.
- Tax authority circulars issued every year provide interpretation of the articles of the ITL but are not modifications of the law.

Relevant regulations and rulings

Article 41 E establishes that any cross-border transaction held with a related-party, or with an unrelated entity domiciled in a tax haven, in a back-to-back transaction or any transaction resulting from a restructuring process is subject to transfer pricing regulations. The new regulation is applicable as of 1 January 2013 and applies to 2013 tax obligations and thereafter, thus affecting the intercompany transactions entered into during and after 2012.

For prior years, transfer pricing matters were regulated by Article 38, according to which the burden of proof was on the Internal Revenue Service (IRS), and no obligations relative to statements, studies or methods were set forth therein.

On 29 September 2014, Law No. 20.780 was published in the Chilean Official Gazette, introducing changes to Chilean tax legislation. Notwithstanding the specific terms contained in this law for particular cases, these entered into force on 1 October 2014.

Accounting principles

The local GAAP is Chilean GAAP and also International Financial Reporting Standards (IFRS).

Tax treaties

Twenty-eight tax treaties have been concluded that contain an article resembling Article 9 of the OECD Model Tax Convention. Six other agreements were signed but are not in force.

Relationship rules

According to Article 41 E, parties are deemed to be related when:

- One party or more participates directly or indirectly in the direction, control, capital, profits or revenues of another party
- An entity is a permanent establishment, agency or branch of a headquarters
- Transactions are carried out with residents in tax havens
- They are individuals with their spouses, or relatives up to the fourth degree of consanguinity
- One of the parties carries out transactions with a third party that, in turn, carries out similar transactions with parties related to the latter (back-to-back)

Income taxation

1.1. Increase in First Category Tax (corporate tax)

The First Category Tax will progressively increase from 20% to 25% or 27% (depending on the type of regime under which the taxpayer has selected to use) as follows:

- Commercial year 2016: 24%

- Commercial year 2017: new taxation regimes discussed in 1.2 below will apply
  - Attributed regime: 25%
  - Distributed regime: 25.5%
- Commercial year 2018: 27% (applicable only to the distributed regime)

1.2. New taxation regimes

From 1 January 2017, the law creates two alternative taxation regimes for taxpayers subject to the First Category Tax:

(1) attributed regime (Article 14 A of the ITL), on which basis foreign shareholders will be subject to the Additional Tax (withholding tax on dividends) on the income of the entities in which they have interests in the same year such income is triggered, and (2) distributed regime (Article 14 B of the ITL), through which foreign shareholders will be subject to the Additional Tax only on the effective dividends distributed by the company. Selecting one regime over the other depends on the law's formalities for each type of entity, as follows:

- Individual entrepreneurs and individual limited liability companies: attributed regime
- Partnerships (*Sociedades de Responsabilidad Limitada*) in which the partners are only Chilean individuals: attributed regime
- Partnerships in which one or more partners are legal entities or taxpayers not resident or domiciled in Chile: distributed regime
- Taxpayers under the regime established in Article 58, No. 1 (permanent establishments): distributed regime
- Stock companies (*Sociedades Anónimas y Sociedades por Acciones*): distributed regime

Once the applicable regime is determined, by choice or the lack of it, a five-year holding period is required.

International tax rules

Changes in excess indebtedness rules

New excess indebtedness rules are introduced, as well as amendments to the existing rules, in connection with the following matters:

- The 3:1 debt-to-equity ratio remains unchanged; however, to determine the debt, all loans granted by local or foreign entities, whether related or not, shall be included (before this amendment, only loans granted by foreign related parties subject to 4% withholding were included).
- The 35% penalty tax applies only to payments to related entities subject to the 4% withholding tax or not subject to withholding taxes.
- The concept of related company now applies to all kinds of guarantees granted by group companies.
- These new rules will apply only to loans granted after 1 January 2015.

Recognition of foreign passive income (CFC rules)

In accordance with new Article 41 G of the ITL, foreign-source income will continue to be taxed on a cash basis, as a general rule. Additionally, from 1 January 2016, taxpayers domiciled in Chile will be taxed on an accrual basis on the passive income generated by their "foreign-controlled entities."

According to these new provisions, control will be deemed to exist over a foreign entity when:

- A Chilean taxpayer directly or indirectly owns 50% or more of the capital, profit or voting rights
- The foreign entity is domiciled in a country or territory with low or no taxation, unless proven otherwise

General anti-avoidance rules (GAAR)

One year from the publication of the new Chilean tax reform (i.e., from 29 September 2015), new substance-over-form rules became effective. These new rules give the IRS the authority to challenge a transaction due to abuse or simulation and request payment of the relevant taxes as if such abuse or simulation never occurred. Anti-abuse rules apply to transactions carried out after the entry into force of the same; therefore, all prior transactions will be subject to the rules currently in force.

According to the new rules, abuse will exist when taxpayers circumvent, totally or partially, a taxable event; reduce the tax base or tax obligation; or delay or defer the creation of such obligation without a reason different from purely tax motivation.

In turn, simulation will be deemed to exist when the legal acts or business activities of taxpayers conceal the occurrence of a taxable event or the nature of the elements of the tax obligation, or the real amount or creation of the same.

OECD Guidelines treatment

Although the ITL does not mention the OECD Guidelines, it is important to note that Chile was accepted as a full member of the OECD in 2010. Therefore, the guidelines should be treated as relevant when dealing with transfer pricing issues.

In this sense, the Chilean transfer pricing (TP) regime follows and recognizes the OECD Guidelines. Likewise in transfer pricing audits, the SII uses the OECD Guidelines as a source.

Although Chilean TP rules do not refer to Chapter 9 of the OECD Guidelines in some TP audits, the SII may use Chapter 9 as a reference, when it is applicable.

Documentation requirements

Taxpayers must keep all the relevant information supporting the methods used to determine whether their transactions are in accordance with the arm's-length principle ready and available to be furnished upon the SII's request. The SII may also request that foreign authorities furnish information related to intercompany transactions.

There is no obligation to submit TP documentation in Chile; however, in TP audits, the SII requires the TP documentation to support the intercompany transactions that are being audited.

In an audit process, usually, the SII gives between 10 days and one month for the documentation delivery (including the TP documentation). For this reason, companies in Chile try to keep in their files the TP documentation for every year.

Priorities/pricing methods

The transfer pricing methods accepted are the same as those established by the OECD Guidelines. Additionally, a sixth, or "other," method is acceptable when applied in any reasonable economic analysis for a case in which none of the other methodologies is viable.

It considers the "best method" rule, which means that the taxpayers must choose the method that best reflects the transaction's economic reality to determine its market value. The taxpayer should be able to demonstrate or sustain the applicability of such a method over the others.

Foreign comparables are accepted in the absence of local comparables as long as foreign comparables are similar in functions, assets and risks of the entity analyzed.

The local TP rules do not make reference to secret comparables, and there is no background of the use of this type of comparable.

Chile (continued)

Return disclosures/related-party disclosures

From 2013 onward, it has been mandatory for taxpayers to file a sworn transfer pricing statement (transfer pricing return) every year. This statement comprises all intercompany transactions held in the prior year, and it must disclose all transactions held with related parties, the transfer pricing method applied, the organizational structure of the economic group and other data derived from the transfer pricing economic analysis.

Taxpayers that meet any of the following conditions are obliged to file this return:

- Companies considered as midsize or large as of 31 December of the commercial year to be disclosed
- Companies that entered into transactions with parties domiciled in tax haven countries (according to the list in Article 41 D of the ITL)
- Companies that have entered into transactions of more than CLP500 million (approximately USD725,000 or the equivalent in a foreign currency) with non-domiciled related parties as of 31 December of the commercial year to be disclosed

Transactions with related parties must be registered by the type of transaction and by the related entity. The IRS also requires technical aspects to be filed, such as:

- Transfer pricing method used
- Profit level indicator applied
- Global or segmented analysis
- Party analyzed
- Transfer pricing adjustments (if applicable)

Transfer pricing-specific returns

The taxpayer is required to file Form No. 1907.

Documentation deadlines

There are no deadlines to present transfer pricing documentation.

In an audit process, usually, the SII gives between 10 days and one month for the documentation delivery (including the TP documentation).

The due date to file the transfer pricing return is the last business day of June. An additional three-month extension for the TP return, Form No. 1907, can be formally requested of the SII; in the case that an extension is granted, the taxpayer is informed.

Transfer pricing penalties

According to Resolution 31 of 2016 issued by the SII, in case the taxpayer does not file the sworn statement by the due date, or if the taxpayer files an incorrect or incomplete statement, it is subject to a fine of 10 Annual Tax Units (ATUs) to 50 ATUs (1 ATU is approximately USD830).

Regarding TP adjustments, price, value or profit margin differences that result from applying local TP rules are subject to a fine of 40% of the difference.

If the SII makes the TP adjustment by means of an assessment, an additional 5% will be applied, unless the taxpayer furnished the information and documentation required during the inspection process by the SII, as determined by the former in a notification. It could also be subject to additional penalties and interest.

Chile (continued)

Penalty relief

There are no penalties for not preparing and submitting TP documentation. However, maintaining contemporary TP documentation would be accepted by the tax authority as proof of the taxpayer's "good faith." In these cases, the transfer pricing penalty may not be imposed.

Statute of limitations on transfer pricing assessments

The general statute of limitations is three years starting from the latest date at which the tax was due. It could be extended to six years if no return is filed, or if the authorities consider that the returns are false. Based on Circular 49, there are distinct limits to conducting audits, depending on the size, complexity and other characteristics that can arise. In this sense, in the case of a certain set of transfer pricing audits, the applicable statute of limitations will be 12 months, during which the tax authority will test the proper application of the arm's-length principle. These special cases are:

- The determination of the taxpayer's net income, where there are taxable sales or revenues in excess of 5,000 monthly tax units (UTMs)
- A review of the tax effects of corporate reorganization
- A review of the accounting for transactions between related companies

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general, as well as the likelihood that transfer pricing would be reviewed as part of that audit, is considered to be medium. If transfer pricing is indeed reviewed, the likelihood that the methodology would be challenged is deemed to be low.

The taxpayer faces the burden of proof to show that transfer prices in transactions with related parties are consistent with the arm's-length principle.

Transfer pricing audit cases have significantly increased because of Chile's recent inclusion as a full member of the OECD and also because of the changes in the TP rules introduced to the ITL in September 2012.

TP audits in Chile are quite active, because the SII has groups dedicated only to performing such audits. Most of the TP audits are generated from the review of TP aspects (e.g., information included in the TP return) and not as a result of other audits of topics different from TP.

It is important to highlight that when a taxpayer is subject to a tax or transfer pricing audit performed by the Chilean authorities, keeping a transfer pricing study will be considered as a strong mechanism of defense.

Finally, taxpayers should realize that they are entitled to amend the price, value or profit related to their transactions on the basis of transfer pricing adjustments made in other countries that have entered into a convention with Chile for the avoidance of double international taxation. This adjustment may be applied within a term of five years from the fiscal year in which the transaction triggered tax effects in Chile, provided that the adjustment is final in the other country.

APA opportunity

Taxpayers may propose price, value or profit advance agreements with regard to their transactions. To that end, a request and a transfer pricing study need to be filed. The SII may completely or partially accept the request or reject it within six months after the taxpayer has furnished the relevant information. The resolution to accept or reject the proposed agreement cannot be challenged by either an administrative or legal process. This agreement may last for up to four commercial years, at the end of which it can be extended by a prior agreement between the parties involved.

Impact of new OECD BEPS Action 8–10 guidelines

Although OECD rules are not mandatory in Chile, there is a tendency in court cases to consider the OECD Guidelines as interpretative of or complementary to the Chilean Transfer Pricing Regulations. Additionally, tax authorities tend to use the OECD Transfer Pricing Guidelines when there are no specific provisions in the Chilean Transfer Pricing Regulations. So from a practical point of view, recent OECD developments are likely to affect the transfer pricing analyses of the Chilean companies. Formally, there have been no changes in local transfer pricing rules based on these developments.

Impact of new OECD BEPS Action 13 Country-by-Country Report

On December 28, 2016 the SII issued resolution No. 126 which establishes the Sworn Statement No. 1937 relating to the country-by-country reporting (CbCR).

The objective of this obligation is to grant tax administrations a tool to control tax avoidance and evasion while at the same time facilitating cooperation between them. In this regard, on January 27th, 2016 the Chilean Government signed the Multilateral Competent Authority Agreement on the exchange of country-by-country reporting (CbCR).

This obligation applies to Chilean groups with consolidated revenue of at least Euro 750 million as of previous year closing and in particular the ultimate parent that consolidates the financial statements in Chile will be in charge of submitting the country-by-country reporting (CbCR). According to the resolution a different entity may be appointed to submit this report, and notice of such appointment must be given to the SII. (Within 30 consecutive days prior to the expiration date).

The SII requires integral information (financial, tax and functional) with respect to an MNE Group on a country-by-country reporting (CbCR) basis to be filed, such as:

- Revenues
- Profits
- Taxes (paid or determined)
- Stated capital
- Accumulated earnings
- Tangible assets
- Number of employees
- Additional functional information for each company of the group

This Sworn Statement No. 1937 must be filed by the last business day of June with respect to the financial, functional and tax information of the prior fiscal year (a 3 month extension may be obtained, one time only).

According to Resolution 31 of 2016 issued by the SII, in case the taxpayer does not file the sworn statement by the due date, or if the taxpayer files an incorrect or incomplete statement, it is subject to a fine of 10 Annual Tax Units (ATUs) to 50 ATUs (1 ATU is approximately USD830).

China

"China" refers to the mainland China jurisdiction in this publication.

Taxing authority and tax law

Taxing authority: State Administration of Taxation (SAT)

Tax laws and regulations:

- China Corporate Income Tax Law (CITL), Chapter 6, Articles 41 to 48
- CITL Implementation Regulations, Articles 109 to 123

Accounting principles: Chinese GAAP, which has undergone increasing convergence with International Financial Reporting Standards

Relevant regulations and rulings

As of 29 June 2016, there are two SAT releases that form the overall framework for transfer pricing enforcement in China:

- Bulletin Gonggao [2016] No. 42 (Bulletin 42) — Bulletin on Improving Administration of Related-party Transaction Reporting and Contemporaneous Documentation
- Circular Guoshuifa [2009] No. 2 (Circular 2) — Implementation Measures for Special Tax Adjustments (Trial Implementation)

Circular 2 contains the substantive rules with respect to transfer pricing, including transfer pricing methods and comparability analysis; procedural guidance with respect to APAs, cost sharing arrangements, MAPs; and rules relating to anti-avoidance regimes, such as thin capitalization, foreign controlled corporations and general anti-avoidance rules.

Bulletin 42 contains the documentation rules with respect to transfer pricing, including tax return disclosures and contemporaneous documentation. Bulletin 42 is effective for taxable years beginning 1 January 1 2016 and thereafter. It supersedes the provisions of Circular 2 covering contemporaneous documentation rules prior to 2016. It also supersedes in its entirety Circular (2008) No. 114, which covered tax return disclosures prior to 2016.

In September 2015, a consultation draft was issued that would have updated Circular 2 in its entirety (the Consultation Draft). Bulletin 42 implements those portions of the Consultation Draft within its scope. It is expected that future releases will implement the other portions of the Consultation Draft; however, the timing of such releases is unknown.

Other relevant SAT releases include:

- Circular Guoshuihan [2009] No. 363 (Circular 363) — Notice on the Strengthening, the Monitoring and Investigation of Cross-border Related-party Transactions (for Single Function Entities):
  Provides that entities with limited functions and risks (such as toll manufacturers, limited risk distributors, contract R&D service providers) that are making losses must prepare contemporaneous documentation (without regard to monetary thresholds) and spontaneously provide them to tax authorities by 20 June of the following year
- Circular Guoshuihan [2009] No. 188 — Notice on Intensifying the Transfer Pricing Follow-up Administration:
  Provides that taxpayers that have incurred a transfer pricing adjustment on audit will be subject to a five-year follow-up period during which tax authorities will maintain scrutiny of the taxpayer's transfer pricing results
- Circular Guoshuifa [2012] No. 13 — Notice on Internal Procedures of Special Tax Adjustments (Trial Implementation):
  Sets out the guidelines for different tax authorities across China to coordinate work on tax investigations
- Circular Guoshuifa [2012] No. 16 — Notice regarding Procedural Guidelines for Joint Review of Significant Special Tax Adjustments Cases (Trial Implementation):
  Sets up a joint panel review mechanism for cases involving large taxpayers (capital over RMB100 million or revenues from main operations over RMB1 billion) to ensure consistency

- Bulletin Gonggao [2013] No. 56 — Bulletin on the Implementation Measures for Tax Treaty Mutual Agreement Procedures: *Supplements Circular 2 guidance on MAPs under tax treaties* Relevant regulations and rulings
- Bulletin Gonggao [2014] No. 54 (Bulletin 54) — Bulletin on Monitoring and Administration of Special Tax Adjustments: *Provides guidelines for tax authorities investigating transfer pricing issues, including encouraging taxpayers to make self-adjustments even in the absence of a formal audit*
- Bulletin Gonggao [2015] No. 45 — Bulletin on Strengthening the Follow-up Monitoring of Cost Sharing Arrangements: *Modifies Circular 2 by eliminating pre-approval requirements for entering into a cost sharing arrangement while strengthening follow-up monitoring*
- Bulletin Gonggao [2015] No. 16 (Bulletin 16) — Bulletin on Corporate Income Tax Treatment of Certain Overseas Related-party Payments:
Disallows deductions for royalty and service payments to related parties under certain circumstances, such as when the related-party has inadequate substance

OECD Guidelines treatment

The Chinese transfer pricing framework is generally consistent with the framework established by the OECD Guidelines. The SAT has observer status on the OECD's transfer pricing working group and has been deeply involved in the OECD/G20 BEPS project, including the revisions to the OECD Guidelines relating to risks and intangibles. Having said this, while reference may be had to the OECD Guidelines, the SAT does not see itself as bound by them. The SAT has also been deeply involved in the development of the *United Nations Practical Manual on Transfer Pricing for Developing Countries* (UN Manual) and has contributed one of the four sections in Chapter 10 on country practices. The UN Manual itself is largely consistent with the OECD Guidelines but places emphasis on different aspects and differs in certain nuances.

Key areas in which the Chinese approach may differ to some extent from other countries' understanding of the OECD Guidelines approach are location-specific advantages (LSAs) or other local market features, local intangibles and intra-group services, as follows:

- The SAT places considerable emphasis on LSAs and takes the view that profits in China should be higher because of characteristics of the local market, such as location savings and market premiums. Under Bulletin 42, specific documentation of the role of LSAs is a required component of the local file.
- The SAT believes that local contributions to intangibles are often quite significant. China's "Country Practices" section of the UN Manual, for example, emphasizes the role played by Chinese affiliates in developing marketing intangibles and manufacturing process improvements.
- The SAT takes a skeptical view of charges made for headquarters services, requiring vigorous application of the benefits test. The definition of shareholder services advanced in the Consultation Draft, for example, is arguably broader than the definition in the OECD Guidelines.

Documentation requirements

Contemporaneous documentation is required when there are related-party transactions above certain thresholds. Under Article 2 of Bulletin 42, the definition of "related parties" is very broad. Notably, two corporations are considered related if there is 25% common stock ownership. Familial relationships and overlapping boards of directors or management personnel can also give rise to a related-party relationship.

China's documentation requirements are consistent with the BEPS framework: in addition to Country-by-Country (CbC) reporting requirements, Bulletin 42 provides for a master file and a local file in specified circumstances. Bulletin 42 also provides for "special item files" with respect to cost sharing arrangements and thin capitalization, if applicable.

China (continued)

Under Article 5 of Bulletin 42, Chinese resident taxpayers that are the ultimate parent company of a group whose consolidated revenue in the previous year exceeded RMB5.5 billion are required to file a CbC report. China will also accept "surrogate" filings by a Chinese resident taxpayer that is so designated by its group. As China has an extensive tax treaty and information exchange network, the SAT will be receiving and actively reviewing CBC reports filed by groups with ultimate parent companies in other jurisdictions. While there is no local filing requirement, Article 8 of Bulletin 42 provides that Chinese tax authorities may request a Chinese taxpayer to provide its group's CbC report in the course of an investigation if the ultimate parent company is required by its home jurisdiction to prepare a CbC report but China has been unable to receive the report because of the parent company's failure to file, the lack of a treaty or exchange mechanism between China and that jurisdiction or the failure of such an exchange mechanism to work in practice.

Under Article 11 of Bulletin 42, taxpayers are required to prepare a master file if annual related-party transactions exceed RMB1 billion or, importantly, if the ultimate parent company of the taxpayer's group has already prepared a master file. Article 12 of Bulletin 42 specifies the contents of the master file. These are basically consistent with the OECD BEPS master file guidance; however, required disclosures with respect to business restructurings are described in greater detail, and disclosure and brief descriptions of any bilateral APAs are specifically required (in addition to unilateral APAs as specified by OECD guidance).

Under Article 13 of Bulletin 42, taxpayers are required to prepare a local file if any of the following transaction thresholds are reached:

- Tangible asset transfers exceeding RMB200 million (in case of toll manufacturing, value should be based on annual import and export values for customs purposes)
- Financial asset transfers exceeding RMB100 million
- Intangible asset transfers exceeding RMB100 million
- Aggregate amount of other related-party transactions exceeding RMB40 million (including service transactions, intangibles licensing, tangible property rentals and interest on loans)

Taxpayers whose related-party transactions are wholly domestic to China are exempt from documentation requirements. Transactions that are covered by an APA are also exempt from Bulletin 42's documentation requirements (although the APA itself will have annual reporting requirements) and are not counted toward the thresholds in Article 13.

Article 14 of Bulletin 42 specifies five primary components of the local file:

- Enterprise overview
- Related-party relationships
- Related-party transactions
- Comparability analysis
- Selection and application of transfer pricing methods

Notable elements of the disclosure requirements for related-party transactions are:

- The requirement of a so-called "value chain analysis," which includes (i) a description of the group's business flows, goods flows and cash flows; (ii) copies of the most recent financial statements for each related-party participant in value chains that involve the taxpayer; (iii) measurement of the contributions of LSAs to value creation; and (iv) disclosure of the principles and results of the allocation of group profits among value chain participants.
- The requirement of extensive disclosures and analysis of related-party service transactions, including detailed disclosures of participants to a shared services arrangement, allocation methods and benefits received by each participant.

All documentation (including the master file) must be maintained in the Chinese language.

China (continued)

Priorities/pricing methods

Under Circular 2, there is no priority among transfer pricing methods. All of the methods identified by the OECD Guidelines are considered reasonable methods: namely, CUP, resale price, cost-plus, TNMM and profit split (including both contributory profit split and residual profit split). Other methods are also acceptable if they are consistent with the arm's-length principle. Income-based valuation methods are frequently accepted for valuation of equity shares and may also be used for intangibles. For TNMM, while all profit-level indicators are recognized in principle, the ones most often used in practice are operating margin and markup on total costs.

In applying TNMM, database searches for comparable companies are generally expected to be limited to publicly traded companies. In any event, nonpublic Chinese companies are not required to publicly file their financial statements, so there are no country-specific databases available. Tax authorities have a clear preference for local Chinese comparables but, given the limited number of potential comparables, will accept regional sets of comparables if necessary. Where foreign comparables are used, tax authorities will seek to make adjustments for LSAs. Article 37 of Circular 2 explicitly authorizes tax authorities to use non-publicly available information (i.e., secret comparables); such non-public information is used in practice, especially in a risk assessment context.

Return disclosures/related-party disclosures

Under the authority of Article 43 of the CITL, Article 1 of Bulletin 42 requires that taxpayers complete and submit a set of comprehensive Related-party Transaction Annual Reporting Forms (RPT Forms) along with their annual tax filing on or before 31 May of the following calendar year. For taxable years before 2016, there were nine RPT Forms. For taxable year 2016 and after, there are up to 22 RPT Forms that a taxpayer may need to prepare. Three of the RPT Forms implement the CbC reporting requirement, if applicable; an additional three are English translations of these three. The other 16 RPT Forms are:

- Enterprise Information Return
- Summary of Annual Related-party Transactions Form
- Related-party Relationships Form
- Ownership Transfer of Tangible Asset Transactions Form
- Ownership Transfer of Intangible Asset Transactions Form
- Use Right Transfer of Tangible Asset Transactions Form
- Use Right Transfer of Intangible Asset Transactions Form
- Financial Asset Transactions Form
- Financing Transactions Form
- Related-party Service Transactions Form
- Equity Investment Form
- Cost Sharing Agreement Form
- Outbound Payment Form
- Overseas Related-party Information Form
- Financial Analysis of Related-party Transactions Form (unconsolidated)
- Financial Analysis of Related-party Transactions Form (consolidated)

Transfer pricing-specific returns

China does not have transfer pricing-specific returns. However, the return disclosures described above are very extensive.

Documentation deadlines

Article 19 of Bulletin 42 specifies documentation deadlines. Taxpayers should finish preparation of the master file within 12 months of the ultimate parent company's fiscal year-end. The local file and any special item files should be prepared before 30 June of the calendar year following the year in which the transactions occurred. (All Chinese taxpayers file returns on a calendar-year basis.) This is a one-month extension of the 31 May deadline under Circular 2. All documentation should be submitted to tax authorities within 30 days of a request (extended from 20 days under Circular 2).

Transfer pricing penalties

General penalties applicable to tax record maintenance and tax filing requirements also apply to transfer pricing matters. Under Article 62 of the Tax Collection and Administration Law, taxpayers failing to fulfill tax filing obligations may be fined between RMB2,000 and RMB10,000. This would apply to failure to file transfer pricing disclosure forms with the annual tax return. Under Article 60, taxpayers failing to maintain accounting books and other relevant information, or failing to provide such information to tax authorities upon request, may be fined between RMB2,000 and RMB10,000; or, in serious cases, the fine can be up to RMB50,000. This would apply to failure to maintain or provide contemporaneous documentation.

Under the CITL and Implementation Regulations, if a taxpayer continues to refuse to provide information or provides false information, the tax authorities are empowered to assess taxable income on a deemed basis (rather than on the basis of transfer pricing results).

While there are no penalties on transfer pricing adjustments, there is a 5% interest surcharge if the taxpayer did not file transfer pricing disclosure forms or fails to meet the contemporaneous documentation requirements. To meet these requirements, in addition to preparing the documentation described below, the taxpayer must provide it to tax authorities within 30 days of the request (prior to 2016, within 20 days of request). In all events, whether there is an interest surcharge or not, interest will be applied to the underreported tax resulting from transfer pricing adjustments based on the base RMB lending rate published by the People's Bank of China.

Penalty relief

As discussed above, the 5% interest surcharge can be avoided if transfer pricing disclosure forms are filed and contemporaneous documentation requirements are met.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is 10 years.

- Article 24 of Bulletin 42 states that contemporaneous documentation should be maintained for 10 years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as high, as is the likelihood of transfer pricing issues being reviewed under an audit. The likelihood of transfer pricing results being challenged is characterized as high. Moreover, even in the absence of a formal transfer pricing audit, tax authorities may challenge a taxpayer's transfer pricing and encourage the taxpayer to make a "self-assessment" adjustment (pursuant to Bulletin 54). Self-assessments, as opposed to formal audit adjustments, account for over two-thirds of China's transfer pricing tax revenues each year.

In recent years, the SAT has put in place a taxpayer monitoring system, leveraging big data capabilities, to differentiate "low-risk" taxpayers from "high-risk" taxpayers, based on their demonstrated willingness to comply with tax requirements and aggressiveness of tax positions taken. High-risk taxpayers are much more likely to face formal tax audits.

China (continued)

Two industries that are currently under intensified scrutiny by tax authorities are pharmaceuticals and luxury goods. This focus illustrates the degree of importance the SAT places on LSAs, as the SAT considers both industries to enjoy substantial market premiums. In addition to LSAs, the tax authorities have lately been paying close attention to outbound payments of royalties and service fees. With respect to royalties, tax authorities have focused on the extent to which the Chinese taxpayer has made contributions to the value of licensed intangibles and possibly developed local intangibles, thereby suggesting royalty rate reductions are appropriate. For services, tax authorities have sought authentication that services were actually provided, and that costs were appropriately captured and allocated based on actual benefits received.

APA opportunity

APAs are available in China, including unilateral, bilateral and multilateral APAs. Guidance regarding the APA process and procedures is provided in Articles 46 through 63 of Circular 2. The duration of an APA is generally three to five years. Requirements for APA applicants are that their related-party transaction volume must be at least RMB40 million, they must have duly filed RPT Forms with their tax returns and they must have met contemporaneous documentation requirements. There is no application fee.

The most recent APA Annual Report issued by the SAT covered APA experience through 2014. This report indicates that, although the overall principle for selection of APA cases is "first-come, first-served" and certain industries or regions may be prioritized, the most important criteria for selection is the "quality" of the request submission. Quality of a submission is measured by whether complete value chain information is provided and whether there is a high-quality quantitative analysis of LSAs and local intangibles.

The importance of offering a high-quality application is highlighted by considering some statistics. As of 31 December 2014, there were 90 APA requests that were in the pre-acceptance stage and another 39 that were in process. The SAT expects a significant number of new requests each year. By contrast, between 2005 and 2014, the most APAs concluded in a single year was 19 in 2013; in 2014, only 9 were concluded. While the SAT continues to increase staffing marginally, in 2014, there were only six staff at the SAT level to handle all APA and MAP cases.

By way of history, Chinese local tax authorities entered into the first bilateral APA in 1998. While there continued to be APAs at the local level in the intervening years, the APA program was formalized in 2005, the first year that the SAT began collecting statistics. Between 2005 and 2014, a cumulative total of 113 APAs was concluded (70 unilateral and 43 bilateral). Bilateral APAs were concluded with 16 partner countries. There is a clear trend toward bilateral APAs and the certainty with regard to double taxation that comes with them: of the 90 APA requests in the pre-acceptance stage, 83 were bilateral APA requests and only 7 were unilateral.

Impact of new OECD BEPS Action 8–10 guidelines

As noted above, while Chinese tax authorities may make reference to the OECD Guidelines and especially to the BEPS-related amendments, they do not see themselves as bound by them. The SAT has shown a keen interest in combating BEPS behaviors by multinationals and will apply BEPS-related concepts, whether from the OECD Guidelines or from domestic law, on tax audits regardless when the underlying transactions occurred. Bulletin 16 issued in March 2015 (i.e., after the BEPS 2014 update to the OECD Guidelines chapter on intangibles) is a clear case in point: deductions will be disallowed for royalty payments made any time within the 10-year statute of limitations where the recipient only has legal ownership of the intangibles but did not make any valuation creation contribution to them.

Colombia

Taxing authority and tax law

Taxing authority: Directorate of National Taxes and Customs (*Dirección de Impuestos y Aduanas Nacionales, or DIAN*)

Tax law: Colombian Tax Code, Extraordinary Decree 624, enacted 1989

Relevant regulations and rulings

- Law 788 (enacted December 2002) and Law 863 (enacted December 2003) establish transfer pricing rules, which are Articles 260-1 to 260-11 of the Colombian Tax Code.
- Tax reform: Law 1607, enacted in December 2012, included significant modifications to the transfer pricing regime. Under these modifications, permanent establishments (PEs) are considered Colombian taxpayers and must comply with Colombia's formal transfer pricing obligations. Additionally, transactions carried out between taxpayers in Colombia and their related parties located in free trade zones are also subject to transfer pricing rules and regulations as transactions are carried out with entities in tax havens.

Regulatory Decree 3030, published in December 2013, establishes transfer pricing guidelines, including the contents of the transfer pricing documentation and the informative return, use of financial information and the APA programs.

The definition of "related parties" is found in Article 260-1 of the Colombian Tax Code. The definition of "tax haven" is found in Article 260-7 of the Colombian Tax Code.

The tax reform mentions that it is not mandatory to use the interquartile range as the accepted measure to determine if the analyzed transaction complies with the arm's-length principle. Accordingly, other statistical measures can be used, including the total range. Additionally, one-year data of the tested party and comparable companies must be used in the transfer pricing analysis. If multiple-year data is used, it should be supported in the transfer pricing report.

The tax reform established that an independent auditor must certify the financial information (whether it is segmented or not) used to carry out the transfer pricing analysis of an intercompany transaction. This rule applies even if the tested party is the related-party abroad.

OECD Guidelines treatment

Although Colombia is not a member of the OECD, the OECD Guidelines are generally followed in local regulations. According to Sentence C-690 of the Colombian Constitutional Court, issued on 12 August 2003, the OECD Guidelines and Commentaries are an auxiliary source of guidance and interpretation, but they are not mandatory for the Colombian tax authority. However, the OECD Guidelines have been mentioned and have been used as a reference in official audits.

Documentation requirements

Taxpayers must prepare documentation that supports the assertion that each transaction with foreign related parties complies with the arm's-length principle. The transfer pricing documentation includes a functional analysis (organizational structure, business description, functions, assets, risks and detailed information about the intercompany transactions, among other areas), a macroeconomic analysis, an industry analysis and the transfer pricing economic analysis.

For supporting documentation purposes, those transactions exceeding USD317,365 by type of transaction are subject to transfer pricing analysis only if the total amount of the transactions exceeds USD604,978. Transactions engaged with residents or those domiciled in tax havens (related or independent parties) are subject to transfer pricing analysis if the total amount of the transactions exceeds USD99,177. For financing operations, the amount of principal is the base to calculate these thresholds.

Priorities/pricing methods

Colombian tax law has established five transfer pricing analysis methods: CUP, resale price, cost-plus, TNMM and profit split (which can be applied either in the form of a contribution analysis or a residual analysis).

Method selection should be based on the characteristics of the transaction under analysis. The selected method should be the one that best reflects the economic reality of the transaction, provides the best information and requires the fewest adjustments.

Following are some of the important changes in the transfer pricing regime relating to methods:

- When internal comparables are available, they must be used as priority when carrying out the transfer pricing analysis.
- When using the CUP method to analyze the purchase of used fixed assets between related parties, the original purchase invoice issued by the third party to the related-party abroad must be used to obtain the initial purchase value, thus taking into account the asset's depreciation since acquisition, in compliance with the applicable accounting principles. If no original invoice is available, a third party's valuation must be performed to prove the arm's-length value of the acquired asset.
- The equity value cannot be used to analyze the purchase or sale of stocks that are not publicly traded on the stock market. Instead, financial valuation methods must be used, particularly those that calculate the market value through the discounted cash flow method.
- With regard to intragroup services, the taxpayer must demonstrate that the services were in fact received and that the Colombian entity benefited. Moreover, it is necessary to prove that the paid fee complies with the arm's-length principle.
- Company restructurings that include redistribution of functions, assets and risks must comply with the arm's-length principle.
- Financial information in International Financial Reporting Standards must be used for transfer pricing analysis for those taxpayers who began its application from fiscal year 2015.

Return disclosures/related-party disclosures

As part of the transfer pricing return, taxpayers must disclose information about related parties, such as whether it's a foreign or local related-party (free trade zone), the country of residence and tax identification number. Information about transactions carried out in tax haven jurisdictions also must be disclosed.

Other information disclosed on the transfer pricing return includes the type of intercompany transaction, the amount of the transaction, the transfer pricing methodology applied, the company assessed, the price or margin obtained in the transaction and the arm's-length range.

It is also necessary to include information regarding comparability adjustments, the designation of the tested party, the amount of the adjustments included in the income tax return (if any) and the financial information that was used (segmented or complete information).

When performing transactions resulting in payments in favor of a related-party located in a tax haven jurisdiction, specific information about functions, assets and risks, and details about costs and expenses incurred by the foreign entity, must be included in the transfer pricing documentation.

When the transaction is held with a third party located in a tax haven jurisdiction, supporting documentation must be included in the transfer pricing report to prove there is no economic relation between the parties, and the details about functions, assets, risks, and costs and expenses should not be included in the report.

Transfer pricing-specific returns

The Colombian tax authorities require a transfer pricing informative return to be completed, as required by Article 260-9 of the Colombian Tax Code. This annual requirement must contain information about related parties, intercompany transactions completed during the previous fiscal year and transfer pricing analysis results.

Documentation deadlines

Regulatory Decree 3030 establishes the obligation to file the transfer pricing documentation with the tax authority every year via its electronic system. The due date is the same for both filing the transfer pricing documentation and filing the transfer pricing return.

Normally, due dates for complying with these obligations are in July of the following calendar year.

Transfer pricing penalties

The Colombian transfer pricing regime issues penalties stemming from the supporting documentation and the transfer pricing return.[1]

Transfer pricing documentation

- Late filing: USD149 to USD142,814
- Information inconsistencies: 1% of the value of the transactions reported with inconsistencies that were carried out with related parties, limited to USD37,687
- Omitted information (transactions): 2% of the value of the omitted transactions carried out with related parties, limited to USD198,353; additionally, rejection of cost and expense related to omitted operations may apply
- Omitted information (related parties located in tax havens): 4% of the total value of the transactions carried out with related parties, limited to USD99,177; additionally, rejection of cost and expense related to omitted operations may apply
- Amendment of transfer pricing documentation: up to USD198,353 if the amendment is performed after a pre-assessment has been issued by tax authorities

Transfer pricing return

- Late filing: USD99 to USD95,210
- Information inconsistencies: 0.6% of the total value of the transactions carried out with related parties, limited to USD22,612
- Omitted information (transactions): 1.3% of the total value of the transactions carried out with related parties, limited to USD198,353; additionally, rejection of cost and expense related to omitted operations may apply
- Omitted information (related parties located in tax havens): 2.6% of the total value of the transactions carried out with related parties, limited to USD59,506; additionally, rejection of cost and expense related to omitted operations may apply
- Non-filing of transfer pricing return: 10% of the total value of the transactions carried out with related parties, limited to USD198,353

The penalties mentioned above do not include additional fines and penalties that taxpayers incur for the amendment of income tax returns or transfer pricing adjustments.

[1] The amounts in US dollars apply for taxable year 2016 and are subject to changes because of the exchange rate and the tax value unit. For the purposes of this guide, tax value unit for 2016 is COP29,753 and the exchange rate is COP3,000 per US dollar.

Colombia (continued)

Penalty relief

The transfer pricing regime gives taxpayers in Colombia penalty relief, as described below:

Transfer pricing documentation

- Reduced penalty (before the tax authority's penalty order):
  - When the taxpayer amends its transfer pricing documentation for inconsistencies or omissions before the tax authority issues its penalty order, the penalty will be reduced to 50% of the amount determined in the official assessment.

Transfer pricing return

- Reduced sanction (before the tax authority's penalty order):
  - When the taxpayer amends its transfer pricing return for inconsistencies or omissions before the tax authority issues its penalty order, the penalty will be reduced to 50% of the amount determined in the official assessment.
  - The transfer pricing return can be voluntarily amended for two years from the original date of the filing.

The tax authority has a period of five years from the original filing date to start an administrative process to impose penalties regarding noncompliance of formal transfer pricing duties.

Transfer pricing adjustments

A penalty of up to 160% of the additional tax could apply. For a self-assessment or acceptance of the challenges made by the tax authorities, this fine could be decreased to 10%.

Statute of limitations on transfer pricing assessments

The general statute of limitations for transfer pricing adjustments is two years from the date of filing the income tax return. In some cases (losses or setoff of losses), the statute of limitations is five years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Since 2004, the tax authorities have improved their audit processes, focusing on the hydrocarbon and mining industries, especially in the following aspects:

- The tax authorities challenge the benefits and actual rendering of general services (such as accounting, administrative and marketing). During an audit, the tax authorities have required companies to prove that the usefulness, non-duplication, benefits and more of the aforementioned services comply with Article 107 of the Colombian Tax Code.
- In the last year, the tax authorities have started to challenge, on a general basis, the sets of comparables developed by taxpayers and have prepared new sets by themselves.

From a general perspective, the likelihood of an audit is medium.

Colombia (continued)

APA opportunity

In 2012, the first APA was concluded in Colombia, and several are in the evaluation phase. The Colombian tax authorities promote them as a viable and advantageous option for taxpayers, as they consolidate the taxpayer's transfer pricing position across several years instead of on a year-to-year basis. The APA agreement will be valid for the year it is subscribed to, the year before and up to three taxable years after.

Impact of new OECD BEPS Action 8–10 guidelines

The Colombian tax authorities have indicated that Colombia will apply the new OECD Guidelines, in particular those relating to Action 13. Tax authorities consider a modification to the secondary law to be sufficient to apply these Guidelines in the local transfer pricing regulation, because there is no explicit reference in the domestic law to the latest approved version. Regarding Actions 8–10, there is no official position from the tax authorities yet. The transfer pricing guidelines are used as an auxiliary source of interpretation for the local regulation. The inclusion of the new OECD Guidelines in the local regulation would need an amendment of the primary law.

Costa Rica

Taxing authority and tax law

Taxing authority: Tax Administration of Costa Rica (*Dirección General de Tributación, or DGT*)

Tax law: Income Tax Law (ITL)

Relevant regulations and rulings

Executive Decree No. 37898-H (the TP Executive Decree), which adopts transfer pricing regulations applicable to individuals or business entities that conduct related-party transactions, came into effect on 13 September 2013, upon publication in the *Official Gazette* on 13 September 2013.

On 13 September 2016, the DGT issued the transfer pricing information return regulations DGT-R-44-2016 that complement Article 8 of the TP Executive Decree.

OECD Guidelines treatment

Currently, Costa Rica is not an OECD member, but it is being evaluated for admission. There is no reference to the OECD Guidelines in the TP Executive Decree. Costa Rican transfer pricing provisions are mainly based on the OECD Guidelines and apply to all of the transactions conducted by Costa Rican taxpayers with related entities resident abroad and within Costa Rica. In addition, the OECD Guidelines have been mentioned and used as a reference in official audits and court resolutions.

Documentation requirements

Contemporaneous transfer pricing documentation related to domestic and cross-border related-party transactions must be maintained in Spanish. The documentation must include the name, address and tax residency of the related persons with whom transactions are carried out, as well as the correct application of an approved method, as stated in the TP Executive Decree. It is necessary to include information regarding the functions performed, assets used and risks borne by the taxpayer involved in each transaction. Information and documentation about comparable transactions or companies must also be included.

Priorities/pricing methods

The TP Executive Decree requires the application of the most appropriate transfer pricing method. The specified methods are CUP, resale price, cost-plus, profit split and TNMM, and the valuation of goods with international quotations method that can be applied as an alternative to the CUP method.

Return disclosures/related-party disclosures

Related-party disclosures have to be made in specific transfer pricing returns. No related-party disclosures need to be made on general income tax returns.

Transfer pricing-specific returns

Taxpayers are obligated to file a transfer pricing information return annually when both of the following conditions are met: (i) the taxpayer conducts cross-border and local related-party transactions and (ii) such taxpayer falls under the category of "large taxpayers" (*grandes contribuyentes*) or "large regional companies" (*grandes empresas territoriales*) or is an individual or entity operating under the Free Trade Zone Regime.

Documentation deadlines

Taxpayers must prepare and maintain the transfer pricing documentation on an annual basis. The TP Executive Decree does not state a deadline. The documentation must be at the disposal of the DGT upon request.

Transfer pricing penalties

No express monetary penalties are applied when taxpayers fail to maintain contemporaneous transfer pricing documentation or the transfer pricing information return. Nevertheless, the monetary penalties for noncompliance set forth in the Tax Code of Standards and Procedures should apply by default.

In the case of a transfer pricing income adjustment, surcharges and penalty interest apply, per the general provisions of the Tax Code of Standards and Procedures.

Penalty relief

No penalty relief regime is in place.

Statute of limitations on transfer pricing assessments

The standard four-year statute of limitations on general tax assessments should apply. This statutory period is extended to 10 years for unregistered taxpayers, fraudulent returns filed and failure to file. The term is extended in cases of amended returns.

The statute of limitations starts January 1 following the due date of the tax return.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is categorized as high, especially for taxpayers characterized as large taxpayers and multinational companies with related transactions. The likelihood of transfer pricing assessments as part of a general tax audit is considered high as well. In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is also high. Currently, the DGT aggressively has been trying to apply only the CUP method.

Although the TP Executive Decree was published recently, transfer pricing has been part of the Costa Rican tax environment for the past 10 years.

Costa Rica (continued)

Before the TP Executive Decree, Costa Rica did not have official transfer pricing rules. To date, neither the ITL nor the Tax Code of Standards and Procedures technically include any specific transfer pricing provision. Not even the general arm's-length principle is codified. However, in an internal directive from 2003 (DGT-20-03), the DGT instructed its auditors to examine intercompany transactions under the general economic reality and substance-over-form principles defined under §§ 8 and 12 of the Tax Code of Standards and Procedures and apply general transfer pricing principles. Even though there were no official regulations or any kind of technical references or guidelines for taxpayers, tax auditors reviewed and challenged related-party transactions primarily of multinational companies, as well as some large local companies in Costa Rica. This resulted in complex tax adjustments for companies doing business in the country. These DGT actions were endorsed by several rulings from administrative and judicial courts, as well as rulings from the Constitutional Chamber of the Supreme Court.

There was an attempt to pass transfer pricing legislation through Congress in 2012, but it was part of a larger tax reform package that was repealed after the Constitutional Court declared the whole law unconstitutional. However, despite lacking a law regulating transfer pricing, the Constitutional Court stated that the DGT could apply transfer pricing rules based on §§ 8 and 12 of the Tax Code of Standards and Procedures. A few months later, the TP Executive Decree was drafted and approved.

The TP Executive Decree is intended to formalize an administrative practice that has been in force for years and create a certain level of legal certainty in relation to this subject matter while Congress passes more comprehensive legislation.

APA opportunity

APAs are contemplated under the provisions of the TP Executive Decree. Taxpayers can request an APA for a maximum of three years. However, the corresponding regulations have not yet been enacted.

Impact of new OECD BEPS Action 8–10 guidelines

There is no reference to the OECD Guidelines within the existing transfer pricing provisions.

Regarding BEPS initiatives, however, the tax authorities have been working on measures that provide a possible legal framework to implement BEPS actions, such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters that is signed and currently valid.

In addition, the tax authorities have been active in BEPS-related actions, such as participation in the Multilateral Competent Authority Agreement for the automatic exchange of country-by-country reports, and more recently in August 2016, the creation of a commission to work on a domestic regulatory framework to implement the BEPS Action Plan. However, it is hard to predict at this stage the time frame in which amendments to the existing transfer pricing regulations will occur, and it will be important to monitor further developments in this area.

Croatia

Taxing authority and tax law

Taxing authority: Ministry of Finance

Tax law:

- Corporate Income Tax Act (CIT Act)
- Corporate Income Tax Bylaw (CIT Bylaw)

Relevant regulations and rulings

Article 13 of the CIT Act and Article 40 of the CIT Bylaw prescribe arm's-length pricing as the basic principle to be followed and define the methods allowed and the documentation required to support prices between related parties.

In general, arm's-length pricing is required only for cross-border transactions between related parties. However, in line with the amendments to the CIT Act (in force as of 1 July 2010), the obligation to comply with transfer pricing rules is extended to transactions between domestic entities if one of the entities is either in a tax-loss position or in a special tax status (paying tax at a lower rate or exempt from paying corporate income tax). Note that this is in line with the nonbinding, official opinion of the tax authorities issued before amendments to the legislation were introduced (i.e., the opinion governs prior to 1 July 2010). At present, neither the CIT Act nor the CIT Bylaw provides extensive guidance or instruction to taxpayers about meeting the transfer pricing requirements.

In line with Article 14 of the CIT Act, when determining the income from interest on loans granted/received from related parties, the interest rate applied for tax purposes should be the rate that would be applied between non-related parties at the time of granting the loan, i.e., the market interest rate. The market interest rate should be determined and published by the Minister of Finance prior to the beginning of the tax period in which it should be applied, taking into account that this interest rate is realized under comparable circumstances or would be realized in transactions between non-related parties.

Furthermore, Article 37 of the CIT Bylaw prescribes that the interest rate on loans between related parties should be defined by the Minister of Finance before the start of the tax period for which the interest rate is to be applied (taking into consideration that the interest rate is the one that can be used in comparable circumstances or between non-related parties). The interest rate between related parties is determined as an arithmetic mean of the average interest rates on loans granted to the nonfinancial companies for a period longer than one year, published by the Croatian National Bank in the current calendar year.

The prescribed interest rate published by the Minister of Finance for 2016 was 5.14%.

OECD Guidelines treatment

Although Croatia is not an OECD member country, the provisions of relevant Croatian tax legislation are generally based on the OECD Guidelines. Furthermore, the Ministry of Finance issued instructions for the tax officials performing transfer pricing audits, which are also based on the OECD Guidelines.

Documentation requirements

According to the CIT Bylaw, to prepare documentation to substantiate the arm's-length nature of the prices charged in transactions with any related parties, a taxpayer should:

- Collect information on the corporate group in which it operates and its position in the group, and provide analysis of related-party transactions and other details of the group and the taxpayer
- Identify the transfer pricing method applied; describe data, methods and analysis performed in the process of determining transfer prices; and provide reasons that the particular method was selected

- Document assumptions and evaluations used to determine transfer prices (in line with the principle of unbiased transactions), with reference to comparability, functional analysis and risk analysis
- Document all calculations of transfer pricing based on the selected method (such documentation should enable a comparison with the prices applied by other comparable taxpayers)
- Update transfer pricing documentation from previous years to reflect adjustments made due to changes in relevant facts and circumstances
- Make available documents that were prepared and based on the transfer pricing analysis, or to which references have been made
- Maintain the documentation concerning related parties and intercompany transactions

Priorities/pricing methods

The Croatian CIT Act regulations do not provide detailed rules on how to arrive at the arm's-length price that should be applied in related-party transactions. However, the CIT Act prescribes the following methods that a taxpayer can use to determine the arm's-length price: CUP, resale-minus, cost-plus, profit split and TNMM. All five standard methods are allowed; however, traditional transactional methods (CUP, resale-minus and cost-plus) should have the priority when establishing whether the conditions imposed between related parties are at arm's-length.

If possible, the CUP method should be applied. Other available methods — i.e., transactional profit methods (profit split and TNMM) — should be used on occasions when traditional methods cannot be reliably applied.

Return disclosures/related-party disclosures

Applicable for the tax return for 2016, a form outlining relevant information on transactions with related parties will need to be submitted (PD-IPO form).

Transfer pricing–specific returns

The Croatian CIT Act and CIT Bylaw do not prescribe specific requirements for separate returns (including information returns) for related-party transactions.

Documentation deadlines

There is no deadline for preparing the transfer pricing documentation prescribed by the legislation. The law requires the transfer pricing documentation to be readily available and provided to the tax authorities upon their request in a tax audit. The documentation should be in Croatian.

Although not prescribed by CIT legislation, in practice, the tax authorities started requesting, on a case-by-case basis, a statement of the transfer pricing method applied. The transfer pricing documentation is submitted as supporting documentation upon submission of the corporate income tax return (within four months of the taxpayer's fiscal year-end).

Transfer pricing penalties

Fines of up to HRK200,000 (approximately EUR27,000) for a company and HRK20,000 (approximately EUR2,700) for the responsible individual within the company may be imposed for any underestimation of the corporate income tax liability. Penalty interest would also be calculated from the date the tax was due until the date the tax is paid.

Penalty relief

There are no specific provisions concerning penalty relief.

Statute of limitations on transfer pricing assessments

The general statute of limitations for determining tax liabilities and rights in a particular tax period expires at the end of the third year following the year in which a tax return should have been filed (e.g., because the 2012 corporate income tax return has to be filed by 30 April 2013, filings for 2012 become statute-barred on 1 January 2017). However, the general statute of limitations may be extended, and it restarts after each intervention by the tax authority concerning a tax return that has been filed. The absolute statute of limitations expires at the end of the sixth year following the year in which the tax return should have been filed. Therefore, filings for 2012 become statute-barred, regardless of the number of intervening events initiated by the tax authority, on 1 January 2020.

Note, however, that the law's provisions regulating the statute-of-limitations period of the right to assess tax have been amended, effective 1 January 2013. The statute-of-limitations period mentioned above now could be prolonged in cases when investigations are initiated concerning a director, shareholder or related-party in connection with the abuse of rights (e.g., deliberate actions aimed at nonpayment of tax) or unexplained sources of assets.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In the past few years, the tax authorities have increased their focus on prices applied in transactions with related parties and the frequency of transfer pricing audits. Initially, because of limited experience in transfer pricing, the tax authorities tended to dispute service charges between related companies. However, tax inspectors have become more knowledgeable about transfer pricing and are increasingly aware of the issues.

The tax authorities issued a manual containing instructions for tax inspectors to follow in transfer pricing audits. The manual also provides a translation of the OECD Guidelines. Therefore, the OECD Guidelines should represent a good theoretical basis for defining transfer prices and for preparing the documentation that supports them.

Generally, the tax authorities accept a transfer pricing file prepared in line with the OECD Guidelines.

Once a tax audit is initiated, there is a high risk of transfer pricing being reviewed within the audit, especially when related-party transactions total significant amounts.

APA opportunity

Croatia has not implemented legislation concerning APAs, but they are expected to be introduced in the near future.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position nor case laws yet. However, because the Croatian transfer pricing rules are generally based on OECD Guidelines, it is likely that the Croatian tax authorities will follow the recommendations set in the new amendments of these Guidelines.

Republic of Cyprus

Taxing authority and tax law

Taxing authority: Cyprus Taxation Department

Tax law: Income Tax Law

Relevant regulations and rulings

Currently, Cyprus has no local transfer pricing regulations, but the arm's-length principle is codified in the tax law with wording similar to that of Article 9 of the OECD Model Tax Convention (on associated Enterprises). The arm's-length principle is applicable to both related and connected persons. In addition, the majority of Cyprus' double tax treaties contain an article resembling Article 9 of the OECD Model Treaty Tax Convention. Hence, during a tax audit, transfer pricing issues could theoretically arise.

OECD Guidelines treatment

In principle, OECD Guidelines are expected to be applicable in case of a transfer pricing issue.

Documentation requirements

No documentation requirements.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Related-party balances and transactions are disclosed on an aggregated basis in the company's income tax return.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Any transfer pricing adjustments that may arise during a tax audit may trigger additional income tax liability (plus applicable interest and penalties). There are no specific transfer pricing penalties.

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

The statute of limitations is the same as it is for income tax (i.e., 6 years, which may be increased to 12 years in case of fraud).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In principle, the likelihood of an annual tax audit and that transfer pricing will be reviewed as part of that audit is low. In case transfer pricing is reviewed as part of the audit, the probability that transfer pricing methodology will be challenged is low.

APA opportunity

Not available, although the tax authorities may change their practice in the near future.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Czech Republic

Taxing authority and tax law

Taxing authority: Ministry of Finance (MF)

Tax law: Czech Income Tax Act

Relevant regulations and rulings

Directive D-332 discusses the application of international standards in the taxation of transactions between associated companies. D-332 confirms the applicability of the OECD Guidelines for both international and domestic transactions (with certain exceptions).

Directive D-333 outlines requirements concerning § 38nc of the Czech Income Tax Act and comments on the principles of binding assessments, the latter of which corresponds to the preliminary price agreement principles within the meaning of the OECD Guidelines.

Directive D-334 outlines requirements of the expected scope of documentation of a transfer pricing methodology agreed upon between related parties. It also comments on the scope and nature of documentation in accordance with the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union (EU) (Code of Conduct), created by the EU Joint Transfer Pricing Forum.

Directives D-332, 333 and 334 are not legally binding, but the tax authority usually follows them in practice.

OECD Guidelines treatment

Based on D-334, the OECD Guidelines and the Code of Conduct generally are accepted in the Czech Republic.

This directive also mentions that transfer pricing documentation prepared in accordance with the Code of Conduct "should be sufficient" for substantiating the method of calculating the arm's-length price.

Documentation requirements

There are no formal statutory documentation requirements in place. D-334 describes the documentation that is expected and may be required by the tax authority. The directive is not legally binding, but it is followed in practice. D-333 sets out documentation that should serve as the initial basis for filing the application for a binding assessment. The documentation supporting a request for a binding assessment should contain information on the group, the company, the business relationship, other circumstances affecting the business relationship and the transfer pricing method.

It is crucial for the taxpayer to have supporting documentation in case the tax authority audits the transactions, as the burden of proof rests with the taxpayer. The tax authority has great discretion in deciding what level and nature of documentation is sufficient. During the tax audit, the authority may request any documentation that reasonably substantiates the actual character and substance of the transaction, its benefits for taxpayers, the appropriateness of the level of fees and the transfer pricing method selected. The analysis of a controlled transaction and the identification of comparables could be useful. Therefore, a high level of formal evidence may be necessary to support various aspects of the transaction.

Priorities/pricing methods

The MF follows the OECD Guidelines. Use of profit-based methods is acceptable, where substantiated.

Return disclosures/related-party disclosures

From 2014, taxpayers are obliged to fill in a mandatory enclosure to the corporate income tax return that includes reporting of intragroup transactions. Qualifying companies have to submit information regarding related parties (name, registered office) and complete a list of selected transactions entered into with them in a special enclosure to their tax return. The transactions are classified by type (such as sale of goods, provision of services, financial transactions and payment of royalties).

In addition, all taxpayers have to disclose in the corporate income tax return whether they were engaged in transactions with related parties.

Effective 1 January 2001, the executives of a controlled entity are required to complete a memorandum with respect to relationships and transactions with companies in the group. This does not apply if a controlling agreement is concluded. Note that this is based on commercial legislation rather than on tax legislation, and the memorandum has no direct tax impact or tax aspects.

Transfer pricing-specific returns

No specific transfer pricing return is required.

Documentation deadlines

There is no specific deadline to prepare documentation, because no statutory documentation requirement exists.

In the event of a transfer pricing challenge, the taxpayer must file information before the statutory deadline for tax proceedings. This is generally within 15 days of the taxpayer's receipt of a request from the tax authority. This time limit may be extended at the discretion of the tax authority if the taxpayer so requests.

Transfer pricing penalties

There are no specific transfer pricing penalties. Generally, when the tax authority successfully challenges transfer pricing, a penalty of either 20% of the unpaid tax or 1% of the decreased or reduced tax loss will be applied. Thereafter, interest is assessed at 14% above the "repo rate" (or repurchase agreement rate) of the Czech National Bank (for a maximum of five years).

Penalty relief

No penalty relief regime is in place. It is at the discretion of the MF to decrease penalties; however, this is limited to specific situations.

Statute of limitations on transfer pricing assessments

The general statute of limitations applies. Effective 1 January 2011, the limit set by the Tax Code is three years from the end of the period for filing the return for the taxable period in question (i.e., the period in which the tax liability arose). However, if the tax authority undertakes an act directed at the assessment of tax, then the three-year time limit begins again. The limit will also be prolonged if the supplementary tax return for the respective period is filed (should the taxpayer file an additional return in the 12 months before the current limit expires, the limit is extended by one year) or if a tax loss carryforward may be utilized in the particular period. However, tax may not be assessed after 10 years.

Czech Republic (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as medium, while the likelihood that transfer pricing is reviewed as part of that audit is high. The tax authority has adopted a global approach. Audit subjects are selected based on complex criteria, and transfer pricing is only one aspect among many others. Intangibles, royalties, long-term losses and service fees are seen as the most likely transfer pricing audit issues. Although no specific country is targeted for transfer pricing audits, transactions with tax haven countries are closely scrutinized. The scrutiny of transfer pricing will only intensify, and in press statements, the MF has directed that the tax authorities should particularly focus on transfer pricing. In addition, they have created specialized sections within the tax authority containing full-time specialists dedicated to transfer pricing issues.

APA opportunity

APA regulations were established under § 38nc of the Income Tax Act, which became effective 1 January 2006. Upon the taxpayer's request, the tax administrator decides whether the taxpayer has chosen a transfer pricing method that would result in a transfer price determination on an arm's-length basis. The binding assessment can be issued only for transactions effective in a particular tax period or that will be effective in the future. It is impossible to apply for a binding assessment of business relationships that have already affected tax liability. D-333 details the procedure for issuing binding assessments and the particulars for the application. Generally, the tax administrator should issue the decision within six months.

Impact of new OECD BEPS Action 8–10 guidelines

Although there is currently no official position, based on information from the Czech tax authorities, general principles of the Czech transfer pricing legislation and the current practice in the transfer pricing area, it is likely that the amended OECD Transfer Pricing Guidelines will be applied on transactions that can still come under tax audit.

Denmark

Taxing authority and tax law

Taxing authority: SKAT (the Danish Customs and Tax Administration)

Tax law:

- Danish Tax Assessment Act
- Danish Tax Control Act

Name of local GAAP: Årsregnskabsloven (Danish Financial Statements Act)

Relevant regulations and rulings

Denmark has issued new requirements for transfer pricing documentation following the OECD's BEPS Action 13. Regulation Number 401, of 28 April 2016, applies to controlled transactions carried out in income years starting on 1 January 2016 or later. The previous regulation, Number 42, of 24 January 2006, on documentation of transfer pricing of controlled transactions, will be repealed with effect for income years starting on 1 January 2017 or later. Regulation 401, of 28 April 2016, is mandatory for income years starting on or after 1 January 2017, while for income years starting on 1 January 2016 or no later than 31 December 2016, it is possible to apply either Regulation 401, of 28 April 2016, or Regulation 42, of 24 January 2006. The regulations are referred to as the Executive Orders on Transfer Pricing Documentation.

In addition, a bill on country-by-country reporting (CbCR) took effect as of 1 January 2016.

The tax authorities have published guidelines on the application of the Executive Order on Transfer Pricing Documentation. These guidelines are binding only for the tax authorities, not the taxpayers. SKAT issued a version of those guidelines on 29 January 2016.

In 2009, the tax authorities published additional documentation guidelines on valuation. The guidelines apply to the valuation of companies, shares and intellectual property rights. The guidelines include a description of valuation models, recommendations on the use of these and guidelines for the documentation of the valuation. The guidelines, referred to as the Guidelines of Valuation, were revised on 15 January 2013.

OECD Guidelines treatment

The OECD Guidelines are generally recognized as a source for interpretation of the Danish transfer pricing rules.

Documentation requirements

The transfer pricing documentation requirements apply to both domestic and foreign intercompany transactions. Under certain circumstances, the transfer pricing documentation requirements are reduced for small and medium-sized companies (i.e., companies that are classified according to the following thresholds measured at a group level):

- Fewer than 250 employees and have either:
  - An annual total balance of less than DKK125 million

    Or
- An annual revenue of less than DKK250 million

According to Regulation Number 401, of 28 April 2016, documentation must consist of two parts, and the content requirement is in line with OECD's BEPS Action 13 Report:

- A master file containing standardized information relevant for all MNE group members, such as the group's intangibles, intercompany financial activities, financial and tax positions
- A local file describing the business activities performed by the group's companies in the respective country

The documentation can be prepared in Danish, Norwegian, Swedish or English.

CbCR is required for taxpayers belonging to MNE groups with consolidated turnover exceeding DKK5.6 billion (approximately EUR750 million) in the immediately preceding income year. The requirement to prepare the CbC report is applicable for income years starting on or after 1 January 2016, if the ultimate parent company is a Danish tax resident. If certain conditions are met, Danish subsidiaries of a non-Danish parent may act as a surrogate and may submit a CbC report on behalf of the non-Danish parent in Denmark. A provision ensures that CbCR requirements for Danish subsidiaries will first apply for income years starting on or after 1 January 2017.

For income years starting on 1 January 2016 or no later than 31 December 2016, companies can choose to prepare transfer pricing documentation in accordance with Regulation 42, of 24 January 2006, instead of the new Regulation 401, of 28 April 2016. According to Regulation 42, the documentation must include:

- A description of the group, including the legal group structure; history of the group, including a description of restructurings, organizational structure and primary business activities; and a description of the industry in which it operates
- A description of the Danish entity and the other entities involved in intercompany transactions with the Danish entity (primary business activities and three years of key financials for all entities involved)
- A description of each intercompany transaction
- Comparability analysis (database search if necessary) for each intercompany transaction
- A list of any written intercompany agreements in relation to the intercompany transactions and a copy of any written agreements that the Danish entity or the related parties have entered into with foreign tax authorities regarding intercompany transactions

Upon request from the tax authorities, a taxpayer is required to provide database search as part of the transfer pricing analysis within 60 to 90 days. Foreign comparable companies are accepted.

In addition, new rules as of January 2013 came into force, allowing the tax authorities to request entities that are subject to the transfer pricing documentation requirements to obtain an auditor's report under special circumstances.

Priorities/pricing methods

The following transfer pricing methods are accepted: CUP, resale price, cost-plus, profit split, TNMM and others. When selecting the most appropriate method, the taxpayer should consider the aspects regarding the application of methods stated in the OECD Guidelines.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Form 05.021 "controlled transactions – annex to the income tax return" (Form 05.022 for the English version) discloses information on all intercompany transactions and whether the company qualifies for reduced documentation requirements. The form has to be filled in only if the total value of the controlled transactions exceeds DKK5 million in the income year.

Denmark (continued)

Documentation deadlines

There is an assumption in the documentation rules that the documentation is being prepared contemporaneously. In any event, documentation has to be in a final form at the filing date of a company's tax return. The documentation must be submitted within 60 days of the tax authorities' request for documentation. The tax authorities can in principle start a tax audit for an income year when the filing deadline of a company's tax return expires. Therefore, there must always be prepared a contemporaneous documentation at the filing date of a company's tax return that makes the submission within 60 days possible.

Transfer pricing penalties

Penalties were introduced for income years commencing on or after 2 April 2006. Penalties are applicable if the transfer pricing documentation requirements are not observed due to the taxpayer's gross negligence or willful misconduct.

The penalty amounts to DKK250,000 per legal entity per year for which insufficient transfer pricing documentation or no transfer pricing documentation is submitted. If the tax authorities increase the income, an additional fine of 10% may be imposed on the income adjustment. The penalty amounts are nondeductible.

Where there is an income adjustment, a 3.6% nondeductible surcharge in 2015 (4.6% in 2014, 3.9% in 2013, 4.3% in 2012 and 4.8% in 2011) will be levied on all prior-year adjustments of corporate taxes payable. Furthermore, nondeductible interest of 0.8% will be added from 1 January 2016 (0.8% for the income years 2014–2015, 0.4% until 31 July and 0.7% from 1 August 2013, and 0.5% for the income years 2011–12) for each additional month after the corporate tax payable for the income year in question is due. The compound interest was introduced in 2013.

In addition, if the taxpayer does not fulfill the disclosure requirements as stated in Form 05.021 (please refer to the section titled "Transfer pricing-specific returns"), or if the information provided in Form 05.021 is not correct, a penalty will be calculated.

Penalty relief

If the taxpayer provides insufficient documentation or no documentation and subsequently provides documentation that meets the requirements, the fine will be reduced to half of the original amount (DKK125,000). However, the 10% penalty on any income adjustment still applies. As stated above, adequate transfer pricing documentation submitted in due time will provide penalty protection.

Statute of limitations on transfer pricing assessments

The statute of limitations for a transfer pricing assessment is 1 May in the sixth year after the income year concerned (e.g., the statute of limitations for the income year 2011 is 1 May 2017).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of a general tax audit can be characterized as moderate. As the majority of audits carried out in Denmark are transfer pricing audits, the risk of transfer pricing being scrutinized during an audit is high. The likelihood that the transfer pricing methodology will be challenged is also high.

The tax authorities operate dedicated transfer pricing audit centers across Denmark solely to carry out transfer pricing audits independently of general tax audits. The Danish Government has launched initiatives with a focus on multinational companies, including increasing the funds allocated to the tax authorities and tightening the penalty rules in transfer pricing cases. The tax authorities are particularly focused on:

- Valuation assignments, in particular in relation with the transfer of intangible assets
- Intangible assets
- Group financing, including long intercompany loans, cash pools and guarantees
- Pricing of intragroup transactions of goods and services
- Competent authority TP (MAP/APA) with the goal to relieve double taxation

APA opportunity

The Danish legislation provides for unilateral, bilateral and multilateral APAs. There is no bilateral APA regime in place, however it is common practice by the Danish tax authorities to accept and process APAs though. The practice is that they typically apply for five years.

The tax authorities expect an increase in the number of APAs that will be initiated and finalized during the next few years.

Impact of new OECD BEPS Action 8-10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Dominican Republic

Taxing authority and tax law

Taxing authority: Tax Administration of the Dominican Republic (*Dirección General de Impuestos Internos, or DGII*)

Tax law: Dominican Tax Code

Relevant regulations and rulings

In January 2007, an amendment to Article 281 of the Dominican Tax Code introduced the arm's-length principle, allowing the DGII to adjust prices used in related parties' transactions that do not meet this standard. Transfer pricing regulations are in effect as of fiscal year 2011.

On 2 June 2011, the DGII enacted regulations through Revenue Ruling No. 04-2011 regarding the general guidelines and penalties. As of 9 November 2012, through the enactment of Law 253-12 (Law), these regulations were incorporated into Article 281 of the Dominican Tax Code. Revenue Ruling No. 04-2011 was revoked by Executive Decree No. 78-14, dated 6 March 2014, which, in general, implemented modifications made by Law No. 253-12 regarding transfer pricing material.

The decree broadened the scope of Article 281 of the Dominican Tax Code, which now states that transfer pricing regulations apply to transactions between:

- A resident and a nonresident related-party
- A resident and a resident related-party
- A resident and an individual, corporation or entity domiciled in a tax haven

Transfer pricing adjustments will apply only if the intercompany transaction results in a tax deferral or reduction of taxable income.

The DGII will assume that taxable income has been reduced or deferred when the intercompany transaction, as originally priced, results in (i) compensation of carryforward losses, (ii) base erosion in favor of another jurisdiction or (iii) arbitrage of tax rates among residents.

OECD Guidelines treatment

Currently, the Dominican Republic is not an OECD member. Furthermore, under the current regulations, there is no reference in which the OECD Guidelines can be relied upon for interpretation. However, the transfer pricing regulations in the Dominican Tax Code are mainly based on the OECD Guidelines.

Documentation requirements

Contemporaneous transfer pricing documentation related to domestic and cross-border intercompany transactions must be maintained.

Article 18 of Decree No. 78-14 dictates that taxpayers must prepare a transfer pricing study and file an information return to prove their compliance with the arm's-length principle to the DGII.

A transfer pricing documentation study must include, among other things:

- A detailed description of the nature of the transactions
- Information on the taxpayer, including financials and a detailed analysis of functions, risks and assets
- Comparability analysis
- Transfer pricing method employed, including the method selection process
- Specification of the price or margin, or range of prices or margins, applied by the taxpayer to its intercompany transactions

Dominican Republic (continued)

Under Decree No. 78-14, taxpayers are exempt from preparing a transfer pricing study in certain situations:

- Taxpayers whose total amount of intercompany transactions does not exceed DOP10 million and that have no transactions with entities located in tax havens or under preferential tax regimes
- For related-party transactions with entities resident in the Dominican Republic, provided that such intercompany transactions do not result in a tax deferral or overall reduction of tax revenues

Nevertheless, taxpayers excluded from the documentation requirements are still subject to complying with the arm's-length principle and are required to file the information return.

Priorities/pricing methods

Article 281 of the Dominican Tax Code establishes the following methods to assess the arm's-length standard: CUP, resale price, cost-plus, TNMM, profit split and transparent market concept (the sixth method).

Return disclosures/related-party disclosures

There are no related-party disclosures that are to be made on general income tax returns.

Transfer pricing-specific returns

Article 18 of Decree No. 78-14 states that taxpayers should file an annual information return.

Information to be disclosed includes related parties' tax address and tax identification number, transaction classifications, amounts, invoices for each transaction, and methods applied for analysis and profit or loss obtained. This return shall be filed within 180 days after the closing date of the fiscal year.

Documentation deadlines

Documentation must be readily available 180 days after the fiscal year-end and must be kept as part of the company's accounting books and records. If requested by the tax authorities, documentation should be provided within the period the tax authorities stipulate in the notice.

Transfer pricing penalties

Article 281 bis of the Dominican Tax Code, with reference to Article 257, dictates that failure to provide transfer pricing documentation on time or failure to provide true, complete or accurate information could result in penalties of up to three times 0.25% of the previous year's income.

Furthermore, any additional tax generated by DGII price adjustments should be subject to surcharges and penalty interest.

Penalty relief

Taxpayers can benefit from reductions of the surcharges assessed as a result of any DGII adjustment. For example:

- 40% reduction of the surcharges assessed if the company decides to voluntarily amend its tax return without any prior notice from the tax authorities

Dominican Republic (continued)

- 30% reduction of the surcharges if, after being audited, the difference between the estimated tax and the effectively paid tax represents less than 30% of the latter

Statute of limitations on transfer pricing assessments

The statute of limitations is three years. The term is affected by amended returns. However, if a taxpayer fails to file a return, the period is extended to five years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is currently categorized as medium. The likelihood of a transfer pricing assessment as part of a general tax audit is considered high. Even though transfer pricing regulations are relatively new in the country, the DGII has been active in tax audits regarding transfer pricing issues.

In case transfer pricing is scrutinized, the risk that the transfer pricing methodology will be challenged is high.

APA opportunity

APAs, bilateral or multilateral, are contemplated in Article 281 bis of the Dominican Tax Code and in Decree No. 78-14.

Timelines and general information

- Taxpayers can request an APA for a certain time period and renew it for an additional three years.
- APAs should be requested within the first three months of the corresponding taxpayer's fiscal year and can be requested, among others, for financing transactions with third parties to exceed the thin capitalization rules.
- The DGII must issue a response within the first 24 months after the request was filed. If no response is issued, the request may be presumed to have been denied.
- The decree establishes the information that must be included in the APA request.

Furthermore, Article 281 of the Dominican Tax Code contemplates a protection regime (*regimen de protección*) oriented to specific industries or economic activities, even though the Law does not mention the specific industries or activities subject to this regime. The DGII could determine a minimum price or margin if the taxpayer agrees and reflects it in its income tax return. Such a price or margin could be calculated considering the total value of income, assets, costs and expenses, and other variables that may be justified. The DGII issues a corresponding resolution once the industry or economic activity is selected.

Impact of new OECD BEPS Action 8–10 guidelines

As of the date of this publication, the tax authorities have not made public any formal initiative to update existing transfer pricing rules regarding the new OECD Guidelines as a result of the BEPS 8–10 reports on 23 May 2016.

Nevertheless, the tax authorities have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and have participation in the Multilateral Instrument to automatically modify existing tax treaties, which serve as possible legal frameworks to implement OECD BEPS actions in the Dominican Republic. However, it is hard to predict at this stage whether the DGII will amend the current transfer pricing regulations, and if so, the time frame in which that would occur.

Ecuador

Taxing authority and tax law

Taxing authority: Ecuadorian National Taxes are administered by the Internal Revenue Service (*Servicio de Rentas Internas*, or SRI) and National Customs Service (*Servicio Nacional de Aduanas del Ecuador*, or SENAE).

Tax law: Ecuadorian tax law is mainly found in the Tax Code; Internal Tax Regime Organic Law (*Ley Orgánica de Régimen Tributario Interno*, or LORTI); Tax Fairness Law (*Ley Reformatoria Para La Equidad Tributaria En El Ecuador*, or LET); Organic Code for Production, Trade and Investments (*Código Orgánico de la Producción, Comercio e Inversiones*, or COPCI); Organic Code for Land Organization, Autonomies and Decentralization (*Código Orgánico de Organización Territorial, Autonomía y Descentralización*, or COOTAD); and the executive order regulations of those laws, double taxation treaties and supranational norms.

The financial information for the companies in Ecuador is in conformity with International Financial Reporting Standards.

Relevant regulations and rulings

The transfer pricing regime is part of the Corporate Income Tax (CIT) enacted in LORTI, and its application is prescribed in LORTI, tax administration resolutions and communications, and a Technical Guidelines document prepared by the SRI that is available on its website.

Tax rules on transfer pricing include certain particularities:

- Domestic transactions are affected by the transfer pricing regime. Compulsory delivery of its documentation may be waived if certain conditions are met.
- There are restrictive deductibility limits for royalties, technical services, management fees and consulting services paid to related parties.
- Certain indirect allocated expenses paid to related parties are restricted.
- The CIT for banana exports became revenue-based where the taxable revenue derives from transfer prices calculated by SRI.
- The use of the interquartile range, when more than one comparable is found, is compulsory for every applicable method. Also, the transfer pricing adjustment must be calculated to the median of the comparables set.
- The use of a single year (contemporaneous to the transaction) of financial statements of comparable companies is preferred, as well as the exclusion of companies making losses.
- The tax administration may use secret comparables.
- The Transfer Pricing Report content (see “Documentation requirements” section below) and the standardization of the TNMM and capital adjustments are defined in a Technical Guideline that is available on the tax administration website.

During 2016, a modification on the Tax Law Regulation was issued, including certain transfer pricing provisions, such as:

- Eliminating the CUP application for commodities using intermediaries, also known as the Argentinian “sixth method” or commodities rule
- Eliminating the compulsory application of hierarchy of methods
- Allowing the tax administration to establish anti-avoidance rules
- Requiring the OECD’s Transfer Pricing Guidelines to be used as the transfer pricing technical reference for items not covered by laws, treaties or SRI resolutions

Taxpayers may obtain exemption from the transfer pricing regime when they comply with all these conditions concomitantly:

- Have a payable CIT greater than 3% of their taxable revenues
- Not perform transactions with tax havens
- Not have government contracts related to the exploration and exploitation of nonrenewable resources

Within one month after filing the tax return, the companies that adhere to the exemption must provide a spreadsheet that details the type and class of transaction, number of transactions, name of related-party, address of related-party and the tax rate applicable to the related-party.

Rulings in transfer pricing are still very few; nevertheless, permanent activity in tax audit is directed to transfer pricing, where intangibles transactions are typically the subject of detailed analyses. As the OECD Guidelines shall be used as a technical reference for Ecuadorian purposes, OECD BEPS Actions 8, 9 and 10 shall be used as guidelines for the pertinent transactions.

Some other BEPS action plan concerns have already been addressed in Ecuadorian LORTI reforms of 2008, 2010 and 2015, especially those related with Action 3.

In addition, it is relevant to note that Tax Reforms for 2008 and 2010 are aligned with BEPS Action 2, considering loans to shareholders as dividends paid off early and Action 4 considering that the sub-capitalization rule requires the amount of debt with foreign related parties not to exceed 300% of the equity.

OECD Guidelines treatment

The transfer pricing regime defines the OECD's Transfer Pricing Guidelines most recent at 1 January of the transaction's fiscal year as a technical reference for transactions held during that fiscal year. However, LORTI, Ecuadorian SRI resolutions, Ecuadorian laws or international treaties signed by Ecuador hold supremacy over the OECD Guidelines.

The SRI's preferred applications of the transfer pricing methods are detailed in the Transfer Pricing Technical Guidelines that the tax administration keeps posted and updated at its website.

Several BEPS action plan concerns are partially addressed in Ecuadorian tax law, such as:

- Treatment of loans to parent companies or shareholders as dividends (Action 2)
- Obligation to treat tax havens or preferential tax regimes as related parties, punishment to shareholders in such jurisdictions, ability to make it compulsory to treat major business partners as related parties, beneficial owner rules for Ecuadorian residents (Action 3)
- Thin capitalization rules (Action 4)
- Strict rules for application of double taxation treaties based on withholding and devolution mechanisms, punishment for triangulation of benefits (Action 6)
- Strengthened tax resident rules and substitute figure to oblige foreign residents (Action 7)
- Nondeductibility of recently traded intangibles (Action 8)
- Deductibility limits to services and allocation transactions (Action 10)
- Obligation to reveal creation or transactions with tax havens or low tax jurisdictions (Action 12)

Documentation requirements

Transfer pricing documentation has to be submitted in Spanish.

The tax administration has defined "relevant transactions" to exclude domestic (exceptions apply) and certain cross-border transactions in order to quantify the amount that triggers the transfer pricing formal obligations, as explained below:

- Taxpayers are required to file the Transfer Pricing Annex (TP Annex) if the relevant transactions exceed USD3 million.
- Taxpayers are required to submit the Transfer Pricing Report (TP Report) if the relevant transactions exceed USD15 million.

The transfer pricing regulation requires a TP Annex to be filed using software provided by the tax administration, detailing:

- All transactions with domestic and cross-border related parties, including those affecting the profits and losses and the balance sheet
- The methods applied in analyzing each transaction
- Calculated adjustments for each transaction

The TP Report must substantiate the analyses made for all transactions reported in the TP Annex.

Notwithstanding the thresholds that trigger documentation submission, the SRI may require, at any time, the TP Annex or the TP Report, even though the company does not reach the threshold amounts and on transactions that did not accumulate for the threshold.

The TP Report must include the following contents, among others:

- Full functional analysis of the multinational group and the local party
- Risk analysis of the local company and assets detail
- Detailed functional description of the intercompany transactions, as well as documents for the economic substance of the transactions, copies of contracts and specification of the tax jurisdiction for each related-party
- A function, risk and assets analysis for each related-party that the tested party held transactions with regarding the analyzed transaction
- Market analysis, including global and local descriptions and a demand analysis for both levels
- Economic analysis, including detailed reasoning for every methodological decision
- Comprehensive detail of the searching process of comparable companies, including the files that show the database filtering and its outcome
- Detailed comparability factors analysis
- Detailed reasons for rejection of non-comparable companies, including detailed information of such company
- Accepted comparable companies' activities description and financial statements
- Analysis description and conclusion

The TP Report should be submitted in digital format (PDF or text file) recorded on a CD.

In addition, taxpayers must submit all working papers (as digital files) and the digital copies of the information and documents relevant for its transfer pricing analysis.

The TP Annex and TP documentation must be submitted up to two months after the tax return of the companies according to the ninth digit of their tax identification number (typically, TP obligations are due in June).

In general, a domestic transaction becomes relevant when there is any opportunity to obtain a benefit because of different tax rates applicable to any of the counterparts or in case any of them has shareholders located in tax havens or low tax jurisdictions.

Companies with paid taxes over 3% of the taxable income will be exempted from the TP regime for the fiscal year where the aforementioned threshold is surpassed, except when the taxpayer has transactions with tax havens or low tax jurisdictions or when the taxpayer has a contract with the Ecuadorian Government for exploration or exploitation of nonrenewable resources.

Priorities/pricing methods

The legislation accepts the following methods: CUP, resale price, cost-plus, profit split and TNMM.

The five transfer pricing methods in the OECD Transfer Pricing Guidelines (profit split and residual profit split are recognized as one method) may be used.

In 2016, LORTI regulation reform eliminated the compulsory hierarchy application between direct and indirect methods and also allowed the Ecuadorian tax administration to issue technical guidelines that all taxpayers must follow unless they may document the reasons behind the use of a different methodological election.

In addition, the mentioned reform amended the Ecuadorian Tax Law Regulation and changed the transfer pricing rules. Specifically, it eliminated the application of the CUP method for import and export transactions with public and well-known international prices and the CUP method for import and export transactions through an international intermediary (also known as the Argentinean "sixth method" or commodities rule).

The SRI, through resolution, may establish the technical standards and methodology to prevent transfer pricing abuse, including:

- Method to apply the arm's-length standard
- Existence of reference prices
- Identification of data sources for prices or margins
- Availability of information regarding the listing periods
- Acceptance or prohibition of intermediaries

The SRI prefers the utilization of local comparable companies instead of foreign comparable companies. The use of foreign comparable companies is acceptable if the taxpayers can document and demonstrate that it is not possible to access public information of local companies.

In disputes with the SRI for certain primary agricultural products, nonrenewable natural resources or any kind of commodity, the tax administration may use secret comparables or databases to make comparisons using the CUP method.

The denominator in the PLI should be an item that does not reflect controlled transactions (the denominator should be independent from controlled transactions). Furthermore, the PLI for operations, segments or transactions analyzed as segments or comparable companies must be calculated only with the financial information for the year when transactions were held, unless there is no available comparable; in such case, the previous year's information may be used if a demonstration of similar conditions happening in both years is included.

The Technical Guidelines mention that to calculate the profitability indicator of the tested party and the comparable companies, taxpayers should use the financial information of the fiscal year under review. If the taxpayer uses more than one year of financial information to calculate the PLI, this must be objectively justified.

Return disclosures/related-party disclosures

No specific related-party information, aside from the documentation required by transfer pricing regulations, is required. It implies providing enough information to make sure that economic substance of the transactions is documented, including the ability of related parties to provide services being paid by the Ecuadorian taxpayer.

Nonetheless, information regarding ownership of companies is required for all taxpayers for general tax purposes, including the CIT rate.

The definition of "related parties" is broad and includes:

- Companies domiciled in countries listed by the SRI as Tax Havens or with tax rates lower than 60% of the corresponding Ecuadorian tax
- Companies representing more than 50% of a taxpayer's purchases or sales, in cases where the tax administration notified the relationship to the taxpayer and the taxpayer has not been able to prove that there is no relationship on management, administration, control or capital

In compliance with BEPS actions 8, 9 and 10, certain information may be relevant to demonstrate the economic substance of the transactions being held.

Ecuador (continued)

Transfer pricing–specific returns

The transfer pricing regime requires a number of specific obligations to be fulfilled in terms of the information that is required by the tax administration, as well as by the external auditors because of Tax and Companies Laws compliance requests. The following is typical information that should be prepared and shared or submitted:

- Report on the external audit of the financial statements, which shall include tax compliance assessments that make it compulsory to communicate the transfer pricing analysis outcome before the issuance of the audit report
- Income tax return, which includes transfer-pricing-specific fields
- Related parties operations annex
- TP Report
- Tax Compliance Report, which must be filed by external auditors each year, including details of transfer-pricing-related information

The TP Report and the related parties operations annex, typically due in June, have specific classifications for financial transactions; the Tax Compliance Report, typically due in July, includes specific sections for them.

Documentation deadlines

Calculated transfer pricing adjustments and relevant intercompany transaction figures must be included in the CIT return form (due in April).

The TP Annex and TP Report must be filed no later than two months after filing the CIT return.

If a taxpayer that was not obligated to file reports because it did not trespass thresholds, the taxpayers could receive a request from the tax authority to file transfer pricing documentation, the taxpayer has at least 20 labor days to provide it.

Transfer pricing penalties

Ecuador has a specific transfer pricing penalty regime. Penalties of up to USD15,000 could be applied if taxpayers do not submit the TP Report or the TP Annex, or if inaccuracies, mistakes, differences, lack of information or false data are detected.

In spite of the above, the tax administration issued a document (*Instructivo para el Establecimiento de Sanciones Pecuniarias*) that is used to establish the penalty amount according to the seriousness of the fault or misdemeanor (late delivery or incomplete or erroneous information sent by the local taxpayers). Based on this document, late filing could imply a nominal penalty of up to USD333.

Assessments of any kind, including transfer pricing adjustments, must charge interest (around 13% per year) for the time between the moment when the taxes were payable (typically, April of the year after the transactions were held) and the time when the tax is finally paid. In addition, a 20% surcharge on the assessment will be applied.

Penalty relief

Currently, no penalty relief regime is available; nevertheless, the 20% surcharge may be prevented when an assessment is accepted at the draft stage of the administrative action, before the final assessment has been issued.

Statute of limitations on transfer pricing assessments

The statute of limitations is three years from the date of the CIT return filing and six years if material information is missing from the return.

Ecuador (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In recent years, the number of cases involved in ongoing litigation and undergoing domestic appeals (preceding court action) has increased. Tax havens, royalties and commodities are frequently involved in disputes.

The likelihood of an annual tax audit in general can be characterized as high but depends on several factors, including revenues, industries, recurrence of losses, transactions with tax havens or low tax jurisdictions and compliance precedents. If a taxpayer is selected for a general tax audit, the likelihood that transfer pricing will be reviewed as part of that audit is high.

If transfer pricing is reviewed as part of the audit, the likelihood that the transfer pricing methodology will be challenged is also high. For example, in audits of which transfer pricing is a subject, the percentage of reviews where assessments are based on challenging the methodology (or at least the comparables set) is more than 75%.

On the other hand, there is a probability that for certain primary agricultural products, nonrenewable natural resources or any kind of commodity, the tax administration may use secret comparables or databases to make comparisons using the CUP method.

Certain taxpayers continuously face a high risk of tax administration audits. These taxpayers are usually defined by total revenue, or because of certain business activities in relevant industries.

A transfer pricing audit is triggered by a central decision-making body. To determine which taxpayers to audit, these elements are considered (ranked in order of importance):

- Risk assessment process run by the SRI
- Nature of related-party transactions undertaken by the taxpayer
- Risk assessment run by the local customs authority
- Previous tax audits of the taxpayer
- Low ratio of paid CIT/revenue
- Important changes in the operating structure of a company, such as the application of a low-risk structure

APA opportunity

The Ecuadorian tax administration issued an APA-like procedure that details the kind of information that would be requested to ask for a Transfer Pricing Ruling. Transfer Pricing Rulings are unilateral, but a bilateral consultation procedure may be requested of the tax administration. The response from the SRI takes the form of pricing or methodology consultations and information disclosure, and in general terms tends to be limited to the information available to the taxpayer in Ecuador, unless the transaction is difficult to be explained to the administration.

The consultation procedures became massive as the result of the limitation of certain expenses paid to related parties, where the only way to lift the limitation is to request for a ruling on the price of the relevant transaction.

The ruling term includes the year previous to the response date (in cases where the response is issued before the CIT return filing for the previous year), the year when the response is issued and the following three tax years. The SRI has up to two years to resolve the consultation, but the time will depend on the complexity and the number of consultations under the review of the local tax administration.

Transactions acquitted by a ruling will not be relevant for filing thresholds and should not be included in the TP Report and TP Annex; however, certain documentation regarding the compliance of the ruling and the validity of its key assumptions must be filed.

Ecuador (continued)

Impact of new OECD BEPS Action 8–10 guidelines

The OECD Guidelines are applicable as technical guidelines for every transaction not being regulated by any internal law, regulation or resolution or by any international treaty. The regulation expresses that the guidelines for analyzing a transaction will be those that were the most current on 1 January of the fiscal year during which the transaction was held. In this regard, the OECD Guidelines amendments will be applicable for transactions that Ecuadorian companies hold with related parties (domestic or cross-border) starting 1 January 2017.

Egypt

Taxing authority and tax law

Taxing authority: Egyptian Tax Authority (ETA)

Tax law: Income Tax Law No. 91 of 2005 (ITL) and its amendments

Relevant regulations and rulings

To raise taxpayer awareness of transfer pricing principles and how to apply Article 30 of the ITL and Articles 38, 39 and 40 of its executive regulation, the ETA, with the assistance of the OECD, issued its transfer pricing guidelines in 2010. The ETA decided to issue its transfer pricing guidelines in a series of parts, with the first part focusing on the main concepts and issues. Accordingly, the first part provides taxpayers with guidance on the arm's-length principle, comparability analysis, transfer pricing methods and documentation requirements.

The upcoming parts of the transfer pricing guidelines will address other issues, such as the application of the arm's-length principle to transactions involving intangible property, intragroup services, cost contribution arrangements (CCAs) and APAs.

Taxpayers may submit their transfer pricing documentation in English. However, an Arabic version is generally requested during the inspection process.

According to Article 30 of the ITL, "If the associated persons set conditions in their commercial or financial dealings different from the conditions taking place between non-associated persons, which are liable to reduce the tax base or transfer its burden from a taxable person to another tax-exempted or non-taxable person, the Administration may determine the taxable profit on basis of the arm's-length pricing."

The head of the administration may conclude advance agreements with associated persons on one or more methods for determining the arm's-length price.

According to the transfer pricing guidelines, a related-party is defined as any person who has a relationship with a taxpayer that may lead to an effect on that taxpayer's taxable profit. Based on the transfer pricing guidelines, related parties include:

- A spouse, ancestors and descendants (family members)
- Capital associations and a person that holds at least 50% of the value of shares or voting rights, whether directly or indirectly
- Partnerships, the joint partners and silent partners of those partnerships
- Any two or more companies where a third party holds 50% or more of the value of shares or of the voting rights in each company

Introducing the General Anti-Avoidance Rule (GAAR):

The rule was introduced under Article No. 92 (bis) of Law No. 53 of 2014, which was published by the Egyptian Government on 30 June 2014. Article No. 92 provides that tax implications of transactions would not be acknowledged (upon determining a tax assessment) where it is proved that the purpose or one of the main purposes of such transactions is to avoid or postpone taxes.

The Law exemplified aggressive tax planning as in cases where:

- The expected profit from the transaction prior to tax deduction is minimal as compared to the tax benefits attained from the examined transaction.
- The transaction resulted in obvious tax exemptions, which do not reflect the risks experienced by the taxpayer or his or her financials based on the transaction.
- The transaction includes some criteria having contradicting impacts eliminating each other.

In all cases, the burden of proving the transaction's abusive purpose falls upon the ETA. However, the taxpayer may provide evidence that could disprove accusations of aggressive tax planning.

Egypt (continued)

To ensure that the ETA does not act abusively, the Minister of Finance will issue a decree forming a committee led by the head of the ETA or his or her deputy to examine the cases of tax avoidance. The taxpayer would not be penalized for tax avoidance unless the committee offers its approval.

OECD Guidelines treatment

Pursuant to the executive regulations of the ITL, in case none of the three methods referred to in the law (CUP, RP and CP) are applicable, any one of the methods mentioned in the OECD Guidelines, or any other acceptable method suitable for the taxpayer, may be followed.

Documentation requirements

The Egyptian transfer pricing rules place the burden of proof on the ETA, provided that the taxpayer can produce sufficient transfer pricing documentation (and other supporting documents, including intercompany agreements, schedules and invoices) to support its declared transactions on the tax return. According to the rules, however, the burden of proof shifts to the taxpayer in the event that the tax return is not filed or the taxpayer fails to produce proper transfer pricing documentation to support its tax return positions.

The transfer pricing documentation does not need to be submitted with the tax return but should be available at short notice if the ETA requests it.

Priorities/pricing methods

In Articles 39 and 40 of the ITL, the executive regulations establish the methods of calculating the arm's-length price.

According to Article 39, the fair market price shall be determined according to the CUP, cost-plus or resale price methods.

According to Article 40, the preferred method for determining the neutral price shall be the CUP method. In case the data necessary for applying this method is unavailable, any of the two other methods prescribed in Article 39 may be applied.

In case of inability to apply any of the three methods mentioned, any other method described by the OECD Guidelines or any other method appropriate for the taxpayer may be followed. Profit-based methods noted in the OECD Guidelines, such as the TNMM, are acceptable methods, provided the taxpayer can demonstrate that the method used is the most appropriate for the analysis and give reasons for why the other methods are not appropriate.

Return disclosures/related-party disclosures

The corporate tax return, in its related-party disclosure section, requires taxpayers to provide the following information:

- Name of the related-party or parties, along with the group structure
- The nature of the relationship
- Type of the related-party transactions, if any
- The value of the transactions
- The method used to determine the fair market price and the reasons for selecting this method
- The country of origin for tangible and intangible goods
- The country of the supplier

Egypt (continued)

Transfer pricing-specific returns

There are no separate returns to be filed for transfer pricing. However, disclosure of related-party transactions is required on the corporate tax return.

Documentation deadlines

Taxpayers are obliged to prepare transfer pricing reports beginning with fiscal year 2010. However, they do not need to submit the transfer pricing study with the annual tax return. The transfer pricing report will be required during the inspection process. From 2010 onward, Egyptian transfer pricing documentation is required to be contemporaneous with the tax return. Egyptian tax returns are filed four months following the year-end of the company's fiscal year. Companies are allowed to file for a two-month extension. Hence, at the latest, transfer pricing documentation should be completed by June for companies with a December year-end (in principle, without the extension, the companies would have until April) to be contemporaneous.

Transfer pricing penalties

According to the ITL, if the tax amount included in the tax return by the taxpayers is less than the amount of the finally estimated tax, they shall be liable for a penalty based on the following:

- 5% of the tax payable on the non-included amount, if such amount is equivalent to 10% and up to 20% of the legally payable tax
- 15% of the tax payable on the non-included amount, if such amount is equivalent to more than 20% and up to 50% of the legally payable tax
- 40 of the tax payable on the non-included amount, if such amount equivalent to more than 50% of the legally payable tax

Penalty relief

There is currently no specific penalty related to transfer pricing; however, any adjustments based on related-party transactions that cannot be defended due to the absence of a transfer pricing study or sufficient supporting documents will be subject to the normal penalties and interest mentioned in the ITL.

Statute of limitations on transfer pricing assessments

The statute of limitations is five years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transfer pricing is now part of the general corporate tax return audit. In its annual general budget — Taxation Chapter, the Republic of Egypt indicated that transfer pricing adjustments are a major and priority source of tax income to the country. Hence, the ETA has started paying extra attention to related-party transactions during the corporate tax inspection for financial year 2005 onward. During the assessment, the ETA demands documents to support intercompany pricing.

Taxpayers who will provide sufficient documentation proving that they exerted efforts to establish transfer prices that comply with the arm's-length principle are likely to be assigned by the ETA a low tax risk rating. However, taxpayers giving inadequate consideration to their transfer pricing practices will be assigned a high risk rating.

Egypt (continued)

Taxpayers with high perceived risk are more likely to be audited by the ETA than those perceived to have low risk.

The ETA intends to issue periodic clarifications in connection with the transfer pricing issues that might arise from its practical experience.

APA opportunity

APAs are available in Egypt, but none have been concluded to date.

Impact of new OECD BEPS Action 8-10 guidelines

During 2016, Egypt signed on to the BEPS inclusive framework.

By signing up to be a BEPS Associate, Egypt is committing to implement the four BEPS minimum standards on:

- Action 5 (Harmful Tax Practices)
- Action 6 (Treaty Abuse)
- Action 13 (CbCR)
- Action 14 (Dispute Resolution)

Egypt needs to amend the domestic tax law to reflect the effect of the abovementioned four actions that present the minimum BEPS standards. In addition, Egypt also needs to sign multilateral exchange of information agreements with other countries in order to work toward Action 13 (CbCR).

As of December 2016, no amendments have been introduced to the local tax law. In addition, Egypt did not sign any multilateral exchange of information agreements with other countries during 2016.

El Salvador

Taxing authority and tax law

Taxing authorities: *Dirección General de los Impuestos Internos* (DGII) and *Ministerio de Hacienda* (MH)

Tax law: Salvadorian Tax Code (TC)

Relevant regulations and rulings

Effective as of 29 December 2009, the Salvadorian Congress passed a tax reform modifying the TC through Decree No. 233. Among the most relevant changes were the introduction of the principle of valuation at fair market value, the definition of "related parties" and the comparability concept.

Disclosure in the tax report

Under the rules of the TC, when a taxpayer has assets with a value exceeding USD1,142,857 or sales higher than USD571,429 during the previous fiscal year, it must appoint an external tax auditor (certified public accountant) to perform a statutory tax audit and file the resulting tax audit report within the first five months following the tax year that was audited (deadline of 31 May or, when applicable, the next business day).

As part of the tax reform, subsection (f) was added to § 135 TC to include an obligation for an external tax auditor to include a note in its report regarding transactions conducted by the taxpayer with its related parties or entities domiciled in tax haven jurisdictions, indicating whether the taxpayer complies with the transfer pricing legislation (mainly the arm's-length principle).

As of March 2012, the MH, on its website, published Administrative Guideline, or *Guía de Orientación* (GO), No. 001/2012, intended to provide general guidance to taxpayers about the tax treatment of related-party transactions or transactions with entities domiciled in tax haven jurisdictions.

The GO is intended to supplement the TC by defining guidelines for both taxpayers and tax auditors. For taxpayers, it provides guidance about topics such as the identification of related parties, transfer pricing methodology and documentation requirements, as well as the application of withholding tax and nondeductibility of costs and expenses in related-party transactions and transactions with tax havens. For tax auditors, it provides guidance about disclosures in the tax report.

Recent changes

By means of Legislative Decree No. 763 of 31 July 2014, the TC now recognizes the use of the OECD transfer pricing methods and guidelines when determining market prices of related-party transactions.

OECD Guidelines treatment

El Salvador is not a member of the OECD; however, § 62-A of the TC makes a specific reference to the methods established by the OECD Guidelines to determine the pricing used in related-party transactions. As a result, taxpayers can carry out their transfer pricing analyses in accordance with OECD Guidelines, and it is binding upon the tax authorities.

Documentation requirements

Currently, transfer pricing documentation is indirectly required in El Salvador through the GO, and it is advisable to document and adequately support all transactions made with related parties for the external tax auditor to verify and reflect in the tax audit report that said transactions comply with transfer pricing regulations. Furthermore, the tax authorities have already started transfer pricing audits.

In case a taxpayer does not maintain contemporaneous transfer pricing documentation, no penalties apply, but there is an increased risk that the tax authorities will attempt to recalculate and adjust it according to their criteria.

In any case, taxpayers should have all supporting data and information to demonstrate that their intercompany transactions meet the arm's-length principle.

Among the documentation requirements imposed by the GO and the Decree, information about the taxpayer and its multinational group should be included, as well as a complete functional analysis and criteria for the selection of comparables (transactions or companies) and the applicable transfer pricing methodology.

The GO and the Decree recognize the arm's-length standard, the comparability criteria, the transfer pricing methods and, implicitly, the overall OECD Guidelines as a valid reference for establishing transfer prices.

Even though there is no explicit documentation obligation for taxpayers in the TC, the fact that the external auditor has to issue an opinion on transfer prices as part of the Tax Audit Report (*Dictamen Fiscal*) effectively requires taxpayers to prepare and maintain transfer pricing documentation by 31 May of each year.

Priorities/pricing methods

The law does not regulate specific transfer pricing methods, but it establishes that tax authorities are empowered to apply the CUP method when adjusting prices.

The introduction of Decree No. 763 through § 62-A clarifies that the OECD methods are acceptable for both taxpayers and the DGII when determining and assessing prices in related-party transactions. In addition, the GO establishes that the following methods are acceptable: CUP, resale price, cost-plus, TNMM and profit split.

Return disclosures/related-party disclosures

Disclosure in the tax audit report

Under the rules of the TC, when a taxpayer has assets with a value in excess of USD1,142,857 or sales higher than USD571,429 during the previous fiscal year, it is required to appoint an external tax auditor (CPA) to perform a statutory tax audit and file the resulting tax audit report within the first five months following the tax year that was audited (deadline of 31 May or, when applicable, the next business day).

Subsection (f) of § 135 of the TC includes an obligation for an external tax auditor to include a note in its report regarding transactions conducted by the taxpayer with its related parties or with entities domiciled in tax haven jurisdictions, indicating whether the taxpayer complied with the transfer pricing legislation (mainly, the arm's-length principle).

Transfer pricing-specific returns

Section 124-A of the TC establishes an obligation for taxpayers to file an information return for transactions conducted with related parties (Form F-982) within the first three months that follow the fiscal year-end, when these transactions (individually or in the aggregate) are equal to or exceed USD571,429 annually.

Among the information that is required by Form F-982 are:

- The name of the related-party or of the tax-haven-domiciled party
- The tax identification number, if said party is domiciled in El Salvador

- The annual amount of the transactions
- The comparability criteria applied
- The methodology applied
- The comparability adjustments made
- The description of the transaction (listed are 19 operations of income, 20 of expense, 7 of assets and 5 of liabilities)

In case of noncompliance with the filing obligation of this information return, Article 244 literal (l) of the TC establishes a penalty of 0.5% of the taxpayer's equity, as reflected on the taxpayer's balance sheet, minus any surplus on the revaluation of assets, or at least three monthly minimum wages. When there is no balance sheet, or it is not possible to determine a taxpayer's equity, a penalty of nine monthly minimum wages applies.

Documentation deadlines

It is recommended that taxpayers prepare and maintain contemporaneous transfer pricing documentation within the first five months following the close of the financial year (i.e., by 31 May).

Transfer pricing penalties

Failure to maintain transfer pricing documentation leads to a penalty of 2% of the taxpayer's equity, as reflected on the taxpayer's balance sheet, minus any surplus on the revaluation of assets. This is imposed when the taxpayer does not have supporting documentation or fails to comply with the obligation to maintain all documentation for 10 years for transactions conducted with related parties, and those with individuals or legal entities domiciled, incorporated or resident in tax haven jurisdictions. Said penalty cannot be less than nine monthly minimum wages.[1]

Failure to comply with § 135-(f)

In case the external tax auditor fails to comply with the new requirement under § 135-(f) of the TC, a penalty of five monthly minimum wages is established for the tax auditor, regardless of any other penalty that may be imposed by the local certified public accounting council for not complying with the responsibilities of the profession.

Additionally, when the tax auditor's noncompliance is due to the fact that the taxpayer failed to provide the information and documentation requested and required by the tax auditor, a penalty of 0.1% of the taxpayer's equity (as reflected on the taxpayer's balance sheet), minus surplus on the revaluation of assets, would be imposed on the taxpayer. Said penalty is at least four monthly minimum wages.

Failure to file related parties information return

In case of noncompliance with the filing obligation of the information return, § 244 literal (l) of the TC establishes a penalty of 0.5% of the taxpayer's equity (as reflected on the taxpayer's balance sheet), minus any surplus on the revaluation of assets, with a minimum of three monthly minimum wages.

When there is no balance sheet, or it is not possible to determine the taxpayer's equity, a penalty of nine monthly minimum wages applies.

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[1] The minimum wage is established by the Salvadorian Labor Ministry. As of 1 January 2015, and according to Executive Decree No. 104 published in the Official Gazette No. 119, the monthly commercial minimum wage to which the TC refers was established was USD251.70.

General penalties and interest in case of tax adjustments

In case of adjustments for underpayments either on income tax or value-added tax, a general penalty of 25% of the unpaid tax applies, with a minimum of USD568.

Furthermore, late interest also applies. If the tax liability is paid within two months of the original payment term, the applicable annual interest rate is 6.16%. If the tax liability is paid more than two months after the original payment term, the applicable annual interest rate is 10.16%.

Penalty relief

According to § 261 of the TC, if there is voluntary disclosure and payment before any notice of an examination is received from the tax authorities, a 75% penalty reduction applies; if an examination is already ongoing, a 30% penalty reduction may still apply.

Statute of limitations on transfer pricing assessments

Under the current legislation, and in particular the rules of the TC, the ordinary statute of limitations is three years; however, when no tax return has been filed, the statute of limitations is extended to five years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit currently is categorized as medium. As part of every general tax audit, the tax authorities review compliance with transfer pricing regulations. Thus, the likelihood that transfer pricing will be scrutinized as part of a general tax audit is high. The tax authorities have been investing in training personnel outside the country to implement transfer pricing audit programs and have been active in transfer pricing audits. In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is medium, and the likelihood that the set of comparables will be challenged is high.

APA opportunity

There is no APA program available.

Impact of new OECD BEPS Action 8-10 guidelines

As of the date of this publication, the tax authorities have not made public any official initiative to update transfer pricing regulations regarding the new OECD Guidelines as a result of the BEPS 8–10 reports on 23 May 2016.

Nevertheless, the tax authorities have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters which serves as a possible legal framework to implement BEPS actions in El Salvador. However, it is hard to predict at this stage whether the DGII will amend current transfer pricing regulations, and if so, the time frame in which that would occur. It will be important to monitor further developments in this area.

Estonia

Taxing authority and tax law

Tax authority: Estonian Tax and Customs Board

Tax law: Estonian Income Tax Act

Relevant regulations and rulings

The following articles of the Estonian Income Tax Act relate to transfer pricing:

- Article 8 — Associated persons
- Article 50, §§ 4 to 8
- Article 53, §§ 4 to 6 — Permanent establishments
- Article 14, § 7 — Sole proprietors
- Article 50, § 7 — Documentation requirements

Current Estonian transfer pricing legislation is effective as of 1 January 2007, amended as of 1 January 2011.

The Ministry of Finance issued a transfer pricing regulation on 10 November 2006 (No. 53), which came into force on 1 January 2007. The regulation sets out in more detail the principles for determining the arm's-length price and also establishes documentation requirements. There have been a few court rulings and an increasing number of tax proceedings on transfer pricing issues in Estonia.

OECD Guidelines treatment

The tax authorities follow the OECD Guidelines. However, domestic legislation is the prevailing law.

Documentation requirements

All entities must be able to prove that transactions with related parties take place at arm's-length. Yet there is an additional documentation requirement if the taxpayer is:

- A resident credit institution, finance institution, insurance agency or a listed company
- A resident of a low-tax-rate territory
- A resident legal person or a nonresident with a permanent establishment in Estonia conforming to the following:
  - Number of employees (including associated persons) is at least 250
  - Turnover of the financial year preceding the transaction with associated persons was at least EUR50 million
  - Consolidated balance sheet net assets were at least EUR43 million

Categories of documentation required:

- Company analysis
- Industry analysis
- Functional analysis
- Economic analysis

Priorities/pricing methods

The Tax and Customs Board accepts the CUP, resale price, cost-plus, profit split and TNMM or, if necessary, any other suitable method. There is no hierarchy of methods; all are treated as equal. However, if available, internal and Estonian domestic data is preferred for determining the arm's-length price.

Return disclosures/related-party disclosures

An annual report, including a description of transactions with related parties, must be filed within six months of the end of the relevant financial year. If the taxpayer has the obligation to prepare the transfer pricing documentation, such documentation must be completed every financial year.

The documentation does not have to be filed with the tax return or annual report.

Transfer pricing-specific returns

Currently, the Estonian tax laws do not require a separate return for related-party transactions.

Documentation deadlines

There is no deadline for preparing transfer pricing documentation. However, taxpayers are obliged to submit the documentation within 60 days of the tax authority's request.

Transfer pricing penalties

If the required documentation or the relevant tax return is not submitted on time, the fine may be as high as EUR3,200. When a taxpayer intentionally submits wrong information on its tax return that reduces the tax paid, a criminal penalty may be imposed, and the fine may be as high as EUR16 million.

If the price of a transaction concluded between a resident company and a person associated with this company differs from the market value of the transaction, income tax shall be imposed on the amount that the company would have received as income, or the amount that the company would not have incurred as expenses if the transfer price had conformed to the market value of the transaction. The income tax rate is 20% on the gross amount of the taxable difference (i.e., 20/80 of the net amount) and is payable even if a company has losses.

If tax is assessed, interest on the tax amount at the rate of 0.06% per day, up to the principal tax amount, will be imposed retroactively as of the date when the tax was supposed to be paid until actual payment (here, interest is subject to income tax at the rate of 20/80 as a nonbusiness-related expense).

Penalty relief

There is no penalty relief if a taxpayer has the necessary documentation but the transfer pricing is determined to be non-arm's-length and there is an income tax adjustment. However, imposing a fine is probably more the exception than the rule. Interest for the delay of the tax payment is always assessed.

Estonia (continued)

Statute of limitations on transfer pricing assessments

The statute of limitations for making an assessment of tax is three years. In the event of intentional failure to pay or withhold an amount of tax, the limitation period for making an assessment of tax is five years. The statute of limitations begins to toll as of the due date of submission of the tax return that was either not submitted or contained information leading to an incorrect determination of the tax due.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as medium. There is a high likelihood that transfer pricing will be reviewed as part of a general tax audit. Further, the likelihood that the transfer pricing methodology will be challenged is characterized as medium.

APA opportunity

Currently, the Estonian tax laws do not provide any opportunity to conclude APAs.

Impact of new OECD BEPS Action 8–10 guidelines

Formally, there have been no changes in local transfer pricing rules based on these developments; however, it is important to monitor further developments in this area.

Fiji

Taxing authority and tax law

Tax authority: Fiji Revenue and Customs Authority (FRCA)

Tax law:

- Income Tax Act
- Fiji's double tax agreements

Relevant regulations and rulings

The final Fiji Transfer Pricing Guidelines (FRCA Guidelines) were issued in 2012 and provide guidance on how § 34 of the Income Tax Act and Income Tax (Transfer Pricing) Regulations 2012 are applied. These guidelines are intended to provide an overview of the framework within which the transfer pricing rules operate.

OECD Guidelines treatment

The FRCA adopts the positions outlined in the OECD Guidelines for multinational enterprises and tax administrations, and it proposes to follow the OECD Guidelines in administering Fiji's transfer pricing rules. Consequently, the FRCA Guidelines supplement the OECD Guidelines, rather than supersede them, and the OECD Guidelines should be referred to if more detail is required.

Documentation requirements

There are no explicit requirements under § 34 or any other provisions of the Income Tax Act for any particular category of information to be included in transfer pricing documentation.

The Income Tax (Transfer Pricing) Regulations 2012 require a taxpayer to record, in writing, sufficient information and analysis to verify that its controlled transactions are consistent with the arm's-length principle.

The FRCA Guidelines indicate that a taxpayer's main purpose in preparing and maintaining documentation should be to place the taxpayer in the position in which it can readily demonstrate to the FRCA that a transfer pricing method has been used to establish that the taxpayer's transfer prices are consistent with the arm's-length principle in light of the relevant facts and circumstances.

Priorities/pricing methods

The FRCA accepts the most reliable method or methods chosen from the following:

- CUP
- Resale price
- Cost-plus
- Profit split
- TNMM

TNMM and the profit split methods are the most commonly used in Fiji. Because Fiji is in a developing state, most transactions are cross-border and are performed by multinationals.

Return disclosures/related-party disclosures

There are no specific disclosure requirements. However, it is advisable to provide details of the following, together with the income tax return, otherwise the FRCA may disallow a deduction for the same:

- Payments to nonresidents, such as dividends, interest, management fees, "know-how" payments, royalties or contract payments made

In some instances, the FRCA may require additional details before assessing an income tax return.

Transfer pricing–specific returns

There is no separate transfer pricing return required to be filed in Fiji.

Documentation deadlines

Documentation for transactions undertaken in a tax year must be in place prior to the due date for filing the income tax return for that year.

Transfer pricing penalties

In accordance with the Income Tax (Transfer Pricing) Regulations 2012, the following penalties apply:

- Failure to keep required transfer pricing documentation is an offense, and upon conviction the person is liable for a fine of at least FJD100,000.

In accordance with the Tax Administration Decree, the following penalties apply:

- For failing to keep, retain or maintain accounts, documents or records as required under a tax law:
  - If the failure is knowingly or recklessly made, the taxpayer faces a penalty equal to 75% of the amount of tax payable for the tax period to which the failure relates

    Or
  - In any other case, the taxpayer faces a penalty equal to 20% of the amount of tax payable for the tax period to which the failure relates
- For making false or misleading statements:
  - If the statement or omission was made knowingly or recklessly, the taxpayer faces a penalty equal to 75% of the tax shortfall.
  - In any other case, the taxpayer faces a penalty equal to 20% of the tax shortfall.
  - The amount of penalty imposed under the abovementioned cases is increased by 10 percentage points if this is the second application of the penalties relating to making false or misleading statements, or 25 percentage points if this is the third or a subsequent application.

Penalty relief

Shortfall penalties may be reduced by 10 percentage points if the person voluntarily discloses the shortfall prior to the earlier of:

- Discovery by the FRCA of the tax shortfall

Or

- The commencement of an audit of the tax affairs of the taxpayer

Shortfall penalties may also be reduced if a taxpayer has a historically good compliance record.

Fiji (continued)

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations applying only to transfer pricing assessments. Accordingly, the statute of limitations applying to all assessments will also apply to transfer pricing assessments.

In accordance with the Tax Administration Decree, the amendment of a tax assessment may be made:

- In the case of fraud, willful neglect or serious omission by or on behalf of the taxpayer, at any time

Or

- In any other case, within six years of the date the FRCA served the notice of assessment on the taxpayer

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Tax audits are undertaken at the discretion of the FRCA. The FRCA selects audit targets based on certain criteria and risk profiling, including:

- Company incurring ongoing losses
- Lower-than-expected profitability
- Dealings with associates in tax haven jurisdictions
- Dealings with associates in special-purpose tax haven jurisdictions — these jurisdictions have relatively high headline tax rates but offer significant tax savings for specified activities
- Those who offer special reduced tax rates for a particular activity
- Poor compliance processes and records
- Intragroup charges, e.g., management and technical fees
- Large royalty payments and excessive debt levels (i.e., interest payments)
- Transfer of intangibles
- Business restructurings

APA opportunity

APAs are not available in Fiji currently but may be considered later in the context of introducing a binding rulings process. Currently, there is one APA in existence in Fiji.

However, the FRCA does encourage taxpayers to discuss related-party transactions with the FRCA prior to entering into the same, with a view of eliminating any transfer pricing implications of the same, even though such discussions are not binding on either party.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Finland

Taxing authority and tax law

Tax authority: Finnish Tax Administration

Tax law: Finnish Tax Act on Assessment Procedure §§ 14 a-c, 31, 32, 75 and 89

Name of Local GAAP: Finnish GAAP

Relevant regulations and rulings

Transfer pricing legislation came into effect on 1 January 2007. The provisions contained in the law apply to financial periods beginning 1 January 2007 or later.

Regarding business restructurings, the Finnish Tax Administration's guidelines state that from a transfer pricing perspective, business restructurings should be examined as a whole. However, the guidelines state that the specific circumstances and effects of the restructuring on the material functions of parties should be taken into account, and the arm's-length principle has to be utilized. Nevertheless, the guidelines are general in nature and do not specifically state how the tax authorities should consider individual cases.

There is no established case law on business restructurings in Finland. However, there have been some advance rulings relating mainly to the transfer and valuation of intangibles. In July 2014, the Supreme Administrative Court ruled that transactions concluded between affiliated parties cannot be re-characterized based on § 31 of the Finnish Tax Act on Assessment Procedure (as a part of a transfer pricing adjustment).

OECD Guidelines treatment

The Finnish regulations and tax practice in general follow the OECD Guidelines.

Documentation requirements

The transfer pricing documentation aims to prove that the prices used in cross-border intragroup transactions are acceptable from the perspective of the tax authority. According to the law, the documentation obligation applies to the following entities:

- Group companies, if the group employs at least 250 employees, regardless of the amount of turnover or assets
- Group companies, if the group employs fewer than 250 employees and if the company's turnover exceeds EUR50 million and their assets are worth more than EUR43 million
- The Finnish branches of a foreign company, if the above conditions are met by this company
- Companies that are not small and medium-size enterprises, as defined by criteria (related to, for example, a company's independence) contained in the European Commission's Recommendation on the definition of micro, small and medium-sized enterprises (2003/361/EC)

When calculating the amount of employees, turnover or assets of an enterprise, or a branch owned by a foreign company, information regarding the foreign owners is also taken into account on a pro rata basis. Group companies are required to prove the arm's-length nature of cross-border intragroup transactions by preparing transfer pricing documentation. According to the law, the documentation should contain the following information:

- A description of the business
- A description of associated enterprises
- Information on transactions between associated enterprises

Finland (continued)

- A functional analysis regarding transactions between associated enterprises
- A comparability analysis, including available information on comparables
- A description of the transfer pricing method and its application

Less extensive documentation is required if the total amount of transactions between two parties during a fiscal year does not exceed EUR500,000.

The transfer pricing documentation may be prepared in Finnish, Swedish or English.

Priorities/pricing methods

Taxpayers may choose any of the OECD transfer pricing methods, as long as the chosen method results in an arm's-length pricing for the intragroup transaction. In its selection of the method, a taxpayer should consider the aspects regarding the application of methods stated in the OECD Guidelines.

Return disclosures/related-party disclosures

Based on paragraph 26.4 of the Finnish Tax Act on Assessment Procedure, if the other party to the transaction is a nonresident, and if the tax authorities cannot obtain adequate information on the transaction by using an appropriate international treaty, the taxpayer is responsible for presenting such information.

Transfer pricing-specific returns

If a taxpayer (including a Finnish branch of a foreign company) is obligated to prepare transfer pricing documentation in Finland, the Finnish tax authorities also require Form 78 to be completed and disclosed with the annual corporate income tax return. Information regarding cross-border intragroup transactions, which normally cannot be directly found in the company's financial statements, is reported on Form 78.

However, information regarding the transfer pricing method applied is not reported in this form.

Documentation deadlines

A taxpayer has to submit the transfer pricing documentation for a specific fiscal year within 60 days of a request by the tax authorities, but not earlier than six months after the end of the financial period. The additional clarifications concerning the documentation have to be submitted within 90 days of a request by the tax authorities.

Transfer pricing penalties

A tax penalty of up to EUR25,000 can be imposed for failure to comply with the transfer pricing documentation requirements, even if the pricing of intragroup transactions has been at arm's-length. In addition, a possible adjustment of taxable income may result in a separate tax penalty of up to 30% of the adjusted amount of income, as well as penalty interest.

Finland (continued)

Penalty relief

Penalties can be reduced or removed if the taxpayer presents supplementary transfer pricing documentation that supports the arm's-length nature of the intragroup transactions. The determination of penalties will be made on a case-by-case basis.

According to a decision issued by the Finnish Supreme Administrative Court in 2014, penalties should not be assessed in transfer pricing cases where the taxpayer has adequately tried to follow the arm's-length principle in its intragroup pricing.

Statute of limitations on transfer pricing assessments

The time limit for the adjustment of income due to the failure to apply arm's-length principles to the pricing of a transaction is five years from the beginning of the following year during which the taxation was finalized.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as low. There is a high likelihood of transfer pricing being reviewed as part of an audit, and the likelihood of a challenge to the transfer pricing methodology similarly is high.

APA opportunity

Advance rulings are available in Finland. There is no legislation for APAs; however, the tax authorities have indicated their willingness to utilize them.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official implementation in the legislation; however the Finnish tax authorities will take Actions 8-10 into account when assessing the arm's-length nature of intragroup transactions.

France

Taxing authority and tax law

Taxing authority: generally referred to as the French tax authorities (FTA) (*Direction Générale des Finances Publiques*, or DGFiP; formerly, *Direction Générale des Impôts*, or DGI). The *Mission d'Expertise Juridique et Economique Internationale* (MEJEI) Department is responsible for both MAPs and APAs.

Tax law: French Tax Code (FTC)

Local accounting principles: referred to as "French GAAP" and supervised by the Authority of Accounting Standards (*Autorité des normes comptable*)

Relevant regulations and rulings

- FTC Articles 57 (arm's-length principle), 223 quinquies B (annual declaration of related-party transactions), 223 quinquies C (CbCR), 238A (reversal of burden of proof in case of tax haven), 209B (CFC regulation) and 1735 ter (transfer pricing documentation penalty regime)
- French Procedural Tax Code (FPTC) Articles L 10, L 13AA, L 13AB, L 13B, L47A–1, L62A, L 80B and L 188A
- Case law about application of the theory of the Abnormal Act of Management and FTC Article 57
- Thin capitalization rules also covered by FTC Articles 212 and 39-1
- Administrative doctrine pertaining mainly to FTC Articles 57 and 238A, and FPTC Articles L 13B and L 80B (main administrative guidelines BOI-BIC-BASE-80-10-20-20141117, BOI-CF-IOR-60-50 and BOI-INT-DG-20-50)

France has also concluded tax treaties with more than 100 countries in the world.

OECD Guidelines treatment

The French tax authorities consider the French transfer pricing regulations to be consistent with the OECD Guidelines and are following the BEPS developments very closely (certain BEPS initiatives have been introduced as law).

There is no specific French transfer pricing-related regulation pertaining to business restructuring (with the exception of certain circumstances about burden of proof) or attribution of profits to permanent establishments.

Experience in tax audits dealing with business restructurings shows that tax auditors often consider a decrease in profit or sales as an indicator of a *de facto* transfer of something of value, which should be taxed. In addition, special attention should be paid to restructuring operations (e.g., site closure, layoff and transfer of going concerns), as well as the value contribution of the French taxpayer to the supply chain of the group before and after the business restructuring. French tax inspectors are also paying more attention to financial transactions (e.g., loans, guarantees), as well as continuing discussions around intellectual property rights.

Documentation requirements

General transfer pricing documentation requirements (Article L 13B of the FPTC) where Article L 13AA does not apply

For small and medium enterprises that do not meet the criteria stipulated in L13AA (see below), the FTA may require information pertaining to transfer pricing in the course of an audit (based on Articles L 13B and L 10 of the FPTC). The nature of the required information, and the short deadline under which a taxpayer may have to provide it, leads to a *de facto* documentation requirement covering any French-based company. The following main documents are usually expected:

- Business and organizational structure overview
- Functional analysis, contracts, legal and management account information

- Method selected and economic analysis (including identification of competitors and comparables, depending upon the transfer pricing method)

Special transfer pricing documentation requirement (Articles L 13AA and L 13AB of the FPTC)

Pursuant to Article L 13AA of the FPTC, and for fiscal years 2010 and after, companies that satisfy the criteria listed below must provide their transfer pricing documentation upon the tax inspector's request (thus, in the context of a tax audit), as follows:

- Have total net sales (before taxes) or total gross assets equal to or greater than EUR400 million
- Hold, directly or indirectly, at the closing date of the fiscal year, more than 50% of the capital or voting rights in a legal person having such turnover or gross assets
- Be, on the closing date of the fiscal year, more than 50% held, directly or indirectly, by such legal person
- Belong to a French tax consolidated group that includes at least a legal person that meets one or more of the aforementioned criteria

If the documentation is not immediately provided to the FTA, it should be delivered within 30 days of the FTA's request. If documentation is missing, or if the taxpayer fails to provide exhaustive and comprehensive documentation within 30 days of a formal notice from the FTA, a penalty of up to either 5% of the transfer pricing reassessment or 0.5% of the volume of transactions (see above) would be applied, with a minimum of EUR10,000 per fiscal year under audit.

The contents of the transfer pricing documentation to be made available to the FTA are threefold:

- **General information concerning the related enterprises (economic, legal, financial background of the group):**
  - General description of the activity carried out, including changes that occurred during the audited period, compared with previous years
  - General description of the legal and operational structures (with identification of the entities involved in controlled transactions)
  - General description of the functions carried out and risks borne by the related entities, to the extent that they impact the audited company
  - List of the main intangible assets held in relation to the audited company
  - General description of the transfer pricing policy of the group
- **Specific information pertaining to the audited company:**
  - General description of the activity carried out, including changes that occurred during the audited period, compared with previous years
  - General description of the transactions carried out with related enterprises, including the amount and nature of the flows, including royalties
  - List of the cost-sharing agreements
  - Copy of transfer pricing rulings
  - Presentation of the methods used to determine the transfer prices (including an analysis of the functions, risks and assets, and with an explanation of the choice of applied method[s])
  - Where necessary, an analysis of the comparables used (including characteristics of the goods and services, functional analysis, contract clauses, economic situation and specific strategies of the comparable companies)
- **Information pertaining to agreements or tax rulings obtained by the audited company's related parties from foreign tax authorities (if known by the audited entity in question)**

The third component was proposed and passed in the 2014 French Finance Bill requiring taxpayers that fall within the scope of Article L 13AA of the FPTC to include in their transfer pricing documentation tax rulings (as defined in French tax law) obtained by all related parties from foreign tax authorities even if such rulings are not transfer pricing-related and do not impact the results of the French taxpayer. This documentation requirement entered into force from 1 January 2014 onward. In practice, the requirement does not cover documents obtained from foreign tax administrations that are not in the possession of the French taxpayer.

Taxpayers filing their Corporate Income Tax (CIT) return from this date and that are subject to the abovementioned provisions of Article L 13AA of the FPTC, must — in addition preparing an Article L 13AA report — file a "light" transfer pricing documentation. Please note that, for financial years ending on or after 31 December 2016, the threshold for filing this "light" transfer pricing documentation, also referred to as a Transfer Pricing Statement, was lowered from EUR400 million to EUR50 million Euro (it should be duly noted that the threshold for falling within the merit of Article L 13AA, ie "full" transfer pricing documentation requirement, did not change and remains at 400 million Euro).

Every year, this Transfer Pricing Statement will have to be filed within six months after the filing deadline of the tax return by French taxpayers that fall under the scope of the "full" transfer pricing documentation requirement (as codified in Article L 13AA of the FPTC), already in force since 2010. However, as noted above, from financial years ending on or after 31 December 2016 onwards, the scope of taxpayers that are required to file the Transfer Pricing Statement has been broadened by lowering the EUR400 million Euro net sales and/or gross asset threshold that applies to Article L 13AA to EUR50 million.

It is important to note that the requirement to provide full transfer pricing documentation in case of a tax audit remains in force and that this obligation to file a Transfer Pricing Statement is an additional, cumulative transfer pricing documentation requirement implemented by the French Government in the context of its stated objective to combat BEPS. The transfer pricing-related information that needs to be provided in the Transfer Pricing Statement takes the form of two tables:

- The first table deals with the general information about the group. The reporting entity has to report the main activities of the group, including the intangible assets held by the group and used by the reporting entity (e.g., patents, trademarks and know-how). The reporting entity shall report the nature of the asset and the country where the entity owning the asset resides. Furthermore, the reporting entity has to mention a general description of the transfer pricing policy applied by the group and related to the reporting entity.
- In the second table, for all intragroup transactions (including income, expenses, and purchase and disposal of assets) with an aggregate amount by type of transaction that exceeds EUR100,000, the entity is required to indicate the total aggregate amount for the year, the transfer pricing method applied, the country or countries in which the related-party at the other end of the transaction(s) is/are incorporated, and any change in the transfer pricing policy or the nature and location of the assets. In addition, the French taxpayer is also required to disclose any change that may have occurred in the transfer pricing method being applied and provide additional information when a transfer pricing method is used that falls within the "other method" category, as defined by the OECD Guidelines; the taxpayer also needs to describe any change in the activity of the entity. The latter requirement is specifically aimed at identifying business restructuring situations.

No detailed functional analysis or economic analysis is required in this light documentation report, and the penalty for a not filing this Transfer Pricing Statement is minimal (i.e., EUR150). However, the purpose of this new provision is understood to enhance the FTA's capability to identify taxpayers with the highest transfer pricing exposure and allocate governmental audit resources accordingly. Such an approach — where taxpayers failing to file the report would of course be highly scrutinized — is in line with the latest OECD developments. Accordingly, the preparation of this light documentation report should therefore be seen as an important extension to the overall — already existing — obligation of documenting intragroup transactions in France.

This Transfer Pricing Statement has to be filed in French (even if the "full" transfer pricing documentation has been drafted in English). From 2016 onwards, this declaration must be filed electronically.

The 2016 Finance Bill introduced a CbCR requirement in the French legislation applicable to fiscal years beginning on or after 1 January 2016. The CbCR will have to be filed online within 12 months from the closing of each fiscal year. The information to be disclosed — which should include, on a country-by-country basis, the group's profits and other economic, accounting and tax aggregates and information on the location and activities of its constituent entities — are detailed by decree. The CbCR will be exchanged by France under automatic exchange agreements, subject to reciprocity.

France (continued)

The requirement applies to legal entities established in France that (i) prepare consolidated accounts, hold directly or indirectly foreign branches or subsidiaries and generate a consolidated revenue of EUR750 million or more (unless they are held by another entity that is already subject to a CbCR requirement) or (ii) are held by foreign companies that meet the aforementioned conditions but are located in a "noncompliant" jurisdiction (except if the entity demonstrates that another group entity located in a "compliant" jurisdiction has been designated for filing the CbCR). "Compliant" jurisdictions will be listed by decree and will be those (i) having introduced CbCR, (ii) having an automatic exchange agreement in place with France and (iii) respecting the terms of that agreement. The penalty for non-filing would be EUR100,000.

Taxpayers that are required to file the CbCR have to report on their tax return the name and location of the (surrogate) entity that files the CbCR on behalf of the group. However, if the ultimate parent company files the CbCR itself and if that ultimate parent company is located in a jurisdiction that has signed the automatic exchange of information agreement with France, the French entity of that MNE is not required to disclose the name and the location of its ultimate parent, ie in this case the French entity has no CbCR reporting requirement.

Pursuant to Article L 13AB of the FPTC, all French companies involved in transactions with companies located in non-cooperative jurisdictions (as defined by Article 238-0 A of the FTC) have to provide, in addition to the documentation described in Article L 13AA of the FPTC, supplementary documentation, including all documents normally required by the FTA from companies subject to CIT, and such requirement notably includes a French accounting-compliant balance sheet and the profit-and-loss statement of the foreign company.

French taxpayers that do not meet the conditions set out in Articles L 13AA and L 13AB of the FPTC nevertheless remain bound by the general transfer pricing documentation requirements set out in Article L 13B of the FPTC and the general information sharing rule set out in Article L 10 of the FPTC (see above).

Priorities/pricing methods

The tax authorities accept the following methods: CUP, resale price, cost-plus, profit split and TNMM; yet, tax inspectors usually prefer the TNMM, based on French comparables when the tested party is French.

Return disclosures/related-party disclosures

In the event of a specific request from the tax authorities at the time of an audit (on the basis of either Articles L 13AA and L 13AB of the FPTC, or Article L 13B of the FPTC), the taxpayer is obligated to disclose the nature of its relationship with the related parties (i.e., the links of dependence between the French audited entity and the related parties). These legal provisions also provide an obligation to disclose the activities of the related parties.

Transfer pricing-specific returns

See information above about the Transfer Pricing Statement and CbCR to be submitted to the FTA, provided by Article 223 quinquies B and new Article 223 quinquies C of the FTC respectively, for companies that satisfy specific criteria.

Documentation deadlines

General transfer pricing documentation requirement (Article L 13B of the FPTC)

Upon the FTA's request, documentation must be submitted within 60 days, though it may be possible to obtain a 30-day extension in exceptional circumstances. Exceeding such deadline may trigger penalties mentioned previously.

Special transfer pricing documentation requirement (Articles L 13AA and L 13AB of the FPTC)

Upon the FTA's request, documentation must be submitted immediately upon the first request made by the tax inspector in the course of an audit. If not, the FTA will send a formal claim for the documentation, which will provide for a 30-day deadline, starting on the day the formal claim was received by the taxpayer, after which penalties for documentation failure will apply.

The annual Transfer Pricing Statement mandated by Article 223 quinquies B of the FPTC must be filed within six months following the filing of the CIT return with the corporate tax office to which the declaring company has been assigned.

The annual CbCR mandated by Article 223 quinquies C of the FPTC will have to be filed online within 12 months from the closing of each fiscal year.

Transfer pricing penalties

Penalties specific to a failure to comply with the transfer pricing documentation requirements apply, in addition to the fiscal penalties generally applied as a consequence of a transfer pricing reassessment. Transfer pricing reassessments from the FTA trigger an adjustment of the taxable profit for CIT purposes (and other taxes, depending on the case).

Specific transfer pricing penalties apply when the taxpayer fails to answer the tax authorities' request for documentation, either on the basis of Article L 13B of the FPTC (which relates to general transfer pricing documentation requirements, provided the FTA can evidence a transfer pricing issue before it applies this article) or on the basis of Articles L 13AA and L 13AB of the FPTC (which relate to special transfer pricing documentation requirements). Failure to provide complete information in the framework of Article L 13B of the FPTC may result in:

- A reassessment of the company's taxable profit based on information the tax authorities possess
- The application of a EUR10,000 penalty for each year audited

Failure to provide sufficient transfer pricing documentation under the framework of Articles L 13AA and L 13AB of the FPTC will trigger penalties. This penalty regime is enshrined in Article 1735 ter of the FTC and was amended by the French Parliament on 18 December 2014. The current transfer pricing penalty regime therefore only applies to reassessment notices that were issued by the FTA after that date and states that the penalty will be the highest of the following:

- EUR10,000 per entity and per period under audit
- 0.5% of the volume of transactions relating to the documents that failed to be provided to the tax authorities
- 5% of the reassessments based on Article 57 (arm's-length principle) of the FTC, including transactions mentioned in the above point

Penalties generally applied as a result of a transfer pricing reassessment, regardless of compliance with transfer pricing documentation requirements, are as follows:

- After a transfer pricing reassessment is made, the additional profit is qualified as a deemed distribution of a benefit. The tax treatment of such "benefit" transfer may trigger the same consequences as a deemed transfer of a dividend, depending on the definition of "dividend" in the applicable tax treaty. Accordingly, a withholding tax on the reassessed amounts is often imposed by the FTA. When the double tax treaty permits the FTA to treat the transfer pricing reassessment as a deemed dividend distribution, the actual withholding tax applied of course depends on the relevant tax treaty provisions.[1] 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. Note that the effective rate will be the grossed up rate (i.e. 300% effective withholding tax rate in case of a reassessed transaction with a "non-cooperative" jurisdiction).

[1] See the Dividends or the Other Income clauses of the relevant tax convention.

- If the transfer is treated as a deemed dividend, the tax authorities also usually apply a 10% penalty for not declaring the withholding tax. Such penalty is applied regardless of the good faith of the taxpayer.
- However, if certain cumulative conditions are met, at the request of the taxpayer, the withholding taxes may be waived. These cumulative conditions are enshrined in Article L62 A of the FPTC but basically require that (i) the taxpayer files, before the FTA issues the tax bill, a written request to apply Article L62 A and (ii) the amounts classified as deemed dividends are repatriated to the benefit of the French taxpayer within 60 days from the request. However, the taxpayer cannot have recourse to Article L62 A if the non-French related-party that entered into the reassessed transaction with the French entity is located in a non-cooperative state or territory.
- Late interest payments are applied in the case of tax reassessments made on the grounds of Article 57 of the FTC. The ordinary late payment interest rate is 0.40% per month (i.e., 4.8% per year).
- Supplementary penalties apply if the taxpayer committed a willful offense (formerly referred to as "bad faith" penalties) (40%) — this is much more frequently applied by the tax authorities — or acted fraudulently (80%). In these cases, taxpayers are denied recourse to the European Arbitration Convention and often also from MAP through the applicable double tax treaty (possibly subject to discussion, however, depending on treaty provisions).

In addition, the adjustment may result in a reassessment of other taxes and contributions, such as business or local taxes and employee profit-sharing regimes.

Prior to 1 January 2014, French regulations provided that in cases where MAP relief is sought (to avoid double taxation on the grounds of a tax treaty or the European Arbitration Convention), tax collection could currently be suspended during the entire mutual agreement process and postponed until the competent authorities reach an agreement (Article L 189A of the FPTC). This measure has been terminated, so companies can no longer defer the payment of the French transfer pricing reassessment by opening a MAP.

Penalty relief

During a tax audit and before the tax authorities send the notice of reassessment, taxpayers, under the framework of Article L 62 of the FPTC, are allowed to correct their errors or omissions in consideration of a reduced late payment interest rate (3.36% per year), which is equal to 70% of the ordinary late payment interest rate. In this respect, taxpayers must file a complementary tax return and pay the corresponding additional taxes at the same time.

Following a tax reassessment, taxpayers can request MAP relief (on the grounds of a tax treaty and/or the European Arbitration Convention) to avoid double taxation resulting from the reassessment. Administrative guidelines

(BOI-INT-DG-20-30) specify the scope and the conditions to be met when such a procedure commences (e.g., timing, absence of penalties).

Assessment of a transfer pricing documentation penalty under L 13AA (transfer pricing documentation penalty regime) does not prevent the taxpayer from seeking recourse under MAP provisions.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is the same as for all French corporate tax assessments, generally three years following the year for which the tax is due (it might be longer under certain circumstances, e.g., permanent establishment qualifications, loss carryforwards). A special extension can apply in the case of a request for international tax assistance (Article L 188A of the FPTC).

The general three-year statute of limitations can also be extended in specific cases, such as when an asset (e.g., going concern/clientele) was transferred but not declared on time (extension from three to six years in this particular case). An effective extension to 10 years applies in cases where permanent establishments are deemed to exist by the FTA and where the non-French entity never declared any activities in France to the FTA.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of a general tax audit is high, as is the risk that transfer pricing issues will be scrutinized during the audit. Similarly, if transfer pricing is reviewed as part of the audit, the likelihood that the transfer pricing methodology will be challenged is high. The number of tax audits in transfer pricing is increasing considerably, and the FTA is becoming more extensive and technical in its queries, because it now uses economic bases as well as legal bases. In particular, after the FTA announced that it will scrutinize business restructuring operations in a systematic manner going forward, tax audits focusing on this topic are on the rise, and it is becoming common to see valuation experts (engaged by the FTA) involved in these audits to determine the arm's-length exit charge. Recent business restructuring cases to date indicate that the tax office tends to focus on matters such as the value contribution of the French taxpayer to the supply chain of the group before and after the business restructuring and the internal communication between the group entities to determine, for example, the authorization and negotiation power retained by the French entity, as well as who performed the development, enhancement, maintenance, protection and exploitation (or DEMPE functions, discussed in the OECD Guidelines), and who bears these costs. If any of the information obtained supports it, the FTA will not hesitate to reassess the taxpayer based on an alternative transfer pricing method (potentially increasing the exit tax consequences), such as applying the profit split or otherwise insisting that the French entity should have been entitled to a higher return for its non-routine functions previously or to be performed.

Moreover, based on our experience, new Article 223 quinquies B of the FTC enables the FTA to identify French taxpayers with the most significant potential transfer pricing exposure and thereby allocate their transfer pricing audit resources accordingly. Indeed, the FTA is using this new requirement as a programming tool to launch new tax audits on French taxpayers that have either (i) failed to file the new transfer pricing document or (ii) filed information that does not appear compliant with the arm's-length principle or coherent with the taxable position of the company.

From an overall perspective, transfer pricing issues that receive the greatest scrutiny are:

- Business restructurings (e.g., transfer of intangibles and clientele, conversion of a distributor into an agent) or a sudden decrease in the operating margin, likely to hide a change in the transfer pricing policy applied
- Product sale prices (underestimated or overestimated prices), especially (but not only) in case of losses
- Management fees
- Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)
- Permanent establishments
- Closure and conversion costs
- Intangibles and economic ownership (including questions about royalties)
- Benchmarking exercises (the FTA expects local comparables obtained typically from French company databases when the tested party is French, and it usually rejects Pan-European searches)
- Financial transactions

As an alternative to a transfer pricing dispute, the FTA increasingly seeks to deem the existence of a permanent establishment to try and allocate additional taxable base to the French territory and does not hesitate to resort to judicial searches in instances where the FTA feels that auditors cannot access information via normal investigative procedures.

Other tax audit trends:

- There has been a significant increase in the execution of police tax raids led by the FTA (based on Article L 16B of the FPTC).
- There has been the development of computerized tax audits, in which IT specialists assist tax inspectors in extracting the required information from accounting systems.

- For most taxpayers: There is a new obligation to provide a file detailing all accounting entries (Article L 47 A 1), i.e., accounting records in the form of an accounting entry file (AEF). The obligation includes the provision of compulsory fields, and nondisclosure of AEF complying with French requirements may imply specific penalties. This obligation also weighs on branches and not only on subsidiaries.
- Communication of the analytical and consolidated accounts in case of a tax audit: After the enactment of the French 2014 Finance Bill (i.e., 31 December 2013), companies in the scope of L 13AA of the FPTC or with a turnover exceeding EUR152.4 million or EUR76.2 million, depending on their business activity, have had to communicate their management accounting in case of an audit. The precise definition of the management accounting should be further clarified in future additional regulatory guidance.

French holdings will also have to disclose the detail of their consolidated accounts, allowing the FTA to identify the tax provisions, for instance.

Few court decisions in France go into detailed transfer pricing issues. One of the main questions relates to the burden of proof, which usually is said to rest with the tax inspectors.

APA opportunity

Bilateral and, under certain circumstances, unilateral APAs are available (Article L 80 B 7° of the FPTC). No fees are required to enter into the APA program. This section was provided by the Finance Amendment Act for 2004 and came into force 1 January 2005. It incorporates existing procedures as described by the French administrative guideline 4 A-8-99, dated 7 September 1999. A specific procedure also exists for certain activities (e.g., headquarter profile). On 28 November 2006, the tax authorities released a new administrative guideline (formerly 4 A-13-06 referred under BOI-SJ-RES-20-20 from September 2012), adding a simplified APA procedure for small and medium-sized enterprises and presenting an online guide pertaining to transfer pricing methods.

In theory, the process requires that the request be submitted at least six months before the beginning of the first fiscal year covered. There is no rollback possibility.

Impact of new OECD BEPS Action 8–10 guidelines

In practice, the FTA adheres to the OECD Guidelines and has followed the BEPS developments very closely since the introduction of the BEPS initiatives. Incorporating certain BEPS initiatives (such as CbCR applicable to fiscal years beginning on and from 1 January 2016 onward) into the French tax law only strengthens this position. It should be noted that the FTA already applies BEPS notions during tax audits, even though the law has not changed. With regards to transfer pricing documentation and in particular the master file and local file, an amendment to the law will be needed to implement the OECD's recommendations in this respect (Action 13), as was already done for CbCR.

Also, we note that the FTA considers that the OECD Guidelines are "common sense" and therefore can be applied retroactively if the law allows the FTA to do so.

Gabon

Taxing authority and tax law

Taxing authority: Gabonese Tax Authority

Tax law: General Tax Code (GTC)

Relevant regulations and rulings

Section 12 and Sections P 831, P 831 bis, P 831 ter, P 832 and P 860 of the GTC contain the main legislative provisions concerning transfer pricing.

Section 12 of the GTC provides that transactions between group companies should be conducted as if the transaction were undertaken with third parties. The profit level of the transactions undertaken would also be taken into account.

OECD Guidelines treatment

The Tax Authority accepts the OECD Guidelines.

Documentation requirements

Section P 860 provides that a company is required to provide transfer pricing documentation that details the transfer pricing policy adopted by the head office. This document should include legal, economic, tax and accounting information and the methodology used to validate the transfer pricing policy. The document should also include information about the relationship with other group companies with which transactions would be undertaken. With the draft of Finance law for 2017, these information concern the local file.

The Master file shall contain the nature of the activities performed by the group, the global policy regarding transfer pricing and the profit and activities sharing in a global scale.

The country-by-country reporting (CbCR) (if the annual consolidated turnover is more than or equal to XAF491,967,750,000) shall contain the group profit sharing, the economic, accounting and tax aggregates sharing and the information regarding the localization and activities of all the group companies.

Priorities/pricing methods

The Tax Authority should accept the methods prescribed by the OECD (i.e., CUP, resale price, cost-plus, TNMM and profit split).

Return disclosures/related-party disclosures

There are no disclosure requirements.

Transfer-pricing-specific returns

No guidance is currently available on transfer pricing-specific returns.

Documentation deadlines

Transfer pricing documentation should be provided at the start of the fiscal year of operation.

With the draft of Finance law for 2017, the Master file shall be filed at the CIT return filing return deadline of the ultimate parent.

The local file shall be filed at latest on April 30.

The country-by-country reporting (CbCR) shall be filed in 12 months following the closing of the concern fiscal year.

In case of violation, a notice is sent to the company requiring filing of the documentation within 60 days.

Transfer pricing penalties

Any excessive charges would be regarded as distributions of income and be subject to withholding taxes as the case may be.

Tax adjustments for transfer pricing are subject to the normal penalty rules. In case of an audit by the tax authorities, an incorrect corporate tax return is subject to a penalty of 1.5% on the basis of the amount recovered, capped at 50%. In case of willful neglect, the penalty is increased by 100%. In case of fraud, the penalty is 150% over and above the penalty for an incorrect tax return as detailed above.

With the draft of Finance law for 2017, for failure to submit the transfer pricing documentation, the taxpayer is subject to a penalty of 5% of the global amount of the transaction (a minimum penalty of XAF65 million per year).

For failure to submit the country-by-country reporting (CbCR), the taxpayer is subject to a penalty of 0,5 per thousand of the consolidated turnover excluding tax capped to XAF100 million per year).

Penalty relief

Waiving of penalties is possible on special request to the Tax Authority.

Statute of limitations on transfer pricing assessments

The statute of limitation is four years after the payment of corporate tax is due. Taxes are due by 30 April following the calendar year-end.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The transfer pricing legislation is relatively new. However, tax audits are increasingly focusing on related-party transactions, especially when the taxpayer is in a recurrent loss position.

APA opportunity

Gabon has just introduced an APA agreements for related-party transactions in the Finance Act 2014.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area, as it is expected that the law will be tightened to take the BEPS action plan into account.

Georgia

Taxing authority and tax law

Taxing authority: Revenue Service of Georgia (RS)

Tax law: Georgian Tax Code, effective from 17 September 2010 (GTC)

Local GAAP: International Financial Reporting Standards used as a reference GAAP

Relevant regulations and rulings

The transfer pricing general principles are provided in Articles 126 to 129[1] of the GTC.

Additionally, transfer pricing in Georgia is regulated by the Instruction on Pricing International Controlled Transactions[2] (Instruction).

Georgian transfer pricing rules generally follow the OECD Guidelines. They apply to cross-border transactions between a Georgian resident company and a related foreign company. In certain cases, these rules may also apply to transactions between a Georgian resident company and an unrelated foreign company, where the latter is a resident of a low-tax jurisdiction or offshore country. The Georgian Government determines the list of low-tax jurisdictions and offshore countries.[3]

Related parties

The definition of "related parties" in transfer pricing law includes a list of criteria defining when companies and individuals can be declared related parties. The main criterion defining the relationship is the ownership threshold (i.e., if one party directly or indirectly controls, or factually controls, more than 50% of another party). The definition of "factual control" broadens the application of transfer pricing rules and covers situations in which one party (i) provides financial instruments (credit, loan, guarantee) or securities that separately or in the aggregate exceed 50% of another party's capital, (ii) has the power to control a board of directors of another party or to participate in its profit or (iii) holds more than 50% of the voting shares directly or through its relative.

OECD Guidelines treatment

Georgian transfer pricing rules generally follow the OECD Guidelines. The Instruction contains a direct reference to the OECD Guidelines 2010 and sets forth that issues that are not regulated by the GTC or the Instruction shall be regulated by the OECD Guidelines.

Documentation requirements

The transfer pricing documentation does not have any predefined format, but it should contain the following types of information:

- Overview of the business operations of the Georgian enterprise
- Analysis of the economic factors affecting the prices

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[1] Approved by Decree #423 of the Minister of Finance of Georgia.

[2] Ibid.

[3] Decree #132 of 30 May 2013.

- Organizational structure
- Description of the controlled transactions
- Analysis of the comparability factors
- Details of the group's transfer pricing policy
- Transfer pricing method applied and reasons for selection of a particular method
- Comparability analysis
- Details of APAs relevant to the controlled transaction (if any)
- Conclusion on compliance with the arm's-length principle and, where relevant, on adjustments made by the Georgian enterprise to its transfer prices or taxable income
- Other information that may have a material effect with regard to compliance of the arm's-length principle

The transfer pricing documentation may be submitted in the Georgian or English languages. However, whenever the documentation is submitted in English, the tax authorities may request Georgian translation to be arranged by a taxpayer.

Priorities/pricing methods

The transfer pricing law includes five methods similar to those used in international transfer pricing practices: (1) CUP, (2) cost-plus, (3) resale price, (4) TNMM and (5) profit split. The CUP method has first priority, whereas the profit split is the method of last resort.

The three traditional methods prevail over the TNMM and profit split method. Some other method can be used if none of the approved methods can provide reliable results and such other method yields a result consistent with that which would be achieved by independent enterprises engaging in comparable uncontrolled transactions under comparable circumstances. In such cases, a taxpayer shall bear the burden of demonstrating that the above requirements have been satisfied.

Taxpayers should select the most appropriate method according to the nature of their business, comparability factors and the availability of relevant information. If there is a lack of internal comparables or information (or if these internal comparables or information are not accurate or reliable enough), the taxpayer may use external comparables from the foreign markets. Under the Instruction, use of secret comparables is prohibited.

Return disclosures/related-party disclosures

Disclosure of transactions with related parties, and also other types of third-party transactions that would remain subject to transfer pricing control (e.g., transactions with parties located in low-tax jurisdictions), is required during the filing of corporate income tax returns.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

The documentation has to be submitted within 30 days upon request by the tax authority.

Georgia (continued)

Transfer pricing penalties

No specific penalties are defined for when a taxpayer does not submit transfer pricing documentation; if the documentation is not submitted within the deadline, the standard penalty for the failure to submit information to the tax authorities will apply. In addition, the penalties for underreporting of tax will apply if the tax authorities subsequently reassess the Georgian entity's amount of taxable profit.

Penalty relief

No specific penalty relief is available. However, in practice, having proper transfer pricing documentation reduces the risk of transfer pricing adjustments.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. The general statute of limitations in Georgia is four years. It is automatically extended to 11 years when a taxpayer chooses a 10-year carryforward of losses. Tax cannot be reassessed after this period has elapsed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as high, as is the likelihood that transfer pricing will be reviewed as part of an audit. Since 2014, tax authorities have a heightened interest in the tax effects of intercompany transactions. They are more focused on a taxpayer's business activities, supply chain operations and transfer pricing strategies than ever before.

APA opportunity

A unilateral APA (between a resident taxpayer and the RS) is available only for transactions that separately or in the aggregate exceed GEL50 million. In principle, the agreed-upon method is binding throughout the APA term, which is three years, with the possibility of extension.

The law also introduces the possibility for a taxpayer to conclude multilateral APAs where the transactional counterparties are in a jurisdiction with which Georgia has a double tax treaty. However, because there are no special regulations in this regard yet, it is impossible to conclude multilateral APAs at this stage.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Germany

Taxing authority and tax law

Taxing authority: German taxes are administered either by the German Federal Central Tax Office (*Bundeszentralamt für Steuern*) or by German state authorities

Tax law: Tax acts, executive order laws, double taxation treaties and supranational norms

Relevant regulations and rulings

The tax authorities assess intercompany transactions by following the arm's-length principle (§ 1 of the Foreign Tax Act).

The German interpretation of the arm's-length principle generally follows the definition in Article 9 of the OECD Model Tax Convention. However, a relevant intensification, § 1 (1) Sentence 3 of the Foreign Tax Act, stipulates that for the interpretation of the arm's-length principle, it is assumed that both parties involved in an intercompany transaction have full knowledge about all facts and circumstances (information transparency).

Detailed transfer pricing regulations concerning the cross-border transfer of functions were incorporated into § 1 of the Foreign Tax Act on 1 January 2008. An Executive Order Law providing details on how the new transfer pricing provisions relate to business restructurings and transfer of functions is effective from 2008 onward.

On 13 October 2010, new Administration Principles for the Examination of Income Allocation between related parties in cases of cross-border Transfer of Business Functions were released, which include 81 pages of clarifications on applying § 1(3) of the Foreign Tax Act and the Executive Order Law on Transfer of Business Functions. The Administration Principles detail, for example, circumstances under which a business restructuring and transfer of function would be exempt from the taxable valuation of the "transfer package." In such cases, the receiving entity of a function exclusively performs the transferred function for the transferring entity and receives a cost-based remuneration (i.e., based on the cost-plus method or a cost-based TNMM), in accordance with the arm's-length principle. In such cases, it is assumed that the transfer package does not include any significant intangible property or other advantages and, thus, a valuation of the transfer package is not required. This exemption from examination of the transfer package generally affects the transfer of routine functions for which execution is connected with low risks and that, as a consequence, are usually remunerated on the basis of the cost-plus method.

As of 1 January 2013, a law amending § 1 of the Foreign Tax Act is in effect that incorporates the authorized OECD approach (AOA) on the allocation of profits to permanent establishments into German law. The AOA treats a permanent establishment as a (nearly) fully separate entity for tax purposes. This includes the recognition of internal dealings between the head office and a foreign permanent establishment, such as the supply of goods, a service provision and even licensing arrangements. These dealings have to be priced in accordance with the arm's-length principle (i.e., including a profit element). Because of the lack of legally binding contracts between the different parts of one enterprise, contemporaneous transfer pricing documentation becomes crucial to defend the transfer prices applied for internal dealings. The new domestic rules stipulate that Germany will not tax the profits of the permanent establishment that are determined based on the AOA if the AOA is not yet implemented in the applicable double tax treaty. However, for the treaty relief, the taxpayer has to "prove" that the other contracting state does not apply the AOA and that this will lead to double taxation.

In October 2014, an Executive Order Law with regard to the application of the arm's-length principle to permanent establishments was released. The main issues covered by the Executive Order Law are the attribution of assets and risks to a permanent establishment, the allocation of the (free) capital/surplus to the different parts of the enterprise, as well as some clarifications under which conditions a dealing ("assumed contractual relationship") between different parts of the legal entity is recognized for tax purposes, in particular with respect to treasury dealings. In addition, the Executive Order Law contains specific provisions with respect to permanent establishments of banks and insurance companies and construction and exploration sites. Furthermore, the Executive Order Law stipulates that the taxpayer has to prepare an "Auxiliary Calculation" on an annual basis with respect to assets, capital, remaining liabilities and revenues and expenses attributable to the permanent establishment, including deemed revenues and expenses resulting from internal dealings. Part of the Auxiliary Calculation is documentation notes on the reasoning for the applied asset attribution. In particular, if the taxpayer deviates from the basic principles for the asset attribution laid down in the Executive Order Law, it should be properly documented that such deviation leads to a result that better reflects the arm's-length principle. The Auxiliary Calculation has to be prepared, at the latest, when the tax return for the respective financial year is filed. The Executive Order Law is applicable for fiscal years beginning after 31 December 2014.

On 18 March 2016, the German Ministry of Finance issued a draft version of the Administrative Principles on the Profit Attribution to Permanent Establishments, which include 152 pages of details and clarifications of the AOA that is implemented in § 1(5) of the Foreign Tax Act and the Executive Order Law. With regard to the implementation of the AOA into German tax law for financial years beginning after 31 December 2012, the Draft Administrative Principles differentiate the following scenarios depending on the type of double tax treaty (DTT) in place:

- No DTT — Article 7 OECD Model Tax Convention (MTC) (new) + OECD Commentary 2010: § 1(5) Foreign Tax Code is fully applicable.
- Article 7 OECD MTC (old) + OECD Commentary 2008: § 1(5) Foreign Tax Code is applicable (but limited application of AOA for the use of IP); full application of AOA in case of corresponding approach in other country.
- No DTT based on OECD MTC — Article 7 OECD MTC (old) + OECD Commentary pre-2008: Only application of AOA, if other contracting country applies AOA; otherwise no application, but proof from taxpayer required.

For financial years beginning after 31 December 2014, the Executive Order Law applies, i.e. the preparation of an Auxiliary Calculation is required and the attribution rules for capital, etc., apply. In other words, the taxpayer has to prepare an Auxiliary Calculation for the first time for its permanent establishment (PE) for financial year 2015 onward although the arm's-length principle has to be considered already from financial year 2013 onward for the PE profit allocation. In contrast to the law, the Draft Administrative Principles assume that the AOA will already apply for financial years starting before 1 January 2013 if a DTT according to Article 7 OECD MTC 2008 or 2010 is applicable (as described above).

The German Ministry of Finance has invited the industrial and municipal associations as well as the groups of experts to comment on the Draft Administrative Principles by 13 May 2016. It is expected that the final Administrative Principles will be published by the German Ministry of Finance in fiscal year 2017.

Other relevant provisions for transfer pricing issues in German tax law are:

- § 8(3) German Corporate Income Tax Act (hidden profit distribution)
- § 4(1) German Income Tax Act with Directive R40 of the German Corporate Tax Directives (hidden capital injection)
- §§ 90(3), 162(3) and 162(4) German General Tax Code and the Executive Order Law to § 90(3) German General Tax Code

To help interpret the German transfer pricing provisions, the German tax authority issued a circular, "Principles for the Examination of Income Allocation in the case of internationally related Enterprises," dated 23 February 1983, known as the Administration Principles. The Administration Principles do not constitute binding law for taxpayers or the courts but are binding for the tax authority and therefore indicate how the tax authority will treat specific intercompany transactions between related parties. The purpose of the Administration Principles is to provide a directive concerning the tax audit treatment of transfer pricing cases and to ensure a uniform application of rules and methods.

In addition to the three Administration Principles mentioned above, administration circulars concerning income allocation with regard to cross-border cost sharing arrangements (dated 30 December 1999), cross-border secondment of personnel (dated 9 November 2001), cross-border business relations in respect of the duty of determination, the duty of cooperation, adjustments as well as MAPs and EU arbitration procedures (dated 12 April 2005), the application of § 1 Foreign Tax Code to cases of marginal amortizations on loans issued to foreign related entities (dated 29 March 2011), as well as with regard to mutual agreement and arbitration procedures in the field of taxes on income and capital (dated 13 July 2006), have been published since 1999.

On 16 December 2016, the German Federal Council (Bundesrat) approved the Bill Concerning the Implementation of Changes to the EU Administrative Cooperation Directive and of Additional Measures against Base Erosion and Profit Shifting. The core part of the bill is the implementation of the nonpublic CbCR standards as proposed by the OECD in its report on Action 13 of the BEPS project. The bill foresees mandatory CbCR for fiscal years beginning after 31 December 2015. It also includes the implementation of the European Union Automatic Information Exchange Directive, which was adopted in December 2015 and governs the exchange of information concerning advance cross-border rulings and APAs. These actions are flanked by additional transparency measures, namely:

- Modification of already existing statutory transfer pricing documentation obligations, which include the requirement to prepare country-specific (local file) and global (master file) documentation
- Additional information reporting obligations imposed on multinational enterprises

OECD Guidelines treatment

The OECD Guidelines provide support for domestic use but do not constitute binding law in Germany. German transfer pricing regulations and practices do differ from those of the OECD Guidelines with regard to certain issues (e.g., the application of transactional profit methods, documentation requirements and the treatment of transfers of functions).The German tax authorities consider the German transfer pricing laws and regulations to be generally consistent with the OECD Guidelines.

Documentation requirements

Section 90 of the German General Tax Code contains transfer pricing documentation requirements. For the documentation of transfer pricing issues, an Executive Order Law on the Type, Content and Scope of Documentation (effective 30 June 2003) prescribes general requirements and the documentation required in special circumstances. A circular (Administration Principles — Procedures) dated 12 April 2005 provides the tax authority's interpretation of the requirements set out in the General Tax Code and in the Executive Order Law.

General documentation requirements are:

- General information: shareholder relationships, organizational and operative group structure and operations
- Description of intercompany transactions: nature and extent of transactions, intercompany contracts, and a list of important intangibles
- Functions and risks analysis: description of functions and risks the taxpayer bears within the intercompany transaction, contractual terms, business strategies and value chain
- Transfer pricing analysis: selection of the transfer pricing method, appropriateness of the method selected, calculation of the transfer price, list of comparables and documentation of adjustment calculations

Special documentation requirements

The taxpayer has to document any special circumstances used to substantiate the arm's-length nature of the price determined, including special business strategies, business restructurings, cost contribution agreements, overview of APAs and MAPs, information on transfer price adjustments and causes of losses from intercompany transactions, and countermeasures (if losses occur in more than three consecutive financial years).

In general, transfer pricing documentation must be prepared in German. However, taxpayers may ask for approval to prepare transfer pricing documentation in English. In practice, taxpayers mostly use English documentation and provide translations upon tax authorities' request.

Modification of existing German documentation requirements

The Bill Concerning the Implementation of Changes to the EU Administrative Cooperation Directive and of Additional Measures against Base Erosion and Profit Shifting, which was approved by the Federal Council (Bundesrat) on 16 December 2016, provides for a modification of the existing German transfer pricing documentation requirements by introducing a master file and local file documentation requirement.

All entities with gross receipts (third-party and intercompany) of at least EUR100 million in the previous financial year are required to prepare a master file. The master file shall in particular include the following:

- Graphic illustration of the organizational structure
- Summarized description of business activities
- General description of the overall strategy for the use of intangible assets in the value chain, in particular with regard to development, ownership and exploitation
- General description of the way of financing

In addition to the master file requirement, the preparation of country-specific and company-related documentation, also known as the local file, is legally fixed in the bill. The local file shall in particular describe the intercompany transactions of the company within the group and document the arm's-length nature of the respective intercompany pricing. The most important information, which needs to be included, is the selection and application of the transfer pricing method used, as well as the time of the transfer pricing determination (so-called "price setting approach").

The amended master file and local file requirements apply for the first time for financial years starting after 31 December 2016. Finally, the bill mandates a revision of the German Executive Order Law on the Type, Content and Scope of Documentation to provide further guidance on the amended documentation requirements.

Implementation of the CbCR standard

The Bill Concerning the Implementation of Changes to the EU Administrative Cooperation Directive and of Additional Measures against Base Erosion and Profit Shifting, which was approved by the Federal Council (Bundesrat) on 16 December 2016, implemented the CbCR standard as proposed by the OECD in its report on Action 13 of the BEPS project. The requirements of the German CbCR rule are generally in line with the OECD guidance on CbCR and the EU Directive on CbCR.

Accordingly, CbCR obligations apply to German-headquartered multinational groups with annual consolidated group revenue of at least EUR750 million and are required for financial years starting after 31 December 2015. Additionally, a "secondary mechanism" has been implemented for domestic entities that are part of a multinational group that includes both a "secondary reporting local filing" and "surrogate parent filing." The secondary mechanism provides for the filing of the CbC report for financial years commencing after 31 December 2016 only.

CbC reports have to be filed within 12 months, starting from the end of the fiscal year to which they relate. The report will be automatically delivered by the German tax authorities to tax authorities of foreign countries through exchange-of-information channels. The automatic exchange with foreign countries will only take place on the basis of an underlying agreement with the country, i.e., usually a double tax treaty.

The content of the mandated CbC report includes:

- Aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid and accrued, number of employees, stated capital, accumulated earnings and tangible assets other than cash or cash equivalents in each jurisdiction in which the group operates
- Identification of each constituent entity (including permanent establishments) within the group, including the entity's jurisdiction of tax residence (and the jurisdiction under which the entity is organized, if different from its jurisdiction of tax residence) and the nature of the entity's main business activity or activities

For fiscal years starting from 1 January 2017, a German entity will be obliged to indicate in its German tax return whether it is:

- A German group parent company
- A designated surrogate parent company

  Or
- A domestic group company of a foreign group parent company

In the last case, the German entity is also obliged to specify which group entity will file the CbC report and which tax authority will receive the CbC report. If this information is missing in the German tax return, the German entity is required to submit the CbC report by itself (local filing) to the German tax authorities.

Priorities/pricing methods

The application of transfer pricing methods is dependent on the availability and quality of third-party comparable data. Three situations are distinguished: full comparability of the data, limited comparability of the data and non-availability of third-party comparable data.

When full comparability of third-party data exists (after making appropriate adjustments with regard to the functions exercised, the assets used, and the associated opportunities and risks), the law prioritizes the traditional transaction methods: CUP, resale price and cost-plus. Any price within the full range of fully comparable third-party data meets the arm's-length principle.

If limited comparability exists, all OECD methods (whose application is appropriate in the case under review) are allowed, i.e., the aforementioned traditional methods and the transactional profit methods (TNMM and profit split). In case of limited comparability, the range of available third-party comparable data must be limited by applying statistical measures (e.g., the interquartile range).

If no comparable data exists, the law stipulates that taxpayers have to conduct a hypothetical arm's-length analysis to derive arm's-length transfer prices. Accordingly, in compliance with the so-called prudent and diligent business manager principle, and based on the functional analysis and internal projections, the taxpayer has to establish a range of hypothetical arm's-length prices. The range of negotiation is defined by the minimum price a hypothetical seller would accept and by the maximum price a hypothetical purchaser would pay. The taxpayer must use the value within the range of negotiation that has the highest probability of complying with the arm's-length principle. If the taxpayer provides no reasoning behind choosing that value, the arithmetic mean of the range of values is assumed to be the arm's-length transfer price for the transaction under review.

Return disclosures/related-party disclosures

Apart from transfer pricing documentation requirements, there are currently no specific disclosure requirements.

Transfer pricing-specific returns

Apart from transfer pricing documentation requirements, no separate returns for related-party transactions are currently required.

Documentation deadlines

In Germany, contemporaneous documentation requirements exist only for exceptional business transactions. For such extraordinary business transactions (e.g., restructuring within the group), the documentation must be prepared contemporaneously (i.e., within six months of the end of the business year in which the transaction has occurred). However, the preparation of contemporaneous documentation is strongly recommended for all cross-border transactions.

Germany (continued)

Documentation must be submitted within 60 days upon receipt of the tax authority's request. In the case of extraordinary business transactions (e.g., transfer of functions), documentation must be submitted within 30 days of the tax authority's request. In general, the request is made in the course of a tax audit.

Transfer pricing penalties

If a taxpayer does not comply with the transfer pricing documentation requirements to the extent outlined in § 90(3) of the German General Tax Code, a rebuttable presumption applies under which the taxpayer's income had been reduced by the amount of inappropriate transfer prices, thereby forming the basis of a transfer pricing adjustment.

The tax authorities may apply § 162(3) of the German General Tax Code if the taxpayer submits insufficient or no documentation, or if extraordinary transactions have not been recorded contemporaneously. In all three cases, the tax authority is authorized to estimate the income, provided that the taxpayer does not rebut the presumption. This also holds true when a taxpayer does not disclose relevant data available only from the foreign related parties. If estimation by the tax authorities is indicated in such cases and it is possible to determine the relevant income only within a certain range, the range may be fully exploited to the taxpayer's detriment.

The legislation takes into consideration that a single appropriate transfer price does not exist and that comparable third-party prices may vary within price ranges. Under the tax law effective 1 January 2008, the transfer price is adjusted to the median of the range in the event that the taxpayer's transfer price falls outside the full range (in case of full comparability of third-party data) or the interquartile range (in case of limited comparability of third-party data) of arm's-length prices.

Penalties can be assessed based on the taxpayer's noncompliance with the documentation requirements. An actual income adjustment is not subject to penalties, but interest is assessed on the additional tax payments (6% per annum, which is nondeductible for tax purposes). Interest starts accruing 15 months after the end of the calendar year in which the tax liability arose.

If the taxpayer fails to submit transfer pricing documentation or if the documentation provided is unusable or insufficient, a penalty of 5% to 10% on the income adjustment will be applied, with a minimum penalty of EUR5,000.

For late filing, the taxpayer faces a penalty of up to EUR1 million (minimum penalty of EUR100 per day of delay). Penalties are imposed after the closing of a tax audit. The aforementioned penalties constitute nondeductible expenses for tax purposes. Section 146(2b) of the German Federal Tax Code further allows the assessment of penalties of up to EUR250,000 in case documents are not provided to tax auditors in a timely manner upon request.

According to the Bill Concerning the Implementation of Changes to the EU Administrative Cooperation Directive and of Additional Measures against Base Erosion and Profit Shifting, which was approved by the Federal Council (Bundesrat) on 16 December 2016,, the penalty regime has been tightened and follows a transactional approach. If no or insufficient transfer pricing documentation for a certain transaction is submitted, the burden of proof shifts to the taxpayer, and the German tax authorities can assess income adjustments up to the most unfavorable point within the arm's-length range. Taxpayers, therefore, have to ensure that their transfer pricing documentation is complete and includes all intercompany transactions they are involved in, e.g., including intercompany financial transactions. Noncompliance with the CbCR obligation may be subject to a penalty of up to EUR10,000.

Penalty relief

The taxpayer is required to present utilizable documentation to the German tax authority. Accordingly, no penalty relief applies.

Statute of limitations on transfer pricing assessments

The assessment period for taxes (§ 169 of the General Tax Code) is four years. For customs duties, it is shorter, and in cases of grossly negligent evasion of taxes or tax fraud, it is much longer (10 years in the case of tax fraud). These periods commence at the end of the calendar year in which the tax liability arose. No special time limit provisions apply if intercompany transactions are involved. The general regime of the statute of limitations applies in accordance with the General Tax Code. Accordingly, each case has to be carefully considered to determine the specific statute of limitations. Most taxes are levied by way of assessment. Assessments can be made only within the statutorily prescribed assessment period, which is subject to the statute of limitations for assessments.

The assessment period, however, does not start before the end of the calendar year in which the taxpayer has submitted the tax return (but also does not start later than three years after the year the tax liability arose). There are a number of statutory exceptions to the statute of limitations for assessments (e.g., it should be kept in mind that the limitation period is interrupted when a tax audit begins).

Section 175a of the General Tax Code stipulates that tax assessments can be amended due to the result of a MAP or European Union (EU) arbitration procedure up to one year after the effective date of such agreement, regardless of whether the aforementioned statutes of limitations have expired before.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit in Germany is high for domestic and foreign groups of companies. Usually, a tax audit covers a three- to four-year period on a continuous basis. The likelihood of transfer pricing issues being scrutinized during a tax audit is also high and continuously rising. It is expected that transfer pricing issues will continue to attract significant attention in tax audits, in particular, with respect to transactions qualifying as exceptional business transactions under the documentation provisions, such as the transfer of functions. Further, many tax audits increasingly focus on (brand) royalty charges and financing transactions. The likelihood that the transfer pricing mechanism will be challenged, if transfer pricing is reviewed as part of the audit, is also high.

APA opportunity

In Germany, taxpayers may apply for a bilateral or multilateral APA in relation to transfer pricing questions. The German Ministry of Finance issued an APA circular on 5 October 2006 that defines the APA procedures and provides guidance with regard to the negotiation of APAs. Additionally, the Annual Tax Act 2007 introduced fees for APAs: EUR20,000 for a new APA, EUR15,000 for a renewal and EUR10,000 for a modification during the term of the APA. For small taxpayers (i.e., those with intercompany tangible goods transactions below EUR5 million and other intercompany transactions below EUR500,000), the filing fee is half of the above amounts. The administrative competence for APAs is centralized in the Federal Central Tax Office. From application to conclusion, the APA process can take 18 months to several years. According to the APA circular, the APA term should be not less than three years and not more than five years. An agreement reached between two competent authorities will be made conditional in two regards: the taxpayer must consent to the Intergovernmental agreement and must waive its right to appeal tax assessments, to the extent that they are in line with the content of the APA.

Impact of new OECD BEPS Action 8–10 guidelines

Germany does not have an explicit reference in its domestic law to the latest approved version of the OECD Guidelines. The OECD Guidelines provide support for domestic use but do not constitute binding law in Germany. Although there is currently no official position, it can be assumed that the German tax authorities will apply the amended OECD Guidelines on transactions that can still come under tax audit, i.e., also for periods before 23 May 2016. In addition, it is expected that the German Federal Ministry of Finance will provide further guidance in the form of additional respectively amended "Administrative Principles" with regard to BEPS 8–10 items.

Ghana

Taxing authority and tax law

Taxing authority: Ghana Revenue Authority (GRA)

Tax law: The Income Tax Act, 2015, Act 896 as amended (ITA) is the main income tax law in Ghana. The Regulations to the Tax Act and the nine double tax agreements currently in effect complete the tax architecture.

Local GAAP: Ghana now mandates all companies to use the International Financial Reporting Standards.

Relevant regulations and rulings

Section 31 of the ITA requires persons in a controlled relationship to calculate their income tax and tax payable in accordance with the arm's-length standard. The transfer pricing regulations, 2012 (L.I 2188), which became effective from 14 September 2012, also provides rules regarding the application of the arm's-length standards.

The rules apply to transactions between:

- Taxpayers in a controlled relationship
- A permanent establishment and its head office
- A permanent establishment and other related branches of the permanent establishment
- A taxpayer and another taxpayer who are in an employment relationship

The regulations apply to the following intercompany transactions between affiliated companies:

- The purchase and sale of goods
- The purchase, sale, lease or use of a tangible asset
- The purchase, sale, lease or use of an intangible asset
- The provision of management services, technical services and other intragroup services
- The provision of finance and other financial arrangements
- Rent and hire charges
- Any other transaction that may affect the profit or loss of an entity

Regarding thin capitalization, a resident entity, other than a financial institution, in which 50% or more of the underlying ownership is held by an exempt person, is deemed to be thinly capitalized if the ratio of the debt-to-equity ratio exceeds 3:1. Interest deductions or exchange losses arising on debt in excess of the 3:1 ratio are disallowed. An exempt person means (a) a nonresident person or (b) a resident person for whom interest paid or foreign exchange gain realized with respect to the debt claim constitutes exempt income. Additionally, the commissioner-general may also re-characterize an arrangement between persons in a controlled relationship, including re-characterizing debt financing as equity financing if, in his opinion, the arrangement does not comply with the arm's-length standard.

OECD Guidelines treatment

The rules follow the OECD Guidelines.

Documentation requirements

The rules state that a person who engages in a transaction with another person with whom it has a controlled relationship shall maintain contemporaneous documentation detailing the transactions engaged in by that person for each tax year. The regulations provide guidance about the nature of documentation to be retained. Generally, this follows the OECD requirements.

The taxpayer shall, for purposes of these regulations, file returns on income in accordance with § 124 of the ITA. The form prescribed by the commissioner-general for purposes of filing returns on income shall include a list of disclosures relating to the taxpayer's transfer pricing study.

Priorities/pricing methods

The transfer pricing rules require the use of the most appropriate method to price related-party transactions.

Similar to the OECD Guidelines, the transfer pricing methods approved by the commissioner-general include:

- CUP
- RPM
- CPM
- Transactional profit split method
- TNMM

Notwithstanding the transfer pricing methods stated, the commissioner-general may use a different method or, in writing, permit a taxpayer to use another method. The commissioner-general may do this where, in his opinion, having considered the nature of the transaction, the arm's-length price cannot be determined by the use of any of the five stated transfer pricing methods. A taxpayer who intends to use an unspecified method may have to apply to the commissioner-general for prior approval. The taxpayer has to prove that none of the specified methods can reasonably be applied to determine the arm's-length nature of the intragroup pricing and that the unspecified method yields a result consistent with the arm's-length principles. Although not binding on the taxpayer, the practice notes on the transfer pricing regulations state that where the CUP and another TP method are equally reliable, the CUP is preferred by the commissioner-general. Similarly, in applying the CUP, the commissioner-general prefers the use of internal comparables.

Return disclosures/related-party disclosures

A transfer pricing-specific form must be submitted.

Transfer pricing-specific returns

Filing an annual return on transfer pricing transaction is required and forms part of the Corporate Income Tax Return (Form 22a or Form 22b). The return must be filed no later than four months after the end of the taxpayer's financial year. The return requires disclosure of intercompany transactions, related parties to the transactions and the transfer pricing methods applied. For first-time submissions, the organizational structure of the person globally, showing the location and ownership linkages among associated enterprises, is required to be disclosed in the transfer pricing-specific form.

Ghana (continued)

Documentation deadlines

The commissioner-general may request additional information from the taxpayer, who would be required to comply with the request within the required time frame. No guidance is currently available about the time frame.

Transfer pricing penalties

The provisions of an act of fraud, failure to file returns, failure to maintain records, penalty for underpayment of tax and offenses may also apply to the transfer pricing regulations.

Penalty relief

Under Ghanaian law, any tax due and payable resulting from an adjustment performed by the commissioner-general will be deemed as additional tax. Additional penalties can be issued under the act for offenses of fraud, failure to file, refund or the underpayment of tax.

Statute of limitations on transfer pricing assessments

The general statute of limitations prescribes 12 years, after which the commissioner-general cannot recover tax. The tax law, however, prescribes six years. Where fraud is involved, there is no limit.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The commissioner-general may, upon the receipt of returns filed, examine if the amounts charged to the final accounts, or credited to the final accounts, are within the arm's-length range.

The commissioner-general may also conduct a transfer pricing audit any time during the year, even when the person has not filed a return. In practice, the likelihood of an annual tax audit (including transfer pricing scrutiny) occurring is medium. The likelihood of the pricing method being challenged in a transfer pricing audit is low to medium.

APA opportunity

There is no APA available for multinationals operating in Ghana.

Impact of new OECD BEPS Action 8–10 guidelines

Ghana is a member of the OECD Development Centre. In the transfer pricing practice notes issued by the commissioner-general (which binds the commissioner-general only), the commentaries in the OECD Guidelines are referred to as being interpretive aids to the transfer pricing regulations. The commissioner-general, however, has not issued any communication specific to the updates introduced by the BEPS 8–10 reports to the OECD TP Guidelines, and it will be important to monitor further developments in this area.

Gibraltar

Taxing authority and tax law

Taxing authority: Commissioner of Income Tax

Tax law: Income Tax Act 2010 and rules and regulations adopted pursuant to that Act

Relevant regulations and rulings

There are no specific transfer pricing rules set out in Gibraltar's tax law. However, § 40 of the Income Tax Act 2010 gives the Commissioner of Income Tax the power to counter tax avoidance and provides that this is to be construed in such manner as best secures consistency among:

- The powers granted in § 40(1)
- Internationally accepted principles for the determination of profit in respect of activities within a multinational group of companies, notably the rules that, at 1 January 2011, were contained in Article 9 of the Model Tax Convention on Income and on Capital published by the OECD
- All documents published by the OECD, at any time before 1 January 2011, as part of its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, together with such documents issued by the OECD on or after 1 January 2011, which are designated by the minister and published in the Gibraltar Gazette

OECD Guidelines treatment

As set out above, the general anti-avoidance provisions in the tax law state that those provisions shall be construed in a manner that best secures consistency among those powers, internationally accepted principles for the determination of profit in respect of activities within a multinational group of companies, notably the rules that, at 1 January 2011, were contained in Article 9 of the Model Tax Convention on Income and on Capital published by the OECD, and such documents issued by the OECD on or after 1 January 2011, which are designated by the relevant minister and published in the Gibraltar Gazette.

Documentation requirements

Transfer pricing documentation is not required by law.

However, in practice, it is recommended that taxpayers maintain contemporaneous documentation in areas of subjectivity. The existence of documentation need not be disclosed in or provided with the return. In practice, due to Gibraltar's relatively low rate of corporate tax (10% for most companies), the requirement to document transfer pricing is more likely to arise from the jurisdiction in which the Gibraltar-taxable entity's counterparty is taxable. This would not apply when the counterparty is based in a zero-tax jurisdiction.

Priorities/pricing methods

There is nothing specific in the legislation, other than the reference above to documents published by the OECD.

Return disclosures/related-party disclosures

Not applicable.

Gibraltar (continued)

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

There are no specific transfer pricing penalties. If tax is underpaid, or paid late, a surcharge of 10% of the underpaid amount is due immediately after the date at which the tax was due. A further surcharge of 20% of the underpaid amount is due if the amount remains underpaid after another 90 days. Additional penalties are payable for failing to comply with specific provisions in the Income Tax Act 2010, though none specifically relate to transfer pricing.

Penalty relief

There is no specific provision in the legislation for relief from surcharges. Penalties may be removed at the discretion of the Commissioner of Income Tax.

Statute of limitations on transfer pricing assessments

The Commissioner of Income Tax has one year from the date that a return is received to give notice of his intention to make an inquiry about a return. After that date expires, for up to six years from the end of the relevant accounting period or tax year, the Commissioner of Income Tax may raise an assessment upon discovery that a person has not been assessed tax or was assessed at a lesser amount than ought to have been assessed. There is no time limit for additional assessments to be raised when any form of fraudulent or willful default or negligent conduct has been committed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Although queries are frequently raised by the Income Tax Office on behalf of the Commissioner of Income Tax, queries relating to transfer pricing are relatively uncommon.

In practice, because of Gibraltar's relatively low rate of corporate tax (10% for most companies), the requirement to justify transfer pricing is more likely to arise from the jurisdiction in which the Gibraltar-taxable entity's counterparty is taxable. This would not apply when the counterparty is based in a zero-tax jurisdiction.

APA opportunity

Taxpayers may request advance tax rulings from the Commissioner of Income Tax. Such rulings generally do not have a fixed expiry date, but the rulings state that they are given on the basis of the facts and circumstances as described by the taxpayer in the request and on the basis of the tax law in force at the time of the ruling.

Gibraltar (continued)

Impact of new OECD BEPS Action 8–10 guidelines

There has been no specific amendment to tax law in Gibraltar to apply the amended OECD Guidelines 2016.

However, as stated above, the general anti-avoidance provisions in the tax law state that those provisions shall be construed in a manner that best secures consistency among those powers, internationally accepted principles for the determination of profit in respect of activities within a multinational group of companies, and such documents issued by the OECD on or after 1 January 2011, which are designated by the relevant minister and published in the Gibraltar Gazette.

Greece

Taxing authority and tax law

Taxing authority: Ministry of Finance

Tax law: Greek Income Tax Code (Law 4172/2013) and Greek Tax Procedures Code (Law 4174/2013)

Relevant regulations and rulings

Transfer pricing in Greece is driven by the Income Tax Code (L. 4172/2013) and the Tax Procedures Code (L. 4174/2013), double taxation treaties and supranational norms. Other decisions and guidelines issued are provided below:

- Circular POL 1142/02.07.2015 aims to clarify transfer pricing issues, affecting intercompany transactions pertaining to tax years starting from 1 January 2014 onward. The circular provides long anticipated clarifications (e.g., clarifications on the concept of "associated/affiliate persons," the calculation of the interquartile range, the use of databases for the comparable company search and the benchmarking studies to be used for documentation purposes).
- Issued by the General Secretary of Public Revenues, Decision 1097/2014, as amended by Decision 1144/2014, provides the mandatory contents of the Transfer Pricing Documentation File for intercompany transactions referring to fiscal years starting on or after 1 January 2014.
- Decision 1284/2013 of the General Secretary of Public Revenues determined the procedures for the conclusion, amendment, revocation and annulment of an APA. The decision refers to the procedures of both unilateral and bilateral APAs for cross-border intercompany transactions that take place in financial years starting 1 January 2014 onward.
- APA guidelines and templates from the Ministry of Finance were issued in October 2014.

OECD Guidelines treatment

The aforementioned legislative framework confirms the application of the OECD Guidelines. More specifically, according to the Income Tax Code, the provisions regarding intercompany transactions are interpreted and implemented in accordance with the OECD Guidelines.

Documentation requirements

Persons subject to documentation requirements include taxpayers with a total value of intercompany transactions of more than EUR200,000 or EUR100,000, depending on whether their turnover is more or less than EUR5 million respectively.

Entities exempt from income tax obligations are also exempt from transfer pricing documentation requirements.

Taxpayers qualifying as subject to documentation requirements need to document all transactions irrespective of value, whereas expense transactions fully tax adjusted for corporate income tax purposes are exempt from documentation requirements.

The transfer pricing file as per Decision 1097/2014 consists of both a master file and a local file, in line with the OECD Action 13 BEPS initiative:

- The master file is standard for all group companies and contains common, standardized information for the group affiliates, as well as for the branches.
- The local file (Greek file) contains additional information regarding the Greek companies.

Furthermore, companies are obliged to electronically submit a Summary Information Table of their intercompany transactions to the tax authorities up to the deadline for the submission of companies' corporate income tax (CIT) returns (i.e., in principle, 30 June for companies with a financial year-end of 31 December).

Priorities/pricing methods

Greek regulations follow the OECD Guidelines. More specifically, Decision 1097/2014, as amended by Decision 1144/2014, adopts the OECD methods. However, the traditional transaction methods (CUP, resale price and cost-plus) are preferred, while transactional profit methods are allowed when the traditional methods do not lead to reliable results. In particular, transactional profit transfer pricing methods, such as the TNMM and profit split, can be used only in cases where the above traditional transfer pricing methods are considered ineffective because of the absence of available or sufficient comparables, provided that a detailed justification is included in the documentation files.

Return disclosures/related-party disclosures

Taxpayers disclose their intragroup transactions by annually filing a Summary Information Table of transfer pricing information. For intragroup transactions taking place from 1 January 2015, a Summary Information Table must be filed up to the deadline for the submission of companies' CIT returns.

Transfer pricing-specific returns

Companies must submit a Summary Information Table of their intercompany transactions to the tax administration up to the deadline for the submission of companies' CIT returns.

Documentation deadlines

The transfer pricing documentation should be prepared annually by the deadline for the submission of companies' CIT returns, however the transfer pricing documentation is not filed with the tax authorities until it is officially requested. The taxpayer should be able to present the transfer pricing file to the audit authorities within 30 days following their request.

Transfer pricing penalties

Transfer pricing penalties were recently amended with L. 4337/17.10.2015 in a rationalization effort. More specifically, the following changes are introduced to the penalties imposed in case of noncompliance with transfer pricing (TP) obligations:

- Penalties for late filing of the Summary Information Table (SIT) are calculated at 0.1% on the value of the transactions subject to documentation requirements (minimum penalty of EUR500 — maximum penalty of EUR 2000). In the event of filing an amended SIT, a penalty applies only to the extent that the declared amounts are amended and such amendments exceed the amount of EUR200,000. In the event that the amended amounts exceed EUR200,000, then the penalty is calculated at 0.1% on the value of the transactions subject to documentation requirements (minimum penalty of EUR500 — maximum penalty of EUR2,000).
- Penalties for an inaccurate filing of the SIT are calculated at 0.1% on the value of the amounts to which the inaccuracy relates (minimum penalty of EUR500 — maximum penalty of EUR2,000). If the inaccuracy consists in differences in the amounts declared and does not exceed 10% of the value of the total transactions subject to documentation, no penalty applies.
- Penalties for non-filing of the SIT are calculated at 0.1% on the value of the transactions subject to documentation requirements with a minimum penalty of EUR2,500 and a maximum penalty of EUR10,000.
- In the case of failure to provide the tax authorities with TP documentation within 30 days from the official request, a penalty of EUR5,000 applies, which is increased to EUR10,000 if TP documentation is provided after 60 days, and to EUR20,000 if it is provided after 90 days or it is not provided at all.

Greece (continued)

In the case of noncompliance with the arm's-length principle, the difference in taxable profits shall increase the tax base of the company. In addition, the general income tax inaccuracy penalties ranging from 10% to 50% of the tax underpayment will apply, as well as default interest.

Penalty relief

No penalty relief is available.

Statute of limitations on transfer pricing assessments

Taxpayers must keep documentation files for a period equal to the statute of limitations for performance of a tax audit, as specified by the provisions of the general tax provisions applicable for the said financial year.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In the course of the statutory audit, certified auditors may be required to issue a tax certificate to the companies they audit by performing a special audit of their tax affairs, which takes place at the same time as with the statutory audit. Based on this, the transfer pricing documentation file should be available to the certified auditors before the tax certificate is issued. Further, based on our recent experience, local tax authorities tend to scrutinize taxpayers' transfer pricing arrangements in the course of tax audits, focusing especially in the review of the benchmarking studies included in the documentation files.

The likelihood of tax audit by the local tax authorities in general can be considered as high, based on recent experience. Further, in the course of general audits, the likelihood that transfer pricing will be reviewed is characterized as certain, based on the audit program followed by the Greek tax authorities. Tax authorities tend to challenge related-party transactions and there is a clear trend toward increased awareness of transfer pricing issues among local tax auditors.

APA opportunity

The Tax Procedures Code, along with the implementing decision, provides the possibility of an APA from 1 January 2014. An APA will cover any relevant criteria used for the intragroup pricing.

These criteria mainly includes the transfer pricing method, the comparable data to be used and any relevant adjustments to be made, as well as the critical assumptions under which the approved transfer pricing methodology will remain valid.

An APA term cannot exceed four years, and a retroactive effect is not possible.

Impact of new OECD BEPS Action 8–10 guidelines

Greece has already adopted the two-tier approach with a master file and a local file, while the respective Greek TP provisions refer in general to the relevant OECD guidance. However, there is no official position or case law that has been recommended for the amendments.

Based on official guidance issued by the Greek Ministry of Finance, the intragroup transactions' pricing should be tested at the time of concluding the transaction; thus in the absence of explicit guidance regarding the time frame for the application of revised OECD Transfer Pricing Guidelines in Greek legislation, the revised Guidelines should be applicable to transactions entered into on or after 23 May 2016. Keeping this in mind, the possibility of the Greek tax authorities taking a robust position and trying to retroactively apply new guidance if this supports their position cannot be ruled out.

Guam

Taxing authority and tax law

Taxing authority: Department of Revenue & Taxation (DRT)

Tax law: Internal Revenue Code (IRC)

Relevant regulations and rulings

- Treasury Regulations (Treas. Regs.) §§1.482, 1.6662, 1.6038A, 1.6038C
- Revenue Procedures (Rev. Proc.) 99-32, 2006-9, 2006-54 and 2007-13
- On 22 November 2013, the Internal Revenue Service (IRS) issued Notice 2013-78, which contains a proposed revenue procedure that would update and supersede Rev. Proc. 2006-54 and 2006-2C.B 1035, providing guidance for requesting assistance from the US competent authority acting through the Advance Pricing and Mutual Agreement (APMA) Program. The proposed revenue procedure intends to substantially improve the clarity, readability and organization of Rev. Proc. 2006-54. The IRS sought taxpayer comments in March 2014; a final revenue procedure is pending.
- On 22 November 2013, the IRS issued Notice 2013-79, which contains a proposed revenue procedure that would update and supersede Rev. Proc. 2006-9 and 2008-31. The revenue procedure aims to provide guidance and instruction on APAs and the IRS' administration of APAs. The IRS sought taxpayer comments in March 2014; a final revenue procedure is pending.
- In April 2007, the IRS designated cost-sharing arrangement (CSA) buy-ins as a "Tier I" issue that was thus susceptible to intensified audit scrutiny. While the IRS' tier process was officially eliminated in August 2012, it was replaced by knowledge networks known as Issue Practice Groups (IPGs) for domestic issues and International Practice Networks (IPNs) for international issues. CSA buy-ins are expected to remain an issue upon which the IPNs will focus.
- A coordinated issue paper (CIP) was released on 27 September 2007, providing internal IRS guidance for examiners in developing CSA exam positions. However, the CIP was withdrawn on 26 June 2012.

The CSA regulations were issued in final form on 16 December 2011. Additional temporary and proposed regulations were published on 19 December 2011. The final CSA regulations closely follow the temporary CSA regulations that were issued in January 2009, and the additional temporary and proposed regulations make only minor changes to the final regulations. The final regulations provide the IRS with the discretion to make periodic adjustments and formalize other proposed requirements for compliance.

Finalized services regulations were issued on 31 July 2009. These regulations provided for only minor modification of the temporary regulations that had been in effect as of 1 January 2007. The new services regulations explicitly require stock-based compensation to be considered as part of total costs. Guidance regarding the list of "specified covered services," as defined in Treas. Reg. 1.482-9(b)(3)(i), can be found in Rev. Proc. 2007-13.

OECD Guidelines treatment

The DRT considers its transfer pricing laws and regulations to be wholly consistent with the OECD Guidelines.

For domestic purposes, the OECD Guidelines do not provide support and would not be directly relevant to the application of any pricing methods. However, if taxpayers pursue competent authority relief from double taxation or a bilateral APA, the OECD Guidelines are relevant and may be used to demonstrate compliance with international principles.

Documentation requirements

Transfer pricing documentation is not required by law. However, in practice, it is recommended that taxpayers maintain contemporaneous documentation to avoid the penalties described above. The existence of documentation need not be either disclosed on, or provided with, the return.

For penalty avoidance purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained certain documentation (further described below) that substantiates the taxpayer's assertion that it reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application) provided the most reliable measure of an arm's-length result under the principles of the best-method rule.

The principal documents required by the regulations are:

- An overview of the taxpayer's business and an analysis of the legal and economic factors affecting pricing
- A description of the organizational structure
- Any documents explicitly required by regulations (e.g., CSA documents)
- A description of the pricing method and reasons the method was selected (a best-method analysis)
- A description of alternative methods and why they were not selected
- A description of controlled transactions and any internal data used to analyze them
- A description of comparables used, how comparability was evaluated and any adjustments that were made
- An explanation of any economic analysis and any projections used to develop the pricing method
- Any material data discovered after the close of the tax year but before filing the tax return
- A general index of the principal and background documents and a description of the record-keeping system

Priorities/pricing methods

The regulations provide a "best-method" rule for determining the appropriate method to be applied by the taxpayer for each intercompany transaction.

- For tangible goods, the DRT accepts the CUP, resale price, cost-plus, profit split and unspecified methods.
- For intangible goods, the DRT accepts the CUT, cost-plus, profit split and unspecified methods.
- For services, the DRT accepts the services cost, comparable uncontrolled services price, gross services margin, cost of services plus, cost-plus, profit split and unspecified methods.
- For CSA buy-ins, the DRT accepts the CUT, income, acquisition price, market capitalization, residual profit split and unspecified methods.

Return disclosures/related-party disclosures

Under new regulations issued in 2010, certain taxpayers must also disclose their uncertain tax positions (UTPs) on Schedule UTP and provide information such as the ranking of the positions by the sizes of their reserves and concise descriptions of the tax positions. There is a phase-in period so that by 2014, the UTP disclosures will be required for corporations with assets of USD10 million or more.

Guam (continued)

Transfer pricing-specific returns

Taxpayers are required to file Forms 5471, 5472 and 8865 regarding transactions with related parties.

Documentation deadlines

If documentation is prepared to help protect against penalties, then it must be in place by the filing date of a timely filed Guam tax return. Taxpayers must provide documentation to the DRT within 30 days of an examiner's request.

Transfer pricing penalties

Pursuant to IRC §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. The penalties are calculated as a percentage of the underpayment, or the penalty may apply to a valuation misstatement. There is no penalty for failure to have documentation; however, documentation may help taxpayers avoid a penalty.

Penalty relief

Penalties may be avoided by establishing reasonable cause and good faith via the preparation of documentation of the taxpayer's application of IRC §482, as described below.

Statute of limitations on transfer pricing assessments

A general statute of limitations applies in Guam: 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. There is no statute of limitations for fraud-related adjustments. Most treaties with trading partners provide the IRS access to closed years to provide relief from double taxation pursuant to a mutual agreement procedure. Note that Guam is not party to US tax treaties.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit is dependent on the facts and circumstances. The introduction of what the OECD refers to in its Action Plan on BEPS as "high-risk transactions" increases the likelihood of a tax audit.

Guam does not have the same human and material resources available to the IRS. Therefore, the likelihood of transfer pricing scrutiny from Guam is basically the same as the likelihood of a general tax audit.

APA opportunity

Taxpayers may request unilateral, bilateral or multilateral APAs. The APA process is administered by the IRS' APMA Program. Guidance regarding APAs can be found in Rev. Proc. 2006-9. The revenue procedure has strict case management procedures, disclosure requirements and detailed guidance regarding the submission and processing of APA requests. Additional competent authority guidance is provided in Rev. Proc. 2006-54. Updates to both revenue procedures are pending.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Guatemala

Taxing authority and tax law

Taxing authority: Tax Administration Superintendence (*Superintendencia de Administración Tributaria*, or SAT)

Tax law: Tax Legislation Update Law (TLUL)

Relevant regulations and rulings

Guatemala issued transfer pricing rules in 2012, and they are included in the TLUL of the Congress Decree 10-2012. By means of such TLUL, the rules are effective from 1 January 2013 onward. However, Decree 19-2013, approved by the Congress on 20 December 2013, changed the effective date of the regulations to tax year 2015 and onward. Decree 19-2013 states that the SAT is still entitled to request information regarding the content of Chapter VI of the TLUL. Chapter VI of the TLUL includes, among other items, the definition of "arm's-length principle" and "related parties," the criteria that taxpayers must follow to perform a comparability analysis, the methods to apply when assessing the arm's-length principle, the taxpayer's obligation to prepare and maintain the transfer pricing documentation necessary to support the arm's-length nature of intercompany pricing, and the empowerment of the tax authorities to adjust prices.
On 11 March 2014, the SAT issued an announcement in the *Publinews* gazette, affirming the obligation of taxpayers to comply with the transfer pricing regulations for the period from 1 January 2013 to 20 December 2013. This clarifies the requirements in the wake of the issuance of Decree 19-2013.

OECD Guidelines treatment

Guatemala is not an OECD member, and there is no specific reference to the OECD Guidelines in the TLUL.

However, the transfer pricing provisions in the TLUL are mainly based on the OECD Guidelines and apply to all of the transactions conducted between Guatemalan taxpayers and their related parties abroad. The transfer pricing rules also present an additional non-OECD method (the import and export valuation method, or "sixth method"), which is intended to be used for transactions involving imports or exports of goods with well-known prices in international markets.

Documentation requirements

Contemporaneous transfer pricing documentation must be maintained. The documentation must include:

- Taxpayer corporate group information that affects the relationship with the taxpayer:
  - General information regarding the corporate group's legal and organizational structure
  - Description of the intercompany transactions performed by the companies of the corporate group
  - Description of the functions performed and risks assumed by the companies of the corporate group
  - Information regarding the intangible assets of the corporate group
  - Description of the transfer pricing policy of the corporate group
  - Intercompany service agreements subscribed by the companies of the corporate group
  - APAs subscribed to by the companies of the corporate group
  - Annual report of the corporate group

- Taxpayer information:
  - Identification of the taxpayer and its related parties
  - Description of the intercompany transactions performed by the taxpayer
  - Comparability analysis
  - Description of the transfer pricing methodology applied

Priorities/pricing methods

Acceptable transfer pricing methods are the CUP, resale price, cost-plus, profit split, TNMM, and the imports and exports valuation method (the "sixth method").

The CUP, resale price and cost-plus methods take priority over the transactional methods. In addition, the sixth method is preferred for transactions involving imports or exports of goods with well-known prices in international markets.

Return disclosures/related-party disclosures

Taxpayers are required to attach their audited financial statements (expressed in International Financial Reporting Standards from FY2013 onward), which will include information regarding their intercompany transactions, to the annual tax return.

Transfer pricing-specific returns

Regulations to Chapter VI of the TLUL were enacted in 2013. The main provision of these regulations is the filing obligation in the form of a transfer pricing information return.

From FY2015 onward, taxpayers are required to file a transfer pricing information return in the form of an appendix to the annual tax return, which must be presented by 31 March 2016.

Documentation deadlines

As of FY2015, documentation must be readily available by the due date of the annual income tax return (which must be presented by 31 March 2016) and must be kept as part of the company's accounting books and records. If requested by the tax authorities, documentation should be provided within 20 days from the receipt of the notice.

Transfer pricing penalties

According to Article 66 of the Regulations to the TLUL, penalties for failure to comply with the transfer pricing obligations correspond to the general tax penalties. Penalties for failure to present the transfer pricing documentation, upon request of the tax authority, would be GTQ5,000 for the first time, GTQ10,000 for the second time and GTQ10,000 plus 1% of the taxpayer's gross income from then on.

In addition, any additional tax generated by price adjustments made by the SAT is subject to surcharges and penalty interest.

Penalty relief

There are currently no provisions for reductions in penalties.

Guatemala (continued)

Statute of limitations on transfer pricing assessments

The statute of limitations on assessments is four years from the date of filing the tax return.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit and transfer pricing assessments as part of a general tax audit is medium. Although transfer pricing regulations are relatively new in Guatemala, the SAT has been performing transfer pricing audits to taxpayers regarding fiscal year 2013, and during 2016 the DGI requested fiscal year 2016 transfer pricing documentation from all taxpayers that informed intercompany transactions. When transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is high.

APA opportunity

APAs are contemplated in Article 63 of the TLUL. Taxpayers can request an APA for a maximum of four years. The procedures for establishing an APA are established in Articles 57 to 63 of the Regulations to the TLUL.

Impact of new OECD BEPS Action 8–10 guidelines

Upon the existing transfer pricing provisions, there is no reference to the OECD Guidelines, and as of today, the tax authorities have not made public any official initiative to update transfer pricing regulations regarding the new OECD Guidelines as a result of the BEPS 8–10 reports on 23 May 2016.

Nevertheless, the tax authorities have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters that serve as possible legal frameworks to implement BEPS actions in Guatemala. However, it is hard to predict at this stage whether the SAT will amend current transfer pricing regulations, and if so, the time frame in which that would occur.

Honduras

Taxing authority and tax law

Taxing authority: Tax Administration of Honduras (*Servicio de Administración de Rentas*, or SAR)

Tax law:

- Decree No. 232-2011 that establishes the Transfer Pricing Law, Articles 1 to 22
- Executive Decree No. 027-2015, with its regulations on transfer pricing, Articles 1 to 40
- Communication — DEI – SG – 004 – 2016

Relevant regulations and rulings

Honduran transfer pricing provisions apply to all transactions conducted by Honduran taxpayers with local related entities, foreign related entities and with entities operating under a special tax regime in Honduras. The regulations also apply to transactions conducted by taxpayers with entities domiciled in tax havens.

The transfer pricing provisions also include an additional non-OECD method (the import and export valuation method, or "sixth method"), which is intended to be used for transactions involving goods with well-known prices in international markets. The Transfer Pricing Law is in force from 1 January 2014.

OECD Guidelines treatment

The OECD Guidelines can be relied upon for interpretation of the rules, as long as they do not contradict the Honduran tax system.

Documentation requirements

Contemporaneous transfer pricing documentation regarding related-party transactions is mandatory and must be maintained. According to Article 32 of the Executive Decree No. 027-2015, the documentation must include at least the following information:

- The activities and functions performed by the taxpayer
- The risks assumed and assets used by the taxpayer in carrying out these activities and functions
- The details of the items, documents, facts and circumstances assessed for justifying the prices or amounts between related entities
- Detail and quantification of transactions with related entities
- Identification of related entities with whom the declared intercompany transactions were performed
- The valuation method used, indicating the reasons and arguments why it was considered as the most appropriate method
- Identification of each of the comparable transactions and comparable factors selected
- Identification of the sources of information from which comparable transactions and comparability factors were obtained
- Details of the elements, quantification and methodology used to practice the necessary adjustments over the selected comparable
- Details of comparable transactions and comparability factors not selected, stating the reasons and considerations for disposal
- Description of the comparable company's business and its characteristics
- The median and the arm's-length range
- The arm's-length price
- Details of the adjustments to transfer prices for these to comply with the arm's-length principle

Honduras (continued)

Priorities/pricing methods

The provisions require the application of the most appropriate transfer pricing method. The specified methods are the CUP, resale price, cost-plus, profit split, TNMM and any other alternative method (as long as it is possible to demonstrate that no other method can be reasonably applied, and that it represents what third parties will agree upon under comparable arm's-length circumstances). A taxpayer can use an alternative method when it is in accordance with the international practice and standards, and previously approved by the SAR.

Return disclosures/related-party disclosures

Taxpayers must report on the income tax return whether they conducted transactions with related parties and disclose the total amount of such related-party transactions, indicating if they are income, purchases or other expense items.

Transfer pricing-specific returns

An informative return on the transactions conducted with related parties should be filed annually, as follows:

- For fiscal years that ended in December, taxpayers must file the transfer pricing return between 1 January and 30 April.
- For a special fiscal year that did not end in December, taxpayers must file the transfer pricing return within three months after the fiscal year-end.

Documentation deadlines

Taxpayers are required to prepare transfer pricing documentation annually by the due date of the income tax return. The documentation should be filed only if requested by the SAR.

Transfer pricing penalties

If taxpayers fail to provide information, or provide false, incomplete or inaccurate information in response to a request by the SAR, a penalty of USD10,000 applies.

If taxpayers report taxable income less than it should have been under arm's-length conditions, a penalty of 15% on the corresponding income adjustment applies.

If taxpayers fail to provide the correct information or fail to declare a correct taxable income, then the penalties will be the greater of 30% or USD20,000.

If taxpayers fail to comply with any other provision of the Transfer Pricing Law, a penalty of USD5,000 applies.

Penalty relief

There is currently no penalty relief regime in place.

Statute of limitations on transfer pricing assessments

The statute of limitations on general tax assessments is 5 to 10 years. The term is extended with the filing of an amended return.

Honduras (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is categorized as high. The likelihood of transfer pricing assessments as part of a general tax audit is considered medium. The SAR has not yet initiated any tax audits regarding transfer pricing because the regulations come into force as of tax year 2014. In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology is challenged is medium.

APA opportunity

APAs are contemplated under the provisions of Decree 232-2011 and Executive Decree 027-2015. Taxpayers can request an APA for a maximum of five years. However, the corresponding regulations have not yet been enacted.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law from the SAR yet; however, it will be important to monitor further developments in this area.

Hong Kong (SAR)

Taxing authority and tax law

Tax authority: Inland Revenue Department (IRD)

Tax law: Inland Revenue Ordinance (IRO)

Relevant regulations and rulings

- Section 16 of the IRO about deductibility of expenses in arriving at assessable profits
- Section 17 of the IRO about prohibited deductions
- Section 20 of the IRO about basis for taxation of closely connected, nonresident persons
- Section 61A of the IRO about transactions designed to avoid tax liability

Departmental Interpretation Practice Note (DIPN) 45: Relief from Double Taxation due to Transfer Pricing or Profit Reallocation Adjustments, issued in April 2009

DIPN 46: Transfer Pricing Guidelines — Methodologies and Related Issues, issued in December 2009

DIPN 48: Advance Pricing Arrangement, issued in March 2012

DIPN 51: Profits Tax Exemption for Offshore Private Equity Funds, issued in May 2016

Local GAAP: Hong Kong Financial Reporting Standards (HKFRS), which are largely based on International Financial Reporting Standards (IFRS)

OECD Guidelines treatment

DIPN 46 is largely based on the OECD Guidelines, and the IRD generally will not differ from the transfer pricing methodologies recommended by the OECD Guidelines.

Documentation requirements

There is no contemporaneous transfer pricing documentation requirement. However, § 51C of the IRO requires taxpayers to maintain sufficient records about the transacting parties and other details of goods and services transactions. In addition, upon an audit or investigation, the taxpayer is expected to have maintained records that have details about intercompany transactions with regard to the nature of transactions and payments made or received. There are no specific requirements regarding the language in which the documentation is prepared, and typically, reports are prepared in English.

Per DIPN 46, upon an inquiry, audit or investigation, the IRD will look for the following documentation:

- Details of any relevant commercial and financial relations that fall within the scope of "closely connected, nonresident persons" or "transactions designed to avoid tax liability"
- The nature, terms, prices and quantum of relevant transactions, including transactions that form a series and any relevant offsets
- The method by which the nature, terms and quantum of relevant transactions were arrived at, including any study of comparables undertaken
- The manner by which the selected method has resulted in arm's-length terms or in which it has not, the computational adjustment required and how it has been calculated; this usually includes an analysis of market data or other information about third-party comparables

- The terms of relevant commercial arrangements with both third-party and group customers; these include contemporaneous commercial agreements (e.g., service or distribution contracts, loan agreements) and any budgets, forecasts or other papers containing information relied upon in arriving at arm's-length terms, etc.

In addition, DIPN 46 also refers to the OECD Guidelines for further guidance about documentation requirements.

Priorities/pricing methods

The IRD recognizes the methods outlined in the OECD Guidelines, which include the traditional transaction methods (CUP, resale price and cost-plus) and profit methods (profit split and TNMM). Other methods are also allowed, to the extent that the OECD-recognized methods are not applicable. The most appropriate method should be selected. Although the IRD may prefer the traditional transaction methods, as they are considered to be the most direct means of establishing the arm's-length price, the TNMM is accepted in circumstances in which traditional transaction data is not available, comparable or reliable.

Return disclosures/related-party disclosures

The IRD requires taxpayers to disclose in their annual profits tax return whether they have transactions with nonresident persons, fees paid for royalties, fees paid to nonresidents for services rendered in Hong Kong and the location of the nonresident person.

Transfer pricing-specific returns

There are no specific returns that have to be filed for transfer pricing purposes.

Documentation deadlines

Documentation is generally required only upon request.

Transfer pricing penalties

The IRO does not impute penalties targeted specifically at transfer pricing, and there are no provisions to apply penalties for a lack of transfer pricing documentation by itself. However, the IRD is empowered to take punitive action under IRO §§ 80(1), 80(1A), 80(2), 82 and 82A for noncompliance. Offenses can include any person who, without a reasonable cause or with willful intent to evade tax, fails to comply with record-keeping requirements of IRO § 51(C); files an incorrect tax return; furnishes any incorrect information; fails to furnish a return in time; fails to inform chargeability for tax; makes any false statement in connection with a claim for any deduction of the allowance; gives any false answer to any question or request for information asked or made in accordance with the provisions of the IRO; or makes use of any fraud, art or contrivance to evade tax, among others.

Offenses can be subject to a fine of HKD10,000, plus up to three times the amount of tax undercharged. In the case of willful intent, the taxpayer can be subject to a fine of HKD50,000, plus up to three times the amount of tax undercharged and three years of imprisonment.

Penalty relief

The scale of the penalty to be imposed on a taxpayer in Hong Kong is determined based on the nature of the omission, the quantum of understatement of income or profits, the scale of the business, the degree of the taxpayer's cooperation or disclosure, and the length of the offense period. Penalties can be scaled upward or downward based on such facts of the case.

Statute of limitations on transfer pricing assessments

The statute of limitations in Hong Kong is six years after the end of the assessment year. In the case of fraud or willful evasion, the statute of limitations is extended to 10 years from the end of the assessment year.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of an annual tax audit in Hong Kong may be triggered by a variety of situations, such as if the accounts of a business are heavily qualified, profits or turnover are deemed unreasonably low, filing of tax returns is persistently delayed or omitted, business records are not properly maintained, or requested information is not provided.

While there are no field auditors, and there is no separate division within the IRD that deals specifically with transfer pricing cases, transfer pricing may be reviewed as part of an audit if the IRD suspects that transactions have not been carried out on an arm's-length basis (e.g., goods are sold or purchased at a deflated or inflated price, service or royalty fees are not commensurate with the benefits received, or transactions are with tax haven locations). An audit related to transfer pricing will be aimed at reviewing the intercompany pricing policies and any analysis prepared to support the pricing, considering the facts of the business and the transactions. Transfer pricing inquiries typically arise as part of general field audits, with the deductibility of expenses or payments to related parties being a common line of inquiry. Notably, among asset managers, the allocation of fee revenue into Hong Kong is an increasingly frequent area of enquiry. The recent DIPN 51 notes that an allocation to Hong Kong using a cost-plus formula is not likely to be arm's-length if significant functions are performed, or significant risks are borne, in Hong Kong. The risk of audit or transfer pricing scrutiny is dependent on the facts and circumstances of the taxpayer.

APA opportunity

The IRD introduced an APA program in March 2012. The IRD issued guidelines in the form of DIPN 48, which details the key features of the APA program. APAs will be limited to bilateral or multilateral agreements and generally will not include unilateral agreements. However, unilateral agreements may be considered if a treaty partner does not wish to participate in an APA, in which the Hong Kong competent authority is unable to reach an agreement with the relevant treaty partner, or where a non-treaty partner is prepared to give a unilateral APA regarding transactions integrally linked to the transactions covered by a bilateral or multilateral APA.

Impact of new OECD BEPS Action 8–10 guidelines

On 20 June 2016, Hong Kong announced that it will be a part of the inclusive framework for the global implementation of the BEPS project by becoming a BEPS associate. As an associate, Hong Kong will implement four minimum standards, namely Action 5 (countering harmful tax practices), Action 6 (preventing treaty abuse), Action 13 (transfer pricing documentation) and Action 14 (enhancing dispute resolution). However, there is no official position on how the amended OECD Transfer Pricing Guidelines 2016 will be implemented. It remains to be seen whether and how Hong Kong will adopt the remaining BEPS measures, including BEPS Actions 8–10.

On 26 October 2016, Hong Kong announced a consultation paper on measures to counter BEPS (the Consultation Paper). The Consultation Paper proposes the introduction of transfer pricing rules in Hong Kong, including adoption of the three-tiered approach to transfer pricing documentation recommended by the OECD. Relevant amendment bill(s) are planned to be introduced in mid-2017.

Hungary

Taxing authority and tax law

Tax authority: National Tax and Customs Administration (NTCA)

Local GAAP: Hungarian Accounting Standards

Tax laws:

- Corporate Income Tax (CIT) and Dividend Tax (Act on CIT)
- Tax Procedure (Act on Tax Procedure)

Relevant regulations and rulings

- The following sections are relevant to transfer pricing:
  - Act LXXXI of 1996 on Corporate Income Tax (CIT) and Dividend Tax (Act on CIT)
  - Act XCII of 2003 on Tax Procedure (Act on Tax Procedure)
  - Section 259.13 within Act CXXVII of 2007 on Value-Added Tax (Act on VAT) defines a non-independent party for VAT purposes
  - Section 3.69 within Act CXVII of 1995 on Personal Income Tax (PIT) defines an independent party for PIT purposes
  - Ministry of Finance Decree 38 of 2006 on the administrative procedure for obtaining an APA
  - Ministry of Finance Decree 22 of 2009 (Decree 22) on the fulfillment of transfer pricing documentation obligations[1] effective 1 January 2010, amended with an effective date of 21 June 2013; under special circumstances, amended version is optionally applicable to compliance liabilities pertaining to 2012 as well
- The following sections of the Act on CIT are relevant to transfer pricing:
  - Section 4.23 — definition of "related-party" for CIT purposes
  - Section 18 — adjustment of prices applied between related parties
  - Section 31.2 — reference to the OECD Guidelines
- The following sections of the Act on Tax Procedure are relevant to transfer pricing:
  - Section 1.3a — prohibition of the different classification for the same legal relationship audited and classified previously, amended and effective 1 January 2015
  - Section 1.8 — definition of "fair market price"
  - Section 23.4b — reporting related parties to the NTCA
  - Sections 132/B and 132/C — provisions on the Hungarian APA
  - Section 172.16 — penalties related to documentation
  - Section 178.17 — definition of "related-party"
- 37/2004 — guideline issued by the NTCA on the fulfillment of the transfer pricing documentation requirement
- 55/2006 — guideline issued by the NTCA on the application of the TNMM
- 48/2007 — guideline issued by the NTCA on the preparation of simplified transfer pricing documentation and default penalties

[1] This contains provisions with regard to the EU master file concept.

- 77/2007 — guideline issued by the NTCA on the preparation of consolidated transfer pricing documentation
- 139/2007 — guideline issued by the NTCA on the application of transfer pricing methods in practice16/2010 — guideline issued by the NTCA on changes to the definition of "related parties" from 2010
- 21/2010 — guideline issued by the NTCA on the adjustment of related-party items in connection with the assumption of a loan and waiver of receivables
- 41/2010 — guideline issued by the NTCA on the adjustment of the prices for in-kind contributions
- 19/2013 — guideline issued by the NTCA on suretyship provided by related entities

OECD Guidelines treatment

The Act on CIT contains specific reference to the OECD Guidelines. If the Hungarian tax laws do not include regulations on specific issues, the OECD Guidelines may be used as a primary reference.

Documentation requirements

The Act on CIT states that companies that do not qualify as small enterprises ("small enterprises" are defined as employing less than 50 persons and having less than EUR10 million in total turnover on a consolidated basis) must document the methods they used to determine the fair market prices, as well as the facts and circumstances supporting them.

The detailed documentation obligation must be applied for all related-party agreements in effect in the tax year. The details of the documentation obligation are regulated by Decree 22. Foreign entities (usually foreign taxpayers engaged in business activities through a Hungarian permanent establishment) are also subject to the documentation obligation. However, transfer pricing rules are not required to be observed when the CIT base would not change even if a non-arm's-length price were applied (i.e., if the income attributable to the foreign permanent establishment is exempt from Hungarian tax, based on the applicable double tax treaty).

Overall, the Hungarian transfer pricing documentation requirements are consistent with the OECD Guidelines. The following list outlines the mandatory elements of the Hungarian full-scope transfer pricing documentation:

- Name, registered seat (official location) and tax number (or company registration number and the name and seat of the registering authority) of the related parties participating in the related-party transaction under review
- Content of the agreement with the related-party, which includes:
  - Subject of the agreement
  - Signing date (amendment date) of the agreement
  - Period during which the agreement is effective
  - Characteristics of the service provided or goods sold (functional analysis)
  - Method and terms of the fulfillment of the agreement
- Analysis of the relevant market (industry analysis)
- The method applied for establishing the arm's-length price
- Reasons for selecting the method applied
- Description of comparable services and goods transactions
- Factors affecting the arm's-length price, margin or profit, and the extent of any necessary adjustments
- The arm's-length price, margin or range

Hungary (continued)

- Information about tax rulings or official and court procedures in progress relating to the given transaction
- Preparation and amendment date of the documentation
- If consolidated transfer pricing documentation is prepared (single documentation covering several similar or strongly interrelated transactions), reasons for consolidation have to be provided

According to Decree 22, a taxpayer can choose to prepare "separate" or "joint" documentation. By introducing the joint transfer pricing documentation option, Decree 22 essentially adopted the regulations regarding the Master File concept included in the EU's Code of Conduct on transfer pricing documentation. The joint documentation consists of two parts: common documentation containing standard information about the members of the group within the EU (i.e., master file) and specific documentation describing the agreements concluded between the Hungarian taxpayer and its related parties. Taxpayers must declare to the NTCA (on the CIT return) which type of transfer pricing documentation they would like to prepare (either the single documentation or the joint documentation).

The common document has to be prepared with respect to the Member States of the EU and should also include the controlled transactions carried out between third-country companies and EU group companies.

The obligatory elements of the common documentation are the following:

- A general description of the business and the business strategy of the enterprise, including the changes from the previous year
- A general description of the organization and the legal and operational structure of the group (including an organizational chart, a list of the group members and a description of the parent company's participation in the operation of its subsidiaries)
- A list of the related parties carrying out controlled transactions with group members within the EU
- A general description of controlled transactions (list of significant controlled transactions, e.g., sale of tangible fixed assets, provision of services, development of intangible assets and provision of financial services, including the values of these transactions)
- A general description of the functions and risk and the changes in these, compared with the previous year
- Information about the ownership of intangible assets and royalties paid and received
- A description of the group's transfer pricing policy or transfer pricing system
- Cost contribution agreements (CCAs) and APAs relating to the determination of the arm's-length price and court decisions about the arm's-length price
- Date of preparation and modification of the documentation

The country-specific documentation must include the following information:

- Name, registered seat (official location) and tax number (or company registration number and the name and seat of the registering authority) of the related-party
- Description of the business enterprise and the strategy of the business enterprise, including the changes, compared with the previous year
- Subject of the agreement, description of the transactions, value of the transactions, signing date (amendment date) of the agreement and the period during which the agreement is effective
- Comparable search (characteristics of the service provided or goods sold, functional analysis, contractual conditions and economic circumstances)
- Description of the comparable data
- Transfer pricing policy of the group
- Preparation date and modification date of the documentation

Based on the work of the European Union Joint Transfer Pricing Forum, in 2012, Decree 22 introduced low-value-added intragroup services in the Hungarian transfer pricing regulations. Low-value-added intragroup services typically are routine services provided between related parties outside the scope of the main business activity (e.g., information technology services or administration services). For these services, taxpayers may prepare transfer pricing documentation encompassing a relatively less-detailed technical analysis. According to the amendment of Decree 22 in 2012, this type of documentation is applicable if the value of the transactions does not exceed HUF150 million or 5% of the service provider's net income and 10% of the recipient's operational costs and expenditures in the given tax year. In this case, the cost-plus method is accepted without a separate analysis, and the law considers markups chosen from the range between 3% and 7% to be at arm's-length. With the last amendment of Decree 22 in 2013, the arm's-length range of markups applicable without further analysis in the case of low-value-adding service transactions was modified to between 3% and 10%. While the above provision came into force on 21 June 2013, it is important to note that these rules — under special circumstances[2] — can be applied for documentation due with respect to financial year 2012 as well.

Exemptions from the documentation obligation according to Decree 22 are as follows:

- For transactions in which the arm's-length value of contractual performance during the tax year in question (without VAT) does not exceed HUF50 million
- When costs are recharged without applying any markup, provided that the service provider is not a related-party from the perspective of the taxpayer or the cost-bearing entity
- If the NTCA established the applicable arm's-length price in a resolution (APA)
- Cash transfers
- Transactions carried out between a Hungarian resident taxpayer's foreign permanent establishment and its related-party, if the taxpayer's CIT base does not include the income attributable to the foreign permanent establishment

For 2009 and onward, the documentation can also be prepared in a foreign language. However, at the NTCA's request, the taxpayer has to prepare a Hungarian translation (an exception applies for English, French and German language documentation).

Priorities/pricing methods

The traditional methods (i.e., CUP, resale price and cost-plus) and the profit-based methods recommended by the OECD (i.e., TNMM and profit split) are acceptable. Other methods can also be used only after the five major methods have been rejected.

As an important new requirement in a relatively wide array of cases, taxpayers are required by law to apply the interquartile range in their pricing and assess their Hungarian tax liabilities accordingly.

Return disclosures/related-party disclosures

Within 15 days of concluding its first contract with a related-party, the taxpayer must report the name, registered seat and tax number of the contracting party to the NTCA. Cessation of the related-party status must also be reported.

In the CIT return, the tax base should be adjusted if the price used in the related-party transaction differs from the fair market price. In their year-end corporate tax returns, taxpayers must declare which type of transfer pricing documentation they have elected to prepare.

According to Hungarian transfer pricing regulations, the taxpayer is not required to file the transfer pricing documentation with the NTCA; however, the taxpayer needs to present the documentation during a tax audit.

Companies' financial statements include certain compulsory disclosures about related-party transactions.

[2] The amendments of Decree 22 practically are applicable only for taxpayers whose fiscal year does not coincide with the calendar year and the deadline for the preparation of the transfer pricing documentation is not before 21 June 2013.

Hungary (continued)

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

The transfer pricing documentation for contracts effective in a given tax year has to be prepared by the deadline for filing the annual CIT return (the last day of the fifth month following the closing of the given tax year).

Transfer pricing penalties

In relation to a tax base adjustment, a penalty of 50% of the unpaid tax may be imposed, as well as a late payment interest charge at double the prime rate of the National Bank of Hungary, in line with general rules. A default penalty of up to HUF8 million may be levied for not fulfilling, or not properly fulfilling, the content and formal documentation requirements. As a general rule, the default penalty is levied for each set of documentation per fiscal year under a tax audit.

Penalty relief

Currently, no penalty relief is available.

Statute of limitations on transfer pricing assessments

In the absence of a tax return or appropriate reporting, the statute of limitations lapses on the last day of the fifth calendar year calculated from the tax year in which taxes should have been declared, reported or paid. However, within the framework of the Arbitration Convention, it is possible to request a tax base adjustment even after the statute of limitations has expired.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of transfer pricing issues being scrutinized during an NTCA audit is steadily growing. The NTCA now routinely checks the existence and completeness of the documentation (i.e., whether all transactions are covered).

For larger transactions, the NTCA usually inspects whether the content and formal requirements are fulfilled in the documentation. Since the beginning of 2007, the NTCA has started to train transfer pricing specialists. Consequently, the NTCA's knowledge of the application of transfer pricing methods has increased significantly. Since 2009, targeted transfer pricing audits have been commonplace; the number of audits and the amount of assessments are growing at a rate of roughly 50% each year. Since 2012, there have been two groups within the NTCA dedicated to transfer pricing issues. One group has specialized mainly in transfer pricing audits of large taxpayers, while the other deals solely with APA and transfer pricing-related MAP requests.

The likelihood of comprehensive NTCA audits is characterized as medium; however, large taxpayers are reviewed every two to three years.

For medium and large taxpayers, the risk of an audit with a transfer pricing focus can be characterized as high. In particular, the NTCA places significant focus on loss-making taxpayers and the enforcement of the interquartile range, especially at limited-risk entities.

The NTCA challenges the transfer pricing methodology, especially for situations in which:

- The profitability of the Hungarian party is not tested in the documentation
- The taxpayer came to an unusual conclusion regarding the transfer prices

- The pricing method is unusual
- The transactions themselves can be regarded as unusual or unique (especially hybrids, CCAs and certain royalty arrangements)

The NTCA continuously cooperates with other countries' tax authorities and follows the international transfer pricing auditing practices as well, through which it constantly develops its dedicated transfer pricing experts and their auditing practices. Based on experience, the NTCA is now rather knowledgeable about matters concerning method selection; therefore, the risk of the taxpayer's application of a particular transfer pricing methodology being challenged is characterized as medium to high.

APA opportunity

On 1 January 2007, a formal APA regime was introduced in Hungary. Unilateral, bilateral and multilateral APAs are available according to the provision.

Anonymous pre-filing consultation with the NTCA's APA team is free. APAs may be requested for ongoing and future transactions and can be relied on for three to five years, and they can be extended for a further three years. The application fees for APAs range from HUF500,000 to HUF10 million,[3] depending on the type of APA and the transaction value. Starting in the year of filing a valid APA request, the taxpayer does not have to prepare transfer pricing documentation for the transactions covered by the APA.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area, as it is expected that the law will be tightened to take the BEPS action plan into account.

[3] For unilateral APAs, the application fee is between HUF500,000 and HUF7 million. If a request is submitted for an arm's-length range, the application fee is HUF500,000, in the case of traditional transfer pricing methods, and HUF2 million, in the case of profit-based methods.

Iceland

Taxing authority and tax law

Tax authority: Directorate of Internal Revenue

Tax law: Income Tax Act

Relevant regulations and rulings

The Government has issued a regulation (No. 1180/2014) with additional guidelines on documentation and pricing. On

15 June 2015, Iceland's Parliament passed a bill amending Article 57 of the Iceland Income Tax Act No. 90/2003.

OECD Guidelines treatment

Tax authorities recognize the OECD Guidelines. According to the law, tax authorities may assess and adjust pricing between related parties based on the OECD principles

Given the newness of both Chapter IX of the OECD Guidelines and the domestic transfer pricing rules, it is unclear how business restructurings will be affected."

Documentation requirements

Legal entities that have turnover or total assets exceeding ISK1 billion in the previous year are required to document the nature and extent of transactions with related parties, including the reasoning for transaction prices and other terms. The duty exists as of the beginning of the next operational year. The documentation requirements do not apply to domestic transactions.

Priorities/pricing methods

The pricing methods are based on the OECD Guidelines. The provision does not specify any one method or prioritize the methods.

Return disclosures/related-party disclosures

Legal entities must confirm that the documentation requirement has been fulfilled in the yearly tax return. Tax authorities have extensive authority to claim information. There is no specific disclosure requirement besides the documentation requirement.

Transfer pricing-specific returns

Legal entities subject to the documentation requirements must submit form RSK 4.28 with their tax return by 31 May. Form RSK 4.28 requires taxpayers to provide the name of related parties, tax identification numbers, country of incorporation, type and volume of the transaction as well as a "check-the-box" confirmation of whether the transaction has been documented or not.

Documentation deadlines

Legal entities that are required to fulfill the documentation duty must start in the beginning of the next operational year after the turnover or total assets exceed ISK1 billion.

Documents must be provided to the tax authorities within 45 days of a request, and documents must be kept for seven years.

Transfer pricing penalties

There is no penalty for failure to provide documentation.

The provision states that tax authorities may assess and adjust pricing between related parties, as they are defined in the provision based on the OECD principles. These adjustments can be performed within the domestic statute of limitation period (i.e., for the six previous years from the date of the adjustment). A 25% penalty can be applied to the adjustment of pricing in case of underpayments.

Penalty relief

According to Article 108 of Act 90/2003 on income tax, the general rule is that a penalty can be avoided if the taxable party is not responsible for the situation causing the adjustment of pricing, or if the situation is caused by force majeure.

Failure to comply with documentation rules does not provide penalty relief.

Statute of limitations on transfer pricing assessments

The statute of limitations period is six years prior to the year of assessment.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general depends on several factors, such as the surveillance plan of the tax authorities, the type of business, revenue and compliance. The risk can therefore be defined as medium.

There is a high likelihood that transfer pricing will be reviewed as part of a tax audit.

Due to the fact that transfer pricing rules just came into effect, it is hard to assess the likelihood of transfer pricing methodology being challenged.

APA opportunity

Icelandic tax authorities do not issue APAs. It is uncertain if tax authorities will provide binding opinions on transfer pricing.

Impact of new OECD Guidelines

Formally, there is no local position or case law; however, it is important to monitor further developments in this area.

India

Taxing authority and tax law

Taxing authorities:

- Central Board of Direct Taxes (CBDT)
- Income Tax Department

Tax law: Income Tax Act, 1961

Relevant regulations and rulings

- Sections 92 to 92F and §§ 144C, 270A, 271AA, 271BA, 271G, 271GB and 286 of the Income Tax Act, 1961
- Rules 10A to 10TG and Rule 44GA of the Income Tax Rules, 1962

The pricing of international transactions between associated enterprises will need to be determined with regard to the arm's-length principle using methods prescribed under Indian transfer pricing regulations. Associated enterprises are enterprises for which 26% of the voting power in one is held by the other or a common parent holds at least 26% of the voting power in both such enterprises in addition to certain other scenarios that would deem two enterprises as associated. Transfer pricing provisions apply to the following types of transactions between associated enterprises:

- Purchase, sale or lease of tangible or intangible property
- Provision of services
- Lending or borrowing money or capital financing, including any type of long-term or short-term borrowing, lending or guarantee; purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable; or any other debt arising during the course of business
- A mutual agreement or arrangement for cost allocation or apportionment
- A transaction of business restructuring or reorganization
- Any other transaction having a bearing on the profits, income, losses or assets of such enterprises

Transactions with a third party will be deemed transactions between associated enterprises if the third party has a prior agreement with the associated enterprise, or if the terms of the relevant transaction are determined, in substance, between the third party and the associated enterprise, even if the taxpayer and third party are both domestic entities.

Safe-harbor provisions

On 18 September 2013, the CBDT introduced safe-harbor provisions. The provisions provide minimum operating profit margins in relation to operating expenses a taxpayer is expected to earn for certain categories of international transactions — such as provision of software development services, information technology-enabled services, knowledge process outsourcing services, contract R&D services, and manufacture and export of automotive components — that will be acceptable to the tax authority. Further, the provisions also cover transactions pertaining to lending money and providing a guarantee by an Indian entity to its wholly owned subsidiary.

The transfer price contained in the safe-harbor rules are applicable for five years, beginning from financial year 2012–13. The safe-harbor rules, optional for a taxpayer, contain the conditions and circumstances under which the tax authority would accept the norms and margins and the related compliance obligations.

The taxpayer has the flexibility in electing the years to be governed by the safe-harbor rules within a five-year period. When the tax authority accepts a taxpayer's transfer price under the safe-harbor rules, the taxpayer shall not be entitled to invoke the MAP under an applicable tax treaty.

India (continued)

Specified domestic transactions

Effective in financial year 2012–13, the transfer pricing provisions are applicable to "specified domestic transactions" if the aggregate value of such transactions exceeds approximately INR200 million.

Specified domestic transactions include payments to related parties; inter-unit transfer of goods or services of profit-linked, tax–eligible units; transactions of profit-linked, tax-holiday-eligible units with other parties; and any other transaction for which an entity may be notified by the CBDT.

By extending transfer pricing provisions to specified domestic transactions, the pricing of these transactions will need to be determined with regard to the arm's-length principle using methods prescribed under Indian transfer pricing regulations.

OECD Guidelines treatment

Indian legislation is broadly based on the OECD Guidelines. Five of the six methods prescribed in the legislation to compute arm's-length prices conform with the OECD Guidelines.

Further, the tax authorities generally recognize the OECD Guidelines and refer to them for guidance, to the extent that they are not inconsistent with domestic law.

Documentation requirements

A detailed list of mandatory documents is listed in Rule 10D(1) of the Income Tax Rules, 1962. The categories of documentation required are:

- Ownership structure
- Profile of the multinational group
- Business description
- Nature and terms (including prices) of international transactions
- Description of functions performed, risks assumed and assets employed
- Record of any financial estimates
- Record of uncontrolled transaction with third parties and a comparability evaluation
- Description of methods considered
- Reasons for rejection of alternative methods
- Details of transfer pricing adjustments
- Any other information or data relating to the associated enterprise that may be relevant for determining the arm's-length price

A list of additional optional documents is provided in Rule 10D(3). The taxpayer is required to obtain and furnish an Accountant's Certificate (Form 3CEB) regarding maintenance of documentation.

Priorities/pricing methods

Indian legislation prescribes the following methods: CUP, resale price, cost-plus, profit split and TNMM. In addition, effective from financial year 2011–12, the legislation also provides a sixth method — namely, any other method that considers the price charged or paid for a similar uncontrolled transaction. No hierarchy of methods exists; rather, the most appropriate method should be applied.

Since the introduction of the transfer pricing provisions, the Indian legislation has considered the arithmetic mean of various data points to be equivalent to the arm's-length price and has allowed a prescribed percentage of variation between the arm's-length price determined using the arithmetic mean and the transfer price. However, in October 2015, the CBDT issued a notification changing its approach to using an arm's-length price range by using the 35th and 65th percentiles, instead of the internationally accepted practice of the interquartile range (if certain conditions are met, such as availability of minimum 6 data points).

Return disclosures/related-party disclosures

The taxpayer needs to file an accountant's report (Form 3CEB), along with the return of income by the due date. The taxpayer is required to provide information such as the nature and value of the transaction, details about the associated enterprise with which the transaction was undertaken and the method used to benchmark the transaction.

In accordance with Indian Accounting Standard 18, a company is required to disclose related-party transactions in its financial statements.

Transfer pricing-specific returns

Under § 92E of the Income Tax Act, 1961, an accountant's report is required to be provided with the tax return. In the report, the accountant certifies that the taxpayer has maintained the prescribed documentation.

Documentation deadlines

The information and documentation specified should, as far as possible, be contemporaneous, and they should exist no later than the filing date of the income tax return, which is 30 November following the close of the financial year.

Although an accountant's report must be submitted along with the tax return, the taxpayer is not required to furnish the transfer pricing documentation with the accountant's report at the time of filing the tax return. Transfer pricing documentation must be submitted to the tax officer within 30 days of the notice during assessment proceedings.

Transfer pricing penalties

- For not maintaining documentation, failure to report the transaction, or maintenance of or furnishing inaccurate particulars, a penalty of 2% of the transaction value may be levied.
- For a failure to furnish information or documents requested by the tax officer, a penalty of 2% of the transaction value may be levied.
- For transactions undertaken up to 31 March 2016, in the case of a transfer pricing adjustment, a penalty in the range of 100% to 300% of the additional tax liability arising from the adjustment may be levied, unless the taxpayer is able to demonstrate that the arm's-length price was determined in good faith and with due diligence.

- For transactions undertaken from 1 April 2016 onward, a penalty of 50% on the taxpayer on underreported income may be levied in the case of a transfer pricing adjustment if it results in underreporting of income. The penalty can be increased to 200% if the underreporting is the consequence of misreporting.
- For not furnishing an Accountant's Certificate (Form 3CEB) by the due date, a penalty of INR100,000 may be levied.

Penalty relief

Relief from penalties may be requested if the taxpayer is able to demonstrate reasonable cause for the noncompliance/default. Additionally, immunity from imposition of penalty may be sought for transactions undertaken from 1 April 2016 onward under certain conditions.

Statute of limitations on transfer pricing assessments

Transfer pricing assessments (in which a matter has been referred to the transfer pricing officer) are to be completed within 43 months of the close of the financial year (1 April to 31 March). However, if the tax authorities determine that income has escaped assessment, an assessment may be reopened within seven years of the close of the financial year.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Previously, tax authorities issued internal guidelines pursuant to which companies with related-party transactions in excess of INR150 million were being compulsorily scrutinized. Cases with lesser transactional values were also often picked up for audit.

However, the tax authorities recently removed this numerical benchmark for selecting cases for transfer pricing audits. This is seen as a move to shift the approach of selecting cases for transfer pricing audits based on the facts and circumstances of the cases. However, regardless of the approach for selecting cases for audit, the risk of transfer pricing audit continues to remain relatively high. In addition, audits are carried out annually, and once a case is selected for a transfer pricing audit, there is a high likelihood of recurring audits thereafter.

In most cases, the tax authorities do not seem to have adopted a centralized or coordinated approach to audits, with officers in different locations taking divergent positions in cases with similar fact patterns. Substantial documentation is being requested in the course of the audit proceedings.

The likelihood of a general tax audit is characterized as high. Further, the likelihood that transfer pricing will be reviewed as part of a general tax audit is also characterized as high. Finally, if transfer pricing is reviewed as part of the audit, the likelihood that the transfer pricing methodology will be challenged is also high.

The information technology, business process outsourcing, banking and pharmaceutical sectors have received particular attention. Additionally, the tax authorities are increasingly scrutinizing intragroup services received and royalty payments made by Indian taxpayers. The taxpayer is required to demonstrate that the intragroup services were actually rendered or the intellectual property was actually provided and that such rendering or provision resulted in a tangible benefit to the taxpayer. In recent audits, there has also been a significant focus on marketing intangibles. In many cases, brand promotion expenses incurred by Indian subsidiaries have been held as excessive when compared with industry standards and, thus, disallowed.

The tax authorities have sought an updated analysis using data that may not be available to the taxpayer when contemporaneous documentation is prepared.

Further, officers have insisted on disaggregating transactions in which the taxpayer has adopted an aggregate or combined approach to its transfer pricing documentation. During recent audits, tax authorities have paid considerable attention to the approach adopted by the taxpayer when selecting comparable data.

Further, expenses made toward advertising, marketing and sales promotion have been scrutinized thoroughly, with the tax authorities alleging that such expenses may constitute an international transaction if the intangibles are not owned in India. In such a case, the authorities expect reporting and separate benchmarking of such transactions.

Transfer pricing additions in India go through the regular appellate proceedings. In many cases, the appeals were pending at the first appellate authority for three to five years. Hence, to fast-track transfer pricing issues, the Indian Government introduced an alternative dispute resolution process in 2009. Under this process, the taxpayer may choose to approach a dispute resolution panel when a tax officer proposes a transfer pricing adjustment. The panel should dispose of the matter within nine months, and the panel's decision shall be binding on the tax officer.

APA opportunity

The APA regime has been introduced in India, effective 1 July 2012. The APA rules provide an option for taxpayers to seek a unilateral, bilateral or multilateral APA. The APA can be valid for up to five years and requires payment of a specified fee. Rollback provisions have also been introduced by the Finance (No 2) Act, 2014. A rollback would be available to taxpayers that have applied for an APA for a period of four consecutive previous years. The rules related to the rollback provisions have also been released by the CBDT, outlining the rules and procedures applicable to the rollback. The APA filing process includes an optional pre-filing submission, filing the APA request itself, negotiating the APA, execution and monitoring. Taxpayers are required to prepare and file an annual compliance report for each year under the APA, which the tax authorities do not subject to a compliance audit.

Impact of new OECD BEPS Action 8–10 guidelines

As part of the Finance Act 2016, master file and CbC reporting requirements were introduced in the Indian transfer pricing provisions. The requirements are expected to follow the OECD BEPS Action 12 recommendations. The provisions are applicable from 1 April 2016 (i.e., FY 2016–17). An Indian resident that is a parent entity of a group, or a designated alternative reporting entity (ARE) resident in India, is required to file a CbC report in India for every accounting year. Failure to furnish details pertaining to the CbC report shall attract penalties.

The Indian tax administration is of the view that the guidance flowing from the final report of the BEPS project on Actions 8–10 should be utilized by both the tax authorities and taxpayers in situations of ambiguity in interpretation of the law. However, India has not endorsed the guidance in the BEPS report pertaining to low-value-adding intragroup services under Action 10 and has not opted for the simplified approach. This view has been expressed by the Indian tax administration in the revised India chapter to the 2016 draft of the United Nations' manual on transfer pricing. Further, India has endorsed the recommendations contained in the BEPS final report on Action 13, which supported the three-tiered documentation regime comprising a local file, a master file and a CbC report and has already carried out legislative changes in its domestic law.

Indonesia

Taxing authority and tax law

Taxing authority: Director General of Tax (DGT)

Tax law: Income Tax Law; General Taxation Provisions and Procedures; and Value Added Tax of Goods and Services and Sales Tax on Luxury Goods Law

Relevant regulations and rulings

The tax laws that govern transfer pricing in Indonesia are:

- Law Number 7 Year 1983 regarding Income Tax (amended by Law Number 36 Year 2008) (PPh Law)
- Law Number 6 Year 1983 regarding General Taxation Provisions and Procedures (amended by Law Number 16 Year 2009) (KUP Law)
- Law Number 8 Year 1983 regarding Value Added Tax of Goods and Services and Sales Tax on Luxury Goods (amended by Law Number 42 Year 2009) (PPN Law)

Indonesia's primary transfer pricing provisions are contained in Article 18 of the PPh Law. Article 18(3) authorizes the DGT to redetermine the amount of taxable income and deductible expenditures for transactions between taxpayers where a "special relation" exists. Article 18(3) also allows a redetermination of debt as equity. The redetermination should be made in accordance with equity and common practice of business for independent parties (i.e., in accordance with the arm's-length principle). A special relation is deemed to exist where:

- A taxpayer has direct or indirect ownership of 25% or more in another taxpayer or two or more other taxpayers
- A taxpayer controls another taxpayer or two or more other taxpayers
- There is a family relation, biologically or by marriage, in the first degree

DGT Regulation PER-22/PJ/2013 (PER-22) and Circular Letter SE-50-PJ/2013 (SE-50) provide detailed guidance on transfer pricing audit processes and technical transfer pricing positions to be adopted by tax auditors. PER-22 also extends Article 18 to domestic related-party, production-sharing contracts; contracts of work or cooperative agreements for oil and gas extraction; and mining. PER-22 states that Article 18 will apply where transfer pricing between related parties is not specified in the production-sharing contract, the contract of work or the cooperative agreement.

The DGT issues regulations that provide guidance on the application of the tax law, rather than being binding on taxpayers. Regulation PER-43/PJ/2010 (PER-43) provides guidance on the application of the arm's-length principle. In 2011, this regulation was amended by regulation PER-32/PJ/2011 (PER-32). Under these regulations, taxpayers should:

- Conduct a comparability analysis and determine comparable transactions
- Determine the appropriate transfer pricing method
- Apply the arm's-length principle based on the results of the comparability analysis and the most appropriate transfer pricing method
- Document the steps taken in determining the fair price or fair profit in accordance with the provisions of the prevailing tax regulations

PER-43, as amended by PER-32, can apply to domestic related-party transactions as well as international related-party transactions. The regulations may be applied when there are transactions between a taxpayer and another domestic taxpayer or permanent establishment, and when the related parties are subject to different tax rates caused by items such as:

- The imposition of final and non-final income taxes within a specific sector
- The imposition of the sales or luxury goods tax
- Transactions conducted with taxpayers of oil and gas production-sharing contractors

OECD Guidelines treatment

Indonesia is not a member of the OECD, although it has been granted "enhanced participation" status. The DGT largely endorses the principles of the OECD Guidelines in its regulations. However, it should be noted that the DGT's practical application of the arm's-length principle in an audit context regularly diverges from the principles endorsed by the OECD Guidelines.

Documentation requirements

Under PER-43, transfer pricing documentation is mandatory. In 2011, PER-32 limited the documentation requirement to transactions with a total value of IDR10 billion or more for each counterparty in a fiscal year.

Taxpayers are required to indicate whether transfer pricing documentation has been prepared when they file the transfer pricing schedule to the corporate income tax return (Form 3A/3B), as well as disclose the transfer pricing method that has been used to price their related-party transactions during the year.

Documentation requirements are largely prescriptive and should also address key points that the DGT will raise during audits based on the transfer pricing audit regulations that have been introduced. Recent transfer pricing audit regulations were released at the end of 2013.

Priorities/pricing methods

PER-32 states that the most appropriate transfer pricing method should be selected. The decision for the most appropriate method should regard:

- The advantages and disadvantages of each method
- The suitability of the method based on the functional analysis
- The availability of reliable information to apply the method
- The level of comparability between the tested transaction and potential comparable data, including the reliability of potential adjustments

Return disclosures/related-party disclosures

The disclosure of domestic and international related-party transactions with the corporate income tax return is required in Form 3A/3B. The information required includes the counterparty, the type of transaction, the value of the transaction, the transfer pricing method applied and the reason for the application of the method. Additionally, taxpayers are required to disclose whether they have transfer pricing documentation prepared.

Transfer pricing–specific returns

There are no transfer pricing-specific returns required until a transfer pricing audit commences, at which point the taxpayer is required to complete forms specific to the audit process.

Indonesia (continued)

Documentation deadlines

As noted above, taxpayers are required to indicate whether transfer pricing documentation has been prepared when they file the transfer pricing schedule to the corporate income tax return in Form 3A/3B. Following a formal request for transfer pricing documentation from the DGT, taxpayers are requested to submit their documentation within 7 days; however, they have 30 days to submit their documentation under the regulation.

Transfer pricing penalties

Inappropriate disclosure of information regarding related-party transactions by a taxpayer in a corporate income tax return may be construed as an act of fraud that could lead to an administrative penalty of up to 400% of the tax underpayment. There is a penalty of 2% per month — up to 48% — on any tax underpayment arising from adjustments of income and costs corresponding to related-party transactions as a result of the tax audit process.

Penalty relief

There are no provisions for penalty relief.

Statute of limitations on transfer pricing assessments

There is no separate statute of limitation for transfer pricing. Under Indonesian tax law, the DGT is permitted to conduct a tax audit, which includes assessments of the arm's-length nature of related-party transactions, within five years of the relevant fiscal year.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is high. In addition, a taxpayer's application for a tax refund will trigger an automatic tax audit, which must be finished within one year since the submission of the tax return.

The likelihood that transfer pricing will be reviewed as part of a regular and special tax audit is high, and the likelihood that the tax authority will challenge the transfer pricing methodology is also high, as Indonesia has an aggressive transfer pricing controversy environment. This aggressive audit environment is partially driven by the Indonesian Government's desire to increase Indonesia's tax collection as a percentage of the gross domestic product (GDP).

Tax audit cases are typically commenced in the taxpayer's relevant tax office, with the exception of the special audit cases. A transfer pricing audit, unless it is a special audit, will occur as a part of an all-taxes audit. The DGT has a central transfer pricing team and/or valuations team that is assigned to cases as needed. The central transfer pricing team or valuations team might also be involved in assisting a tax auditor team in respective tax office in performing transfer pricing audits.

In practice, in addition to taxpayers that are subject to an automatic tax audit as a part of the tax overpayment process, taxpayers that exhibit the following characteristics are at a higher risk of a transfer pricing audit:

- A large number of related-party transactions with offshore entities
- A multinational company that has continuous operating loss and/or significant related-party transactions
- Lower net profit in comparison with other similar enterprises or with the industry average
- Increasing gross revenue and receipts but no change or decrease in net profit
- Related parties in tax havens

The role of a taxpayer's account representative (AR) — each taxpayer is assigned an AR to assist with its tax matters – has also increased this year with regards to confirming transfer pricing compliance. ARs have been actively risk-profiling taxpayers' transfer pricing audits by audit teams.

In undertaking transfer pricing audits, tax auditors will follow guidance contained in PER-22 and SE-50.

APA opportunity

Under PER-43, APAs are available. The specific DGT guidance covering APAs is PER-69/PJ/2010 (PER-69), which states that APAs may be unilateral or bilateral. Subsequently, the Government issued Ministry of Finance Regulation No.7/PMK.03/2015 (PMK-7) on 12 January 2015, regarding the formation and implementation of an APA. This regulation became effective from 90 days after the enactment date (i.e., 12 April 2015) and is applicable for all outstanding and future APA applications.

Under PER-43, MAPs are also available, in accordance with the provisions of an applicable tax treaty. The specific DGT guidance covering MAPs is PER-48/PJ/2010. Subsequently, the Government issued Ministry of Finance Regulation No. 240/PMK.03/2014 (PMK-240), regarding the implementation of the MAP, which provides a refinement to the guidelines that had been stipulated in previous regulations. PMK-240 is effective from 22 December 2014 and applicable for all outstanding and future MAP implementations under tax treaties that are effective prior to, on or after this date.

Impact of new OECD BEPS Action 8–10 guidelines

The Indonesian Ministry of Finance has recently released a new regulation (Peraturan Menteri Keuangan No 213/PMK.03/2016) regarding the type of additional documents/information that is mandatory to be kept by taxpayer who conducts transactions with related parties and its procedures. The release of this regulation marks the implementation of the three-tiered documentation structure as stipulated in the OECD BEPS Action Plan 13 in Indonesia. The new regulation brings changes to the threshold of preparation of transfer pricing documentation as well as the timeline for availability and submission of the documentation. The new regulation is effective for fiscal year 2016 onwards.

Iraq

Taxing authority and tax law

Taxing authority: General Commission for Taxes (GCT)

Tax law: Law No. 113 of 1982, as amended

Relevant regulations and rulings

Iraq's income tax law does not currently follow OECD Guidelines. However, the GCT expects that all transactions with related parties should be entered under the usual commercial rates that apply to contracts with unrelated third parties.

The GCT conducts a tax audit of each annual tax filing (audited financial statements prepared under the Iraqi Unified Accounting System and a tax return form) and will ask for any supporting documentation it deems necessary.

The GCT actively employs a deemed tax mechanism based on its own estimation of a reasonable profit (a deemed profit); this is the GCT's default position, despite the requirement to file audited financial statements. Consequently, the Iraqi tax authorities rely on the simplified method of applying a deemed tax to ensure that at least a minimum level of tax is paid in Iraq.

Iraq has entered into a bilateral double taxation treaty with Egypt and a multilateral double taxation treaty with the states of the Arab Economic Union Council. In practice, and with respect to Iraq taxation, it is not recommended to rely on a position based on a tax treaty between Iraq and another country, as the GCT does not look to the treaties, nor does it apply their provisions.

OECD Guidelines treatment

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Not applicable.

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

As per the practice of the Iraqi tax authority, a tax audit is conducted for each annual tax filing.

APA opportunity

Not applicable.

Impact of new OECD BEPS Action 8–10 guidelines

Not applicable.

Ireland

Taxing authority and tax law

Taxing authority: Irish Revenue Commissioners (IRC)

Tax law: Taxes Consolidation Act (TCA) 1997

Relevant regulations and rulings

Section 835C TCA 1997 (Section 835C), Part 35A, sets out the primary transfer pricing regulations in Ireland.

The regulations apply to any arrangement between associated enterprises involving goods, services, financing or intangible assets, but only where those transactions meet the definition of being an Irish trading (Case I/II) transaction for one or both of the parties, and only if those arrangements are entered into or amended on or after 1 July 2010. The regulations apply to both domestic and cross-border transactions where Irish trading receipts are understated or trading expenses are overstated.

There are exemptions from these regulations for small and medium enterprises when a company has fewer than 250 employees and either turnover of less than EUR50 million or assets of less than EUR43 million. This is an annual test that is applied at a group level.

Section 835F TCA 1997 (Section 835F) imposes an obligation on companies to have such records available as may reasonably be required for determining whether the company's trading income has been computed in accordance with the requirements of Section 835C. Transfer pricing documentation is fundamental to validating and explaining the pricing of the intragroup transactions and, if requested, has to readily establish that the transfer prices are consistent with the arm's-length requirements of Section 835C to the IRC's satisfaction.

OECD Guidelines treatment

The regulations adopt the 2010 OECD Guidelines into the domestic legislation. The IRC's application of the regulations in relation to documentation will accept both the European Union (EU) Transfer Pricing Documentation guidance and Chapter V of the OECD Guidelines (the OECD rules apply only insofar as they relate to trading transactions).

The regulations are expected to be amended to align with recent BEPS transfer pricing related updates to the OECD Guidelines post a general review of Ireland's corporate tax regime, which is expected to be concluded in the middle of 2017.

Documentation requirements

The documentation must be sufficient to demonstrate a company's compliance with the transfer pricing regulations according to guidance issued by the IRC in their Tax Briefing Issue 07 in June 2010. The actual documentation required will be dictated by the facts and circumstances of the transactions. The cost of producing the documentation should be commensurate with the risk involved. It would be expected that complex and high-value transactions generally would require more detailed documentation than simple, high-volume transactions.

The transfer pricing documentation may be kept in the form of the company's own choosing, and the company is not required to prepare the documentation itself. The documentation does not need to be prepared or kept in Ireland but must be in a language of the State (i.e., English or Irish).

The documentation is required to contain the following:

- The associated parties involved in the transaction
- The nature and terms of the transaction
- The terms of relevant transactions with both third parties and associates
- The method, or methods, by which the pricing of the transactions was derived, including any comparability analysis and any functional analysis undertaken
- The application of the transfer pricing method
- Any budgets, forecasts or other relevant papers relied on in arriving at an arm's-length result

The transfer pricing documentation requirements are expected to be amended post a general review of Ireland's corporate tax regime (to be concluded in the middle of 2017)to align more fully with recent BEPS transfer pricing related updates to the OECD Guidelines. This is expected to include master file and local file obligations in accordance with Action 13 of the OECD's BEPS project. This will mean that a company must keep on file the following:

- A master file that provides tax administrations with high-level information regarding a group's global business operations and transfer pricing policies
- A specific local file for each relevant jurisdiction that provides a local tax administration with information regarding material related-party transactions, and the company's transfer pricing supporting analysis with regard to those transactions

This documentation should be reviewed at regular intervals to determine whether the pricing remains at arm's-length. The IRC has stated that it will be guided by Chapter V of the OECD Guidelines and by EU Transfer Pricing Documentation guidance in applying the documentation requirement. At this point in time the introduction of and update to the documentation requirements in line with Action 13 is expected no earlier than for fiscal years beginning on or after January 1, 2018.

Priorities/pricing methods

Ireland accepts the arm's-length principle as set out in Article 9 of the OECD Model Tax Convention and also in the respective article on associated enterprises in Ireland's double taxation treaties. To establish an arm's-length price, the OECD Guidelines will be referenced. The arm's-length principle asserts that intragroup transfer prices should be equivalent to those that would be charged between independent persons dealing at arm's-length in otherwise similar circumstances.

Transfer prices should be reviewed at regular intervals to determine that pricing remains at arm's-length.

Return disclosures/related-party disclosures

Currently, there are no tax return disclosures. However, certain multinationals may be obligated to submit a CbC report in accordance with BEPS Action 13. Multinational groups with accounting periods beginning on or after 1 January 2016 and annual consolidated revenue in the immediately preceding accounting period of EUR750 million or more will need to submit a CbC report to the IRC.

Transfer pricing-specific returns

Not applicable.

Ireland (continued)

Documentation deadlines

Documentation must be available for in-scope transactions for accounting periods beginning on or after 1 January 2011. While there is no statutory deadline with respect to documentation, a separate guidance note issued by the IRC states that it is considered a best practice that some transfer pricing analysis be prepared when the terms of the transaction are agreed to, and that for a company to be in a position to make a correct and complete return, transfer pricing documentation should exist when the return is filed. The tax return is due nine months after the end of an accounting period.

The documentation requirements do not apply to a transaction, the terms of which were agreed to before 1 July 2010, if:

- The terms of the agreement clearly envisage the transaction.
- Application of these terms delivers the price of the transaction.
- An agreement to enter into a further agreement would not meet these conditions.

However, intercompany arrangements that were agreed to prior to 1 July 2010, and that are renegotiated and re-signed after 1 July 2010, are within the scope of the regulations.

Transfer pricing penalties

There is no separate statutory regime for transfer pricing penalties. However, standard tax-geared corporate tax penalties that apply to the Irish self-assessment regime may be applied to transfer pricing assessments by the IRC.

Penalty relief

There are currently no penalty protection or relief rules in the regulations, but the IRC has guidance that the existence and quality of transfer pricing documentation will be a key factor in determining the level of penalties applicable to a transfer pricing adjustment, if any.

Statute of limitations on transfer pricing assessments

The statute of limitations is currently four years after the end of the tax year or the accounting period in which the return is made.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Compliance with the transfer pricing regulations will be subject to audit. The provisions delegate transfer pricing auditing to officers authorized for that purpose by the IRC. This ensures that the audits concerned will be undertaken by officers who appreciate and are equipped to deal with the complexities involved in applying the arm's-length principle.

- The IRC released guidance on 26 November 2012 setting out their proposed approach to monitoring compliance with the Irish regulations.
- The guidance, released as "Revenue eBrief No. 62/2012," introduced a procedure referred to as the Transfer Pricing Compliance Review (TPCR), which is a self-review carried out by a company or a group of its compliance with the Irish regulations. The IRC will request a selection of companies to conduct a TPCR in any given year.
- TPCRs will not be considered revenue audits, but certain cases may be escalated to a transfer pricing audit based on a risk assessment by the IRC. TPCR selection and transfer pricing audit activity commenced in 2013.
- The first round of formal transfer pricing audits commenced in Ireland in 2015.

Ireland (continued)

APA opportunity

The Irish Revenue Commissioners have formally introduced a bilateral APA program with the publication of guidelines on 23 June 2016 — "Revenue eBrief No. 60/2016." The guidelines are effective for new APAs requested from 1 July 2016 and formalize Irish Revenue's APA practice, which had previously operated on an informal basis.

Impact of new OECD BEPS Action 8–10 guidelines

Formalized legislation has not been published or enacted yet. At this point in time, it is expected that Actions 8-10 will not be legally effective in Ireland until at least the beginning of 2018.

Israel

Taxing authority and tax law

Taxing authority: Israeli Tax Authority (ITA)

Tax law: Income-tax Act, 1961

Relevant regulations and rulings

The ITA Income Tax Regulations (Determination of Market Terms) were drafted pursuant to §85A of the Israeli Income Tax Ordinance. Final regulations were adopted in November 2006. The Israeli Transfer Pricing (ITP) Regulations apply to all international intercompany transactions carried out after the regulations were validated on 29 November 2006. The ITP Regulations are based on a combination of the OECD Guidelines and the US transfer pricing regulations.

In Israel, taxpayers are required to comply with the proper timing for submission of documentation (i.e., 60 days from the official demand of a tax inspector), which shifts the burden of proof to the taxing authority if the latter challenges the transfer pricing.

In the last few years, the ITA has released several publications about issues that affect transfer pricing, including:

- Restructuring — The ITA provides guidance to its local assessing officers about how to deal with post-acquisition restructuring and intellectual property (IP) migration following such restructurings.
- Capital notes — Capital notes enable Israeli taxpayers to finance their foreign subsidiaries with non-interest financial debt instruments.
- Inclusion of stock option expenses by Israeli cost-plus companies — The ITA asserted that these expenses should be included. The ITA's approach has recently been reinforced by the Israeli court's ruling in two cases addressing this issue. These cases are currently being appealed.
- Digital economy — In light of the OECD's BEPS Action 4, the ITA has published guidance reflecting a broader definition of "permanent establishment."

OECD Guidelines treatment

The ITA considers its transfer pricing rules and regulations to be consistent with the OECD Guidelines.

However, usually a local adaptation is necessary, mainly with respect to the interquartile range when the CUP method is used and the decision of whether to use local, European or US comparables.

Documentation requirements

A taxpayer is required to file a transfer pricing report with the tax assessing officer, at the tax assessing officer's request, within 60 days of the application date. Documentation must include:

- The taxpayer's group structure, the parties to the international transaction, their residency, and any special relations between the taxpayer and the other parties
- The contractual terms, including specifications of the asset, the service granted, the price paid, the loan and credit terms, and related guarantees
- The taxpayer's area of activity and any relevant developments
- The economic environment in which the taxpayer operates and the related risks
- Details of all transactions entered into by the taxpayer with a related-party
- An economic analysis

The taxpayer is also required to attach additional documents that corroborate the data submitted, such as transaction contracts and any other contracts between the related parties and tax returns filed with foreign taxing authorities.

Priorities/pricing methods

To determine whether an international transaction is at arm's-length, the ITP Regulations require the taxpayer to apply one of the following methods, in order of preference:

- CUP or CUT
- Comparable profitability
  - Cost-plus or resale price
  - CPM or TNMM
  - Profit split
- Other methods

An international transaction is at arm's-length if, through the application of the selected method, the result falls within a defined interquartile range.

As an exception, the entire range of values will apply when the transfer pricing method applicable is CUP or CUT and no adjustments are performed. If the international transaction's result is outside the range, the median should be applied as the arm's-length price for the transaction.

Additionally, the ITP Regulations stipulate the use of several profit-level indicators (PLIs), depending on the particular industry and environment. For example, when appropriate, the following PLIs may apply:

- A cost-plus markup may be applied to a company's direct costs
- A gross profit margin may be applied to:
  - The operating profit or loss applicable for comparable transactions
  - The profit or loss derived as a proportion of the firm's assets, liabilities or capital
- Other measures considered appropriate under the circumstances

Return disclosures/related-party disclosures

Commencing with the fiscal year ended 2007, taxpayers must attach to the annual tax returns a specific transfer pricing form (#1385), in which the following should be disclosed:

- A short description of the intercompany transaction details of the other party and its residency
- Transaction volume and residency of other party
- Signatures on all declarations (forms) that the international transactions were conducted at arm's-length

According to the taxing authority, such declaration must be supported by documentation that meets the requirements.

Transfer pricing-specific returns

Refer to the "Return disclosures/related-party disclosures" section.

Israel (continued)

Documentation deadlines

Taxpayers in Israel must provide documentation within 60 days of a tax assessing officer’s request.

Transfer pricing penalties

The ITA has not specified any penalties with regard to its transfer pricing regulations. However, general tax penalties applied by the ITA, with regard to a tax deficit, will also apply to transfer pricing adjustments. In addition, a false declaration on Form 1385 may expose the signing officer to criminal charges.

Penalty relief

There is no penalty relief regime applicable in Israel.

Statute of limitations on transfer pricing assessments

The Israeli Income Tax Ordinance has general rules for auditing a tax return. As such, the statute of limitations usually is three years (or four if the commissionaire extends the time period), beginning at the end of the fiscal year in which the tax return was filed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is high. Traditionally, taxpayers operating in the international arena or subsidiaries of foreign companies have a higher likelihood of being audited.

The likelihood that transfer pricing will be reviewed as part of that audit is high. In the past, the likelihood that the transfer pricing methodology would be challenged in a transfer pricing review had been moderate, if supported by robust transfer pricing documentation. Recently, a growing trend of challenged transfer pricing methodology has been seen as well. When no documentation exists, the methodology is even more likely to be challenged.

Following the recent circulars on restructuring, stock option expenses and the digital economy as described above, these issues are more likely to be challenged, as well as financial transactions. In addition, considering Israel’s start-up ecosystem, another focus point of tax audits is IP migrations and business restructurings. There are currently several such cases being debated in court.

APA opportunity

Section 85A of the Israeli Income Tax Ordinance, which governs the ITP Regulations, stipulates in Article 85A(d) the conditions under which an APA may be concluded and delineates the scope of an APA.

The process starts with a detailed application that includes all of the relevant details. Under the APA process, the ITA must respond to the taxpayer’s application within 120 days (though the time can be extended up to 180 days), otherwise the application will be approved automatically and the intercompany policy will be deemed as providing reasonable arm’s-length prices. In practice, a complete APA procedure may take 12 months.

Impact of new OECD Guidelines

During the past several months, the Israeli tax authorities have been working on amending the Israeli transfer pricing regulations, in light of the BEPS Action Plan. While no such changes have formally been introduced yet, it is expected that they would apply for the entire 2016 fiscal year.

The expectation is that the new regulation will include a country-by-country reporting (CbCR) requirement, including the OECD's EUR750 million threshold. This expectation is reinforced by Israel's signing of the Multilateral Competent Authority Agreement (MCAA) for the automatic exchange of CbC information in May this year. Further, a requirement for master file/local file reporting is also expected.

A trend is also evident in tax audits, in which the ITA is often observed taking an aggressive BEPS-oriented position for previous years as well, claiming that the Action Plan only formalized the proper tax treatment that should have been in place beforehand.

We also note that in light of the BEPS Action Plan, on 11 April 2016, the ITA released a tax circular on the digital economy, which lays out the framework for the taxation of foreign enterprises recording income from the sale of products or services in Israel via the internet. The circular includes a broadened definition for "permanent establishment," in line with the OECD's BEPS Action 4, which we expect would impact many digital businesses selling in Israel. This impact will also include added documentation requirements where new permanent establishments are identified.

Italy

Taxing authority and tax law

Taxing authority: Italian Revenue Agency (*Agenzia delle Entrate*, or AdE)

Tax law and decrees: embedded within Presidential Decree No. 917 of 22 December 1986 (Decree 917 or Consolidated Corporate Income Tax Code) and Presidential Decree No. 600 of 29 September 1973 (Art. 31-ter introduced with Law Decree No. 147, dated 14 September 2015)

Relevant regulations and rulings

Transfer pricing is regulated in Article 110 (7) and Article 9 (3)-(4) of the Italian Income Tax Code for Corporate Income Tax (IRES) purposes. To be noted that transfer pricing is relevant also for regional tax purposes (IRAP).

Legislative Decree No. 78 of 31 May 2010 (Decree 78) introduced an optional transfer pricing documentation provision in the Italian tax law. Article 26 outlines that if the taxpayer provides tax authorities with proper transfer pricing documentation during a tax assessment, no tax penalties will be applied on possible tax adjustments; currently, the tax penalties are 90% to 180% of the additional taxes if the tax authority determines that the intercompany transactions do not comply with the arm's-length standard.

Additional guidance was issued with Operational Instructions in September 2010 and Circular Letter 58/E, dated 15 December 2010 (Circular 58/E).

Compliance with the Italian transfer pricing documentation regime is not mandatory. In this respect, taxpayers are expected to make a strategic management decision, taking into consideration that the penalty protection is afforded only if complete and appropriate transfer pricing documentation is in place. The transfer pricing documentation must follow the format provided by the law, be in Italian and be detailed enough to provide officers with a substantial view of the intercompany flows and related policies. Based on the qualification of the Italian entity (i.e., holding, subholding or subsidiary), a different documentation set is provided by the law (i.e. master file and country file, vs country file only). The law provides that in case of Italian permanent establishments of foreign home offices, the relevant qualification is the one of the home office.

Among the most significant implications of the requirements are that taxpayers must:

- Assess the Italian entity's type to determine the proper documentation to be prepared for penalty avoidance
- Advise the tax authority as to the existence of current transfer pricing documentation for the current tax year with the filing of the tax return by ticking the specific box

Italian Supreme Court (*Corte di Cassazione*) Decision No. 22023 of 13 October 2006 notes that the burden of proof rests on the tax authority for transfer pricing issues. According to the Supreme Court, and subsequently confirmed by the 2010 OECD Guidelines, where the burden of proof is on the tax authority, the taxpayer is not obliged to give evidence that the transfer prices comply with the arm's-length principle unless the tax authority has already proved (*prima facie*) that the taxpayer has not complied with the arm's-length principle.

In the past, several rulings identified and challenged domestic transfer pricing issues, even though the wording of the relevant regulation referred exclusively to cross-border transactions. New clarifications are provided with Law Decree No. 147, dated 14 September 2015. Under this decree, it is specified that transfer pricing rules do not apply to intercompany transactions involving group companies located in Italy.

OECD Guidelines treatment

Italian transfer pricing rules are largely consistent with the OECD Guidelines. Indirect reference to the applicability of the 2010 OECD Guidelines can be found in the abovementioned regulations on the optional transfer pricing regime for penalty protection. No explicit reference in the Italian domestic law to the latest approved version of the OECD Guidelines (under the BEPS project) exists.

Documentation requirements

Proper documentation for penalty protection purposes (optional regime) must be drafted on a yearly basis, and it must be available in each of the taxable periods subject to audit.

Documentation requirements (continued)

The filing of the documentation does not bind the tax authorities to the application of penalty relief when:

- Notwithstanding compliance with the formal structure, the documentation delivered during the course of an audit is neither complete nor consistent with the provisions endorsed by the operational instructions.
- The information provided in the documentation is not consistent, wholly or partly, with the reality. Omissions or partial inaccuracies do not jeopardize the eligibility of the transfer pricing documentation for penalty protection.
- The Italian budget law for 2016, Law n. 208 of 28 December 2015, introduced the CbCR obligation for multinational entities in line with the provisions of Action 13 of the BEPS project and of the European Union's recent development in terms of documentation requirements. The law introduced a new CbCR obligation for multinational entities to submit an annual report indicating the amounts of revenues, gross profit, taxes paid and accrued, and other indicators of effective economic activities. Obligated taxpayers are:
- Italian parent companies of groups that: (1) are required to submit group consolidated financial statements; (2) have realized a consolidated annual turnover in the year prior to the CbCR of at least EUR750 million; and (3) are not controlled by any other entities
- Italian resident companies, controlled by a foreign company, that are required to submit group consolidated financial statements in a country where the CbCR does not apply, or in a country that does not grant an actual exchange of information on the CbCR

In the case of omission or incomplete submission of the CbCR, penalties from EUR10,000 to EUR50,000 apply.

Additional guidance regarding operational instructions was expected to be issued in 2016.

Priorities/pricing methods

Traditional methods, such as CUP, resale price and cost-plus, are preferred over profits-based methods.

The selection of the transfer pricing method entails an explanation of the reasons for using a particular method that produces results consistent with the arm's-length standard. Should a profit method be selected when a traditional transactional method could be applied in an equally reliable manner, the taxpayer should explain why the latter had been excluded. The same explanation applies when a method other than the CUP method is selected, in the event that the latter could have been applied to achieve equally reliable results.

An accurate description of the taxpayer's procedure for selecting comparable transactions will have to be provided (inclusive of detailed comparability analysis), as well as a clear description of the underlying steps in arriving at an arm's-length range, if needed.

Small and medium-sized companies (i.e., companies with an annual turnover lower than EUR50 million) are not required to refresh the benchmarks every year.

The 2014 Stability Law provides important changes for groups involved in certain online businesses. From a transfer pricing perspective, the new rules provide that entities involved in the collection of online advertisements and in related auxiliary services on behalf of foreign group companies must use profit-level indicators other than those applicable to the costs incurred in the conduct of their business. However, the 2014 Stability Law does not provide any guidance about an alternative transfer pricing method to be used. Exceptions apply for companies that reach an APA with the tax authority by way of the International Standard Ruling procedure (outlined in the following sections).

Return disclosures/related-party disclosures

Italian companies must officially communicate (in documents, correspondence and register of companies) whether they are managed and controlled by another company, as well as the name of the related company (Article 2497-bis of the Italian Civil Code). Financial statements should include essential data from the managing or controlling company's financial statements and relations with related parties (Articles 2424, 2427, 2428 and 2497-bis of the Italian Civil Code). The tax return should disclose transactions with tax havens concerning costs and expenses. Disclosure is also applicable for taxpayers with reference to intercompany flows that are to be grouped in costs versus revenues.

Transfer pricing-specific returns

In Italy, there are no specific transfer pricing returns. As already mentioned, for the purposes of the optional penalty protection regime, taxpayers that intend to adhere to such regime shall communicate the availability of proper documentation on the annual income tax return (i.e., in a dedicated box) to the Italian Revenue Agency.

Documentation deadlines

Taxpayers shall communicate to the Italian Revenue Agency the availability of proper documentation on the annual income tax return (i.e., in a dedicated box) in case they decide to opt for the penalty protection regime.

The submission of the proper documentation to the tax authorities must be executed within 10 days since the specific request. If supplementary information is needed during an audit or any other assessment activity, it must be provided within seven days of a request (or within a longer time period, depending on the complexity of the transactions under analysis), to the extent that the period is consistent with the time of the audit. Once the time periods have elapsed, the tax authorities are not bound by the application of the penalty relief.

Transfer pricing penalties

If and when the abovementioned optional transfer pricing documentation regime for penalty protection purposes is deemed inapplicable (with various degrees of judgment), general penalties for underpayment apply (Decree 471).

In particular, when the tax return has been filed, standard administrative penalties apply in an amount equal to 90% to 180% of the additional taxes or the minor tax credit assessed by Italian tax authorities (both for IRES and IRAP purposes). According to Circular Letter 58/E, higher penalties may be, in principle, applicable when the documentation is not deemed complete and appropriate.

Penalties apply when:

- The taxable income declared is lower than assessed.
- The taxes declared are lower than those due.
- The tax credit declared is greater than that due to the taxpayer.

The same penalties apply where undue tax allowances or deductions from the taxable income have been declared in the tax return. Interest on taxes or additional taxes due also applies. No penalties apply in case of losses.

Italy (continued)

Law Decree No. 158/2015 amended the Italian provisions on the criminal impacts of unfaithful tax returns, providing that taxpayers that disclose the criteria used for determining the arm's-length value of their intercompany transactions in their financial statements or in other documentation relevant for tax purposes (e.g. transfer pricing documentation for penalty protection) are not subject to potential criminal ramifications.

Penalty relief

Please refer to the section above for the application of the new penalty protection regime.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on an assessment for transfer pricing. The general statute of limitations period for tax purposes applies. Therefore, taxpayers must receive a notice of tax assessments by 31 December of the fourth year following the year for which the tax return has been filed. If the tax return has been omitted or is treated as null and void, the assessment period for the relevant year is extended by an additional year.

In case of criminal ramifications, terms for assessments can be doubled but only in the case that the criminal offense has been communicated by the AdE to the criminal authorities within the standard statute of limitations.

In case of tax inspections relating to Fiscal Year 2016 onward, the mentioned terms are increased by one year for unfaithful tax returns, and by two years for omitted tax returns.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of a general tax audit is high, as is the risk of being audited specifically for transfer pricing. The likelihood of the transfer pricing methodology being challenged is also high, as tax officers often try to challenge all of the various aspects of transfer pricing, i.e., not only the methodology, but also the functional analysis and comparables.

Italy is particularly active in challenging taxpayers on deemed permanent establishments: following the Italian Supreme Court's Philip Morris case, additional case law is available in this respect.

In addition, the Italian tax authorities generally pay particular attention and direct greater tax audit activity to large taxpayers, and they are devoting greater resources in intelligence and monitoring the activities of multinationals.

Likewise, Circular Letter No. 6/E issued by the Central Revenue Agency on 25 January 2008 provides operating guidelines for tax authorities in relation to preventing and combating tax avoidance, and among the most crucial areas to be assessed, it mentions intercompany transactions and transfer prices according to the provisions of Article 110 (7) of Decree 917. Legislative Decree No. 185 issued on 29 November 2008 introduced the category of "large" taxpayers, stating that "in relation to the corporate income tax and VAT returns of relevant size companies, the Central Revenue activates substantial controls in the year following the one of the filing [where] relevant size companies are the ones which achieve a (yearly) turnover not lower than EUR300 million. Such threshold was reduced to EUR100 million by 31 December 2011."

Starting in 2012, in implementing the provisions of paragraph 10 of Article 27 of Legislative Decree No. 185 of 2008, Circular Letter 18/E, dated 31 May 2012, provides that the "tutorship" activities shall cover all of the large taxpayers (then about 3,200 companies, compared with about 2,000 tutorials in 2011). As part of the tutorship activities, the need to maintain a high level of attention is reaffirmed for the purpose of identifying a number of phenomena related to important risk factors that the OECD has also carefully considered. Transfer pricing is expressly mentioned among such phenomena.

Italy (continued)

Guidance on transfer pricing assessments is included in Circular Letters that are generally issued on a yearly basis and relate to general instructions on tax inspections. Compliance with the optional regime on transfer pricing documentation is identified as a positive factor of transparency and cooperation with the tax administration within the risk-monitoring activities.

APA opportunity

With Article 8 of Legislative Decree No. 269, enacted 24 November 2003, the Italian Government introduced a unilateral ruling system mainly relating to transfer pricing, dividends and royalties. The law was enacted with the *Provvedimento del Direttore dell'Agenzia delle Entrate*, dated 23 July 2004. This document provides a number of practical guidelines for the ruling program.

On 23 December 2013, the Italian Government issued Law Decree No. 145/2013 (the Destination Italy Decree), which extends the scope of APAs to preliminary assessments of Italian permanent establishments of foreign entities and provides that the validity of agreements reached through the International Standard Ruling (e.g., including APAs) is increased from three years to five. In addition, taxpayers will be able to use ruling results (e.g., in the case of an APA) to adjust past years but not beyond the year in which the ruling request was submitted (rollback system).

Law Decree No. 147, dated 14 September 2015, introduced the new Article 31-ter of the Presidential Decree No. 600 of 29 September 1973, which expands the scope of the APA. It will also be available to determine asset tax bases in the case of inbound and outbound migrations.

Additional operational guidance was provided by instructions released on 21 March 2016.

Patent box regime

On 29 July 2015, the Italian Government signed a decree that implements the patent box provisions introduced by the 2015 Budget Law (Law No. 190 of 23 December 2014) and subsequently amended by Law Decree No. 3 of 24 January 2015. The said provisions introduce an elective regime that grants an exemption from corporate income tax and local tax on income derived from qualifying intangible assets (such as patents, brands, know-how and other intellectual properties). The regime is eligible for taxpayers that perform R&D activities (also if outsourced to any third parties) and is characterized by a five-year lock-in period. An advanced ruling is specifically required to determine the relevant income attributable to the qualifying intellectual property when it is directly exploited by the taxpayers. Additional operational guidance was provided by various instructions released from November 2015 to April 2016.

Mutual agreement procedures

On 5 June 2012, the Italian tax authorities issued a Circular Letter pertaining to the settlement of international tax disputes and, more specifically, clarifying some of the procedures involved in using the MAP process. In addition, the roles in the management of the MAP process and the involvement of both the Italian tax authorities and the Italian Ministry of Economy and Finance are described.

The Circular Letter clarifies the relationship between MAPs and Italian litigation procedures. It states that the existence of a litigation procedure does not affect the course of the MAP until a tax court decision is issued. In such a case, the Circular Letter clarifies that the decision of the tax court becomes final for the Italian tax authorities and the Ministry of Economy and Finance, having the same effect on MAPs as under the settlement procedures. As far as the Arbitration Convention is concerned, access to the advisory commission phase is allowed only if the taxpayer renounces the option to pursue the domestic litigation procedure.

Impact of new OECD BEPS Action 8–10 guidelines

As mentioned, no explicit reference in the Italian domestic law to the latest approved version of the OECD Guidelines (under the BEPS project) exists, although experience shows that the Italian Tax Authorities are in practice already referencing to certain updated provisions.

Japan

Taxing authority and tax law

Taxing authority: National Tax Agency (NTA)

Tax law:

- Corporation tax
- Business tax
- Prefectural and municipal inhabitant taxes (local tax)

Relevant regulations and rulings

- Special Taxation Measures Law (STML) Article 66-4/66-4-2/66-4-3/66-4-4/66-4-5 — Special Provisions for Taxation of transactions with foreign related persons and profits attributable to a permanent establishment (PE)
- STML Article 68-88/66-88-2 — Special Taxation Measures of Transactions between Consolidated Corporations and Foreign Related Persons
- STML Enforcement Orders 39-12, 39-12-2, 39-12-3, 39-12-4/39-112, 39-112-2
- STML Enforcement Regulations Articles 22-10, 22-10-2, 22-10-3, 22-10-4, 22-10-5/22-74, 22-75
- STML Circulars 66-4 (1)-1 to 66-4 (10)-1, 66-4-3 (1)-1 to 66-4-3 (8)-2, 68-88 (1)-1 to 68-88 (10)-1
- Commissioner's Directive on the Establishment of Instructions for the Administration of Transfer Pricing Matters (Administrative Guidelines)
- Commissioner's Directive on the Establishment of Instructions for the Administration of Transfer Pricing Matters for Consolidated Corporations (Administrative Guidelines for Consolidated Corporations)
- Commissioner's Directive on Mutual Agreement Procedures

OECD Guidelines treatment

The NTA refers to the OECD Guidelines for direction, and the Japanese Transfer Pricing Administrative Guidelines contain the following statement in Paragraph 1-2(3): "In light of the importance of a common understanding regarding transfer pricing by each country's tax authorities for the resolution of international double taxation that arises due to taxation pursuant to the transfer pricing tax system, appropriate administration shall be carried out by referring to the OECD Guidelines to the extent necessary in examinations and in reviews of requests for APAs."

Documentation requirements

The 2016 tax reforms, effective 1 April 2016, adopted MNE reporting rules in line with BEPS Action 13. Specifically, MNEs must submit (or prepare and maintain) three types of documents to the tax authorities: (1) a CbC report under STML Article 66-4-4; (2) a master file under STML Article 66-4-5; and (3) a local file under 66-4 (6).

CbC report

If the ultimate or surrogate parent entity is located in Japan, a Japanese corporation that is a constituent entity of a specified MNE group (limited to those that fall into the category of ultimate or surrogate parent entities) must submit a CbC report to the District Director via e-Tax filing within one year of the day following the one that the fiscal year covered by the report ends. In this case, the CbC report is transmitted to the tax authorities in the country where the constituent entity resides according to the information exchange system based on tax treaties (direct filing).

If the ultimate or surrogate parent entity is located in a foreign county, a Japanese corporation or foreign corporation with a PE that is a constituent entity of a specified MNE group does not have the duty to submit a CbC report because the CbC report submitted by the ultimate or surrogate parent entity to the tax authorities in the country where it resides is transmitted by the tax authorities to the NTA in Japan. As an exception, under certain conditions, Japanese corporations or foreign corporations with a PE that is a constituent entity of a specified MNE group must submit a CbC report to the District Director via e-Tax within one year of the day when the fiscal year covered by the report ends.

The first year for the CbC report will be the year commencing on or after 1 April 2016. MNE groups that reported less than JPY100 billion of total consolidated income in the previous fiscal year will be exempt from the CbC reporting requirement.

Master file

Japanese corporations or foreign corporations with a PE that is a constituent entity of a specified MNE group must submit a master file to the District Director via e-Tax filing within one year of the day following the end of the fiscal year covered by the file.

The first year for the master file will be the year commencing on or after 1 April 2016. MNE groups that reported less than JPY100 billion of total consolidated income in the previous fiscal year will be exempt from the master file reporting requirement.

Local file

Corporations engaged in controlled transactions must prepare or obtain and store documents considered as necessary to calculate arm's-length prices for the controlled transactions by the deadline for submission of final tax returns (contemporaneous documentation). Documents considered as necessary to calculate arm's-length pricing are stipulated under STML Enforcement Regulations Articles 22-10 and 22-74.

The first year for the local file will be the year commencing on or after 1 April 2017. Any foreign related transactions with a particular foreign related-party with less than JPY5 billion (sum of receipts and payments) in the previous fiscal year (or current fiscal year if there is no previous fiscal year) as well as intangible assets transactions with less than JPY300 million (sum of receipts and payments) will be exempted from a requirement to prepare and maintain a local file by the due date of the tax return (contemporaneous documentation).

Failure to provide appropriate materials by a day designated by a tax examiner that comes within 45 days can trigger the tax examiner's authority to collect transactional data from comparable firms (i.e., secret comparables) for the taxpayer. That is, the comparables are not disclosed to the taxpayer because the transactional data of the companies is confidential. Alternatively, an examiner can resort to "presumptive taxation," presuming an arm's-length price with reference to profit ratios of other corporations in the industry that carry out similar activities.

If any foreign related transactions are exempt from contemporaneous documentation, the taxpayer is required to submit documents considered as important to calculate arm's-length pricing stipulated under STML Enforcement Regulations Articles 22-10 and 22-74 by the day designated by the tax examiner that comes within 60 days.

Japan (continued)

Priorities/pricing methods

Historically, the Japanese tax authorities have required that the CUP, resale price and cost-plus methods be used whenever possible, allowing the use of other methods (e.g., profit split and TNMM) only after the first three have been discounted. However, triggered by similar changes in the OECD Guidelines, STML Articles 66-4 and 66-4-2 were amended to eliminate the hierarchy of methods in favor of the most-appropriate-method approach for tax years beginning on or after 1 October 2011.

Return disclosures/related-party disclosures

The taxpayer must file Schedule 17-4 (previously Schedule 17-3) – Detailed Statement Concerning Foreign Affiliated Persons and Related-party Transactions. Schedule 17-4 requires that taxpayers disclose the transfer pricing methods applied in calculating the arm's-length prices of foreign related-party transactions.

Schedule 17-4 requires taxpayers to disclose the following three additional information items:

- The number of employees of the foreign related-party
- The amount of retained earnings of the foreign related-party for the preceding year
- Any APA between the taxpayer and the foreign competent authority

Transfer pricing-specific returns

Schedule 17-4 must be attached to the regular annual tax return when the taxpayer has foreign related-party transactions during the fiscal year.

Documentation deadlines

A CbC report is required to be submitted within one year of the year-end of the ultimate parent with the District Director by e-Tax filing.

A master file is required to be submitted within one year of the year-end of the ultimate parent to the District Director by e-Tax filing.

A local file is required to be prepared within two to four months following the year-end depending on whether an extension is in place.

Transfer pricing penalties

Transfer pricing assessments are subject to the same penalties that apply to general corporate tax assessments. There are two types of penalties:

- The underpayment penalty tax is computed as either 10% of the additional assessed tax (up to JPY500,000) or 15% of the additional tax, depending on the amount of underpayment.
- Delinquency tax (interest) accrues in two parts:
  - The first part of delinquency tax accrues for one year following the due date of the original tax return at a rate of 4% per year plus the official discount rate as of 30 November of the prior fiscal year. However, for the time period commencing 1 January 2014, the rate is determined by adding 1% to the average contractual interest rate on short-term bank loans for the period from October (two years prior) to September of the prior year, as announced by the Minister of Finance on 15 December of the prior year. As a specific example, this translates to a delinquency tax rate of 2.8% for the period from 1 January 2015 to 31 December 2015.

The second part of delinquency tax accrues from the date following the date of the assessment notice until the date the additional tax is paid. For the first three months following the date of the assessment notice (including the one-month period from the date of the notice until the payment deadline, and two months following the deadline), the rate of delinquency tax is 4% per year plus the official discount rate as of 30 November of the prior fiscal year. However, for the time period commencing 1 January 2014, the new rate explained in the above paragraph applies. For any delinquency tax accruing after this period, the rate increases to the lower of 14.6% or the rate computed by adding 7.3% to the average contractual interest rate on short-term bank loans for the period from October (two years prior) to September of the prior year, as announced by the Minister of Finance on 15 December of the prior year. As a specific example, this translates to a delinquency tax rate of 2.8% for the period from 1 January 2015 to 31 December 2015.

A fine of up to JPY300,000 will be imposed if corporations fail to submit a CbC report or a master file to the District Director by the deadline without good reason.

There is no separate penalty for failure to prepare and maintain a local file. However, unlike in many other countries, preparation of sufficient documentation does not lead to penalty relief in the case of an assessment.

Penalty relief

There are no specific provisions for reductions of underpayment penalties.

However, the 2007 tax reforms allowed for the provision of a grace period for the payment of assessed taxes — including penalty taxes — for taxpayers submitting an application for MAPs. The taxpayer must submit a separate application to be entitled to the grace period. The grace period is the period starting on the initial payment due date of assessed taxes (if the application submission date is later than the initial payment due date, the submission date is applicable) and ending one month after the day on which the "correction," based on the mutual agreement, has been made (or the day on which a notification was issued that an agreement could not be reached). Any delinquency taxes accrued during the grace period will be exempted. However, under STML Article 66-4-2(2) (which grants a postponement of tax payment), the tax authority requires the taxpayer to provide security equivalent to the amount of the tax payment (i.e., collateral). This new transfer pricing rule applies to applications for a grace period made on or after 1 April 2007.

Statute of limitations on transfer pricing assessments

The statute of limitations in Japan on transfer pricing assessments is six years from the deadline for filing tax returns for a fiscal year (STML Article 66-4(16)).

A corporation must maintain corporate tax records for seven years from the fiscal year-end (Corporation Tax Law Articles 126 and 150-2 and Corporation Tax Law Enforcement Regulation Articles 59 and 67).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a specific company being audited depends on the company's profile. In general, however, the likelihood of a general tax audit in Japan is medium to high, compared with other jurisdictions. The Japanese tax authorities have a robust enforcement mechanism, and tax audits are a regular tool of enforcement. Medium to large taxpayers can expect a tax audit on a regular basis.

Tax examinations usually include a review of transfer pricing issues, even if the examination team lacks specialized transfer pricing expertise. A tax examiner may challenge transfer pricing directly, or may refer the file to a specialized transfer pricing team for follow-up. Thus, the likelihood that transfer pricing will be part of a general tax audit is similarly characterized as medium to high. This likelihood has increased with the introduction of the New General Tax Law, which prohibits two or more separate tax audits of the same taxable period, except in cases where the taxpayer's written consent has been obtained. The effect of this new law is to incentivize the simultaneous conduct of a transfer pricing audit along with the general tax audit.

Japan (continued)

Taxpayers may also be audited for transfer pricing only (not part of a tax audit) when they consent to a separate transfer pricing audit. In general, the Japanese tax authorities request that taxpayers provide written consent prior to the start of an extensive transfer pricing audit. The NTA and the major regional tax bureaus together employ a large corps of dedicated transfer pricing specialists to enforce Japan's transfer pricing rules. Transfer pricing audit risk is generally medium to high for large taxpayers with significant related-party transactions. The risk is increased for taxpayers that meet any of the following criteria:

- In industries targeted by the NTA
- Low profits or losses in Japan
- High profits in foreign affiliates as disclosed in Schedule 17-4 (relative to profits reported in Japan)
- Fluctuating profitability
- Significant transactions with low-tax jurisdictions
- In industries with high margins (the NTA is likely to seek applying its own comparables, including possibly secret comparables available only to the NTA, although secret comparables have become less common in recent years)

Regardless of whether a transfer pricing review arises from a general tax audit or a transfer pricing audit, once the review is underway, the likelihood that the transfer pricing methodology will be challenged is high if the taxpayer appears unprepared to defend its transfer pricing policies and methods.

APA opportunity

Unilateral and bilateral APAs are available and very common; however, the NTA prefers bilateral APAs.

APA guidelines are included in the Administrative Guidelines. A rollback of up to six years is possible in the case of a bilateral APA; however, a rollback is not permitted in unilateral cases.

The NTA regularly accepts profit-based methods, such as the TNMM.

The APA filing deadline is the first day of the first fiscal year to be covered by the proposed APA.

Impact of new OECD BEPS Action 8–10 guidelines

Based on the report issued by the Tax Research Commission (the sixth international taxation DG) dated 23 October 2015, the Ministry of Finance has been examining whether domestic tax law and practice should be amended to reflect the BEPS Action 8–10 reports on 23 May 2016. A guidance on measures for hard-to-value intangibles was set to be prepared in 2016 and on the transactional profit split method in the first half of 2017. Guidance on low-value-added intragroup services and cross-border commodity transaction is also expected to be prepared.

Jordan

Taxing authority and tax law

Taxing authority: Income and Sales Tax Department (ISTD)

Tax Law: Income Tax Law No. (34) of 2014 (Income Tax Law), as amended

Relevant regulations and rulings

Jordan's Income Tax Law does not currently follow OECD Guidelines. The only guidance regarding transfer pricing rules in Jordan is provided under Article 20 (d). This article does not set rates or specifications to calculate the profit margin in regard to related parties' transactions; it specifies only that related-party transactions should be entered into under similar commercial terms and rates as in contracts with unrelated third parties based on the standard market practice.

Jordan has entered into double tax treaties with a number of foreign countries wherein the language contains an article that resembles Article 9 of the OECD Model Treaty (on associated enterprises). However, the ISTD does not usually honor or consistently apply the treaties.

OECD Guidelines treatment

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Not applicable.

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In Jordan, the sampling method is applied by the ISTD to select which files will undergo a tax audit. However, as per the practice of the ISTD, a tax audit will be conducted for taxpayers who are labeled as "large taxpayers" — i.e., those with revenues equal to JOD4 million or above.

APA opportunity

Not applicable.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position yet; however, it will be important to monitor further developments in this area.

Kazakhstan

Taxing authority and tax law

Taxing authority: State Revenue Committee of the Ministry of Finance

Law: The Law of the Republic of Kazakhstan on Transfer Pricing No. 67-IV of 5 July 2008 (the TP Law)

Relevant regulations and rulings

In addition to the TP Law, the following subordinate legal acts regulate transfer pricing in Kazakhstan:

- Rules for monitoring of transactions (No. 176 of 16 March 2015)
- Rules for concluding agreements on the application of transfer pricing (No. 1197 of 24 October 2011)
- Rules on the procedure of authorized bodies' interaction in examining transfer pricing issues (No. 129 of 26 March 2009)
- List of goods (works, services) in international business transactions that are subject to transaction monitoring (No. 194 of 19 March 2015)
- List of officially recognized sources of information on market prices (No. 292 of 12 March 2009)
- List of exchange-quoted goods (No. 638 of 6 May 2009)

OECD Guidelines treatment

Although Kazakhstan is not a member of the OECD, the transfer pricing law currently in effect has some features in common with the OECD Guidelines. However, one of the principal differences is that Kazakhstan's transfer pricing legislation targets all international business transactions, regardless of whether the parties are related.

Documentation requirements

Documentation requirements are established for two categories of transactions in Kazakhstan:

- Transactions with goods (works, services) that are subject to monitoring
- All other transactions with goods (works, services) subject to transfer pricing control

Taxpayers involved in transactions subject to monitoring are required to prepare and submit monitoring reports annually. Monitoring reports include information on the applied prices, relationships of the parties, industries and market conditions, business strategy, transfer pricing methodology, functional and risk analysis, tangible and intangible assets, method, source of information used for determination of a market price, and other related information.

Transaction participants executing transactions with other goods (works, services) that are subject to transfer pricing control should maintain documentation supporting the applied prices, but this documentation must not be as detailed as that required for monitoring reports. The tax authorities may request transfer pricing documentation in either Kazakh or Russian languages.

Priorities/pricing methods

The transfer pricing law supports five pricing methods that should be applied in the following order: CUP, cost-plus, subsequent resale price, profit split and TNMM. Although the methods have similar names, their application may differ from that described in the OECD Guidelines.

Return disclosures/related-party disclosures

Currently, no related-party disclosure is required in tax declarations, though both National Accounting Standards and International Financial Reporting Standards (IFRS) require such disclosures in financial statements.

Transfer pricing-specific returns

Apart from the general transfer pricing documentation requirements (as described above), no other transfer pricing return is required to be filed.

Documentation deadlines

Transfer pricing monitoring reports must be submitted to the tax authorities no later than 15 May of the year following the reporting year.

The documentation supporting the applied transaction prices must be submitted within 90 days of the date of the competent authority's request.

Transfer pricing penalties

Special penalties are in place for failure to comply with the documentation requirements established by the transfer pricing legislation (i.e., monitoring reporting and documentation supporting the transaction price). The maximum amount of penalty is set at approximately USD2,200 (KZT742,000).

The penalty for an understatement of tax resulting from a transfer pricing adjustment is up to 50% of the additional accrued tax amount. In addition, interest for the delayed payment of the additionally assessed tax resulting from the transfer pricing adjustment is calculated at 2.5 times the National Bank refinancing rate (approximately 13.75%).

Transfer pricing penalties are also imposed on individuals for personal liability of an administrative violation, including criminal liability if the tax amount misreported exceeds approximately USD125,000 (KZT42,420,000).

Penalty relief

The legislation in Kazakhstan considers cases for penalty relief when an entity may be exempt from administrative liability. These cases, among others, include expiration of the statute of limitations, exemption on the basis of an act of amnesty and reconciliation of the parties. Despite legal provisions allowing for exemption, implementation is quite rare in practice.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. The general statute of limitations period for the assessment of penalties for underpayments of tax, understatements of income or overstatements of expenses is five years from the date of the relevant violation. Within the same statute of limitations period, the taxpayer has the right to introduce amendments and additions to its tax reporting.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit depends on the tax risk level assigned to a particular taxpayer. There are several criteria for determining the level of tax risk. The main criterion is the coefficient of the tax burden of the taxpayer. Depending on the level of risk, the tax authorities determine the frequency of tax audits to be conducted:

- For high level of risk — not more than one tax audit per annum
- For medium level of risk — not more than one tax audit in three years
- For low level of risk — not more than one tax audit in five years

The likelihood of transfer pricing issues being scrutinized during an audit and the tax authority challenging the transfer pricing methodology is high. The export of goods from Kazakhstan receives greater scrutiny. A review of the method, its use and the interpretation of information on market prices often results in transfer pricing adjustments that are often contested by taxpayers.

There are two types of tax audits in Kazakhstan that can cover transfer pricing issues: complex and thematic. A complex audit is aimed at checking tax obligations for all types of taxes and other obligatory payments for the fiscal year, including those related to transfer pricing. A thematic tax audit reviews only tax obligations on specific issues or taxes (e.g., transfer pricing issues).

APA opportunity

Transaction participants are allowed to conclude an agreement on the application of transfer prices. The procedure for requesting such an agreement is included in the rules for concluding agreements on the application of transfer pricing, and it discusses the following:

- List of documents required for concluding the agreement
- Procedure for consideration of a request by the authorized bodies (tax and customs authorities)
- Duration of the agreement (e.g., not more than three years from the date of signing)
- Other

Impact of new OECD Guidelines

There has not been any impact from the new OECD Guidelines yet.

Kenya

Taxing authority and tax law

Taxing authority: Kenya Revenue Authority (KRA)

Tax law: Income Tax Act

Relevant regulations and rulings

Section 18(3) of the Income Tax Act and the Income Tax (transfer pricing) Rules, 2006 (amended rules 2012) articulates the arm's-length principle and provides guidance about the definition of related persons. The transfer pricing guidelines apply to:

- Transactions between associated enterprises within a multinational company where one enterprise is located in, and is subject to tax in, Kenya and the other is located outside Kenya
- Transactions between a permanent establishment and its head office or other related branches in which the permanent establishment shall be treated as a distinct and separate enterprise from its head office and related branches

OECD Guidelines treatment

The Income Tax (transfer pricing) Rules provide for the application of the OECD methods in determining the arm's-length pricing.

Documentation requirements

The Commissioner for Domestic Taxes may, where necessary, request information, including books of accounts and other documents relating to transactions where transfer pricing is applied. Such documents shall include information relating to:

- The selection of the transfer pricing method and the reasons for the selection
- The application of the method, including the calculations made and price adjustment factors considered
- The global organization structure of the enterprise
- The details of the transaction under consideration
- The assumptions, strategies and policies applied in selecting the method
- Other background information regarding the transaction

The books of accounts and other documents shall be prepared in, or translated into, English at the time the transfer price is established.

When a taxpayer avers the application of arm's-length pricing, such taxpayer shall:

- Develop an appropriate transfer pricing policy
- Determine the arm's-length price as prescribed under the guidelines provided by these rules
- Furnish documentation evidencing their analysis upon request by the Commissioner for Domestic Taxes

Priorities/pricing methods

Rule 4 of the aforementioned rules provides that a taxpayer may choose from among six methods when determining the arm's-length price: CUP, resale price, cost-plus, profit split, TNMM and any other method as the Commissioner for Domestic Taxes may prescribe.

In 2012, the transfer pricing rules were amended to give the Commissioner for Domestic Taxes power to prescribe the application of the above methods. The practice notes that the application of the methods is yet to be released by the KRA.

Return disclosures/related-party disclosures

According to the corporate tax return format, the taxpayer is required to declare the names and addresses of related parties outside of Kenya.

Transfer pricing-specific returns

There are no specific transfer pricing returns for taxpayers.

Documentation deadlines

The deadline for preparing documentation is the same as the deadline for filing the tax return (i.e., within six months after year-end). Appropriate documentation must be provided upon request.

Transfer pricing penalties

There are no specific transfer pricing penalties. However, the Commissioner for Domestic Taxes can conduct an audit and make adjustments in the taxable profit and demand taxes, where applicable. Any tax due and unpaid in a transfer pricing arrangement is deemed to be an additional tax for the purposes of §§72D, 94 and 95(1) of the Income Tax Act.

- Section 72D of the Income Tax Act provides that a penalty of 20% shall immediately become due and payable on the unpaid tax after the due date.
- Section 94 of the Income Tax Act provides that a late payment interest of 2% per month — or part thereof — shall be charged on the tax amount, including the penalty remaining unpaid for more than one month after the due date, until the full amount is recovered.
- Section 95(1) provides that if the tax assessed on the total annual income of a person is greater than 10% of the estimated amount of chargeable tax on the taxpayer's provisional income tax return for that year, interest at the rate of 2% per month shall be payable on the entire difference between the tax assessed and the tax estimated.

Penalty relief

Currently, there is no penalty relief available.

Statute of limitations on transfer pricing assessments

According to §56(3) of the Income Tax Act, the statute of limitations for transfer pricing assessments is seven years after the relevant year of income, unless the Commissioner for Domestic Taxes has reasonable cause to believe that fraud or gross or willful neglect has been committed in connection with, or in relation to, tax for a year of income.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The taxing authority has intensified transfer pricing audits and has been issuing communications challenging already filed transfer pricing policies. The likelihood of occurrence of tax audits is high, as is the likelihood of a transfer pricing review as part of a general tax audit. The likelihood of the transfer pricing methodology being challenged in a transfer pricing review is high.

Kenya (continued)

APA opportunity

No specific APA rules are applicable.

Impact of new OECD Guidelines

Kenya is not a member state of the OECD, and transfer pricing regulations do not have explicit reference to the latest approved OECD version. Thus, the amendments will not apply automatically, and it will be important to monitor further developments in this area.

Kosovo

Taxing authority and tax law

Tax authority: Tax Administration of Kosovo

Tax laws and ministerial instructions: Corporate Income Tax (CIT) law and Tax Administration and Procedures (tax procedures law)

Relevant regulations and rulings

Tax laws and ministerial instructions that govern transfer pricing include:

- Law No. 05/L-029, dated 22 July 2015, on CIT
  - Article 2, paragraph 1.12 — definition of market value
  - Article 2, paragraph 1.18 — definition of related persons for CIT purposes
  - Article 27 — transfer pricing definition, transfer pricing methods
- Law No. 03/222, dated 12 July 2010, on tax procedures
  - Article 1, paragraph 1.27 — definition of related persons
  - Article 46 — tax authorities' right of transfer pricing adjustments
- Double taxation treaties enacted by Kosovo
- Administrative Instruction No. 14/2010, dated 19 November 2010, of the Ministry of Economy and Finance on CIT law (a new administrative instruction is expected to be issued following the abrogation of Law 03/L-162 on CIT)
  - Section 20, paragraph 1 — transfer pricing application
  - Section 20, paragraph 1-8 — transfer pricing methods priority application
  - Section 20, paragraph 9 — transfer pricing documentation

OECD Guidelines treatment

The Kosovar legislation on transfer pricing makes reference to the OECD Guidelines. The relevant regulatory framework for transfer pricing includes provisions of the CIT law and tax procedures law and the related instructions.

Documentation requirements

Taxpayers that perform transactions with related parties must maintain sufficient supporting documentation to justify their transfer price determination method and to show that it is in line with the arm's-length principle. Such documentation should explain in detail the methodology used in arriving at the transfer prices applied.

Priorities/pricing methods

The tax authorities generally follow the OECD Guidelines in examining related-party transactions and transfer prices charged. However, contrary to the OECD best-method approach, the three traditional transactional methods are preferred, especially the CUP method. When profit split is more appropriate, because the activities of the transacting entity are highly integrated and the use of intangibles is incurred, the tax authorities may allow it to be used. A method of last resort is the TNMM.

Return disclosures/related-party disclosures

The current legislation does not provide for any return disclosures or related-party disclosures. According to the Kosovar tax legislation, the taxpayer is not required to file any transfer pricing documentation with the tax authority.

Companies' financial statements include certain compulsory disclosures of related-party transactions.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

The current legislation does not provide for specific penalties in case of transfer pricing adjustments. Therefore, in case of an adjustment, the general tax penalties would apply. Hence, a penalty of 50% would apply on the amount of unpaid tax liability due to the lower declared taxable profit. If the taxpayer decides to amend the transfer pricing position taken previously by filing an amended tax return, before a tax audit is initiated, then the penalty for the late filing imposed will be 5% of the unpaid liability for each month of delay, capped at 25%. Moreover, a penalty for late payment of the tax liability will apply at 1% thereof for each month of delay, capped at 12%. Both penalties do not apply cumulatively; rather, the late payment penalty starts applying to the extent that the unpaid liability has not been paid by the time the late-filing penalty reaches its ceiling. In both cases, default interest would apply, which should be, at a minimum, 0.5% higher than the bank lending interest rate in Kosovo.

Penalty relief

Currently, no penalty relief is available.

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments is six years from the income tax return filing due date.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transfer pricing is audited in the general course of a corporate income tax audit. The likelihood of a tax audit in Kosovo is high for domestic and foreign groups of companies. Usually, a tax audit covers the last three to four years. Laws and relevant guidelines do not provide details on the contents of the documentation required to be kept by the taxpayer to substantiate the grounds on which the transfer prices applied are in line with the arm's-length principle. The tax administration is unlikely to challenge the methodology applied. In principle, in examining the arm's-length character of a transaction, the tax administration should use the same transfer pricing method applied by the taxpayer, to the extent that it is the most appropriate one for that transaction.

Kosovo (continued)

APA opportunity

Kosovar legislation does not provide for the possibility of an APA.

Impact of new OECD Guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Kuwait

Taxing authority and tax law

Taxing authority: Kuwait taxes are administered by the Department of Inspections and Tax Claims (DIT).

Tax law: Kuwait Income Tax Decree No. (3) of 1955, as amended by Law No. 2/2008 read along with its Executive Rules and Instructions

Relevant regulations and rulings[1]

This includes Executive Bylaws of Law No. 2/2008 and Executive Rules and Instructions of Kuwait Income Tax Decree No. 3 of 1955, as amended by Law No. 2/2008. Executive Rule No. 49, concerning the tax treatment of related companies:

- Sets out the definition of "related parties"
- Incorporates the arm's-length principle into Kuwaiti domestic regulations
- Provides a clear basis for the tax authority to inspect companies dealing with related parties and verify whether the arm's-length principles was observed
- Gives the authorities effective rights to assess the respective profits of related parties in cases of "dividing the tax burden," tax avoidance, tax evasion or "reduction" of taxes

The definition of related parties is broad when compared with international standards. It covers companies that are "legally or financially associated, thus creating common interest." Further, the regulations provide for a non-exhaustive list of examples of related parties, covered by the definition (holding — subsidiary, head office — branch, associate companies). It needs to be stressed here that the definitions refer to "effective control" (whether resulting from shareholding or contractual arrangements) and "substantial influence" criteria.

The regulations do not provide any specific procedures to follow in transfer pricing inspections, implying that the general regulations pertaining to tax assessments apply.

The regulations do not list the methods that the tax authorities should follow, other than the general guidance that related-party transactions should have "a sound base" and be "compared with what is usually conducted among companies which are not legally or financially associated."

In addition to the general framework described above, the domestic tax laws also provide many specific, although provisional, anti-avoidance and safe-harbor regulations applicable in related-party transactions. The mechanisms applied by the legislature here vary. A clear trend to tighten the tax system is observed. The measures adopted include fixed profitability ratios (deemed profit margins) and limitations on deducting costs.

For example, Executive Rule Nos. 25 and 26 concerning Supplies and Design and Consultancy expenses respectively provide for the following regarding related-party transactions:

- Supplies — The DIT deems the following profit margins (computed on the revenue from imported materials and equipment) on imported material cost:
  - Imports from head office: 15%
  - Imports from related parties: 10%
  - Imports from non-related parties (i.e., third parties): 5%

[1] Unless stated otherwise, all quotes and terms used herein are based on EY's translation from Arabic

Kuwait (continued)

- Design fees incurred abroad — The DIT deems the following profit margins (computed on the design revenue) for design expenses incurred outside Kuwait:
  - Design work carried out by head office: 25%
  - Design work carried out by the related parties: 20%
  - Design work carried out by the non-related parties (i.e., third parties): 15%
- Consultancy fees incurred abroad — The DIT deems the following profit margins (computed on the consultancy revenue) on consultancy fees incurred outside Kuwait:
- Consultancy work carried out by head office: 30%
- Consultancy work carried out by the related parties: 25%
- Consultancy work carried out by the non-related parties (i.e., third parties): 20%

Related-party leases: Lease expenses arising from assets rented from related parties are allowed as a deductible expense only after customs documents evidencing the value of the assets are presented to the DIT. The lease expenses will be limited to the amount of depreciation normally charged on the asset for its use in Kuwait. In the event that it is not possible to determine the asset's value on which depreciation is calculated, the rental value of the leased assets may not be approved and the expense is fully disallowed.

The deduction of interest allocated by the head office may be disallowed for tax purposes in certain cases. Head-office cost allocation can be capped.

Intellectual property: The DIT would determine the reasonableness of charges from related parties for intellectual property based on supporting documents.

All of the above rules contain clauses allowing certain flexibility. The tax authority may decide on a different treatment upon consultation, depending on the circumstances of the case. These clauses, although rarely applied to the benefit of taxpayers so far, can be revoked in conjunction with the tax treaty regulations.

OECD Guidelines treatment

The domestic regulations do not explicitly refer to the OECD Guidelines.

In practice, however, the likelihood of controversy and tax assessment decreases if the taxpayer refers to internationally accepted standards and the proper application of the method in a particular case is well-documented.

Documentation requirements

Currently, Kuwaiti tax regulations do not set any formal transfer pricing documentation requirements. Transfer pricing documentation should be drawn up and updated to limit the controversy exposure.

Priorities/pricing methods

Domestic laws do not regulate the pricing methods. As mentioned above, the regulations offer general guidance in this respect. In practice, it may be useful in discussions with the DIT if the transfer pricing method used is based on internationally accepted principles and standards and the transfer pricing documentation shows that the taxpayer adhered to the method.

Kuwait (continued)

Return disclosures/related-party disclosures

The International Financial Reporting Standards are followed in Kuwait. This sets the basic related-party disclosure standard and implies transparency in this regard.

The disclosure duties based on tax laws are very broad under the Kuwaiti regulations. There is a general obligation to disclose the transactions (obviously including the related-party transactions) in connection with tax retention duties. This implies that the tax authorities have access to a broad base of information pertaining to the level of prices agreed upon locally, both between related and non-related parties. In addition, the taxpayers are obliged to disclose some of the related-party transactions as part of the annual corporate income tax return with respect to material cost, design and consultancy fees incurred; related-party leases; intragroup financing; intellectual property; and other items. A special template must be used.

Transfer pricing-specific returns

Kuwait does not require a separate return for related-party transactions. A specific template covering selected related and non-related-party transactions must be disclosed, together with the annual tax return.

Documentation deadlines

Currently, Kuwait does not have any formal documentation requirements and, hence, no deadlines.

In practice, it is advisable to prepare and update the documentation before the annual inspection so that it can be admitted as evidence in the proceedings in a timely manner.

Transfer pricing penalties

There are no specific penalties applicable in transfer pricing adjustments. Kuwait does not have specific penalties for failure to present the appropriate documentation. Penalty interest (1% per month) is imposed in the case of transfer pricing adjustments resulting in an assessment of additional income.

Penalty relief

Kuwaiti tax regulations do not offer any penalty relief mechanisms.

Statute of limitations on transfer pricing assessments

General regulations apply. Law No. 2 of 2008 provides a statute of limitations period of five years (generally, calculated from the date of filing the annual tax return, unless a tolling or discovery rule can be applied).

Frequency of the tax audit and transfer pricing scrutiny by the tax authority

The Kuwaiti tax system is based on initial self-assessment followed by the mandatory audit of the tax return by the tax authority. This implies that, in essence, the DIT audits every submitted tax return, including any related-party transactions.

Kuwait (continued)

The taxing authority adds special scrutiny for intercompany transactions relating to material supply cost, design and consultancy fees incurred abroad; related-party leases; intragroup financing; and intellectual property. Here, the likelihood of challenging the transfer price or methodology is characterized as particularly high. Similarly, transactions pertaining to material assets disposal usually trigger the attention of the tax authority. The same applies when entities declare midterm and long-term losses from their Kuwaiti operations.

APA opportunity

There are no specific provisions allowing APAs in Kuwaiti domestic regulations.

Impact of new OECD BEPS Action 8–10 guidelines

Kuwait has not taken any position with respect to the applicability of the amended OECD Transfer Pricing Guidelines 2016 that were updated with the BEPS 8-10 reports on 23 May 2016.

Laos

Taxing authority and tax law

Tax authority: Tax Department

Tax law: Amended Tax Law No. 70/NA, dated 15 December 2015

Relevant regulations and rulings

There are no transfer pricing regulations in Laos.

Laos has concluded double tax treaties that are in effect with Brunei, China, South Korea, Malaysia, Myanmar, Thailand, Vietnam and Luxembourg.

OECD Guidelines treatment

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

In regulations, there are no specified pricing methods in Laos. In practice, the Tax Department may adopt a different pricing method, such as averaged or market prices.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Not applicable.

Penalty relief

Not applicable.

Laos (continued)

Statute of limitations on transfer pricing assessments

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The Laos Tax Department conducts annual tax audits and assessments after the corporate taxpayers submit their annual profits tax returns and financial statements in March of the following year. There is no specific transfer pricing audit in Laos.

APA opportunity

Not applicable.

Impact of new OECD Guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Latvia

Taxing authority and tax law

Tax authority: State Revenue Service

Tax law: Law on Corporate Income Tax; Law on Taxes and Duties

Relevant regulations and rulings

The arm's-length principle is established in the Law on Corporate Income Tax. Article 12 of the Law on Corporate Income Tax determines that the taxable income of the taxpayer may be adjusted upward if related-party transactions are not at arm's-length. Transfer pricing documentation requirements are laid down in Article 152 of the Law on Taxes and Duties.

Cabinet Regulation No. 556, promulgated on 4 July 2006, set the transfer pricing methods applicable for determining arm's-length prices in related-party transactions. Additionally, Cabinet Regulation No. 16, promulgated on 3 January 2013, set requirements regarding the conclusion of APAs.

Latvian companies generally have to apply accounting rules that are set by local accounting law and relevant Cabinet Regulations. The main principles provided by the local accounting law mainly are in line with International Financial Reporting Standards (IFRS), although there are various differences. Exceptions apply to credit institutions and insurance companies that have to apply IFRS.

OECD Guidelines treatment

Latvian transfer pricing legislative acts contain a reference to the OECD Guidelines in applying the transfer pricing methods. In most cases, the State Revenue Service accepts the principles stipulated in the OECD Guidelines regarding the structure of transfer pricing documentation.

Documentation requirements

Taxable persons with an annual net turnover exceeding EUR1.43 million are obliged to prepare transfer pricing documentation for all related-party transactions with an annual value of more than EUR14,300.

According to the Law on Taxes and Duties, transfer pricing documentation should contain:

- General overview of the industry — brief description of taxpayer's operations in recent years
- Organizational and legal structure of the taxpayer and related entity — description of internal relations
- Information about taxpayer's business strategy — market strategy, product distribution strategy and supply chain, as well as sales and management strategy that may affect the pricing policy of intercompany transactions
- Description of intangibles — any that may affect the transfer price, if any
- Information identifying operations between related companies — functions of the group members, including associated risks and assets employed; the role and responsibility of each group member involved in the transactions; and information regarding restructuring the taxpayer's operations resulting in the transfer (acquisition) of business functions, assets or risks to (from) a related-party for a price compliant with the market price
- Description of the goods or services in the transactions — those between the taxpayer and related-party
- Terms and conditions of the agreement — those concluded between the taxpayer and related-party
- Forecast of taxpayer's operating activities — in relation to the agreement concluded with related entity

- Description of the selected transfer pricing method for testing compliance — for the price (cost) applied with a controlled transaction with the market price (cost)
- Depending on the selected transfer pricing method, financial analysis of comparable unrelated companies or analysis of price (cost) applied to comparable transactions between unrelated companies and compliance with the market price (cost)
- Other documents supporting the price (cost) applied to transactions between the taxpayer and related-party — concluded agreements; documents justifying expenses; written resolutions; and decisions made in board, council, shareholder and other internal meetings

The transfer pricing documentation should be filed with the tax authorities in Latvian. For non-qualifying taxpayers (with net turnover and related-party transaction with an annual value less than the statutory threshold), preparation of transfer pricing documentation is optional. However, they still should comply with the statutory requirement that controlled prices are at arm's-length. In practice, it means that the taxpayer may provide the State Revenue Service with limited-scope transfer pricing documentation substantiating that prices applied to intercompany transactions are at arm's-length.

Priorities/pricing methods

Five methods are accepted: CUP, resale price, cost-plus, profit split and TNMM. If the CUP method may be appropriately applied, then it is deemed as the preferential transfer pricing method.

Return disclosures/related-party disclosures

Related-party transactions must be disclosed in Appendix 2 of the Corporate Income Tax return. The taxpayer should disclose the related parties involved, the types of transactions (e.g., purchase or sale of goods, services or fixed assets), the volume of transactions and the transfer pricing methods applied.

Transfer pricing-specific returns

There are no transfer pricing-specific returns in Latvia; however, related-party transactions must be disclosed in Appendix 2 of the Corporate Income Tax return.

Documentation deadlines

There is no deadline set for the preparation of the transfer pricing documentation, but the relevant documentation could be required during the State Revenue Service's tax audit. The tax audit may be initiated throughout the year; however, taxable income adjustments may take place after the corporate income tax return is filed (i.e., four to seven months after the end of the financial year). Transfer pricing documentation should be submitted within 30 days following a request by the State Revenue Service.

Transfer pricing penalties

There is no specific penalty for not having transfer pricing documentation. When the prices applied in transactions between related parties are not at arm's-length, the taxable income of the taxpayer may be adjusted upward, and a penalty of 20% to 30% and a late payment penalty (annual rate of 18%) on the additionally payable corporate income tax may be applied. For recurring transfer pricing adjustments, the penalty rates are doubled (i.e., are from 40% to 60%).

Latvia (continued)

Penalty relief

There is no specific penalty relief with respect to transfer pricing adjustments. Per ordinary procedure, a penalty imposed as the result of a tax audit may be reduced by 50%. In practice, having proper transfer pricing documentation reduces the risk of transfer pricing adjustments.

Statute of limitations on transfer pricing assessments

The State Revenue Service has the right to assess the tax of local transactions within three years and cross-border transactions within five years after the tax becomes due.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Small and medium taxpayers in Latvia have a medium risk that they will be subject to a general tax audit, while large taxpayers have a high risk of audit. All taxpayers are exposed to a high risk that transfer pricing will be reviewed as a part

of an audit. In addition, there is a medium risk for all taxpayers that if transfer pricing is reviewed as a part of the audit, the transfer pricing methodology will be challenged.

APA opportunity

A taxpayer has an opportunity to conclude an APA with the State Revenue Service for cross-border transactions with a related foreign company when the transactions exceed EUR1.43 million during a period of 12 months.

There are specific Cabinet Regulations regarding an APA that specify the information to be included in an APA application, describe the procedure and time frame for concluding an APA, and set the fee for filing an APA.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position on how, from a domestic perspective, the amended OECD Transfer Pricing (TP) Guidelines 2016, which were updated with the BEPS Action 8–10 reports on 23 May 2016, will apply. With respect to the OECD TP Guidelines amendments that directly relate to the application of the five transfer pricing methods, the amendments generally should apply with respect to transactions that were entered into after 23 May 2016, as the local transfer pricing laws have relevant reference to the OECD TP Guidelines and according to the administrative process law, any amendments that may impact taxpayers should not have retroactive effect.

Lebanon

Taxing authority and tax law

Tax authority: Ministry of Finance

Tax law: Law 44 tax procedure law dated 11 November 2008/Income tax law dated 12 June 1959

Relevant regulations and rulings

The Lebanese tax regulation regarding transfer pricing is still neither elaborated upon nor clear.

Article 15 of the Income Tax Law states that if it appears that establishments belonging to establishments located outside Lebanon transfer part of their profits abroad either by increasing or decreasing purchase or sale prices, or otherwise, the profits so transferred shall, for taxation purposes, be added to the profits shown in the accounts. Without sufficient evidence to enable the real profits to be determined, the profits of a similar establishment shall be taken as a basis for comparing and determining the profit, in addition to the apparent indications and particulars gathered by the competent financial authorities.

In addition, the Lebanese Parliament raised the tax procedures law in 2008. Article 10 of that law states that the tax authority has the right to reclassify certain transactions in the following instances:

- Virtual transaction for the purpose of tax evasion
- Legal transaction in form but for the purpose of tax evasion
- Transactions between related parties if these transactions are not at arm's-length

Virtual transaction

According to Article 12 of the legislative decree No. 2488 dated 3 July 2009, which determines the application of Article 10 mentioned above, a transaction is considered virtual when its value differs by 20% from the arm's-length value of a similar transaction occurring between two non-related parties with the same competing conditions.

Arm's-length value

"Arm's-length value" is defined by the tax authorities under Decision No. 453/1, dated 22 April 2009, as the value of a similar transaction that occurs between independent persons and under complete competitive conditions that took place on the day of the transaction.

Individuals are considered related if any of them holds the authority of supervision, management or control over the other, or if they are related by other means such that one party is an employee of the other or if any one of them is a guardian for the other.

Individuals and entities are considered related when any one of them has the authority of supervision and management over the other.

Entities are considered related if one entity has the authority of supervision and management over one or several other entities.

Tax evasion

The tax authorities defined "tax evasion" as each action a taxpayer takes to reduce or eliminate the tax due, to postpone the tax due dates, or to increase the amount of deductible or refundable tax when it is prohibited.

OECD Guidelines treatment

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Not applicable.

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Not applicable.

APA opportunity

Not applicable.

Impact of new OECD Guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Libya

Taxing authority and tax law

Taxing authority: Tax Department of the Ministry of Finance

Tax law: Income Tax Law (Law 7/2010)

Relevant regulations and rulings

Currently, there are no local transfer pricing regulations in Libya, but Libya has concluded about 17 tax treaties that contain an article resembling Article 9 of the OECD Model Treaty (on associated enterprises).

OECD Guidelines treatment

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Not applicable.

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Not applicable.

APA opportunity

Not applicable.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Lithuania

Taxing authority and tax law

Taxing authority: Ministry of Finance of the Republic of Lithuania and the State Tax Inspectorate

Tax law: Law on Corporate Income Tax of Lithuania

Relevant regulations and rulings

The arm's-length principle is established in the Law on Corporate Income Tax of Lithuania and its implementation rules, introduced in 2004.

- Article 40 of the Law on Corporate Income Tax of Lithuania
- Order of the Minister of Finance No. 1K-123 as of 9 April 2004 on transfer pricing evaluation and documentation rules
- Order of the Head of the State Tax Inspectorate No. VA-27 as of 22 March 2005 on the associated party transaction disclosure in the annual corporate income tax return

OECD Guidelines treatment

The use of the OECD Guidelines is explicitly advocated in the regulations and rulings applicable in Lithuania.

Other OECD papers, such as those regarding business restructurings and profit allocation to permanent establishments, are not explicitly implemented in the Lithuanian legislation.

Documentation requirements

The transfer pricing documentation requirements are binding for resident and nonresident legal entities registered as corporate income taxpayers in Lithuania whose revenues in Lithuania in the year before the transactions were conducted exceeded EUR2.9 million.

In addition, transfer pricing documentation requirements apply to credit institutions, such as banks and entities providing financial services (e.g., insurance companies), regardless of their revenue amount.

The transfer pricing documentation has to contain:

- Details of the transactions
- Terms and conditions of the transactions
- Participants in the transactions, including their legal and organizational structure
- Functions performed, property used or contributed, and the risks assumed by the parties
- Data and methods considered and the analyses performed to determine the transfer prices
- All relevant assumptions, strategies and policies that influenced the determination of the methods applied

In general, the principles in the OECD Guidelines are to be followed.

Priorities/pricing methods

The CUP method is preferred over other pricing methods. In cases where the CUP method cannot be reliably applied, other transaction-based methods, such as resale price or cost-plus, shall be used.

Taxpayers are encouraged to use profit-based methods only if transaction-based methods are not sufficient. Taxpayers are not required to use more than one method; however, a combination of methods may be used in all cases, provided the decision to apply any particular method is adequately supported.

Return disclosures/related-party disclosures

An associated-party disclosure annex (Form FR0528) to the annual corporate income tax return has to be submitted when the taxpayer's associated-party transactions exceed an annual value of approximately EUR90,000. On Form FR0528, taxpayers are required to provide information about the transactions between associated parties related to fixed tangible and intangible assets, stocks and goods, financial and other services, securities and derivatives, rent of property and loans. The taxpayers are also required to inform the tax authorities whether any transfer pricing method prescribed in the transfer pricing rules have been used in the transactions disclosed.

Transfer pricing-specific returns

The rules for completing the associated-party disclosure form (Form FR0528) are set forth in the Order of the Head of the State Tax Inspectorate No. VA-27 as of 22 March 2005. Form FR0528 must be submitted within six months of the end of each tax period. No other transfer pricing-specific returns shall be provided to the Lithuanian tax authorities.

Documentation deadlines

There are no specific requirements or schedules for preparing transfer pricing documentation. Taxpayers must submit the transfer pricing documentation within 30 days of the corresponding notice by the tax authorities.

Transfer pricing penalties

There are no specific transfer pricing penalties. General tax penalties of 10% to 50% of the additional tax are applicable in the case of taxable income adjustments. Moreover, penalty interest will apply.

There are no special penalties related to not providing transfer pricing documentation at the request of the tax authorities.

Penalty relief

Transfer pricing penalties are subject to general penalty relief rules.

Statute of limitations on transfer pricing assessments

Transfer pricing assessments may occur during the five years prior to the year in which the assessment takes place.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of a tax audit is characterized as medium. General tax audits are conducted at the discretion of the tax authorities. The likelihood that transfer pricing will be reviewed as part of an audit is characterized as high. Transfer pricing is high on the agenda during the tax audit. Transfer pricing documentation is always requested and analyzed. The likelihood that the transfer pricing methodology will be challenged is characterized as high. Tax authorities make an independent analysis of a taxpayer's tax position and analyze both documentation and factual results. Adjustments have been applied much more frequently than in previous years.

APA opportunity

As of 1 January 2012, taxpayers may conclude unilateral APAs with the Lithuanian tax authorities on prospective transactions. Bilateral or multilateral APAs may be concluded based on existing tax treaties for avoiding double taxation.

Impact of new OECD BEPS Action 8-10 guidelines

No official position or case law

Luxembourg

Taxing authority and tax law

Tax authority: Luxembourg Tax Authority (*Administration des Contributions Directes*)

Tax law: Income Tax Law (ITL), General Tax Law

Relevant regulations and rulings

The Luxembourg ITL contains two articles relating to transfer pricing: Article 56 ITL on the Arm's-Length Principle and Article 164(3) ITL on Hidden Profit Distribution. Both articles provide for the application of the arm's-length standard for transactions between related parties.

Article 56 ITL is dedicated to the arm's-length principle. Applicable as from 1 January 2015, profits of associated enterprises entering into transactions that do not meet the arm's-length principle will be determined according to normal market conditions and taxed accordingly. Based on this wording, both upward and downward adjustments are possible. Furthermore, this provision applies to domestic and cross-border transactions.

Article 56 ITL covers any "enterprise," which means any person carrying out a commercial activity. As such, under Article 56 ITL, S.A.s, S.à r.l.s, SICARs and individuals that have a commercial business are considered to be included in the definition of "enterprise." However, non-Luxembourg residents (unless they have a permanent establishment in Luxembourg) or transparent entities (such as FCP, SCS and SCSp, unless they exercise a commercial activity) would likely not be included under the scope of Article 56 ITL. SICAVs have a commercial business and are considered to be enterprises; however, they benefit from a subjective tax exemption.

The commentaries of the law specify that the arm's-length principle is applicable to any taxpayer, regardless of the legal form under which it exercises its activities in Luxembourg. Therefore, not only will this provision cover tax opaque collective undertakings and tax transparent partnerships, but also individual and collective undertakings without legal form.

Because Article 56 ITL grants the possibility to adjust the profits declared by a taxpayer, it is necessary to determine if the conditions of a controlled transaction (i.e., a transaction between associated enterprises) are consistent with the arm's-length principle and what quantum of adjustment has to be made to achieve the arm's-length principle. To assess this, a comprehensive economic comparability analysis/benchmark, which consists of comparing controlled transactions with uncontrolled transactions (i.e., transactions between independent parties), should in principle be realized in order to sustain the arm's-length character of the intragroup transaction. The commentaries to the law also refer to the OECD Guidelines, designed to be observed by multinationals as well as tax authorities in matters of transfer pricing between related parties involved in cross-border transactions.

The Luxembourg Tax Authority had already issued two circulars, on 28 January 2011 (Circular LIR No. 164/2) and on 8 April 2011 (Circular LIR No. 164/2 bis), regarding the tax treatment applicable to companies carrying out intragroup financing activities.

Circular LIR No. 164/2 clarifies, in broad terms, that the OECD Guidelines should be used as a reference when determining the arm's-length remuneration to be realized by companies carrying out intragroup financing activities. Moreover, it explains the substance requirements to be met by these entities and defines the procedure for obtaining clearance from the Luxembourg Tax Authority on the arm's-length remuneration of the financing activities. Circular LIR No. 164/2 bis clarifies the effect of Circular LIR No. 164/2 on intragroup financing transactions set up prior to its issuance. Notably, it provides a grandfathered period up through 31 December 2011 for clearances issued prior to 28 January 2011, and for companies to comply with the requirements of Circular LIR No. 164/2.

A draft law in relation to country-by-country reporting (CbCR) rules was introduced in the Luxembourg Parliament on 2 August 2016. The draft law aims at transposing Directive 2016/881/EU of 25 May 2016, which amends Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation as to include the CbCR rules for global multinational enterprises.

In addition, on 12 October 2016, a draft law was introduced in the Luxembourg Parliament, adding a new transfer pricing article in the ITL (Article 56bis), which focuses on the comparability analysis as revised in the context of BEPS. The draft law intends to implement the recommendations of the Guidance for Applying the Arm's-length Principle set out in Actions 8-10 of the BEPS Action Plan, by clarifying that the methods to be used for the determination of the appropriate arm's-length price must take into account the factors of comparability identified and be coherent with the nature of the accurately delineated transaction.

OECD Guidelines treatment

The OECD Guidelines are not officially incorporated into Luxembourgian tax law. Nevertheless, the commentaries to the 2015 Budget Law modifying Article 56 ITL refer to the OECD Guidelines being designed to be observed by multinationals, as well as tax authorities, in matters of transfer pricing between related parties involved in cross-border transactions. In addition, the commentaries to the 2017 Budget Law inserting the new Article 56bis refer to OECD BEPS Action 8 – 10, in particular to the Guidance for Applying the Arm's-length Principle. The reference to the OECD Guidelines for assessing the arm's-length character of intercompany transactions had already been confirmed in Circular LIR No. 164/2 about intragroup financing transactions.

Considering that OECD Guidelines are not incorporated into Luxembourg's income tax law, the arm's-length nature of intercompany transactions may also be established with reference to other generally accepted transfer pricing guidelines or regulations.

Documentation Requirements

Luxembourg's tax law includes general documentation requirements but does not provide specific transfer pricing documentation regulations. The General Tax Law has been amended to extend the existing general obligation of taxpayers so they can justify the data contained in their tax returns with appropriate information and documentation (codified in §171 of the General Tax Law) for transfer pricing matters. This provision is reinforced by a third paragraph clarifying that the general documentation requirements set forth by this provision also apply to transactions between associated enterprises.

In the absence of further guidance, one could rely on the OECD Guidelines (referred to in the commentary to the law) and the *Practical Manual on Transfer Pricing for Developing Countries* issued by the United Nations for an indication of what types of documentation a taxpayer may be required to provide. Reference is also made to the European Council's "Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union," dated in 2006, aimed at harmonizing the transfer pricing documentation that multinationals have to provide to tax authorities.

Priorities/pricing methods

Although there are no specific pricing methods mentioned in the ITL, the draft law introduced on 12 October 2016 reinforces that the methods to be used for the determination of the appropriate arm's-length compensation must take into account the OECD comparability factors and be coherent with the nature of the accurately delineated transactions. All methods advocated by the OECD are acceptable under the current administrative practice, such as the CUP, resale price, cost-plus, TNMM and profit split methods. There are no priorities established among the different methods.

Return disclosures/related-party disclosures

There are no specific disclosures required when filing tax returns. It is, however, a common practice that transactions with related parties are detailed by nature and by related-party in a schedule attached to the tax returns.

Transfer pricing-specific returns

Currently, there are no specific requirements for transfer pricing-specific returns.

Documentation deadlines

As a general rule, contemporaneous documentation should exist when transactions are carried out. That rule also applies to transfer pricing documentation. Luxembourg's tax law neither contains specific transfer pricing documentation regulations nor includes a deadline to produce transfer pricing documentation. As mentioned above, taxpayers must be able to justify the data contained in their tax returns with appropriate information and documentation. The tax authority may request, in the context of assessing the tax return or in the context of a tax audit, that transfer pricing documentation be provided within a certain time frame. Such time frame may be as short as 14 days but may be extended upon request.

With regards to the draft law in relation to the CbCR rules introduced in Luxembourg's Parliament on 2 August 2016, multinationals with entities in Luxembourg with a consolidated annual group revenue of at least EUR750 million will be required to file the CbC report for fiscal years beginning on and after 1 January 2016. The CbC report shall be filed no later than 12 months after the last day of the reporting fiscal year of the group.

Any constituent entity of a group that is resident for tax purposes in Luxembourg shall notify the Luxembourg tax authorities about whether it is the ultimate parent entity, the surrogate parent entity or the constituent entity no later than the last day of the reporting fiscal year of such group (i.e., for groups whose fiscal year-end is 31 December 2016, this notification should be made before 31 December 2016).

Transfer pricing penalties

To the extent that the arm's-length standard is not respected, the tax authority may reassess or adjust the taxable result, but no penalties are set forth in the tax law for cases in which such adjustments are made.

With regards to the CbCR rules, in the cases of failure on filing, late filing, inclusion of incomplete or inexact information, or in the case of not respecting any of the obligations included in the mentioned draft law, a penalty of up to EUR250,000 can be imposed to the declaring entity. This penalty is imposed at the discretion of the competent tax authority. Against the decision imposing the penalty, the declaring entity can appeal at the administrative court.

Penalty relief

Because there are no specific transfer pricing penalties in the tax law, there are no specific provisions for penalty reductions.

Statute of limitations on transfer pricing assessments

There are no specific limitations on transfer pricing adjustments; rather, the general rules apply. The statute of limitations is, in principle, five years starting from 1 January of the calendar year following the relevant tax year. In cases where no tax return or an incomplete tax return is filed, as well as in cases of fraud, the statute of limitations is extended to 10 years. Moreover, once a Luxembourgian company has been assessed for income and net wealth tax purposes for a particular year, the tax authorities may not reassess the relevant tax year unless they have obtained new information and the statute of limitations has not yet expired. As long as the tax authorities have issued a provisional tax assessment, the taxable base may still be adjusted after the provisional assessment is issued, until the statute of limitations has expired.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There are no specific rules regarding transfer pricing audits in Luxembourg. Transfer pricing normally should be reviewed as part of a regular tax audit respectively when assessing the tax return for a specific year. The risk of transfer pricing being reviewed under a tax audit is characterized as medium.

The tax authority has the right to carry out an audit during the statute of limitations period until final income tax assessments are issued.

APA opportunity

The General Tax Law (*Abgabenordnung*) includes a provision (Paragraph 29a) dedicated to the tax ruling practice (*procedure des décisions anticipées*). This provision, which has been further completed by a grand-ducal regulation, reflects and formalizes the administrative practice applied in the past, enabling taxpayers to obtain up-front legal certainty. The aim is also to provide a harmonized and uniform application of the tax laws across the various taxation offices and increased transparency toward foreign tax authorities.

The Circular Letter LIR No. 164/2, dated 28 January 2011, further formalizes the issuance of APAs for intragroup financing transactions (i.e., activities consisting of granting loans or advances to associated enterprises funded through the issuance of public or private loans, advances or bank loans).

To further enhance tax transparency, the law on automatic exchange of information on tax rulings and APAs (transposing EU Council Directive 2015/2376 of 8 December 2015) was introduced into Luxembourgian legislation on 23 July 2016. The law foresees the mandatory and automatic exchange of information on cross-border tax rulings and APAs with all the other Member States of the European Union. The law is applicable as from 1 January 2017. However, retroactive effect up to 1 January 2012 is provided for certain rulings issued before 1 January 2017.

Furthermore, based on the final recommendations of the OECD in relation with Action 5 of the BEPS project, Luxembourg may also exchange information on certain types of tax rulings and APAs that were issued on or after 1 January 2010 and that were still in effect as from 1 January 2014.

Impact of new OECD BEPS Action 8-10 guidelines

The 2017 Budget Law published on 12 October 2016 proposes the introduction of a new article in the Luxembourg transfer pricing legislation. The aim of the new article (currently in draft form) is to implement the recommendations provided in the Guidance for applying the arm's-length principle of BEPS Action 8-10 and thus of the amended Chapters 1 and 2 of the OECD Guidelines. It is envisaged that these updated chapters would apply to transactions valid after the date when the draft law is enacted (both new transactions and ongoing ones, considering also the transaction type).

Republic of Macedonia

Taxing authority and tax law

Taxing authority: Revenue Office and Customs Office

Tax law: Corporate Income Tax (CIT) Law, Tax Procedures Law and Customs Law and Double Taxation Treaties

Relevant regulations and rulings

Tax laws and ministerial instructions that govern transfer pricing are:

- CIT Law
  - Article 12 — correction of prices applied between related parties; reference to transfer pricing methods
  - Article 13 — correction of the interest rate applied between related parties
  - Article 14 — late payment interest charge
  - Article 16 — "related-party" definition
- Tax Procedures Law
  - Article 60 — obligation of the taxpayer to justify, upon a tax authority's request, any tax position taken
- Customs Law
  - Article 28, paragraph 2 — definition of a "fair market price" for customs purposes
- Double taxation treaties enacted by Macedonia
- 174/2014 — administrative guidelines on the obligation of the taxpayer to provide, upon a tax authority's request, analysis of why the transfer prices applied are considered to be at arm's-length
- 174/2014 — administrative guidelines — a safe-harbor rule for intercompany interest charges
- 39/2005 — administrative guidelines — defining "related-party" for customs purposes

OECD Guidelines treatment

No reference is made in the law or in the administrative guidelines to the OECD Guidelines. However, in the absence of any guidance outlining what the contents of adequate documentation should look like, the OECD Guidelines can effectively serve as a model.

There are no specific tax regulations on business restructurings in Macedonia.

Documentation requirements

No specific transfer pricing documentation requirement exists under the current tax legislation. The administrative guidelines to the CIT Law stipulate that a taxpayer that is involved in intercompany transactions is obligated to present, upon the tax authority's request, sufficient information and analysis for proving that the prices applied are in line with the arm's-length principle. In practice, a transfer pricing analysis prepared in line with the OECD Guidelines should be sufficient for the taxpayer to comply with the tax authority's request.

Republic of Macedonia (continued)

Priorities/pricing methods

CIT Law makes explicit reference to the CUP and the cost-plus methods, although preference is for the CUP method. No reference is made to the other transfer pricing methods of the OECD Guidelines. However, using one of the other OECD transfer pricing methods should be acceptable, as long as no CUPs are available and the taxpayer's analysis demonstrates that the method chosen is the most appropriate one, in line with the OECD Guidelines.

Return disclosures/related-party disclosures

Currently, there are no specific disclosure requirements.

Transfer pricing-specific returns

There are no transfer pricing-specific return requirements.

Documentation deadlines

There are currently no specific provisions for documentation deadlines. In the tax authority's request, the time frame is specified. However, in practice, the time frame is very short; hence, it is advisable that the documentation be compiled as soon as practicable after the close of the tax year.

Transfer pricing penalties

Failure to report the correct amount of tax liability results in a penalty of up to 10 times the amount of the understatement of tax. Additionally, default interest of 0.03% applies on the amount of the additional tax liability for each day of delay in settling such liability. Penal prosecution may not be ruled out if there are sufficient indications that tax evasion is in place. For not providing the tax authority with transfer pricing documentation upon its request, a fine of EUR3,000 is imposed. For the same offense, tax authorities are entitled to suspend the taxpayer's business activity for 3 to 30 days.

Penalty relief

Currently, no penalty relief is available.

Statute of limitations on transfer pricing assessments

There is a five-year statute of limitations counted from the following year of the year of expiration of the statutory term granted for filing the CIT returns, after which the tax authorities may not audit the taxpayer's reported position and reassess tax liabilities. Audited tax periods can be re-audited further to the decision of the tax authority as long as the five-year time period has not elapsed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There is no mandatory frequency for performing tax audits. The tax authority has the discretion to initiate a tax audit in accordance with the audit plans. In general, the likelihood of an annually recurring tax audit is medium. The likelihood that controlled financial transactions may be reviewed as part of that audit is characterized as high, and the likelihood that the transfer pricing methodology may be challenged is characterized as medium.

APA opportunity

No binding ruling or APA opportunities are currently available.

Taxpayers may file a request for a written opinion with the Revenue Office or the Ministry of Finance for the interpretation and application of the tax law with regard to a specific tax issue. However, the value of the position of the tax authorities on a particular tax aspect is very limited because the tax authorities refuse to provide any opinion about transactions that have not yet been implemented.

Impact of new OECD BEPS Action 8–10 guidelines

Macedonian tax legislation does not contain any reference to the OECD Guidelines. The Macedonian tax authorities have not issued any local guidance for implementation of the amended OECD Guidelines that were updated with the BEPS reports; however, it will be important to monitor further developments in this area.

Madagascar

Taxing authority and tax law

Taxing authority: Malagasy tax authorities (Ministry of Finance and Budget; *Direction Générale des Impôts*)

Tax law: General Tax Code, tax acts and executive orders

Relevant regulations and rulings

Transfer pricing matters are mainly regulated by:

- The General Tax Code, articles 01.01.13–I-$2 (arm's-length principle), 01.01.10-1° (no deduction on abnormal or unreasonable expenses), 20.06.08 (documentation requirements and deadlines), 20.01.56.8 (penalties) and 20.06.23 (on-site tax audit regime and deadlines)
- The executive decision no. 4 — MFB/SG/DGI on transfer pricing rules (transfer pricing tax audit, pricing methods, tax haven details)

OECD Guidelines treatment

Madagascar is not an OECD member. However, the OECD guidelines and the French tax law globally inspired Malagasy laws on transfer pricing, although there are no direct references.

Documentation requirements

According to the General Tax Code Article 20.06.08, in the event of a tax audit, tax authorities are entitled to request from local companies any documentation and information related to:

- Nature of connections linking the local company to foreign ones
- Method for establishing the price of transactions that occurred between them, justifications and, when appropriate, granted counterparties
- Known activities of foreign business partners
- Tax treatment of commercial exchanges between the local company and a controlled foreign corporation.

Priorities/pricing methods

The aforementioned executive decision no. 4 — MFB/SG/DGI accepts the following methods:

- CUP
- Resale price
- Cost-plus
- TNMM
- Transactional profit split method

It is up to the taxpayer to select and justify the most suitable approach.

Return disclosures/related-party disclosures

As previously mentioned, in the framework of tax audits, there is an obligation for the local company to disclose the nature of its connections to all related foreign companies, their activities, the selected method for determining their prices and the tax treatment of their transactions.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

All aforementioned documents and information required by tax authorities have to be provided upon request from the tax authorities within two months (extendable to three months).

In the case of an inadequate or insufficient response, tax authorities may demand that additional information be provided within 30 days.

Transfer pricing penalties

If a company provides insufficient or no documentation at all within the aforementioned deadlines (the three-month first-request period or the 30-day additional-information period), it is subject to a penalty of MGA5 million. Otherwise, general tax penalties apply in the event of a transfer pricing reassessment.

Penalty relief

There is no specific penalty relief applicable to transfer pricing. However, general penalty relief may apply in the framework of a transaction, a procedure provided by the General Tax Code, with tax authorities.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing assessments is the same as for all corporate tax assessments, i.e., three years following the year for which the tax is due. This statute could be extended to the common statute of limitations of 30 years if a notification of restraint is issued during the reassessment, which they usually do.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit in Madagascar for foreign companies and companies submitted to income tax under real regime is high. Such companies are under close monitoring. However, tax audits and tax reassessments related to transfer pricing are not frequent yet. Malagasy transfer pricing law and practice are still recent; therefore, field tax auditors with the tax authorities are not quite familiar with its principles or pricing methods.

Madagascar (continued)

APA opportunity

Malagasy tax law does not provide a specific APA procedure. Rescripts, individual binding tax ruling or any kind of prior agreement with the tax authority are not common practices in Madagascar.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Malawi

Taxing authority and tax law

Taxing authority: Malawi Revenue Authority (MRA)

Tax law: Taxation Act

Relevant regulations and rulings

- Malawi transfer pricing regulations under § 127A of the Taxation Act
- No rulings are available.

OECD Guidelines treatment

The Malawi transfer pricing regulations follow the OECD Model, and there is heavy reliance by the MRA on the OECD Transfer Pricing Guidelines.

Documentation requirements

There is no mandatory documentation requirement. The Commissioner General of the MRA may demand any sort of transfer pricing-related documentation, and so it is advisable that the person engaged in transfer pricing should maintain all the relevant documentation.

Priorities/pricing methods

The following methods are applicable:

- CUP
- Resale price
- Cost-plus
- Profit split
- TNMM
- Any other such method as may be prescribed by the Commissioner General from time to time

Return disclosures/related-party disclosures

There is no specific requirement for related-party disclosures, but it is advisable to maintain any relevant documentation on related-party transactions.

Transfer pricing-specific returns

Not applicable.

Malawi (continued)

Documentation deadlines

Documentation deadlines are not stipulated, but the Commissioner General may require a taxpayer to provide the necessary documentation in a prescribed period.

Transfer pricing penalties

There are no specific transfer pricing penalties. All penalties related to transfer pricing are those applicable on normal income tax cases: normally, 100% of the taxes involved or 200% of the taxes involved if the case is considered fraudulent in nature.

Penalty relief

Penalty relief is available at the Commissioner General's discretion.

Statute of limitations on transfer pricing assessments

Normally, the assessments can be raised going back six years, but in cases of fraud, the MRA can raise assessments going back indefinitely.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

These are conducted by the tax authority from time to time, though not on a regular basis.

APA opportunity

Malawi law does not provide for APAs.

Impact of new OECD BEPS Action 8–10 guidelines

No official position or case law has been recommended for applying the amended Guidelines. In cases in which the MRA exploits the OECD Guidelines, Malawi tax law is still the ultimate authority on transfer pricing matters, and there are cases in which the MRA has used the letter amendments in the OECD Guidelines to raise additional assessments for earlier years.

Malaysia

Taxing authority and tax law

Taxing authority: Inland Revenue Board (IRB)

Tax laws: Income Tax Act, 1967 (ITA)

Relevant regulations and rulings

Transfer pricing provision

- Section 140A of the ITA: Power to substitute the price and disallowance of interest on certain transactions
- Section 138C of the ITA: Advance Pricing Arrangement
- Income Tax (Transfer Pricing) Rules 2012 (P.U. [A] 132)
- Income Tax (Advance Pricing Arrangement) Rules 2012 (P.U. [A] 133)
- Income Tax country-by-country reporting (CbCR) Rules 2016 [P.U.(A) 357] (CbCR Rules); and
- Income Tax (Multilateral Competent Authority Agreement on the Exchange of country-by-country reporting (CbCR)) Order 2016 [P.U.(A) 358] (Malaysian MCAA)

General anti-avoidance provision

- Section 140 of the ITA: Power to disregard certain transactions if not deemed arm's-length

Transactions by nonresident

- Section 141 of the ITA: Powers regarding certain transactions by nonresidents

Time bar period

- Section 91(5) of the ITA: Time bar for income tax assessment in relation to transfer pricing adjustments

The IRB released the 2012 Malaysian transfer pricing guidelines in May 2012, superseding the original Malaysian transfer pricing guidelines issued in 2003. The transfer pricing guidelines set out further guidance in relation to applying the transfer pricing legislation in Malaysia (i.e., § 140A and the transfer pricing rules).

In addition, the IRB issued the Malaysian APA guidelines in July 2012 to provide guidance on applying APAs in Malaysia. The APA rules set out the legal provisions pertaining to applying for unilateral and bilateral APAs in Malaysia.

These 2012 transfer pricing Guidelines and APA rules had a retroactive effective date of 1 January 2009.

OECD Guidelines treatment

The 2012 Malaysian transfer pricing guidelines are largely based on the governing standard for transfer pricing, which is the arm's-length principle as established in the OECD Guidelines. The IRB respects the general principles of the OECD Guidelines.

Malaysia (continued)

Documentation requirements

Contemporaneous documentation pertaining to transfer pricing need not be submitted with the tax return, but it should be made available to the IRB upon request. All relevant documentation must be in, or translated into, Bahasa Malaysia (the national language) or English.

Contemporaneous transfer pricing documentation should include records and documents providing a description of:

- Organizational structure, including an organization chart covering persons involved in a controlled transaction
- Nature of the business or industry and market conditions
- The controlled transaction
- Strategies, assumptions and information regarding factors that influenced the setting of any pricing policies
- Comparability, functional and risk analysis
- Selection of the transfer pricing method
- Application of the transfer pricing method
- Documents that provide the foundation for, or otherwise support or were referred to in, developing the transfer pricing analysis
- Index to documents
- Any other information, data or document considered relevant by the person to determine an arm's-length price

Priorities/pricing methods

The IRB accepts CUP, resale price, cost-plus, profit split and TNMM. However, the Malaysian transfer pricing rules state that the traditional methods are preferred over the profit methods and advise that the profit methods should be used only when the traditional methods cannot be reliably applied or cannot be applied at all.

Return disclosures/related-party disclosures

Taxpayers are required to disclose in a tax return if transfer pricing documentation has been prepared. This compliance requirement is effective from the year of assessment in 2014.

Disclosure of arm's-length values is required in the tax return for the following transactions:

- Sales to related companies
- Purchases from related companies
- Other payments to related companies, lending to and borrowing from related companies
- Receipts from related companies

Transfer pricing-specific returns

In July 2011, the IRB started requiring a form related to information on cross-border transactions, from selected corporate taxpayers, requesting the following information for a given year:

- Names of ultimate holding company; holding companies; subsidiaries, both local and foreign; and affiliates in Malaysia
- A chart of the global corporate structure to which the taxpayer belongs, including ultimate holding companies, direct and indirect subsidiaries, associated companies and other related parties, indicating the companies with whom the taxpayer conducts related-party transactions

- Information about cross-border intercompany transactions, such as:
  - Sales and purchases of stock in trade, raw materials and other tangible assets
  - Royalties and license fees and other payments for the use of intangible assets
  - Management fees, including fees and charges for financial, administrative, marketing and training services
  - Research and development
  - Rent and lease of assets
  - Interest
  - Guarantee fees
  - Other services not falling under any of the above categories
- Particulars of financial assistance (showing balances during the year and the ending balance) with related companies outside Malaysia, such as:
  - Interest-bearing loans
  - Interest-bearing trade credit
  - Interest-free loans

Transfer pricing-specific returns (continued)

- Description of the taxpayer's business activity:
  - Manufacturing (toll, contract, full-fledged)
  - Distributor (commissionaire, limited risk, full-fledged)
  - Service provider
  - Others (taxpayer to specify)
- Specification of the industry in which they operate and associated industry code
- Confirmation of whether they have prepared transfer pricing documentation for the relevant year

The issuance of Form MNE 2012 is an indication of the IRB's increasing attention to transfer pricing. The purpose of the form is to assess taxpayers' risk profiles, as well as their level of compliance with the transfer pricing provisions. The form initially will be issued to selected corporate taxpayers to gather information about the basis period for the 2010 year of assessment, and taxpayers will be given 30 days to complete and return the form to the IRB. In the future, it is expected that the form will be issued to selected corporate taxpayers before they file their annual income tax returns.

Documentation deadlines

Contemporaneous transfer pricing documentation is defined as transfer pricing documentation brought into existence:

- When a person is developing or implementing any controlled transaction
- Where in a basis period for a year of assessment the controlled transaction is reviewed and there are material changes, the documentation shall be updated prior to the due date for furnishing a return for that basis period for that year of assessment

Transfer pricing documentation should be made available for submission to the IRB upon request.

Malaysia (continued)

Transfer pricing penalties

There are no specific penalties for transfer pricing. However, the existing legislation and penalty structure under

§ 113(2) of the ITA, *Penalty for incorrect return, incorrect information*, is applied with penalties that are 100% of the undercharged tax.

Penalty relief

There are no specific transfer pricing documentation penalties in the legislation. However, the guidelines stipulate penalties of 35% on the balance of tax undercharged where no transfer pricing documentation is prepared, and 25% where documentation is not prepared in accordance with the guidelines; Penalties are triggered only if a transfer pricing adjustment is made by the IRB.

Statute of limitations on transfer pricing assessments

There is a seven-year statute of limitations for additional assessment issued pursuant to transfer pricing adjustments, and documentation must be kept for seven years. There is no statute of limitations in instances of fraud, willful default or negligence.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Tax audits, including transfer pricing audits, are normally conducted to cover a period of three to five years (transfer pricing audits increased to seven years under § 91(5) of the ITA). As such, the risk of a taxpayer being subjected to an annual audit could be characterized as medium.

For companies with related-party transactions, the likelihood that transfer pricing will be reviewed is characterized as high; every multinational corporation that was audited during the last 12 months had its transfer pricing policy scrutinized.

As mentioned above, the IRB has indicated via the transfer pricing rules and guidelines that the traditional methods are preferred over the profit methods, and it advised that the profit methods should be used only when the traditional methods cannot be reliably applied or cannot be applied at all. Accordingly, if a profits-based method is applied without substantiation, the risk of the methodology being challenged is high.

APA opportunity

The introduction of § 138C of the ITA effectively formalizes the availability of unilateral and bilateral APAs in Malaysia. Additionally, formal APA rules and guidelines in relation to APAs have been issued, and a specific unit in the IRB to oversee the APA applications and negotiations has been established.

Impact of new OECD BEPS Action 8–10 guidelines

Currently, no official position or case law has been recommended for applying the amended guidelines; however, it will be important to monitor further developments in this area.

Maldives

Taxing authority and tax law

Taxing authority: Maldives Inland Revenue Authority (MIRA)

Tax law: Business Profit Tax Act

Relevant regulations and rulings

Maldives Law No. 5 of 2011 (Business Profit Tax Act) contains transfer pricing provisions under the Tax Avoidance section. This section applies when the computation of the taxable profits of a person for a tax year takes into account a transaction entered into directly or indirectly between that person and another person and those two persons are associated with each other.

MIRA either may disregard or apply arm's-length terms in assessing tax.

In the Business Profit Tax Act, persons are associated if:

- One controls the other or both are controlled by the same person
- One is a relative of the other

A person is a relative of another if he or she is:

- The individual's spouse
- A brother, sister, parent, grandparent or child of the individual or the individual's spouse
- A spouse of a person listed above, and a child includes a stepchild

OECD Guidelines treatment

In general, the transfer pricing requirements follow the OECD Guidelines.

Documentation requirements

There are no specific documentation requirements.

Priorities/pricing methods

The arm's-length price is determined on the basis of a comparison with similar goods or services provided between unrelated parties.

Return disclosures/related-party disclosures

The following information should be disclosed in the final business profession tax (BPT) return:

- Related-party expenses other than directors' remuneration
- Loan interest payable to related parties for the period

In addition to the above, related-party disclosures must be made in the notes to the audited financial statements, which are filed with the MIRA in support of the tax declaration.

Maldives (continued)

Transfer pricing-specific returns

There currently is no requirement to prepare a separate tax return for related-party transactions.

Documentation deadlines

There are no documentation deadlines.

Transfer pricing penalties

Financial penalties in the form of interest and fines shall be imposed for noncompliance with business profit tax rules and may apply in the case of a deficiency assessment due to transfer pricing adjustments.

Penalty relief

There are no penalty relief provisions in place.

Statute of limitations on transfer pricing assessments

The MIRA may serve a notice of inquiry to the taxpayer within 12 months from the date of submission of the return for business profits taxes and could conduct tax assessments up to three years from the date of the service of the notice of inquiry.

A transfer pricing assessment is part of the regular business profits tax assessments conducted by the MIRA. The MIRA may conduct a tax audit for all taxes or certain types of taxes only (i.e., withholding tax (WHT), goods and services tax (GST) or BPT). The tax audit covers a "tax period," which may be annual (usually the case for BPT) or monthly (usually the case for WHT and GST). After an audit is completed, a tax assessment is issued. However, if new relevant data or information subsequently is discovered after an assessment has been issued, the MIRA may revisit a tax period that previously has been audited. Data or information that was not previously disclosed during the tax audit process would be considered new data or information.

In cases where a taxpayer has deliberately or fraudulently evaded tax, a notice of inquiry may be served within three years of the date on which sufficient information becomes available to the MIRA.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The MIRA conducts a tax audit of tax returns that are submitted, and the likelihood of a review of transfer pricing as part of the regular audit is medium to high. The likelihood of a challenge to the transfer pricing methodology, however, is characterized as low to medium, provided that sufficient documentation is available.

During the income tax review process, the MIRA will likely demand the documentation supporting the transfer prices of intercompany transactions.

APA opportunity

There is no APA program available.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Malta

Taxing authority and tax law

Taxing authority: Commissioner for Revenue (CfR)

Tax law: The main tax laws transpire from the Income Tax Act (ITA) and the Income Tax Management Act (ITMA).

Relevant regulations and rulings

The transfer pricing concept is recognized in a number of articles in the ITA and ITMA, notably sub-articles 5(6) and 5(7) of the ITMA.

OECD Guidelines treatment

Agreements between associated enterprises must be entered into at arm's-length, but Malta's transfer pricing rules are not very detailed.

Documentation requirements

Not applicable.

Priorities/pricing methods

The Government has no specified preference as to the priority of methods. However, the cost-plus method is an acceptable pricing method.

Return disclosures/related-party disclosures

Such information is required to be disclosed as part of the income tax return of the taxpayer.

Transfer pricing-specific returns

Malta does not require a separate return for related-party transactions. Each company is required to file an income tax return that includes information about related-party transactions.

Documentation deadlines

Not applicable.

Transfer pricing penalties

An incorrect transfer pricing structure could result in a tax assessment. Please refer to the section below for more details regarding penalties for omission.

Penalty relief

When a taxpayer amends an omission from a return by delivering a further return (i.e., an adjustment) before that taxpayer is notified by the CfR that an inquiry will be conducted into the taxpayer's tax declarations and liabilities, and the further return is delivered to the CfR within 12 months after the relative tax return date, such taxpayer is not subject to any additional tax other than the interest payable on the late settlement of the endangered tax.[1]

If a further return is delivered to the CfR 12 months after the relative tax return date, but the CfR has not yet issued a notification in writing, the rate of additional tax for that omission shall be 0.1% per month of the endangered tax.

If a further return is delivered to the CfR after it issues a notification in writing, and the taxpayer is not notified with an assessment in which additional tax is charged for that omission, the rate of additional tax for that omission shall be 0.75% per month of the endangered tax.

If a further return is not delivered to the CfR after it issues a notification in writing, and the taxpayer is notified with an assessment in which additional tax is charged for that omission, the rate of additional tax for that omission shall be 1.5% per month of the endangered tax.

Statute of limitations on transfer pricing assessments

The time limit on when the tax authority can assess tax and any applicable penalties for transfer pricing is six years. But in the cases of evasion or fraud, the time limit for raising an assessment is open-ended.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is low. The likelihood that transfer pricing will be reviewed as part of that audit and the likelihood that the transfer pricing methodology will be challenged are low.

APA opportunity

Malta does not have an APA process.

Impact of new OECD BEPS Action 8–10 guidelines

As indicated above, Malta's transfer pricing rules are limited to a requirement for adherence to the arm's-length principle. Hence, in the absence of existing transfer pricing guidelines, the OECD BEPS Action 8–10 guidelines are not currently applicable.

[1] "Endangered tax" means the difference between the tax declared to be chargeable by the taxpayer after taking into account any exemption, relief, allowance or tax credits to which the taxpayer may be entitled and the tax actually chargeable after considering the same, but shall not include any additional tax.

Mauritius

Taxing authority and tax law

Taxing authority: Mauritius Revenue Authority (MRA)

Tax law: Income Tax Act 1995 (ITA 1995)

Relevant regulations and rulings

There are no relevant transfer pricing regulations. Under Section 159 of the ITA 1995, any person may apply for an advance ruling. The MRA should issue the ruling within 30 days of the receipt of the application.

OECD Guidelines treatment

Because Mauritius does not have any specific transfer pricing laws, this question is not applicable. Based on experience with the MRA, the OECD Guidelines have been used to determine the arm's-length price.

Documentation requirements

As Mauritius does not have any transfer pricing laws, there is nothing specific that the MRA prescribes or requests through its statement of practice. It is recommended that all supporting documents, such as comparable data and basis of allocation of profits, be maintained.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

The taxpayer should advise only if related-party transactions have been made at arm's-length.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

The MRA has up to five years from the submission of the tax return to issue a notice of assessment. The time limit of five years will be reduced to four years further to the amendment made by the Finance (Miscellaneous Provisions) Act 2015 (FMPA 2015). To date, the amendment made by the FMPA 2015 has not yet been proclaimed.

The time frame to keep any documents under the Mauritian corporate laws is seven years. At a minimum, it is suggested to maintain records for seven years.

Transfer pricing penalties

Even though Mauritius does not have any transfer pricing laws, the MRA can challenge intercompany transactions. The penalty for any late payment of tax is 5%, and monthly interest at the rate of 1% applies.

Penalty relief

The Director General of the MRA is empowered to waive any interests and penalties when he or she is satisfied that the error is attributable to a just or reasonable cause.

Statute of limitations on transfer pricing assessments

While there are no transfer pricing laws in Mauritius, the MRA may challenge intercompany transactions and has up to five years from the submission of the tax return to issue a notice of assessment. In the case of fraud and willful neglect, the time limit of five years does not apply.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit is medium. The likelihood that transfer pricing will be reviewed as part of that audit is also medium. The likelihood that the transfer pricing methodology will be challenged is high.

APA opportunity

Under the Mauritian tax laws, an advance ruling is possible.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Mexico

Taxing authority and tax law

Taxing authority: Servicio de Administracion Tributaria (SAT)

Tax law: Income Tax Law (ITL)

Relevant regulations and rulings

A single Central Transfer Pricing (Audits) Administration, within the SAT, is responsible for enforcing the transfer pricing rules in Mexico for both audits and transfer pricing rulings (APAs) and MAP relief. Additionally, last year, an Energy TP Administration was established in order to enforce the transfer pricing regulation for this sector, due to the energy reform in Mexico.

The Ministry of Finance issues tax legislation; the Congress approves it. The SAT regularly publishes administrative regulations and rules. Increasingly, more regulations deal with intercompany transactions.

- ITL, Article 2 (VI and last two paragraphs): definition of "permanent establishment"
- ITL, Article 4: ITTIC benefit application
- ITL, Article 5: foreign tax credit treatment
- ITL, Article 11: tax treatment of interest as dividends
- ITL, Articles 27-V, 28 (XVII, XVIII, XXVII and XXIX): deductibility requirements and limitations for payments to domestic or foreign related parties under specific circumstances
- ITL, Article 76 (IX, X and XII): taxpayer obligations for arm's-length pricing (all), contemporaneous transfer pricing documentation (cross-border), transfer pricing disclosure (cross-border), ITL (Article 180) method application (all), accounting records (all)
- ITL, Article 76-A: obligation to have a transfer pricing master file, CbC report and local file
- ITL, Articles 90, 94, 101, 110, 111, 140, 147, 148, 149, 151: individual related-party treatment
- ITL, Article 179: "related-party" definition, comparability, business cycles, permanent establishments and transfer pricing, tax havens and OECD Guidelines
- ITL Article 180: transfer pricing methods, ranges and selection of the most appropriate method
- ITL Article 181: permanent establishment and *maquiladoras*
- ITL, Article 182: transfer pricing options for *maquiladoras*
- ITL, Article 184: statement of the arm's-length principle, right of the tax authority to adjust to arm's-length result under ITTIC, definition of "related-party" (OECD)
- FFC, Article 32A: information about tax compliance and option of third-party certification
- FFC, Article 34A: transfer pricing ruling (unilateral), bilateral APA under treaty
- FFC, Articles 81 (XVII and XL) and 82 (XVII and XXXVII): fines for failure to report foreign intercompany transactions (ITL, Article 76X)
- FFC, Articles 83 (XV) and 84 (XIII): fines for failure to maintain intercompany transactions (transfer pricing documentation) as part of accounting records

In addition, as a result of Mexico's energy reform, the Hydrocarbons Revenue Law (HRL) was created in 2014 to regulate the revenues to be generated as a result of hydrocarbons exploration and extraction activities. The regulation included in the HRL considers relevant transfer pricing aspects that should be considered by every contractor.

- HRL, Article 30: applicability of the OECD Guidelines to analyze transactions performed with related parties
- HRL, Article 51: obligations for arm's-length pricing and method application
- MTR, TR: domestic transaction documentation (threshold) obligation

OECD Guidelines treatment

The ITL, Article 180, states that the OECD Guidelines can be relied upon for interpretation of the rules as long as they do not contradict the ITL or international tax treaties.

Documentation requirements

Contemporaneous transfer pricing documentation related to cross-border intercompany transactions must be maintained. Documentation must include the name, address and tax residency of the nonresident related persons with whom transactions are carried out, as well as evidence of direct and indirect participation between related parties and correct application of a method as stated in Article 180 of the ITL, following the hierarchy established therein. It is necessary to include in the documentation information regarding the functions performed, assets used and risks borne by the taxpayer and its related parties involved in each transaction. Information and documentation of comparable transactions or companies by type of transaction must also be included.

A related-party is considered if there is direct or indirect participation in management, supervision, control or capital/ownership. On the other hand, the parent company of a permanent establishment and all other permanent establishments of that company are also considered related parties.

As part of adopting BEPS Actions 8–10, the tax authorities are expecting a more robust functional analysis that demonstrates that the attribution of profits among related parties is according to each party's functions and risks related to the development, enhancement, maintenance, protection and exploitation of the intangibles as well as to include the new analytical framework to determine which associated enterprise assumes the risks for transfer pricing purposes.

Taxpayers are required to identify related-party transactions clearly in their accounting records. Also, domestic intercompany transactions are required to be documented by demonstrating that an accepted pricing method (i.e., one that is listed in the ITL) has been applied and that the arm's-length standard has been met.

In addition to the abovementioned, under the model contracts signed or to be signed by Mexican oil and gas industry contractors that are performing hydrocarbons exploration and extraction activities in transactions conducted with related parties, contractors will be required to determine their income and costs, considering the prices and amount of consideration that would have been used with or between independent parties in comparable transactions on the terms, methods and conditions set forth in the applicable law. To demonstrate that the transactions were agreed to at market prices, the contractor shall make use of the transfer pricing methods included in the ITL and the OECD Guidelines.

Mexican taxpayers performing intercompany transactions with foreign related parties are not required to maintain formal transfer pricing documentation, following the requirements stated in Article 76 (IX), as long as companies do not cover the threshold of revenues within the previous fiscal year (MXN13 million for business activities, or MXN3 million for the provision of professional services). As for Mexican taxpayers performing transactions with domestic related parties, as of 23 December 2015, temporary Rule I.3.9.5 allows entities that conduct intercompany transactions with domestic related parties to opt out of preparing contemporaneous transfer pricing documentation, based on the same threshold amounts considered in Article 76 (IX).

Priorities/pricing methods

The transfer pricing methods in Mexico, established in Article 180 of the ITL, are the CUP, resale price, cost-plus, profit split, residual profit split and TNMM. Effective since 2006, the ITL specifically requires a hierarchical consideration of transfer pricing methods, with a particular preference for the CUP method, and then the traditional transactional methods over the transactional profit methods.

Return disclosures/related-party disclosures

Mexican taxpayers must submit a transfer pricing return (Exhibit 9 of the Multiple Annual Tax Return) to the SAT, which is due contemporaneously with the submission of the annual tax return. Such an informative return includes an appendix with the disclosure of information related to intercompany transactions with foreign related parties, including information regarding 57 concepts by type of transaction and by related-party, such as the following:

- Names, countries and tax identification numbers of affiliates
- Types of transactions and corresponding amounts
- Transfer pricing methods applied
- Gross or operating margins earned on each transaction (applicable only for certain types of transactions)
- Withholding rates and fiscal year during which deductions for the intercompany transaction were registered

Also, according to the ITL, Article 182, an informative return must be filed by *maquiladora* companies (the DIEMSE). The DIEMSE was renewed in 2016. The new form requests more information, compared with the previous form used, and highlights the following required information:

- An indication of whether the company is certified for value-added tax (VAT) and the special tax on production and services
- Financial information for determining costs and operating expenses, such as income on contract manufacturing and those that are distinct from manufacturing, wages and salaries, loans, among others
- The taxable profit generated by the contract transaction and by different transactions, as well as income tax paid in each
- Information regarding VAT over 12 months (VAT that is credited, transferred, retained, recoverable and returned)
- Percentage that represents machinery and equipment that is the property of the foreign resident with respect to all machinery and equipment that is used in contract manufacturing, as well as the amounts that serve as a basis for determining such a percentage
- Information regarding foreign trade, such as temporary imports, transfers received, final imports, returns and exports

Both informative returns must be filed by the time the Tax Report or the Alternative Information to the Tax Report is presented.

When filing the Tax Report or the Alternative Information to the Tax Report, the auditor or the taxpayer must indicate, among other things, that the company's transfer pricing documentation is in place and the transfer pricing tax return was filed for the fiscal year under review and that it complies with the requirements stated in the ITL. Further, the auditor or the taxpayer must complete and file a large number of detailed questionnaires, including the ones described below, which deal with intercompany transactions:

- Attachment 16 — information regarding related-party transactions, such as:
  - Tax identification
  - Tax name
  - Country of residence
  - Type of intercompany transaction
  - Amount of intercompany transaction

   - Transfer pricing methodology applied
   - Assessment regarding transfer pricing compliance

This information is required for all intercompany transactions (i.e., with foreign and domestic related parties for each related-party and type of transaction). This questionnaire is intended to verify compliance with the ITL, not only with respect to transfer pricing aspects, but also with respect to the deductibility requirements of all tax positions.

- Attachment 17 — questionnaire on related-party transactions. This questionnaire includes, among others, the following sections:
   - APAs (if applicable)
   - Transfer pricing documentation compliance and filing date of informative tax return
   - Application of primary or corresponding adjustments
   - Tax identification of the advisor or preparer of the transfer pricing documentation
   - Confirmation of deduction for pro rata charges
   - Information regarding financial derivative operations
   - Information regarding thin capitalization
   - *Maquiladora* rules compliance
- Transfer pricing questionnaire related to the review conducted by the external auditor (not included in the Alternative Information to the Tax Report file):
   - Questions regarding the confirmation of all aspects related to cross-border and domestic intercompany transactions

Transfer pricing documentation must be readily available as part of the accounting records by 31 March. An aggressive interpretation of the ITL, taken by the SAT and confirmed by a tax court, in this case is that failure to comply with the documentation requirements results in nondeductibility of the payments to related parties.

Additionally, any transfer pricing adjustment over MXN5 million or 20% of the arm's-length value should be disclosed in the Relevant Operations Disclosure Return (Formato 76), which was introduced in 2014.

Master file, CbC and local file returns are required under new provisions effective 1 January 2016. Mexican taxpayers should have available an MNE's master file and CbC returns, although the Mexican taxpayer is the one that is entitled to have the documentation and file it to the SAT by, at the latest, 31 December 2017.

It is very important to note that, under the model contracts signed or to be signed by the Mexican oil and gas contractors performing hydrocarbons exploration and extraction activities, the contractor's financial statements shall be audited annually, by an independent external auditor, pursuant to the FFC and its regulations in force. Said independent auditor shall deliver to the Mexican Ministry of Finance the transfer pricing study demonstrating that the transactions that have occurred with related parties are at an arm's-length.

Moreover, according to the already mentioned model contracts, the Ministry of Finance at any time may require third parties and related parties to the contractor to submit documentation and information relating to their operations with the contractor or relating to the activities performed by them under the contract, for the purposes of complementing, supporting and enhancing the verification work with which it is charged.

Transfer pricing-specific returns

See Exhibit 9 of the Multiple Informative Return (DIM) for transactions carried out with foreign related parties, as well as the Manufacturing, *Maquiladoras* and Export Services' Informative Return (DIEMSE) for transactions carried out under the *maquiladora* regime, and Tax Report questionnaires.

Documentation deadlines

Transfer pricing documentation must be in place when the company files its annual income tax return (by the end of March of the following year) and must be kept, along with the company's accounting records, for at least five years after the filing of the last tax return for each year. For those companies that chose to have a Tax Report based on their financial statements prepared by an external auditor (*Dictamen Fiscal*), the taxpayer's external auditor is required to disclose the company's compliance with all tax obligations, including those related to transfer pricing. This disclosure is made through the Tax Report, which must be filed by 15 July every year. As of 2014, taxpayers are obliged to file an Information Return on the State of Tax Affairs and may choose to have a Tax Certification (*Dictamen Fiscal*) conducted by an external auditor if they do not want to file the Return on the State of Tax Affairs themselves. According to the FFC, the Return on the State of Tax Affairs is due by 15 July and the Tax Certification is due by the end of June.

The Relevant Operations Disclosure Return (Formato 76) must be filed on a monthly basis.

As part of the 2016 tax reform, taxpayers should submit a master file return, a local file return and a CbC file return by 31 December of the following year. Corresponding formats and instructions are still pending.

Similarly, the transfer pricing reports of those contractors engaged in hydrocarbons exploration and extraction activities shall be delivered by the external auditor to the Ministry of Finance no later than 15 July of the tax year following the tax year for which the financial statements are audited.

Transfer pricing penalties

There are specific penalties for failure to file or the untimely filing of the transfer pricing information return. A penalty of MXN68,590 to MXN137,190 can be imposed if the information return for foreign related-party transactions is not filed, or is incomplete or incorrect.

If the SAT decides that a transfer pricing adjustment is needed, and unpaid contributions are determined as a consequence, penalties could vary from 55% to 75% of the omitted taxes, plus surcharges and inflation adjustments. Also, if a transfer pricing adjustment reduces the net operating loss (NOL), the penalty ranges from 30% to 40% of the difference between the determined NOL and the NOL in the tax return, plus surcharges and inflation adjustments.

There are no penalties if the taxpayer self-corrects its tax results before an audit, and reduced penalties apply if self-correction is made during the audit but before the tax assessment. Waivers and abatements are possible under limited circumstances.

Starting in 2014 and in anticipation of the OECD's BEPS Action Plan, the ITL established in Article 28 (XXIX) that payments to foreign or domestic related parties will not be deductible as long as these amounts also are deductible for the taxpayers' counterparts. Moreover, Article 28 (XXIX) of the ITL limits the deduction of payments made to foreign related parties for interest, royalties or technical assistance if the related-party receiving the payment is transparent for tax purposes, the payment is not considered taxable revenue for the counterpart or it is treated as nonexistent for the foreign related-party.

Penalty relief

Contemporaneous documentation might reduce tax penalties by 50%, as long as the taxpayer complies with the formal requirements established in Article 76 (IX) of the ITL. In the case of overdetermined NOLs, penalties could be reduced to 15% to 20% of the overstated NOL.

Statute of limitations on transfer pricing assessments

The statute of limitations for an assessment in Mexico is five years from the date of filing the tax return. The term is affected by amended returns with respect to items changed, and it is suspended by an audit. The SAT has two years to complete a transfer pricing audit.

Mexico (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There is a high audit risk focusing on business restructuring (limited risk structures, migration of intangible property and centralization of functions and risks in favorable tax jurisdictions), highly leveraged structures, CSAs and pro rata-based charges in general, including management fees.

The SAT's internal criteria related to tax positions, which include transfer pricing comments, are still valid. Most of these rules regarding transfer pricing are related to formal documentation requirements for Mexican taxpayers carrying out intercompany transactions with both domestic and foreign related parties. These criteria are some of the areas upon which the SAT focuses during transfer pricing audits, in addition to substantive and technical issues regarding compliance, planning and transfer pricing documentation.

APA opportunity

Unilateral and bilateral APAs are available under Article 34-A of the FFC and Mexico's tax treaties, respectively. Unilateral APAs can cover the fiscal year of the application, the three subsequent fiscal years and a one-year rollback.

Starting in 2014, the self-assessment option for *maquiladoras* is no longer available. As such, Mexican contract manufacturers with an IMMEX program will have to choose between pursuing an APA and applying safe harbor rules (with taxable profit being the greater of applying a 6.5% return over total costs or a 6.9% return over total assets, including assets and inventories of consignment property of foreign parties but used in the manufacturing activity). More unilateral and bilateral APAs are expected to be derived from this new obligation.

As of 14 July 2016, temporary Rule 2.12.8 allowed the SAT to perform a functional analysis as part of the study and evaluation processes of the information, data and documentation, for purposes of identifying and specifying performed functions, assets used and risks born in transactions under consultation. The functional analysis referred to by this Rule will take place in the fiscal address of the taxpayer and in its establishments, branch offices, premises, warehouses or in any other place or establishment, platform, shipment or area in which recognition activities or superficial exploration take place, as well as exploration or hydrocarbon extraction.

Specifically in APA requests, there are measures aligned to the BEPS Action Plan that have been incorporated into domestic legislation, such as temporary Rule 2.12.8.

Impact of new OECD BEPS Action 8–10 guidelines

The application of the amendments of the OECD Transfer Pricing Guidelines 2016 through the update of BEPS Actions 8–10 is immediate and mandatory (ITL, Article 79). The amendments will apply to transactions that were in effect during 2016. New disclosure requirements must be met by Mexican taxpayers; three informative returns should be presented before December 2017 regarding tax year 2016: master file, local file and CbC. Specific requirements need to be complied with, and rules for the implementation of this additional obligation have not yet been submitted by the SAT.

Mongolia

Taxing authority and tax law

Taxing authority: General Department of National Taxation (GDNT)

Tax law: General Tax Law (GTL), Corporate Income Tax (CIT) Law, double tax treaties and VAT Law

Relevant regulations and rulings

There is no single, all-encompassing piece of transfer pricing legislation in Mongolia. Transfer pricing rules are contained in the GTL, CIT Law, double tax treaties and VAT Law. In addition, various implementation guidelines by the Government of Mongolia, Ministry of Finance and GDNT govern transfer pricing in Mongolia.

Various sections in Mongolian tax laws refer to the need for transactions between related parties to be conducted at arm's-length. Failing this, the tax authorities may seek to adjust the transaction to a fair market value.

- Article 11 of Mongolia's CIT Law indicates that the transfer of goods and services between related parties should be made at "market price." If the price charged is below or above the market price, then the value of the transaction will be determined with reference to the benchmark price used in transactions between non-related parties.
- Article 48.1 of Mongolia's GTL separately indicates that taxable income should be based on fair market prices (prices that are used between unrelated parties, Article 48.2 of the GTL) and allows for the tax office to apply an "indirect assessment method" (i.e., actual or standard price method) to be used if this is not the case.
- Article 48.5 of the GTL notes that if market prices cannot be applied, then returns earned by comparable independent companies with similar business operations should be used to determine the appropriate return to be earned in related-party transactions.
- Both transfer pricing provisions in the CIT Law and GTL have clauses that explain related parties, including entities that are connected in terms of management of control or ownership, as follows:
  - Article 48.4 of the GTL states that "related-party" shall mean "bodies who are authorized to participate directly or indirectly in the management, control or ownership" of other entities.
  - Article 6.1 of the CIT Law states that if the following relation is present with a taxpayer, it shall be a related-party: it (1) owns 20% or more of the common stock of the other entity, (2) has the right to receive 20% or more of the dividends or distributions from the other entity, or (3) has the right to appoint 20% or more of the management of the other entity or is otherwise able to determine its policies.
- As an implementing guideline, the Ministry of Finance released guidelines setting out the pricing methodologies (often referred to as the Benchmarking Guideline 2007) that taxpayers can use for documentation requirements for related-party transactions. There is also a supportive guideline to the Benchmarking Guideline 2007 adopted by the GDNT that establishes sources of information for certain goods and services.
- In addition, the GDNT has published comprehensive transfer pricing guidelines (approved by the GDNT Board, dated 25 December 2014) as an internal transfer pricing reference guideline for GDNT use with the intention of replacing the Benchmarking Guideline 2007. Taxpayers should use this new guideline implicitly for transfer pricing purposes.

OECD Guidelines treatment

Mongolia is not a member of the OECD. However, the Benchmarking Guideline 2007 allows use of the OECD Guidelines. For domestic purposes, the OECD Guidelines may provide support for applying any pricing methods demonstrating compliance with international principles.

Documentation requirements

According to the Benchmarking Guideline 2007, taxpayers are required to maintain contemporaneous documentation in order to comply with the arm's-length standard. The documentation should be prepared in Mongolian.

The transfer pricing documentation should substantiate a taxpayer's assertion that it reasonably concluded that, given the available data and the applicable pricing methods, the chosen method (and its application) provided the most reliable measure of an arm's-length result under the principles of the best-method rule.

The principal documents required by the regulations are:

- Name of the related parties, relationships between the transacting parties, incorporation documents thereof
- Group ownership and legal structure
- Overview of group and company profile
- Description of the goods or services
- Key terms and conditions of the contractual agreements
- Functions performed and risks borne by each party
- Comparability analysis
- Pricing method for the allocation of profits or losses, a description of the pricing method and reasons why the method was selected (a best-method analysis)
- Analysis and evaluation of external and internal economic and legal factors, including considerations of market conditions, economic circumstances and business strategy

Priorities/pricing methods

The regulations provide a "best-method rule" for determining the appropriate method to be applied by the taxpayer for each intercompany transaction.

Return disclosures/related-party disclosures

A list of related-party transactions for the relevant tax year concerned must be disclosed in corporate income tax returns, including information about the name of the related parties, property or goods and services, and value of the transaction.

Transfer pricing-specific returns

There are no specific transfer pricing returns.

Documentation deadlines

According to the Benchmarking Guideline 2007, documentation should be prepared at the time of executing related-party transactions and must be provided to the GDNT upon request.

Mongolia (continued)

Transfer pricing penalties

General noncompliance penalty rules apply to transfer pricing adjustments. Transfer pricing adjustments are subject to a 30% penalty of tax payable (Article 74.1 of the GTL). In addition, a fine at a specified rate per day on the outstanding balance of the tax payable is imposed (the Government-approved interest rate for 2015 is 0.054% daily, or 19.60% per annum). However, the fine imposed should not exceed 50% of the tax payable amount (Article 74.3 of the GTL).

Penalty relief

Generally, there is no penalty relief available in Mongolia for transfer pricing adjustments made by the GDNT.

Statute of limitations on transfer pricing assessments

There is a five-year statute of limitations in Mongolia for tax purposes, including transfer pricing adjustments. Comprehensive tax audits usually occur every two to three years for domestic companies, which include transfer pricing audits. During this time, multiple open years are often investigated simultaneously.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, comprehensive tax audits and transfer pricing usually occur every two to three years in Mongolia. Tax authorities are increasingly focusing on transfer pricing investigations.

It is expected that, in the near future, the MTA will pay greater attention to transfer pricing issues, as it is being rapidly educated by international donors, such as the International Monetary Fund and the World Bank, about various technical assistance projects aiming to strengthen transfer pricing audit skills.

In addition, Mongolia intends to have a significant tax reform enhancing the transfer pricing legal framework and is preparing to establish a special group of transfer pricing specialists, developing a more OECD-based transfer pricing framework.

APA opportunity

An APA regime is not available at the moment.

Impact of new OECD guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Montenegro

Taxing authority and tax law

Taxing authority: Tax Administration of Montenegro

Applicable tax legislation: Corporate Income Tax Law (CIT Law)

Relevant regulations and rulings

Article 38 of the CIT Law Bylaw on corporate income tax

OECD Guidelines treatment

Montenegrin transfer pricing provisions are only loosely based on the OECD Guidelines and do not refer to their application.

Documentation requirements

The Montenegrin CIT Law does not prescribe any transfer pricing documentation requirements.

Priorities/pricing methods

The CUP method has priority in the selection of the transfer pricing method. If CUP cannot be applied, the CIT Law allows two other traditional transaction methods: the cost-plus and resale minus. Montenegrin transfer pricing regulations do not recognize transactional profit-based methods (i.e., the TNMM and profit split method).

Return disclosures/related-party disclosures

According to Article 38 of the CIT Law, taxpayers are obligated to disclose in their annual CIT return the revenues and expenses resulting from the transactions with related parties, as well as present and compare these with revenues and expenses that would have been realized in the same transactions if they were conducted with unrelated parties. Any difference between the two should be included in the taxable basis.

Transfer pricing-specific returns

There is no specific transfer pricing return in Montenegro.

Documentation deadlines

Not applicable.

Transfer pricing penalties

There are no specific penalties if a taxpayer fails to disclose related-party transactions in the annual CIT return.

Montenegro (continued)

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

The general statute of limitations period of five years for taxes in Montenegro would also apply to transfer pricing assessments. The five-year period starts at the beginning of the year following the year in which the respective tax liability was to be assessed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Montenegrin tax authorities conduct random audits. Typically, audits take place no more often than once in three to five years, and they cover all taxes (no tailor-made transfer pricing audits are going on). Given the lack of specific audit practice in this area, a material level of sophistication should not be expected at this stage with respect to reviewing related-party transactions.

APA opportunity

Advance rulings and APAs are not available in Montenegro.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Morocco

Taxing authority and tax law

Tax authority: Moroccan Tax Administration (*Direction Générale des Impôts*, or DGI)

Tax law: Moroccan Tax Code (MTC)

Relevant regulations and rulings

Transfer pricing aspects are regulated by Articles 213-II and 214-III of the MTC.

- Article 213-II of the MTC: The Moroccan Tax Administration is authorized to adjust the taxable income or/and the declared turnover of the Moroccan enterprises that depend, directly or indirectly, on enterprises located inside or outside of Morocco. In this case, the tax authorities are entitled to determine the profits that have been indirectly transferred. These adjustments are performed by way of comparison with similar independent enterprises or by way of direct appreciation based on the information available to the Moroccan Tax Administration.
- Article 214-III of the MTC: For operations involving foreign companies, the Moroccan Tax Administration is entitled to request from local entities all documents and information related to:
  - The nature of relations linking the Moroccan company to the foreign company
  - The nature of the services provided or the products sold
  - The method of determining the prices for the operations realized between the Moroccan and foreign companies
  - The foreign company's tax regime and tax rates

There are no tax regulations and rulings in Morocco that deal with transfer pricing aspects.

However, note that Morocco has an exchange control regulation pursuant to which the Control Exchange Office can challenge excessive, unduly transfer of payments abroad.

OECD Guidelines treatment

Morocco is not an OECD member. However, the Moroccan Tax Administration generally accepts references to the OECD Guidelines regarding transfer pricing.

There is no specific Moroccan transfer pricing regulation pertaining to business restructuring or attribution of profits to permanent establishments.

Documentation requirements

Currently, there are no provisions in the MTC binding companies to submit or present transfer pricing documentation.

However, according to Article 214-III of the MTC, for operations involving foreign companies, the Moroccan Tax Administration is entitled to request from local entities all documents and information related to:

- The nature of relations linking the Moroccan company to the foreign company
- The nature of the services provided or the products sold
- The method of determining the prices for the operations realized between the Moroccan and foreign companies
- The foreign company's tax regime and tax rates

Morocco (continued)

Priorities/pricing methods

In Article 213-II of the MTC, reference is made to profit shifting done through increase or decrease of purchase/sale prices, or by any other means. As such, no particular method is provided by Moroccan tax law, but it should be relevant from an economic standpoint.

Return disclosures/related-party disclosures

As mentioned above, in the event of a request from the tax authorities (on the basis of Article 214-III of the MTC), there is an obligation to disclose the nature of the relationship between the taxpayer and the related parties (i.e., the links of dependence between the Moroccan audited entity and the related parties), the nature of the services provided or the products sold, the method of determining the prices for the operations realized between the Moroccan and foreign companies, and the foreign companies' tax regimes and tax rates.

Transfer pricing-specific returns

There is no transfer pricing-specific return to be filed before the tax authorities.

Documentation deadlines

In the event of a request from the tax authorities on the basis of Article 214-III of the MTC, the requested documents and information should be provided within 30 days.

In addition, a best practice is to have transfer pricing documentation ready, in case of a transfer pricing reassessment during a tax audit based on Article 213-II of the MTC, as the company would have 30 days to provide an answer. Transfer pricing penalties

Currently, there are no provisions in the MTC binding companies to submit or present transfer pricing documentation.

However, according to Article 214-III of the MTC, for operations involving foreign companies, the Moroccan Tax Administration is entitled to request from local entities all documents and information related to:

- The nature of relations linking the Moroccan company to the foreign company
- The nature of the services provided or the products sold
- The method of determining prices for the operations realized between the Moroccan and foreign companies
- The foreign company's tax regime and tax rates

If no information is provided, a dependent relationship is deemed between the Moroccan company and the foreign company.

Generally, penalties apply as a result of a transfer pricing reassessment (regardless of compliance with any transfer pricing documentation requirement), as follows:

- In terms of corporate income tax (CIT), the amounts reassessed are reinstated in the taxable income of the company and taxed at the applicable CIT rate. In addition, penalties apply as follows:
  - 20% for reassessment of the taxable basis, and a 100% penalty applies in cases where bad faith is demonstrated
  - 10% for late payment
  - 5% for the first month of late payment and 0.5% for each month thereafter

Morocco (continued)

- When reassessing transfer pricing, the Moroccan Tax Administration also reassesses the corresponding VAT and withholding tax (WHT). In addition, penalties VAT and WHT apply as follows:
  - 30% penalty for reassessment of the taxable basis, and a 100% penalty applies in cases where bad faith is demonstrated
  - 20% penalty for late payment
  - 5% penalty for the first month of late payment and 0.5% penalty for each month thereafter

Penalty relief

In the case of a reassessment regarding penalties, a reduction might be granted to taxpayers that introduce a tax claim before the Moroccan Tax Administration.

Having transfer pricing documentation does not grant taxpayers with any penalty relief. However, it could help during a tax audit to support the company's pricing policy.

A penalty relief may be granted in the case of a settlement between the Moroccan Tax Administration and the taxpayer in the frame of a tax audit.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is the same as for all other tax assessments — generally, four years following the year for which the tax is due (it might be longer when loss carries forward or a VAT credit exists).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of transfer pricing issues being raised within a tax audit is high. In fact, the number of tax audits raising transfer pricing issues is increasing considerably, and the Moroccan Tax Administration is focusing on:

- Product sale prices (underestimated or overestimated prices), especially (but not only) in case of losses
- Management fees
- Cost allocations
- Business restructurings (e.g., transfer of intangibles and of clientele indemnity) or a sudden decrease in the operating margin likely to hide a change in the transfer pricing policy applied

APA opportunity

The finance bill for 2015 introduced, as of 1 January 2015, an APA procedure in the Moroccan tax law.

Such procedure is provided by Articles 234 bis and 234 ter of the MTC, as follows:

- Article 234 bis: Taxable companies in Morocco that are directly or indirectly related to companies situated outside Morocco can request from the administration the conclusion of an APA on the method used to determine the prices of transactions mentioned in Article 214-III for a period that does not exceed four fiscal years. The modalities of that agreement will be determined by decree.
- Article 234 ter: The administration is not entitled to challenge the method used to determine the prices of transactions mentioned in Article 214-III if such a transaction is covered by an advanced transfer pricing agreement in accordance with the above-mentioned Article 234 bis.

However, the agreement will be deemed void from its date of inception in the following cases:

- Misrepresentation of the situation or concealment of information errors or omissions attributable to the company
- Noncompliance with the methodology and obligations set out in the agreement by the company, or the use of fraudulent means. The cases referred to above may be invoked by the administration only in the context of a tax audit

Furthermore, the decree detailing the modalities of conclusion of APA should have been published no later than the end of 2016. In fact, according to the draft of the aforesaid decree, the APA application should be filed at least six months before the beginning of the fiscal year of the period covered by the APA. In practice, the first APA concluded should cover as first financial year FY18 to FY21.

Impact of new OECD 8–10 guidelines

As mentioned above, Morocco is not an OECD member; however, the Moroccan Tax Administration generally accepts references to the OECD Guidelines regarding transfer pricing issues.

As of the time of this publication, Morocco has neither implemented any change in its domestic legislation nor renegotiated any double tax treaties to be in line with the BEPS project recommendations. However, it will be important to monitor further developments in this area. It should be mentioned that Morocco is especially interested in Action 7 (PE avoidance).

Myanmar

Taxing authority and tax law

Taxing authority: Internal Revenue Department (IRD)

Tax law: Income Tax Law

Relevant regulations and rulings

There are currently no transfer pricing regulations and rulings in Myanmar.

OECD Guidelines treatment

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

There is no explicit penalty for transfer pricing assessments, nor is there an explicit penalty for not having transfer pricing documentation.

However, for tax shortfalls in general, a penalty not exceeding 10% of the tax may be imposed.

Penalty relief

Not applicable.

Myanmar (continued)

Statute of limitations on transfer pricing assessments

In Myanmar, the IRD will review the tax returns filed annually before an assessment is made. Once the final assessment letter is issued, the taxpayer can settle the amount of tax assessed by the IRD. The IRD retains the right to reassess the company backdated for three years, but this period can be extended if tax evasion is suspected. However, there is no precedent case in which the IRD has revisited a company with the Myanmar Investment Commission permit.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is low. This is because corporate income tax in Myanmar is based on an "annual agreed-upon" approach. In other words, the IRD will send an assessment letter to the taxpayer at the end of the year if they do not agree with the corporate income tax return filed by the taxpayer. The taxpayer has options to either comply with an additional assessment or appeal such assessment. Hence, a tax audit of the past year rarely happens.

Currently, the likelihood that transfer pricing will be reviewed as part of that audit is quite low. So far, there has not been any challenge to the transfer pricing methodology in Myanmar.

APA opportunity

Not applicable.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position yet; however, it will be important to monitor further developments in this area.

Namibia

Taxing authority and tax law

Taxing authority: Directorate Inland Revenue (Inland Revenue)

Tax law: Income Tax Act 24 of 1981 (the Act)

Relevant regulations and rulings

Section 95A authorizes Inland Revenue to adjust the consideration for goods or services to an arm's-length price for the purposes of calculating the Namibian taxable income of a person.

There are no specific regulations or rulings; however, Practice Note 2 of 2006, dated 5 September 2006, contains guidance on the application of § 95A.

OECD Guidelines treatment

Although Namibia is not a member of the OECD, Inland Revenue accepts the OECD Guidelines and has largely based its practice on them. Practice Note 2 provides, as follows: "This Practice Note is based on and acknowledges the principles of the OECD Guidelines. Nothing in this Practice Note is intended to be contradictory to the OECD Guidelines and in cases where there is conflict, the provisions of the OECD Guidelines will prevail in resolving any dispute.

"Any amendments made to the OECD Guidelines will be deemed to be incorporated into this Practice Note."

Inland Revenue also accepts the principal methods referred to in the OECD Guidelines.

Documentation requirements

Currently, there is no statutory requirement to prepare transfer pricing documentation.

Furthermore, the income tax return does not require confirmation that cross-border related-party transactions are entered into at arm's-length. Practice Note 2 of 2006, however, encourages taxpayers to prepare documentation should Inland Revenue request such information.

Priorities/pricing methods

Inland Revenue accepts the methods prescribed by the OECD (i.e., CUP, resale price, cost-plus, TNMM and profit split).

According to Practice Note 2, "the suitability and reliability of a method will depend on the facts and circumstances of each case. The most reliable method will be the one that requires fewer and more reliable adjustments."

Return disclosures/related-party disclosures

Currently, there are no disclosure requirements.

Transfer pricing-specific returns

Not applicable.

Namibia (continued)

Documentation deadlines

Currently, there is no obligation to submit transfer pricing documentation.

Transfer pricing penalties

No specific transfer pricing penalties are imposed in the Act. With this said, taxpayers face the following penalties:

- Additional tax of up to 100% of the provisional tax amount underpaid
- 200% of the additional tax resulting from an adjustment (in the event of default, omission, incorrect disclosure or misrepresentation)
- Interest of 20% per year

Penalty relief

When taxpayers have made conscientious efforts to establish transfer prices that comply with the arm's-length principle and have prepared documentation to evidence such compliance, Inland Revenue will likely take the view that the taxpayer's transfer pricing practices represent a lower tax risk. Such evidence may provide some mitigation against the 200% penalty.

Statute of limitations on transfer pricing assessments

Namibia does not have a statute of limitations. Inland Revenue may indefinitely conduct reviews and audits. However, in terms of the Act, records must be maintained for five years, so it is unlikely that periods older than five years will be reviewed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Inland Revenue is not conducting transfer pricing reviews or audits currently, nor does it have a dedicated transfer pricing team.

APA opportunity

Namibia does not currently have an APA program.

Impact of new OECD BEPS Action 8–10 Guidelines

No official position or case law has been established yet; however, it will be important to monitor further developments in this area.

Netherlands

Taxing authority and tax law

Tax authority: Dutch Tax Administration (*Belastingdienst*)

Tax laws:

- Dutch Income Tax Act 2001
- Dutch Corporate Income Tax Act 1969

Accounting standards:

- Listed companies: International Financial Reporting Standards (IFRS)
- Other: Netherlands GAAP but may voluntarily opt for IFRS

Relevant regulations and rulings

- Articles 3.8 and 3.25 of the Dutch Income Tax Act 2001
- Articles 8 and 8b of the Dutch Corporate Income Tax Act 1969
  - Article 8b, which became effective 1 January 2002 and introduced transfer pricing documentation requirements, codifies the arm's-length principle.
- Articles 29b–29h of the Dutch Corporate Income Tax Act 1969
  - Effective 1 January 2016, Articles 29b–29h provide supplementary transfer pricing documentation requirements in line with OECD BEPS Action 13.

Besides the articles in Dutch tax law mentioned above, the Dutch Under-Minister of Finance issued several decrees in August 2004, which both updated and expanded the decrees published in 2001, including adjustments and improvements in the rules for obtaining advance certainty. In November 2013, the Dutch Under-Minister of Finance issued a new decree on transfer pricing and the application of the arm's-length principle, which combines and replaces two previous decrees on transfer pricing (i.e., IFZ 2001/295M and IFZ 2004/680M). This decree provides important insights into the Dutch Tax Administration's position in applying the arm's-length principle in general and into specific types of common intercompany transactions, such as financial transactions, captive insurance companies, intangible and tangible fixed assets, centralized procurement companies and intercompany services. The decrees provide the tax authority's formal position but do not legally bind the taxpayer. The 2004 decrees, which clarified how the fiscal rules within the APA and Advance Tax Ruling (ATR) practice should function, have been replaced and updated by the decrees of 12 June 2014.

Moreover, a Ministerial Regulation providing further rules regarding the form and content of the CbC report, master file and local file was published in the *Government Gazette* on 30 December 2015.

The decrees published are:

- Implementation decree regarding the coordination group transfer pricing, DGB2004/1339M
- Mutual agreement procedure decree, IFZ 2008/248M
- Decree on profit allocation to permanent establishments (PEs), IFZ 2010/457M
- Decree on transfer pricing and the application of the arm's-length principle and the OECD Guidelines, IFZ 2013/184M
- APA decree, DGB2014/3098
- ATR decree, DGB2014/3099
- Decree regarding financial service activities, DGB2014/3101
- Questions and answers on the decree regarding service entities and grandfathering regime ruling policy, DGB2014/3102

- Decree on APAs, ATRs, financial services entities, interposed holdings, contact point potential foreign investors, organization and competency rules, DGB 2014/296M
- In January 2014, legislation with respect to the application of safe-harbor rules on substance of group financing and licensing companies and holding companies, and exchange of information, was amended; the impact of the changes has been dealt with in the decrees DGB2014/3101 and DGB2014/3102

Ministerial Regulation published:

- The Regulation of the Minister of Finance dated 30 December 2015, no. DB2015/462m, on rules for elaboration of additional documentation requirements for multinational companies

OECD Guidelines treatment

The tax authority generally follows the OECD Guidelines.

The Dutch transfer pricing decree (as published by the Under-Minister of Finance in November 2013) provides further guidance regarding how the arm's-length principle is interpreted and applied. According to this decree, the OECD Guidelines leave room for interpretation or require clarification on several issues. The goal of the decree is to provide insight into the position of the Dutch Tax Administration regarding these issues.

The transfer pricing decree of November 2013 provides specific guidance on intragroup services and shareholder activities, support services, contract research, cost contribution arrangements, arm's-length price determination when the value at the time of the transaction is uncertain, financial transactions, captive insurance companies, intangible and tangible fixed assets, centralized purchasing companies and other transfer pricing topics. With respect to business restructurings, no specific guidance has been issued to date. However, the tax authority generally follows the OECD guidance on this subject.

Documentation requirements

Articles 29b–29h, Dutch Corporate Income Tax Act 1969

With Articles 29b–29h of the Corporate Income Tax Act 1969, the OECD's three-tiered approach (i.e., CbC report, the master file and the local file) has been implemented.

The requirement to prepare a CbC report is applicable to Dutch tax resident entities, members of a multinational companies group, with a consolidated group turnover equal to or exceeding EUR750 million in the fiscal year preceding the fiscal year to which the CbC report applies. A Dutch tax resident entity not being the ultimate parent company or the "surrogate parent entity" would need to file a CbC report in the Netherlands when:

- The country in which the ultimate/surrogate parent entity is a tax resident has not established CbCR obligations
- The country in which the ultimate/surrogate parent entity is a tax resident does not have a signed agreement in place for automatic information exchange with the Netherlands on CbC reports — at the latest, 12 months after the last day of the fiscal year

Or

- The inspector has informed the group entity that the country in which the ultimate/surrogate parent entity is a tax resident has systematically failed to comply

Dutch tax resident entities of a multinational companies group having a consolidated group turnover equal to or exceeding EUR50 million in the fiscal year preceding the year for which the tax return applies will have to prepare a master file and a local file. These files should be included in the records of the taxpayer within the term set for submitting its corporate income tax return. The master file should include a chart illustrating the multinational companies group's legal and ownership structure and geographical location of operating entities, a description of the multinational companies group's business or businesses, information regarding the multinational companies group's intellectual property, information regarding the multinational companies group's intercompany financing activities and information on the multinational companies group's financial and tax positions. The local file should include information regarding the local entity (e.g., management structure, organization chart, reporting lines), regarding the material controlled transactions in which it is involved and financial information (e.g., annual financial account, how financial data used in applying the transfer pricing method may be tied to annual financial statements). The Ministerial Regulation dated 30 December 2015, no. DB2015/462m, provides guidance on the format and content of the CbC report, master file and local file.

If a taxpayer does not meet the consolidated group turnover threshold of EUR50 million in the fiscal year preceding the year for which the tax return applies, the already existing Dutch documentation requirements under Article 8b(3) of the Corporate Income Tax Act 1969 are applicable.

Article 8b(3), Dutch Corporate Income Tax Act 1969

Taxpayers are obligated to prepare documentation that describes how the transfer prices have been established, and this must be included in the accounting records. Furthermore, the documentation needs to include sufficient information that would enable the tax authority to evaluate the arm's-length nature of the transfer prices applied between associated enterprises. The Parliamentary explanations to Article 8b do not provide an exhaustive list of information that should be documented.

Transfer pricing documentation could include:

- Information about the associated enterprises involved
- Information about the intercompany transactions between these associated enterprises
- A comparability analysis describing the five comparability factors as set forth in Chapter I of the OECD Guidelines
- A substantiation of the choice of the transfer pricing method applied
- A substantiation of the transfer price charged
- Other documents, such as management accounts, budgets and minutes of shareholder and board meetings

Priorities/pricing methods

There is no "best method" rule. Taxpayers are, in principle, free to choose any OECD transfer pricing method, as long as the method chosen results in arm's-length pricing for the transaction.

Since the 2010 revision of the OECD Guidelines, which establishes the "most-appropriate method" rule for selecting the transfer pricing method, there is no longer a hierarchy among the methods. Nevertheless, the OECD Guidelines do state that when the CUP method and another transfer pricing method can be applied in an equally reliable manner, the CUP method is preferred. Taxpayers are not obligated to test all of the methods, though they must substantiate the method chosen.

Return disclosures/related-party disclosures

Dutch corporate income taxpayers are required to confirm in the corporate income tax return (by checking a separate box) whether they have been involved in cross-border related-party transactions involving tangible and intangible fixed assets during the fiscal year. Furthermore, Dutch corporate income taxpayers are required to confirm in a separate appendix whether they have conducted financial services on a group level without having any substance in the Netherlands or without assuming any risks during the fiscal year.

Netherlands (continued)

Transfer pricing-specific returns

Dutch corporate income taxpayers are not required to file a specific transfer pricing return in addition to the regular corporate income tax return.

Documentation deadlines

Documentation is generally expected to be complete when the taxpayer enters into a transaction. Dutch tax resident entities of a multinational companies group that will have to prepare a master file and a local file should have included these files in their records within the term set for submitting their respective corporate income tax returns.

Dutch tax resident entities of a multinational companies group that do not qualify for the documentation rules under Articles 29b–29h of the Corporate Income Tax Act 1969 are granted four weeks to prepare the transfer pricing documentation if such documentation is not available upon the request of the tax authority. This period may be extended up to three months, depending on the complexity of the intercompany transactions in which the taxpayer is engaged.

Transfer pricing penalties

The Dutch general penalty regime is also applicable for transfer pricing. According to this regime, an administrative and, under certain circumstances, even a criminal penalty can be imposed in case of noncompliance. Under this regime, this could mean a monetary fine of the third category (currently EUR8,100) or custody of six months. In the case of intention, this could mean a fine of the fourth category (currently EUR20,250) or an imprisonment of four years at the most.

During the Parliamentary discussions regarding the introduction of the arm's-length principle and transfer pricing documentation requirements (i.e., Article 8b) into the Dutch Corporate Income Tax Act 1969, a question was raised regarding the Dutch policy in connection with the levy of administrative penalties in case of a transfer price adjustment. The Dutch Under-Minister of Finance declared that penalties in such instances should be limited to cases in which it is plausible that the agreed-upon transfer price is not regarded as arm's-length as a result of a purely intentional act. Therefore, an administrative penalty will not be imposed, even in the event of gross negligence or a conditional intentional act under this policy announcement.

In case of a purely intentional act, as set forth above, the tax may be increased with a maximum penalty of 100% of the (additional) tax due, plus interest.

In addition to the above-described penalties, so-called administrative fines might be applicable (e.g., for not meeting filing a deadline).

The lack of transfer pricing documentation will shift the burden of proof regarding the arm's-length nature of the transfer price used by the taxpayer.

From the additional documentation requirements implemented in the Dutch Corporate Income Tax Act 1969 following OECD BEPS Action 13, it follows that the same general penalty regime would be applicable. Noncompliance with the CbCR requirements in principle will be regarded as a criminal offense for which a criminal penalty can be imposed. However, under certain circumstances, as an alternative, an administrative penalty can be imposed. During the Parliamentary discussion related to this proposal, it was mentioned that criminal charges will be reserved for the most severe cases.

Penalty relief

Transfer pricing penalties are unlikely if the taxpayer prepares proper transfer pricing documentation that adequately substantiates the arm's-length nature of the taxpayer's intercompany transactions.

Netherlands (continued)

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments is the same as the statute of limitations on tax assessments (as covered by the General Tax Act). The statute of limitations for making an assessment is three years from the end of the taxpayer's fiscal year. If the tax inspector has granted an extension for filing the tax return, the assessment period is extended to the end of the extension period. Once a final assessment for a financial year is imposed, additional assessments relating to that financial year can still be issued for up to five years after the end of the financial year (respectively 12 years in the case of foreign-source income). Similarly, this period is extended with the extension of the filing period granted to file the Dutch corporate income tax return. However, an additional assessment can be imposed only if either:

- The Dutch tax authority discovers a new fact that it reasonably should not have known at the moment the final assessment was issued

  Or
- The taxpayer acted in bad faith

An additional assessment is possible only up to two years after the tax assessment has been issued in the case of a mistake, which is recognized if (i) no tax assessment has been issued at all or (ii) the tax assessment is too low, while the taxpayer reasonably should have known that the final tax assessment was incorrect (if the difference amounts to at least 30% of the total taxes due, the taxpayer is deemed to have been aware of the mistake).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of being audited by the tax authority is considered moderate. However, during an audit, the likelihood of transfer pricing issues being scrutinized is high, and consequently the controversy risk is high as well. In particular, it is highly likely that the transfer pricing methodology will be assessed relative to the specific facts and circumstances.

Transfer pricing is a key issue in any tax audit, and many companies are subject to separate transfer pricing audits. A functional analysis is incorporated into many of these audits and forms the basis of the transfer pricing risk analysis of taxpayers.

The tax authority, among others, has shown interest in performing head-office audits (which include intragroup services and other activities performed by the head office) and in analyzing the economic substance of transactions, in terms of alignment of functions and risks. Next to head-office activities, intangible transactions are often evaluated, as well as business reorganizations, centralized purchasing companies, captive insurance companies and financial services transactions (including loans and guarantees). During these transfer pricing audits, the tax authority appears to have a particular interest in potential internal CUPs and the economic substance of a transaction.

The tax authority has also focused, as a natural result of the risk analysis, on transactions with entities in countries with low effective tax rates.

APA opportunity

Unilateral, bilateral and multilateral APAs with rollback features are available. The APA process works very efficiently in the Netherlands.

A number of specific features enable an efficient and transparent process, including the option to hold pre-filing meetings, the opportunity to develop a case management plan with the APA team to agree upon timing and key steps, and even specific support regarding economic analysis that is available to small taxpayers.

There are specific (unilateral) APA options for Dutch financial services entities. Financial services entities consist of both financing (mere receipt and payment of intercompany interest) and licensing (mere receipt and payment of intercompany royalties) companies.

The Dutch tax authorities process many unilateral and bilateral APAs on annual basis. The Dutch competent authority has bilateral APA experience across all continents.

Mutual agreement procedures (MAPs)

On 29 September 2008, a decree (IFZ2008/248M) describing the MAP process under bilateral treaties and the European Union (EU) Arbitration Convention was published. The decree aligns the MAP process in the Netherlands with the OECD Memorandum on Effective Mutual Agreement Procedures (MEMAP), making the route to obtaining relief from double taxation more accessible and transparent for taxpayers. Key features of the new decree are formally introducing an Accelerated Competent Authority Procedure (ACAP), endorsing arbitration to resolve MAP cases, targeting a reduction of MAP-related expenses, introducing transparency into the process by providing regular feedback and updates to the taxpayer, encouraging use of Article 9(2) of the OECD Model Tax Convention (MTC), and committing to tackle resolution of double taxation in cases ''not provided for in the Convention'' (Article 25(3) of the OECD MTC), in addition to the more traditional double taxation cases.

Attribution of profits to permanent establishments

On 27 January 2011, a decree (IFZ2010/457M) was published in the Government Gazette concerning the attribution of profits to permanent establishments (PE Decree). This PE Decree provides further insights into the tax authority's position on permanent establishments, following the publication of the 2010 OECD Report on the Attribution of Profits to Permanent Establishments (PE Report) and the OECD work on Article 7 of the OECD MTC, including commentary, in recent years. The PE Decree, effective 28 January 2011, provides that the Dutch policy concurs with the conclusions established in the PE Report.

Furthermore, it clarifies the tax authority's position regarding the dynamic approach to interpreting tax treaties; the preference for the capital allocation approach when allocating ''free'' capital to a permanent establishment; the preference for the fungibility approach when allocating the amount of interest; certain issues regarding dealings involving group services, intangible assets and financial assets; and certain specific topics, including advance certainty.

Impact of new OECD BEPS Action 8–10 Guidelines

a) The amendments will apply to transactions that were entered into after 23 May 2016; yes

b) The amendments will apply to transactions that were already in effect on 23 May 2916; yes

c) The amendments will apply to transactions that can still come under tax audit even though they were no longer in effect on 23 May 2016; yes

The Dutch Parliament is of the belief that the guidance of the OECD can be compared with the view of authoritative writers and conclusions of the Attorney-General. The tax authority generally follows the OECD Guidelines. The Dutch transfer pricing decree provides further guidance on how the arm's-length principle is interpreted and applied. In a letter to the Parliament on 5 October 2015, the Dutch Deputy-Minister of Finance stated that the Government views the Dutch transfer pricing policy as being aligned with the outcomes of the OECD BEPS actions on transfer pricing.

New Zealand

Taxing authority and tax law

Taxing authority: Inland Revenue Department (IRD)

Tax law:

- Sections YD 5, GB 2 and GC 6 to GC 14 of the Income Tax Act 2007 (ITA)
- Tax Administration Act 1994 (TAA)
- New Zealand's double tax agreements are also relevant tax laws in New Zealand.

Relevant regulations and rulings

The final New Zealand Transfer Pricing Guidelines (IRD Guidelines) were issued in October 2000. While the IRD Guidelines are still relevant, the IRD is now applying the 2010 OECD Guidelines (as revised in 2016), which are considered to be broadly consistent with New Zealand's transfer pricing legislation and double taxation treaties.

OECD Guidelines treatment

The IRD fully endorses the positions set out in Chapters I to IX of the OECD Guidelines and generally follows those positions in administering New Zealand's transfer pricing rules. Consequently, the IRD Guidelines should be read as supplementing the OECD Guidelines, rather than superseding them. This applies to the domestic application of the New Zealand rules, as well as in relation to issues raised under New Zealand's double tax agreements.

In addressing business restructuring issues, the IRD will seek to ensure that there is a commercial case for any restructuring and that the economic substance aligns with the legal form of the arrangement. The IRD has released some high-level guidance in the form of 10 questions that should be addressed by companies undertaking cross-border business restructurings. These questions aim to help ascertain the commercial rationale of the restructuring.

Documentation requirements

There are no explicit requirements in New Zealand's transfer pricing legislation (§§ GC 6 to GC 14 of the ITA) for any particular category of information to be included in transfer pricing documentation. Section GC 13 requires taxpayers to select and apply an appropriate transfer pricing method for tax return purposes. The IRD Guidelines indicate that a taxpayer's main purpose in preparing and maintaining documentation should be to place the taxpayer in a position where it can readily demonstrate to the IRD that a transfer pricing method has been used to establish that the taxpayer's transfer prices are consistent with the arm's-length principle, in light of the relevant facts and circumstances.

There are currently no specific regulations to require multinational companies to prepare CbC reports in line with the OECD proposal.

Priorities/pricing methods

The IRD accepts the most reliable method (or combination of methods) chosen from among the CUP, resale price, cost-plus, profit split and comparable profit (or TNMM) methods.

Return disclosures/related-party disclosures

A company's income tax return requires disclosure of:

- Payments to nonresidents, such as dividends, interest, management fees, "know-how" payments, royalties or contract payments made
- Whether the company is controlled or owned by nonresidents
- Whether the company holds an interest in a CFC

More detailed disclosure of various financial information and other data is now required for interests held in CFCs.

Transfer pricing-specific returns

There is no separate transfer pricing return required to be filed in New Zealand (notwithstanding the disclosures outlined above).

However, the IRD does require that multinational companies and branches complete detailed transfer pricing questionnaires as part of their transfer pricing risk assessment activities (see the next section for further details).

Documentation deadlines

Although there is no explicit legislative requirement for a taxpayer to document its transfer pricing policies and practices, the IRD Guidelines indicate that taxpayers that prepare and maintain transfer pricing documentation are more likely to ensure that the burden of proof (that prices are not at arm's-length) remains with the Commissioner. The IRD will generally request a copy of a taxpayer's transfer pricing documentation as part of an income tax audit or transfer pricing risk assessment. While each case is different, a taxpayer generally is given 20 working days to submit the documentation upon request.

Transfer pricing penalties

Under § 141A-K of the TAA, the following penalties are imposed:

- A 20% penalty for not taking reasonable care
- A 20% penalty for an unacceptable tax position
- A 40% penalty for gross carelessness
- A 100% penalty for an abusive tax position
- A 150% penalty for evasion or a similar act

Penalty relief

Shortfall penalties may be reduced upon voluntary disclosure to the Commissioner of the details of the shortfall, as follows:

- If disclosure occurs before notification of an investigation, the penalty may be reduced by 100% (only for lack of reasonable care or unacceptable tax position categories) or 75% for other shortfall penalties.
- If disclosure occurs after notification of an investigation, but before the investigation commences, the penalty may be reduced by 40%.

Shortfall penalties may be reduced by a further 50% if a taxpayer has past good compliance records.

New Zealand (continued)

Statute of limitations on transfer pricing assessments

The Commissioner's power to issue amended assessments is subject to a four-year time limit from the end of the year in which the tax return is filed. A taxpayer can extend the applicable statute of limitations by an additional six months by signing a waiver, which generally arises when a dispute is not resolved, and more time would allow either completion of the dispute process by mutual agreement of both parties or where another case before the court is likely to resolve the issue in current dispute.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of an annual tax audit is characterized as medium to high. Tax audits are undertaken at the IRD's discretion. The IRD selects audit targets based on certain criteria, such as low profitability or losses, industry performance, transaction types (e.g., large, intercompany finance arrangements) and media reports. However, most large companies can typically expect to be audited every five years.

The risk of transfer pricing scrutiny during a tax audit is characterized as high. Risk assessment review questionnaires relating to transfer pricing and thin capitalization are typically issued to companies during general income tax audits or risk reviews and as part of the IRD's specific transfer pricing review process. The questionnaires request detailed information, including financial details of the New Zealand taxpayer and consolidated group, types and values of related-party transactions, methodologies used, details of any business restructures, and whether transfer pricing documentation has been prepared. An "International Questionnaire" is also used by IRD to provide information regarding certain BEPS-related risks specific to inbound multinational companies.

The IRD also uses questionnaires in respect of interest, guarantee fees and royalties. In addition, there is a separate transfer pricing questionnaire for branches.

The likelihood of the transfer pricing methodology being challenged depends on the complexity of the cross-border associated-party transaction. Transactions involving provision of intangibles, financing and intragroup services tend to receive higher scrutiny during a transfer pricing risk review. New Zealand subsidiaries that provide sales/marketing services to an offshore principal can expect a more detailed transfer pricing review.

APA opportunity

Section 91E of the TAA allows a unilateral APA to be issued in the form of a binding ruling. Bilateral or multilateral APAs may be entered into pursuant to New Zealand's double tax agreements under the MAP provisions. The IRD has not established any formal guidelines for APAs, as each case is considered to be different, depending on a taxpayer's specific facts and circumstances. The IRD encourages pre-application conferences to make the APA application process less time-consuming.

Impact of new OECD BEPS Action 8–10 guidelines

The IRD intends to apply the amended OECD Transfer Pricing Guidelines to an extent that is not inconsistent with domestic transfer pricing legislation.

Nicaragua

Taxing authority and tax law

Taxing authority: *Dirección General de Ingresos* (DGI)

Relevant regulations and rulings

Currently, there are no local transfer pricing regulations in Nicaragua. However, regulations will be in effect as of 30 June 2017.

OECD Guidelines treatment

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Not applicable.

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is categorized as high. The likelihood of transfer pricing assessments being part of a general tax audit is considered low. The DGI has not yet initiated any tax audits regarding transfer pricing because the regulations will come into force as of tax year 2017. In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is unknown.

APA opportunity

Not applicable.

Impact of new OECD BEPS Action 8-10 guidelines

Currently, there is no official position or case law from the DGI about the amended OECD TP Guidelines 2016.

Nigeria

Taxing authority and tax law

Taxing authority: Federal Inland Revenue Service (FIRS)

Tax law: Companies Income Tax Act, Petroleum Profits Tax Act, Personal Income Tax Act

Relevant regulations and rulings

The Income Tax (Transfer Pricing) Regulations No. 1, 2012, govern transfer pricing in Nigeria.

The Transfer Pricing Regulations apply to transactions between connected taxable persons and require that the taxable profits resulting from such transactions are consistent with the arm's-length principle.

Affected transactions specifically, but not exclusively, include the following:

- Sale and purchase of goods and services
- Sale, purchase or lease of tangible assets
- Transfer, purchase, license or use of intangible assets
- Provision of services
- Lending or borrowing of money
- Manufacturing arrangements
- Any transaction that may affect profit and loss or any other matter incidental to the foregoing

For purposes of applying the Transfer Pricing Regulations, permanent establishments are treated as separate entities, and any transaction between a permanent establishment and its head office or other connected taxable persons is considered a controlled transaction subject to the Transfer Pricing Regulations.

OECD Guidelines treatment

The Transfer Pricing Regulations are to be applied in a manner consistent with the OECD Guidelines and Article 9 of the United Nations and OECD Model Tax conventions. The Transfer Pricing Regulations explicitly recognize the five methods accepted by the OECD Guidelines as being appropriate.

There is no guidance in the Transfer Pricing Regulations on the treatment of business restructuring. Chapter 9 of the OECD Guidelines can be expected to apply.

Documentation requirements

Taxpayers are required to prepare contemporaneous transfer pricing documentation, which must be in place at the time of filing their tax returns. The tax returns are due six months after the year-end. The transfer pricing documentation can be requested with 21 days' notice after the tax return is filed. The FIRS may extend this time frame at its discretion. The Transfer Pricing Regulations provide that the documentation should be prepared taking into account the complexity and volume of the applicable transactions.

Priorities/pricing methods

The Transfer Pricing Regulations require the most appropriate transfer pricing method to be selected based on the facts and circumstances relating to the intercompany transactions being analyzed. The Transfer Pricing Regulations prescribe the following methods to be used in determining whether the result of a transaction or series of transactions is consistent with the arm's-length principle:

- CUP
- Resale price
- Cost-plus
- TNMM
- Transactional profit spilt
- Any other method that may be prescribed in the regulations made by the FIRS from time to time

A taxpayer may apply a transfer pricing method outside of the specified methods if it can be established that: (i) none of the listed methods can be reasonably applied and (ii) the method used gives rise to a result that is consistent with the arm's-length principle.

Return disclosures/related-party disclosures

Taxpayers are required to complete and attach a Transfer Pricing Declaration form to the annual tax return as well as a Transfer Pricing Disclosure form. The Transfer Pricing Disclosure Form requires the taxpayer to indicate whether it has complied with the Transfer Pricing Regulations and prepared transfer pricing documentation. The Transfer Pricing Disclosure Form also requires disclosure of information about intercompany transactions and business restructuring.

Transfer pricing-specific returns

Taxpayers are required to complete Transfer Pricing Declaration and Disclosure forms, which are to be submitted as part of an annual transfer pricing return (TP return), due at the same time that the tax return is filed. The tax return will be deemed incomplete without the TP return. For clarity, the TP return consists of (i) the Transfer Pricing Disclosure Form, (ii) the Transfer Pricing Declaration Form (for the first annual filing only), (iii) a copy of audited financial statements, (iv) a copy of the income tax self-assessment and (v) the income tax computation and all relevant schedules.

The FIRS has also requested that taxpayers submit transfer pricing policy documents along with their first TP return. The transfer pricing policy documents are a unique requirement of the Nigerian regime and should include information such as the name of the members of the group and organizational structure, ownership or control linkages of connected entities, outline or a brief description of the business activities of the group and its members, types of intercompany transactions that may occur, the flow or anticipated flow of controlled transactions, and the transfer pricing method that may be adopted for the pricing for each type of controlled transaction. For clarity, the transfer pricing policy document is not the same as transfer pricing documentation but rather is a condensed form of key information about the company's transfer pricing policies.

Nigeria (continued)

Documentation deadlines

Transfer pricing documentation should be in place at the due date for filing the income tax return for the year in which the documented transactions occurred.

The Transfer Pricing Declaration and Transfer Pricing Disclosure forms, as well as the transfer pricing policy documents, should be submitted when the income tax return is filed.

Transfer pricing penalties

A taxable person who fails to comply with any of the provisions of the regulations will be liable for a penalty as prescribed in the relevant provisions of the applicable tax laws (Companies Income Tax Act, Petroleum Profits Tax Act and Personal Income Tax Act).

For example, under the Companies Income Tax Act, the penalty for filing corporate income tax returns late is NGN25,000 in the first month in which the failure occurs and NGN5,000 for each subsequent month. Late payment of taxes due attracts a penalty of 10%, plus interest at the bank lending rate.

It should be noted that the Transfer Pricing Regulations are silent with regard to accrued interest on the underpayment of tax. Generally, the FIRS applies interest at the prevailing interest rate on the underpayments of tax.

Penalty relief

There is no specific penalty relief in the Transfer Pricing Regulations. However, it is envisaged that a taxpayer would mitigate the risk of penalties through appropriate documentation of controlled transactions. In this regard, the burden of proof lies with the taxpayer.

Statute of limitations on transfer pricing assessments

No statute of limitations exists in the Transfer Pricing Regulations, but under the principal tax regulations, all supporting documentation for the taxpayer's returns has to be retained for six years. In cases of criminal tendencies, such as fraud or willful default, there is no statute of limitations.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transfer pricing audits have fully commenced and are progressing well. The transfer pricing returns are filed annually and reviewed by the tax authorities for the purposes of risk assessment, and information requests are sent to taxpayers selected for transfer pricing audits. While many taxpayers have received notifications on transfer pricing documentation requests, some have yet to receive such a request.

Under transfer pricing audits, cross-border transactions, particularly with entities in low-tax jurisdictions, are perceived to present higher risks than domestic transactions and as such are given more scrutiny.

Nigeria (continued)

APA opportunity

The Transfer Pricing Regulations indicate that a connected taxable person may request that the FIRS enter into an APA to establish an appropriate set of criteria for determining whether the taxpayer has complied with the arm's-length principle for certain future controlled transactions over a fixed period. The taxpayer may request a unilateral, bilateral or multilateral APA.

Current indications are that the FIRS will not accept APA applications in the initial period of application of the Transfer Pricing Regulations as it is building capacity.

Impact of new OECD BEPS Action 8–10 guidelines

Nigeria joined the new inclusive framework on 1 July 2016 as a BEPS associate to implement the minimum standards on harmful tax practices (Action 5), tax treaty abuse (Action 6), country-by-country reporting (CbCR) (Action 13) and dispute resolution mechanisms (Action 14). However, there is no public pronouncement on the developments yet.

Currently, there is no updated regulation on guidance, timing and deadlines for implementation of the BEPS 8–10 requirements of the final OECD Guidelines. To this end, all transfer pricing requirements under the existing Transfer Pricing Regulations still apply in Nigeria.

Norway

Taxing authority and tax law

Taxing authority: Norwegian Tax Authority (NTA)

Tax law:

- Taxation Act (1999)
- Tax Administration Act (1980)

Local GAAP: The local accounting standard in Norway is referred to as the Norwegian generally accepted accounting standards (NGAAP).

Relevant regulations and rulings

The arm's-length principle is stated in Taxation Act (1999) § 13-1, and the transfer pricing filing and documentation requirements are stated in Tax Administration Act (1980) § 4-12.

In June 2007, the Norwegian Parliament adopted transfer pricing regulations (Tax Administration Act § 4-12). The requirements became effective in January 2008. The transfer pricing requirements consist of filing and documentation requirements.

The Ministry of Finance also published the guidelines to the Norwegian documentation requirements in 2007. These guidelines outline specific requirements of what to include in the Norwegian documentation.

Effective in 2014, new interest deductibility restrictions on related-party debt came into effect. According to the new legislation, the net interest expense paid to a related-party can be deducted only to the extent that internal and external interest expense combined does not exceed 30% of the taxable earnings before interest, taxes, depreciation and amortization (EBITDA). The restriction also covers third-party interest expenses, where a related-party has provided a guarantee. Certain exemptions are expected to apply in relation to external debt guaranteed by a related-party. Exemptions to the interest deductibility restrictions rule apply if the total amount of net interest expense does not exceed NOK5 million during the fiscal year.

On 11 May 2016, the Norwegian Government issued a white paper on the domestic CbCR rules. The proposal is aligned with the proposal for CbCR regulations issued by the OECD in relation to Action 13 of its BEPS project. According to the proposal, all multinational groups with annual consolidated group revenue equal to or exceeding NOK6.5 billion (approximately USD730 million) will be obliged to file a CbC report. No date has been set for implementation of the law, but it is anticipated that the law will be effective for the income year 2016, and first reporting should be done by 31 December 2017, based on figures from the income year 2016.

OECD Guidelines treatment

The NTA has a long history of following the OECD Guidelines. The Norwegian regulations follow OECD principles, and documentation prepared in line with the OECD Guidelines will generally meet the Norwegian requirements.

The Taxation Act (1999) § 13-1 gives the OECD Guidelines a strong and formal status under Norwegian tax law. However, OECD Guidelines Chapter IV (Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes) and Chapter V (Documentation) are not included. The status of the OECD Guidelines is limited to that of guidance, and they do not constitute binding rules.

The NTA seems to be applying the principles outlined in OECD Guidelines Chapter IX (Transfer Pricing Aspects of Business Restructurings). Recent tax audits and court cases have shown that the principles described in OECD Guidelines Chapter IX are applied in practice.

Documentation requirements

In Norway, the transfer pricing requirements consist of filing and documentation requirements.

The filing requirement is an attachment to the annual tax return (RF-1123), which includes a listing of all intercompany transactions. The form will serve as a basis for the NTA when targeting transfer pricing tax audits. The filing requirements are applicable for all transactions reported in the tax return.

In addition, covered taxpayers are obliged to prepare transfer pricing documentation that describes how the transfer prices have been established between associated enterprises. The documentation needs to include sufficient information that would enable the NTA to evaluate the arm's-length nature of the transfer prices applied between associated enterprises. Both cross-border and domestic transactions are covered. Specific requirements worth mentioning with respect to the Norwegian documentation rules are as follows:

- Key financial figures for the last three years for the Norwegian entity, and all group entities that undertake transactions with the Norwegian entity during the covered income year, must be included, and any losses incurred by the Norwegian entity must be explained.
- Agreements for the related-party transactions must be attached to the documentation.
- A description of how the transfer price in a transaction is actually computed must be provided.
- The level of detail required depends on the complexity of the transaction and, in particular, if the transaction is of high value, intangibles are involved or if there may be a tax motivation for pricing the transaction at non-arm's-length conditions, the level of detail required is higher.
- A description of material changes to the enterprise of the group during the income year thereunder, an explanation of reorganizations and material changes to the functions performed by the enterprise, and the property it uses in its business activities and the risk it assumes must be included.
- There is no specific threshold for which related-party transactions should be documented. However, exceptions are made for transactions defined as immaterial according to certain requirements. In the latter case, the taxpayer is required to provide limited information only.
- The transfer pricing documentation may be prepared in any of the following languages: Norwegian, Swedish, Danish or English.

Priorities/pricing methods

The NTA accepts the pricing methods contained in the OECD Guidelines. The traditional transactional methods (CUP, resale price and cost-plus) are generally preferred to the profit-based methods (TNMM and profit split). However, support for applying the profit-based methods under certain circumstances is increasing. The NTA generally does not accept the use of Pan-European searches anymore because the tax authorities believe that the Norwegian market, in general, has higher profit margins since Norway has not been affected by the financial crisis in the same way as many other European countries.

There is no specified priority of methods under Norwegian tax law. As stated by the Norwegian Supreme Court, the Taxation Act (1999) § 13-1 allows for the use of several transfer pricing methods, including methods not described in the OECD Guidelines, provided those methods provide arm's-length results.

The NTA tends to prefer local comparables over foreign comparables. However, in the absence of local comparables, it is generally recommended to provide information on foreign comparables.

There have been incidents in which the NTA has made use of secret comparables, although this is not deemed common practice.

Norway (continued)

Return disclosures/related-party disclosures

The filing requirement is an attachment to the annual tax return (RF-1123), which includes a listing of all intercompany transactions. The form serves as a basis for the NTA when targeting transfer pricing tax audits. The filing requirements are applicable to all transactions reported in the tax return.

Transfer pricing-specific returns

There are no transfer pricing-specific returns, except for the attachment to the annual tax return (RF-1123). It is generally recommended that taxpayers provide a description of significant intercompany transactions with the tax return.

Documentation deadlines

The transfer pricing documentation must be submitted within 45 days of a request by the NTA. All documentation must be retained for 10 years. The tax authority assumes that documentation is made on a contemporaneous basis and, accordingly, does not allow for extensions.

Transfer pricing penalties

The transfer pricing penalty (surtax) is 30% of the tax adjustments, provided that the tax authority concludes that the taxpayer provided incomplete or incorrect information when submitting the tax return. If sufficient and correct information is provided, no penalty will be imposed. In the case of gross negligence, a surtax of up to 60% may be levied. However, the normal surtax rate is 30%. Additionally, a nondeductible annual interest charge will apply.

Failure to comply with the filing requirement (described below) carries the same penalties as failure to complete the annual tax return. The same is applicable if the documentation is not submitted by the deadline.

Penalty relief

A 30% penalty is normal; however, the risk of a penalty being imposed may be reduced if proper documentation is prepared. Disclosure in the tax return may, in principle, relieve penalties because the tax authority technically will have been informed and may further investigate the transfer pricing case. The assessment of penalties is becoming increasingly common.

Statute of limitations on transfer pricing assessments

The general statute of limitations for tax assessments in Norway states that issues regarding the tax return cannot be raised after 10 years from the end of the income year. Transfer pricing documentation must, therefore, be retained and stored for at least 10 years.

The statute of limitations is three years if the amendment is based on the tax authority's discretionary assessments or the interpretation of the tax legislation if the tax return filed is correct and complete. Assuming the taxpayer has 31 December as its 2016 income year-end, the statute of limitations will cease 31 December 2019.

The statute of limitations is two years if any tax adjustment is against the taxpayer, provided that the taxpayer has not given incorrect or incomplete information in the tax return. Assuming the taxpayer has 31 December as its 2016 income year-end, the statute of limitations will cease 31 December 2018.

Norway (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a full corporate tax audit is, in general, low. However, the likelihood of a separate transfer pricing tax examination is considered high. For both separate transfer pricing tax examinations and full corporate tax audits, the taxpayer's related-party transactions will likely be scrutinized and challenged. If transfer pricing is reviewed, the likelihood of the transfer pricing methodology being challenged is considered high.

The NTA has a strong focus on intercompany transactions and has established a national transfer pricing project composed of all of the major tax offices to further its focus on transfer pricing. This focus continues to increase, in line with the rising number of dedicated transfer pricing tax inspectors within the NTA.

The NTA selects companies for audit based on the submitted Form RF-1123 and the tax return. Companies are also selected through initiatives by the NTA targeting specific transactions (e.g., business restructurings or transactions involving intellectual property). If selected, the first step is that the taxpayer submits its transfer pricing documentation for review.

Based on the initial review, the company is selected for audit if the documentation does not provide sufficient information and answers about the internal transactions and the profitability of the company.

Currently, any company with a low or negative margin transacting with a foreign related-party has a high risk of a tax audit. In addition, year-end adjustments are often challenged. The NTA often uses this as an argument to claim that the result is not at an arm's-length.

APA opportunity

APAs are in their infancy in Norway, and a separate MAP or APA unit was established in 2015. No formal guidelines have been issued regarding procedure for the application. However, it will not be possible to engage the APA unit on a no-name basis. The APA process is free.

Impact of new OECD BEPS Action 8–10 guidelines

The transfer pricing filing and documentation requirements follow from the Tax Administration Act (1980) § 4-12. No changes to the law as such are expected, besides the new law on CbCR. Actions 8–10 are assumed to be sufficiently covered by the current Taxation Act § 13-1. However, updated regulations are expected regarding Norwegian documentation requirements to reflect the new OECD Guidelines on documentation.

Oman

Taxing authority and tax law

Taxing authority: Secretariat General for Taxation (SGT), a part of the Ministry of Finance

Tax law: Income Tax Law (ITL) issued by Royal Decree 28/2009 and the Executive Regulations, clarifying certain provisions of the ITL, issued by Ministerial Decision 30/2012; all tax legislation enacted by Royal Decree; provisions that implement the tax law introduced by Ministerial Decisions and Executive Regulations

Relevant regulations and rulings

Articles 126 to 128 of the ITL contain the transfer pricing regulations.

OECD Guidelines treatment

OECD Guidelines are not binding in Oman. However, in the past, the SGT has taken OECD Guidelines into account.

Documentation requirements

The law has not provided any specific documentation requirements. Therefore, documentation requirements are determined on a case-by-case basis. Global transfer pricing reports, adequately localized for the region, could help demonstrate the arm's-length basis of pricing for related-party transactions.

Priorities/pricing methods

No pricing methods have been prescribed in the law or under the existing regulations. The law mentions that pricing shall be taken into account, assuming the terms upon which transactions would have been entered into by independent persons. This suggests the CUP method may be preferred. The SGT is expected to enact more rules and publish more guidance in the coming years.

Return disclosures/related-party disclosures

Oman follows International Financial Reporting Standards (IFRS). Therefore, the SGT expects taxpayers to disclose related-party transactions in their financial statements in accordance with IFRS. Introduction of e-filing of tax returns in the near future may augment additional related-party transaction disclosures, along with the tax returns.

Transfer pricing-specific returns

Under the Executive Regulations that were issued in 2012, formats of the tax returns have been modified to collect information from the taxpayer about related-party transactions. The disclosure requirement has been effective since 2012.

Documentation deadlines

No documentation deadlines are currently applicable because there is no specific transfer pricing documentation filing requirements.

Transfer pricing penalties

Currently, there is no specific transfer pricing penalty prescribed in the law.

Penalty relief

Because there are no specific transfer pricing penalties, no penalty relief is currently applicable. While there are no specific provisions for relief, the SGT does look at each case independently and has waived the delay penalty on late submissions of tax returns.

Statute of limitations on transfer pricing assessments

There are no separate transfer pricing assessments conducted in Oman. The transfer pricing assessment will be conducted as part of the regular tax assessment for a tax year. The statute of limitations to complete the regular tax assessment is five years from the end of the year for which a tax return is submitted.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is high, and tax assessments are conducted annually. A review of transfer pricing is one of the main processes during the annual tax assessment. Therefore, related-party transactions, from a transfer pricing perspective, are highly likely to be reviewed as part of the tax assessment. Because there is no specific methodology prescribed in the tax law, the appropriate transfer pricing methodology used is determined on a case-by-case basis. Accordingly, the likelihood of the methodology being challenged in a transfer pricing audit is also high.

APA opportunity

There is no opportunity to conclude an APA.

The provision of advance rulings is not mentioned in the ITL; therefore, the SGT is not legally bound to grant an advance ruling. However, as a matter of practice, the SGT has been responding to advance ruling requests. Each response is binding on the SGT for that particular case and cannot be applied generally to any other case.

Impact of new OECD guidelines

Although the SGT has taken OECD Guidelines into account in the past, they are not binding in Oman. There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Pakistan

Taxing authority and tax law

Taxing authority: Federal Board of Revenue (FBR)

Tax law: Income Tax Ordinance of 2001 (the Ordinance)

Relevant regulations and rulings

Section 108 of the Income Tax Ordinance deals with the powers of the commissioner with respect to transactions between associates.

The commissioner may distribute, apportion or allocate income, deductions or tax credits between the persons as is necessary to reflect the income that the persons would have realized in an arm's-length transaction. While making any adjustments, the commissioner may determine the source of income and the nature of any payment or loss as revenue, capital or otherwise.

Section 109 of the Ordinance empowers the commissioner to re-characterize the transaction for determining the taxable amount or tax liability. The commissioner may:

- Re-characterize a transaction or an element of a transaction that was entered into as part of a tax avoidance scheme
- Disregard a transaction that does not have substantial economic effect
- Re-characterize a transaction in which the form of the transaction does not reflect the substance

In a December 2014 statement, the FBR announced that it created a transfer pricing unit and would develop the technical knowledge of the field officers, including the development of a database of comparables.

OECD Guidelines treatment

The methods used by the commissioner to determine the arm's-length result are identical to the methods available under the OECD Guidelines.

Pakistan has concluded approximately 63 income tax treaties containing an article that resembles Article 9 of the OECD Model Tax Convention (on associated Enterprises).

Documentation requirements

Transfer pricing documentation is not required by law. However, in practice, it is recommended that taxpayers maintain contemporaneous documentation to avoid re-characterization of transactions between associates, as described above.

Priorities/pricing methods

The Income Tax Rules of 2002 (the Rules) state that the following methods may be applied by the commissioner to determine the arm's-length result:

1. CUP method: The price quoted in a transaction between uncontrolled parties on similar terms and conditions will be considered.
2. Resale price method: The difference in the resale gross margin of the two transactions would be considered and compared for determining whether the transaction between controlled parties is on an arm's-length basis.
3. Cost-plus method: The cost-plus markup realized in an uncontrolled transaction will be considered as a basis to determine whether a similar transaction between controlled parties is on an arm's-length basis.

4. Profit split method: Where a group of associates is formed and the transactions are so interrelated that a separate basis is not possible to identify the arm's-length results for a similar transaction between uncontrolled persons, the profit-sharing basis agreed to between independent persons forming an association would be considered.

Of the first three methods, the one that provides the most reliable measure of an arm's-length result with regard to all of the facts and circumstances, in the opinion of the commissioner, shall be applied. The fourth method shall apply only if the other methods cannot be reliably applied.

Return disclosures/related-party disclosures

Pakistan follows International Financial Reporting Standards (IFRS). Therefore, the FBR expects taxpayers to disclose related-party transactions in their financial statements in accordance with IFRS.

Transfer pricing-specific returns

Transfer pricing-specific returns are not required in Pakistan.

Documentation deadlines

Because no specific transfer pricing documentation requirements have been provided, no documentation deadlines are currently applicable.

Transfer pricing penalties

Currently, there is no specific transfer pricing penalty prescribed in the law.

Penalty relief

Because there are no specific transfer pricing penalties, no penalty relief is currently applicable.

Statute of limitations on transfer pricing assessments

There are no separate transfer pricing assessments conducted in Pakistan. A transfer pricing assessment, if any, will be conducted as part of the regular tax assessment for a tax year.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The FBR recently established an internal Transfer Pricing Division, and a database for comparative analyses and audit methodology is being developed. Generally, the transfer pricing aspect is covered in the tax audit proceedings conducted by the commissioner once the return of income is selected for a tax audit.

Pakistan (continued)

APA opportunity

There is no opportunity to conclude an APA. However, an advance ruling is possible.

Per the provisions of Section 206A, a nonresident taxpayer may file an application with the FBR seeking confirmation of taxability, or otherwise of the proposed transaction, by providing complete details and documentation. The ruling issued by the FBR shall be binding on the tax authorities regarding the application of the transaction and according to the law as it stood at the time of such ruling. The prescribed time limit for issuance of the ruling by the FBR is three months after such application is received, along with necessary details and documents.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Panama

Taxing authority and tax law

Taxing authority: Tax Administration of Panama (*Dirección General de Ingresos*, or DGI)

Tax law: Panama Tax Code (the Tax Code)

Relevant regulations and rulings

- Law No. 33, enacted in 2010 (Law 33) and applicable as of fiscal year 2011, established the transfer pricing provisions in the Tax Code (Chapter IX of Title I of the Fourth Book) in Articles 762-A to 762-K.
- Law No. 52 (Law 52), which modified Law 33 and related sections of the Tax Code, was enacted in August 2012 and is applicable to fiscal years ending after August 2012.
- Executive Decree No. 958, with its regulations on transfer pricing, is in the related sections of the Tax Code (Chapter IX of Title I of the Fourth Book).

Prior to fiscal year 2011, Law 33 introduced norms to adapt the Tax Code to international double tax treaties (DTTs) that applied only to taxpayers with transactions conducted with affiliates resident in countries with which Panama had signed a DTT.

With Law 52, all cross-border intercompany transactions conducted by Panamanian taxpayers are now subject to transfer pricing obligations, according to modified § 762-D of the Tax Code.

OECD Guidelines treatment

The OECD Guidelines can be relied upon for interpretation of the rules, as long as they do not contradict the Tax Code.

Documentation requirements

Contemporaneous transfer pricing documentation related to cross-border intercompany transactions must be kept and maintained in Spanish. Documentation must include:

- The complete identification of the taxpayer and of the nonresident related parties with whom transactions are carried out, as well as evidence of direct and indirect participation between related parties
- A detailed description of the nature, characteristics and amount of all intercompany transactions of the taxpayer, including the transfer pricing method employed

It is also necessary to include the method selection process and specify the price or margin, or a range of prices or margins, applied by the taxpayer in its intercompany transactions. In addition, it is necessary to include in the documentation information regarding the functions performed, assets used and risks borne by the taxpayer involved in each transaction. Information and documentation about comparable transactions or companies by type of transaction must also be included. Internal comparables are preferred over external comparables, and the reasons for not applying internal comparables must be duly documented.

The documentation must be prepared considering the complexity and volume of the transactions and should include the information that the taxpayer used in its evaluation of the intercompany transactions, consisting of information pertaining to both the multinational group to which the taxpayer belongs and the taxpayer itself.

Panama (continued)

The information regarding the multinational group contained in the documentation should include:

- A general description of the organizational, legal and operating structure of the group, with any relevant changes
- Identification of the related parties with whom the taxpayer conducts intercompany transactions
- The transfer pricing policy of the multinational group, if any

Priorities/pricing methods

The transfer pricing methods in Panama are CUP, resale price, CPM, profit split, residual profit split and TNMM. The selection of the method should be based on the characteristics of the transaction under analysis and the circumstances of the case and should aim to be the one that best respects the arm's-length principle.

Return disclosures/related-party disclosures

Taxpayers must report on the income tax return whether they conducted related-party transactions and disclose the total amount of such related-party transactions, depending on their nature — that is, if they are income, purchases or other expense items.

Transfer pricing-specific returns

An information return (Form 930) on the transactions conducted with related parties resident abroad should be filed within six months of the close of the fiscal year.

Documentation deadlines

Documentation must be readily available by the date on which the transfer pricing information return is due and must be kept along with the company's accounting books and records. If requested by the DGI, documentation should be provided within 45 days of notification.

Taxpayers should file an information return on cross-border intercompany transactions annually, and it should be filed within six months of the close of the fiscal year.

Transfer pricing penalties

Failure to file the transfer pricing information return results in a penalty of 1% of the total amount of intercompany transactions. However, the penalty will not exceed PAB1 million. For the penalty calculation, the gross amount of the transactions will be considered regardless of their nature (i.e., regardless of whether they are items of income, expense or deduction).

In addition, transfer pricing income adjustments imposed by the DGI can result in surcharges and penalty interest.

Penalty relief

There is currently no penalty relief regime in place.

Statute of limitations on transfer pricing assessments

The statute of limitations on assessments is three years from the date of filing the income tax return. The term is extended with the filing of an amended return.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit currently is categorized as medium. The likelihood of a transfer pricing assessment as part of a general tax audit is medium. In the past couple of years, the DGI has requested transfer pricing documentation from taxpayers regarding fiscal years 2013 and 2014 and has been performing tax audits regarding transfer pricing issues. For the last years, the DGI has worked on creating a specialized transfer pricing unit.

If transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is low.

APA opportunity

Currently, no APA program has been established.

Impact of new OECD BEPS Action 8–10 guidelines

Under the existing transfer pricing provisions, the OECD Guidelines can be relied upon for interpretation only, and they are not mandatory for taxpayers.

As of today, the tax authorities have not made public any official initiative to update existing transfer pricing provisions regarding the new OECD Guidelines as a result of the BEPS Action 8–10 reports adopted on 23 May 2016.

Although the DGI has commenced the process to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which could serve as a possible legal framework to implement BEPS actions in Panama, it is hard to predict at this stage whether it will amend the current transfer pricing regulations, and if so, the time frame in which that would occur. Thus, it will be important to monitor further developments in this area.

Papua New Guinea

Taxing authority and tax law

Tax authority: Internal Revenue Commission (IRC)

Tax law: Income Tax Act 1959 (the Act)

Relevant regulations and rulings

Division 15 of the Act, Transfer Pricing: Determination of the taxable income of certain persons from international transactions and Papua New Guinea's double tax agreements (Division 15).

IRC — Taxation Circular No. 2011/2 — Commissioner General's interpretation and application of the Taxation Laws on Division 15 of the ITA 1959 (the Circular).

OECD Guidelines treatment

The Circular acknowledges the OECD Guidelines, as well as guidance provided by the United Nations.

Although Papua New Guinea (PNG) is not a member country of the OECD, the OECD Guidelines are acknowledged as an important, influential document that reflects unanimous agreement among the member countries and that was reached after extensive consultation with industry and tax practitioners in many countries. The Circular states that the OECD Guidelines should be followed in the absence of guidance in terms of the Circular, the provisions of Division 15 or the double tax agreements entered into by PNG.

The Commissioner General considers the guidance provided on business restructurings contained in Chapter IX of the OECD Guidelines to be relevant and recommends that taxpayers follow the guidance in establishing arm's-length conditions in international agreements with associated entities involving business restructurings. Where appropriate, the Commissioner General will publish future guidance on this issue.

Documentation requirements

The general requirements of the Act require taxpayers to keep proper records relating to their transfer pricing. However, there is no specific statutory requirement to prepare and maintain transfer pricing documentation.

Priorities/pricing methods

Division 15 and the double tax agreements entered into by PNG do not prescribe any particular methodology for ascertaining an arm's-length consideration. Given that there is no prescribed legislative preference, the Commissioner General generally would seek to use the most appropriate method, per the OECD Guidelines.

Return disclosures/related-party disclosures

The IRC requires an International Dealings Schedule (IDS) to be filed with each tax return when the international related-party dealings exceeded Papua New Guinean kina (PGK) 100,000 in value (excluding the capital value of any related-party loans) or when loans with related parties have an aggregate capital value exceeding PGK2 million at any time during the year.

Information to be disclosed on the IDS includes:

- International related-party transaction types and quantum
- Countries with which the taxpayer has international related-party transactions
- Percentage of transactions covered by contemporaneous documentation
- Transfer pricing methodologies selected and applied for each international related-party type
- Details of branch operations

Transfer pricing-specific returns

As stated above, the IRC requires an IDS to be filed with each tax return when the international related-party dealings exceed PGK100,000 in value (excluding the capital value of any related-party loans) or when loans with related parties have an aggregate capital value exceeding PGK2 million at any time during the year.

Documentation deadlines

As a general rule, the Commissioner General considers that taxpayers should contemporaneously document the process they have followed and their analysis in determining transfer prices in their efforts to comply with the arm's-length principle. This should include some justification of why those transfer prices are considered to be consistent with the arm's-length principle.

The IRC recommends preparing contemporaneous documentation for all future transactions that are entered into after the release of the Circular by no later than the date of lodgment of the tax return affected by those transactions.

Transfer pricing penalties

The Act does not impose specific penalties in respect to non-arm's-length pricing practices and the general additional tax and penalty provisions will apply to default, evasion or omission relating to transfer pricing.

The penalty, additional tax and offense provisions applicable in the event of default or omission in the completion of the tax return or evasion of taxation contained in the Act stipulate a liability for additional tax or penalty of double the difference between the tax properly payable and the tax that would be payable based on the return as lodged. The Commissioner General has the discretion to remit the additional tax either in whole or in part. If an incorrect return is lodged, the taxpayer may be prosecuted and liable for a fine not less than PGK1,000 and not exceeding PGK50,000. In addition, the court may order the taxpayer to pay to the Commissioner General a sum not exceeding double the amount of income tax or dividend (withholding) tax that would have been avoided if the statement in the return had been accepted as correct. Where additional tax is imposed under prosecution, the amount of that additional tax will reduce the amount of additional tax imposed by the Commissioner General.

Penalty relief

The Commissioner General has the discretion to remit the penalty amount for any reasons considered sufficient.

Statute of limitations on transfer pricing assessments

There generally is no statute of limitations with respect to transfer pricing adjustments.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Given the low level of resources available to the IRC, the likelihood of an annual tax audit is low. If an audit is conducted, the likelihood that transfer pricing will be reviewed as part of the audit is high. If transfer pricing is reviewed as part of the audit, the likelihood that the methodology will be challenged would depend on the documentation available and the appropriateness of the methodology chosen.

The Commissioner General, as a rule, allocates resources for transfer pricing cases according to the perceived risk to revenue from taxpayer noncompliance with the arm's-length principle. The more significant and the broader the scope of the dealings, the more likely it is that a taxpayer will be subject to a transfer pricing review. Businesses with significant levels of international dealings that are constantly returning losses are at the greatest risk of a transfer pricing review.

Taxpayers should be aware that the Commissioner General may pay closer attention to a transaction involving an associated entity resident in a country with lower tax rates than PNG. The perception exists that transactions involving low-tax jurisdictions are often motivated by tax, rather than strictly commercial reasons. This will be the case particularly when the PNG entity has ongoing tax losses as a result of its dealings with a related-party in a lower-tax jurisdiction.

APA opportunity

The Commissioner General supports having an APA program operating in PNG but no current APA program exists.

Impact of new OECD guidelines

How will your jurisdiction from a domestic perspective (i.e. not in a treaty context) apply the amended OECD TP Guidelines 2016 which were updated with the BEPS 8-10 reports on 23 May 2016?

a) The amendments will apply to transactions that were entered into after 23 May 2016 (no official position or case law)

b) The amendments will apply to transactions that were already in effect on 23 May 2016 (no official position or case law)

c) The amendments will apply to transactions that can still come under tax audit even though they were no longer in effect in on 23 May 2016 (no official position or case law)

If possible, please include a short reference explaining how you come to your answer (e.g., your country has an explicit reference in its domestic law to the latest approved version of the OECD guidelines)

Whilst no official position or case law exists in relation to the amended OECD TP Guidelines 2016,the Circular states that the OECD Guidelines should be followed in the absence of guidance in terms of the Circular, the provisions of Division 15 or the double tax agreements entered into by PNG.

Paraguay

Taxing authority and tax law

Taxing authority: Paraguay Tax Authority (*Subsecretaría de Estado de Tributación*)

Tax law: Tax Law No. 125/91, modified by Law No. 2.421/04 and Law No. 5.061/13

Relevant regulations and rulings

Paraguay does not have a specific transfer pricing law; however, in October 2013, the National Congress enacted a new tax law that states a general disposition related to sale price adjustment (Law No. 5061/13). This new disposition is considered as a kind of transfer pricing regulation and allows the Paraguay Tax Authority to amend prices related to exportation operations for corporate income tax purposes only. Decree No. 1.832/2014 establishes the sale price adjustments on soybeans and their derivatives. The Paraguayan Tax Authority could include other products in the future.

OECD Guidelines treatment

Not applicable.

Documentation requirements

Not applicable.

Priorities/pricing methods

Not applicable.

Return disclosures/related-party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

Not applicable.

Paraguay (continued)

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Not applicable.

APA opportunity

Not applicable.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Peru

Taxing authority and tax law

Tax authority: National Superintendency of Tax Administration (*Superintendencia Nacional de Administración Tributaria*, or SUNAT)

Tax law: Peruvian Income Tax Law (PITL)

Relevant regulations and rulings

Article 32 (Item 4) and Article 32-A of the PITL and Article 24 and Chapter XIX (Articles 108 to 119) of the PITL detail transfer pricing regulations in Peru.

Transfer pricing rules have been effective in Peru since 1 January 2001. Over the years, these rules have undergone several changes with amendments to the PITL and Tax Code. Most recently, on 31 December 2016, the Legislative Decree N° 1312 was published amending the Peruvian transfer pricing (TP) reporting requirements by implementing the changes proposed by the OECD under BEPS Action 13 final report, in force since 1st January 2017.

Peruvian Transfer pricing rules apply both to cross-border and domestic transactions between related parties and all transactions with residents in tax haven jurisdictions.

The transfer pricing adjustments are applicable solely when (1) the value agreed upon by the related parties determines a lower taxable income than the one at arm's-length or (2) in any other case, if the tax authority considers that the transfer pricing adjustment affects the tax determined in Peru for another related-party transaction. The regulations consider that a lower amount of income tax is determined when, among other conditions:

- A deferral of income is evidenced.
- Higher tax losses have been determined than those that would have accrued at arm's-length.

OECD Guidelines treatment

The PITL refers to the OECD Guidelines as a source of interpretation for transfer pricing analysis, as long as they do not contradict the PITL.

Documentation requirements

From 2017, Peruvian transfer pricing formal obligations are aligned with the three-tiered proposal from BEPS, subject to the following conditions:

- Taxpayers whose annual revenue for the fiscal year exceeds 2,300 Tax Units (approximately USD2.74 million) should file a Local File informative return
- Taxpayers that are members of a group whose annual revenue for the fiscal year exceeds 20,000 Tax Units (approximately USD23.82 million) will also be required to submit a master file with high level information of the group's business operations and transfer pricing policies.
- A country-by-country reporting (CbCR) is to be filed annually by taxpayers that are members of a multinational enterprise (MNE) group, including information on revenue, taxes paid and business activities for each entity within the MNE group. The Tax Authorities (SUNAT) cannot rely on such information to propose transfer pricing adjustments without a detailed transfer pricing analysis of individual transactions.

The Maste file and the CbCR will be required from 2018 onwards.

Peru (continued)

Priorities/pricing methods

Peruvian law implicitly adopts a "best method" rule, unless the transaction being evaluated is a sale or purchase of commodities or their derivatives. Under Peruvian legislation, the transfer pricing methods identified are CUP, resale price, cost-plus, profit split, residual profit split and TNMM.

For cross-border transactions involving commodities and other products, whose prices are set by reference to commodity prices, the Comparable Uncontrolled Price Method (CUP method) can be the most appropriate transfer pricing method. These rules establish that the arm's-length price for Peruvian income tax purposes shall be determined by reference to the quoted price of (i) the date of shipment of the commodities exported or (ii) the date of disembarkation of the commodities imported.

Additional guidance and clarification is expected to be established in forthcoming tax regulations as to the products that will be covered by these new transfer pricing rules, the commodity prices and quotes to be considered, the international market, the commodity exchanges or similar markets that may be taken as a reference, and finally the adjustments that shall be accepted to reflect the commodity features and the economically relevant characteristics of the particular transaction.

Return disclosures/related-party disclosures

The main details to be disclosed in the transfer pricing information return include the amount of the transactions, the transfer pricing method selected and the related-party with whom the transactions were made, as well as the results of the tested party, the interquartile range of selected comparables and the amount of the transfer pricing adjustments.

Transfer pricing-specific returns

Up to 2016, an annual transfer pricing informative return should be filed by taxpayers in June, if they meet the following conditions:

- The amount of intercompany transactions exceeds PEN200,000.
- The company has been engaged in transactions from, to or through a low-tax jurisdiction for which the market value is less than the computable cost.

From 2017 the reporting requirements will consist of:

- Local file: taxpayers whose annual revenue for the fiscal year exceeds 2,300 Tax Units (approximately USD2.74 million) must file a Local file informative return.
- Masterfile: Taxpayers that are members of a group whose annual revenue for the fiscal year exceeds 20,000 Tax Units (approximately USD23.82 million).
- CbCR must be filed annually by taxpayers that are members of a multinational enterprise (MNE) group, including information on revenue, taxes paid and business activities for each entity within the MNE group.

Documentation deadlines

The deadline for filing the transfer pricing local file informative return is June of the calendar year following the close of the fiscal year of the corresponding transfer pricing return.

Transfer pricing penalties

Noncompliance with the obligation to file a transfer pricing Local file informative return is penalized with a fine of 0.6% of the company's net income for the year preceding that which is under scrutiny. The penalty cannot be less than 10% of a Tax Unit or more than 25 Tax Units.[1] Likewise, noncompliance with the obligation to file the transfer pricing return according to the dates established by SUNAT subjects the taxpayer to a fine of 0.6% of the company's net income for the year preceding that which is under scrutiny. The penalty cannot be less than 10% of a Tax Unit or more than 25 Tax Units.

The adjustments to annual taxable income resulting from the tax authority's application of the transfer pricing provisions will be subject to additional penalties of up to 50% of the resulting tax deficiency (income misstatement penalties).

Penalty relief

The penalty reductions that a taxpayer can be subject to for not complying with the obligation to have a transfer pricing technical study or present the transfer pricing information return are:

- A 100% penalty reduction if the taxpayer files the transfer pricing informative return after the due date but before it is detected and compelled to do so by SUNAT
- An 80% (with a transfer pricing study) or 90% (with a transfer pricing return) penalty reduction if the taxpayer rectifies the infraction and pays the corresponding fine within the time frame established by SUNAT
- A 50% (with a transfer pricing study) or 80% (with a transfer pricing return) penalty reduction if the taxpayer rectifies the infraction but does not pay the corresponding fine within the time frame established by SUNAT

Statute of limitations on transfer pricing assessments

According to Articles 87-7 and 43 of the Peruvian Tax Code, the statute of limitations for income tax assessments is four years after 1 January of the year that follows the year the annual income tax return is due (generally, 31 March) and six years if returns were never filed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit is characterized as medium, as is the likelihood of transfer pricing issues being reviewed as part of a general audit.

The Peruvian tax administration has already initiated transfer pricing audits. Also, it has issued letters requesting that taxpayers amend their tax returns based on the results of the transfer pricing studies previously presented. The likelihood that the transfer pricing methodology will be challenged during a transfer pricing review is characterized as high.

It is expected that SUNAT will significantly increase its transfer pricing audits during the coming years.

[1] One Tax Unit is the equivalent of approximately USD1,320.

Peru (continued)

APA opportunity

Since 2013, unilateral and multilateral APAs are available for all transactions (cross-border and domestic transactions between related parties and with tax haven residents). Multilateral APAs will be available only for countries that have entered into double tax avoidance treaties with the Peruvian fiscal administration. Draft regulations detailing the procedures to be followed were recently issued.

Impact of new OECD BEPS Action 8–10 guidelines

The OECD Transfer Pricing Guidelines are a source of interpretation for the PITL. No specific reference to the date of the OECD Transfer Pricing Guidelines is included in the legislation. However, no official position has been taken on the date in which these amended OECD Guidelines will become effective for local purposes, and it will be important to monitor further developments in this area.

Philippines

Taxing authority and tax law

Taxing authority: Bureau of Internal Revenue (BIR)

Tax law: Section 50, National Internal Revenue Code of 1997, as amended (Tax Code)

Relevant regulations and rulings

The Commissioner of Internal Revenue has the power under § 50 of the Tax Code to allocate income and expenses between or among related parties and taxpayers or make transfer pricing adjustments to reflect the true taxable income of taxpayers.

Revenue Memorandum Circular (RMC) No. 26-08 formally adopted the OECD Guidelines as interim transfer pricing guidelines in the Philippines. The RMC specifically states that the BIR, as a matter of policy, subscribes to the OECD Guidelines, and until the draft regulations are issued, all concerns of transfer pricing shall be resolved in accordance with them.

On 23 January 2013, the BIR issued transfer pricing regulations. These are found in Revenue Regulation No. 2-2013, which implements § 50 of the Tax Code. The transfer pricing regulations apply to cross-border transactions between associated enterprises and domestic transactions between associated enterprises.

Transactions entered into before the transfer pricing regulations became effective shall be governed by the laws and other administrative issuances prevailing at the time the controlled transactions were entered into.

The transfer pricing regulations took effect on February 9, 2013.

In July 2009, the BIR issued Revenue Memorandum Order (RMO) No. 23-2009, mandating that the National Investigation Division (NID) of the BIR audit related companies and conglomerates, including their officers and related individual taxpayers, to make certain that such taxpayers are clearly reflecting income and expenses that are attributable to controlled transactions. The RMO further states that various schemes being employed by conglomerates and groups of companies to reduce the amount of taxes shall be identified, such as the use of tax-exempt entities or those with special tax privileges, intercompany loans and advances, cost sharing, and the supply of goods and services. During an audit, particular attention shall be given to transfer pricing issues, which will be factored into the audit findings.

RMO No. 36-2010 was issued in March 2010 and prescribes the rules and procedures governing the conduct of special investigation and enforcement activities of related companies, conglomerates, their affiliates and subsidiaries for taxable year 2009. This RMO amended RMO No. 23-2009 and now directs the Large Taxpayers Service and the Enforcement Service to identify conglomerates consisting of related companies (parent company, affiliates and subsidiaries) that will be subject to an audit under the program. The investigation covers all internal revenue taxes for taxable year 2009 and has to be completed no later than six months from the issuance of the letter of authority.

In March 2012, the BIR issued RMO No. 5-2012, prescribing the guidelines and policies in the conduct of the Performance Benchmarking Method. Under this RMO, benchmarking shall be done separately for individual and corporate taxpayers. The BIR will categorize taxpayers as high-risk (more than 30% below the benchmark), medium-risk (16% to 30% below the benchmark) and low-risk (15% or less below the benchmark). Taxpayers classified as high-risk shall be the top priority for enforcement actions, such as an audit.

OECD Guidelines treatment

The transfer pricing regulations are largely based on the OECD Guidelines and refer to them for further guidance and examples.

Documentation requirements

The transfer pricing regulations require contemporaneous documentation to be maintained and retained. It is contemporaneous if it exists or is brought into existence at the time the associated enterprises develop or implement any arrangement that might raise transfer pricing issues. These arrangements should be reviewed when preparing tax returns.

The documentation should be retained and preserved within the period specifically provided in the Tax Code as the retention period. It will, however, be in the best interest of the taxpayer to maintain documentation for purposes of a MAP and possible transfer pricing examination.

The details of the documentation shall include, but not be limited to, the following:

- Organizational structure
- Nature of the business or industry and market conditions
- Controlled transactions
- Assumptions, strategies, policies
- Cost contribution arrangements (CCAs)
- Comparability, functional and risk analysis
- Selection of the transfer pricing method
- Application of the transfer pricing method
- Background documents
- Index to documents

Priorities/pricing methods

The transfer pricing regulations adopt the methods to determine the arm's-length price under the OECD Guidelines (i.e., CUP, resale price, cost-plus, profit split and TNMM).

There is no specific preference for any one method. In determining the arm's-length result, the most appropriate method for a particular case shall be used.

Return disclosures/related-party disclosures

Related-party disclosures are required only in the notes to the audited financial statements, which must be filed along with the annual income tax return.

Transfer pricing-specific returns

There is no requirement for filing transfer pricing-specific returns.

Documentation deadlines

The transfer pricing regulations require contemporaneous documentation. However, the documentation is not required to be submitted when the tax returns are filed. Taxpayers should retain such documentation and submit it to the authorities when required to do so.

Transfer pricing penalties

The transfer pricing regulations adopt the provisions of the Tax Code and other applicable laws in the imposition of penalties on any person who fails to comply with or violates the provisions and requirements of the regulations. In case of a deficiency assessment due to a transfer pricing adjustment, the general penalties apply: a 25% surcharge (50% in fraud cases) and 20% interest per annum.

Penalty relief

There is no penalty relief regime in the transfer pricing regulations.

Statute of limitations on transfer pricing assessments

The general statute of limitations applies, which is 3 years after the last day prescribed by law for filing the return, except in cases of fraud with the intent to evade tax, in which case the statute of limitations is 10 years from the discovery of fraud.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, is high. The likelihood that transfer pricing will be reviewed as part of an audit is high. The likelihood is also high that if transfer pricing is reviewed, then the transfer pricing methodology will be challenged.

APA opportunity

The transfer pricing regulations give taxpayers the option to avail an APA for their controlled transactions and MAP relief as prescribed under the Philippines' bilateral tax treaties. The BIR will issue separate guidelines for the application of an APA and for MAP relief.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position from the BIR whether or not to adopt this. However, it is important to monitor further developments in this area.

Poland

Taxing authority and tax law

Taxing authority:

- Tax Inspection Department in the Ministry of Finance, which coordinates and supervises the work of the local Tax Inspection Offices and Bureaus
- Tax System Department in the Ministry of Finance, which is a newly created department dealing with tax avoidance, APAs and supervision of the uniform application of the tax law

Tax law:

- Corporate Income Tax Act (CIT Act)
- Personal Income Tax Act (PIT Act)
- Tax Ordinance Act
- Decrees

Relevant regulations and rulings

Tax laws and decrees that govern transfer pricing in Poland are:

- CIT Act, dated 15 February 1992: Articles 9a, 11 and 19 §4 (Journal of Laws 2014, Item 851, as amended)
- PIT Act, dated 26 July 1991: Articles 25, 25a and 30d (Journal of Laws 2012, Item 361, as amended)
- Tax Ordinance Act, dated 29 August 1997: Articles 20a–20r (Journal of Laws 2015, Item 613, as amended)
- Ministry of Finance Decree of 9 April 2013, regarding the countries and territories applying harmful tax competition rules for the purpose of corporate income tax (Journal of Laws 2015, No. 600)
- Ministry of Finance Decree of 9 April 2013, regarding the countries and territories applying harmful tax competition rules for the purpose of personal income tax (Journal of Laws 2015, No. 599)
- Ministry of Finance Decree of 10 September 2009, regarding the method and procedure for assessing corporate taxpayers' income by estimating the prices in transactions conducted by these taxpayers, and regarding the method and procedure for eliminating double taxation of taxpayers in case of related parties' income adjustment (Journal of Laws 2014, Item 1186, as amended)
- Ministry of Finance Decree of 10 September 2009, regarding the method and procedure for assessing personal taxpayers' income by estimating the prices in transactions conducted by these taxpayers, and regarding the method and procedure for eliminating double taxation of taxpayers in case of related parties' income adjustment (Journal of Laws 2014, Item 1176, as amended) — hereinafter referred to as the TP Decree

Article 11 of the CIT Act and Article 25 of the PIT Act introduce the arm's-length principle, providing a definition of "affiliation" and the criteria for determining the size of direct and indirect shares held in another entity. Documentation requirements can be found in Article 9a of the CIT Act and Article 25a of the PIT Act. Transfer pricing penalties are defined in Article 19, Clause 4 of the CIT Act and Article 30d of the PIT Act.

Article 9a of the CIT Act and Article 25a of the PIT Act provide detailed guidance regarding transactions that are subject to documentation requirements, including the value limits and categories of such transactions.

According to Article 9a of the CIT Act and Article 25a of the PIT Act, the documentation requirements also encompass transactions in which payment is made directly or indirectly to an entity considered to be in a tax haven. The list of these territories and countries is presented in the Ministry of Finance Decree of 9 April 2013, regarding the countries and territories applying harmful tax competition rules. The decree was issued separately for personal and corporate taxation purposes.

As of 1 January 2007, documentation requirements also apply to Poland-based permanent establishments of foreign companies.

Since January 2015, documentation requirements have also applied to partnerships, joint-venture agreements and agreements establishing partnerships.

New transfer pricing regulations, introducing BEPS Action 13 guidelines to Polish legislation, come into force in January 2017 (new requirements regarding country-by-country reporting (CbCR) are binding as of January 2016). The respective regulations result in increased transfer pricing requirements (as mentioned below).

The pricing methods recognized by the tax authorities are described in the Ministry of Finance Decrees of 10 September 2009. These decrees more precisely describe the transfer pricing methods and introduce the corresponding adjustment procedure (based on the OECD Guidelines), the Arbitration Convention and the Code of Conduct for the Arbitration Convention. Provisions of the decrees also apply to Polish permanent establishments of foreign companies and Polish taxpayers' foreign permanent establishments.

The amended decrees implemented in July 2013:

- Give traditional methods priority for the purpose of assessing income in related-party transactions (previously, only the CUP method was indicated as the first-choice method)
- Provide specific criteria for the selection of the transfer pricing method
- Underline the significance of a comparability analysis
- Introduce a definition of low-value-added services and set out guidelines for tax authorities in respect to examining intragroup services of that type
- Expressly indicate that the cost base used for estimating the fee for low-value-added services should exclude shareholder expenses
- Introduce a definition of a business restructuring (transfer of commercially significant functions, assets or risks between related entities)

The APA regulations are specified in Articles 20a–20r of the Tax Ordinance Act. The introduction of APAs has brought with it special reporting requirements. According to the Ministry of Finance Decree of 31 May 2006, taxpayers that have agreed to an APA must submit, along with their annual CIT return, a progress report on the implementation of the method stipulated in the APA decision. APAs may also be concluded by permanent establishments of foreign companies in Poland, as well as permanent establishments of Polish taxpayers based abroad.

Definition of "related parties"

Polish regulations recognize related entities in the following situations:

- The domestic entity participates directly or indirectly in managing or controlling the foreign entity or has a share in its capital.
- The foreign entity participates directly or indirectly in managing or controlling a domestic entity or has a share in its capital.
- The same legal and natural persons participate directly or indirectly at the same time in managing or controlling a domestic entity and foreign entity or have shares of their capital.
- The domestic entity participates directly or indirectly in managing or controlling another domestic entity or has a share of its capital.
- The same legal and natural persons participate at the same time directly or indirectly in managing or controlling domestic entities or have shares of their capital.

Capital relations exist if one of the entities or contracting parties holds at least a 5% share of the other entity's capital, directly or indirectly. Domestic entities are also considered related for tax purposes by virtue of family, property or employment relations between them or between their management, supervision or control personnel, or if the same person carries out management, supervision or control functions in both of these entities.

Poland (continued)

New transfer pricing regulations (binding from January 2017) modify the definition of "related parties," which includes an increased capital relations threshold from 5% to 25%.

If the parties to a transaction, due to their relationship, agree to or impose terms and conditions that differ from those that would be agreed to by unrelated parties, resulting in the domestic entity not reporting income from the transaction or reporting lower income than would be expected if the relationship did not exist, the taxing authorities may assess additional income and determine the tax due on such income for the domestic entity.

The above rules also apply to the allocation of taxable profit to the permanent establishment of a foreign entity in Poland and to Polish taxpayers carrying out transactions with their permanent establishments abroad.

Domestic entities transacting with foreign related parties are allowed to adjust their income if the foreign tax authorities assert that the transactional prices do not meet the arm's-length principle. Consequently, additional income of the foreign entity is assessed, and the tax due on such income is determined (the so-called corresponding adjustment). However, the Polish tax authorities must justify and accept prerequisites for making the adjustment.

Adjustments to the domestic entities' income will be allowed on the basis of the agreement for the avoidance of double taxation between Poland and the country (i.e., country of the domestic entity's related-party), or on the basis of the convention of 23 July 1990 for the elimination of double taxation in connection with the adjustment of profits of related entities. An application regarding such adjustments should be filed within three years of receiving the decision about assessing the additional income of the taxpayer or the contracting related-party.

In addition, regulations relating to income adjustment also apply to permanent establishments.

Polish regulations do not allow for analogous elimination of double taxation in transactions between domestic related entities.

OECD Guidelines treatment

The Polish transfer pricing regulations do not refer to the OECD Guidelines directly. Nevertheless, the tax authorities sometimes refer to the OECD Guidelines when applying transfer pricing principles (e.g., during APA negotiations). Also, reference to the OECD Guidelines is made with respect to tax havens. According to Article 9a, Clause 6 of the CIT Act (and Article 25a, Clause 6 of the PIT Act), the list of countries recognized as tax havens is issued in regard to settlements made by the OECD. At the same time, the transfer pricing methods presented in the Polish rules are based on the authorized OECD approach.

The amended decrees also introduce specific rules regarding business restructuring and guidelines for tax authorities during tax inspections. These rules are based on the OECD Guidelines' Chapter IX — which discusses business restructurings — and include a definition of a business restructuring, which covers not only firmwide supply chain changes but also less-extensive restructurings involving shifts of risks among group companies (the regulations are designed to implement the OECD Guidelines in the local legislation and cover not only foreign but also local restructuring projects).

Documentation requirements

Taxpayers carrying out transactions with related parties and permanent establishments of foreign companies functioning in Poland, as defined in the Polish CIT Act and PIT Act, are required to prepare transfer pricing documentation. Requirements for such transactions apply where the total transaction amount in a tax year exceeds the following limits:

- EUR100,000 if the transaction value does not exceed 20% of the share capital
- EUR30,000 if the transaction refers to services or intangibles
- EUR50,000 for other types of transactions between related entities

Poland (continued)

Taxpayers carrying out transactions in which payments are made directly or indirectly to an entity in a territory or country recognized as a tax haven are obligated to prepare tax documentation for such transactions when the total transaction amount in a tax year exceeds EUR20,000.

New transfer pricing regulations (binding from January 2017) provide an exemption from the documentation requirement for entities with revenues or costs of less than EUR2 million. Other entities will be obliged to prepare transfer pricing documentation covering transactions, following the below scheme:

- For entities with revenues of EUR2 million, but not more than the equivalent of EUR20 million: significant transactions or events are regarded as transactions and events of value equivalent to EUR50,000 increased by EUR5,000 for each EUR1 million of income more than EUR2 million.
- For entities with revenues of EUR20 million, but not more than the equivalent of EUR100 million: significant transactions or events are regarded as transactions and events of value equivalent to EUR140,000 plus EUR45,000 for each EUR10 million of revenue in excess of EUR20 million.
- For entities with revenues of EUR100 million: significant transactions or events are regarded as transactions and events of value equivalent to EUR500,000.

As there is no specific form required for transfer pricing documentation, the CIT Act and PIT Act regulations instead determine the extent of the documentation. The statutory transfer pricing documentation should cover at least the following elements:

- Functions performed by the parties to the transaction (with consideration of assets employed and risks borne)
- Expected transactional costs and the method and payment due dates
- Method and manner of calculating profits and the transaction value
- Business strategy, if it influenced the transaction value
- Other factors influencing the transaction value
- Expected benefits from intangible performances or services — this element applies only to the purchase of intangibles or services

These elements are mandatory, so if the documentation does not include any of these requirements, the tax authorities may disregard it.

In addition, taxpayers are obliged to prepare statutory Polish transfer pricing documentation and provide it to the Polish tax authorities at their request.

Moreover, according to the amended decrees, tax authorities should first examine low-value-adding services by reference to the documents the taxpayer has provided. The taxpayer may additionally prepare the documentation, which should include, in particular:

- A description of the type of supply, together with the reason justifying the classification of the service as a low-value-adding service
- Confirmation that a given service has been supplied and information showing that its acquisition was reasonable, including a description of the service acquirer's benefits
- A description of and a justification for the supply
- A list providing the description and analysis of the related parties' expenses arising from the service
- A list of shareholder expenses
- A description of the cost-sharing key
- A list of services available on demand
- A description of and a justification for the fee calculation formula
- Documentation of a given service, which can be submitted to the tax authorities

New transfer pricing regulations (binding from January 2017, and from January 2016 for CbCR) introduce fundamental changes to the scope of the mandatory transfer pricing documentation reflecting the guidelines of BEPS Action 13, as outlined below:

- Local file and master file, requiring the presentation in the transfer pricing documentation:
  - Group transfer pricing policy, information about local transactions, but with the justification for the adopted methods of calculating remuneration and confirmation of the arm's-length character of prices, including benchmarking analyses, detailed financial data showing the impact of the transactions on the profits and losses and income of the company, organizational and reporting structures, and other information, but:
    - Benchmarking analyses mandatory for entities with revenues or costs more than EUR10 million
    - Obligation to prepare master file only for entities with revenues or costs more than EUR20 million
- CbCR:
  - For capital groups with consolidated revenues or costs more than EUR750 million, the parent company will have to prepare the CbC report

Priorities/pricing methods

Generally, the transfer pricing methods accepted by the tax authorities are based on the OECD Guidelines. These methods are CUP, resale price, cost-plus, profit split and TNMM. The most appropriate method for assessing income should be chosen.

The amended decrees give traditional methods priority for the purpose of assessing income in related-party transactions (previously, only the CUP method was indicated as the first-choice method). When the transfer price is determined by the tax authorities, the application of traditional methods is verified in the first instance.

Additionally, the amended decrees provide specific criteria for selecting the transfer pricing method. During the selection process, tax authorities will consider:

- The specifics of the transaction, including the parties' contribution to the transaction
- Access to reliable data about similar transactions and companies in the market
- Comparability of the respective transactions and companies

If a taxpayer has determined the arm's-length value of a transaction by applying one of the three accepted traditional methods (i.e., CUP, resale price and profit split) and there is no doubt about the objectivity in choosing the method, the method is also binding on the tax authorities.

Return disclosures/related-party disclosures

Information about related-party transactions is one of the elements of the annual income tax return. The taxpayer is required to indicate in the return whether it was required to prepare transfer pricing documentation.

Taxpayers transacting with related entities are subject to the following reporting and information requirements:

- Disclosing in annual income tax returns whether the taxpayer was required to prepare statutory transfer pricing documentation of transactions with related entities
- Reporting to the Polish tax authorities agreements with nonresidents; such information should be submitted within three months of the end of a tax year (by filing the ORD-U form), and this reporting requirement applies to agreements in which:
  - A one-off amount of receivables or liabilities resulting from the agreement with a nonresident exceeds EUR5,000 and the nonresident owns an enterprise, branch or representative office in Poland
  - The total amount of liabilities or receivables resulting from all agreements concluded with the same nonresident in the tax year exceeds EUR300,000

  - One party to the agreement participates directly or indirectly in the management or control of the other party to the agreement or has a share in its capital entitling it to at least 5% of all voting rights
  - Another entity, not being party to an agreement, at the same time participates directly or indirectly in the management or control of each party to the agreement or has a share in their capital entitling it to at least 5% of all voting rights in each of the parties to the agreement
- Preparing information about payments to nonresidents from which withholding tax is collected and submitting it to the tax office responsible for taxation of foreign persons and to the beneficiary of the payment by the end of the third month of the year following the tax year in which withholding tax was paid (IFT-2/IFT-2 form); moreover, the taxpayer is required to (at the related-party's request) prepare and send information to the taxpayer and competent tax office within 14 days of date when the request is submitted

Those taxpayers that have obtained an APA decision from the Polish Minister of Finance must submit, along with their annual CIT return, a progress report on the implementation of the method stipulated in the APA decision. The format of this report is detailed in the Ministry of Finance Decree of 31 May 2006, which contains the model report on the implementation of a selected transfer pricing method for corporate income tax purposes (Journal of Laws No. 99, Item 687).

Transfer pricing-specific returns

Polish tax law does not require any transfer pricing-specific returns.

New transfer pricing regulations (binding from January 2017) introduce an additional obligation to attach the simplified report on intragroup transactions to the CIT return for entities with revenues or cost of more than EUR10 million.

In addition, Polish taxpayers will be obliged to file, together with the CIT return, a statement confirming the preparation of local file documentation in line with the amended requirement. As indicated in the justification for the law, tax authorities expect that this document will be signed by a member of the management board.

Documentation deadlines

There is no deadline for preparing the transfer pricing documentation; however, taxpayers are required to submit the documentation within seven days of the tax authorities' request.

New transfer pricing regulations (binding from January 2017) introduce a deadline for preparation of the documen¬tation no later than the date for filing the annual CIT return. Fulfillment of the requirement should be confirmed by the statement attached to the CIT return.

Transfer pricing penalties

If the taxpayer does not submit transfer pricing documentation at the request of the Polish tax authorities, a 50% tax rate penalty is applied for income assessed by these authorities, instead of the standard tax rates that generally apply. Moreover, the taxpayer will be required to pay interest on tax in arrears and fiscal penalties resulting from personal responsibility.

Penalty relief

If the taxpayer provides the required transfer pricing documentation on time as specified by the tax authorities (i.e., within seven days of the date of a request), the penalty rate for income assessed can be reduced to the normal tax rate (i.e., 19%).

Poland (continued)

Statute of limitations on transfer pricing assessments

There are no special time limit provisions applicable to intercompany transactions. The general statute of limitations for tax assessment applies, in accordance with the Tax Ordinance Act. Under Article 70, § 1 of the Tax Ordinance Act, tax liability shall expire after five years from the end of the calendar year in which the tax fell due.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In autumn 2015, a new right-wing government came into power; the administration is focused on increasing tax revenues. Among other goals, it aims to reduce profit-shifting activities by multinationals what is visible in the increase of the tax audits in the transfer pricing area.

Thus, the likelihood of an annual transfer pricing audit, in general, has been high starting from the beginning of 2016. The deepest scrutiny is put on the biggest taxpayers with given financial position, i.e., incurring losses, with significant revenues but low profitability, claiming for and overpaid tax return, with very low profitability, with fluctuating revenues, EBIT. Polish tax authorities last year acquired access to the Orbis database (purchased more licenses). This information will allow them to conduct more detailed screenings of entities before starting tax audits, as well as more precise selection of entities for audits.

During transfer pricing audits, tax authorities are especially interested in: substantial intercompany charges for intangibles, services or financing; changes in the business model; sudden reduction in profitability (e.g., as a result of business restructurings); and year-end adjustments (especially if they are one-off profit transfers). In practice, there is no focus on particular industries.

The likelihood is high that the transfer pricing methodology will be challenged if transfer pricing is reviewed as part of the audit. The tax authorities usually engage in a dedicated transfer pricing audit if they notice irregularities in intercompany settlements or believe that the financial result is biased by transfer pricing. In such cases, they often challenge the transfer pricing methodology applied.

Although the acceptance of the OECD Guidelines and international practices has increased, the local approach tends to prevail during audits. Local benchmarks are preferred over Pan-European ones (new transfer pricing rules create an obligation for taxpayers whose revenues/costs exceed EUR10 million to prepare local benchmarks). The pricing information from cross-controls in the industry is used for benchmarking. Moreover, the tax authorities have increased cooperation in the exchange of information with tax authorities in other countries.

The compliance regime is still rigorous in Poland. Court rulings focus mainly on legal rather than economic issues. The most frequently audited types of transactions are: limited risk structures, such as limited risk distributors or contract manufacturers; intangible services (including cost-sharing arrangements); financial transactions; and, recently, business restructurings.

In addition, a Tax System Department was created in the Ministry of Finance with the aim of acting as a center of competence in the areas of tax avoidance, APAs, uniform application of the tax law in written tax interpretations and application of the new law circumvention clause.

On 15 July 2016, new regulations were introduced to the Tax Ordinance Act aiming at limiting aggressive tax planning (the so-called law circumvention clause). These regulations allow authorities to disregard the actions taken by a taxpayer if its main aim was to achieve tax gains. Based on this clause, the Minister of Finance will be able to disregard the existence of certain corporate structures if their existence is artificial and mainly aims to bring tax benefits. New rules are applicable for the tax gains that exceed PLN100,000 in the settlement period and after the Minister of Finance had utilized a certain process before applying the new clause.

In the first half of 2016, the tax authorities assessed additional income that resulted in PLN9.6 billion of income tax gain, i.e., 36.6% more than in the first half of 2015. This success of the tax administration was largely due to the new system of remuneration for tax officers, better cooperation with the prosecutors' offices and access to international databases regarding market prices.

APA opportunity

The APA regulations came into force on 1 January 2006. The APA procedures are described in Articles 20a–20r of the Tax Ordinance Act.

An APA concluded for a particular transaction is binding on the tax authorities with regard to the method selected by the taxpayer. APAs in Poland may apply to transactions that have not yet been executed or transactions that are in progress at the time the taxpayer submits an application for an APA. Under Polish rules, three types of APAs are available:

- Unilateral: This type of APA is defined in the Tax Ordinance Act as an agreement about the method for setting transfer prices between:
    - Two domestic entities — those without foreign capital links
    - A domestic entity and its related foreign party
    - A domestic entity related to a foreign entity and another domestic entity related to the same foreign entity
- Bilateral: This is an agreement concerning cross-border transactions that can be given by the Polish Ministry of Finance upon the request of a domestic entity, but only after consultations and upon obtaining consent issued by the tax authorities of the related foreign entity.
- Multilateral: If the agreement concerns a transaction concluded by a domestic entity with foreign entities from more than one country, the consent of all foreign entities' tax authorities is required to conclude such an agreement.

There are no transaction value limits to be covered by the APAs. To submit an application for an APA, the taxpayer must pay a fee, usually 1% of the transaction value. However, the Tax Ordinance Act sets the following fee limits:

- Unilateral APA: PLN5,000 to PLN50,000
- Unilateral APA concerning a foreign entity: PLN20,000 to PLN100,000
- Bilateral or multilateral APA: PLN50,000 to PLN200,000

The mandatory elements of an APA application are:

- The suggested method for determining prices and an indication of the pricing method recognized by the tax authorities
- A description of the manner of application of the suggested method, with an indication of the principles for price calculation, forecasts and analyses upon which the calculation is based
- A description of the circumstances that may affect the prices
- The documents that may determine the transaction price (agreements, arrangements and other documents indicating the intentions of the parties to the transaction)
- The suggested length of the APA arrangement
- A list of entities with which the transaction will be concluded, including their agreement to submit to the taxing authorities all documents and provide necessary explanations with regard to the relevant transaction; the application must be submitted in Polish

The Tax Ordinance Act precisely defines the terms under which the APA procedure is to be completed:

- The unilateral APA must be issued without unnecessary delay within six months of the start of the APA application procedure.
- The bilateral APA must be issued without unnecessary delay within 12 months of the start of the APA application procedure.
- The multilateral APA must be issued without unnecessary delay within 18 months of the start of the APA application procedure.

The APA is issued by the Ministry of Finance in the form of an administrative decision, and the general administrative procedure resulting from the Tax Ordinance Act applies to the APA. In consequence, the above time limits for the APA procedure may be extended, if necessary.

Poland (continued)

The period for which the APA may be concluded is no longer than five years. The APA may be extended for another five years if the criteria applied in concluding the APA have not changed, or the entity applies for an extension of the APA no later than six months before it expires. The decision is valid from the date of its delivery to all parties (including Polish and foreign, if applicable, tax authorities).

Starting from January 2016, APA regulations were amended. The changes covered mainly:

- Possibility to apply for APA for a few transactions covered by one application (fee is proportionally increased depending on the number of transactions)
- APA covering CCAs
- Elimination of a strict definition of unilateral APA
- In case of the withdrawal of an APA application (based on remarks and obstacles presented by the Ministry of Finance), confirmation of discontinuance of the proceedings is to be provided to tax authorities
- Upon the taxpayer's request, the APA decision may be binding from the date of the application (rollback) instead of the date of delivery
- Renewal of an APA instead of extension with modified requirements for the respective application

Impact of new OECD BEPS Action 8–10 guidelines

The OECD Guidelines are not a binding law in Poland and are used as guidance only. There is no official position stating which transactions they should be applied to, and this is likely to be determined based on future practice.

Portugal

Taxing authority and tax law

Taxing authority: Portuguese Tax and Customs Authority (*Autoridade Tributária e Aduaneira*)

Tax law: Corporate Income Tax Code

Relevant regulations and rulings

Article 63 of the Corporate Income Tax Code articulates the arm's-length principle and provides guidance about transfer pricing in Portugal. An updated write-up of Article 63 of the Corporate Income Tax Code came into force on 16 January 2015 following the publication of Law No. 2/2014.

Ministerial Order 1446-C/2001 of 21 December 2001 (Transfer Pricing Ministerial Order), issued by the Minister of Finance, implements Article 63 of the Corporate Income Tax Code regarding the application of the transfer pricing methods, CSAs, intragroup services agreements, documentation requirements and the corresponding adjustments procedure.

A detailed APA procedure, setting out the APA submission requirements, process and fees, was implemented by Ministerial Order 620-A/2008 on 16 July 2015 (which came into force on 17 July) and is currently foreseen in Article 138 of the Corporate Income Tax Code.

Furthermore, a general anti-avoidance provision applies to all simulated transactions, and the rules embodied in the thin capitalization, CFCs and anti-tax-haven regimes may be used in the general context of transfer pricing.

The new Article 121-A added to the Corporate Income Tax Code introduced an obligation for the multinational groups to submit CbC reports.

OECD Guidelines treatment

The Portuguese regulations and tax practice follow the OECD Guidelines.

Business restructurings are specifically addressed in the Portuguese transfer pricing regulations as activities that must rely on the arm's-length principle; however, the approaches stated in Chapter IX of the OECD Guidelines are likely to affect the transfer pricing audit activity.

The master file concept established in the European Union Code of Conduct on transfer pricing documentation for associated enterprises is not yet adopted in the Portuguese legislation; however, the transfer pricing documentation prepared locally addresses all of the relevant topics contained therein and is more rigorous in terms of the content.

Action 13 of the OECD BEPS Action Plan has been introduced in Portugal in the part devoted to CbC reports.

Documentation requirements

The Portuguese transfer pricing rules require taxpayers with turnover and other income in excess of EUR3 million in the prior year to prepare contemporaneous documentation in the Portuguese language, which should provide evidence of market parity regarding the terms and conditions agreed to, accepted and practiced in the operations made with related parties, as well as evidence of selecting and using the best method.

The regulations divide the documentation between relevant, supporting documentation and that which is applicable to CCAs and intragroup services. The transfer pricing documentation shall include:

- Related-party status, according to the definition presented in Article 63 of the Corporate Income Tax Code (a company subject to a substantially favorable tax regime or included in the Portuguese offshore blacklist is also considered to be a related-party, regardless of any other related-party criteria)

Portugal (continued)

- Characterization of a taxpayer's activity and that of the related parties with which it engages in commercial or financial transactions
- Identification of all intercompany transactions (volumes, terms and conditions) for the year under analysis, as well as for the previous two years, or for the period in which they occurred (if less)
- A functional analysis of each relevant transaction
- Technical studies focusing on essential areas of business
- A description of the method used and evidence of how the prices are calculated
- Information about Portuguese comparables (geographical comparability requirement)
- The legal entity's organizational structure
- All intercompany contractual agreements and unrelated-party agreements

Priorities/pricing methods

The transfer pricing methods described in the Portuguese legislation are based on the OECD Guidelines and therefore do not introduce significant changes to the widely accepted methods recognized among transfer pricing administrators and practitioners.

In fact, Portuguese rules also state (in paragraphs 1 and 2 of Article 4 of the Transfer Pricing Ministerial Order) that the most appropriate method should be applied to a controlled transaction or to a series of transactions to determine whether those transactions comply with the arm's-length principle.

This principle reflects a "best method" rule. This implies that a taxpayer is expected to use the method or methods most suitable to each case, explaining not only the reason a certain method is considered as the most appropriate to test whether the controlled transactions comply with the transfer pricing rules, but also why other methods are rejected.

Hence, the Portuguese tax authority recognizes both the traditional and profit-based methods in the OECD Guidelines and, theoretically, any method is acceptable provided that it can be justified and that the traditional transactional or profit-based methods are not applicable.

Return disclosures/related-party disclosures

The main disclosure requirements at this level are contained in annexes A, B, C and H (transfer pricing annexes) of the Annual Tax and Accounting Information Return (*Informação Empresarial Simplificada*, hereinafter called IES), which include (on a yearly basis) the following information:

- Identity of the related entities
- Amount of transactions conducted with each of the related parties
- Confirmation that proper contemporaneous (annual) transfer pricing documentation is prepared on a timely basis and is currently retained

The deadline for the submission of such return corresponds to the 15th day of the 7th month after the corresponding tax year-end. Taxpayers have to state in good faith in this annual return that they have complied with the contemporaneous documentation requirements and their preparation. Misleading information may result in tax penalties and criminal proceedings.

Multinational groups engaged in activities in the Portuguese territory with aggregated turnover exceeding EUR750 million in the reporting period are obliged to submit the CbC report. The CbC report should be filled in on an aggregated basis (per jurisdiction) and should contain information about allocation of revenues (separating those received in intragroup transactions from those received in third-party transactions), profits, employees, earnings before tax, amounts of taxes due and paid, as well as some other information. It should be submitted to the tax authorities until the end of the 12th month of the year following the reporting year.

Portugal (continued)

Any entity, resident or with a permanent establishment in Portugal, which is part of a group in which one of the entities is subject to the presentation of a CbC report in line with the one foreseen in Article 121-A.1 or 121-A.2 of the CITC, shall communicate electronically, until the end of the fiscal year to which the reporting data corresponds, the identification and the country or tax jurisdiction of the group's reporting entity.

Transfer pricing-specific returns

There are no specific transfer pricing returns. As mentioned above, transfer pricing information is disclosed in the IES in its transfer pricing annexes.

Documentation deadlines

In Portugal, the documentation must be prepared by the 15th day of the 7th month after the corresponding tax year-end. However, the tax authority may, and does, ask for documentation of transactions at any time after they take place.

Transfer pricing penalties

Failure to comply with documentation requirements may result in a possible shift of the burden of proof and the application of secret comparables.

Transfer pricing rules were extended by the publication of specific legislation on penalties for noncompliance with the documentation obligations in 2012. The General Regime on Tax Infractions (RGIT) addresses the following penalties:

- The taxpayer stated in the IES that transfer pricing documentation is prepared and, despite being notified by the tax authority to submit, it was late in its delivery. The penalty related to late delivery can reach EUR20,000 per year and per company.
- The taxpayer does not state in the IES that transfer pricing documentation was prepared but was notified by the tax authority to submit it. The penalty for noncompliance related to an omission or lack of evidence in the IES can reach EUR45,000 per year and per company.
- The taxpayer stated in the IES that transfer pricing documentation is prepared and it was notified by the tax authority to submit it, but the documentation was not prepared. The penalty for noncompliance related to improper fulfillment can reach EUR75,000 per year and per company.
- The taxpayer stated in the IES that transfer pricing documentation is prepared but refused to submit it to the tax authority (when duly requested). The penalty for noncompliance related to the refusal to submit transfer pricing documentation can reach EUR150,000 per year and per company.

Transfer pricing adjustments are subject to the general tax penalty regime. Penalties for noncompliance with mandatory contemporaneous documentation rules may reach EUR150,000 per year and per company. A late-payment interest penalty is also applicable for transfer pricing adjustments at the rate of 4% per year.

In addition, special penalties are foreseen for non-submission of the CbC report, varying between EUR500 and EUR10,000.

Penalty relief

The general tax penalty regime applies in Portugal. The determination of penalties will be made on a case-by-case basis.

Portugal (continued)

Statute of limitations on transfer pricing assessments

In Portugal, assessment is possible during the four years after the end of the assessment year. All Portugal-based companies have a statutory obligation to keep their transfer pricing documentation available (at the Portuguese establishment or premises) and in good order for the relevant year for a 10-year period.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, is medium, as is the likelihood that transfer pricing will be reviewed as part of that audit. The likelihood is high that the transfer pricing methodology will be challenged if transfer pricing is reviewed as part of the audit.

Since January 2004, entities resident in blacklisted offshore countries or territories are deemed related parties for transfer pricing purposes. Additionally, in 2007, the Portuguese tax authority began making positive adjustments to taxpayers' taxable profits as a result of tax audits. These adjustments are based on a benchmark computed from the financial information available in an internal database called MGIT.

With respect to the comparables analysis performed by the tax authority, the following issues are relevant:

- Entities with a recurrent loss situation are excluded from the final comparables sample.
- Comparables' identification is not disclosed in the final sample.
- A transaction is considered arm's-length only if it is within the computed interquartile range.
- Only the median of the interquartile range of the benchmark is considered when tax adjustments are made.

More recently, special emphasis is being put on the quality of comparables, namely, on the royalty CUP analysis. Head office interest charged to branches is the most recent area of scrutiny and adjustment. Cross-border restructurings are also under intense scrutiny, as well as intercompany financial transactions.

APA opportunity

An APA program was included in the Portuguese Corporate Income Tax Code in 2008 (Article 138). Ministerial Order 620-A/2008 allows taxpayers to negotiate the following types of APAs:

- Unilateral: When the parties to an agreement are the Portuguese Tax and Customs Authority and one or more of the taxpayers of individual income tax (IRS) or corporate income tax (IRC);
- Bilateral or multilateral: Besides entering into an agreement between the Portuguese Tax and Customs Authority, IRS and IRC taxpayers, taxpayers now also may choose to sign an agreement with one or several tax authorities in jurisdictions where a double taxation convention is in place with Portugal, under the MAP foreseen in the convention, and must ask that the request for a unilateral APA be filed with the corresponding tax authorities.

APA negotiation time frame

The Portuguese legal time frame foresees the following phases:

- Pre-filing phase: Entails a preliminary evaluation of the initial taxpayer proposal and may involve joint meetings with the tax authorities
- Submission phase: Involves analysis and negotiation of the APA proposal, which, in any case, should be presented at least 180 days before the beginning of the applicable tax year; tax authorities' time frame to evaluate the content of an APA proposal is within 180 days in the case of unilateral agreements and extends to a 360-day period in case of bilateral and multilateral agreements
- Conclusion of the APA process

APAs may not exceed a three-year period, which may be renewable upon a written request to the tax authority.

Application fee

An APA is subject to a filing fee of EUR3,150 to EUR35,000 and is paid to the tax authority, depending on the taxpayer's average turnover (fees are reduced by 50% for renewals or revisions of existing APAs).

APA compliance responsibility

Upon the conclusion of an APA, the taxpayer is responsible for ensuring compliance with the policies, methodologies and terms that are agreed to in the proposal.

Whenever any of the conditions are altered, the taxpayer should formally inform the tax authority or face the penalty of the APA being invalidated.

However, it should also be noted that the burden of monitoring the compliance of the terms agreed to in the APA rests with the tax authority.

In this context, the taxpayer is required to prepare an annual report on the implementation of the agreement, envisaging the validation and verification of compliance with the methods used and the terms of the agreement. This annual report shall be sent to the Portuguese Tax and Customs Authority upon the deadline established for the submission of an annual tax and accounting return.

APA public data

Portuguese tax authorities do not disclose information about APAs submitted or concluded. Despite the fact that some information is publicly known, tax authorities are keen to increase the transparency of the APA process in Portugal. Hence, taxpayers are encouraged to submit proposals.

Impact of new OECD BEPS Action 8-10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Qatar

Taxing authority and tax law

Taxing authorities:

- State tax regime: Qatar Public Revenues and Taxes Department (PRTD)
- Qatar Financial Centre (QFC) tax regime: QFC Authority (QFCA) Tax Department

Tax laws:

- State tax regime — The Income Tax Law No. 21 of 2009 (Qatar Income Tax Law) and its related Executive Regulations should be applied to taxpayers in Qatar, except for those registered in the Qatar Financial Centre (QFC) (see below).
- QFC tax regime — This tax regime is separate and distinct from the state tax regime. The QFC Regulations, which were enacted pursuant to Law No. 7 of 2005 on the promulgation of the law for the QFC, and the QFCA Tax Manual (TP Manual) should be applied to QFC-registered entities.

Local GAAP:

- State tax regime — Qatar adopts the International Financial Reporting Standards (IFRS) in the preparation of financial statements.
- QFC tax regime — The QFCA Tax Department adopts the IFRS in the preparation of financial statements. However, the QFCA Tax Department also allows UK GAAP, US GAAP or standards issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI).

Relevant regulations and rulings

State tax regime

The Qatar Income Tax Law introduced transfer pricing provisions within the general anti-tax-avoidance framework, which states that, "where the taxpayer enters into arrangements or carries on operations or transactions and one of the main purposes of which is to avoid the payment of the tax due, the PRTD may counteract the tax advantage the taxpayer obtained because of such arrangements, operations or transactions, in accordance with the provisions of the Executive Regulations of the Qatar Income Tax Law." The Qatar Income Tax Law aims to make certain that related-party transactions are conducted under arm's-length conditions. As such, the PRTD may:

- Apply the arm's-length value to a deed or an economic event subjected to a different value by the taxpayer.
- Re-characterize the contract where the form of such a deed does not reflect the substance thereof.
- Adjust the amount of the tax due by the taxpayer or any other person involved in the type of arrangements, operations or transactions.

Under the Executive Regulations of the Qatar Income Tax Law, a person shall be deemed to be related to another person in any of the following cases:

- For natural persons, where one of them is a spouse, an in-law or a relative of the other, up to the fourth degree
- For natural and legal persons, where the natural person owns, alone or with another related person or persons, directly or indirectly, more than 50% of the capital, voting rights or income rights of the legal person
- For legal persons, where one of them owns, alone or with another related person or persons, more than 50% of the capital, voting rights or income rights of the other, or where another person or other related persons owns, directly or indirectly, more than 50% of the capital, voting rights or income rights of both legal persons

QFC tax regime

The QFC Regulations and the TP Manual should be applied to QFC-registered entities. The TP Manual provides guidance about the application of the transfer pricing rules of the QFC Tax Regulations. Chargeable profits and tax losses must be calculated on an arm's-length basis.

- Part 8 of the QFC Tax Regulations has a one-way adjustment approach and will be applied only where the resulting transfer pricing adjustment would result in an increase in the amount of chargeable profits or a reduction in tax losses.

OECD Guidelines treatment

State tax regime

Pursuant to the Executive Regulations to the Qatar Income Tax Law, where the data required to apply the CUP method is not available, the taxpayer should submit to the PRTD an application to adopt other transfer pricing methods approved by the OECD.

QFC tax regime

The following methods noted under the OECD Guidelines may be used: CUP, resale price, cost-plus, profit split and TNMM.

Documentation requirements

State tax regime

The Qatar Income Tax Law does not provide specific documentation requirements; however, because the Qatar Income Tax Law requires the use of the CUP method, or other transfer pricing methods also authorized by the OECD, there is an implied requirement to have documentation in place.

Written approval to use an OECD-authorized transfer pricing method other than the CUP method may be obtained from the PRTD before the related-party transactions take place. In the application, a transfer pricing study should be submitted, along with an explanation of why it is not possible to use the CUP method and why an alternative OECD-approved method is appropriate.

In practice, taxpayers are recommended to maintain annual transfer pricing documentation, which should be readily available in the event of a tax inquiry by the PRTD. The transfer pricing documentation should be completed on or before the annual tax return is filed with the PRTD.

Transfer pricing documentation prepared in English is currently acceptable by the PRTD. However, in practice, in the event of a preapproval application to use an OECD method other than CUP, a summary memorandum should also be prepared in Arabic and submitted to the PRTD to facilitate the TP review of the PRTD.

QFC tax regime

The burden of proof is on the QFC-registered taxpayer to establish that the actual conditions are consistent with the arm's-length conditions. There are four classes of records or evidence that will need to be considered, including:

- Primary accounting records
- Tax adjustment records
- Records of transactions with an associated business
- Evidence to demonstrate an arm's-length result (this includes a description of the intercompany transactions and a functional analysis)

A transfer pricing study is specifically recommended when there is a risk that it may be perceived that the QFC-registered taxpayer's intercompany transactions are not based on the arm's-length principle (e.g., the taxpayer is incurring losses during the taxable year or profits appear lower than previous years or compared with competitors in the industry, among other exceptional circumstances).

Priorities/pricing methods

State tax regime

Under the Executive Regulations to the Qatar Income Tax Law, the arm's-length price should be determined using the CUP method. This price is determined on the basis of a comparison with similar goods or services provided between unrelated parties, particularly accounting for the:

- Characteristics of the goods or service
- Contractual terms
- Functions performed, assets used and risks incurred
- Economic circumstances

As discussed in sections above, where the CUP method cannot be applied, any other OECD method can be used, subject to approval by the PRTD.

The PRTD expects comparables from Qatar or the Middle East and North Africa (MENA) region. However, if this is not possible, European comparables should also be acceptable.

QFC tax regime

Where the CUP method is available as evidence, the QFCA Tax Department is likely to consider it the preferred method. A discussion should be included in the documentation about the appropriateness of the selected method.

The QFCA Tax Department prefers comparables from the MENA region or, failing that, Asian or African comparables in preference to European comparables.

Return disclosures/related-party disclosures

State tax regime

Related-party disclosures must be in the notes to the audited financial statements, which are filed with the PRTD in support of the tax declaration.

QFC tax regime

Related-party transactions must be disclosed in the notes to the audited financial statements, which are filed with the QFC Tax Department, along with the income tax return. A QFC branch is not mandated to submit full financial statements.

Transfer pricing-specific returns

For both the state and QFC tax regimes, there currently is no requirement to prepare a separate tax return for related-party transactions.

Documentation deadlines

State tax regime

Currently, there is no requirement for contemporaneous filing of transfer pricing documentation. A transfer pricing study should be submitted along with the preapproval application submitted to the PRTD to use a transfer pricing method other than the CUP method. The PRTD may also require the study during the tax review process.

Qatar (continued)

In practice, it is recommended that annual transfer pricing documentation be prepared on or before the tax declaration is filed to the PRTD.

QFC tax regime

The TP Manual does not state that the taxpayer must file or have completed transfer pricing documentation when filing its tax return. However, the QFCA Tax Department assumes that the QFC taxpayer will assess its intercompany transactions to be at an arm's-length before completing its tax return, essentially requiring an analysis of its intercompany pricing to be prepared.

Transfer pricing penalties

State tax regime

Currently, there are no specific transfer pricing penalties for failure to properly document intercompany transactions. However, financial penalties, in the form of interest imposed for noncompliance with income tax rules under the Qatar Income Tax Law, may apply in the case of a deficiency assessment due to transfer pricing adjustments.

Interest on any additional income tax due resulting from a transfer pricing adjustment may be levied at a rate of 1.5% per month of delay (capped at the amount of income tax due).

QFC tax regime

Where the QFC-registered taxpayer fraudulently or negligently files a tax return, the QFC-registered taxpayer may be exposed to a financial sanction of an amount not exceeding the tax understated. The late payment of tax is subject to a delay payment charge of 5% per annum, calculated for the period from the due date of the tax to the actual payment date.

If a QFC-registered taxpayer fails to maintain adequate records to support the pricing of transactions with associates, or claims in its return that no adjustment is required under the transfer pricing regulations without being able to substantiate that claim, then there may be a penalty liability for failure to maintain adequate records (not exceeding QAR20,000) or for filing an incorrect return (financial sanctions not exceeding the tax understated).

Penalty relief

No penalty relief regime is in place for the state or QFC tax regime.

Statute of limitations on transfer pricing assessments

State tax regime

A transfer pricing assessment is a part of the regular corporate income tax audit by the PRTD. The statute of limitations to complete a regular tax audit is five years following the year in which the taxpayer submitted the tax return.

Where the taxpayer fails to submit the tax return, the right of the PRTD to assess the tax and financial penalties related thereto shall expire 10 years after the taxable year in respect of which the taxpayer was due to file the return. When the taxpayer fails to register with the PRTD, the 10-year period shall start from the date when the PRTD discovered the activities of the taxpayer.

QFC tax regime

The time limit for the QFCA Tax Department to conduct a tax assessment is six years after the end of the accounting period to which it relates.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

State tax regime

During the income tax review process, the PRTD will likely demand the documentation supporting the transfer prices for intercompany transactions to be produced, with a general requirement that any information request is dealt with in a period of two weeks.

The PRTD conducts a tax audit of all tax declarations that are submitted.

The likelihood of a review of transfer pricing as part of the regular audit is medium to high.

The likelihood of a challenge to the transfer pricing methodology, however, is characterized as low to medium, provided that sufficient transfer pricing documentation is available.

The PRTD launched an electronic tax filing system effective in October 2014. With this development, the PRTD raises analytical tax assessments and reasonableness types of questions, utilizing the auditing functionality of the electronic system. Eventually, we expect that the PRTD may move toward risk-based audits.

QFC tax regime

In general, the QFC Tax Department conducts a tax audit of income tax returns that are submitted (the likelihood being medium to high). The likelihood of a review of transfer pricing as part of the regular audit is high.

The likelihood of a challenge to the transfer pricing methodology is medium.

APA opportunity

State tax regime

Currently, there is no APA procedure in place.

QFC tax regime

The QFCA Tax Department has an advance ruling regime and welcomes QFC-registered entities to apply for an APA to obtain certainty about their tax position.

The PRTD deals with MAPs involving both the state and QFC tax regimes.

Impact of new OECD BEPS Action 8–10 guidelines

State tax regime

Neither has the PRTD issued its official position nor has there been any case law in respect of the amended 2016 OECD TP Guidelines, which were updated with the OECD BEPS Action 8–10 and 13 reports on 23 May 2016. However, the PRTD has indicated that it will cooperate with the international tax community for the rollout of the OECD's final BEPS reports.

QFC tax regime

Neither has the QFCA Tax Department issued its official position nor has there been any case law in respect of the amended 2016 OECD TP Guidelines, which were updated with the OECD BEPS Action 8–10 and 13 reports on 23 May 2016. However, the QFCA Tax Department is more in tune with BEPS developments. The TP Manual refers to the OECD TP Guidelines and is expected to be updated to take into account the revisions under the 2016 TP Guidelines.

Romania

Taxing authority and tax law

Taxing authority: Romanian taxes are administrated by the Ministry of Finance, National Agency for Fiscal Administration (the ANAF)

Tax law:

- Law 227/2015 regarding the Fiscal Code, as subsequently completed and amended
- Government Decision 1/2016 for the approval of the norms for the application of Law 227/2015 regarding the Fiscal Code, as subsequently completed and amended

Relevant regulations and rulings

- ANAF Order 222/2008 on the content of the transfer pricing documentation file applicable for administrative procedures initiated before 1 January 2016
- ANAF Order 442/2016 on the content of the transfer pricing documentation file applicable for administrative procedures initiated after 1 January 2016
- ANAF Order 3737/2015, approving the form of the decision issued by the tax authority in application of the procedure for elimination of double taxation between Romanian related parties
- ANAF Order 3735/2015, approving the procedure for the issuance/amendment of APAs and the content of the respective APA request
- ANAF Order 3736/2015, approving the procedure for the issuance of advance individual rulings and the content of the respective request
- Law 207/2015, regarding the Fiscal Procedure Code, as subsequently completed and amended

OECD Guidelines treatment

The Romanian Fiscal Code and the related norms provide that the tax authority should also consider the OECD Guidelines when analyzing the prices applied in related-party transactions. In addition, the legislation on transfer pricing documentation requirements in Romania refers to the European Union Code of Conduct on Transfer Pricing Documentation (C176/1 of 28 July 2006).

Documentation requirements

Even though the documentation requirements were introduced in the Romanian regulations in 2006, the specific content of the transfer pricing documentation file was only formally detailed by the tax authority in February 2008.

The transfer pricing documentation has to be prepared in the local language. If the transfer pricing documentation is prepared in a foreign language, it should be translated and provided to the tax authority in Romanian (including any other documents to be attached to the transfer pricing documentation, as formally requested by the Romanian transfer pricing regulations, e.g., intercompany agreements).

Romanian entities having transactions with related parties should make the transfer pricing documentation for such transactions available upon the request of the tax authority and within the required term.

Taxpayers that entered into APAs for related-party transactions are not required to prepare and submit a transfer pricing documentation file for the periods and transactions covered by the APA.

The provisions of Order 442/2016 stipulate that taxpayers that qualify as large taxpayers and carry out transactions with related parties of a total annual value above certain thresholds are required to prepare on an annual basis transfer pricing documentation within the legal deadline for submission of the annual corporate income tax returns (25th of the third month after the year-end). Such transfer pricing documentation may be requested by the tax authority during or outside a tax audit (for transactions undertaken starting from 2016).

The thresholds considered for establishing the requirement of preparing annual transfer pricing documentation (applicable for the total annual value obtained by cumulating the value of transactions with all related parties, excluding value-added tax [VAT]) are:

- EUR200,000 for interest for financial services
- EUR250,000 for provision of services
- EUR350,000 for acquisitions/sales of tangible or intangible assets

Furthermore, the large taxpayers that carry out transactions that do not exceed the abovementioned thresholds, as well as small and medium taxpayers, are required to prepare transfer pricing documentation only upon request from the tax authority during a tax audit — in respect of transactions for which any of the following thresholds (applicable for the total annual value obtained by cumulating the value of transactions with all related parties, excluding VAT) are exceeded:

- EUR50,000 for interest for financial services
- EUR50,000 for provision of services
- EUR100,000 for acquisitions/sales of tangible or intangible assets

The taxpayers that carry out transactions with related parties but do not exceed the lower thresholds are required to prepare transfer pricing documentation during a tax audit, according to the general rules established under the accounting and tax regulations in force.

The transfer pricing documentation should comprise information regarding the taxpayer, the group and the related-party transactions (including an analysis of the functions performed and the risks assumed by the related parties), as well as information about the transfer pricing methods used for determining the value of related-party transactions. Finally, it should contain a set of relevant statistical comparables.

According to the provision of Order 442/2016, the information that should be included in the transfer pricing documentation has been significantly expanded, as compared to the requirements provided for under Order 222/2008, considering the amendments to the OECD Transfer Pricing Guidelines in addition to the OECD BEPS Action Plan.

Priorities/pricing methods

The tax authority accepts transfer pricing methods provided by the OECD Guidelines. The traditional methods (CUP, resale price and cost-plus) are generally preferred to the profit-based methods (TNMM and profit split).

When selecting the most adequate method, the following must be taken into consideration:

- The method that is the most appropriate to the circumstances in which the prices that are subject to free competition on the commercial comparable markets are established
- The method for which information resulting from the actual related parties involved in the transactions subject to free competition is available
- The degree of accuracy to which adjustments can be made in order to achieve comparability

- The circumstances of the individual case
- The activities effectively conducted by various related parties
- The documentation that can be made available by the taxpayer

In addition, the selected method should reflect the circumstances of the market and the taxpayer's activity.

According to the provisions of Order 442/2016, in the case of benchmarking analysis performed to determine the arm's-length nature of the related-party transactions, the territorial criteria should be considered in the following sequence: local, European Union, Pan-European and international. In the absence of local comparables, foreign comparables are accepted.

Return disclosures/related-party disclosures

Generally, information about related-party transactions undertaken by a Romanian entity is disclosed only upon the specific request of the Romanian tax authority. For statutory accounting reporting purposes, Romanian companies are required to disclose the transactions undertaken with related parties.

Separately from the above, the Romanian legislation provides for the following general disclosure requirements:

- Disclosure of transactions performed by Romanian entities with nonresident companies for which the Romanian company has an obligation to withhold taxes
- Disclosure or registration of contracts concluded by Romanian entities with nonresident companies and individuals performing services in Romania that may trigger Romanian permanent establishment exposure
- Disclosure of long-term financing contracted by a Romanian entity with nonresident companies or individuals

Transfer pricing-specific returns

No specific transfer pricing returns for related-party transactions are currently in place under the transfer pricing rules.

Documentation deadlines

For taxpayers that qualify as large taxpayers and perform transactions above the thresholds (i.e., EUR200,000 for interest for financial services, EUR250,000 for provision of services and EUR350,000 for acquisitions/sales of tangible or intangible assets), the term for providing the transfer pricing documentation is set for 10 days from the request date, but not earlier than 10 days from the deadline set for its preparation. Such transfer pricing documentation should not be submitted together with the tax return, but it might be requested during or outside a tax audit.

For the large taxpayers that carry out transactions that do not exceed the abovementioned thresholds, as well as small and medium taxpayers that perform transactions above the thresholds (i.e., EUR50,000 for interest for financial services, EUR50,000 for provision of services and EUR100,000 for acquisitions/sales of tangible or intangible assets), the transfer pricing documentation should be provided only upon the request of the tax authority during a tax audit, and the term for providing the transfer pricing documentation is between 30 and 60 days — with the possibility to request a single extension of at most 30 days.

Separately, taxpayers that have an APA must prepare and submit to the ANAF on an annual basis a report on the observance of the APA terms and conditions. This report deadline is similar to that of the submission of annual financial statements, and noncompliance with the documentation deadline provisions leads to cancellation of the APA.

Romania (continued)

Transfer pricing penalties

Large, medium and small taxpayers failing to provide the transfer pricing documentation to the tax authority upon request are sanctioned as follows:

- In the case of non-submission of the transfer pricing documentation by large taxpayers (that have the obligation to prepare the transfer pricing documentation within the legal deadline for submission of the annual corporate income tax return) upon the request of the tax authority outside of a tax audit, a penalty between RON25,000 and RON27,000 (approx. EUR5,600 and EUR6,000) will be imposed.
- In the case of non-submission of the transfer pricing documentation upon the request of the tax authority during a tax audit, a penalty between RON12,000 and RON14,000 (approx. EUR2,700 and EUR3,200) will be imposed on the large and medium taxpayers, respectively, and between RON2,000 and RON3,500 (approx. EUR450 and EUR800) on small taxpayers.

In the case of a transaction between related parties, the tax authority 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 authority determines that the arm's-length principle is not observed for the respective transaction or that the taxpayer does not provide to the tax authority sufficient evidence to establish if the arm's-length principle was observed.

The resulting adjustments/estimation would trigger a profits tax liability of 16% (the standard profits tax rate) and late payment interest and penalties according to the provisions of the legislation. Currently, the late payment interest is 0.02% per day of delay. Late payment penalties of 0.01% per day of delay can also be imposed.

In addition, a penalty for undeclared or incorrectly declared tax liabilities established by tax authorities through tax decisions of 0.08% for each day of delayed payment can be imposed. 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 term 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%. This penalty is applicable for tax liabilities due starting from 2016 onward.

Penalty relief

No specific penalty relief provisions currently are in place under the Romanian transfer pricing rules.

Statute of limitations on transfer pricing assessments

No specific statute of limitations exists for transfer pricing assessments. However, general rules for statutes of limitations are applicable – i.e., the Romanian tax authority may normally review tax-related matters retroactively for 5 years (or 10 years in the case of fiscal evasion or fraud).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, can be characterized as medium to high, specifically in the case of entities incurring operating losses over a period of time. The likelihood is high that transfer pricing will be reviewed as part of that audit, and the likelihood is medium that the transfer pricing methodology will be challenged if transfer pricing is reviewed as part of the audit.

Romania (continued)

APA opportunity

Comprehensive APA procedures and requirements have been in effect in Romania since June 2007. An APA may be unilateral, bilateral or multilateral.

By means of an APA, the ANAF approves the specific transfer pricing method utilized by a multinational entity prior to the actual transaction. APAs are binding on the tax authority as long as taxpayers observe their terms and conditions. Unilateral APAs are issued for a term of 12 months, while bilateral and multilateral APAs are issued for a term of 18 months.

The fees payable to the ANAF for the issuance or amendment of an APA are:

- EUR20,000 (issuance), EUR15,000 (amendment) — in case of large taxpayers or for agreements on transactions with a consolidated value exceeding EUR4 million
- EUR10,000 (issuance), EUR6,000 (amendment) — in all other cases

As a general rule, APAs are issued for a period of up to five years; however, this term may be extended in certain cases.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Romanian tax authorities should also refer to the transfer pricing guidelines set out by the OECD when analyzing related-party transactions. Thus, the OECD developments on transfer pricing matters will normally be followed for Romanian purposes by tax authorities and taxpayers as well.

In June 2016, the Romanian Government approved Romania's accession as a member to the BEPS Implementation Forum, thus allowing Romania to participate in the implementation of measures to combat tax erosion and the transfer of profits and the implementation within the national territory.

Given that the transfer pricing area is currently one of the most targeted by tax authorities in Romania in tax audits, participation in the implementation of the OECD BEPS action package represents an alignment with transfer pricing international practices.

Russia

Taxing authority and tax law

Taxing authority: Federal Tax Service of the Russian Federation (FTS)

Tax law: Russian Tax Code

Relevant regulations and rulings

Major transfer pricing regulations are contained in Articles 105.1 to 105.25 of the Tax Code (which were introduced by Federal Law № 227-FZ of 18 July 2011). Regulations regarding transfer pricing penalties are also contained in Articles 129.3, 129.4 and 126 of the Tax Code.

There is no system of rulings in Russia. Private letters issued by the FTS or the Ministry of Finance at the requests of taxpayers are not binding for the tax authorities or companies.

Besides the articles in the Tax Code mentioned above, the Russian Ministry of Finance or the FTS regularly issue letters that provide clarifications on their position in applying the arm's-length principle in general and on specific questions of taxpayers regarding the application of current regulations. These letters provide the Ministry of Finance's and the FTS' formal position but do not legally bind for taxpayers.

Related parties

The Tax Code includes a list of criteria defining where companies and individuals can be declared related parties. The main criterion defining the interdependency is common ownership or management.

In particular, companies are considered related if one owns directly or indirectly more than 25% of the capital of the other, or if there is another company or person that owns directly or indirectly more than 25% of the capital of those companies.

Courts can declare companies or individuals related on other grounds if it is proven that the relationship between the parties influenced the terms and the results of the transactions.

OECD Guidelines treatment

Russia is not a member of the OECD; however, the transfer pricing regulations are largely based on the principles stipulated by the OECD Guidelines.

Documentation requirements

The Tax Code envisages that taxpayers must prepare and maintain a certain set of documents, in any suitable form, justifying the pricing method used in controlled transactions. The level of detail and comprehensiveness of documentation should be consistent with the complexity of the transaction or transactions. Documentation should, in particular, include industry analysis, company analysis, functional analysis, the terms and conditions of the transaction, the reasoning for the selection of the transfer pricing method and data sources used, the computation of the market price range and adjustments, if any, to the tax base made by a taxpayer. In addition to the specified information, taxpayers may also provide other information that demonstrates that commercial and financial conditions in a controlled transaction are consistent with those of comparable uncontrolled transactions.

Documentation is not required for transactions in which prices conform to a regulated price or a price that is prescribed by the anti-monopoly authorities, transactions involving securities and derivatives traded on an organized equity market and transactions covered by an APA.

Russian transfer pricing requirements apply to related-party transactions and certain types of third-party transactions. In relation to cross-border transactions, the following is subject to transfer pricing control:

- All related-party transactions (no threshold)
- Third-party transactions involving goods traded on global commodity exchanges, such as oil and oil products, ferrous metals, nonferrous metals, fertilizers, precious metals and precious stones if the annual income, as a result of all transactions between the parties, exceeds RUB60 million
- Third-party transactions where the counterparty is located in certain low-tax jurisdictions (same threshold as above)[1]

In the domestic market, only related-party transactions can be subject to transfer pricing control, and a RUB60 million threshold applies for the following transactions:

- The subject of the transaction is an object of assessment to mineral extraction tax calculated at an ad valorem tax rate.
- One of the parties to the controlled transaction is exempt from paying profits tax, or pays the tax at a 0% rate.
- One of the parties to the controlled transaction is registered in a special economic zone.
- One of the parties to such a transaction applies a special tax regime, either in the form of unified tax on imputed income or unified agricultural tax, and the aggregate annual amount of income as a result of all transactions between such parties exceeds RUB100 million.
- One of the parties operates drilling or holds a license to explore new oil and gas deposits on the continental shelf.

For all other domestic related-party transactions, a RUB1 billion threshold applies.

Certain domestic transactions are exempt from transfer pricing control, e.g., transactions between members of a domestic consolidated group of taxpayers, or if the following criteria are simultaneously met:

- Both parties are incorporated within the same region of Russia.
- None of the parties have economically autonomous subdivisions in other regions of Russia or pay profits tax to the budgets of other regions.
- None of the parties have tax losses.
- The transaction is not in the list of transactions that are controlled if their annual amount exceeds RUB60 million as outlined above.

Priorities/pricing methods

The Tax Code includes five methods similar to those used in international transfer pricing practice. The resale-minus method has first priority for a routine distributor reselling goods to unrelated customers. In all other cases, the CUP method prevails, whereas the profit split is a method of last resort.

Return disclosures/related-party disclosures

Disclosure of transactions with related parties and third-party transactions that are subject to transfer pricing control is required by way of filing a transfer pricing notification. This notification is due for each year by May 20 of the following year (e.g., by 20 May 2017 for 2016).

[1] A list of such jurisdictions is determined by the Russian Ministry of Finance.

Transfer pricing-specific returns

There are no specific transfer pricing returns in Russia.

The Russian Finance Ministry has issued for public discussion a draft law on the introduction of requirements to prepare and submit CbC reports.[2] The draft was developed as part of the implementation of BEPS international tax initiatives in Russia (Action 13) and is generally consistent with OECD recommendations. Under the proposed law, Russian taxpayers would be obliged to prepare and file CbC reports. The CbCR requirements would apply to international groups whose annual revenue according to their consolidated financial statements exceeds RUB50 billion. The draft law envisages the introduction of the CbCR requirements with respect to financial years starting in 2017. It also provides a possibility for CbC reports to be filled on a voluntary basis for financial years before 2017. It is currently unknown whether and when the draft law will be adopted.

Documentation deadlines

Transfer pricing documentation must be presented within 30 working days of the tax authorities' request. The request can be issued no earlier than 1 June of the year following the year in which the controlled transaction took place.

Transfer pricing penalties

From 2014, transfer pricing penalties were 20% of the additional tax payable due to a transfer pricing adjustment. From 2017, the penalties are being increased to 40%. No penalties apply with respect to transfer pricing adjustments for 2012 and 2013.

Penalty relief

Penalties will be imposed if a taxpayer's income is adjusted as a result of a transfer pricing audit, and if the taxpayer did not provide the transfer pricing documentation supporting the prices in a controlled transaction. Penalties cannot apply if prices were established in accordance with an applicable APA.

Statute of limitations on transfer pricing assessments

The general rule is that the tax authority may audit the taxpayer for up to three years preceding the year when the audit was initiated.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transfer pricing matters in controlled transactions are subject to special transfer pricing audits, which are separate from general tax audits and which should be performed by the FTS rather than local tax authorities. Transfer pricing audits are generally focused on cross-border transactions with emphasis on loss-making transactions, transactions involving low-tax jurisdictions, exports in resource-oriented industries, service fees and royalties. Some domestic transactions may also be regarded as high-risk if they involve entities resident in special economic zones or if they are subject to advantageous tax regimes or are loss-making entities. Transactions that are viewed by the tax authorities as leading to a receipt of an unjustified tax benefit may also be scrutinized from a transfer pricing perspective.

[2] http://regulation.gov.ru/projects#npa=41254

Russia (continued)

APA opportunity

The APA program has been available since 1 January 2012 and is only for "major taxpayers." A non-Russian company cannot apply for an APA. The Tax Code envisages a possibility to conclude multilateral APAs when the transactional counterparties are located in a jurisdiction with which Russia has a double tax treaty.

Impact of new OECD BEPS Action 8–10 guidelines

No draft laws addressing actions envisaged by the OECD BEPS Action 8–10 reports exist yet, except for a draft law on CbCR.

Saudi Arabia

Taxing authority and tax law

Taxing authority: General Authority of Zakat and Tax (GAZT)

Tax law: Saudi tax law and bylaws

Relevant regulations and rulings

Saudi tax law contains certain provisions in respect to measures against tax avoidance, which may support the GAZT when challenging transactions between related parties. In addition, on 19 March 2014, a ministerial resolution was issued that states that in respect of transactions with related parties, the GAZT will issue rules for determining the "fair value" or "arm's-length value" of those transactions in accordance with the agreed-upon international standards.

The arm's-length principle is also included in Gulf Cooperation Council (GCC) customs law, which is applicable for Saudi Arabia as well.

In determining the tax liability, the GAZT is empowered to:

- Disregard a transaction that has no economic effect, or reclassify a transaction whose form does not reflect its substance
- Reallocate income or expenses between related persons or persons under common control as is necessary to reflect the income that would have resulted from a transaction between independent persons

As per Saudi tax law, companies are considered related if they are owned or controlled 50% or more by the same interest. With respect to capital companies, control is defined as ownership of the voting power, or value in the company, held directly or indirectly through one or more subsidiary of any type of company.

Withholding tax

Generally, the withholding tax rates range from 5% to 20% for transactions between unrelated parties. Except for transactions with specified withholding tax rates under Saudi tax regulations, transactions between related parties are subject to a 15% withholding tax.

Thin capitalization rules

Saudi tax law does not contain any specific provision for thin capitalization. Further, the GAZT generally does not challenge the capital adequacy of a company. The level of capital for each entity is determined by the Saudi Arabian General Investment Authority (SAGIA) and the Ministry of Commerce and Industry (MOCI), based on the nature of the underlying project or the company's activity.

However, in accordance with Saudi tax law, the deductibility of interest expense is capped as follows:

- The lower of the interest charged for the year and income from loan fees (interest income) plus 50% of (A–B), where A and B are defined as:
  - A: Income subject to tax, less income from loan fee (interest income)
  - B: Expenses allowable for tax purposes, less loan fee (interest expense)

Interest (or loan fee) in excess of the deductibility limit set out above is a permanent disallowance under the tax law and its bylaws.

Banks are excluded from applying the above regulations. Further, an interest payment by a branch to the head office is not allowed as a deduction in the branch's tax declaration.

OECD Guidelines treatment

The OECD Guidelines are not binding on the Saudi tax authority, but the GAZT does expect transactions between related parties to be in accordance with the arm's-length principle.

Documentation requirements

There is currently no legislative requirement for Saudi taxpayers to submit a transfer pricing document to the GAZT when filing tax declarations. However, it is highly recommended that the taxpayer maintain adequate documents to support the arm's-length nature of intercompany transactions.

Priorities/pricing methods

No specific transfer pricing methods have been prescribed in Saudi tax law and, as such, there is no hierarchy or priority as per which transfer pricing methods should be applied. If a taxpayer in Saudi Arabia adopts and properly implements a global transfer pricing policy that is based on the commonly accepted transfer pricing methods set out in the OECD Guidelines,

then it may be possible for the GAZT to accept the methodology that has been applied, although this has not been tested extensively.

Return disclosures/related-party disclosures

Saudi tax law does not require taxpayers to submit a return disclosure, with respect to related-party transactions. However, the online tax return form that was introduced in February 2016 requires a taxpayer to disclose the "value differences" of a material or service provided by a related entity in excess of normal prices. The term "normal price," which is not explicitly defined, can perhaps be interpreted as the arm's-length price of such materials and services. There has not been much clarification from the GAZT about whether the disclosure is restricted to materials and services only or all other related-party transactions of the taxpayer. However, a taxpayer that makes a disclosure that such prices are as per the arm's-length principle might be expected to back it up with documentation.

Taxpayers are also required to disclose the amount due to and due from related parties, as part of the balance sheet disclosures. In addition, the taxpayers should disclose the name of the related-party, nature of dealings, opening and closing payable/receivable balance, as well as movements in the related-party payable/receivable balance, as part of the explanatory schedules accompanying the balance sheet disclosures.

Transfer pricing-specific returns

There is currently no requirement to prepare transfer pricing-specific return for related-party transactions.

Documentation deadlines

Not applicable.

Transfer pricing penalties

There is currently no specific transfer pricing penalty prescribed under the law. However, penalties as prescribed under the general provisions of Saudi tax law apply in cases of a deficiency assessment relating to a transfer pricing adjustment.

Saudi Arabia (continued)

Penalty relief

No penalty relief is currently applicable under Saudi tax law.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations set out in Saudi tax law regarding transfer pricing assessments. The general statute of limitations for the Saudi tax authority to make or amend a tax assessment is five years from the end of the deadline specified for filing the tax declaration for the taxable year. The GAZT may, however, make or amend an assessment within 10 years of the deadline specified for filing the tax declaration for the taxable year in cases when the tax return was not filed, or if filed, was found to be incomplete or incorrect with the intent of tax evasion.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transactions involving related parties are reviewed in considerable depth by the GAZT to verify if the transaction was made on an arm's-length basis. Among these, intercompany recharge of costs based on allocation and payments made to related parties based on markup on cost principle are frequently scrutinized.

APA opportunity

Currently, there is no APA procedure in place.

Impact of new OECD BEPS Action 8–10 guidelines

Saudi Arabia is a G20 nation and has participated in the OECD BEPS project. Hence, it can be expected that guidelines in line with BEPS action points might be included in the near future.

Senegal

Taxing authority and tax law

Taxing authority: Senegalese tax authorities

Tax law: Senegalese Tax Code

Relevant regulations and rulings

Articles 17, 18, 570, 638 and 639 of the General Tax Code contain the Senegalese transfer pricing regulations, effective since 1 January 2013 (and with retroactive effect to 2012).

The transfer pricing rules follow the arm's-length principle and require the use of the most appropriate method to determine the price applied in related parties' transactions.

These rules apply to transactions between:

- Local companies controlling or under the control of foreign companies
- Companies that are under the common control of a company or part of a group of companies controlling or under the control of foreign companies

Dependence (shareholding) relationships presumably exist between two companies if:

- One company holds, directly or indirectly, the majority of the shares of the other or has therein the effective decision-making power
- Both companies are placed under the control of the same entity, according to the conditions provided in the point above

Basically, a Senegalese company is obligated to maintain transfer pricing documentation if:

- The local entity realizes an annual net turnover (excluding VAT and taxes) more than or equivalent to XOF5 billion
- The local entity holds at the end of the concerned fiscal year, directly or indirectly, more than 50% of the share capital or voting rights of a local or foreign affiliated company, meeting the turnover condition
- More than 50% of the share capital and voting rights of the local entity is held directly or indirectly at the end of the fiscal year by a company meeting the turnover condition

OECD Guidelines treatment

Senegal is not a member of the OECD. In general, the Senegalese tax rules follow the OECD Guidelines.

Documentation requirements

Upon request, the Senegalese entity that is subject to maintain transfer pricing documentation has to provide the Senegalese tax authorities with documentation that supports the prices applied in transactions of any nature realized with foreign affiliated companies, in accordance with Article 17 of the Tax Code.

The required documentation includes at least the following information:

- General information relating to the group:
  - A general description of activities, including changes during the years concerned or under audit
  - A general description of legal and operational structures of the group, with identification of the companies involved in the intragroup transactions

   - A general description of the functions and risks assumed by the affiliated companies involved in the intragroup transactions, provided that such risk and function affect the audited company
   - A list of the main intangible assets held (namely patents, brands, commercial names and know-how) in connection with the audited company
   - A general description of the group's transfer pricing policy
- Specific information relating to the audited company:
   - A description of activities, including changes during the years concerned or under audit
   - A description of transactions realized with other affiliated companies, including the nature and the money flows (such as royalties)
   - A list of the cost-sharing agreements, and a copy of prior agreements in respect to transfer pricing or documents relating to the determination of transfer prices, affecting the profits and losses (taxable profits) of the audited company
   - An introduction to the methodology used to determine the arm's-length character of the transfer prices, including an analysis of functions assumed, assets utilized and risks assumed, and an explanation of the selection and application of the methodology chosen
   - If the chosen methodology requires so, an analysis of comparables considered relevant by the company

If, in the course of a tax audit, the tax authorities have an indication that a company has made an indirect transfer of profits, pursuant to Article 17 of the Tax Code, they can request documents indicating:

- The nature of the relationship between the audited company and the foreign company
- The methodology of the calculation of prices relating to industrial, commercial and financial operations realized with foreign group companies; supporting elements that justify the applied prices; and, if applicable, agreed-upon compensation
- The activities developed by intragroup companies quoted in the first point above, with respect to operations quoted in the second point above
- The fiscal treatment reserved for operations quoted in the second point above and realized by companies outside of Senegal by the audited company, or by companies quoted in the first point above whose major share capital or voting rights are held by the audited company

Priorities/pricing methods

Senegalese transfer pricing regulations require that concerned companies provide documentation that supports the arm's-length character of the prices applied in related-party transactions. The tax law does not provide methods for pricing related-party transactions.

Return disclosures/related-party disclosures

Currently, the corporate income tax return does not include a transfer pricing schedule to be completed or specific transfer pricing-related questions.

Transfer pricing-specific returns

There is no specific transfer pricing return.

Senegal (continued)

Documentation deadlines

The company has to provide the transfer pricing documentation upon the tax authorities' request. However, if the documentation is not provided when requested or is incomplete, the tax authorities can ask the audited company, by means of a formal request, to provide or complete the documentation within 15 days.

Transfer pricing penalties

There are no specific transfer pricing penalties, but the general rule applies. Under Senegalese law, any tax due and payable resulting from an adjustment performed by the tax authorities will be deemed an additional tax. An additional penalty can be issued for the underpayment of tax.

Furthermore, intragroup payments are deductible only if the debtor can prove to the tax administration that the transactions are real and remunerations are not excessive.

Penalty relief

Not applicable.

Statute of limitations on transfer pricing assessments

The general statute of limitations applies to transfer pricing assessments. The period for the tax authorities to assess tax and any applicable penalties regarding transfer pricing matters is four years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The tax authorities may conduct a transfer pricing audit any time during the year. In general, the tax authorities frequently audit transfer pricing.

APA opportunity

Not applicable.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Serbia

Taxing authority and tax law

Taxing authority: Serbian Ministry of Finance

Tax law: Corporate Income Tax Law (CIT Law)

Relevant regulations and rulings

Articles 59 through 61a of the CIT Law define the arm's-length principle, the acceptable methods, and the obligation to prepare and file transfer pricing documentation. The Rule Book on transfer pricing and methods for the determination of arm's-length prices in intragroup transactions provides further details about these and prescribes obligatory content of the transfer pricing documentation.

OECD Guidelines treatment

Serbian transfer pricing provisions and documentation requirements are generally based on the OECD Guidelines.

Documentation requirements

Starting in fiscal year 2013, all taxpayers are obligated to prepare transfer pricing documentation that must contain mandatory elements and file it along with the annual CIT return. The prescribed elements of the transfer pricing documentation are:

- Analysis of the group
- Industry analysis
- Functional analysis
- Related-party transactions
- Selection of transfer pricing method
- Benchmark analysis
- Conclusions reached
- Appendices

Transfer pricing regulations allow taxpayers to submit a "short transfer pricing report" (containing only information about the related-party and the type and amount of the transaction without obligation to carry out any economic analysis) for all transactions (except loans) that meet one of the following conditions:

- The transaction is of an ad hoc nature, and its value does not exceed the threshold amount for value-added tax (VAT) registration purposes (approximately EUR70,000) in the tax period.
- The total value of transactions with one related-party does not exceed the threshold amount for VAT registration purposes (approximately EUR70,000) in the tax period.

Transfer pricing documentation should be submitted in the Serbian language.

Priorities/pricing methods

There is no priority in the selection of methods. The taxpayer is required to select the most appropriate method for determining that the transaction price is at arm's-length. Selection of the most appropriate method is based on the following criteria:

- Nature of transactions that are subject to the analysis
- Availability and reliability of data for the analysis
- Level of comparability between transactions affected by transfer prices and transactions carried out with or between unrelated parties
- The appropriateness of using financial data of unrelated parties for the analysis of transfer pricing compliance by certain types of transactions
- The nature and reliability of assumptions

To determine the arm's-length price of a transaction, the regulations prescribe the following methods: CUP, resale minus method, cost-plus method, TNMM and profit split method.

The taxpayer is also allowed to use any other unspecified method that is reasonable to apply in a given circumstance, assuming that the specified methods cannot be applied.

Foreign comparables are accepted for the purpose of benchmark analysis if no local comparables can be identified.

Return disclosures/related-party disclosures

Taxpayers are obligated to disclose in their annual CIT return revenues and expenses resulting from transactions with related parties, as well as disclose tax-based adjustments based on the transfer pricing analysis.

In addition, related-party disclosures and details of transactions are to be documented through obligatory transfer pricing documentation, which needs to be prepared and filed along with the CIT return.

Transfer pricing-specific returns

There is no specific transfer pricing return in Serbia.

Documentation deadlines

Transfer pricing documentation is to be filed within six months of the reporting period date.

Transfer pricing penalties

Generally, each taxpayer is obliged to file annual transfer pricing documentation together with the annual corporate profits tax return. However, penalties are prescribed only if the taxpayer fails to submit the transfer pricing documentation upon official written request by the tax authorities, subject to an additional filing deadline between 30 and 90 days. The range of penalties for eventual noncompliance is between RSD100,000 (approximately EUR800) and RSD2 million (approximately EUR16,500) for the legal entity and up to RSD100,000 (approximately EUR800) for the responsible individual in the legal entity.

In addition, the possible adjustment of taxable income on a transfer pricing basis may result in a penalty of up to 30% of the understated tax liabilities and may further result in increased interest for late tax payments.

Serbia (continued)

Penalty relief

There is no penalty relief available; however, taxpayers may be approved for an additional period of up to 90 days to comply with the transfer pricing documentation requirements (i.e., to submit to the tax authorities the prescribed transfer pricing document).

Statute of limitations on transfer pricing assessments

The general statute-of-limitations period of five years for taxes in Serbia also applies to transfer pricing assessments. A five-year period starts from the beginning of the year following the year in which the respective tax liability arose.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Audits by Serbian tax authorities are not conducted on a regular basis, and audited periods are not considered irrevocably closed. Typically, audits take place only once every three to five years, and they cover all taxes (except for VAT audits, which are more frequent and are usually triggered by the taxpayer's request for a VAT refund). Transfer pricing is likely to be within the scope of most tax audits. Given the lack of practice, a limited level of sophistication can be reasonably expected from the Serbian tax authorities reviewing related-party transactions.

APA opportunity

Advance rulings and APAs are not available in Serbia.

Impact of new OECD BEPS Action 8–10 guidelines

Although Serbian transfer pricing provisions and documentation requirements are generally based on the OECD Guidelines, new OECD Guidelines updated with BEPS Actions 8–10 have not yet been implemented in the local legislation.

Singapore

Taxing authority and tax law

Taxing authority: Inland Revenue Authority of Singapore (IRAS)

Tax law: Singapore Income Tax Act

Relevant regulations and rulings

Section 34 D of the 2009 Singapore Income Tax Act relates to transfer pricing and empowers the IRAS to make transfer pricing adjustments in cases where a Singapore taxpayer's transfer pricing practices are not consistent with the arm's-length principle.

On 6 January 2015, the IRAS issued the second edition of its transfer pricing guidelines (2015 Singapore Transfer Pricing Guidelines). The 2015 Singapore Transfer Pricing Guidelines provide in detail the IRAS' transfer pricing compliance program and positions regarding transfer pricing matters. It consolidates four previous e-tax guides:

- Transfer pricing guidelines, published 23 February 2006
- Transfer pricing consultation, published 30 July 2008
- Supplementary administrative guidance on APAs, published 20 October 2008
- Transfer pricing guidelines for related-party loans and related-party services, published 23 February 2009

On 4 January 2016, the IRAS issued the third edition of its transfer pricing guidelines (2016 Singapore Transfer Pricing Guidelines) to provide further clarity on the application of the cost-plus method, MAPs and APAs.

OECD Guidelines treatment

The 2016 Singapore Transfer Pricing Guidelines are generally consistent with the OECD Guidelines. The principles and transfer pricing methods set out in the OECD Guidelines are acceptable in Singapore.

However, there are certain differences between the OECD Guidelines and the 2016 Singapore Transfer Pricing Guidelines. In particular, if related parties have a cost-pooling arrangement, the IRAS is only prepared to accept that services are charged without a markup provided that:

- Each participant's share of the costs must be borne in the form of cash or other monetary contributions.
- The services are not provided to any unrelated-party.
- The provision of the services is not the principal activity of the service provider. If the cost of providing the services does not exceed 15% of the total expenses of the service provider for that financial year, the services will not be treated as the principal activity.
- The services are listed in Annex C of the revised Singapore Transfer Pricing Guidelines.
- There is documentation showing that the parties intended to enter into the cost-pooling arrangement before the provision of the service.

In line with the master file and local file approach under Action 13 of the OECD Action Plan on BEPS, the 2016 Singapore Transfer Pricing Guidelines also contain a two-tiered approach in which both group- and entity-level documentation is required. There is no specific requirement in the 2016 Singapore Transfer Pricing Guidelines for country-by-country reporting (CbCR), as proposed by the OECD, although the group-level information required by the IRAS includes some extraterritorial items, such as the business activities and functions of each party in the group for the group's business that is relevant to the Singapore taxpayer.

However, on 16 June 2016, the Ministry of Finance (Singapore) announced that it will join the inclusive framework for the global implementation of the OECD BEPS project as a BEPS Associate. Singapore is committed to implementing the four minimum standards under the BEPS project. As part of the proposed implementation of Action 13, Singapore will implement CbCR for financial years beginning on or after 1 January 2017 for Singapore-headquartered multinational enterprises with revenues exceeding SGD1.125 billion (equivalent to approximately EUR750 million).Further clarification on the detailed CbCR guidelines will be released in September 2016.

Documentation requirements

The 2016 Singapore Transfer Pricing Guidelines indicate that taxpayers should prepare and maintain contemporaneous transfer pricing documentation to substantiate the taxpayer's transfer pricing instead of justifying positions only after the event. Contemporaneous transfer pricing documentation refers to documentation and information that taxpayers have relied upon to determine the transfer price prior to, or at the time of, undertaking the transactions. The IRAS has further clarified that it would also accept, as contemporaneous transfer pricing documentation, the documentation prepared at any time no later than the time of completing and filing the tax return for the financial year in which the transaction takes place.

Specifically, there are Singapore dollar value thresholds for related-party transactions that will warrant the preparation of transfer pricing documentation when these thresholds are exceeded. These thresholds are:

Category of related-party transactions	Threshold (SGD) per financial year
Purchase of goods from all related parties	15 million
Sale of goods to all related parties	15 million
Loans owed to all related parties	15 million
Loans owed by all related parties	15 million
All other categories of related-party transactions. Examples: ‣ Service income ‣ Service payment ‣ Royalty income ‣ Royalty expense ‣ Rental income ‣ Rental expense	1 million per category of transactions

In addition, documentation is not required in the following four situations:

- When the taxpayer transacts with a related-party in Singapore and such local transactions (excluding related-party loans) are subject to the same Singapore tax rates
- When a domestic loan is provided between the taxpayer and a related-party in Singapore and the lender is not in the business of borrowing and lending
- When the taxpayer applies the safe harbor 5% cost markup for routine services
- When the related-party transactions are covered under an APA, although annual compliance reports are still required under an APA

Singapore (continued)

Priorities/pricing methods

The IRAS generally does not have a specific preference for any of the five prescribed methods outlined in the OECD Guidelines, and it stipulates that the transfer pricing method that produces the most reliable results should be selected and applied. However, there is an exception for loan transactions, and the 2016 Singapore Transfer Pricing Guidelines state that the CUP method is the preferred method for substantiating the arm's-length nature of interest charges.

To apply the arm's-length principle, the 2016 Singapore Transfer Pricing Guidelines recommend a three-step approach:

- Step 1: Conduct a comparability analysis
- Step 2: Identify the most appropriate transfer pricing method and tested party
- Step 3: Determine the arm's-length results

Return disclosures/related-party disclosures

No specified disclosures are required on Form C, the Singapore Income Tax Return, for the year of assessment 2016.

Transfer pricing-specific returns

There is no transfer pricing return required to be filed, either separately or along with the Singapore Income Tax Return.

Documentation deadlines

Taxpayers are not required to submit their transfer pricing documentation when they file their tax returns. However, taxpayers should keep their transfer pricing documentation and submit it to the IRAS within 30 days upon request.

Taxpayers are encouraged to update their transfer pricing documentation at least once every three years, while related-party transactions should be tested annually against the arm's-length results.

Transfer pricing penalties

There are no specific penalties regarding transfer pricing adjustments. Under general tax provisions relating to understatements of income, the penalty range is 100% to 400% of the underpaid tax.

Penalties may also apply if taxpayers fail to provide adequate transfer pricing documentation upon request by the IRAS. Such penalties will be invoked under Section 94(2) of the Singapore Income Tax Act for not complying with statutory record-keeping requirements.

Penalty relief

Adequate and contemporaneous transfer pricing documentation to support the pricing of the taxpayer's related-party transactions will help in mitigating penalties, particularly record-keeping requirements for tax.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is as follows:

- If the year of assessment is 2007 or earlier, the statute of limitations is six years from the end of the year of assessment to which the transfer pricing issue relates.
- If the year of assessment is 2008 or later, the statute of limitations is four years from the end of the year of assessment to which the transfer pricing issue relates.

Singapore corporate taxpayers are required to file tax returns by 30 November of the following year after the applicable financial year. For example, a Singapore corporate taxpayer that had a 31 March 2015 financial year-end will be required to file its Singapore corporate tax return by 30 November 2016. The applicable year of assessment in this case is 2016, which corresponds with the basis period that is the financial year ended 31 March 2015.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as medium. If an audit is conducted, the likelihood of transfer pricing being reviewed is characterized as medium. The likelihood that the transfer pricing methodology is challenged as part of an audit is also characterized as medium.

With the passing of Section 34D of the Singapore Income Tax Act in 2009, the IRAS has clearly increased its audit focus on transfer pricing. Consequently, the number of transfer pricing consultations (TPCs) and transfer pricing queries has increased. The TPC is a process whereby the IRAS selects taxpayers for review of their compliance with the 2016 Singapore Transfer Pricing Guidelines. Taxpayers are selected based on risk indicators, such as the value of related-party transactions, the performance of the taxpayer's business over time and the likelihood that taxable profits may be understated by inappropriate transfer pricing. The IRAS has stated examples of circumstances with high transfer pricing risks, namely:

- Transactions with cross-border related parties that are of a high value relative to the taxpayer's other transactions
- Transactions with related parties subject to a more favorable tax treatment
- Recurring losses or large swings in operating results, which may be unusual given the functions and assets of the taxpayer and the risks it assumed
- Operating results that are not in line with businesses in comparable circumstances
- Transactions involving R&D or marketing activities, which could lead to development or enhancement of intangibles
- Use of intellectual property, proprietary knowledge or other intangibles in the business
- Indications (such as through engagement with tax authorities, a country's audit focus, etc.) that the transactions are likely to be subject to transfer pricing audit by tax authorities

In addition to TPCs, transfer pricing audits could also develop from transfer pricing queries raised by the IRAS as part of the IRAS' annual review of the taxpayer's tax return. In a recent trend, the IRAS is making detailed information requests during the early stages of a transfer pricing audit, including a request for transfer pricing documentation up front upon the commencement of an audit.

APA opportunity

Unilateral, bilateral and multilateral APAs are available, and requests for APAs have markedly increased in recent years. The 2016 Singapore Transfer Pricing Guidelines outline the procedures for applying for an APA. Guidance is provided for the following:

- Time frame for discussing APA request: taxpayers ideally should approach the IRAS more than 10 months prior to the first day of the APA period to initiate discussions regarding the APA request
- Content requirements for pre-filing materials and formal APA submission: upon review of the proposed APA at the pre-filing stage, the IRAS would indicate its inclination to accept an APA application no later than four months before the first day of the covered period. Subsequently, the taxpayer needs to submit the formal APA application within three months from receipt of the IRAS' indication
- The process following the filing of the formal APA submission, including regular updates with the taxpayer
- The circumstances under which the IRAS may reject a taxpayer's APA request
- The nature of taxpayer resources and commitments that should be made when an APA is requested
- Rollbacks being limited to bilateral and multilateral APAs

Impact of new OECD BEPS Action 8–10 guidelines

Not Applicable.

Slovak Republic

Taxing authority and tax law

Taxing authority: Slovak Financial Directorate, local tax authorities and Ministry of Finance

Tax law: Income Tax Act and Act on Tax Administration (Tax Code)

Relevant regulations and rulings

Transfer pricing rules in Slovak Republic are stipulated by:

- Sections 2, 17 (5, 6, 7) and 18 of the Income Tax Act
- Relevant sections of the Act on Tax Administration (Tax Code)

The Slovak transfer pricing rules established in the Income Tax Act generally conform to the OECD Guidelines. The OECD Guidelines were published in the *Slovak Financial Newsletter* but are not legally binding. Nevertheless, the tax authorities generally follow them in practice.

Since 2009, taxpayers are obliged to prepare and keep transfer pricing documentation supporting the transfer pricing method used in transactions with foreign related parties. Since this period, the Slovak Ministry of Finance regularly issues official Guidances on the contents of transfer pricing documentation.

The following Guidances were issued as of 15 August 2016:

- Guidance No. MF/8288/2009-72 of the Slovak Ministry of Finance on the Contents of Transfer Pricing Documentation ("2009 Guidance", still in force for periods 2009-2013);
- Guidance No. MF/8120/2014-721 of the Slovak Ministry of Finance on the Contents of Transfer Pricing Documentation ("2014 Guidance", still in force for 2014 period);
- Guidance No. MF/011491/2015-724 of the Slovak Ministry of Finance on the Contents of Transfer Pricing Documentation ("2015 Guidance", not in force anymore, replaced by 2016 Guidance in 2016);
- Guidance No. MF/014283/2016-724 of the Slovak Ministry of Finance on the Contents of Transfer Pricing Documentation ("2016 Guidance", still in force for 2015 period onwards, replacing 2015 Guidance in 2016).

OECD Guidelines treatment

The tax authority usually follows the provisions of the OECD Guidelines (e.g., the acceptable methods listed in the Income Tax Act correspond with the methods listed in the OECD Guidelines). As of 1 January 2014, the Slovak Income Tax Act reflects the 2010 version of the OECD Guidelines (e.g., elimination of preference in applying the selected transfer pricing method).

As of now, there is no formal acknowledgement of the 2016 BEPS-updated version of OECD Guidelines in the Slovak legislation.

Documentation requirements

The required content of transfer pricing documentation is stipulated in the official Guidances of the Slovak Ministry of Finance (2009 – 2016 Guidance). The Guidances aim to conform to the European Union Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union (No. 2006/C 176/01).

As of 2015, transfer pricing documentation must be prepared for all related-party transactions (both foreign and domestic) regardless of their materiality in at minimum the "shortened" documentation extent (as described below). As regards transactions the amounts of which exceed the level of materiality for accounting purposes (as defined by International Financial Reporting Standards) or the flat minimum materiality threshold of EUR 1 million per transaction, have to be generally documented in "basic" or "full" extent, and are dependent on other factors described further below.

Documentation must be prepared separately for each transaction or homogenous group of transactions with the same related-party. Aggregation of transactions is possible only if certain conditions are met:

- Entered into with one entity
- transactions with the same conditions
- closely connected transactions or transactions conditional to each other
- comparable in terms of assets used, functions and risks

Aggregation should give a better picture on the particular TP methods used. It generally requires explanation in the documentation.

The 2016 Guidance prescribes three distinct transfer pricing documentation content extents for different categories of Slovak taxpayers.

"Full" documentation

For the following categories of taxpayers, the 2015 Guidance prescribes the required contents of the transfer pricing documentation, which are generally in line with the Masterfile approach set out by the EU Code of Conduct on Transfer Pricing Documentation:

- taxpayers obliged to use International Financial Reporting Standards (banks, insurance companies, pension funds, companies exceeding a certain size)
- taxpayers entering into transactions with related parties who are taxpayers of non-treaty countries[1]
- taxpayers requesting binding tax authority decision within the Advanced Pricing Agreement (APA) procedure
- taxpayers requesting corresponding transfer pricing adjustments to their tax base (with the exception of corresponding adjustments resulting from their domestic related-party transactions)
- taxpayers deducting tax losses exceeding amount of EUR 300,000 within particular documented tax period or EUR 400,000 within two consecutive tax periods
- taxpayers utilizing tax relief in line with the relevant Slovak legislation

"Shortened" documentation

For natural persons and very small taxpayers qualifying as micro entities under the Slovak Act on Accounting, the 2015 Guidance prescribes only very limited contents of transfer pricing documentation under the concept of so called "shortened" documentation. The requirements under this documentation category combine merely basic information from both master and local files into one documentation, including identification of particular members of taxpayer's group, description of group's organizational / ownership structure along with limited information on intra-group transactions of the taxpayer (i.e. identification of transaction parties, transaction amounts, conditions of the transaction).

[1] Article 2 letter x) of the Slovak Act No. 595/2003 Coll. on Income Taxes

"Basic" documentation

The rest of taxpayers who do not fall into the categories of "full" or "shortened" documentation are obliged to keep transfer pricing documentation in "basic" extent. Similarly to the full documentation, the basic documentation also consists of master and local file. As to the contents of the basic documentation, these are similar, but less extensive than the contents of the full documentation. Most importantly, the basic documentation does not require proving compliance with the arm's-length principle, e.g. a benchmarking analysis is not in the stipulated contents of documentation.

In addition, the 2016 Guidance contains specific documentation requirements for pharmaceutical companies, such as to include in their documentations information on cash and in-kind contributions provided on their behalf from their foreign related parties.

For the 2014 period, the documentation requirements are set under the previous Guidance No. MF/8120/2014-721 of the Slovak Ministry of Finance on the Contents of Transfer Pricing Documentation ("2014 Guidance"). In comparison with the 2014 Guidance, the main changes introduced within the 2016 Guidance are summarized below:

- transfer pricing rules and documentation requirements for domestic related parties
- introduction of universal documentation obligation and minimum materiality threshold
- extension of taxpayer categories obliged to maintain "full" transfer pricing documentation
- extension of "full" documentation content requirements
- specific requirements for taxpayers from pharmaceutical sector

For the periods starting before 1 January 2014, the 2014 Guidance refers to the former Guidance No. MF/8288/2009-72 of the Slovak Ministry of Finance on the Contents of Transfer Pricing Documentation ("2009 Guidance"), additionally stipulating contents of the documentation for taxpayers not obliged to use International Financial Reporting Standards, under the concept of so called "simplified" documentation. Such documentation should comprise merely list of controlled transactions along with their important characteristics. Simplified documentation does not require proving compliance with the arm's-length principle, e.g. a benchmarking analysis is not in the stipulated contents of the simplified documentation.

The language of the documentation should be Slovak, unless otherwise approved at the taxpayer's request. The tax authorities have stated that documentation presented in English, German or French may also be accepted. There has been positive experience in submitting documentation in English.

Priorities/pricing methods

The Slovak Income Tax Act is in line with the OECD Guidelines. A combination of methods is permitted. Non-listed methods may be used if they comply with the arm's-length principle.

Return disclosures/related-party disclosures

The taxpayer should state (on a specific row of the tax return) the difference (if any) between the prices charged in transac¬tions with related parties and the arm's-length prices that decreased the tax base / increased the tax loss. The tax base must be increased by this difference at the same time. The corporate income tax return includes a summary table where the amounts of various types of related-party sales and purchases must be stated (regardless of whether they diverge from arm's-length prices).

Transfer pricing documentation does not need to be enclosed with the tax return.

Transfer pricing-specific returns

There are no transfer pricing-specific returns in Slovakia.

Documentation deadlines

Transfer pricing documentation does not have to be disclosed unless the tax authorities request it, in which case it must be submitted within 15 days upon the request. As of January 2014, submission of documentation may be required without opening a tax audit prior to the request.

Transfer pricing penalties

The 2016 wording of the Slovak legislation did not provide for penalties specific to transfer pricing.

The penalty for unpaid (understated) tax liability equals generally 3x the basic interest rate of the European Central Bank per annum, or 10% of additional tax assessment per annum (per each year of statute of limitation period), within the agreed limits for assessable penalties, i.e. between the minimum penalty cap of 1% and maximum penalty cap of 100% of the additional tax assessment.

In addition, the penalty for the breach of non-monetary obligations (e.g. non-existing or insufficient supporting documentation) in the amount of up to EUR 3,000 can be imposed. On assessing the penalty for the breach of non-monetary obligations, the tax authorities have to take into account all the circumstances that led to the breach of non-monetary obligations (e.g. importance, duration and consequences of the breach).

Penalty relief

As of 2016, there is a general option to submit a supplementary tax return within 15 days from the beginning of the tax audit, which offers taxpayers a possibility to decrease the imposed penalty, compared to tax audit determination of the tax assessment, i.e., a penalty at 7% p.a. or twice the base interest rate of the European Central Bank p.a. (whichever is higher) could be assessed (instead of 10% p.a. / 3x ECB base rate p.a.).

Statute of limitations on transfer pricing assessments

The statute of limitations in Slovakia in the case of applying a double tax treaty is 10 years from the end of the year in which the tax return is filed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of a corporate income tax audit in Slovakia is high, while the likelihood that the taxpayer's related-party transactions will be reviewed as part of that audit is medium to high.

Based on experience with transfer pricing audits in Slovakia, if transfer pricing is reviewed as part of the tax audit, the risk of a challenge by the Slovak tax authorities of the taxpayer's methodology is also medium. After the obligation to prepare and keep transfer pricing documentation was introduced, the tax authority has intensified its activity on transfer pricing and is increasingly focused on the transfer pricing and related documentation when auditing companies that form part of a multinational group. In 2013, a group specializing in transfer pricing was established within the structure of the tax authorities, and the first audits focused solely on the transfer pricing issues that have been commenced.

Notwithstanding the focus of documentation rules on taxpayers that are obliged to maintain the so called "full" transfer pricing documentation, transfer pricing audits do not focus only on such taxpayers. The likelihood of a transfer pricing audit is roughly the same for companies falling in the "basic" documentation scope (e.g., for midsize companies).

APA opportunity

According to Section 18(4) of the Slovak Income Tax Act, in cases of related-party transactions, the taxpayer may request that the tax authority approve the selected transfer pricing method. If approved, the method should be applied for a maximum of five tax periods. The Income Tax Act does not explicitly stipulate that the tax authority may approve the particular price or margin percentage used. Nevertheless, the Slovak tax authority may approve the practical application of the transfer pricing method (e.g., process of identifying comparable transactions or entities). Given this, an APA should provide a reasonable level of comfort for taxpayers.

The request for an APA must be filed at least 60 days before the start of the tax period in which the proposed method should apply. As of 1 September 2014, an APA request is subject to a fee of EUR 4,000 to EUR 30,000 (based on the value of the related transaction).

Impact of new OECD guidelines

There are no official positions of the Slovak tax authorities nor case law with regard to the new 2016 OECD TP Guidelines amendments based on the BEPS Reports on Action Steps 8-10 and 13 issued on 23 May 2016.

A separate draft of Slovak CbCR legislation was submitted to the Parliament in the late 2016.

Slovenia

Taxing authority and tax law

Taxing authority: Financial Administration of the Republic of Slovenia (*Finančna Uprava Republike Slovenije*, or FURS)

Tax law:

- Corporate Income Tax Act (*Zakon o davku od dohodkov pravnih oseb*)
- Regulation on Transfer Prices (*Pravilnik o transfernih cenah*)
- Regulation on the Acknowledged Interest Rate (*Pravilnik o priznani obrestni meri*)
- Tax Procedure Act (*Zakon o davčnem postopku*)

Relevant regulations and rulings

Articles 16 and 17 of the Corporate Income Tax Act provide the definition of "related-party" and the general requirements with which related parties need to comply. These requirements are explained in more detail in the Regulation on Transfer Prices and provide further rules on transfer pricing methods, comparability analysis, use of a range, grouping of transactions, service and royalty charges, cost contribution agreements and related-party relationships.

Article 18 of the Corporate Income Tax Act sets the basis for documentation requirements, which are then elaborated upon in the Tax Procedure Act.

Article 19 of the Corporate Income Tax Act provides the general rules on the acknowledged interest rate on intercompany loans. The rules are defined in more detail in the Regulation on the Acknowledged Interest Rate. The acknowledged interest rate rules establish a safe harbor for interest rates on intercompany loans.

Article 382 of the Tax Procedure Act provides general information on transfer pricing documentation requirements. Provided that the proposed amendments to the Tax Procedure Act are adopted, requirements for country-by-country reporting (CbCR) reporting will be provided under Article 255.

Articles 397 and 398 of the Tax Procedure Act provide regulations regarding transfer pricing penalties.

OECD Guidelines treatment

As the Slovenian transfer pricing regulations follow the principles established in the OECD Guidelines, the tax authority, in the absence of guidance in Slovenian legislation, will also consider the OECD Guidelines during tax audits.

Documentation requirements

The Slovenian transfer pricing documentation requirements are based on the master file concept. Under this concept, as recommended by the European Community (EC) Council, as well as the European Union (EU) Joint Transfer Pricing Forum, the transfer pricing documentation should consist of a master file and a country-specific file. Disclosure of any related-party transaction amounts should be provided with the tax return when it is filed with the tax authority.

Slovenia (continued)

The local legislation sets the following documentation requirements:

The master file

The master file normally includes documentation common to the whole group. The group's headquarters may prepare it, and it should include a general description of the way that the group companies conduct business. The file should include:

- A description of the taxable person
- A description of the global organizational structure of the group
- An explanation of the type of connections between the companies in the group
- An explanation of the method used in the determination of transfer prices
- A description of the business activities and business strategies (including any general economic and other factors, an assessment of the competitive environment, and more)

Country-specific documentation

The local documentation should describe the company's course of business, but on a local level. The country-specific documentation should normally include:

- A description of transactions between affiliated persons
- A functional analysis determining the main functions performed and risks undertaken by the taxpayer and outlining which adjustments may need to be made in relation to comparable situations
- A description of any comparables search performed
- A description of business strategies
- A description of goods and services transferred or rendered
- A description of the method applied for establishing the arm's-length price
- Any other information that might be relevant from a transfer pricing perspective

CbC reports

Further to the recent proposal of amendments to the Tax Procedure Act, Slovenian-based ultimate parents of multinational groups with annual consolidated group revenue EUR750m or more would be required to submit CbC reports for financial years starting on or after 1 January 2016. Provided that the proposal is adopted, such reports will have to include the following data, collated for each tax jurisdiction in which the multinational group is present:

- Revenues
- Profit (loss) before income tax
- Income tax paid and income tax accrued
- Stated capital
- Retained earnings
- Number of employees
- Tangible assets other than cash and cash equivalents

Slovenia (continued)

Furthermore, the CbC report should provide the following information on each group entity:

- Tax jurisdiction
- Jurisdiction of establishment (when not the same as the tax jurisdiction)
- Main business activities

Priorities/pricing methods

Following the changes to the OECD Guidelines regarding the hierarchy of transfer pricing methods, the Regulation on Transfer Prices introduced the "best-method rule" in the beginning of 2012. The best-method rule replaced the previous hierarchy, which preferred traditional transactional methods over transactional profit methods.

However, to some degree, the preference for transactional methods over profit methods still exists; when both can be applied in an "equally reliable manner," the traditional transactional method should be selected. There is a similar conclusion regarding the application of the CUP method, which will trump any other method if both can be applied in an equally reliable manner.

Return disclosures/related-party disclosures

Related-party transactions are reported as a component of the annual corporate income tax return.

Transfer pricing–specific returns

As mentioned above, related-party transactions must be reported as part of the information included on the annual corporate income tax return. In addition, if certain conditions are fulfilled, specifically prescribed attachments must be enclosed with the corporate income tax return. Such conditions include:

- If the cumulative amount of given or received loans from a particular related-party exceeds EUR50,000 in a tax period, the taxpayer must disclose the name of the related-party, its state of residence and tax number, the cumulative amount of the loan given or received and the relationship with the related-party.
- Similarly, if the cumulative amount of other intercompany receivables or liabilities toward a particular related-party exceeds EUR50,000 in a tax period, the taxpayer must disclose the name of the related-party, its state of residence and tax number, the cumulative amount of receivables or liabilities toward the related-party and the relationship with the related-party.

A similar attachment is required if the resident taxpayer has tax losses generated from previous periods, if it is taxed at a 0% corporate income tax rate or at a lower rate than the general one, or if the resident related-party is tax-exempt.

Documentation deadlines

The documentation should be provided to the tax authority upon request, usually made in the course of a tax audit. If it is impossible to submit the documentation immediately, an extension of up to 90 days (depending on the extent and complexity of the information) may be granted. If the master file is not kept in the Slovenian language, the tax authority may request that it be translated before submission, with an extension of 60 days granted to do so.

In line with the proposed amendments of the Tax Procedure Act, the CbC report would have to be submitted to the tax authorities within 12 months following the fiscal year-end.

Slovenia (continued)

Transfer pricing penalties

A taxpayer may be fined up to EUR30,000 if the transfer pricing documentation is not submitted in the prescribed manner; additionally, the individual responsible for preparing the documentation on behalf of the taxpayer may also be fined up to EUR4,000. In the case of a tax adjustment, late payment interest and penalties for offenses may be charged. If the additional tax exceeds EUR5,000, the tax offense qualifies as severe, and fines in the amount of 45% of the additional tax may be levied.

Penalty relief

Penalties (fines) for a tax offense may be avoided if the taxpayer makes a voluntary disclosure before receiving the notice at the beginning of a tax audit or the notice at the beginning of a tax offense procedure or criminal procedure. When making a voluntary disclosure, the taxpayer should adjust the tax liability accordingly.

When making the voluntary disclosure, the taxpayer also must pay the amount of tax due and late payment interest. When tax and late payment interest are paid simultaneously while making the disclosure, the taxpayer avoids facing penalties for a tax offense.

Statute of limitations on transfer pricing assessments

The statute of limitations on corporate income tax assessments is generally five years.

If the tax authorities intervene with any official action against the taxpayer with a purpose to assess or collect tax, the relevant period is reset, without taking into account any previous lapse of time. Nevertheless, the right of the tax authorities to assess and collect tax will cease after 10 years. The transfer pricing documentation must be archived for 10 years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the risk of an annual tax audit is medium. The likelihood that transfer pricing will be reviewed as part of the audit is high. Also, the likelihood that the transfer pricing methodology will be challenged during the tax audit is high.

The tax authority mainly initiates a transfer pricing audit when a Slovenian taxable person is part of a multinational group. The tax authority is currently putting the following transactions under increased scrutiny:

- Intragroup services
- Intangible goods (e.g., royalties and licensing)
- Financial transactions (e.g., loans and cash pooling)

Additional risk factors are the profitability of the local taxpayer, business restructurings, the nature and volume of related-party transactions, transfer pricing issues identified in previous tax audits and information available from the media.

APA opportunity

Starting in 2017, a taxable entity will have the possibility to request a unilateral, bilateral or multilateral APA with the Slovenian tax authorities. However, the following conditions apply:

- The taxable entity and the tax authorities have met beforehand and agreed on the feasibility of an APA.
- The transaction that is subject to the APA has economic substance.

- The taxable entity has a genuine intention to perform such a transaction.
- The taxable entity and the tax authorities agree on concluding an APA.
- The transaction that is subject to the APA will be performed for a longer period of time and is not due to end shortly after the APA is concluded.

The duration of the APA will be determined at the tax authorities' discretion. Administrative fees will apply.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

South Africa

Taxing authority and tax law

Taxing authority: Commissioner of the South African Revenue Service (SARS)

Tax law: Income Tax Act 58 of 1962 (the Act)

Relevant regulations and rulings

Tax law: § 31 of the Act contains the main legislative provisions concerning transfer pricing. Guidance about the application of § 31 is currently contained in Practice Note 7 (6 August 1999) and the addendum to the practice note (29 September 2005).

Section 31 allows the tax authority to consider whether any term or condition imposed as part of any transaction, operation, scheme, agreement or arrangement between connected persons differs from the terms and conditions that would have been agreed to if the parties to the transaction were independent. Any difference in price between what was charged between the connected persons and what would have been charged between independent parties needs to be adjusted in the tax return of the taxpayer. This is often referred to as the primary adjustment.

To the extent that the taxpayer has not recovered the difference between the arm's-length charge and the actual charge from the foreign related-party, a deemed divided will arise (the "secondary adjustment"). On this deemed dividend, 15% dividend withholding tax is due. It is unlikely that a double tax agreement (DTA) will reduce the dividends tax applied to the dividend in specie, although SARS has not specifically indicated this.

As per the current legislation, there are no specific rules in place with respect to intragroup "financial assistance." Section 31 defines financial assistance transactions as any debt, security and guarantees. There are no safe harbor rules in place, and intragroup funding is subject to the same "arm's-length test" as other intragroup transactions. This means that taxpayers must determine the acceptable amount of debt on an arm's-length basis. On 22 March 2013, SARS published a draft Interpretation Note (draft IN) indicating the analysis and documentation that SARS would expect to see in relation to cross-border financial assistance and thin capitalization. However, the draft IN was never finalized, and it is unclear whether and to which extent this is followed by SARS in practice.

OECD Guidelines treatment

Although South Africa is not a member of the OECD, SARS accepts the OECD Guidelines and has largely based its practice on them. By the same token, SARS recognizes the five methods accepted by the OECD Guidelines. The new changes to the legislation will provide closer alignment with the OECD Guidelines and with the approach adopted by the OECD member countries. SARS has also contributed to the United Nations' *Practical Manual on Transfer Pricing for Developing Countries*.

Documentation requirements

Currently, there is no statutory requirement to prepare transfer pricing documentation; however, the income tax return does require confirmation of whether any cross-border related-party transactions were entered into, and it also requests specific information regarding cross-border related-party transactions. In addition, the Income Tax Return (ITR) 14 asks whether a taxpayer has prepared a transfer pricing policy document supporting the arm's-length nature of transactions with connected parties in the respective fiscal year. Therefore, SARS is able more easily to identify high-risk taxpayers and will know if they have transfer pricing documentation in place.

In 2015, SARS introduced legislation, in terms of section 29 of the Tax Administration Act No. 28 of 2011 ("Tax Administration Act"), pertaining to record-keeping requirements, for years of assessment starting on or after 1 October 2016. This legislation sets out additional record-keeping requirement for "potentially affected transactions" for companies where the affected transaction exceeds R100 million. In effect, this will require qualifying companies to keep and retain the records, books of account or documents as set out in the legislation.

Priorities/pricing methods

SARS accepts the methods prescribed by the OECD (i.e., CUP, resale price, cost-plus, TNMM and profit split) and has indicated that it will subscribe to the OECD's view of accepting a best-method approach as long as it is substantiated. SARS may require that adjustments be made to foreign comparable company results used for benchmarking the results of the South African entity to compensate for differences in risks assumed by entities operating in a different jurisdiction.

Practice Note 7 states that the expected impact of geographic differences and other factors on the price would need to be assessed. Hence, the use of foreign comparables is allowed; however, caution should be exercised so that appropriate adjustments reflect differences between the South African and foreign markets.

Return disclosures/related-party disclosures

ITR 14 asks for specific information pertaining to cross-border transactions with connected parties. In particular, taxpayers are required to provide the values of individual cross-border transactions entered into with foreign-connected persons. This includes providing information, such as the amounts received/receivable from foreign related parties and amounts paid/payable to foreign related parties, whether there have been any changes to the company's transfer pricing methodologies. In addition, taxpayers are required to provide certain financial ratios that indicate the level of borrowings and the overall performance of the South African entity.

Transfer pricing-specific returns

There are no transfer pricing returns. All transfer pricing-related questions are in ITR 14, which are covered above.

Documentation deadlines

Although there is no statutory requirement to prepare documentation, SARS recommends that taxpayers with cross-border related-party transactions prepare appropriate documentation. When a taxpayer indicates in ITR 14 that it has prepared transfer pricing documentation, such documentation should be available at the request of SARS.

Transfer pricing penalties

There are no other specific penalties for transfer pricing, but general penalty rules are applicable: penalties could reach 200% of the additional tax resulting from an adjustment (in the event of default, omission, incorrect disclosure or misrepresentation).

Penalty relief

With respect to other penalties that may be imposed under Tax Administration Act, if taxpayers have made conscientious efforts to establish transfer prices that comply with the arm's-length principle and have prepared documentation as evidence of such compliance, SARS will likely take the view that the taxpayer's transfer pricing practices represent a lower tax risk. Such evidence may provide some mitigation against the maximum penalty for the underpayment of income tax of 200%, as provided by the Tax Administration Act.

Statute of limitations on transfer pricing assessments

The normal statute of limitations is three years from the date of assessment. Under the new Tax Administration Act, self-assessment provisions have an extended statute of limitations of five years. As transfer pricing is now a self-assessment provision, the statute of limitations is arguably now five years. This can be extended or removed in the cases of fraud, misrepresentation or nondisclosure of material facts.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

SARS follows a risk approach in assessing the level of transfer pricing risk. If risk is found to exist, SARS will proceed with conducting an audit. In particular, the information that is provided as part of ITR 14 enables SARS easily to identify companies that are more likely to have a high-risk profile. The last few years have seen an increased focus on transfer pricing audits, with some significant assessments being raised. SARS has a specialized transfer pricing team, which has experienced significant growth in the last few years.

The likelihood of a general annual tax audit is currently assessed as medium, and the likelihood of transfer pricing forming a part of such an audit is high. The major focus from an audit perspective under the existing legislation has been implementing stated policies, determining the cost base and examining the comparables used by the tested party to justify that its prices are at arm's-length. Recently, audit activity has increased, and taxpayers are required to provide evidence to support many of the areas scrutinized. The likelihood that the transfer pricing methodology will be challenged is high, especially in a situation in which the taxpayer's transfer pricing methodology is considered not to be the most appropriate methodology, or in which the pricing methodology has been selected but practically cannot be tested or implemented.

APA opportunity

South Africa currently does not have an APA program, although one is being considered. The legislation also currently prohibits SARS from providing an advance ruling to establish a price.

Impact of new OECD BEPS Action 8–10 guidelines

Even though South Africa is not a member of the OECD, it does have OECD observer status and, in principle, follows the OECD Guidelines; the Tax Administration Act makes specific reference to the OECD Guidelines as an "international tax standard." In addition, Practice Note 7 indicates that the OECD Guidelines should be followed in the absence of other specific guidance. Therefore, even though no official or explicit confirmation has been given, it is expected that the revised guidance will be applied by SARS.

The current legislation also makes specific reference to country-by-country reporting (CbCR) reporting as an international tax standard. Furthermore, during 2016, the South African Minister of Finance released regulations concerning the CbC reporting obligations for South African taxpayers that form part of an MNE group. The regulations closely follow the model legislations related to CbC reporting published by the OECD. The first reporting period is the fiscal year (year of assessment) commencing on or after 1 January 2016, and the first CbC reporting will be required to be filed with SARS beginning 31 December 2017.

South Korea

Taxing authority and tax law

Taxing authority: National Tax Service (NTS)

Tax law: South Korean Corporate Tax Act (in South Korea, general tax regulations are provided in the Corporate Tax Act, and transfer pricing regulations are provided in the Law for Coordination of International Tax Affairs [LCITA])

Local GAAP: K-GAAP

Relevant regulations and rulings

- Presidential Enforcement Decree (PED)
- Ministerial Decree and Interpretations

LCITA has been amended to implement BEPS Action 13 on Guidance on Transfer Pricing Documentation and country-by-country reporting (CbCR) reporting.

OECD Guidelines treatment

The LCITA takes priority over the OECD Guidelines. The NTS recognizes the OECD Guidelines, but they have no legally binding effect. Hence, if a taxpayer's argument is based only on the OECD Guidelines and not on the LCITA, the NTS or regional tax offices may not accept it in practice.

After the OECD's 2015 announcement of the BEPS Actions, the NTS revised the LCITA pursuant to BEPS Action 13, requiring master file and local file documentation compliance on the intercompany transactions taken by the taxpayer with its overseas related parties.

Documentation requirements

At the time of filing the corporate income tax return, a taxpayer is required to submit certain transfer pricing reporting forms (refer to the "Return disclosures/related-party disclosures" section below for more details).

Under the contemporaneous transfer pricing documentation rules, to receive relief from the underreporting penalty, taxpayers are required to prepare and maintain transfer pricing documentation by the due date of the annual corporate income tax return filing. Also, documents are required to be submitted in Korean, unless preapproval is provided to submit them in English.

Pursuant to the amendments to the Korean transfer pricing documentation rules applicable for the fiscal year starting on/after 1 January 2016, a Korean taxpayer with an annual revenue of more than KRW100 billion and an overseas related-party transaction amount of more than KRW50 billion must submit an International Related-party Transaction Integrated Report, which includes the master file and local file (i.e., transfer pricing documentation) following OECD BEPS Action 13 within 12 months from the taxpayer's fiscal year-end date.

CbC report filing is also applicable for multinational companies with consolidated revenue greater than KRW1 trillion. The Korean subsidiary of an MNE is required to submit CbC report within 12 months from fiscal year-end of the ultimate parent company, if there is no requirement for CbCR submission in the country where the ultimate parent company is located; or the country where the ultimate parent company is located in has not entered the agreement on the automatic exchange of CbC report. Applicable taxpayer must notify the local district tax office regarding advance notification on CbC report filing within 6 months from fiscal year-end of the Korean taxpayer.

Priorities/pricing methods

The South Korean transfer pricing regulations prescribe the following five transfer pricing methods: CUP, resale price, cost-plus, profit split and TNMM. Other reasonable methods can only be used if the five methods are not applicable. Of the aforementioned transfer pricing methods, the taxpayer is to select the most reasonable method based on the availability and reliability of data.

Return disclosures/related-party disclosures

The LCITA requires a taxpayer to submit the following transfer pricing reporting forms at the time of filing the corporate income tax return:

1. A form stating the transfer pricing method selected and the reason for selecting the method for each related-party transaction; there are different forms for tangible property transactions, intangible property transactions, service transactions and CSAs
2. A summary of cross-border transactions with foreign related parties
3. A summary of income statements of foreign related parties that have cross-border transactions with the South Korean entity

There are certain minimum threshold exemptions for the first and third forms mentioned above based on the transaction amount.

Transfer pricing-specific returns

The transfer pricing reporting forms discussed above form part of the corporate income tax return that is filed with the tax authority.

Documentation deadlines

A taxpayer must submit documents and information, including transfer pricing documentation, requested by the NTS within 60 days of the request. A one-time extension of 60 days may be granted if reasonable circumstances specified in the LCITA exist. For the taxpayer to be eligible for an underreporting penalty waiver for preparing the contemporaneous transfer pricing documentation, the transfer pricing documentation should be prepared by the tax filing due date and submitted to the NTS within 30 days of the request.

The NTS may also request that a taxpayer submit certain information (including transfer pricing documentation) during a tax audit. In that case, the taxpayer may be requested to provide the materials with no grace period (i.e., it may be requested on day one of the tax audit).

Taxpayers subject to filing the International Related-party Transaction Integrated Report shall submit it at the time of the corporate tax filing due date. However, a tax reform proposal was announced on 28 July 2016 to revise the due date for submission to 12 months after year-end.

CbC reporting is due within 12 months after the fiscal year-end date of the ultimate parent company. The automatic international exchange of information between competent authorities of jurisdictions implementing BEPS Action 13 will be effective in 2018.

Transfer pricing penalties

There are two types of penalties associated with a transfer pricing adjustment: an underreporting penalty and an underpayment penalty.

- The underreporting penalty is approximately 10% of the additional taxes resulting from a transfer pricing adjustment.
- The underpayment penalty, which is an interest payment in nature, is calculated as 0.03% of the additional taxes on a transfer pricing adjustment per day (10.95% per year) on the cumulative days. Counting the cumulative days of the underpayment starts from the day after the statutory tax filing due date, which is three months after the fiscal year-end and ends on the date that a payment for the tax assessment is made.

There are certain penalties for failing to comply with information or documentation requests issued by the NTS. A taxpayer must submit information and documents requested by the NTS within 60 days of the request. A one-time extension of 60 days may be granted if reasonable circumstances specified in the LCITA exist. For failure to provide documentation requested by the NTS by the required due date, there is a penalty of up to KRW100 million.

A penalty of KRW10 million shall be imposed on the taxpayer for omitting/falsifying a part of or the whole "Summary of cross-border transactions with foreign related parties" at the time of filing a corporate income tax return.

Further, a penalty of KRW30 million shall be imposed on the taxpayer for omitting/falsifying a part of or the whole International Related-party Transaction Integrated Report at the time of filing a corporate income tax return applicable for the fiscal year beginning on or after 1 January 2016.

Penalty relief

Under Article 13 of the LCITA, if the taxpayer has prepared and maintained contemporaneous transfer pricing documentation for the transfer pricing methods applied to the cross-border related-party transactions reported in the corporate income tax return, and such documentation supports the reasonableness of the transfer pricing methods reported, the penalty for underreporting will be waived if a transfer pricing adjustment is made. To be eligible for an underreporting penalty waiver, the transfer pricing documentation must be submitted within 30 days upon a request by the NTS.

PED Article 23 of the LCITA provides regulations on the contents of the materials needed for the NTS to determine whether there is negligence by a taxpayer regarding the related-party transactions (i.e., contents of a contemporaneous transfer pricing documentation). In general, contemporaneous transfer pricing documentation should include information about the taxpayer's business (including functions performed and factors that can affect the pricing of intercompany transactions with related parties), details about cross-border related-party transactions, an explanation of the transfer pricing method selected and reasons for not selecting other transfer pricing methods prescribed in the regulations, and details about the comparable company or transaction data used.

The regulation also stipulates that the comparable data used should be representative and should not have been selectively chosen to favor the taxpayer's position (i.e., no cherry picking). When a taxpayer applies a transfer pricing method different from that agreed to in an APA or selected by tax auditors in a tax audit, the taxpayer needs to justify the use of the different transfer pricing method.

The underreporting penalty may also be waived in a MAP if the result confirms that the taxpayer is not guilty of negligence. In the case of a unilateral APA, the NTS may decide whether the taxpayer is guilty of negligence. If the taxpayer can show that it: (i) selected and reported the most reasonable transfer pricing method specified in the LCITA, (ii) actually applied the selected method and (iii) maintained supporting documentation, then there is no negligence.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is generally five years from the day after the income tax return filing due date. It extends to 10 years in the case of fraud or another wrongful act and 7 years if a taxpayer does not submit the tax filing on the due date.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Companies should expect to be audited every four to five years, depending on their size, or more frequently, if other special factors exist. The likelihood of transfer pricing being reviewed during a tax audit is high. The NTS, as a matter of policy, requests transfer pricing documentation, and such requests can be made separately from a tax audit. The NTS closely monitors companies whose profitability suddenly drops and companies whose profits fluctuate substantially over a number of years. These companies are likely to be subject to tax audits.

Also, the NTS will likely scrutinize companies paying high royalties abroad or receiving high management service fee charges or cost allocations from overseas related parties. Generally, if transfer pricing is reviewed as part of a tax audit, the tax auditors are likely to challenge the method used by the taxpayer and may propose alternate methods that are less favorable to the taxpayer.

APA opportunity

Unilateral, bilateral and multilateral APAs are available under the LCITA. To encourage the use of APAs, the NTS does not require an application fee, and documents submitted to the NTS with regard to an APA are to be kept confidential, in accordance with the LCITA. In addition, the APA officials of the NTS are making efforts to shorten the APA processing period.

The NTS implemented the Simplified APA (SAPA) program in fiscal year 2015 to reduce the burden of undergoing tax audits for small and medium-sized enterprises (SMEs). With the implementation of the SAPA program for SMEs in 2015, the burden of tax audits will be minimized for those foreign SMEs that operate businesses earnestly. The SAPA program is expected to make APAs more accessible to foreign SMEs with annual revenue of less than KRW50 billion by simplifying the documentation required to be submitted and making certain of completion within one year. The NTS releases annual reports on APAs, which include statistics about the type of APAs being concluded, the countries that are counterparties to APAs, the time taken to process APA applications and other related information. The 2013 NTS APA annual report showed that a total of 405 APAs were applied for and 261 APAs were concluded as of the close of 2013. The annual report also showed that 47 APAs were applied for in 2013. As for processed APAs in 2013, 18 were bilateral APAs and 20 were unilateral APAs.

In recent developments, establishing an Advance Mediation Process between the customs value and transfer pricing (income tax) has been proposed for the LCITA as Article 6 (3). A resident who applies for a unilateral APA may also apply for an advance customs valuation arrangement (ACVA) with the NTS simultaneously. In this case, the commissioner of the NTS will discuss and decide, together with the commissioner of the South Korea Customs Service, the calculation method for transfer pricing and the customs value so that the results from transfer pricing align with the results from customs.

This applies only if the transfer pricing method declared for a unilateral APA uses the CUP method, resale price method or cost-plus method, and the customs method declared for the ACVA uses the transaction value of identical goods or the transaction value of similar goods method, the deductive method or the computed method. The NTS shall notify the taxpayer of the availability of the Advance Mediation Process within 90 days of the date of receipt of the taxpayer's application.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Spain

Taxing authority and tax law

Taxing authority: State Agency of Tax Administration (AEAT) and General Directorate of Taxation (DGT)

Tax law: Spanish Corporate Income Tax Law (CITL)

Relevant regulations and rulings

The transfer pricing regulations are contained in Law 27/2014, approved on 27 November 2014, Article 18 of the CITL.

Transfer pricing documentation requirements have been in effect in Spain since 2006 (following Law 36/2006, applicable to tax periods beginning after 1 December 2006).

On 11 July 2015, by Royal Decree 634/2015, the Spanish Government approved new regulations on transfer pricing documentation requirements based on full implementation of OECD BEPS Action 13, including introduction of country-by-country reporting (CbCR) obligations. The new transfer pricing documentation requirements, as well as the CbC reporting obligations, will need to be complied with for fiscal years beginning on or after 1 January 2016.

OECD Guidelines treatment

Spanish transfer pricing legislation explicitly endorses the application of the OECD Guidelines and those of the European Union Joint Transfer Pricing Forum (EUJTPF).

Documentation requirements

Documentation requirements changed for periods starting on or after 1 January 2016, based on full implementation of OECD BEPS Action 13. For tax periods beginning on or after 1 January 2016, two types of documentation must be maintained: one global document for the group (master file) and one document for each group entity (local file).

The documentation will cover domestic and international transactions. However, transactions within the same fiscal unit are exempted from the documentation requirements. The master file documentation requirements establish the necessity of:

- General descriptions of the organizational, legal and operating group structure, and any changes thereof
- Descriptions of the main activities of the group, including the principal geographic markets where it operates, principal sources of revenue and supply chain of activities representing at least 10% of the group turnover
- Identification of the group entities that enter into related-party transactions, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly
- General descriptions of the nature, amounts and flows of related-party transactions completed by corporate group entities, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly
- General descriptions of the functions performed and the risks assumed by the different group entities, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly, including any changes since the last fiscal year
- List of intangibles (including patents, trademarks and commercial brands) owned by the group, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly, as well as the strategy with reference to the intangible assets' development, ownership and exploitation, amounts involved and significant transfers
- Overall description of the group's funding structure, including main agreements with entities outside the group
- Identification of the group entities carrying out main financing activities: incorporation country and effective center of management location

- Description of the group's transfer pricing policies, including the pricing methodology used to justify the group's policies' compliance with the arm's-length principle
- List of cost-sharing and services agreements between group entities relevant to the Spanish corporate taxpayer
- List of APAs and agreements entered into that are relevant for the Spanish corporate taxpayer
- Corporate group's annual report or equivalent

Group documentation will not be compulsory for groups with turnover under EUR45 million for the previous year.

The local documentation requirements establish the necessity of:

- A detailed description of the taxpayer's business and business strategy, including changes in the business strategy compared with the previous tax year
- A detailed description of management structure, including geographical scope of its functions and reporting lines.
- A description and explanation of the specific controlled transactions, including the transactions (tangible and intangible assets, services, financial, etc.), invoices and amounts of the transactions
- A comparability analysis, including:
  - Amounts of the transactions
  - Characteristics of property and services
  - Functional analysis (functions performed, assets used, risks assumed)
  - Contractual terms
  - Economic circumstances
  - Specific business circumstances
- An explanation about the selection and application of the transfer pricing methods, why the methods were selected and how they were applied
- Any other relevant information used by the taxpayer to value related-party transactions, as well as any agreement entered into with shareholders that may affect the transaction valuation

The tax administration could require further information during a tax audit in regard to the related-party transactions.

For entities with revenues below EUR45 million, limited documentation requirements apply. Furthermore, there are some exemptions for documenting related-party transactions, including:

- Exemptions by volume:
  - For those corporate income tax taxpayers whose transactions carried out with the same related-party do not exceed EUR250,000 at market value (taking into account the total transactions carried out with the same related-party)
- Exemptions by transaction characteristics:
  - Performed between entities within tax consolidation groups
  - Performed between economic interest groupings or temporary business alliances and their shareholders
  - Carried out within the scope of an initial public offering
  - Carried out between savings banks integrated in a vehicle approved by the Bank of Spain

Spain (continued)

In addition, CbC reporting obligations apply to Spanish tax resident entities that are the "head" of a group (as defined under the Spanish commercial law rules) that are not at the same time a dependent of any other entity, to the extent that the consolidated group's net turnover in the immediately preceding fiscal year exceeds EUR750 million. Additionally, it applies to Spanish entities and permanent establishments (PEs) that are, directly or indirectly, held by a non-Spanish resident head entity when:

- The Spanish resident entity or PE has been appointed by its nonresident parent entity to prepare the CbC reporting

Or

- The country in which the head entity is resident: i) has not established CbC reporting obligations in similar terms to Spain, ii) has not signed an automatic exchange of information agreement with Spain in relation to these obligations or iii) has systematically failed to comply with the exchange of information

All Spanish Corporate Income taxpayers must notify the ultimate parent company or surrogate entity that will be preparing and filing before its home country tax administration the Group's CbCR. Notification is due before the year end of the FY to which the CbCR will refer to. CbCR rules are in force for FY 2016 and subsequent FYs.

Priorities/pricing methods

To determine the market value, the law establishes that one of the following methods should be applied: CUP, cost-plus, resale price, profit split or TNMM.

All of these methods have the same preferential level. The selection of the transfer pricing methods should be based on the nature of related-party transactions, the availability of information and the comparability analysis.

Return disclosures/related-party disclosures

Specific disclosure rules exist for transactions with tax havens, even with unrelated parties (as per a blacklist).

Transfer pricing–specific returns

The related-party transactions have to be included in the corporate income tax return. There are no specific transfer pricing returns for taxpayers.

Documentation deadlines

Companies will have to maintain documentation once the corporate income tax return is filed.

The CbC report will have to be submitted before the Spanish tax authorities within 12 months from the fiscal year closing date (i.e., companies subject to this obligation with a fiscal year ending on 31 December 2016 need to file the CbC report by 31 December 2017).

Transfer pricing penalties

Failure to comply with the documentation requirements specified in the regulations may result in major penalties. These penalties can result from not having correct documentation or from not applying the arm's-length principle (market value).

When the assessment does not produce a tax adjustment, the penalty will be EUR1,000 per fact or EUR10,000 per group of omitted, inaccurate or false facts.

When the tax authorities adjust the pricing of a transaction, the penalty may be up to 15% of the gross adjustment.

There will be no penalties if the documentation obligation has been complied with, even if the tax authorities reassess the value of the transactions.

The regulations also include the applicability of "secondary adjustments" (i.e., in those transactions in which both values will have, for the related parties, the tax treatment that corresponds with the nature of the profit realized). The law makes a clarification for cases in which the link is defined in light of the relationship between the shareholder and the entity, and the difference shall (in proportion to the entity's degree of participation) be considered as:

- Dividends, whenever such difference is in favor of the shareholder
- Contributions by the shareholder to the entity's equity, whenever the difference is in favor of the entity

Secondary adjustment does not apply if parties agree to repatriate the excess of profits as assessed by the tax administration (para. 4.72 of the OECD Guidelines).

The above sanctions are compatible with aggravating circumstances, such as resisting, obstructing, excusing or negating the tax authorities' actions.

Penalty relief

Some reductions are applicable to penalties. Penalties do not apply if the documentation requirements have been completely fulfilled, even if the tax authorities propose a reassessment.

Statute of limitations on transfer pricing assessments

A general statute of limitations of four years applies. The term will be interrupted in the case of a tax audit. If a new income tax return is filed with the tax authorities, the four-year period is suspended and a new one begins.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit varies from one industry to the other and depends on the taxpayer's size. Very large companies (annual revenues in excess of EUR60 million) normally come under audit on a yearly basis; hence, the likelihood of a tax audit for such companies is high.

The likelihood of a general audit for large companies (annual revenues between EUR6 million and EUR60 million) is medium, while the likelihood of audit for others is low. However, the tax authorities establish their annual audit plans based on the risk assessment of each taxpayer, so companies for which risk factors apply may be exposed to an increased risk.

The likelihood that transfer pricing will be reviewed as part of an audit is high if the taxpayer regularly enters into cross-border related-party transactions. For all other cases, the likelihood of a transfer pricing review during a general audit is medium.

When the transfer pricing policy is under review, the likelihood of a challenge to the transfer pricing methodology is high. In particular, tax authorities more often aggressively challenge the comparability analysis by applying the most recent OECD guidance to the nine-step process and interquartile range application. The tax authorities have stated that transfer pricing audits are an area of major attention, particularly with regard to business restructurings and intangible transactions.

APA opportunity

Taxpayers may request that the tax authorities issue rulings on related-party transactions before they are carried out. This request has to be filed with a proposal based on the arm's-length principle. On the other hand, the tax authorities may also settle agreements with other tax authorities to determine the market value of the transactions jointly (i.e., bilateral APAs).

The new regulation has improved the previous regime on APAs by extending the valid term to a six-year period (encompassing the previous year, when the time limit for filing the tax return has not yet expired, the current year and the next four years). Also, an APA can be rolled back to tax periods for which a tax return has already been filed, even in a case in which the tax administration has produced a reassessment. This way, the APA may bring taxpayers an opportunity to settle disputes with the tax administration.

Impact of new OECD BEPS Action 8–10 guidelines

Spanish transfer pricing legislation explicitly endorses the application of the OECD Guidelines. It is expected that the amended OECD Transfer Pricing Guidelines 2016, which were updated with the BEPS Action 8–10 reports on 23 May 2016, will not be implemented in the Spanish tax legislation nor will an explicit reference in the domestic law be incorporated referring to the latest approved version of the OECD Guidelines. However, the OECD Guidelines will be applied as soft law by the Spanish tax authorities. In that sense, it is currently not clear as from what date the amendments will be in effect, and it is expected that Spain will follow the OECD recommendations.

Sri Lanka

Taxing authority and tax law

Taxing authority: Department of Inland Revenue (IRD)

Tax law: Inland Revenue Act (IRA)

Relevant regulations and rulings

Transfer pricing regulations are contained in *Extraordinary Gazette* No. 1823/5 issued on 12 August 2013 under and in terms of §§ 104 and 104A of the IRA.

OECD Guidelines treatment

Although Sri Lanka is not a member of the OECD, the IRD generally refers to the OECD Guidelines to resolve matters of interpretations of its own transfer pricing regulations. By the same token, the IRD broadly recognizes the pricing methods stipulated in the OECD Guidelines.

Documentation requirements

Transfer pricing regulations require extensive contemporaneous documentation. Taxpayers are required to keep all of it in English, evidencing that associated undertaking transactions have been established on an arm's-length basis. However, such documentation is required only if aggregate international and domestic transaction values exceed LKR100 million and LKR50 million, respectively, for any year of assessment.

Priorities/pricing methods

The IRD recognizes five pricing methods: the traditional transaction methods (CUP, resale price and cost-plus) and the profit methods (profit split and TNMM). The process of selecting a method should be aimed at finding the most appropriate method to ascertain the arm's-length price. However, the profit split method is accepted as appropriate when unique intangibles or interrelated transactions exist.

Return disclosures/related-party disclosures

Taxpayers are required to file, together with the annual Income Tax Return, the following, if the aggregate value of international transactions with associated undertakings is LKR100 million or more:

- Disclosures by the director/principal officer/precedent partner
- A Certificate of the Director/Principal Officer/Precedent Partner on Transfer Pricing
- A Transfer Pricing Disclosure Form and a Certificate of the Approved Accountant

In accordance with Sri Lankan Accounting Standards, the company is required to disclose related-party transactions in its financial statements.

Transfer pricing-specific returns

Under the IRA, there is no specific tax filing requirement for transfer pricing purposes up to the year of assessment

2014–15. However, the IRD issued new *Extraordinary Gazettes* on 31 March 2016 requiring taxpayers to file details of their international transactions with associated undertakings with the Income Tax Returns. The *Gazettes* also require an independent Approved Accountant to certify that the director's disclosures have been made and the necessary documentation has been examined by the Approved Accountant. This requirement is effective from the year of assessment 2015–16, and therefore the first filing had to have been made on or before 30 November 2016.

Documentation deadlines

The documentation that is required if the threshold mentioned above is exceeded should be furnished upon request. The regulations require taxpayers to retain documents for a period of five years.

Transfer pricing penalties

The IRA does not impose penalties targeted specifically at transfer pricing, and there are no provisions for applying penalties for a lack of transfer pricing documentation by itself. However, the IRD is empowered to take punitive action under the IRA against any person who without a reasonable cause files an incorrect Income Tax Return, furnishes any incorrect information, fails to furnish an Income Tax Return on time, fails to inform chargeability of tax or makes an incorrect statement. Offenses can be subject to a fine, imprisonment or both.

Penalty relief

Penalties may be avoided by establishing reasonable cause and good faith via preparation of documentation of the taxpayer's application of the arm's-length principle.

Statute of limitations on transfer pricing assessments

The statute of limitations for assessment of cases involving transfer prices is five years from the date of filing of the Income Tax Return. In the case of fraud or willful evasion, the statute of limitations will not apply.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit depends on the facts and circumstances. In general, the likelihood of transfer pricing scrutiny during a tax audit is high.

The IRD has now initiated a number of transfer pricing audits. During these audits, a significant increase in the level of scrutiny of transactions with associated undertakings has been observed.

APA opportunity

The APA rules provide an opportunity for taxpayers to opt for a unilateral, bilateral or multilateral APA, available for a fixed period.

Impact of new OECD BEPS Action 8–10 guidelines

Sri Lanka is not a member of the OECD. However, it is one of the 82 members of the Inclusive Framework on BEPS as of 30 June 2016. Sri Lanka has agreed to implement the four minimum standards, namely: the model provisions to prevent treaty abuse, standardized CbCR, a revitalized peer review process to address harmful tax practices and the agreement to secure progress on dispute resolution.

Sweden

Taxing authority and tax law

Taxing authority: Swedish Tax Agency

Tax law: Swedish Income Tax Act

Relevant regulations and rulings

- Sections 14:19–20 of the Income Tax Act include the arm's-length principle
- Sections 39:15–16 of the Tax Procedures Act (*Skatteförfarandelagen* (*2011:1244*)) include documentation requirements regarding transfer pricing
- Advance Pricing Agreements Act (Lag (2009:1289) *om prissättningsbesked vid internationella transaktioner*)

The Swedish Tax Agency has issued regulations (SKVFS 2007:1) regarding the documentation of the pricing between associated enterprises. It also issues general taxation guidelines and opinions, including information about transfer pricing.

OECD Guidelines treatment

The Swedish tax laws on transfer pricing refer to the OECD Guidelines, and the courts and tax authorities apply the OECD Guidelines.

Chapter IX of the OECD Guidelines (about business restructurings) has significantly increased the Swedish Tax Agency's focus on restructurings.

Documentation requirements

MNEs are required to document transactions with related companies.

The documentation shall include:

- A description of the company, organization and business operations
- Information regarding the characteristics and scope of the transactions
- A functional analysis
- A description of the chosen pricing method
- A comparability analysis

In addition to identifying the functions performed, the functional analysis should reveal the risks assumed and assets used, as well as describe which functions, risks and assets contribute to the company's ability to generate profit. Moreover, the importance of the comparability factors described in the OECD Guidelines is highlighted.

Documentation prepared in accordance with the Code of Conduct regarding European Union transfer pricing documentation (EU TPD) is deemed to comply with the Swedish documentation requirements. The documentation should be prepared in Swedish, Danish, Norwegian or English.

For transactions of limited value, simplified documentation can be prepared. Transactions of limited value for fiscal year 2016 include the sale or purchase of goods amounting to approximately SEK28 million or less per counterparty on a yearly basis, or other transactions amounting to approximately SEK5.5 million or less per counterparty on a yearly basis. Simplified documentation is not possible for transactions involving the sale of intangible assets.

The simplified documentation shall include:

- The group's legal and organizational structure and a description of the business operations
- The counterparty to the transaction and information about that entity's business operations
- Information about the intercompany transactions, including the type of transaction, amounts and value
- The method applied to the transaction to comply with the arm's-length principle
- Information about comparable transactions, if utilized

Priorities/pricing methods

One of the methods described in the OECD Guidelines should be applied. With all things being equal, transaction-based methods are preferred over profit-based methods.

Return disclosures/related-party disclosures

No specific disclosure requirements currently exist for filing the tax return. However, submitting the documentation when filing the tax return may eliminate the risk of penalties.

Transfer pricing-specific returns

There are no specific returns that have to be filed for transfer pricing purposes.

Documentation deadlines

The underlying analysis should, in principle, be prepared in connection with the transaction. The final documentation should be available upon request from the Swedish Tax Agency. Such a request is possible from the date the income tax return is filed.

Transfer pricing penalties

Sweden has no specific transfer pricing penalties; however, general penalties apply, ranging from 10% to 40% of the additional tax imposed. In transfer pricing cases, penalties at a rate of 40% are generally imposed.

Penalty relief

Penalties are imposed on taxpayers for supplying the Swedish Tax Agency with inaccurate or insufficient information.

The risk of penalties may be eliminated if there is full disclosure of the transactions undertaken and the methods used, and all other relevant information is provided. In the preparatory work for the law that introduced transfer pricing documentation requirements, it is stated that if an income adjustment is made because the taxpayer's prices are not deemed to be at arm's-length, the penalties might be reduced or eliminated if the taxpayer has prepared proper transfer pricing documentation.

Sweden (continued)

Statute of limitations on transfer pricing assessments

A general statute of limitations applies, which is five years from the year of assessment.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, is medium to high. The likelihood depends on a number of factors, such as the industry in which the company operates, the occurrence of certain transactions, the outcome of previous tax audits and the changes in turnover or profit levels compared with prior years.

The likelihood that transfer pricing will be reviewed as part of that audit is high. The Swedish Tax Agency's focus on transfer pricing-related issues has increased significantly since formal documentation requirements were introduced in 2007. In some cases, tax audits focus only on transfer pricing.

The likelihood is low to high that the transfer pricing methodology will be challenged if transfer pricing is reviewed as part of the audit. The likelihood depends, for example, on the transactions involved, the transfer pricing methods applied, whether documentation and agreements have been prepared, and whether the documentation and agreements are adhered to in practice.

APA opportunity

In Sweden, formal APA procedures have existed since 1 January 2010.

Impact of new OECD BEPS Action 8–10 guidelines

In December 2015, the Swedish Tax Agency stated that the revised guidance in the BEPS Action 8–10 reports has direct and retroactive effect in Sweden because it is only clarifying previous guidance.

Switzerland

Taxing authority and tax law

Taxing authority: Cantonal Tax Administrations (tax assessments) and Federal Tax Administration (SFTA, competent authority)

Tax law: Federal Direct Tax Act and Federal Law on the Harmonization of the Cantonal and Communal Taxes

Local GAAP: Swiss GAAP

Relevant regulations and rulings

There are no specific references to transfer pricing in Swiss tax law. However, legal support for adjusting a taxpayer's taxable profits is derived from the arm's-length principle in Article 58 of the Federal Direct Tax Act on a federal level, as well as in Article 24 of the Federal Law on the Harmonization of the Cantonal and Communal Taxes on a cantonal level. These two articles reject a tax deduction for non-commercially-justifiable expenditures. This, in turn, provides the legal background for an adjustment to taxable profits in cases of deviations from the arm's-length principle.

A number of administrative directives (including circulars and circular letters) implicitly or explicitly refer to the determination of transfer prices, including:

- Circular Letter No. 8 from 18 December 2001, regarding international profit allocation of principal companies
- Circular Letter No. 4 from 19 March 2004, referring to the taxation of service companies

For intercompany loans, there are administrative directives regarding "safe-harbor regulations," which allow for interest rates to be set without any specific documentation:

- Circular Letter No. 6 from 6 June 1997, regarding hidden equity
- Circular from 23 February 2016 regarding interest payments between related group entities (updated annually)

With regard to BEPS, Switzerland is an active participant in all BEPS workgroups. As such, the multilateral agreement on the exchange of CbC reports was signed by Switzerland in January 2016, and in April 2016, the draft federal act required for its implementation was released by the Federal Council.

OECD Guidelines treatment

The SFTA instructed the Cantonal Tax Administrations, in its Circular Letter of 4 March 1997, to unconditionally follow the OECD Guidelines for transfer pricing matters, including financial transactions. There are no specific tax regulations for business restructurings in Switzerland (i.e., Switzerland follows the OECD view).

Documentation requirements

Switzerland does not have specific legal documentation requirements, but if requested by the SFTA, taxpayers must demonstrate that the transfer prices applied were based on sound economic and commercial reasoning on an arm's-length basis. Related to BEPS Action 13, in April 2016, Switzerland issued a draft law addressing the implementation of CbCR that is expected to be implemented in 2018, but the master file and local file concepts will not be enacted in domestic law.

However, it can be concluded from the Federal Direct Tax Act that, in principle, upon request of the Swiss tax administration, a taxpayer should prepare transfer pricing documentation to support the positions taken. With that said, there is little guidance on the structure of such documentation. However, based on the references to the OECD Guidelines in the 4 March 1997 Circular Letter, the SFTA accepts OECD-compliant documentation in one of the official languages of Switzerland.

Priorities/pricing methods

The SFTA adheres to the OECD Guidelines and the application of the respective methods therein.

According to Circular Letter No. 4 from 2004, the profit margin for service companies must be determined in accordance with the arm's-length principle (i.e., for each individual taxpayer on the basis of comparable uncontrolled transactions considering appropriate margin ranges). The circular letter also implicitly states that the cost-plus method is the most appropriate method for service companies to price their services, based on a functional and risk analysis. However, concerning the provision of financial and management services, the cost-plus method shall be accepted only in exceptional cases.

In principle, the SFTA uses a full-cost approach, including all direct and indirect costs.

Regarding comparables, as there are hardly any Swiss comparables contained in databases used for transfer pricing purposes, comparables from other European, preferably Western European, countries are accepted. No secret comparables are used by Swiss tax authorities.

Return disclosures/related-party disclosures

There are no formal related-party disclosure requirements. However, in the case of a tax audit or request from competent authorities, the taxpayer must provide the requested information, to a reasonable extent.

Transfer pricing-specific returns

There are no specific returns that have to be filed for transfer pricing purposes.

Documentation deadlines

There are currently no special provisions for documentation deadlines. However, upon request, proof of the arm's-length character of transactions typically has to be provided within 30 days.

Transfer pricing penalties

There are no specific transfer pricing penalties, but general penalty rules apply. However, non-tax-deductible penalties are imposed only in cases of fraud or negligence. Although generally no penalties apply, in the event of adjustments, interest charges for late payments are due in such cases.

Penalty relief

There are no special provisions for penalty reductions.

Statute of limitations on transfer pricing assessments

The general rule provides for up to 10 years from the end of the tax year if the tax authorities discover new facts or circumstances.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The SFTA and the cantonal tax administrations are more frequently performing tax audits and increasing their scrutiny of transfer pricing arrangements, and the likelihood for an audit can be considered to be medium. In the case of an audit, there is a high likelihood that the remuneration for transfers of intangibles, services, intercompany financing and business restructurings would be challenged.

APA opportunity

Despite the fact that there are no specific formal APA procedures, tax rulings are a common practice in Switzerland. Hence, unilateral APAs can be obtained in due time and with reasonable efforts. At the SFTA, there is a department dedicated to negotiations of bilateral and multilateral APAs. APA procedures are carried out in accordance with the applicable rules for MAPs. All Swiss-signed double tax treaties usually contain a provision for the MAP, under which the SFTA can launch an APA process.

Impact of new OECD BEPS Action 8–10 guidelines

Regarding the new or amended chapters included in the OECD Transfer Pricing Guidelines, there is no specific cutoff date when they should be applied to transactions. However, in the case of an audit, the Swiss tax authorities are already applying the new guidance, increasingly asking questions on substance and requesting disclosure of the entire value chain.

Taiwan

Taxing authority and tax law

Taxing authority: National Tax Administration (NTA)

Tax laws: Income Tax Law (ITL)

Relevant regulations and rulings

- Article 43-1 of ITL
- Article 50 of the Financial Holding Company Law (FHCL)
- Article 42 of the Business Mergers and Acquisitions Law (BMAL)

The Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's-Length Transfer Pricing (transfer pricing guidelines) became effective 30 December 2004.

OECD Guidelines treatment

The taxing authority recognizes the OECD Guidelines.

Documentation requirements

Except for immaterial related-party transactions, extensive contemporaneous documentation is required. According to the transfer pricing guidelines, an enterprise must have the transfer pricing report and relevant documentation prepared when the annual income tax return is filed.

If the enterprise meets the safe-harbor threshold and does not prepare a transfer pricing report, the tax authority may still request "other supporting documents" as evidence of the arm's-length nature of the intercompany transactions. One example of other supporting documents is the parent's or headquarters' transfer pricing report, as long as it does not significantly vary from the concepts presented in the transfer pricing guidelines.

The Ministry of Finance (MOF) released a letter ruling[1] to further relax the safe-harbor criteria. The rule applies for fiscal years ending December 2008 and afterward. The ruling states that the enterprise is not required to prepare a transfer pricing report if any of the following criteria are met:

- The total annual revenue (including operating and nonoperating) of the enterprise does not exceed TWD300 million

  Or

- The total annual revenue (including operating and nonoperating) of the enterprise exceeds TWD300 million but does not exceed TWD500 million, and additionally:
  - The enterprise does not utilize tax credits of more than TWD2 million in a particular year or a loss carryforward of more than TWD8 million for the preceding 10 tax years to reduce the income tax or undistributed earnings surplus tax
  - The enterprise, under the FHCL or BMAL, has no transactions with any overseas related parties (whether a company or an individual), or the enterprise has no transactions with overseas affiliated companies

[1] Tax Letter Ruling No. 09704555160, issued in November 2008.

- The total annual controlled transactions amount is less than TWD200 million

  Or

- The total annual revenue (including operating and nonoperating) of the enterprise exceeds TWD500 million, but the total annual controlled transactions amount is less than TWD200 million

If the taxpayer does not meet the safe-harbor criteria, its documentation file must contain:

- Business overview
- Organizational structure
- Description of controlled transactions
- Transfer pricing report, including:
  - Industry and economic analysis
  - Functions and risks analysis
  - Application of the arm's-length principle
  - Selection of comparables and related information
  - Comparability analysis
  - Transfer pricing methods selected by the enterprises
  - Transfer pricing methods selected by related parties under the same control
  - Result of comparables search under the best method of transfer pricing
- Report of affiliated enterprises under Article 369 of the Taiwan Company Law
- Any other documents that have significant influence over pricing between the related parties

Priorities/pricing methods

In accordance with the OECD Guidelines, the pricing methods are as follows: CUP, resale price, cost-plus, profit split, comparable profit and other methods prescribed by the MOF. However, the MOF does not follow the changes in the hierarchy of the methods in favor of the most-appropriate-method approach within the OECD Guidelines.

Return disclosures/related-party disclosures

Beginning in 2004, a taxpayer must disclose related-party transactions and include the disclosure with the annual income tax return (pages B2-B5), pursuant to the transfer pricing guidelines. The disclosure generally includes:

- The investing structure
- Identification of related parties
- The related-party transaction amounts by type, including transfer of tangible assets, use of tangible assets, transfer of intangible assets, use of intangible assets, rendering of services, use of funds and other types of transactions prescribed by the MOF
- The related-party transaction balances
- The related parties' financial information, including total revenues, gross margins, operating margins and net margins
- Whether the enterprise has prepared transfer pricing documentation for that fiscal year

Taiwan (continued)

The tax authority has issued safe-harbor rules for related-party transaction disclosures in two rulings.[2] Both rulings provide that the enterprise must disclose related-party transactions on its income tax return if the sum of its annual operating and nonoperating revenue (total annual revenue amount) exceeds TWD30 million and meets one of the following criteria:

- The enterprise has related parties outside Taiwan (including the headquarters and branches)
- The enterprise utilizes tax credits of more than TWD500,000, or utilizes loss carryforwards of more than TWD2 million to reduce the income tax or undistributed earnings surplus tax
- The enterprise has total annual revenue exceeding TWD300 million

Transfer pricing-specific returns

Other than the information specified in the "Return disclosures/related-party disclosures" section above, the NTA does not currently require transfer pricing-specific returns.

Documentation deadlines

According to the transfer pricing guidelines, the taxpayer must have the transfer pricing report and relevant documents prepared when the annual income tax return is filed. If the tax return meets the requirements for certification, the tax Certified Public Accountant has to note on the return whether the enterprise has prepared a transfer pricing report in accordance with the transfer pricing guidelines. The report is not required to be attached to the return upon filing.

In accordance with the transfer pricing guidelines, upon audit, the enterprise has to provide the NTA with the report within one month. With the approval of the NTA, the submission deadline can be extended for one month under special circumstances.

Transfer pricing penalties

Pursuant to the transfer pricing guidelines, up to 200% of the tax shortfall could be imposed if assessed by the tax authority, under certain circumstances.

Penalty relief

Currently, there is no penalty relief regime in place.

Statute of limitations on transfer pricing assessments

The statute of limitations is five years (commencing from the date following the expiration date of the period for payment of said tax) if the tax return was filed timely, and seven years if it was not.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The MOF has issued a ruling[3] that sets forth circumstances under which a transfer pricing audit will be triggered, as follows:

- The gross profit ratio, operating profit ratio and net-income-before-tax ratio are below the industry average.

[2] Tax Letter Ruling Nos. 09404587580 (for tax year 2005) and 09604503530 (for tax year 2006 and afterward).

[3] Tax Letter Ruling No. 09404540920, issued 2 August 2005.

Taiwan (continued)

- The parent or headquarters reports profit on the global consolidated level, but the local affiliate reports loss or much less profit than the industry average.
- The enterprise reports significant fluctuations in profit during the transaction year and in the two preceding years.
- The enterprise fails to disclose related-party transactions in accordance with the related-party transactions disclosure requirements.
- The enterprise fails to determine whether its related-party transactions are within an arm's-length range and fails to prepare documents in accordance with the transfer pricing guidelines.
- The enterprise fails to charge related parties in accordance with the transfer pricing guidelines or charges an abnormal amount.
- The enterprise fails to provide the transfer pricing report upon a tax audit.
- The tax authority adjusted the transfer pricing of the enterprise, in which case the tax years preceding and subsequent to the year of a transfer pricing audit are likely to be selected for audit.
- The enterprise has significant or frequent controlled transactions with related parties in tax havens or low-tax jurisdictions.
- The enterprise has significant or frequent controlled transactions with related parties entitled to tax incentives.
- Any other transaction fails to meet the arm's-length requirements in accordance with the transfer pricing guidelines.

In general, the likelihood of an annual tax audit is characterized as high because the NTA frequently conducts corporate income tax audits.

The likelihood that transfer pricing will be reviewed as part of the annual corporate income tax audit is also characterized as high. All corporate income tax audits may include a request and review of the documentation, as well as related supporting materials. In the past year, there has been increased activity by the NTA, especially with respect to requests to see documentation reports. In particular, companies conducting business through tax havens have attracted more scrutiny, along with those making losses.

The likelihood that the transfer pricing methodology will be challenged during the audit is high, based on any of the factors or circumstances listed below:

- Whether the tested party is the least-complex entity in a transaction
- Why different transactions are tested on an aggregate basis
- Whether the denominator for calculating the profit-level indicator is one of the variables in the controlled transaction
- Whether the use of intangible assets by related parties is remunerated accordingly and fairly
- Whether services provided to related parties are remunerated accordingly and fairly
- When the payment terms for accounts receivable are significantly longer between related parties than third parties, or when overseas deferred expenses are significant or out of the ordinary; in each case, Taiwan's tax authority considers these transactions a type of loan and expects interest income to be paid to the lender
- Whether reasonable fee income is received for acting as the guarantor for a related-party

APA opportunity

APAs are available under Articles 23 through 32 of the transfer pricing guidelines.

If the transactions undertaken by a profit-seeking enterprise with related parties satisfy the following criteria, the enterprise may file an application for an APA with the tax collection authorities pursuant to the following provisions:

- The total amount of the transactions being applied for APAs shall be no less than TWD1 billion, or the annual amount of such transactions is no less than TWD500 million.
- No significant tax evasion was committed in the past three years.

- Documentation, as required under subparagraphs 1 to 4 and subparagraphs 6 to 10, paragraph 1 of Article 24, has been well-prepared.
- A transfer pricing report, as prescribed under subparagraph 5, paragraph 1 of Article 24, has been prepared.
- Other criteria, as approved by the MOF, have been met.

On 6 March 2015, the MOF amended the transfer pricing guidelines to reduce the threshold to promote the APA application as follows:

- The total amount of the transactions being applied for APAs shall be no less than TWD500 million, or the annual amount of such transactions is no less than TWD200 million.

In addition, the taxpayer may file an application for a pre-meeting with the tax authority, per the amendment.

According to Tax Letter Ruling No. 9404540920, under an APA, a tax return is not subject to a transfer pricing audit except when:

- The enterprise fails to provide the tax authority with the annual report regarding the implementation of the APA.
- The enterprise fails to keep the relevant documents in accordance with transfer pricing guidelines.
- The enterprise fails to follow the provisions of the APA.
- The enterprise conceals material facts, provides false information or conducts wrongful acts.

Impact of new OECD BEPS Action 8–10 guidelines

The Taiwan Ministry of Finance (MOF) had formed a specialized team to study BEPS since 2014. In March 2015, the MOF held a consultation meeting for Action 13. In February 2016, the Head of the MOF was interviewed by the Economic Daily News and said the transfer pricing rule will be amended to adopt the three tiers' standards in the near future. On 19 July, the Taiwan MOF held a consultation meeting for discussion of Actions 8 to 10 with CPAs, lawyers, scholars and associations. The MOF is likely to amend the transfer pricing guidelines to adopt Actions 8 to 10. DEMPE (development, enhancement, maintenance, protection and exploitation) and low-value-added services will be provided in the transfer pricing guidelines in the near future.

Tanzania

Taxing authority and tax law

Taxing authority: Tanzania Revenue Authority (TRA)

Tax law: Income Tax Act, 2004 (ITA 2004); subsequently revised by Finance Act, with the latest edition being July 2016

Relevant regulations and rulings

Section 33 of ITA 2004 emphasizes the arm's-length principle of transactions between associates. Transfer pricing regulations were issued on 7 February 2014, and transfer pricing guidelines were published in May 2014.

OECD Guidelines treatment

Tax authorities and the Commissioner recognize the OECD Guidelines and the United Nations' transfer pricing manual (UN TP Manual).

Nevertheless, the ITA 2004 and the 2014 transfer pricing regulations prevail if there are any inconsistencies between them and the OECD and the UN's documents.

Documentation requirements

The transfer pricing regulations stipulate that documentation should provide a description of the following:

- Organizational structure, including an organizational chart covering persons involved in a controlled transaction
- Nature of the business or industry and market conditions
- The controlled transactions
- Strategies and assumptions regarding factors that influenced the setting of any pricing policy
- Comparability, functional and risk analysis
- Selection of transfer pricing method
- Application of transfer pricing method
- Documents that provide the foundation for or otherwise support or were referred to in developing the transfer pricing analysis
- Index and any other information, data or document considered relevant by the Commissioner

Priorities/pricing methods

Despite the fact that transfer pricing methods are based on the OECD Guidelines and the UN TP Manual, taxpayers must first apply traditional transactional methods. Transactional profit methods can be applied if traditional transactional methods cannot be reliably applied.

Notwithstanding the above, the transfer pricing regulations reiterate that the most appropriate method should be applied with regard to the nature and specific features of the transaction in question.

Return disclosures/related-party disclosures

The taxpayer is required to disclose the amount of sales, purchases and loans made or received from associates in and outside of Tanzania in its tax return.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

The documentation should be in place before the due date for filing the income tax return for the year and must be, upon request, submitted to the tax authority within 30 days.

Transfer pricing penalties

The general rules of penalties for noncompliance and interest for underpayment of tax under the ITA 2004 apply.

Penalty relief

The Commissioner may grant relief for interest and penalties if he or she is satisfied that the noncompliance or underpayment of tax has reasonable cause.

Statute of limitations on transfer pricing assessments

A general rule of five years (with effect from 1 July 2016; previously three years) from the date of filing the tax return applies.

The tax authorities can ignore the five-year limitation when they suspect fraud or intent to evade payment of tax.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There are no special transfer pricing audits stated in the law. However, the tax authority stated that the intercompany transactions will be audited in the general tax audits, but a special transfer pricing team will be involved during the audit. The tax authority has recently requested TP documentation for the review. No TP adjustment has been made so far.

APA opportunity

The transfer pricing regulations provide for an opportunity to enter into unilateral, bilateral or multilateral APAs. In a seminar for taxpayers on transfer pricing, the tax authorities have indicated that, until further notice, no APAs will be stipulated until local expertise has been built.

Impact of new OECD BEPS Action 8–10 guidelines

As transfer pricing is new in Tanzania (regulations were only issued in February 2014), the tax authority is still in a developing/learning phase and there has been no development regarding BEPS implementation.

However, Tanzania is a member of the African Tax Administration Forum (ATAF), an organization created to provide a platform for cooperation among African tax authorities, which works toward increasing the level of voluntary tax compliance while combating tax evasion and avoidance. In 2015, the ATAF held a consultative conference on BEPS and provided feedback from its members to the OECD. It is anticipated that the TRA will get closer to implementing BEPS as more and more ATAF members start to implement it. Therefore, it will be important to monitor further developments in this area.

Thailand

Taxing authority and tax law

Taxing authority: Thai Revenue Department (TRD)

Tax law: Thai Tax Code (TTC)

Relevant regulations and rulings

Tax law provisions, agreements and standards related to transfer pricing are:

- Provisions of the TTC dealing with exchanges at below-market prices:
  - Sections 65 bis (4) and (7)
  - Section 70 ter
  - Sections 65 ter (13), (14), (15) and (19)
  - Section 79/3
- Double tax agreements between Thailand and other countries
- Thai Accounting Standards No. 18 and No. 24
- Transfer pricing guidelines: Departmental Instruction No. Paw. 113/2545 (DI 113)

On 16 May 2002, the TRD issued its guidelines specifically addressing transfer pricing. DI 113 is written in the form of an internal departmental instruction, which provides guidance to tax officials for tax audit purposes.

On 23 April 2010, the TRD issued the bilateral advance pricing arrangement (bilateral APA) guidelines stipulating the rules governing the bilateral APA process, including procedures for applications, the level of information required, circumstances under which the TRD may discontinue a bilateral APA and taxpayer compliance after a bilateral APA is concluded.

On 7 May 2015, the Cabinet approved in principle the draft Transfer Pricing Act to add relevant matters as additional sections to the TTC. The Transfer Pricing Act is expected to become effective after the draft act is refined and approved again by the Cabinet in late 2015 or early 2016.

OECD Guidelines treatment

The Thai transfer pricing guidelines generally follow the OECD Guidelines, including allowing all of the methods acceptable under the OECD Guidelines. This includes supporting material beyond the scope of the OECD Guidelines. The OECD Guidelines are not binding on the TRD; however, they may be persuasive in areas not addressed by DI 113.

Documentation requirements

The following elements of contemporaneous documentation are specified:

- The structure and relationships between business entities within the same group, including the structure and nature of business carried on by each entity
- Budgets, business plans and financial projections
- Taxpayers' business strategies and the reasons for adopting those strategies
- Sales and operating results and the nature of transactions between business entities within the same group

- Reasons for entering into international transactions with business entities in the same group
- Pricing policies, product profitability, relevant market information and profit sharing of each business entity
- Functions performed, assets utilized and risks assumed by the related business entities should all be considered
- Support for the particular method chosen
- Where other methods have been considered, details of those methods and the reasons for their rejection (contemporaneously documented)
- Evidence supporting the negotiation positions taken by the taxpayer in relation to the transactions with business entities in the same group and the basis for those negotiating positions
- Other relevant documentation (if any) supporting the transfer prices

Priorities/pricing methods

The TRD, by default, accepts TNMM, although it would also accept the CUP, resale price, cost-plus and other commercially used methods, such as the profit split method, as specified in the OECD Guidelines.

Return disclosures/related-party disclosures

Currently, there is neither disclosure of the existence nor nonexistence that transfer pricing documentation is required to be submitted with a tax return, nor does any documentation need to be filed with a tax return.

Under the Thai Federation of Accounting Professions and Securities and Exchange Commission (SEC) regulations, the related-party transactions of companies listed by the SEC must be disclosed in the company's financial statements and annual report. Non-listed companies are not required to disclose related-party transactions in their financial statements.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

The taxpayer is required to submit the transfer pricing documentation as and when requested by the TRD by the submission date stipulated in the request letter. However, the taxpayer may request an extension, if necessary. Such a request must be a formal letter submitted to the TRD. In general, the maximum extension is one month after the TRD has received the letter.

On 7 May 2015, the Cabinet also approved in principle, as part of the draft Transfer Pricing Act, that taxpayers are required to prepare and file transfer pricing documentation within 150 days after the close of the accounting year. Filing incomplete documentation or false statements will be subject to monetary penalties not exceeding THB400,000.

Transfer pricing penalties

There is no explicit penalty for transfer pricing assessments, nor is there an explicit penalty for not having transfer pricing documentation.

However, for tax shortfalls in general, if the TRD assesses a company, a penalty of 100% or 200% of the tax shortfall and a 1.5% per-month surcharge may be imposed. The 1.5% monthly surcharge is capped at 100% of the tax shortfall amount.

Penalty relief

In the event of a transfer pricing adjustment, there is no formal penalty relief for having transfer pricing documentation in place.

Penalties may be reduced to half, or waived, if the taxpayer voluntarily files a return and accounts for the tax shortfall. Surcharges are a form of interest and cannot be reduced. Contemporaneous documents cannot be used to reduce the penalty for a transfer pricing shortfall. However, documentation is an important tool in the defense of transfer pricing, should a tax audit take place.

Statute of limitations on transfer pricing assessments

Under § 19 of the TTC, the statute of limitations is two years from the date of filing the tax return. This period may be extended to five years upon suspicion of tax evasion or fraud.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as medium. The likelihood of transfer pricing being reviewed as part of an audit is characterized as high, as is the likelihood of a challenge of the transfer pricing methodology.

Scrutiny of transfer pricing during a tax audit or inquiry in Thailand is common, and the likelihood of an audit of the average multinational company is moderate to slightly high. The TRD expects taxpayers to cooperate in providing relevant transfer pricing supporting documentation. Failure to do so will likely lead to a tax audit.

Since the corporate income tax was reduced from 23% to 20% in 2013, the level of tax enforcement has been increasing, especially in the area of transfer pricing.

The TRD does not focus on a specific country or industry, but rather it focuses on multinational corporations of various industries that incurred intercompany fees, cost allocations, consecutive losses and fluctuations of profitability.

Generally, the TRD makes transfer pricing adjustments to the deductibility of expense items during its annual routine visits to taxpayers to review their business operations. During such checks, if officials find any transactions warranting further scrutiny (including deductibility of expenses arising from intercompany transactions), a further investigation will be conducted.

In most cases, the taxpayer under investigation will be required to add the expenses (to the extent deemed excessive) back to its taxable income and pay the resulting additional tax. The final tax adjustments are then generally settled by way of negotiations.

APA opportunity

Given that bilateral APA guidelines were issued in April 2010, the TRD encourages taxpayers to enter into an APA to obtain a greater degree of certainty and eliminate double taxation, as provided in double tax treaties between Thailand and other jurisdictions. Currently, the TRD is very active in negotiating APAs with Japan and is also working to negotiate APAs with other countries.

Since the Thai transfer pricing and bilateral APA guidelines were issued in 2002 and 2010, respectively, 23 bilateral APAs have been concluded to date (22 between Thailand and Japan and 1 between Thailand and Korea). Currently, 20 bilateral APAs are being reviewed and negotiated.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law; however, it is important to monitor further developments in this area.

Turkey

Taxing authority and tax law

Taxing authority: Turkish taxes are administered by the Turkish Ministry of Finance or by Turkish state authorities.

Tax law: Turkish tax law is found in the Corporate Tax Code.

Relevant regulations and rulings

Transfer pricing is regulated by Article 13 of the Corporate Tax Code numbered 5520, published 21 June 2006. Article 13 of the Corporate Tax Code states:

"Income shall be considered to have been wholly or partially distributed in a disguised manner through transfer pricing, if the company engages in purchase of goods and services with related parties at prices or at amounts which they determine do not comply with the arm's-length principle."

Transfer pricing provisions have been effective since January 2007. There are two cabinet decrees, published in December 2007 and April 2008. Further, two communiqués have been issued by the Ministry of Finance: the General Communiqué on Disguised Profit Distribution by Means of Transfer Pricing Serial Nos. 1 and 2. A third was issued as a draft communiqué on March 2016: Draft General Communiqué No. 3 on Disguised Profit Distribution through Transfer Pricing. This regulation is aimed at including Action Plan 13 of the OECD BEPS project in the current transfer pricing legislation in Turkey.

Additionally, the Turkish Revenue Administration (TRA) under the Ministry of Finance issued guidance in 2009 regarding MAPs and in 2010 regarding disguised profit distribution through transfer pricing.

The Draft General Communiqué has been prepared in compliance with Action 13 of the OECD BEPS project.

OECD Guidelines treatment

The preamble to the law states that the provisions of international regulations, especially the OECD Guidelines, are taken as reference. However, there is no particular reference to the OECD Guidelines in the actual content of the regulations, including Article 13 of the Corporate Tax Code, the related decrees and communiqués. In addition, the law diverges from the OECD approach on two major points: (1) the term "related-party" is broadly defined and (2) it also applies to domestic related-party transactions.

In local transfer pricing rules, business restructurings are not referenced. However, there are strict provisions in local tax codes regarding anti-abuse rules and the substance-over-form principle.

In general, transfer pricing rules place significant documentation and disclosure requirements on Turkish taxpayers, but during transfer pricing inspections, it seems that fulfilling these requirements does not provide any assurance to taxpayers. It would not be wrong to state that the tax auditors are still not fully aligned with the OECD Guidelines and that there is a very strong tendency toward using the CUP method despite the difficulties in comparability, as well as the fact that the regulations endorse all of the transfer pricing methods listed in the OECD Guidelines.

Documentation requirements

Taxpayers are required to submit, as an attachment to the corporate income tax return, a transfer pricing form detailing related-party transactions.

Turkey (continued)

In addition to the transfer pricing form, taxpayers are required to prepare (and submit upon request by the tax authority) an annual transfer pricing report, which requires:

- Corporate taxpayers that are registered with the Large Taxpayers Tax Office to prepare the report covering all domestic and foreign related-party transactions
- Corporate taxpayers having activities in the Turkish Free Trade Zones to prepare the report covering domestic transactions conducted with related parties
- Other taxpayers to prepare the report for purposes of disclosing transactions conducted with foreign related parties

All of the documentation above is to be prepared in Turkish.

On 16 March 2016, the Turkish Revenue Administration (TRA) released Draft General Communiqué No. 3 on Disguised Profit Distribution through Transfer Pricing.

The Draft Communiqué implements in Turkey the OECD's and G20's "standardized three-tier" approach to transfer pricing documentation under Action 13. Accordingly, taxpayers are required to prepare a:

- Master file — This should consist of an overview of the multinational group's business operations, transfer pricing practices, organizational structure, its intangibles and intercompany financial activities, its financial and tax positions, and a description of the group's businesses.
- Local file – This should contain detailed information about the local business, such as related-party payments and receipts for products, services, royalties and interests.
- Country-by-country reporting (CbCR) — This holds high-level information about the jurisdictional allocation of profits, revenues, employees and assets.

Priorities/pricing methods

There is no priority among the methods. However, there is a priority among comparables, and if there are internal comparables, they should be analyzed first. Only if there is a lack of internal comparables (or if these internal comparables are not accurate or reliable enough) can external comparables then be used.

Return disclosures/related-party disclosures

Taxpayers are required to disclose information about all related-party transactions (domestic and cross-border) performed with related parties with minimum 10% share, regardless of the magnitude, on their transfer pricing forms. In addition, taxpayers are required to prepare an annual transfer pricing report, which should include the following information in detail:

- Name or title of the local related-party
- Taxpayer identification number
- Name of the foreign related-party and the country in which it resides

Other required disclosures include the sale and purchase of commodities, both in the form of raw material and finished goods; the lease of any property; construction, R&D and commission-based services; all related-party financial transactions, including lending and borrowing funds, marketable securities, insurance and other transactions; and intragroup services. Taxpayers must also disclose the transfer pricing methods applied in the related-party transactions.

Turkey (continued)

Transfer pricing-specific returns

Taxpayers are required to submit a transfer pricing form detailing related-party transactions. This form should be submitted as an attachment to the corporate income tax return.

On the transfer pricing form, the taxpayer has to disclose information about its related parties (both domestic and international) that engage in intercompany transactions with the taxpayer, the nature (purchase of raw materials, licensing of intangible assets, etc.) and amounts of the transactions, and the total amount of intercompany transactions priced according to each transfer pricing method applied by the taxpayer.

Draft General Communiqué No. 3, in compliance with Action 13, requires that the following appendices be submıtted:

- Appendix 2 — If corporate taxpayers' sales or purchases of goods or services with related parties during a fiscal year exceed TRY30,000, they will be required to complete the form on transfer pricing, controlled foreign corporation and thin capitalization regarding such transactions, and submit it to the relevant tax office in the attachment of the corporate tax return.
- Appendix 4 — If corporate taxpayers have assets on the balance sheet of the previous year-end and net sales revenue in the income statement of TRY100 million and above, they will be obliged to electronically submit the transfer pricing form on transactions conducted with related parties exceeding TRY30,000 within a fiscal year by the end of the second month following the filing deadline of corporate tax return.

Documentation deadlines

Deadlines to prepare documentation are as follows:

- Transfer pricing report — Upon request of the tax authority, the documentation has to be submitted within 15 days of the request.
- Transfer pricing form — The form must be submitted as an attachment to the annual corporate income tax return, which must be filed by the 25th day of the fourth month after closing of the fiscal year.

Deadlines to prepare documentation under Draft General Communiqué No. 3 are as follows:

- Master file — By the end of the second month following the filing deadline of corporate tax return, the file must be submitted to the tax authority or those authorized for tax inspection if requested.
- Local file:

Appendix 2 — Submit as an attachment to the corporate tax return.

Appendix 4 — Submit as an attachment to the corporate tax return (within two months following the submission date of the corporate tax return).

Transfer pricing report — Upon request by the tax authority, the documentation has to be submitted within 15 days of the request.

- CbC report — to be submitted electronically by the end of the twelfth month following the fiscal year subject to the report.

Transfer pricing penalties

There are no specific transfer pricing penalties, but a disguised income distribution is assumed to exist if the transfer prices applied in related-party transactions do not meet the arm's-length standard. If such a disguised distribution is assessed during a tax audit:

- For corporate income tax purposes, 20% of corporate income tax is recalculated as if the disguised distribution had not been made.
- Dividend withholding tax of 15% is calculated for the net amount of the disguised distribution.

Additionally, a late-payment interest penalty (1.4% monthly) and a tax loss penalty (which is the same as the tax loss amount) are charged to the taxpayer.

Turkey (continued)

Penalty relief

A 50% penalty relief will be applied to residual taxes due to disguised profit distribution, provided for taxpayers that have submitted proper transfer pricing documentation.

It is also possible to come to a settlement regarding the tax loss amount and the tax penalty assessed. In settlement negotiations, taxpayers may assert a good-faith defense.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. Rather, the general rule for the statute of limitations is applicable, which is five years from the accrual of the tax payment.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

For medium- and large-sized multinational firms, the likelihood of an annual tax audit is high. Most large-sized multinationals are handled by a specific tax office (Large Taxpayers Tax Office), which requests information from these taxpayers throughout the year.

Also, taxpayers in sectors such as pharmaceuticals, telecommunications, banking and finance, and automotive are often continuously audited. Moreover, most of the tax revenue in Turkey is generated through indirect taxes; thus, companies subject to excise taxes are usually subject to closer examination.

The risk of transfer pricing scrutiny during a tax audit is high, as tax inspectors generally focus on related-party transactions.

The frequency of transfer pricing audits has increased, and these audits are mainly focused on intragroup charges, such as management fees and cost allocations. Tax inspectors often look to find out whether specific services or projects were provided to the recipient under management services (e.g., preparation of a procurement agreement, redesign of a compensation policy or legal advisory for a court case). If the service charges are not documented with specificity about the type of service being provided to the Turkish entity, then they are likely to be treated as royalties (and therefore subject to withholding tax), based on the claim that industrial or commercial experience is used.

The likelihood of a challenge to the transfer pricing methodology is similarly high. Among tax inspectors, there is a strong tendency for using the CUP method, regardless of the inherent difficulties based on comparability. It has also been common practice to use secret comparables, which the taxpayer can challenge if the case is taken to litigation.

APA opportunity

Companies can apply for their cross border intercompany transactions to unilateral, bilateral or multilateral APA's.

Impact of new OECD BEPS Action 8–10 guidelines.

There is no official position or case law (draft communiqué) yet; however, it will be important to monitor further developments in this area.

Uganda

Taxing authority and tax law

Taxing authority: Uganda Revenue Authority (URA)

Tax law: Income Tax Regulations

Relevant regulations and rulings

Uganda's transfer pricing legislation is contained in the Income Tax Regulations 2011, under Sections 90 and 164 of the Income Tax Act, Cap 340, and became effective 1 July 2011.

Uganda's transfer pricing regulations apply to a controlled transaction if one party is subject to tax in Uganda and the other party is either located in Uganda or outside of Uganda. A controlled transaction is defined as a transaction between associates. Further, the regulation refers to the definition of the term "associates" in the domestic Income Tax Act as follows:

"Where any person, not being an employee, acts in accordance with the directions, requests, suggestions, or wishes of another person whether or not they are in a business relationship and whether those directions, requests, suggestions, or wishes are communicated to the first-mentioned person, both persons are treated as associates of each other."

Regarding thin capitalization, when a nonfinancial services, offshore related-party intends to fund its Ugandan operations with interest-bearing debt, the foreign debt-to-equity ratio cannot be in excess of 1:1 at any time during a year of income. A deduction is disallowed for the interest paid by the company during the year on that part of the debt that exceeds the 1:1 ratio. An interest deduction will be allowed on all interest generated from local financial assistance.

OECD Guidelines treatment

Ugandan regulations adopt the arm's-length standard and recognize the OECD Guidelines. However, where the OECD Guidelines conflict with the Domestic Taxing Acts, the provisions in the Domestic Taxing Acts take precedence.

Documentation requirements

Taxpayers are required to maintain sufficient information and analysis to verify that the pricing, terms and conditions attached to the controlled transactions are consistent with the arm's-length standard. The URA came up with a practice note detailing the minimum information that should be included in transfer pricing documentation.

Generally, the required information includes;

- Company Details
- Transaction Details
- Determination of arm's-length price
- Summary and Conclusion

Uganda (continued)

Priorities/pricing methods

Uganda accepts the five methods specified in the OECD Guidelines. The most appropriate method is selected based on the circumstances and data available.

- Comparable Uncontrolled Price method (CUP)
- Resale Price method (RPM)
- Cost Plus method (CPM)
- Transactional Net Margin method (TNMM)
- Transactional Profit Split method (PSM)

Return disclosures/related-party disclosures

The following transfer pricing information needs to be disclosed:

- The group organization structure of the entity
- The details of the transaction under consideration
- The transfer pricing method, including the reasons for its selection
- The assumptions, strategies and policies applied in selecting the method
- The application of the method, the calculations made and the price adjustment factors considered
- The transfer pricing policy agreement
- Such other background information as may be necessary

Transfer pricing-specific returns

There are no specific transfer pricing returns required to be filed with the tax authority. However, most recently, the tax authorities have come up with a related-party disclosure form that has been circulated to most multinational entities as part of the initial transfer pricing audit procedure.

Documentation deadlines

Transfer pricing documentation must be in place at the time the income tax return is filed, with an effective date of 1 July 2011. Failure to adhere to this could result in imprisonment or commercial penalty or both, as highlighted below.

Uganda (continued)

Transfer pricing penalties

Specific transfer pricing penalties apply for failure to comply with transfer pricing documentation requirements. Where one fails to put in place transfer pricing documentation under the transfer pricing regulations, the person is liable, upon conviction, to imprisonment for a term not exceeding six months or a fine not exceeding 25 currency points (currently, UGX500,000) or both. In addition to the above, in the event that the URA raises an upward transfer pricing adjustment, a 20% penalty on the shortfall will be imposed if the provisional tax paid is less than 90% of the actual tax liability. The penalty for late payment is 2% per month of the shortfall and 2% of the gross tax liability for the year for which the return is filed late. Other civil and criminal penalties may apply under specific circumstances.

Penalty relief

There is no specific penalty relief. However, penalties may be reversed in case of successful objection to a tax assessment before the tax authority or appeals of tax decisions made before the Tax Appeals Tribunal or the Courts of law.

Statute of limitations on transfer pricing assessments

The Income Tax Act gives the URA the authority to make adjustments, but it does not indicate a time limit for such adjustments. Under the Income Tax Act, the URA can revisit assessments going back five years, but this period is unlimited in cases of fraud or any gross or willful neglect by or on behalf of the taxpayer or upon the discovery of new information.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The URA has stated that it considers transfer pricing to be a major area of tax leakage and, as such, is expected to focus its resources on monitoring cross-border transactions going forward. The URA has already instigated transfer pricing audits under its previous anti-avoidance rules.

APA opportunity

Applications for unilateral and bilateral APAs are allowed.

Impact of new OECD BEPS Action 8–10 guidelines

There is no official position or case law yet; however, it will be important to monitor further developments in this area.

Ukraine

Taxing authority and tax law

Taxing authority: State Fiscal Service of Ukraine

Tax law: Ukrainian Tax Code

Relevant regulations and rulings

Article 39 of the Ukrainian Tax Code[1] regulates transfer pricing in Ukraine. Generally, the provisions of the Law are in line with the OECD Guidelines.

A number of rules and provisions related to transfer pricing are also established by other laws and decrees, as follows:

- Law of Ukraine No. 609-VIII (July 2015) features amendments to the Ukrainian Tax Code regarding transfer pricing.
- Law of Ukraine No. 1636-VII (12 August 2014) governing the creation of the free economic zone of Crimea and special conditions of economic activity on the temporarily occupied territory of Ukraine (entities in Crimea are considered nonresidents for the purposes of transfer pricing).
- Decree of the Cabinet of Ministers of Ukraine No. 381 (4 June 2015) defines the new algorithm for the interquartile range calculation.
- Order of the Cabinet of Ministers of Ukraine No. 977-p (16 September 2015) provides the list of countries (territories) that match the criteria specified by subparagraph 39.2.1.2 of Article 39 of the Tax Code of Ukraine.
- Decree of the Cabinet of Ministers of Ukraine No. 616 (8 September 2016) provides the list of goods traded on the commodity exchanges and the list of world commodity exchanges for the purpose of CUP method application in order to improve tax control over transfer pricing.

The tax authorities provide administrative interpretation and guidance with respect to the application of the transfer pricing rules, the release of consultation letters, orders and opinions expressed in press and at public events.

Local accounting standards: Ukrainian GAAP or IFRS.

Currently, no regulations and rulings have been issued on BEPS Actions 1–15 (relevant legislation acts are in development).

OECD Guidelines treatment

Ukrainian law incorporates the main standards of the OECD Guidelines. A taxpayer taking part in a controlled transaction shall determine the amount of their taxable income pursuant to the arm's-length principle. The array of methods and documentation requirements closely follows the OECD Guidelines.

The Ukrainian tax authorities are not obliged to follow the OECD Guidelines, as Ukraine is not an OECD member country. However, in many cases, the Ukrainian tax authorities refer to the OECD Guidelines in their consultations and opinions expressed publicly.

Documentation requirements

For reporting years starting from 1 January 2015:

Documentation is required for Ukrainian entities conducting controlled transactions with:

- Nonresident persons who are determined as related parties according to paragraph 14.1.159 of the Ukrainian Tax Code

[1] Further referred to as "the Law" or "Article 39" (used interchangeably).

- A nonresident person who is not a related-party, if this person is acting as an intermediary in a transaction between related parties, does not perform any significant function and does not use significant assets or take significant risks in this transaction
- Nonresident persons, whether related or not, if they are registered in states (territories) approved by the Order of the Cabinet of Ministers of Ukraine No. 977-p (dated 16 September 2015)
- Foreign trade transactions on sales of goods through nonresident persons under commission agreements

Transactions listed above are recognized as controlled if both of the following conditions are met simultaneously:

- Total income of the taxpayer derived from all types of activities, which are accounted for when determining the object of corporate tax, exceeds UAH50 million (approximately USD2 million) during the corresponding tax (reporting) calendar year.
- The annual volume of transactions with any counterparty from any category listed above exceeds UAH5 million (approximately USD200,000).

For reporting years 2013 and 2014:

Documentation is required for Ukrainian entities conducting controlled transactions with:

- Nonresident related parties
- Any residents of low-tax jurisdictions (with a corporate profit tax rate lower than that of Ukraine by 5 percentage points)
- Resident related parties, if they are loss-making, that do not pay regular corporate profits tax and value-added tax (VAT) (or pay these taxes at a lower rate), or use single tax or agricultural tax regimes

Transactions listed above are subject to control if the annual amount of all transactions between two counterparties is at least UAH50 million.

Transfer pricing documentation requirements are generally based on OECD principles. The transfer pricing documentation should contain the following information:

- Comprehensive information about the related parties
- Information about the group (structure, description of activities, group transfer pricing policies)
- Description of the transaction (terms and conditions)
- Description of the goods (work, services), including physical characteristics, quality and reputation in the market, country of origin and manufacturer, trademarks
- Terms and conditions of the payments
- Factors that impact the price
- Functional analysis and risk analysis
- Economic analysis (transfer pricing method applied, its substantiation, amount of income or expenses, profitability level, calculation of the arm's-length price and profitability range, approach to selection of comparables, sources of information)
- Comparability analysis of commercial and financial conditions of selected transactions
- Information about corresponding adjustments made by the taxpayer (if any)

Transfer pricing documentation must be submitted in Ukrainian. English and any other languages are not acceptable.

Ukraine (continued)

Priorities/pricing methods

The Ukrainian transfer pricing rules provide for the five methods similar to those specified by the OECD Guidelines.

The CUP method is given priority. In cases when the resale price method, cost-plus method, net margin or profit split methods may be applied by the taxpayer with the same reliability, the resale price or cost-plus method shall be used. Profit-based transfer pricing methods may be used without specific restrictions.

For controlled transactions involving export and import of goods from the list approved by the decree of the Cabinet of Ministers of Ukraine No. 616 (dated 8 September 2016), the CUP method based on information from commodity exchanges shall apply. To apply other methods in such situations, a taxpayer shall submit to the tax authorities a written report that shall include data about PLIs of all related parties of the taxpayer that took part in the purchase and sale of the goods in the supply chain (up to the first not related counteragent). Such report shall be provided by 1 May of the year following the reporting period.

Return disclosures/related-party disclosures

Taxpayers shall report all self-adjustments of tax liabilities arising due to application of transfer pricing rules in a special transfer pricing annex to the corporate profit tax (CPT) return.

Transfer pricing-specific returns

Ukrainian transfer pricing rules require the submission of a transfer pricing report disclosing all the controlled transactions of a taxpayer for the reporting period, provided that the controlled transactions with the same counterparty exceed UAH5 million (approximately USD200,000).

Documentation deadlines

Taxpayers are obligated to submit transfer pricing documentation within one month from the day following the date of receipt of a request from the tax authorities. The tax authorities may request the documentation no earlier than 1 May of the year following the reporting period.

Transfer pricing penalties

The Controlled Transactions Report is due 1 May every year since 2013 and is mandatory. Starting from 1 January 2015, the Controlled Transactions Report should be submitted if the amount of controlled transactions with the same counterparty exceeds UAH5 million (approximately USD200,000).

The penalty for not filing the Controlled Transactions Report is 300 minimum wages (UAH413,400, or approximately USD16,000).

The penalty for not including all of the controlled transactions in the Controlled Transactions Report is 1% of the total amount of transactions not included, but no more than 300 minimum wages (UAH413,400, or approximately USD16,000).

Tax authorities may request transfer pricing documentation for the previous fiscal year starting 1 May of the next year, and the taxpayer has one calendar month to comply. The penalty for not submitting the transfer pricing documentation is 3% of the sum of the controlled transactions for which the transfer pricing documentation was not submitted, but not exceeding 200 minimum wages (UAH275,600, or approximately USD11,000).

The penalty for understatement of tax liabilities as a result of noncompliance with transfer pricing rules is from 25% up to 50% of the understated tax (no penalty is applicable for the 2013, 2014 and 2015 reporting years). In addition, understated tax is subject to a late payment interest at a rate of 120% of the discount rate established by the National Bank of Ukraine (which is 15% per annum as of 30 September 2016).

Penalty relief

Penalty relief is provided for the transition period starting 1 September 2013 until the end of 2014, during which the penalty for the understatement of tax liabilities will be UAH1. Additionally, there is penalty relief for all understatements of corporate tax liabilities in 2015. No penalty relief is provided for periods after 1 January 2016.

No special penalty relief is provided for failing to submit the transfer pricing documentation and the Controlled Transactions Report.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing assessments is seven years (2,555 days, as specified by the Tax Code) from the last date for filing the CPT, or from the actual day the CPT return was filed, if it was later than the due date.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

According to the Law, transfer pricing audits should be performed independently from other tax audits. The tax authorities shall not have the right to conduct more than one audit of a controlled transaction of the taxpayer during a calendar year. In general, the likelihood of an annual tax audit may be assessed as high, and so is the likelihood of a transfer pricing review. The likelihood that the transfer pricing methodology will be challenged during the course of an audit is currently unknown because of the novelty of the legislation and absence of practical experience in Ukraine.

Self-adjustments are possible. Self-adjustments are the upward adjustments of tax liabilities performed by taxpayers resulting from applying the transfer pricing rules and have to be recorded in the CPT return. Deadlines for filing the Controlled Transactions Report are not aligned with the deadlines for filing the CPT return.

Corresponding adjustments in case of transactions with nonresidents are not prescribed by the Law.

APA opportunity

Decree of the Cabinet of Ministers of Ukraine No. 504 (17 July 2015) defines the procedures and requirements for APAs between the tax authorities and the taxpayer (bilateral and multilateral APAs are permissible). Currently, there are no APAs signed by the tax authorities.

Impact of new OECD BEPS Action 8–10 guidelines

Ukraine does not follow the OECD Guidelines, as it is not an OECD member country. Accordingly, BEPS Action 8–10 reports will not influence Ukrainian transfer pricing rules directly.

The Ukrainian Government has announced an initiative to implement BEPS developments in the local legislation; however, the possible extent and practical peculiarities of such implementation remain unclear.

United Kingdom

Taxing authority and tax law

Taxing authority: Her Majesty's Revenue and Customs (HMRC)

Tax law: Taxation (International and Other Provisions) Act 2010 (TIOPA 2010)

Relevant regulations and rulings

HMRC publishes its internal guidance manuals on its website, providing taxpayers and their advisors with insight into how HMRC applies the legislation. HMRC also publishes technical notes and statements of practice concerning a number of transfer pricing topics.

The UK's domestic transfer pricing legislation is now consolidated and set out in Part 4 of the TIOPA 2010. This covers cross-border and UK-to-UK transactions.

The UK's basic transfer pricing rule requires that "provisions" made or imposed between parties by means of a "transaction or series of transactions" are consistent with the arm's-length principle so as to not create a UK tax advantage.

The term "provision" covers all of the terms and conditions attached to a transaction or series of transactions, including arrangements, understandings and mutual practices. The term "series of transactions" is defined to make it difficult to structure business arrangements in a way that will prevent there being transactions for transfer pricing purposes, even when a third party is included in the chain.

Exemption for small and medium-sized enterprises (SME): For the calculation of profits arising on or after 1 April 2004, the legislation provides an exemption from transfer pricing rules for the vast majority of transactions carried out by a business that is a small or medium-sized enterprise. The exemption applies only to transactions with territories for which there is a full nondiscrimination article in the relevant treaty. What constitutes SMEs for this purpose 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 (i.e., 50 or 250, for small or medium, respectively) and one (or both) of either the annual turnover limit or the balance sheet total limit. The annual turnover limit for small enterprises is GBP10 million; for medium entities, it is GBP50 million. The balance sheet limit is GBP10 million for small and GBP43 million for medium enterprises, respectively. Reference to the characteristics of a whole group of associated enterprises, and not the UK entity alone, determines whether the SME exemption applies.

Change to compensating adjustment rules in relation to UK/UK transactions: The rules now restrict the use of the compensating adjustment mechanism in the transfer pricing legislation. The legislation prevents a claim for a compensating adjustment being made by a person (other than a company) within a charge for income tax, where the counterparty to the transaction is a company.

The UK does not have a rulings process for transfer pricing outside of an APA, although some comfort has historically been gained through discussions with HMRC under its Real-Time Working (RTW) initiative. In this case, the HMRC team may, with input from HMRC's transfer pricing specialists, provide some comfort of the methodology as part of an overall risk assessment however more recently HMRC have not been willing to provide that sort of comfort albeit their International Manual still confirms this to be available. It is understood that the manual will be changed in this regard in 2017.

As noted above, HMRC's practice in a number of areas is set out in manuals that it publishes on its website. This is so for RTW. However, RTW is under review by HMRC, and we understand that further guidance will be issued. Currently, there is a reluctance to enter into any RTW discussions, pending clarification of what, if anything, may be covered.

OECD Guidelines treatment

The OECD Guidelines are effectively imported into the UK transfer pricing rules because the Guidelines are required to be used in interpreting the rules. Finance Act 2011 included provisions confirming that for accounting periods ending on or after 1 April 2011, the 2010 version of the OECD Guidelines is to be used in reinterpreting the UK Transfer Pricing Statutory Code. In this regard, § 164 of the TIOPA 2010 confirms that the UK's transfer pricing provisions are to be construed in alignment with Article 9 of the OECD Model Tax

Convention and its associated transfer pricing guidelines. For these purposes, "transfer pricing guidelines" means all of the documents published by the OECD at any time before 1 May 1998 "as part of their Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" and any other documents designated as such by Treasury order. Currently, as noted above, the 2010 version is to be used for accounting periods ending on or after 1 April 2011, while the 1998 version applies to earlier periods. Furthermore, the Finance Bill for 2016, which became law in October 2016, confirms further changes in interpretation. This l requires that for accounting periods beginning on or after 1 April 2016, the 2016 version of the OECD Transfer Pricing Guidelines are to be used in place of the 2010 version.

Documentation requirements

The legal requirement is to have documentation to confirm compliance with the statutory provisions regarding the arm's-length principle. There is no statutory prescription, although HMRC does publish guidance on what might be expected.

SMEs (as defined above) to the extent exempt in relation to transactions with companies in territories having a tax treaty that includes a full nondiscrimination article do not need to document compliance with the arm's-length principle for those transactions.

HMRC has published guidance in this regard that sets out the types of documents that it might expect to be kept. This guidance is stated as building upon that published by the OECD, but, as of yet, no mention is made of the Action 13 changes to Chapter V. The UK guidance currently divides documentation into primary accounting records, tax adjustment records and, most importantly, evidence. Documentation relating to evidence of compliance with the arm's-length principle is to follow the OECD Guidelines, and HMRC has set out some suggestions of what this should or may include, such as:

- An identification of the associated enterprises with whom the transaction is made
- A description of the nature of the business
- The contractual or other understandings between the parties
- A description of the method used to establish or test the arm's-length result, with an explanation of why the method is chosen
- An explanation of commercial and management strategies, forecasts for the business or technological environment, competitive conditions and regulatory framework

HMRC applies a risk-based approach under which it would expect the level and depth of analysis to be dictated by the perceived risk of tax loss through incorrect and non-arm's-length pricing. This typically allows a light-touch approach to most UK-to-UK transactions.

Given prescriptive rules in other territories applying the Action 13 guidance on master files and local files, it is understood that HMRC will expect multinational companies to have documentation compliant with that form and available on request.

Priorities/pricing methods

The OECD Guidelines are followed with regard to pricing methods. All of HMRC's guidance is based on adherence to the OECD Guidelines.

Following a tax case in 2010, HMRC now more routinely challenges the robustness of external CUP data (particularly in relation to intellectual property licenses), unless there has been an analysis around the relevant parties' bargaining positions in agreeing to the third-party license arrangements. This position has been reinforced by the OECD BEPS Actions 8–10.

HMRC has also expressed concern over the use and reliance on the historical CUP analysis in relation to procurement. HMRC's view is that there is little support for the high level of commissions and fees often seen paid in outbound transactions. HMRC has commissioned a third-party consultancy to analyze procurement contracts, which will be used as a risk assessment tool, and returns outside of the expected range will require persuasive analysis not reliant on historical CUP data.

In addition, HMRC often challenges the use of the cost-plus method for high-value-added services, where it looks to substitute some form of value-based fee using the profit split or a similar method.

Return disclosures/related-party disclosures

There are no return disclosure requirements, except those required in statutory accounts and in annual reports filed in compliance with any current APAs. The absence of specific requirements typically will leave prior years open to discovery assessments, as there will not be sufficient disclosure for HMRC to form a view about the compliance with the arm's-length principle.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Under the current guidance, evidence of arm's-length pricing should exist when the relevant tax return is submitted.

Transfer pricing penalties

For accounting periods ending on or after 1 April 2008, the provisions for neglect penalties are set out in Schedule 24 of Finance Act 2007. These provisions are couched in terms of careless or deliberate inaccuracies, rather than neglect. They are tax-geared at up to 100% of the potential lost revenue figure. However, this is now calculated without adjustment for the availability of loss relief and, where the adjustment affects losses only, the lost revenue figure to which the penalty percentage is applied is calculated at 10% of the loss adjustment.

HMRC has also published guidance setting out examples of negligence and carelessness, which carry lower tax-geared penalties (up to 30%), and deliberate inaccuracies, for which the penalties will be higher (up to 70%).

Examples of negligence and carelessness include:

- No attempt to price the transaction
- Shared service center overseas, cost-based, allocation key applied, turnover, modest markup, but no consideration of benefits test for UK entity
- Policy, otherwise arm's-length, not properly applied in practice

Examples of deliberate inaccuracies include:

- A clear internal CUP that has been omitted with no reasonable technical analysis to support why it has been disregarded
- A cost-plus return to a company that has in reality controlled the development of valuable intangibles (not demonstrable as a subcontractor to group members)
- Material factual inaccuracies in the functional analysis upon which the pricing analysis has been based

Penalty relief

The best protection against neglect penalties is to demonstrate sufficient due diligence with regard to compliance. This is best shown through transfer pricing documentation that fully evidences that the application of the arm's-length principle was considered properly in preparing the relevant tax return.

Statute of limitations on transfer pricing assessments

Effective 1 April 2010, assessments may be made four years following the end of the relevant accounting period for instances of carelessness, and this is extended to 20 years if there have been deliberate understatements. This is on the basis that the error was not fully disclosed in the body of the tax return or other documents submitted.

The legislation applicable before 1999 operated in a different manner, and, as a result, an investigation started now would not lead to transfer pricing adjustments for periods before 1999.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as low. There is no system for annual tax audits, as HMRC operates a risk assessment approach to audits and inquiries. The likelihood that transfer pricing will be reviewed as part of an audit is characterized as medium. Most multinational companies will have transfer pricing considered as part of their overall risk assessment, but only those seen as high risk in this area will then be subject to an audit. However, the likelihood then of a challenge to the transfer pricing methodology is characterized as high. Most risk assessments have, at their core, a challenge regarding the methods and the appropriateness of their application.

HMRC has developed a "stage gate" process for transfer pricing inquiries, which is set out in the internal guidance published on its website. This process requires a transfer pricing specialist in HMRC to be assigned and a case team to identify a transfer pricing issue that may necessitate an inquiry. The specialist helps the case team prepare a risk assessment and a business case for submission to a panel for sign-off before an inquiry may be commenced. The responsible panel is then required to sanction, or not, the opening of an inquiry as the initial stage gate. The panel also then regularly reviews progress during the inquiry and signs off on all settlement proposals. Depending on the size of the adjustments proposed in the inquiry, referral to the Transfer Pricing Board and to other committees may be required for final sign-off.

HMRC considers that this process leads to more targeted and focused inquiries in areas warranting specialist transfer pricing resources. The risk of a transfer pricing audit is therefore high for red flags present in the accounts or tax return, such as for:

- A UK company with profits or losses that appear inconsistent with its business activities or worldwide group results over a cycle
- A UK company that provides intangibles but does not generate an entrepreneurial reward for its R&D (through royalties or otherwise)
- Borrowing that appears disproportionately high in relation to shareholders' funds, or interest that appears high in relation to the business's ability to service the debt (acquisition of a UK group by a private equity firm, which may rely on heavy debt funding, may be a red flag)
- Transactions that do not appear to have a commercial purpose
- Transaction with related parties in low-tax territories
- Notes in UK accounts, or other forms of information such as press or internet articles, that mention restructuring, acquisition or merger activity; transfer of UK activities to related parties; or changes to the way in which the company is rewarded
- Significant decline in stock on the balance sheet

In context, a number of these factors taken together may provide a compelling risk assessment and, where the sums warrant, a business case for opening an inquiry.

Under the general risk-based approach to compliance, most multinational companies will have had their transfer pricing considered as part of HMRC's general risk assessment process, which will cover all aspects of tax compliance. These risk assessments are undertaken in real time and before the relevant return is filed. The use of panels and stage gates in transfer pricing inquiries will, however, mean that only those multinational companies rated high-risk for cross-border matters (thus warranting a transfer pricing inquiry beyond a risk assessment) will be subject to a full inquiry when the relevant return is submitted. As such, the number of actual inquiries has fallen over recent years, but high-risk cases are subject to a detailed and extensive inquiry.

APA opportunity

APA opportunities are available, and admissions to the program are not expected to increase beyond current levels, given resource constraints. The legislation governing the APA process is set out in Part 5 of the TIOPA 2010. A statement of practice governing the application of the statutory provisions for APAs was first published in 1999, and a revised statement was published at the end of 2010 (in SP2 2010) with further changes made in 2016. The revised statement of practice confirms thatfor APAs to be admitted to the program, there needs to be sufficient complexity in determining compliance with the arm's-length standard, the likelihood of double taxation absent an APA and it is further judged to be a good use of HMRC resources. This may change to a concentration on cases where without an APA, a MAP claim would likely follow. Limited resources had historically kept the UK to around just 20 new admissions to the program each year, although additional resources from 2011 confirmed a stated intention to increase this number substantially, such that in the years 2012–13 and 2013–14, fully 45 and 43 cases, respectively, were admitted to the program, and in those same years, 27 and 29 were agreed upon.

HMRC will insist on a clause to enable an APA to be revisited if there are changes to the transfer pricing legislation or practices that directly impact the APA.

The UK also operates a thin capitalization agreement system, which uses the APA legislation. These are known as advance thin capitalization agreements (ATCAs). Agreements in this regard are typically couched around covenants similar to that of third-party lenders.

The UK operates a risk-based approach to inquiries and in relation to compliance obligations. Most multinational companies will have had a risk assessment in the UK and may approach HMRC for an RTW initiative discussion around the risks associated with their transfer pricing on a current and prospective basis. Historically, agreements reached following such discussions were couched solely in terms of risk (i.e., transfer pricing was seen as low-risk). More recently, following changes to their procedures at the end of 2011, risk assessment agreements may now also confirm the method used in determining or testing pricing as compliant with the arm's-length principle. Although still short of an APA and its contractual terms, such agreements nevertheless provide up-front comfort as to meeting compliance obligations and the robustness of intragroup pricing. Such discussions have historically been encouraged by HMRC; however, their continued use is under consideration, and revisions to their governance procedures around the RTW is expected. Pending such clarifications, particularly around the possible impact of EU positions on tax rulings, there is reluctance presently by HMRC to engage in the process.

Impact of new OECD BEPS Action 8–10 guidelines

The amendments will apply to accounting periods beginning on or after 1 April 2016 and to transactions that were already in effect on 23 May 2016. The amendments may conceivably apply to transactions that can still come under tax audit even though they were no longer in effect on 23 May 2016 if they were within an accounting period beginning on or after 1 April 2016.

The OECD Transfer Pricing Guidelines are effectively imported into the UK transfer pricing rules because those guidelines are required to be used in interpreting the relevant UK statute as contained in Part IV of the TIOPA 2010. Finance Act 2011, however, included provisions confirming that for accounting periods beginning on or after 1 April 2011, the 2010 version of the OECD Guidelines is to be used in reinterpreting the UK Transfer Pricing Statutory Code. In this regard, § 164 of the TIOPA 2010 confirms that the UK's transfer pricing provisions are to be construed in alignment with Article 9 of the OECD Model Tax Convention and its associated transfer pricing guidelines. For these purposes, "transfer pricing guidelines" means all of the documents published by the OECD at any time before 1 May 1998 "as part of their Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" and any other documents designated as such by Treasury order. Currently, as noted above, the 2010 version is to be used for accounting periods beginning on or after 1 April 2011, while the 1998 version applies to earlier periods. However, the Finance Act 2016, confirms further changes in this interpretation. This requires that for accounting periods beginning on or after 1 April 2016, the 2016 version of the OECD Transfer Pricing Guidelines are to be used in place of the 2010 version.

United States

Taxing authority and tax law

Taxing authority: Internal Revenue Service (IRS)

Tax law: Internal Revenue Code (IRC)

Relevant regulations and rulings

- Treasury Regulations (Treas. Regs.) include §§ 1.482, 1.6662, 1.6038A and 1.6038C.
- Revenue Procedures (Rev. Procs.) include Rev. Proc. 99-32, Rev. Proc. 2015-40, Rev. Proc. 2015-41, Rev. Proc. 2007-13 and Rev. Proc. 2005-46.
- In August 2015, the IRS published Notice 2015-54, announcing that the Treasury Department and the IRS intended to issue new regulations that would deal with the transfer of intellectual property (IP) through partnerships among related parties and apply principles under § 1.482-7 to determine the value of transferred IP.
- In September 2015, the Treasury Department and the IRS released proposed regulations under § 367 (the Proposed Regulations) modifying the application of § 367(a) and (d) to certain outbound transfers of property. The Proposed Regulations would eliminate the exception in the current § 367(d) temporary regulations for the transfer of foreign goodwill and going concern value (FGGCV).
- Final regulations under §367(a) and (d) were published by Treasury on 16 December 2016. The final regulations eliminate the exception under Treas. Reg. Section 1.367(d)-1T(b) for outbound transfers of foreign goodwill and going concern value (FGGCV) and limit application of the active foreign trade or business (ATB) exception under Section 367(a)(3) to certain specified property (not including FGGV). For FGGCV, the Final Regulations require the US transferor to either recognize gain currently under Section 367(a) or elect in to the deemed royalty regime of Section 367(d), thus subjecting to US taxation transfers that have not generally been subject to income or gain recognition under Section 367. The Final Regulations apply on a retroactive basis to transfers occurring on or after 14 September 2015, and to transfers occurring before that date resulting from entity classification elections filed on or after 14 September 2015.
- Further in September 2015, the Treasury Department and the IRS issued Treasury Decision 9738, which contained temporary regulations under § 482 clarifying the application of the arm's-length standard when multiple code sections (e.g., §§ 482 and 367) apply. The temporary regulations apply to tax years ending on or after 14 September 2015.

OECD Guidelines treatment

The IRS considers its transfer pricing laws and regulations to be wholly consistent with the OECD Guidelines. For domestic purposes, the OECD Guidelines do not provide support and would not be directly relevant to the application of any pricing methods. However, if taxpayers pursue competent authority relief from double taxation or a bilateral APA, the OECD Guidelines are relevant and may be used to demonstrate compliance with international principles.

Documentation requirements

Transfer pricing documentation is not required by law. However, in practice, it is recommended that taxpayers maintain contemporaneous documentation to avoid penalties. The existence of documentation need not be either disclosed on, or provided with, the return.

For penalty avoidance purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained certain documentation (further described below) that substantiates the taxpayer's assertion that it reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application) provided the most reliable measure of an arm's-length result under the principles of the best-method rule.

United States (continued)

The principal documents required by the regulations are:

- An overview of the taxpayer's business and an analysis of the legal and economic factors affecting pricing
- A description of the organizational structure
- Any documents explicitly required by regulations (e.g., CSA documents)
- A description of the pricing method and reasons the method was selected (a best-method analysis)
- A description of alternative methods and why they were not selected
- A description of controlled transactions and any internal data used to analyze them
- A description of comparables used, how comparability was evaluated and any adjustments that were made
- An explanation of any economic analysis and any projections used to develop the pricing method
- Any material data discovered after the close of the tax year but before the filing of the tax return
- A general index of the principal and background documents and a description of the record-keeping system

Priorities/pricing methods

For tangible goods, the IRS accepts the CUP, resale price, cost-plus, CPM, profit split and unspecified methods. For intangible goods, the IRS accepts the Comparable Uncontrolled Transaction method (CUT), CPM, profit split and unspecified methods.

For services, the IRS accepts the services cost, comparable uncontrolled services price, gross services margin, cost of services plus, CPM, profit split and unspecified methods. For CSA buy-ins, the IRS accepts the CUT, income, acquisition price, market capitalization, residual profit split and unspecified methods.

The regulations provide a best-method rule for determining the appropriate method to be applied by the taxpayer for each intercompany transaction.

Return disclosures/related-party disclosures

Under regulations issued in 2010, certain taxpayers must also disclose their uncertain tax positions (UTPs) on Schedule UTP and provide information such as the ranking of the positions by the size of their reserves and concise descriptions of the tax positions. There is a phase-in period so that as of 2014, the UTP disclosures are required by corporations with assets of USD10 million or more.

Transfer pricing-specific returns

Taxpayers are required to file forms 5471, 5472 and 8865 regarding transactions with related parties.

Documentation deadlines

If documentation is prepared to help protect against penalties, then it must be in place by the filing date of a timely filed US tax return. Taxpayers must provide documentation to the IRS within 30 days of an examiner's request.

United States (continued)

Transfer pricing penalties

Pursuant to IRC § 6662, taxpayers may be liable for either a 20% or 40% penalty for an underpayment of tax attributa¬ble to a substantial or gross valuation misstatement, respectively. The penalties are calculated as a percentage of the under¬payment, or the penalty may apply to a valuation misstatement. There is no penalty for failure to have documentation; however, documentation may help avoid a penalty.

Penalty relief

Penalties may be avoided by establishing reasonable cause and good faith via the preparation of documentation of the taxpayer's application of IRC § 482, as described above.

Statute of limitations on transfer pricing assessments

A general statute of limitations applies in the US, 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. There is no statute of limitations for fraud-related adjustments.

Most treaties with trading partners provide the IRS access to closed years in order to provide relief from double taxation pursuant to a MAP.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit depends on the facts and circumstances. The introduction of what the OECD refers to in its Action Plan on BEPS as high-risk transactions increases the likelihood of a tax audit.

In general, the likelihood of transfer pricing scrutiny during a tax audit is high. Transfer pricing is extensively regulated in the US, and the IRS has recently taken a number of administrative steps to increase its ability to focus on international transactions, with a particular emphasis on transfer pricing. New positions have been created within the IRS' Large Business and International Division for a deputy commissioner (international) and a director of transfer pricing operations, and a significant number of transfer pricing professionals have been hired. As a result of this emphasis, documentation frequently is requested at the outset of any examination of taxpayers transacting with foreign related parties.

The overall likelihood that the transfer pricing methodology will be challenged during the initial stages of any audit, where there are international transactions, is high. However, experience has shown that well-reasoned documentation reduces the likelihood of further scrutiny.

APA opportunity

Taxpayers may request unilateral, bilateral or multilateral APAs. The APA process is administered by the IRS' Advanced Pricing and Mutual Agreement (APMA) Program. Guidance regarding APAs can be found in Rev. Proc. 2015-41. The revenue procedure has strict case management procedures, disclosure requirements and detailed guidance regarding the submission and processing of APA requests. Additional competent authority guidance is provided in Rev. Proc. 2015-40.

Impact of new OECD BEPS Action 8–10 guidelines

Not applicable.

Uruguay

Taxing authority and tax law

Taxing authority: General Tax Direction (*Dirección Nacional Impositiva*, or DGI)

Tax law: Income Tax Law and Regulations

Relevant regulations and rulings

Transfer pricing documentation requirements have been in effect in Uruguay since 1 July 2007 (following Law No. 18.803), but they were not regulated until 26 January 2009, with the publication of Decree No. 56/009. No. 392/009 made additional modifications.

The DGI issued Resolution No. 2.084/009 on 1 December 2009 (with the modifications introduced by Resolutions No. 819/010 and No. 2.098/009), which defined concepts and established requirements for the transfer pricing report.

OECD Guidelines treatment

Uruguay is not an OECD member, and the OECD Guidelines are not mentioned in Uruguay's Income Tax Law and Regulations. As transfer pricing practice is relatively new in Uruguay, there is no background in that regard, if any, given to the OECD Guidelines.

Documentation requirements

Point 10 of Resolution No. 2.084/009,[1] as amended by Resolution No. 745/011, states that taxpayers falling under § 1 of Presidential Decree No. 56/009 shall be required to submit information on a yearly basis when meeting any of the following circumstances:

- When they engage in transactions included under the transfer pricing rules for an amount exceeding 50 million indexed units (aprox. 160,000,000 Uruguayan pesos) in the related tax period; exempted from this section are transactions carried out by users of free trade zones, according to Law No. 15,921 of 17 December 1987, provided that they are not subject to the Income Tax of Economic Activities (*Impuesto a las Rentas de las Actividades Económicas*, or IRAE)
- When they would have been notified by the DGI
- The abovementioned information should contain:
- An informative, sworn statement, including the breakdown and quantification of the transactions for the period included in the transfer pricing system
- A copy of the financial statements for the related fiscal year, when the taxpayer is not required to submit them under other provisions
- The transfer pricing report

The term within which to submit this documentation shall expire on the ninth month from the end of the fiscal year in question, according to the expiry schedules provided for each group of taxpayers.

Point 11 of the resolution N° 2084/009 states that the transfer pricing report should contain at least the following:

- A breakdown of activities and duties performed
- The risks undertaken and assets used to perform those activities and duties
- The breakdown of the elements, documentation, circumstances and events valued for the abovementioned report
- A breakdown and quantification of the transactions included in the transfer pricing system

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[1] References to Resolution No. 2.084/009 involve the text that incorporates the amendments provided by Resolution No. 745/011

- Identification of the entities with which transactions were performed, included in the transfer pricing system
- The method used to determine the transaction prices, indicating the reasons and grounds justifying it as the most appropriate method, as well as the reasons for ruling out other method
- The identification of each one of the selected comparables to support the transfer prices used
- Identification of the information sources from which the comparables have been obtained
- Details of the comparables selected and subsequently rejected, specifying the rejection bases
- Details, quantification and methodology used to make the necessary adjustments to the comparables selected
- Determination of the median and the interquartile range
- A description of the business activity, business characteristics and other relevant elements of comparable entities
- Study conclusions

Priorities/pricing methods

The law establishes that one of the following methods should be applied to determine the market value: CUP, resale price, cost-plus, profit split or TNMM. For the application of the transfer pricing methods, the comparability analysis and justification for such prices may be performed using the local or foreign party as the tested party. If the foreign party is the tested party, certified documented evidence will be required in the country of origin, issued by a firm of well-known independent auditors, duly translated and authenticated.

Uruguayan law does not prioritize methods. However, for transactions involving imports or exports of goods with well-known prices in transparent markets, those prices must be used. If the transactions are performed through international intermediaries that are not the final consignees of the goods, the applicable price is the price in the respective market. The price to be used is the one in the respective market on the day of the shipment or, if it was registered in the Mercantile Office, the price on the day of the contract.

Return disclosures/related-party disclosures

Taxpayers are required to file:

- The transfer pricing study, including the key elements, such as the functions and activities of the company, risks and assets used, the methods used, the interquartile range, and details of the comparables
- Annual transfer pricing return Form 3001

Transfer pricing-specific returns

Only those taxpayers that are obligated to file the transfer pricing study must file the transfer pricing annual return (Form 3001) with the tax authorities.

In that annual return, the company must provide information about the related-party transactions.

Documentation deadlines

The income tax return is due within four months of the close of the fiscal year-end. In that filing, the company must disclose whether a transfer pricing adjustment is required to achieve an arm's-length result in its transactions with both related parties and unrelated parties located in tax havens. In such cases, the transfer pricing analysis should be performed by that time, even though the documentation is not due until nine months after the fiscal year-end.

The deadline for providing the required documentation is nine months after the end of the fiscal year if:

- The transfer pricing annual return (Form 3001), including detailed information regarding all cross-border intercompany transactions and all transactions with unrelated entities located in tax havens, has been filed.
- The transfer pricing study (under Resolution No. 2.084/009) is to be filed along with Form 3001.

Transfer pricing penalties

The penalty for those that breach the formal requirements established in the transfer pricing framework (i.e., failure to timely file a transfer pricing report and tax return) will be applied on a graduated scale, in accordance with the severity of the breach. The maximum fine is UYU6.09 million.

When there is an underpayment due to transfer pricing, the taxpayer is penalized with a tax omission fine that is 5% of the amount of the underpayment if it is paid before 5 days after the deadline, 10% if it is paid between 5 and 90 days after the deadline, and 20% if it is paid more than 90 days past the deadline. In each case, corresponding surcharges are added.

It is important to note that if the DGI requires the transfer pricing study and a company does not file it, the DGI can suspend the certificate that shows that the taxpayer fulfilled its tax obligations. The immediate consequence of this is that it bars the taxpayer from being able to import goods or obtain a bank loan.

Penalty relief

There currently are no provisions for reductions in penalties.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations for transfer pricing adjustments; rather, the general regime applies. Assessments can be raised 5 years after the company's accounting period ends, but this is extended to 10 years when the difference is due to fraudulent or negligent conduct by the taxpayer.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, is medium, while the likelihood that transfer pricing will be reviewed as part of that audit is high. The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged is high. Transfer pricing practice is new in Uruguay; therefore, there is not a lot of background for such audit practices. However, in the cases known, the taxing authority has challenged the methodology and the companies' comparables sets.

The tax authority relies on a special team of professionals who have focused on performing tax audits for the biggest companies, known as "Great Taxpayers." However, they have not focused on specific industries.

The focus is mainly on:

- Functional analysis
- Segmentation criteria revision
- Comparison between the financial information of the company considered for the transfer pricing analysis and the financial statements, identifying internal and external comparables

Uruguay (continued)

General observations pointed out in inspections are:

- Comparability adjustments made to the stated party
- Rejection of the selected comparable companies
- Observations of companies that have continuous losses for many years

APA opportunity

Currently, no APA regime specifically is published in Uruguay, but the tax authority recently signed the first one.

Uruguayan transfer pricing rules have an APA regime. However, there are no specific procedures defined yet. Therefore, in case an APA process is initiated and no agreement is finally reached, there are no rules about how the local tax authorities should proceed with the already provided information.

As of the time of this publication, only one APA case has been announced publicly, and it was related to a chemical company that was going to start conducting business in Uruguay.

Impact of new OECD BEPS Action 8–10 guidelines

The tax authority submitted a law project in order to modify the local transfer pricing rules and include the BEPS actions, recently this law project was approved by the Parliament. Thus, the local tax authority would be in line with the BEPS guidelines and the new OECD requirements related to transfer pricing. Given this, while there are no case laws yet, it will be important to monitor further developments in this area.

Venezuela

Taxing authority and tax law

Taxing authority: Venezuelan Tax Administration (National Integrated Service of the Customs and Tax Administration — SENIAT)

Tax law:

- 2014 Master Tax Code, Chapter III, Articles 109 to 111, and 220 to 229
- 2015 Venezuelan Income Tax Law, Chapter II, Articles 98 to 168
- 2007 Income Tax Law Reform, Article 116 — inclusion of thin capitalization rules

Relevant regulations and rulings

Administrative Order No. SNAT/2010/0090, issued by the SENIAT, was published in the *Official Gazette* No. 39,557 of 20 December 2010. It establishes the procedure for the calculation and use of the arm's-length range for transfer pricing purposes. The main considerations are as follows:

- The use of the interquartile range as the arm's-length range
- In case the price or amount or profit margin is within the interquartile range (arm's-length range), the tax administration will deem it as agreed-to by independent parties. If, however, it is not within the interquartile range, the taxpayer must take the median of the range as the arm's-length price

In February 2007, a partial reform of the Income Tax Law and rules on thin capitalization were published in the *Official Gazette* No. 38.628. The thin capitalization rules apply, as of fiscal year 2008, to Venezuelan taxpayers or Venezuelan permanent establishments holding debt (controlled debt) of companies or individuals who are considered related according to Title VII, Chapter III of the Income Tax Law. The main inclusions are as follows:

- Taxpayers will have the limited possibility of deducting interest expenses resulting from related parties' loans when the average amount of debt (with related and unrelated parties) exceeds the average amount of equity for the respective fiscal year.
- The amount by which the debt exceeds the taxpayer's equity will be treated as equity for income tax purposes.

OECD Guidelines treatment

The 2010 OECD Guidelines are applicable as a supplement to Venezuelan laws for topics not covered thereunder.

Documentation requirements

Effective since 2002, taxpayers are required to prepare and maintain extensive supporting and contemporaneous documentation. The documentation requirements include details on the functions, assets, risks, organizational structure, business descriptions, detailed information of all operations with related and non-related parties, audited financial statements, agreements and contracts, reasoned method selection, inventory valuation method (if applicable), analysis results and other relevant information.

Priorities/pricing methods

The acceptable methods are the OECD methods: CUP, resale price, cost-plus, profit split and TNMM. In Venezuela, the CUP method takes priority over others.

Return disclosures/related-party disclosures

Not Applicable

Transfer pricing-specific returns

A controlled party's PT-99 form must be filed during the six months immediately following the close of each tax year. The PT-99 form is available on the SENIAT's website.

Documentation deadlines

The taxpayer must prepare documentation by the filing date of the annual income tax return at the end of every fiscal year. In addition, the taxpayer must submit the documentation upon request by the SENIAT during a transfer pricing audit. For taxpayers whose fiscal year ends in December, it is mandatory to file the PT-99 during June. In other cases, the filing deadline will be six months after the fiscal year-end.

Transfer pricing penalties

A failure to file the transfer pricing informative return (PT-99) will trigger a penalty of 150 tax units[1] and a company closure for 10 consecutive days. When failing to submit the documentation upon request by the SENIAT, the taxpayer faces a fine of 1,000 tax units and a company closure for 10 consecutive days. Additionally there is a fine ranging from 100% to 300% of the omitted tax amount. If there is a transfer pricing assessment, late payment interest may also be added to these amounts.

Penalty relief

If a taxpayer applies a legally sanctioned transfer pricing method, this could be considered a mitigating circumstance in the determination of an assessment. This penalty relief is based on previous tax audit procedures and assessments, but there is no legal provision supporting it.

Statute of limitations on transfer pricing assessments

The statute of limitations is 6 years from the date of filing the return and 10 years if the taxpayer fails to comply with the filing of any tax return, including returns for income tax. However, the PT-99 is not considered a tax return for penalty purposes.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The SENIAT continues to be very active and aggressive in transfer pricing audits. It has added transfer pricing as a relevant topic to be reviewed during general tax audits. Thus far, audits have been conducted on taxpayers irrespective of industry.

Tax audits have been focused both in formal duties (i.e., request for contemporaneous transfer pricing documentation, filing PT-99) and in the determination of proper taxable income in intercompany transactions (i.e., challenge methodology, comparables, use of multiple years' data, segmented financial data by transaction and/or activity, among others).

[1] 2015 tax unit = VEF.177 per unit.

Venezuela (continued)

The evaluation criteria to trigger a transfer pricing audit are:

- Inconsistencies among the transfer pricing report, income tax return and transfer pricing information return
- Use of non-updated financial information from comparable companies up to June of the fiscal year subject to the study
- PLIs below the interquartile arm's-length range
- Lower operating margins, compared with operating margins from prior years or with operating losses
- Late filing of transfer pricing information return

Currently, in the transfer pricing review process, the time frame to submit the information requested ranges from two to three business days, and there is a reluctance to give extensions.

The likelihood of an annual tax audit in general is high, as is the likelihood that transfer pricing will be reviewed as part of the audit. However, the likelihood that the transfer pricing methodology will be challenged if transfer pricing is reviewed as part of the audit is low.

APA opportunity

Unilateral and bilateral APAs are available to the extent that they are carried out with nations that have concluded double taxation treaties with Venezuela (refer to Income Tax Law Articles 141 to 165, and Master Tax Code Chapter III, Articles 230 to 239).

Impact of new OECD BEPS Action 8–10 guidelines

According to Article 113 of the Income Tax Law, the 2010 OECD Guidelines are applicable as a supplement to Venezuelan laws for topics not covered thereunder. Therefore, any change to the OECD Guidelines related to the BEPS initiative might have consequences in in Venezuela, and it will be important to monitor further developments in this area.

Vietnam

Taxing authority and tax law

Taxing authority: General Department of Taxation (GDT)

Tax law: Law on Tax Administration

Relevant regulations and rulings

- Article 37 of the Law on Tax Administration[1] articulates the arm's-length principle, which empowers tax authorities to adjust the value of purchases, sales, exchanges and accounting records of goods and services of taxpayers if that value is not in accordance with market prices.
- The Amended Law on Tax Administration No. 21/2012/QH13 was officially enacted on 3 December 2012 and took effect on 1 July 2013. Decree 83/2013/NĐ-CP (Decree 83/2013), issued on 22 July 2013, stipulates in detail the Implementation of a number of Articles of the Amended Law on Tax Administration No. 21/2012/QH13 and took effect on 15 September 2013. Decree 83/2013 also includes Article 34, stipulating the arm's-length principle.
- The Amended Law on Tax Administration No. 71/2014/QH13 was officially enacted on 26 November 2014 and took effect on 1 January 2015.
- Detailed transfer pricing regulations are included in Circular 117/2005/TT/BTC (Circular 117)[2] and Circular 66/2010/TT/BCT (Circular 66).[3] Circular 66 provides guidelines for the calculation of market prices in business transactions between related parties.
- Circular 156/2013/TT-BTC (Circular 156)[4] provides guidance about some articles of the Law on Tax Administration, the Amended Law on Tax Administration No. 21/2012/QH13 and Decree 83/2013.
- Circular 201/2013/TT-BTC (Circular 201)[5] provides detailed guidance about the APA application process.

Circular 117 applies to transactions that took place in the financial years between 2006 and 2009.

Circular 66 governs transactions between related parties that took place from 1 January 2010. It sets forth formal and comprehensive guidelines for many significant issues related to the interpretation and application of the arm's-length principle. In addition to articulating the arm's-length principle, Circular 66 provides definitions of "market prices," "material differences" and "associated parties"; lists acceptable transfer pricing methods; and addresses the "most appropriate method" rule. In addition, it provides guidance about the arm's-length range, benchmarking principles and acceptable databases, as well as reiterates the two mandatory transfer pricing compliance requirements — preparation and submission of the annual declaration of related-party transactions, and maintenance and submission (if requested) of the contemporaneous transfer pricing documentation.

The Ministry of Finance released the revised annual Transfer Pricing Disclosure Form 03-7/TNDN (Form 03) attached to Circular 156 (replacing Form GCN-01/QLT in Appendix 1-GCN/CC of Circular 66); Form 03 is applicable from the 2014 tax year and afterward. As a practical matter, taxpayers will now be required to perform an annual benchmarking study. This is so actual transfer prices used during the year can be compared with the outcome of the benchmarking. Any difference must be disclosed, as required by Form 03. Failure to perform such a study will result in much increased exposure to transfer pricing adjustments and high penalties. The introduction of Form 03 with additional disclosure requirements reaffirms that the contemporaneous transfer pricing documentation is required, that the burden of proof rests with the taxpayer and that the only effective defense rests with up-to-date documentation, including benchmarking.

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[1] This law was enacted by the National Assembly on 29 November 2006 and has been effective since 2007.
[2] This circular was issued by the Ministry of Finance on 19 December 2005.
[3] This circular was issued by the Ministry of Finance on 22 April 2010 and supersedes Circular 117.
[4] This circular was issued by the Ministry of Finance on 6 November 2013.
[5] This circular was issued by the Ministry of Finance on 20 December 2013.

Vietnam (continued)

The National Action Plan for 2012 to 2015, which aims to have at least 20% of the annual tax audit cases devoted to transfer pricing audits, has been implemented strictly by the General Department of Tax ("GDT"), cascading to the provincial level. The purposes of this program are to create a stronger legal framework for transfer pricing and tax administration; provide training to build human resources capabilities; develop and enhance reliable databases; and promote international cooperation to enhance the Vietnam tax authority's capacity for transfer pricing administration.

Furthermore, the tax authorities noted some inadequacies in the documentation provided by the taxpayers (i.e., the documents provided or made available by taxpayers were seen as not compliant with Circular 66, specifically the sections relating to company analysis, industry analysis and benchmarking). Notably, though tax regulations allow valid invoices and intercompany agreements as supporting documents for corporate income tax (CIT) or value-added tax (VAT) purposes, they are not sufficient as or equivalent to mandatory transfer pricing documentation under Circular 66.

Following the introduction of Form 03 and the active implementation of the National Action Plan, the GDT has been working on a draft of the decree on transfer pricing, which will replace the existing Circular 66 once it is issued.

OECD Guidelines treatment

Circulars 117 and 66 are generally based on the OECD Guidelines. How the GDT will apply the OECD Guidelines in interpreting the principles under the circulars remains to be seen during the first few years of implementation of the circulars.

Documentation requirements

Circular 66 requires an availability of transfer pricing documentation that is prepared contemporaneously and must be provided to the tax authority within 30 working days of the tax authority's request. The documentation is required to establish when the transaction occurred and must be updated throughout the performance of the transaction. For compliance purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained documentation showing that it reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application) provided the most reliable measure of an arm's-length result under the principles of the most-appropriate-method rule.

The principal information and documents required by the regulations are:

- Information about transactions between related parties and the taxpayer
- Information and updated reports about the strategy for development, administration and control between related parties
- The pricing policy for transactions in relation to each group of products in accordance with the general guidance of related parties and the taxpayer
- Documents and reports about the process of development, business strategy, projects, production, business or investment plans
- Regulations and procedures for financial statements and internal control reports of the company and of related parties to the transactions
- A diagram of transactions and documents describing transactions, including information about parties to transactions and orders and procedures for payment and delivery of products
- Documents specifying properties and technical specifications of products, breakdown of costs (or cost) of one product, selling price of products, total amount of products produced or traded and sold in the period (specifying such items on the basis of the related transaction and an independent transaction, if any), and quantity of products
- Information, documents and source documents concerning the process of negotiating, signing, performing and liquidating economic contracts and agreements related to transactions (usually including a description of products, place of transaction, form of transaction, value of transaction, terms of payment, payment documentation, period of performance, minutes of meetings or instructions of management regarding the process of negotiation and signing, and performance of a transaction)

- Information, documents and source documents related to economic conditions of the market at the time of the related transactions affecting the method of calculation of a price for transactions (for example, changes in exchange rates and policies of the government affecting prices in transactions and financial incentives)
- The pricing policy for selling and purchasing products and the procedures for control and approval of prices
- Information, documents and source documents used to select the most appropriate method, including data used for comparative analysis and adjustment of significant differences
- Other information or documents used to select and apply the methods

Priorities/pricing methods

Circular 66 permits the use of the following methods: CUP, resale price, cost-plus, CPM or TNMM, or profit split. Taxpayers are required to select the most appropriate method to determine whether the pricing arrangement is at arm's-length under the prevailing regulations.

There is no hierarchy among the methods specified under the Vietnamese transfer pricing regulations, but recent practices suggest that the Vietnam tax authority has a growing preference for the use of the CUP method if reliable information on CUP is available.

Return disclosures/related-party disclosures

Taxpayers are required to declare the related-party transactions in a transfer pricing compliance form or forms: Form GCN-01/TNDN (under Circular 117) applies for the financial years from 2006 to 2009, Form GCN-01/QLT (under Circular 66) applies for the financial years from 2010 to 2013 and Form 03-7/TNDN (under Circular 156) applies for the tax year 2014 and onward.

The disclosure form is required to be submitted together with the CIT return, which must be filed within 90 days from the end of the respective financial year.

Transfer pricing-specific returns

Please see the "Return disclosures/related-party disclosures" section above.

Documentation deadlines

The documentation must be established at the time of the transaction arisen and updated throughout the performance of the transaction. The transfer pricing documentation is required to be submitted in Vietnamese.

Upon receipt of a written request from the tax authorities, taxpayers are obliged to provide the documentation within 30 working days. If enterprises have plausible reasons, a one-time 30-day extension may be granted, and be effective once the initial 30-day period has passed.

Transfer pricing penalties

In accordance with Circular 66 governing the current Vietnamese transfer pricing regulations, the tax authorities are empowered to adjust the taxable incomes or payable income tax amounts for companies that conduct related-party transactions in the following cases:

- When companies fail to declare or fully declare information in the transfer pricing disclosure form for related-party transactions arising in the year of settlement of enterprise income tax, or fail to produce and supply information, data and documents within 30 working days of the tax authorities' request

Vietnam (continued)

- If companies have based themselves on unlawful or invalid documents, data and evidence, or fail to specify the sources of documents, data and vouchers used for determining transfer prices, gross profit ratios or profitability ratios applied to related-party transactions
- When companies have forged unrelated transactions or arranged related-party transactions into related ones so as to select these transactions as unrelated transactions for comparison
- If tax officers suspect that companies either failed to apply or improperly applied in a deliberate manner the provisions of Circular 66

Failure to comply with the arm's-length principle and the documentation requirement implies an exposure to the reassessment of transfer prices or profits for tax purposes, which can be accompanied by penalties and a late-payment interest charge. Administrative penalties ranging from VND700,000 to VND5 million may be imposed for failure to comply with transfer pricing disclosure requirements. In addition, the interest penalty of 0.03% per day over the outstanding tax due may also be imposed if a trans¬fer pricing adjustment is made. Further, taxpayers are also subject to a tax penalty of 20% of additional tax in the case of an incorrect declaration. Additional penalties of up to three times the outstanding tax due may be imposed if there is a finding of tax evasion or fraud.

Moreover, the Vietnamese regulations also enforce criminal proceedings against taxpayers if it is proven that there is significant tax evasion. According to the latest Criminal Code effective on 1 July 2016, for the act of tax evasion, the taxpayer may be subject to tax penalties under criminal proceedings.

Penalty relief

Penalties may be mitigated by timely and adequate disclosure of the related-party transactions on Form GCN-01/TNDN (Appendix 1-GCN/HTQT of Circular 117), or Form GCN-01/QLT (Appendix 1-GCN/CC of Circular 66), or Form 03-7/TNDN (attached to Circular 156), and by the preparation and timely production of transfer pricing documentation.

Statute of limitations on transfer pricing assessments

There is no statute of limitations that specifically applies to transfer pricing in Vietnam. Hence, general principles of the statute of limitations for tax apply:

- For violations of tax procedures, administrative penalties can be imposed within two years from the date committing violations.
- For acts constituting tax evasion or tax fraud not serious enough for penal liability examination, acts of late tax payment and declaration of inadequate tax amounts, administrative penalties may be imposed only within five years from the date committing violations.

The date of commission is the statutory deadline for submitting the required tax return, or the date when the tax authority issues a tax refund, exemption or reduction decision in the case of a tax refund, exemption or reduction. Note that beyond the above periods (two years and five years), a violator will no longer be subject to the imposition of the above-described adminis¬trative penalties but will still be asked to pay the insufficient, evaded or fraudulent tax amount. Hence, it can be said that the statute of limitations with respect to penalties does not apply with respect to the recovery or collection of taxes. Under the Amended Law on Tax Administration No. 21/2012/QH13, the statute of limitations applicable for tax collection is 10 years.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is characterized as high, while the likelihood that transfer pricing will be reviewed as a part of the general tax audit is medium to high. The likelihood that the transfer pricing methodology will be challenged if transfer pricing is a subject of the general audit is characterized as medium.

For 2016, the Vietnamese tax authorities intensified transfer pricing audits at companies across various industries, instead of focusing only on specific industries, such as garment, textiles, electronics, manufacturing and tolling industries.

Vietnamese transfer pricing regulatory enforcement is becoming increasingly sophisticated following the implementation of Decisions 1574/QĐ-TCT and 1575/QĐ-TCT dated 1 September 2015 with the official establishment of the transfer pricing inspection divisions at both the GDT and provincial departments of taxation (PDT) levels, including Ha Noi, Ho Chi Minh City, Binh Duong and Dong Nai. Moreover, it is pertinent to note that the transfer pricing inspection divisions at the GDT are able to engage in policymaking procedures, which were previously the authority of the Reform and Modernization Division at the GDT level, and participate in the consideration of APAs and MAPs.

These recent developments with respect to enhanced legislation, the tax authority's capacity building, the establishment of dedicated transfer pricing inspection divisions at both the GDT and local tax departments, as well as the increasingly sophisticated evidence in transfer pricing audits, show that transfer pricing continues to be the national focus of Vietnam's tax authority going forward.

APA opportunity

After APAs were introduced in the Amended Law on Tax Administration No. 21/2012/QH3, its implementation regulations were issued (Decree 83/2013 dated 22 July 2013) and the draft APA circular was released for public comments, the Ministry of Finance issued Circular No. 201/2013/TT-BTC (Circular 201), providing detailed guidance about the APA application process, which took effect on 5 February 2014.

The guidance about APAs and standardized processes and procedures for applying for an APA included in Circular 201 are generally in line with the OECD's APA guidelines and effective APA regimes in other taxing jurisdictions. Below is a summary of the key features of the APA regime and application processes included in Circular 201:

- Definition of an APA — An APA is a binding agreement between the taxpayer and tax authority that determines in advance the basis of the tax calculation, transfer pricing methods and arm's-length prices of the covered related-party transactions for a specific period.
- Scope of application — An APA is available to corporate taxpayers that undertake domestic or overseas related-party transactions.
- Types of APA — Unilateral, bilateral and multilateral APAs are all accepted.
- APA period — An APA can be effective for up to five years, with renewal for a maximum of five years.
- Competent authorities — The Ministry of Finance gives final approval of APAs, with the GDT in charge of signing off on APA applications. Provincial tax departments help negotiate, process and monitor APA applications within their authority.
- Database — Data and database use for price and profit margin analysis must be publicly recognized with the specified hierarchy of preference.
- Confidentiality — Both the taxpayer and tax authorities must observe information confidentiality. All information and documents provided during the APA application process shall not be used as evidence for further tax audit, tax inspection or tax imposition on the taxpayers.
- Compliance after APA sign-off — Taxpayers should file follow-up annual reports on the APA's terms of compliance.
- Flexibility — Revision options are available in case material assumptions established in the APA change, and the APA can also be used as a benchmark to revise declared prices and profit margins for past years to avoid tax penalties, in accordance with the Law on Tax Administration.
- Independent consultants — Both taxpayers and tax authorities are entitled to hire independent consultants to assist them during the APA process.

Under Circular 201, the APA application process covers the following steps:

- Application for consultation prior to official application for an APA (i.e., pre-filing consultation) — This is required with a prescribed form, along with an exhaustive list of documents to be submitted. There is no specific timeline. The GDT issues the official result of consultation within 30 working days of the end of the consultation process.

- Formal application for APA — An eligible taxpayer may make an official application for an APA in the prescribed form, along with documents required and a processing fee. An official application for an APA must be submitted within 120 days of receipt of written approval from the GDT. An extension of 30 calendar days is available for reasonable circumstances.
- Evaluation of APA application dossier — A meeting to discuss the working schedule between the GDT and the taxpayers is organized within 15 calendar days of the official application. The maximum period for the GDT to evaluate the application is 90 calendar days, with a possible extension of 60 calendar days under reasonable circumstances.
- Negotiation between tax authorities and taxpayers — There is no specific timeline for the negotiation process.
- Sign-off and implementation of the APA

With respect to the challenging transfer pricing audit landscape nowadays, along with the Vietnamese tax authorities' determination and aggressiveness in ensuring taxpayers' compliance, the number of companies that are currently in the process of or considering for APA application has been increasing considerably in recent years in Vietnam.

Impact of new OECD BEPS Action 8–10 guidelines

With respect to the OECD initiatives on BEPS, there are currently no regulations in Vietnam reflecting the BEPS recommendations. On 21 July 2016, the GDT issued decision 1286/QD-TCT establishing three specialized working groups responsible for understanding the best practices relating to BEPS project and proposing appropriate policies to prevent tax evasion and profit shifting. In particular, the GDT and the Ministry of Finance are finalizing the "Draft Decree on Tax Administration of Enterprises with Related-party Transactions" which reflects some recommendations included in Actions 4, 8-10 and 13. The Draft Decree is expected to be approved in 2017.

Zambia

Taxing authority and tax law

Taxing authority: Zambia Revenue Authority

Tax law: Income Tax Act CAP 323 of the laws of Zambia

Relevant regulations and rulings

According to § 97A (1):

- "Actual conditions" means conditions that are made or imposed between any two associated persons on their commercial or financial relations
- "Arm's-length conditions" means subject to § 97AA where that section applies, conditions or no conditions that would have been made or imposed if persons were not associated with each other

Section 97A shall apply when a taxpayer engages in one or more commercial or financial transactions with an associated person and the actual conditions made or imposed in that transaction or transactions are different from the arm's-length conditions and there is, except for this section, a reduction in the amount of income taken into account in computing the income of one of the associated persons referred to in subsection (1), in this section referred to as "the first taxpayer" chargeable to tax for a charge year, in this section referred to as "the income year."

The income of the first taxpayer chargeable to tax in the income year shall be computed for tax purposes on the basis that the arm's-length conditions had been made or imposed as between the first taxpayer and the other associated persons referred to in subsection (2) instead of the actual conditions, and a computation on that basis is referred to as a computation on the arm's-length basis.

If in the income year and by reason of the actual conditions, an amount of income received by that other person associated with the first taxpayer, in this section referred to as "the second taxpayer," is increased, that increase in income corresponds to the reduction in income of the first taxpayer referred to in subsection (2) and (c) a claim under this subsection has been made in writing by the second taxpayer to the Commissioner-General, the second taxpayer's income chargeable to tax in the income year shall be computed on the arm's-length basis for all tax purposes except for the purposes of § 46A.

For the purposes of this section, references to a reduction in an amount of income include references to a reduction to nil or to the accrual of a loss or an increased loss, and references to an increase in income include references to the reduction in a loss whether to a smaller amount or to nil.

Subsection (4) shall not apply unless the amount of income mentioned in paragraph (a) of that subsection would be taken into account in computing the amount of the second taxpayer's income chargeable to tax for the income year.

For the purposes of subsection (6) in a case where no loss accrues or a smaller loss accrues, as mentioned in paragraph (a) of subsection (4) and in subsection (5), a profit shall instead be deemed to have accrued.

Where an assessment or an amended assessment is made on the first taxpayer and the computation of income on which it is based takes into account a different amount of income from that on which earlier computations were based, the second taxpayer may amend a claim under subsection (4) accordingly.

A claim by the second taxpayer under subsection (4) shall not be made in relation to an income year unless:

- The first taxpayer has made a return on the arm's-length basis under § 46 or § 46A for the income year or an assessment on the arm's-length basis is made on that first taxpayer for that year.
- It is made within three years of the date on which that return or, if earlier, that assessment is made, or such longer period as the Commissioner-General may allow.

Zambia (continued)

A claim may not be amended under subsection (8) by reason of an assessment or amended assessment unless the amended claim is made within one year of the date on which the assessment or amended assessment is made.

Where a claim under subsection (4) or an amended claim under subsection (8) is allowed and the claimant has been or may be given credit by virtue of any agreement made under § 74 or under § 76 for foreign tax, within the meaning of § 75 or § 76, in computing the amount of that credit, the foreign tax to be taken into account as having been paid or as being payable by the claimant shall exclude any amount of foreign tax that would not have been paid or payable if the computation of the income on which the foreign tax is chargeable had, so far as it includes income to which the claim or amended claim relates, been made on the arm's-length basis; and the amount of income to be taken into account as having been received by the claimant and in respect of which the claimant is or may be given credit for foreign tax shall be determined, so far as it includes income to which the claim or amended claim relates, on the arm's-length basis.

Any adjustment required to be made by virtue of this section shall be made by way of discharge or repayment of tax, by an amended assessment or otherwise, and may be made notwithstanding that the adjustment relates to a charge year that ended more than six years earlier. Subsections (3), (4) and (5) of § 87 shall apply to any excess tax due to the taxpayer under this section as they apply to an excess determined under subsection (1) of § 87.

Notwithstanding any provision in the Income Tax Act, for any transaction for the sale of base metals or any substance containing base metals or precious metals, directly or indirectly, between related or associated parties, the applicable sale price of such metals or recoverable metals shall be the reference price. For the purposes of subsection (13), "reference price" means:

- The monthly average London Metal Exchange cash price
- The monthly average Metal Bulletin cash price to the extent that the base metals or precious metal prices are not quoted on the London Metal Exchange
- The monthly average cash price of any other metal exchange market as approved by the Commissioner-General to the extent that the base metal price or precious metal price is not quoted on the London Metal Exchange or Metal Bulletin

  Or

- The average monthly London Metal Exchange cash price, average monthly metal market exchange cash price approved by the Commissioner-General, less any discounts on account of proof or low quality or grade

For the purposes of subsection (13), "related or associated parties" include but are not limited to:

- Parties connected directly or indirectly through shareholding, equity or partnerships
- Any joint venture owned or operated jointly with or an unrelated-party
- Connected persons

  Or

- Parties connected through management and control

For the purposes of subsection (15), two persons are connected with each other if:

- One of them is an individual and the other is that person's spouse, a relative of that person or of that person's spouse, or the spouse of such a relative

  Or

- One of them is a trustee of a settlement and the other is:
  - A person who, in relation to that settlement, is a settlor

  Or

  - A person who is connected with a person falling within subparagraph (i)

For the purposes of subsection (16), "relative" means a brother, sister, ancestor or lineal descendant.

Zambia (continued)

OECD Guidelines treatment

Zambia does not have comprehensive transfer pricing rules yet. Meanwhile, guidance is taken from the OECD Guidelines.

Documentation requirements

There is no specific documentation requirement; however, transfer pricing documents are required to support the arm's-length principle.

Priorities/pricing methods

There are no specific guidelines on priorities or pricing methods; however, OECD Guidelines are relied upon.

Return disclosures/related-party disclosures

No specific disclosure requirements currently exist for filing the tax return.

Transfer pricing-specific returns

Not applicable.

Documentation deadlines

Not applicable.

Transfer pricing penalties

No specific transfer pricing penalties are applicable. The general income tax penalties are applicable for noncompliance.

Penalty relief

Penalty relief can be availed through negotiations with the tax authority.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. The income tax statute of limitations of six years is applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The audit program is risk-based, concentrating on thinly capitalized MNEs.

APA opportunity

Zambia does not have a formal APA program.

Impact of new OECD BEPS Action 8–10 guidelines

As stated above, Zambia is not a member of the OECD. Therefore, the provisions therein are only persuasive.

Zimbabwe

Taxing authority and tax law

Taxing authority: Zimbabwe Revenue Authority (ZIMRA)

Tax law: Income Tax Act (*Chapter 23:06*)

Relevant regulations and rulings

Section 16(1)(q) provides for a thin capitalization rule where the safe harbor is a debt-to-equity ratio of 3:1. Interest on the excess debt is disallowed and is also treated as a dividend whether the payee is local or offshore.

Section 16(1)(r) provides for the restriction of the amount deductible for income tax purposes in respect of general administration and management expenditures paid by a subsidiary to the holding company or by a holding company to a subsidiary or by a branch to its foreign parent company to 1% of the rest of the company's expenditure qualifying for deduction. The disallowed amount is also treated as a dividend whether the payee is local or offshore.

Section 23 deals with determining the taxable income of persons buying and selling property at a price in excess of or less than the fair market price and of nonresident persons exporting products from Zimbabwe without prior sale.

Section 24 deals with determining the taxable income in accordance with double taxation agreements if conditions are created between related parties, which, in the opinion of the commissioner, differ from those that would be made between two persons dealing with each other at arm's-length.

Section 98 deals with determining the taxable income of persons involved in tax avoidance:

- Where transactions, operations or schemes are entered into
- That have the effect of avoiding, postponing or reducing the liability for income tax
- That have been entered into by abnormal means or in an abnormal manner
- Creating abnormal rights and obligations that would not normally be created by persons dealing at arm's-length
- Of which the commissioner is of the opinion that avoidance, postponement or reduction of the liability was the sole or one of the main purposes of the transaction, operation or scheme

Section 98A deals with income splitting on transfers of income by an individual to an associate or transfers of property to an associate in which the associate receives or enjoys income from that property.

With effect from 1 January 2016, §98B of the Income Tax Act was amended to introduce the arm's-length principle to transactions between related parties. The 35th schedule of the Income Tax Act provides guidelines and methods on how to determine whether a controlled transaction meets the requirements of the arm's-length principle.

OECD Guidelines treatment

The OECD Guidelines are a relevant source of interpretation for the Zimbabwe transfer pricing regulations.

Documentation requirements

Taxpayers are currently not obligated to submit transfer pricing documentation but are expected to have it prepared and ready upon request by the ZIMRA.

Zimbabwe (continued)

Priorities/pricing methods

The following are the approved transfer pricing methods in Zimbabwe:

- CUP
- Resale price
- Cost-plus
- TNMM
- Transactional profit split

Where all the above mentioned methods can be applied with equal reliability, the determination of arm's-length conditions shall be made using the CUP method.

In addition, taking the comparability factors into consideration, where the CUP, resale price and cost-plus methods can be applied with equal reliability with TNMM and the transactional profit split method, the determination of arm's-length conditions shall be made using the CUP, resale price or cost-plus methods.

Foreign comparables are accepted in the absence of local comparables. Comparable data used must be available to both the taxpayer and the ZIMRA. In addition, Zimbabwe has very limited comparable data because of the current depressed state of the economy.

There is no practice of using secret comparables.

Return disclosures/related-party disclosures

No specific disclosure is required.

Transfer pricing-specific returns

No specific transfer pricing return is required.

Documentation deadlines

Transfer pricing documentation must be provided on request by the tax authority (§98B subsection 5). The time provided by the ZIMRA to fulfill the request is not specified in the Income Tax Act. This means that the time provided will be at the discretion of the ZIMRA audit team.

Transfer pricing penalties

There are no specific transfer pricing penalties. The general corporate tax penalties (for noncompliance, late filing or non-filing) apply. Penalties range up to 100% of the tax payable.

Penalty relief

Penalties can be waived or reduced through negotiation with the tax authority.

Zimbabwe (continued)

Statute of limitations on transfer pricing assessments

The statute of limitations is six years from the relevant year or date of the assessment.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The audit program is risk-based, concentrating on nonresident controlled and significantly thinly capitalized Zimbabwean companies and branches. There is no audit cycle.

APA opportunity

There is currently no APA program in place.

Impact of new OECD Guidelines

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