



WTS Alliance Network

The Transfer Pricing Guide to Central and Eastern Europe



Disclaimer

The information contained in this booklet can neither be exhaustive nor can it reflect the individual circumstances of a specific case. The information provided does not constitute advice or any other form of legally binding information and solely expresses our interpretation of the relevant transfer pricing regulations as of November 2009. Any changes in transfer pricing and tax regulations, business practices, or any other conditions impacting the companies involved subsequent to this date can naturally not be reflected. Since tax laws are continually being revised, subsequent legislation and interpretations could significantly affect the transfer pricing and tax consequences. Neither WTS AG nor any other company that has been contributing to this booklet can therefore guarantee the accuracy and completeness of the contents of this booklet.

The Transfer Pricing Guide to Central and Eastern Europe

1. Introduction

1.1 Purpose of the TP Guide

The abundance of existing regulations in national tax laws and their frequent changes can be challenging. Especially in transfer pricing where two (or more) jurisdictions are involved in every cross-border transaction.

The Transfer Pricing Guide to Central and Eastern Europe ("TP Guide") has been created by the companies of WTS Alliance as a reference book for practitioners who are seeking for an overview about the transfer pricing regulations of the countries in Central and Eastern Europe ("CEE"). It contains transfer pricing relevant information about taxing authority and tax law, national regulations, documentation requirements, methods, penalties, special considerations, opportunity of advance pricing agreements as well as information about recent and anticipated developments covering eighteen countries in the CEE region.

In many of the CEE countries, transfer pricing regimes are still developing. Uncertainty prevails where regulations have not been issued yet or where best practice rules still have to emerge. Taxpayers with cross-border business relations should be aware that the regulations issued by national tax authorities may not (or not yet) be in line with the provisions of the OECD-Guidelines. Local documentation requirements vary as well as the availability of certain transfer pricing methods, benchmarking and advance pricing agreements. Also regulations regarding business restructurings may vary: Germany for example has recently issued a regulation on international business restructurings that appears to be unique in the European Union and impacts on companies with business relocations from Germany to foreign jurisdictions.

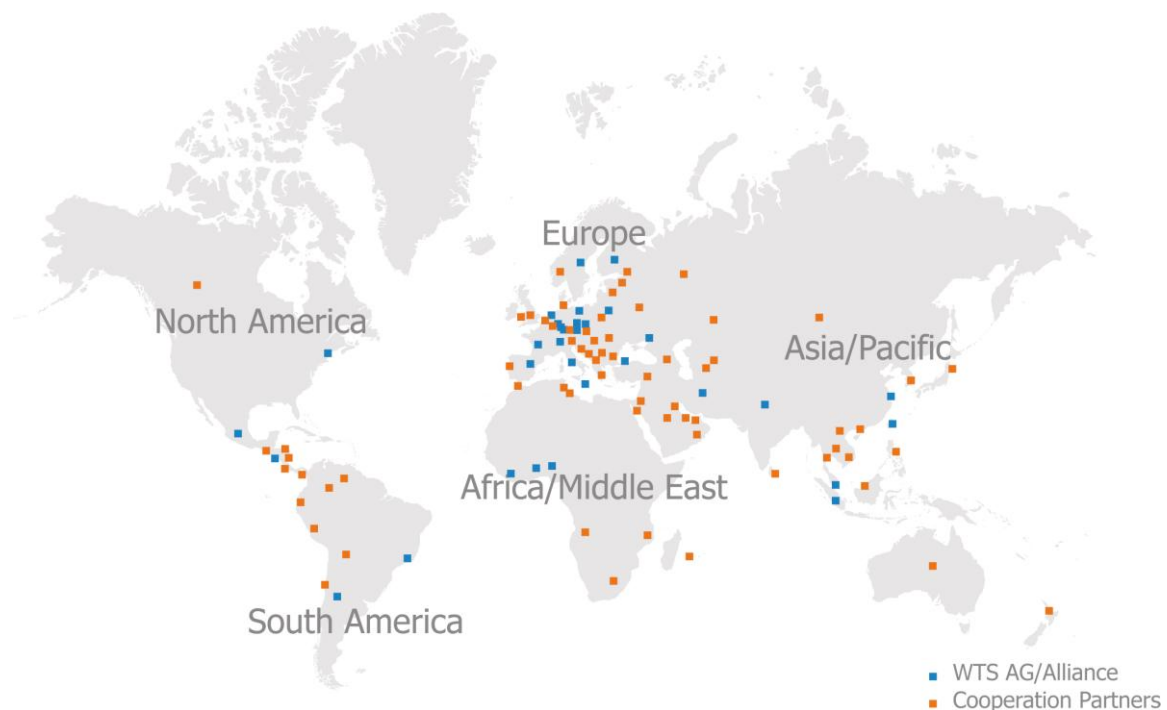
In case you have any further questions with regard to transfer pricing in your jurisdiction(s) after reading the information contained in this booklet, please do not hesitate to contact us.

We would like to thank our local Alliance members and cooperation partners for their contributions and their cooperation in the creation of this booklet.

1.2 About WTS Alliance

WTS Alliance ("Alliance") is a global network of subsidiaries of WTS AG ("WTS") and selected independent tax firms. WTS is the coordinating body of the Alliance. Based upon strong quality criteria, one partner per country only is selected. In countries where the Alliance is not yet represented, clients' requests are handled by tested cooperation partners.

Table 1: WTS global network of Alliance members and cooperation partners:



The expertise and the high quality standards of each firm's personnel combined with proven working relationships within the network yield a consistent level of excellence and outstanding client service. WTS Alliance makes it possible to present fast and consistent cross-border solutions to our clients. In the field of transfer pricing, WTS has Alliance members and cooperation partners in over 90 countries worldwide.

As transfer pricing issues naturally involve two or more jurisdictions, the members of our transfer pricing teams have many years of experience in international cooperation within the Alliance, covering all relevant aspects of transfer pricing ranging from the gathering of relevant country specific information for our clients over full-blown international documentation projects to the negotiation of international mutual agreement procedures.

As the Alliance mainly consists of small and midsize tax consulting firms, we are able to offer a competitive range of fees for a highly diverse portfolio of professional international transfer pricing services.

1.3 About WTS AG

WTS AG ("WTS") is a rapidly expanding tax consultancy headquartered in Munich, and with further representation in Germany and abroad. In Germany, WTS has offices in Duesseldorf, Erlangen, Frankfurt am Main, Gruenwald, Hamburg, Munich and Raubling.

Our consulting activities focus on the area of national and international corporate tax law. In addition to ongoing tax consulting and training services, we focus in particular on transfer pricing services, transaction support, global financial services, and advising companies and groups on VAT issues, as well as expatriate consulting and looking after delegates on an individual basis.

WTS is a pure tax consulting company that does not provide audit services in order to avoid possible conflicts arising between consulting and audit.

Today, WTS has more than 400 employees. Our team combines a wealth of experience from corporate tax departments of multinational enterprises. Former employees of the "Big4" companies and former employees of the tax authorities complete our team.

Our experts in the field of transfer pricing have gained many years of experience in international consulting firms as well as in tax departments of renowned international groups. We have a practice-oriented approach and develop creative and pragmatic solutions. Finding practical solutions also means keeping an eye on future developments and the resulting requirements in this field. We support you with the determination of appropriate transfer prices and the preparation of the necessary transfer pricing documentation, starting with the development of internal transfer pricing guidelines to the coaching of employees in charge of transfer pricing and documentation. For benchmark studies, process control for documentation systems and the preparation of documentation we can provide you with IT-based solutions. When relocating company functions we assist you with the analysis, evaluation, contractual arrangements and the documentation required. When dealing with cross-border intercompany transactions we also take into account related topics such as secondments, value added tax and customs duties. We defend your existing systems in external tax audits as well as in mutual agreement and arbitration procedures.

Our clients are leading international corporations and large, global, mid-sized companies as well as their subsidiaries in Germany and abroad.

We are working for your future... wherever you are.

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Table of Abbreviations

(Additional abbreviations may be introduced in the country specific profiles. These additional abbreviations only apply to the respective country profile).

Alliance	WTS Alliance Network
APA	Advance Pricing Agreement
C+M	Cost Plus Method
CA	Competent Authority
CEE	Central and Eastern Europe
CIT	Corporate Income Tax
CPM	Comparable Profit Method
CUPM	Comparable Uncontrolled Pricing Method
DTT	Double Taxation Treaty
EU	European Union
EU TPD	Council of the European Union: Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (2006/C 176/01)
MNE	Multinational Enterprise
OECD	Organisation for Economic Cooperation and Development
OECD-Guidelines	OECD: Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
OECD-MC	OECD Model Tax Convention
PE	Permanent Establishment
PSM	Profit Split Method

RPM	Resale Price Method
TNMM	Transactional Net Margin Method
TP	Transfer Pricing
TP Guide	The Transfer Pricing Guide to Central and Eastern Europe 2009
TP Aspects	OECD: Transfer Pricing Aspects of Business Restructurings (discussion draft)
VAT	Value Added Tax
WTS	WTS Aktiengesellschaft Steuerberatungsgesellschaft

Transfer Pricing in **Austria**

1. Basic Information

1.1 Tax Authority and Tax Law

The Austrian Ministry of Finance (Bundesministerium für Finanzen "BMF") is the supreme tax authority in Austria. The BMF drafts decrees and guidelines binding the local tax authorities but not the courts on the basis of the statutory provisions. The BMF and the local tax authorities are the responsible tax authorities in Austria.

Generally, the Austrian tax law does not contain any specific transfer pricing provisions. However, Section 6/6 of the Austrian Income Tax Act (Einkommensteuergesetz "EStG") provides for the application of the arm's length principle in case of a cross-border transfer of assets or the supply of services both in a PE context and in an associated companies-situation. Therefore, it is regarded as the domestic statutory provision for the implementation of the OECD-Guidelines. Additionally, rules regarding informal contributions and constructive dividends are stipulated in Section 8 (2) and Section 8 (1) of the Austrian Corporate Income Tax Act (Körperschaftsteuergesetz "KStG").

The Austrian law does not provide for specific documentation requirements with regard to cross-border transactions. However, according to the Austrian tax administration, the domestic documentation requirements contained in Section 124, Section 131 and Section 138 of the General Fiscal Code (Bundesabgabenordnung "BAO") have also to be met in cross-border transactions, whereas these statutory documentation provisions have to be interpreted in a way to apply the OECD-Guidelines by analogy. Additionally the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union ("EU TPD", 2006/C 176/01), which needs to be viewed in the framework of the OECD-Guidelines, has to be taken into account for documentation purposes.

1.2 Transfer Pricing Regulations

Currently no legally binding regulations with regard to transfer pricing exist in Austria.

1.3 Adherence to OECD-Guidelines

The Austrian BMF published the OECD-Guidelines (and corresponding updates) in circulars (AÖFV. Nr. 114/1996, 122/1997, 155/1998, 171/2000) which are not legally binding on the courts or the taxpayers, but on the tax authorities. However, as the Austrian tax law does not contain any specific transfer pricing provisions, the OECD-Guidelines are of great practical importance in Austria. Moreover, according to the Austrian tax administration the OECD-Guidelines have to be taken into account when interpreting the general domestic statutory documentation provisions.

Please note that generally the standard methods (CUPM, RPM; C+M) still have priority in Austria. However, due to the developments on the OECD level (proposed revision of chapters I-III OECD-Guidelines) it might be expected that the transactional profit methods may be applied equally in the future.

2. Documentation

2.1 Documentation Requirements

As already mentioned above, the Austrian tax law does not contain any specific documentation requirements for cross-border transactions between related parties. As regards the definition of the term "related parties", reference is made to Art 9 (1) OECD-MC due to the lack of definition in the Austrian tax law. However, in case of such cross-border transactions the general documentation provisions as provided for in the Austrian General Fiscal Code (in particular Section 124, Section 131 and Section 138) have to be met. These provisions are interpreted for transfer pricing documentation purposes by taking into account the relevant provisions of the OECD-Guidelines (especially Chapter V).

According to Section 138 (1) BAO, the tax authorities may request the taxpayer to prove or to accredit the correctness of the statements made in the tax return or other applications. The tax authority may in this respect request the taxpayer to provide books and records, commercial papers and other documents that are relevant for the determination of the tax base (Section 138 (2) BAO). According to the Austrian case law, the taxpayer's duty of assistance to the tax authorities, as indicated in Section 138 BAO, is increased in cross-border situations, as the investigation possibilities of the tax authorities are more restricted in foreign jurisdictions (Austrian Supreme Administrative Court 30.05.1995, 91/13/0248). However, the duty of assistance is not infringed if it is not feasible for the taxpayer to provide the requested information. In the context of transfer pricing transactions, the provision of available information is defined by the OECD-Guidelines (opinion of the BMF published in the Circular of 1 December 2006, BMF-010221/0626-IV/4/2006).

There is no statutory preparation deadline for the regular transfer pricing documentation although the preparation should be carried out contemporarily. Upon request of the tax authority, the transfer pricing documentation has to be submitted within an adequate term. Consequently, due to the lack of a statutory submission deadline, it is generally at the discretion of the tax authority to determine an adequate submission term for the transfer pricing documentation.

2.2 Components

An appropriate transfer pricing documentation should include detailed information as stipulated in the OECD-Guidelines, which complies to a large extent with the documentation requirements stipulated by the EU TPD introducing the Masterfile and Country specific file concept.

Therefore, the following elements should be inter alia included in a transfer pricing documentation in Austria:

- an overview and a general description of the group's organizational, legal and operational structure;
- a description of the business activity of the taxable entity and its related parties;

- a description of special business strategies (if applicable – e.g. in the case of a market penetration);
- an explanation of the type of controlled transactions and amounts involved (including the provision of the corresponding contractual agreements);
- a description of the group's transfer pricing system documenting the arm's length nature of the company's transfer prices;
- a functional and risk analysis;
- a comparability analysis (possibly including a database analysis, which is, however, not required); and
- a description of the transfer pricing policy and of the chosen pricing method including appropriate arguments as to why the method has been selected.

2.3 Purpose

If the taxpayer does not provide an appropriate transfer pricing documentation as required by the general statutory documentation provisions (especially Section 138 BAO, interpreted by applying the OECD-Guidelines by analogy), the burden of proof of the tax authority is reduced. Generally the tax authorities have to prove comprehensively that the figures reported in the tax return are not correct in order to justify a deviation from the taxpayer's statements. If, however, the taxpayer does not provide an appropriate documentation and therefore infringes his (increased) duty of cooperation, the tax authority may reasonably estimate the taxable profits according to Section 184 BAO.

Additionally, late payment interests as well as other penalties may be triggered if no appropriate documentation is provided (see Point IV).

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

Generally, the transfer pricing methods as defined by the OECD-Guidelines may be applied in Austria in order to determine an arm's length price. The taxpayer may generally select a transfer pricing method as defined by the OECD-Guidelines, whereby the standard methods (Comparable Uncontrolled Pricing Method "CUPM", Cost Plus Method "C+M" and Resale Price Method "RPM") still have priority over the Profit Split Method ("PSM") and the Transactional Net Margin Method ("TNMM"). Within the standard methods, the CUPM should be applied preferentially as it is regarded as the most reliable method with regard to the application of the arm's length principle. However, if even after certain adjustments no sufficient data is available for a comparison of the related transaction with an unrelated transaction, a hypothetical arm's length comparison using the PSM and TNMM method can be conducted as well. Furthermore, it is expected that due to the developments at the OECD level the transactional profit methods may be applied equally in the future.

The application of global formulary apportionment methods is definitely rejected in Austria.

3.2 Availability of Benchmarking

Regarding the use of databases for transfer pricing purposes, no provisions currently exist in Austria. However, in practice benchmarking analyses are regularly used by taxpayers as supporting evidence that the transfer prices applied fall within the arm's length range. If a benchmarking analysis is performed, the search process has to be documented in order to enable the tax authority – which also has access to certain databases (e.g. AMADEUS database by Bureau van Dijk) – to retrace the search strategy.

However, a mere database screening will not be accepted by the tax authority as an appropriate transfer pricing documentation. The taxpayer has to verify the results of the benchmarking analysis by applying a "qualitative analysis", examining the results of the analysis by taking into account all the information which can be derived by the taxpayer with reasonable effort. Therefore, a benchmarking analysis cannot replace an appropriate tax analysis (including especially a function and risk analysis), but may support the results derived therefrom.

4. Penalties

4.1 Rates and Conditions

The Austrian tax law does not provide for any specific penalties if the transfer pricing documentation is not provided at all or if an inadequate documentation is provided. Nevertheless, if no documentation is provided, the tax authority may regard a transaction as not complying with the arm's length standard and apply a tax base adjustment based on its own estimation.

If the adjustment leads to an increase of the corporate income tax liability, interests will be charged on the additional corporate tax payment. According to Section 205 BAO the interest rate is linked to the official borrowing rate of the European Central Bank (applicable interest rate since May 2009: 2,38% p/a). Such interest is charged for a maximum period of 48 months.

In the case of an intentional (illegal) tax evasion, a criminal penalty may be imposed under Section 33 or Section 34 of the Austrian Criminal Tax Law Act (Finanzstrafgesetz "FinStrG") if the profit adjustment results in an additional tax payment.

Finally, if the tax authority requests the taxpayer to provide further information according to Section 138 (2) BAO or Section 161 (1) BAO and the taxpayer does not comply with this request, an administrative penalty of up to EUR 5.000 may be levied in accordance with Section 111 BAO in order to enforce the provision of the information requested. However, the imposition of this administrative penalty is at the discretion of the tax authority and must not be imposed if the provision of the requested information is impossible or not feasible (Austrian Supreme Administrative Court, 16 February 1994, 93/13/0025).

4.2 Reduction or Cancellation of Penalties

Penalties (except for those defined by the Criminal Tax Act) may not be imposed based on considerations of equity.

The assessment of transfer pricing adjustments is subject to the general limitation period of 5 years (Section 207 (2) BAO), starting with the end of the year in which the tax liability arose. Under certain circumstances, this limitation period may be renewed, whereas the absolute period of limitation amounts to 10 years (Section 209 (3) BAO). In the case of evasion or fraud, the limitation period amounts to 7 years.

5. Special Considerations

5.1 Business Restructurings

In Austria, no specific provisions regarding the relocation of business functions exist. Therefore, if business functions are transferred from Austria to other countries, the general provisions (e.g. with regard to the sale of an operating unit, possible exit taxation, etc.) apply.

Additionally, according to the Austrian tax administration, the OECD Discussion Draft on "Transfer Pricing aspects of Business Restructurings" has also to be taken into consideration in the event of the transfer of business functions (EAS 2987, 23 July, 2008). Based on the TP Aspects, the Austrian tax administration intends not only to tax the transfer of tangible and intangible assets (including a potential goodwill), but also the loss of potential future profits. However, it should be stressed that no case law exists in Austria in this respect.

5.2 Tax Return Disclosures

No specific tax return disclosures are required from the taxpayer.

5.3 Competent Authority

If the taxpayer disagrees with the adjustment of the transfer prices as proposed by the tax authorities in the course of an audit or as assessed by the tax authorities, he may file an application requesting the initiation of a mutual agreement procedure based on Art 25 OECD-MC. The competent authority in Austria for initiating mutual agreement procedures is the Ministry of Finance. The respective double tax treaty may stipulate time limits for filing the application.

If the application for the initiation of a mutual agreement procedure based on Art 25 OECD-MC is filed after the tax has been assessed, the payment may be suspended.

5.4 Other Considerations

Management fees paid by an Austrian subsidiary to its parent company abroad are generally deductible for tax purposes in Austria. However, deductibility depends on the respective management services effectively rendered by the parent company as mere shareholder costs may not be deducted at the level of the Austrian subsidiary.

Even though the Austrian tax administration generally follows the interpretation of the term "shareholder costs" as defined by the OECD-Guidelines, an analysis on a case by case basis taking into account the services actually rendered should be implemented, as only general principles exist and no appropriate case law regarding the deductibility of management fees is available yet.

6. Advance Pricing Agreements

6.1 APA Opportunity

The Austrian tax law does not contain any specific procedural rules regarding APAs. However, based on Art 25 OECD-MC, bilateral or multilateral APAs are generally available in Austria. The Austrian Ministry of Finance is the competent authority for negotiating and concluding bilateral APAs. If a bilateral APA is concluded, the local Austrian tax authority is generally obliged to implement the results of the APA. However, the taxpayer may reject the implementation of the APA. In practice hardly any APAs were initiated in Austria so far.

6.2 APA Filing Fees

Currently no fees are levied by the Austrian tax administration if an APA is conducted.

7. Developments

Currently it is expected that the BMF will release specific Austrian Transfer Pricing Guidelines for the first time which should be applicable as of 2010 and should generally follow the OECD Guidelines. These Austrian Transfer Pricing Guidelines will only be published as a statement of practice by the BMF and will therefore generally not be legally binding on the courts or the taxpayers, but on the tax authorities. However, due to the lack of specific statutory transfer pricing provisions, these Austrian Transfer Pricing Guidelines will be of great practical importance.

Transfer Pricing in **Bosnia and Herzegovina**

1. Basic Information

1.1 Taxing Authority and Tax Law

The State of Bosnia and Herzegovina ("BaH") consists of two entities: The Federation of BaH and the Republic of Srpska. Therefore, there are two Ministries of Finance (Ministarstvo Finansija) which have to be considered as the supreme authorities for finance issues. The Ministry of Finance of the Federation BaH is located in Sarajevo, while the Ministry of Finance of the Republic of Srpska is located in Banja Luka.

Relevant regulations on transfer pricing are contained in the Income Tax Act (Porez na dobit FBiH) of the Federation BaH (articles 45 – 48), where also the arm's length standard is adopted. The law has been recently changed; the actual version is effective from 01 January, 2008 on.

For the Republic of Srpska the relevant regulations are contained in the Income Tax Act (Porez na dobit RS - article 9) and its by-law (articles 38), where the arm's length standard is also adopted. The law has been changed recently; the actual version is effective from 01 January, 2007 on.

1.2 Transfer Pricing Regulations

There are no specific Transfer Pricing Regulations other than the above mentioned Tax Laws and accompanying by-laws.

Neither in legislation nor in tax audits has transfer pricing been a major topic yet.

1.3 Adherence to OECD-Guidelines

Bosnian tax authorities do not comment on the question whether the local transfer pricing laws are in line with the OECD-Guidelines.

However, in the Federation of BaH the Comparable Uncontrolled Price Method has priority according to article 47 of the by-law to the Income Tax Act. The cost plus method may only be applied when no comparable prices are available. Other methods are not mentioned.

The by-law to the Income Tax Act in The Republic of Srpska is more detailed. It also gives priority to the CUPM over profit oriented methods which may only be used, if the application of the standard methods would not yield satisfying results.

2. Documentation

2.1 Documentation Requirements

In Bosnia and Herzegovina national and international transactions with related entities have to be documented. While regulations in the Federation BaH require the taxpayer to fill out an

annex to the fiscal balance sheet containing all transactions between related parties with actual and comparable prices, the Republic of Srpska requires these additional data to be disclosed in an annex to the corporate income tax return. The difference in wording has no practical impact.

In the Federation BaH the taxpayer is considered to be related to an entity as per the control concept.

In the Republic of Srpska the taxpayer is considered to be related to an entity, if this entity owns (directly or indirectly) a participation of at least 10% in the taxpayer's capital. The control concept does not apply.

The tax authorities did not issue guidelines on the application of the documentation requirements contained in the Profit Tax Acts and the by-laws.

The documentation is to be written in one of the official languages of BaH (Bosnian, Croatian or Serbian).

The preparation deadline for the transfer pricing documentation is the deadline for the filing of corporate income tax returns which means that the documentation has to be submitted by the end of March following the relevant calendar year.

2.2 Components

No details available.

2.3 Purpose

Fees and severe penalties may apply in case the documentation requirements are not met (on time).

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

Please refer to Section 1.3.

3.2 Availability of Benchmarking

Benchmarking studies are not available in BaH.

4. Penalties

4.1 Rates and Conditions

If transfer pricing documentation is not provided, or the documentation is unusable, or the documentation is not delivered on time, the transfer prices are estimated in the Federation BaH as well as in the Republic of Srpska.

Additional penalties for tax evasion may apply.

4.2 Extent of Enforcement

Under the current penalty regime, transfer pricing penalties seem not to be enforced severely in practice.

4.3 Reduction or Cancellation of Penalties

Not applicable.

5. Special Considerations

5.1 Business Restructurings

No specific regulations regarding business restructurings have been introduced in BaH.

5.2 Tax Return Disclosures

Please refer to § 1.3.

5.3 Competent Authority

Before paying tax, the taxpayer may go to a competent authority ("CA") when the amount of the proposed adjustment is communicated. The taxpayer may also submit an application during the tax audit and before the assessment.

5.4 Other Considerations

As there are two tax authorities in the country that do not co-operate very closely relevant information and data regarding international taxation and transfer pricing are not kept in a central database.

Management fees are generally deductible, but they are subject to withholding tax (10 %) provided that an international tax treaty does not indicate otherwise.

The level of interaction between tax and customs authorities is quite low because there is only one state customs authority while there are two tax authorities (except for VAT).

6. Advance Pricing Agreements

APAs are not available in Bosnia and Herzegovina.

7. Developments

Recent changes have resulted in the new corporate income tax acts described above. No further developments are expected for the time being.

Transfer Pricing in **Bulgaria**

1. Basic Information

1.1 Taxing Authority and Tax Law:

The Bulgarian Ministry of Finance and the Minister of Finance are the supreme state authorities for financial issues. One of the subordinate state authorities which are subordinate to the Minister of Finance is the National Revenue Agency ("NRA"). The Ministry of Finance, in particular NRA, are the responsible authorities for taxation issues in Bulgaria.

Relevant regulations on transfer pricing are contained in paragraph 1 of the Supplementary provisions of the Bulgarian Tax Insurance Procedure Code ("TIPC") where the arm's length standard is defined; the actual version is effective as of 01 January 2006 onwards.

Provisions on transactions between related parties and the prevention of taxation avoidance are set out in Part 1, Section 4 of the Corporate Income Tax Act ("CIT Act"); the definition of the hidden distribution of profit is provided for under paragraph 1 of the Additional provisions of the CIT Act (effective date 01 January 2007).

1.2 Transfer Pricing Regulations

1.2.1 Legally Binding Regulations

Tax authorities may adopt legally binding regulations on transfer pricing issues only if they are entitled under the provisions of applicable law.

The formal act issued by the Minister of Finance concerning transfer pricing is the Regulation on Implementing Market Pricing Methods which is in force as of 19 August, 2006 (the "Regulation"). As already specified, the Regulation further clarifies the transfer pricing methods adopted on the grounds of the TIPC (cf. paragraph 1 of the Supplementary provisions).

1.2.2 Letters of the Tax Administration

NRA publishes circulars (i.e. official letters) which are neither legally binding on the taxpayers nor on the courts, but rather aim to provide an equal interpretation and application of the binding law. These official circulars also set out the position of the tax administration on concrete issues.

However, neither letters nor circulars on transfer pricing documentation or relevant issues have been issued yet.

1.3 Adherence to OECD-Guidelines

In general, the Bulgarian transfer pricing regulations are in line with the OECD-Guidelines. However, the transactional profit method and the distributed profit method may be used only when the application of the so-called standard methods would not lead to satisfying results.

2. Documentation

2.1 Documentation Requirements

2.1.1 General Comments

At present, the applicable Bulgarian regulations do not provide for explicit rules on transfer pricing documentation requirements. The issue has been subject to public discussions recently and it has been recommended that the Bulgarian tax authorities would need to adopt principal guidelines and instructions on transfer pricing documentation requirements. To this end, the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union ("EU TPD"), adopted by the EU Council on 27 June, 2006, should be taken into consideration.

However, since the EU TPD could neither be deemed legally binding on the tax authorities nor on the taxpayers, its provisions may only be used by the taxpayer as a general guide on the transfer pricing documentation. As a consequence, the Bulgarian tax authorities may further specify the scope of transfer pricing documentation to be kept by the taxpayer on the basis of the EU TPD. They may also require additional information in case of tax audits. Please keep in mind that the tax authorities have not adopted explicit regulations on transfer pricing documentation yet.

Practical experience of the tax authorities with respect to transfer pricing issues is still insufficient due to the fact that the general rules and regulations on transfer pricing methods need to be further developed, modified and implemented.

During tax audits, the taxpayer is usually required to provide documentation and other relevant information concerning the period under review within 7 to 14 days. However, this deadline may be extended. In case the documentation is not written in Bulgarian language, the tax administration may require an official translation of the documents to be provided.

2.1.2 Relationship Threshold

The TIPC provides a definition of the notion of related parties (cf. § 1 of the Supplementary provisions). "Related persons" shall be:

- (a) the spouses, the relatives of direct line of descent, collateral relatives – up to the third degree included; and the relatives by marriage – up to the second degree included, the persons who live in joint household (for the purposes of Art. 123, paragraph 1);
- (b) an employer and an employee;
- (c) the partners;
- (d) a person who participates in the management of the other person's company or in the other person's subsidiary company;

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- (e) the persons in whose managing or controlling body participates one and the same legal entity or natural person, including cases where the natural person represents another person;
 - (f) a company or a person who owns more than 5% of the stakes or shares issued with a right of vote of the company;
 - (g) a person who exercises control over another person;
 - (h) persons whose activity is controlled by a third person or his subsidiary company;
 - (i) persons who have joint control over a third person or his subsidiary company;
 - (j) a person who is a trade representative of the other person;
 - (k) a person who has made a donation to the other person;
 - (l) persons participating directly or indirectly in the management, the control or the capital of another person(s).

When a taxpayer is engaged in a transaction with related persons, in case of a tax audit he/she shall be obliged to prove his compliance with the market price and to account for any discrepancy. This may include the submission of all the relevant documents of the foreign company (cf. article 116 of the TIPC).

Generally, when the transactions involve a foreign person, it shall be considered that the relations are between related persons, if:

- (a) the foreign person is registered in a country which is not a member State of the EU, and in which the due income or corporate income tax, which the foreign person has realized or shall realize as result of the transactions, is more than 60 % lower than the Bulgarian income or corporate tax, unless the audited person submits evidences, that the foreign person owes tax, which is not an object of preferential regime, or that the foreign person has realized the commodities or has provided the services at the local market price;
- (b) the country, in which the foreign person is registered, refuses or is not able to exchange information regarding the implemented transactions or relations, when there is a concluded and enforced international tax agreement.

2.2 Components

Currently the applicable regulation does not provide for specific rules about the contents of the transfer pricing documentation.

2.3 Purpose

The transfer pricing documentation should be kept in view of the tax authorities' right to require evidence, documentation and explanations in writing for tax audit purposes. If the taxa-

ble person fails to provide the required documentation, the tax administration shall be considered as being right and shall perform potential adjustments at its own discretion.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general, the applicable Bulgarian regulations provide for the Comparable Uncontrolled Pricing Method (CUPM), the Resale Price Method (RPM), the Cost Plus Method (CPM), the Profit Split Method (PSM) and the Transactional Net Margin Method (TNMM) for the purposes of estimation of the market prices.

However, the Regulation defines the priority of the first three standard methods (i.e. the CUPM, the RPM and the CPM). In case these do not lead to the intended results, then the other two methods should be applied.

The Regulation further specifies that if the use of a single method does not provide a result complying with the arm's length principle, a combination of two or more methods may be accepted.

3.2 Availability of Benchmarking

The Bulgarian tax administration neither uses a general database nor provides benchmarking analyses. Nothing indicates that benchmarking studies would be accepted by tax authorities.

4. Penalties

4.1 Rates and Conditions

The general rule of article 15 of the CIT Act indicates that if related persons enter into commercial and financial relationships under terms affecting the amount of profit and income, and which differ from the terms between non-related persons, the taxable profit and income accruing to the said related persons shall be determined and taxed under the terms which would have arisen between non-related persons.

Additional penalties for tax evasion may be applied in accordance with Section 6 of the CIT Act.

The Bulgarian legislation in force does not provide for specific administrative penalties for noncompliance with the transfer pricing documentation requirements. Therefore, at present, only a general administrative sanction for non-cooperation (including the non-provision of documentation and information upon request) with the tax authorities (e.g. in case of tax audits) might currently be imposed. According to article 273 of the TIPC, the administrative penalty in this case might amount up to EUR 250.

4.2 Extent of Enforcement

When the regulation on transfer pricing documentation is introduced, the administrative penalties regime will be further developed and be subject to future regulation.

4.3 Reduction or Cancellation of Penalties

In accordance with the TIPC, procedures for tax assessment and the determination of tax liabilities may be applied within up to five years from the year of submission of the tax return (or respectively the year in which the tax return should have been filed).

5. Special Considerations

5.1 Business Restructurings

The CIT Act contains regulations on the taxation regime to be applied to company transformations. No specific rules concerning the relocation of business functions have been introduced.

5.2 Tax Return Disclosures

The taxpayer is required to enclose in the annual corporate income tax return a copy of the auditors report and a copy of the annual financial statements of the company.

5.3 Competent Authority

As per article 92 of the CIT Act the taxpayer is required to submit an annual CIT return before 31 March of the year following the year for which tax is due. However, if differences were to arise between the annual financial statements attached to the tax return and those certified by the registered auditors, resulting in differences in the taxable income, the taxpayer has until 30 June of that year to submit a corrective declaration. The grounds for the differences shall also be disclosed. This declaration may ensure the adjustment of the taxable income and the resolution of the tax liability.

5.4 Other Considerations

Management fees paid to foreign persons (legal entities) that are related to the management and control of a Bulgarian legal entity are subject to withholding tax. They are generally deductible.

5.5 Cooperation with Other Authorities

For audit and control purposes, the Bulgarian tax administration has recently developed successful practices of cooperation and interaction with other competent authorities, among them the Bulgaria Customs Agency and its competent authorities.

6. Advance Pricing Agreements

6.1 APA Opportunity

At present, APAs are not available in Bulgaria. However, the transfer pricing regulations will be subject to further developments and the tax administration will certainly broaden its practices based on the applicable laws and on the recommended models and standards of the OECD.

7. Developments

In view of the lack of explicit regulation, it is expected that detailed rules and guidelines on transfer pricing documentation will be adopted by the tax authorities in the near future in order to implement the model recommendations of the EU TPD and of the OECD-Guidelines. The issue was subject to discussions and consultations that have been initiated by the National Revenue Agency experts and representatives of Bulgarian companies in the beginning of 2009.

Transfer Pricing in **Croatia**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance and the Tax administration, which is the administrative organization within the Ministry of Finance, are the supreme authorities for taxation issues. Relevant Transfer pricing provisions are contained in the Corporate Income Tax Law and Corporate Income Tax Regulations.

1.2 Transfer Pricing Regulations

Article 13 of the Corporate Income Tax ("CIT") Law contains the provisions related to transfer pricing issues. This law is effective as of 01 January, 2005. Prior to that date, the former CIT Law only contained basic provisions concerning related party transactions.

1.3 Adherence to OECD-Guidelines

Croatian transfer pricing provisions contained in the current CIT Law are fully in line with the provisions and recommendations of the OECD-Guidelines.

2. Documentation

2.1 Documentation Requirements:

Croatian CIT legislation defines related parties as follows: related parties are independent companies where one company has more than 50% of the other company's shares, or has a direct or indirect majority in the other company's shareholding rights.

Transfer pricing documentation must be prepared prior to the transactions in question and must be available to the tax authorities upon request.

The law specifies that the documentation has to be prepared and submitted to the tax authorities in Croatian language. However, we are aware of cases where the tax authorities accepted documentation in English language.

All business transactions between related parties, where one of them is a resident and the other is a non-resident, are affected by the transfer pricing regulations.

2.2 Components

According to Section 13 of the CIT Law and to Section 40 of the CIT Regulations, a transfer pricing documentation should:

1. describe the reviewed information, methods and analysis conducted in order to set the transfer prices and choose the most appropriate method;

2. identify the selected method and explain why this method has been selected;
3. document the assumptions and assessments made to ensure the arm's length character of the transactions (including compatibility, functional analysis and risk analysis);
4. document all calculations made during the application period of the selected method with relation to the taxpayer, and the companies deemed comparable;
5. link the current documentation to the documentations of the previous years in an appropriate way, in order to account for any adjustments realized due to material changes in the relevant facts and circumstances;
6. document any element which specifies the basis used to determine the transfer pricing, or which supports the transfer pricing applied, or which is mentioned in the transfer pricing analysis.

2.3 Purpose

The business transactions between related parties and the corresponding transfer prices will only be accepted by the Croatian tax authorities if they are complying with the arm's length principle.

If transfer prices/cost allocations are successfully challenged during a tax audit, the tax authorities may adjust (i.e. increase) the tax base according to the difference between the agreed prices and market prices. In addition, the tax authorities would charge a penalty interest amounting to 14% of the amount of underpayment per year, as well as penalties ranging from HRK 1,000 to HRK 200,000 (approx. EUR 140 to EUR 28,000).

Finally, as cross border intercompany service fees generally require reverse charged VAT to be assessed and then reclaimed by the Croatian recipient of the service, if the tax authority successfully challenges the deductibility from a CIT point of view due to transfer pricing issues, they will usually also challenge the possibility of a VAT reclaim (22% VAT rate). In such a case, the tax authorities would also charge a penalty interest amounting to 14% of the amount of over claimed VAT per year.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

The CIT Law indicates a number of methods that entrepreneurs may use in order to determine whether they comply with the transfer pricing regulations or not:

- Comparable uncontrolled price method ("CUPM");
- Resale prices method ("RPM");
- Cost plus method ("C+M");

- Profit split method ("PSM"); and
- Transactional net margin method ("TNMM");
- Comparable profit method ("CPM").

The comparable uncontrolled price method has priority over other methods and should be used whenever possible.

3.2 Availability of Benchmarking

Depending on the method used for the transfer pricing analysis, a benchmarking analysis may be included in the transfer pricing documentation.

The benchmarking study should be based on Croatian companies as far as possible. In cases where data on such companies is missing or is not adequate, the study should include companies of similar profile, similar size and similar activities operating in a similar environment (i.e. neighboring countries).

Croatian companies and the tax authorities most frequently use Bureau Van Dijk's "Amadeus" database as it contains more relevant data on Croatian companies than most of the rival databases.

4. Penalties

4.1 Rates and Conditions

If the Croatian tax authorities successfully challenge the transfer prices applied and increase the tax liability based on the increased tax base, they will also charge penalty interest at the statutory rate of 14% p.a. In addition, penalties ranging from HRK 1,000 to HRK 200,000 (approx. EUR 140 to EUR 28,000), will also be charged to the company based on the severity of misdemeanor, while the responsible natural person within the company ("usually the director") will be penalized in the range from 500 HRK to 20,000 HRK (approx. EUR 70 to EUR 2,800).

4.2 Extent of Enforcement

Transfer pricing is a relatively new issue in Croatia and the tax authorities have not started to challenge transfer prices on a large scale yet. The Croatian tax authorities currently tend to disallow the complete transaction if they conclude based on the lack of documentation that the service performed by the foreign related party was not received by a Croatian entity (i.e. the transaction is treated as a hidden transfer of profit).

4.3 Reduction or Cancellation of Penalties

Currently, the statute of limitations on transfer pricing assessments in Croatia is 3 years (relative statutory limitation period) or 6 years (absolute statutory limitation period).

In addition, if the company disagrees with the tax authorities' conclusions, the company can appeal to Tax Authorities and initiate a legal proceeding.

5. Special Considerations

5.1 Business Restructurings

No specific regulations regarding business restructuring were introduced in Croatia. However, Croatian company law and Croatian CIT legislation incorporate limited provisions related to business restructurings. Otherwise, IFRS and CFRS (a simplified version of IFRS for small and medium sized entrepreneurs) are applied.

5.2 Tax Return Disclosures

In its tax return the taxpayer must disclose the prices that have been agreed with related parties that exceed the market prices (i.e. for example hidden profit transfers, excessive interests, etc).

5.3 Competent Authority

It is possible to contact a competent authority before paying taxes.

5.4 Other Considerations

The Croatian tax authorities can exchange information with tax authorities of other countries and use secret comparables.

Management fees are generally deductible, but are often under enhanced scrutiny due to the fact that these often involve hidden distributions of profit. Unlike business consultancy and advisory fees, management fees are per se not subject to withholding tax. Therefore, if the Tax Authorities estimate that the management services under review involve business advisory services, they will assess the corresponding withholding tax.

The Croatian tax authorities and Croatian customs authorities are both under the jurisdiction of the Croatian Ministry of Finance and their interaction is on a high level both operationally and structurally.

6. Advance Pricing Agreements

APAs are not available in Croatia.

7. Developments

The Croatian transfer pricing legislation is not very detailed yet, and in most cases when detailed guidance is needed, we have to revert to the OECD-Guidelines. Recently, work was initiated on the preparation of more detailed TP regulations, but no information was released as to when this would be implemented.

Transfer Pricing in **Czech Republic**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance of the Czech Republic (Ministerstvo finance, "MF") is the supreme authority for finance issues. In 1995, the Central Financial and Tax Directorate ("CFTD") was established as the central body of the Czech Tax Administration by decision of the Minister of Finance and became a Section of the Ministry of Finance. The CFTD is an integral part of the Ministry of Finance and is in charge of the management of the Territorial Financial Authorities implemented on 1 January, 1991 by the Act No. 531/1990 Sb., on the Territorial Financial Authorities. The Territorial Financial Authorities are composed of 8 Financial Directorates in charge of 200 Tax Offices.

Relevant regulations on transfer pricing are contained in Act No. 586/1992 Sb., on Income Taxes ("ITA") and in Guidance D – 258, Guidance D – 292 and Guidance D – 293.

1.2 Transfer Pricing Regulations

1.2.1 Legally Binding Regulations

Tax authorities can only issue legally binding regulations on transfer pricing if they are formally empowered by explicit provisions in an act.

The main legal regulation on transfer pricing in the Czech Republic is the amended ITA, which became effective on 1 January, 1993. Related persons are defined in Section 23 § 7 of ITA - persons associated economically, personally or in any different way. The same Section states the tax auditor's right to adjust the taxpayer's tax base. This right can be exercised when prices agreed between related persons differ from prices agreed between independent persons in current business relations under the same or similar terms without such differences being properly documented.

ITA also contains some other fragmentary regulations related to transfer pricing, especially Section 25 (1) w exposing the thin capitalization rules, Section 35a (2) d concerning investment incentives and Section 38nc concerning APAs.

1.2.2 D – Guidance Issued by the Ministry of Finance

The Ministry of Finance issues D Guidances which are neither binding on the taxpayer nor on the courts, but only on the tax authorities themselves. The principles contained in the D Guidances basically follow the principles laid down by the OECD-Guidelines. However, these principles are neither directly implemented in tax laws nor is there any direct reference to them in the Czech tax laws. Nevertheless, they are binding on the tax authorities in order to achieve equal interpretation and application of tax regulations. They also indicate the position of the tax authorities on the respective subject(s).

- Guidance D – 258 issued by the Ministry of Finance with respect to the application of international standards in taxation to transactions between associated enterprises – transfer pricing (MF, Issue No: 491/1554/2004, applicable as of 1 January, 2004 as

amended on 13 April, 2006). The issuance of this methodology guidance aims at assuring a unified approach to the taxation of the transfers of goods, intangible assets and services within multinational enterprises both by the tax administration and taxpayers. This guidance is based on the principles laid down by the OECD-Guidelines. The main purpose of guidance D – 258 is to lay down basic principles regarding transfer pricing, the methods used for transfer pricing purposes, the relevant documentation and the subsequent adjustment of profit.

- Guidance D – 292 issued by the Ministry of Finance in respect of Section 38nc of the Income Tax Act – concerns the binding consideration over the procedure related to the conclusion of advance pricing agreements (MF, Ref. no.: 39/116 680/2005-393 and 39/105 193/2007-393, applicable as of 1 January, 2008). This Guidance deals with the procedure for the conclusion of APAs in general, details the requirements for their application and states other relevant information.
- Guidance D – 293 issued by the Ministry of Finance in respect of the scope of transfer pricing documentation (MF, Issue no.: 39/116 682/2005 – 393, applicable as of 19 April, 2006). It deals with the scope of the transfer pricing documentation. This Guidance essentially meets the conditions laid down by the EU.

1.3 Adherence to OECD-Guidelines

From the Czech tax law's point of view, the OECD-Guidelines are not legally binding documents. Nevertheless, they are considered as very effective documents. Mainly, their significance is binding for the interpretation of International Double Taxation Treaties ("DTT").

Generally, the Czech tax authorities consider the Czech transfer pricing laws to be in compliance with the OECD-Guidelines. However, in the Czech Republic, ITA and the methodology guidance have priority.

2. Documentation

2.1 Documentation Requirements

Guidance D – 293 deals with the scope of the transfer pricing documentation.

In the Czech Republic, neither international nor national transactions with related entities have to be documented. However, the Ministry of Finance issued recommendations concerning the scope of a transfer pricing documentation. Hence, a transfer pricing documentation shall only be used as supporting evidence.

For transfer pricing purposes, related persons shall mean persons related through capital or otherwise. The taxpayer is considered to be related through capital if one person directly or

indirectly holds at least 25% in another (one or more) person's registered capital or voting rights. The taxpayer is considered to be otherwise related with another person in five cases:

- participating in the management or control of such person;
- being managed or controlled by the same person or close persons;
- being a controlling or controlled person in the sense of the Commercial Code (having a direct or indirect influence on management or commercial activity of another person in law or in fact);
- being close persons; or
- having established a legal relationship predominantly for the purpose of reducing their tax base or increasing their tax loss.

The documentation shall be written in Czech due to the tax auditor's right to act in Czech and to ask for relevant documentation in Czech language. However, the taxpayer can file an application asking for permission to deliver the documentation in a different language.

As the maintenance of a transfer pricing documentation in the Czech Republic is not mandatory, no deadline exists for the preparation of such transfer pricing documentation. However, the taxpayer may be asked to present transfer pricing documentation to the tax authority in the following cases:

- when the tax authorities assess his tax liability during a tax audit,
- when applying for a binding consideration under Section 38nc of ITA – Binding consideration with respect to the transfer pricing between associated enterprises,
- when initiating a mutual agreement procedure under Article 25 of bilateral Double Taxation Treaties ("DTT") which may lead to the presentation of a case to the Arbitrary Commission under the provisions of the Arbitration Convention.

In such cases, the terms for the presentation of the transfer pricing documentation shall meet the provisions of Act no. 337/1992 Sb., on administration of taxes, as amended ("AAT").

2.2 Components

According to Guidance D – 293, transfer pricing documentation has to include the following items:

1. Information concerning the group (possibly Master File) - description of business activities, description of the complete ownership and organizational structure of the whole group, information on associated enterprises engaged in transactions including an overview of financial results of associated enterprises involved, allocation of functions within the group, allocation of risks, overview of intangible property ownership (licenses, patents, know-how etc.) and flows related to license fees, overview of the transfer pricing policy implemented, list of cost contribution arrangements concluded, overview of advance pricing agreements entered into by the associated enterprises (binding consideration issued), commitment of the company to submit other evidence within reasonable time if the presented information about the group is insufficient etc. If some of the above mentioned facts are expected to change in the near future, such changes should also be mentioned and accounted for.

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2. Information concerning the company - precise description of business activities, complete ownership and organisational structure, financial results of previous years and corresponding financial indicators, strategies adopted etc.
 3. Information concerning the transactions - precise description of the subject of the transactions (i.e. precise description of goods and services traded), financial and trading terms, all relevant agreements and contracts entered into by the enterprises concerned, volume of the transactions, functions and risks associated to the transactions concerned etc. In case of transactions involving intangibles (management and marketing services, consultancy etc.), it is necessary to describe the characteristics of the services provided in a detailed way to identify the purpose of the services and the expected benefits arising from them.
 4. Information concerning other circumstances affecting the transactions - the company's marketing strategy, specific economic conditions of the market, specific legislation etc.
 5. Information concerning transfer pricing methods used - an explanation of the selection and application of the transfer pricing methods, explanations of why a particular way of pricing has been selected, information concerning comparable transactions (internal ones within the group and/or external ones between two comparable independent enterprises); comparability analysis. Intra-group transactions are suggested as a source of information by both D-Guidances, as the burden of proof is on the side of the taxpayer, it is always convenient to provide as much evidence as possible. However, intra-group transactions cannot serve as a base for comparability analysis as in the OECD-Guideline. The tax authority can also compare the intra-group transactions to the conditions made for each transaction. Those shall be equal for all the parties.

However, in some cases a tax auditor may require the provision of other documents than those mentioned above. Such a situation where the tax authorities require documents exceeding the recommendations of the Guidance D - 293 should only happen in exceptional cases.

2.3 Purpose

The main purpose of Guidance D - 293 is to implement common and partially centralised principles in respect of transfer pricing positions adopted by the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the EU ("EU TPD") and by the OECD-Guidelines as well.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general, the Czech tax authorities accept the Comparable Uncontrolled Pricing Method ("CUPM"), the Cost Plus Method ("C+M"), the Resale Price Method ("RPM"), the Profit Split Method ("PSM") and the Transactional Net Margin Method ("TNMM").

The selection of the relevant method depends on the performed analysis. It is impossible to determine beforehand which method should be used. The appropriateness of each method must be assessed, namely taking into account the available information about comparable transactions as well as the necessity of performing adjustments in order to determine correct transfer prices. In this respect, the guidance D - 258 recommends to proceed from the simplest to the most complicated method (i.e. from CUPM to TNMM) in the following sequence: CUPM, C+M or RPM at the same level, PSM and TNMM. Considering the simplicity of use and greater probability of obtaining information about comparable conditions, it would be reasonable to prefer traditional transactional methods, i.e. CUPM, C+M and RPM. If sufficient information is not available and none of the traditional transactional methods can be used, profit methods, namely PSM or TNMM, will be used.

3.2 Availability of Benchmarking

In Czech tax law, no specific rule requires that taxpayers present transfer pricing documentation, although Section 31 of AAT, namely paragraph 9, stipulates: *"Taxpayer shall present evidences of all facts he is obligated to state in the tax return, reporting and accounting documents, or required by the tax auditor in the course of a tax assessment procedure"*. That means that the burden of proof mostly lies with the taxpayer. Therefore, the tax auditor may require the taxpayer to provide evidence and plausible explanations of the transfer pricing applied in accordance with the arm's length principle. Within the framework of the transfer pricing audit, the taxpayer is obliged to demonstrate how the prices have been set-up, and whether they have been set up in a way that third-parties would. If the company fails to meet this obligation, the tax authority may apply the provisions of Section 23 (7) of ITA against the company.

Generally, a database screening could be used as evidence in order to support the transfer pricing policy applied. However, the relevant circumstances shall be documented with all information available to the taxpayer and the tax authorities shall have the opportunity to verify such information. Pan-European benchmarks are often accepted by the Czech tax authorities. For example, the AMADEUS database by Bureau van Dijk is often used for benchmarking analyses involving other European companies.

4. Penalties

4.1 Rates and Conditions

As the D Guidances are only binding on tax auditors, no penalties apply for the non compliance with the recommendations laid down in the D Guidances. Penalties may occur in case of tax evasion – a penalty in the form of interest payments on tax arrears may be levied.

4.2 Extent of Enforcement

The tax authorities focus on transfer pricing issues during tax audits. Moreover, each tax audit must include a review of transfer pricing issues. The tax authorities commonly use the Amadeus database.

4.3 Reduction or Cancellation of Penalties

According to the AAT, relevant financial authorities may waive tax or penalties if the taxpayer meets the specific conditions stipulated in AAT.

5. Special Considerations

5.1 Business Restructurings

Under the Czech tax law no specific regulation concerning business restructuring and/or the relocation of business functions have been implemented yet.

5.2 Tax Return Disclosures

No specific tax return disclosure is required from the taxpayer.

5.3 Competent Authority

Before paying tax, the taxpayer may file an application addressed to the tax auditor asking for the issuance of a decision (binding opinion) on tax consequences arising from certain tax decisive events that have already occurred or that are expected to occur.

After the assessment, the Ministry of Finance may waive the tax in whole or in part under special circumstances. Additionally, the tax auditor may allow a tax debtor to defer his tax payments or to pay tax by installments based on his application and under fulfillment of certain conditions.

5.4 Other Considerations

ITA, AAT and the relevant Guidances of the Ministry of Finance constitute the whole Czech regulations in relation to transfer pricing, as indicated above. No additional specific considerations shall be taken into account regarding transfer pricing issues. The information given to tax authorities is confidential and therefore, only tax authorities have access to them.

Management fees are generally deductible. In some cases, situations may occur where shareholder costs have already been included in management fees. In such cases, tax deductibility of management fees shall be refused.

Cooperation between tax and customs authorities has increased after the Czech Republic joined the EU. Customs authorities provide *inter alia* supporting activities for the benefit of the tax authorities, i.e. mainly controlling and assistance services.

6. Advance Pricing Agreements

6.1 APA Opportunity

Under the Czech tax law, the application of so-called advance pricing agreements ("APA") is possible. Section 38nc of ITA effective as of 1 January, 2006 (an extension of Section 34b of AAT and Guidance D – 292) has implemented a concept of binding agreement over the transfer pricing policy used in related party transactions. The binding agreement takes over the principles of APAs in the sense of the OECD-Guidelines and other international standards and adapts them to the conditions of the Czech tax law.

Upon request by the taxpayer, the tax authorities shall decide whether the transfer pricing method selected by the taxpayer leads to an appropriate allocation of incomes and expenditures between the related parties. Such an agreement shall give a certain degree of certainty to the taxpayer as regards the way the tax authority assesses the transfer pricing method selected by the taxpayer for tax base determination purposes.

6.2 APA Filing Fees

The applicant is obliged to pay the corresponding administrative charge amounting to CZK 10,000 (approx. EUR 400) as per the Annex to Act no. 634/2004 Sb., on Administrative Charges ("AAC"), Table of Charges, part I, item 1 (1) (v), to be paid when filing the application to the respective tax office. According to Section 11 of AAC – Temporary Provisions, the procedure shall be applied to applications filed on and after 1 January, 2008. In case of applications filed before and on 31 December, 2007, the former system of fee payment shall be applied, i.e. CZK 50,000 (approx. EUR 2000) to be paid when the agreement is issued.

7. Developments

7.1 Recent Changes and Anticipated Developments

Recently, the Czech tax authorities have only provided amendments to current regulations concerning transfer pricing issues as explained above. In the near future, no further transfer pricing developments are expected.

Transfer Pricing in **Estonia**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Estonian Ministry of Finance ("Finance Ministry") is the government authority controlling financial issues. Within the purview of the Finance Ministry, the administration of the Estonian taxation system is under the responsibility of the Tax and Customs Board (Maksu- ja Tolliamet). The Tax and Customs Board operates with a centralized authority and four regional authorities.

Transfer pricing rules are based on the Income Tax Act (Tulumaksuseadus - "ITA") § 14 Sections 7 and 8 and § 50 Sections 4 to 8. The rules explaining the acceptable methods for transfer pricing determination purposes are contained in the Finance minister regulation No. 53 of 10.11.2006 on the Methods of Determining the Value of Transactions Made between Related Parties (Seotud isikute vahel tehtud tehingute väärtuse määramise meetodid; "TP Regulation").

If the Tax and Customs Board has adjusted the value of a related party transaction to a taxpayer's detriment, the taxpayer may first opt to seek correction from the Tax and Customs Board itself. If the application to correct the adjustment is unsuccessful or if the taxpayer decides not to seek correction, the taxpayer can always appeal the decision of the Tax and Customs Board to a court.

1.2 Transfer Pricing Regulations

The general applications of Estonia's transfer pricing rules are governed by the above stated law and the TP Regulation. The Tax and Customs Board has also issued guidelines for the determination of transfer prices and makes reference to the explanatory notes on the Finance Minister's regulation on transfer prices, the Commission notice regarding transfer pricing forum as well as the EU transfer pricing forum as sources of information and guidelines regarding the application of transfer pricing rules.

1.3 Adherence to OECD-Guidelines

Estonia is not a member of the OECD, but its transfer pricing laws are in general agreement with the OECD-Guidelines.

The TP Regulation allows the use of the three transactional transfer pricing methods (i.e. comparable uncontrolled price ("CUPM"), cost-plus ("C+M") and resale price method ("RPM")) and the two profit-based methods (i.e. transactional net margin method ("TNMM") and profit split method ("PSM")).

2. Documentation

2.1 Documentation Requirements:

The TP Regulation applies to transactions between:

-
- resident legal person and related person;
 - sole proprietor and related person;
 - permanent establishment in Estonia and related person; and
 - sometimes also resident legal person and its permanent establishment ("PE") abroad.

Two or more entities are considered related parties if:

- they are spouses, direct descendants, siblings, descendants of siblings, descendants or parents of spouse, siblings of spouse;
- they are members of management bodies of their spouses and descendants or parents;
- they are part of the same group in the meaning of Commercial Code;
- one person holds more than 10% of the share capital, votes or rights to profit of a legal person;
- one person holds with other related persons in total more than 50% of the share capital, votes or rights to profit of a legal person;
- more than 50% of the share capital, votes or rights to profit of several legal persons is held by a single person;
- a group of people holds more than 25% of the share capital, votes or rights to profit of a legal person;
- all members of management board or other similar management body are the same people in two or more legal persons; and
- a person is the employee of another person, the spouse of the employee or direct descendant.

The additional documentation requirements enclosed in the TP Regulation are only applicable with regard to:

- credit institutions, insurance companies and listed companies;
- transactions with persons residing in low tax territories; and
- resident companies or PEs with more than 250 employees, 50 MEUR turnover or 43 MEUR balance sheet volume.

The taxpayer is obliged to provide the additional data as specified in the TP Regulation upon demand by the Tax and Customs Board. The taxpayer must be allowed a time period of at least 60 days to comply.

If documents supporting the transfer pricing documentation are in a language other than Estonian, the taxpayer may present the documents in that foreign language. However, the Tax and Customs Board has the right to demand their translation into Estonian and to specify a reasonable delay for compliance.

2.2 Components

The documentation required under the TP Regulation is divided into the main report which concerns the entire international group and the local report which only concerns the Estonian residents and PEs.

The main report can further be divided based on business areas, but for each business area the report should contain:

- an overview of the group's business activities including descriptions of changes in the business strategy compared to the last financial year;
- an overview of the group's structure and general description of the activities of each company of the group, changes to the group's structure since the last financial year;
- general information on transactions with related parties including their type and values;
- tasks performed with regard to the related party transactions and risks assumed by each participant;
- an overview of the immaterial property of the group, a description of the transfer pricing policy of the group; and
- profit split arrangements and a list of advance pricing agreements or other advance rulings concluded.

The local report is used to complete the main report and should contain:

- the description of the taxpayer's activities and changes in the business strategy since the last financial year;
- descriptions of transactions with related parties including information on the volumes of sale and the value of services;
- the volume of leasing activities;
- revenues from the use or transfer of immaterial property;
- interests received or paid on loans;
- changes in trading circumstances and previous agreements;

- analysis of transactions with related parties and respective comparables including the description of the respective property and services, analysis of the activities, overview of the transaction terms, overview of the economic conditions, overview of the business strategy and analysis of corrections in the comparable data;
- specification of the methods used for determining the transfer prices and the reasons for this selection; and
- if possible respective internal and external comparables and references to the sources of the comparable data. All comparable information used for the transfer pricing must be made available to the tax authorities.

The quantity and detail of the documents required for specific transactions must correspond to the complexity of the transaction and its value. The documents must be sufficient to prove that the transfer prices reflect market values.

2.3 Purpose

The purpose of the documentation is to support the transfer price applied to transactions between related parties. The documents must be sufficient to prove that the transfer prices reflect the market value.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

Under the TP Regulation, the three transactional transfer pricing methods (i.e. CUP, C+M and RPM) prevail and two profit-based methods (i.e. TNMM and PSM) are available.

The transfer pricing method should be the one that best suits the nature of the transaction. The TP Regulation contains some guidelines and limits as to which method should be used in which case.

3.2 Availability of Benchmarking

The Tax and Customs Board has not issued any guidelines regarding benchmarking studies and their application to Estonian companies. While the TP Regulation contains general rules on the use and availability of comparables, there are no specific rules. In addition, the practice of benchmarking is not as established in Estonia as in other European countries. As there is no indication that the Tax and Customs Board would not accept a PAN-European benchmark study, we see no problem to use it as part of the documentation.

4. Penalties

4.1 Rates and Conditions

If a taxpayer fails to submit a tax return when required or fails to correct errors made in the tax return, the tax authority can issue a penalty payment of EEK 20,000 (approx. EUR 1,300) upon first offence and EEK 30,000 (approx. EUR 2,000) on second offence.

If the tax authorities are lead to adjusting the transfer prices as a result of the audit, and the taxpayer is deemed to have paid less taxes than required, the resulting debt incurs an interest of 0,06% of the delayed amount per day beginning from the date the tax should have been paid originally.

Misdemeanor and criminal charges amount up to EEK 5,000,000 (EUR 320,000) or imprisonment for seven years, when the taxpayer has deliberately reduced his tax obligation in tax declarations.

4.2 Extent of Enforcement

Should the Tax and Customs Board consider that a transaction is not at arm's length, it will adjust the transaction values and impose interest.

As not many transfer pricing cases have arisen yet, it is difficult to determine to which extent penalties are enforced in practice.

4.3 Reduction or Cancellation of Penalties

The Tax and Customs Board has a three year limit to audit a tax return, including details of any transactions with related parties, from the date on which the tax becomes payable. If an audit is performed and no adjustment is made, the audit is final and cannot be reopened unless it is later established that criminal acts such as false accounting and fraud have occurred.

No current public information is available regarding reductions that may have been granted to penalties imposed for adopting incorrect transaction values.

5. Special Considerations

5.1 Business Restructurings

Estonia has a legislation which controls the taxation consequences of business restructuring/reorganizations but these do not deal with transfer pricing.

5.2 Tax Return Disclosures

In 2007 and 2008, when filing a monthly income tax return, the taxpayer had to answer three questions regarding transactions between related parties. However, there are no such questions in tax returns for January 2009.

5.3 Competent Authority

There is no special authority for submitting an adjustment.

Tax has to be paid within 30 days after the Tax and Customs Board decision.

The taxpayer may first opt to seek correction from the Tax and Customs Board itself. If the application to correct the adjustment is unsuccessful or if the taxpayer decides not to seek correction, the taxpayer can always appeal the decision of the Tax and Customs Board to a court.

5.4 Other Considerations

Compliance with Estonian regulations and use of the EU TPD and of the OECD-Guidelines are recommended as a basic approach in preparing transfer pricing documentation and transaction values.

Estonian law requires the comparability of transactions to be used. The Tax and Customs Board can use the Estonian Statistics Board database and if there is no relevant information in this database, the Tax and Customs Board can use its own database.

There is no special treatment for management fees.

In Estonia, taxes and customs are administered by the same authority, i.e. the Tax and Customs Board.

6. Advance Pricing Agreements

APAs are not available in Estonia. Advance rulings on other tax matters are available, but advance rulings on transfer prices are specifically excluded.

7. Developments

At the time of writing this country profile, there have been no recent or anticipated legal developments with respect to transfer pricing in Estonia.

Transfer Pricing in **Germany**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Federal Ministry of Finance (Bundesministerium der Finanzen "BMF") is the supreme federal authority for finance issues. One of the higher federal authorities that are attached to the BMF is the Federal Central Tax Office (Bundeszentralamt für Steuern "BZSt"). BZSt and the state tax authorities are the responsible tax authorities in Germany.

Relevant regulations on transfer pricing are contained in Section 1 of the Foreign Tax Code (Außensteuergesetz "AStG"), where the arm's length standard is also adopted. This Section has been changed recently; the actual version is effective from 1 January, 2008 on.

Section 90 (3) of the General Tax Code (Abgabenordnung "AO") addresses the documentation requirements for cross-border transactions (effective date: 31 December, 2002). Section 162 (3), (4) AO contains regulations about the consequences for non compliance.

Provisions concerning the hidden profit distribution are given in Section 8 (3) of the German Corporate Income Tax Act (Körperschaftsteuergesetz).

1.2 Transfer Pricing Regulations

1.2.1 Legally Binding Regulations

Tax authorities can only issue legally binding regulations on transfer pricing if they are formally empowered by explicit provisions in the law.

The formal decree-law Gewinnabgrenzungsaufzeichnungsverordnung "GAufzV" has been issued by BMF referring to Section 90 (3) of the General Tax Code (effective date: 30 June, 2003). It contains detailed regulations about the required contents of a transfer pricing documentation.

The *Regulation on the Relocation of Business Functions* (BGBl. I 2008, S. 1680) has been issued by the BMF based upon Section 1 (13) AStG. The regulation is effective from 01 January 2008. It contains provisions regarding the transfer of functions from Germany to other countries.

1.2.2 Circulars by BMF

The BMF also publishes circulars, which are neither binding on the taxpayer nor on the courts, but only to the tax authorities themselves. They serve as a means to achieve an equal interpretation and application of the binding law. They also indicate the position of the tax authority on the respective subjects.

- *Principles Governing the Examination of Income Allocation between Multinational Enterprises* (BMF, IV C 5 S 1341 4/83, 23 February, 1983, BStBl. I 1983, 218). These so-called *Administration Principles* serve as a directive to the tax audit treatment of

transfer pricing cases. Parts of the original directive have been replaced by the newer BMF circular of 2005 (listed below).

- *Administration Principles relating to the Examination of Apportionment of Income in Case of Permanent Establishments of Internationally Operating Enterprises* (BMF, IV B 4 S 1300 111/99, 24 December, 1999, changed on 20 November, 2000, BStBl. I 1999, 1076 and BStBl. I 2000, 1509).
- *Principles for the Examination of Income Allocation through Cost Contribution Arrangements between Internationally Associated Enterprises* (BMF, IV B 4 S 1341 14/99, 30 December, 1999, BStBl. I 1999, 1122).
- *Principles for the Examination of Income Allocation in the Case of Secondments in Internationally Associated Enterprises* (BMF, IV B 5 S 1341 20/01, 09 November, 2001, BStBl. I 2001, 796).
- *Principles for the Examination of Income Allocation in the Case of Internationally Related Parties in Relation to the Duties of Determination and Cooperation, Adjustments of Income, Mutual Agreement and EU Arbitration Procedures (Administration Principles - Procedures)* (BMF, IV B 4 S 1341 1/2005, 25 April, 2005, BStBl. I 2005, 570).

1.3 Adherence to OECD-Guidelines

German tax authorities consider the German transfer pricing laws to be in line with the OECD-Guidelines. However, in Germany, the so-called standard methods have priority. Transactional profit methods may only be used if the application of the standard methods would not yield satisfying results.

2. Documentation

2.1 Documentation Requirements

In Germany, international transactions with related entities have to be documented. The taxpayer is considered to be related to an entity, if this entity owns (directly or indirectly) a participation of at least 25% in the taxpayer's capital or if it is able to exercise a controlling influence. Vice versa, companies are considered to be related, if the taxpayer himself holds a 25% participation in a company's capital or if he is able to exercise directly or indirectly a controlling influence. When a third person holds substantial participation in both companies, the owned companies are also related.

The documentation requirements are contained in Section 90 of the General Tax Code. More detailed instructions are given in GAufzV. The tax authorities' view on the subject of documentation is described in the BMF circular dated April 2005.

According to Section 2 (5) GAufzV, the documentation is to be written in German language. Still, the taxpayer can file an application and may be allowed to deliver the documentation in a different language.

The formal documentation requirements are eased for small enterprises, where the amount of transactions with related parties did not exceed EUR 5,000,000 for the transfer of goods and of EUR 500,000 for transactions other than goods in the respective financial year.

There is no preparation deadline for the regular transfer pricing documentation. However, in case of extraordinary business transactions, the documentation has to be prepared within 6 months after the end of the fiscal year in which the extraordinary business transaction took place. The submission deadlines for the transfer pricing documentation are as follows: The transfer pricing documentation has to be provided within 60 days upon request of the tax authority (regularly during a tax audit). In case of an extraordinary business event, the documentation has to be provided within 30 days upon request.

2.2 Components

According to Section 4 GAufzV, a transfer pricing documentation has to include the following items:

1. General description of the company; information about the market and the competitive environment; description of the shareholder structure
2. Organizational and operational group structure; description of the business activities
3. Overview on the existing business relationships
4. A list of the group's intangible property
5. Functional and risks analysis
6. Description of the value chain
7. Description of the transfer pricing method that has been employed and its application
8. Substantiation of the adequacy of the applied method due to its cause and the charged amount

Additional information is required in special cases, e.g. when there is a change of business strategies, pooling arrangements are made or mutual agreements with foreign tax authorities are closed.

2.3 Purpose

Fees and severe penalties may apply in case the documentation requirements are not met (on time). The main purpose of the documentation is to avoid punishment. But there is also the purpose to shift the burden of proof. In case of documentation default the tax authority may estimate the adjustment necessary at its own discretion and the burden of proof changes from the tax authority to the taxpayer.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general, German tax authorities accept the Comparable Uncontrolled Pricing Method ("CUPM"), the Cost Plus Method ("C+M"), the Resale Price Method ("RPM"), the Profit Split Method ("PSM") and the Transactional Net Margin Method ("TNMM"). However, Section 1 (3) AStG defines a priority rule: The standard methods (CUPM, C+M and RPM) have to be applied, if possible. If an unlimited comparison of the existing arm's length data is not possible, certain adjustments are to be made to allow the use of data with limited comparability. Only if such a comparison is also not possible, a hypothetical arm's length comparison using the PSM and TNMM method can be conducted.

The TNMM method can be applied only if the pricing is to be determined for an entity with routine functions. A limited degree of comparability with companies has to be established at least.

According to the circular of BMF from April 2005, the PSM can be used as a last resort if the transactional methods would not yield satisfying results. This may be the case when more than one entrepreneur is participating in the transactions.

3.2 Availability of Benchmarking

According to Section 3.4.12.4 of the *Administration Principles - Procedures*, a mere database screening itself would not be sufficient for a documentation of adequacy. The relevant circumstances have to be substantiated with all the information that is available to the taxpayer or that the taxpayer can make available with reasonable effort (e.g. information from the website of the comparable enterprises). The tax authority has to be able to verify the search process.

Therefore, a benchmarking analysis alone cannot replace an argumentation of adequacy. Still, benchmarking may be used as a means for supporting the documentation and Pan-European benchmarks are often accepted by German tax authorities. For example, the AMADEUS database by Bureau van Dijk contains rich information and can be used for benchmarking projects with other European companies.

4. Penalties

4.1 Rates and Conditions

If transfer pricing documentation is not provided, or the documentation is unusable, or the documentation is not delivered on time, the transfer prices are estimated (Section 162 (3) AO).

According to Section 162 (4) AO, a penalty surcharge between 5% and 10% of the correction in income applies (the minimum amount is 5,000 EUR), if the documentation is not provided, or if the documentation is unusable.

In cases, where the documentation is handed in late, a minimum surcharge of EUR 100 is imposed per day, which may add up to a maximum amount of EUR 1,000,000 in total.

Additional penalties for tax evasion may apply.

4.2 Extent of Enforcement

As the penalty regime to transfer pricing has been introduced recently in Germany (with effect from 2004), practical experience about the actual extent of enforcement has yet to emerge.

4.3 Reduction or Cancellation of Penalties

Penalties may not be imposed, if the taxpayer is not or only to a small extent responsible for the lack of documentation.

The statute of limitations on assessment for transfer pricing adjustments is 4 years from the end of the year in which the return was filed. In case of evasion or fraud, the period is 10 years.

5. Special Considerations

5.1 Business Restructurings

In 2008, the *Regulation on the Relocation of Business Functions* has been issued by BMF. It contains provisions regarding the transfer of functions from Germany to other countries.

According to the regulation, the business value of a function has to be estimated by a cash flow approach due to its future profit potential. The regulation is highly controversial, because potential future profits that will be realized in the foreign jurisdiction are partly taxed in Germany. Hence, double taxation issues are likely to arise. The regulation is believed by some to violate the basic liberty right to relocate freely within the European Union (which is granted by the EC treaty of 1957). The legislation is effective from 1 January, 2008.

As the regulation has been passed only recently, best practice rules have yet to emerge.

5.2 Tax Return Disclosures

No specific tax return disclosure is required from the taxpayer.

5.3 Competent Authority

Before paying tax, the taxpayer may go to a competent authority ("CA") when the amount of the proposed adjustment is communicated. The taxpayer may also submit an application during the tax audit. Specific timelines may vary according to the pertinent tax treaty. After the assessment, the payment may be suspended. The CA may develop new settlement positions. In this case, the taxpayer is asked for approval.

5.4 Other Considerations

BZSt collects relevant information and data regarding international taxation and transfer pricing in a central database. The data contained therein is confidential and access is exclusively granted to the tax administration only. The local tax auditor may order a review of the information received during the audit procedure, which is then conducted by specialized auditors in BZSt using this source of statistical data.

Management fees are generally deductible. If shareholder costs are already included in management fees, tax deductibility is likely to be refused. However, the interpretation of the term "shareholder costs" by German tax authorities is broad, and not in line with the OECD definition (cf. sec. 7.9 of the OECD-Guidelines). Management fees are usually not subject to withholding tax. Withholding tax may be triggered, if management activities involve the transfer of intellectual property.

6. Advance Pricing Agreements

6.1 APA Opportunity

Bilateral or multilateral Advance Pricing Agreements ("APAs") are available in Germany. A circular on APAs has been released by BMF in 2006. The Federal Central Tax Office is the competent administration for APAs. The application process takes at least 1.5 years. An agreement between the two participating tax authorities becomes conditional, if the taxpayer consents.

6.2 APA Filing Fees

The basic fee for a bilateral APA is EUR 20,000. In case of a multilateral APA, the fee is incurred for every single foreign country. The extension of an existing APA costs EUR 15,000. The fee for amendments is EUR 10,000. For small enterprises, lower rates may apply.

7. Developments

In order to avoid tax erosion, German tax authorities have been introducing the *Regulation on the Relocation of Business Functions*, which was intended to reduce the incentives for global enterprises to relocate their business activities to foreign countries with lower wages and/or taxes. In the European Union, this approach appears to be unique.

An administrative circular on the valuation issues connected to the transfer of business functions is expected this year.

Transfer Pricing in **Hungary**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance (Pénzügyminisztérium) is the supreme authority for finance issues in Hungary. The Ministry of Finance supervises the 3 tax authorities of Hungary, the State Tax Authority (Állami Adóhatóság), the Customs Authority (Vámhatóság) and the Municipal Tax Authorities (Önkormányzati Adóhatóságok). The State Tax Authority is in charge of transfer pricing issues.

Relevant regulations on transfer pricing are contained in Section 18 of the Act on Corporate Income Tax, where also the arm's length standard is adopted.

Decree No 18/2003 (VII. 16.) of the Ministry of Finance addresses the documentation requirements for cross-border transactions effective date as of 1 September, 2003.

Sections 165 to 172 of the Act on the Rules of Taxation contain regulations about the consequences for non compliance.

1.2 Transfer Pricing Regulations

The major rules with regard to the taxation of transactions between related parties are stipulated in Section 18 of the Act on Corporate Income Tax ("CIT Act"). According to these rules, the taxpayer has to adjust its tax base, if prices applied in related party contracts and/or agreements (even if non-written) are not at arm's length. Accordingly, the tax base must be increased if, as a result of the applied prices, the pre-tax profit of the taxpayer is lower than it would have been if fair market prices had been applied. In contrast, if as a result of the price applied in related party transactions being not at arm's length, the pre-tax profit is higher than it would be otherwise, the taxpayer has the option to decrease his tax base (this adjustment is not obligatory and is subject to further conditions).

1.3 Adherence to OECD-Guidelines

The Hungarian tax authorities consider the Hungarian transfer pricing laws to be in line with the OECD-Guidelines. However, in Hungary, the so-called standard methods have priority. Transactional profit methods may only be used if the application of the standard methods would not yield satisfying results.

2. Documentation

2.1 Documentation Requirements

In accordance with the provisions of the CIT Act and the rules stipulated in the Decree No 18/2003 (VII. 16.) of the Ministry of Finance (hereinafter "TP Decree") which entered into force on 1 September, 2003, taxpayers are obligated to keep a record of the prices applied in their transactions with related parties (transfer pricing documentation).

The documentation obligation applies to all contracts concluded between related parties, provided that transactions were carried out (i.e., goods were sold or services were provided) based on the respective contract in the given tax year. Originally, the transfer pricing documentation requirements were only applicable to contracts concluded after 1 September, 2003. Since 2005, however, transfer pricing documentation has to be prepared for all agreements that are in effect, regardless of the date on which these agreements were concluded.

The transfer pricing documentation has to be prepared by the filing deadline of the statutory CIT return (in general by May 31 of the year following the tax year) for the first tax year in which revenues were received/expenses paid under the respective contract. In case of taxpayers with a business year other than the calendar year, this deadline ends 150 days after the end of the business year.

As a general rule, documentation has to be prepared for each contract. If a contract governs more than one transaction, each of the transactions has to be addressed separately in the documentation.

The documentation must also be prepared (or revised) when the contracts are modified or the conditions of arm's length prices change.

2.2 Components

As mentioned above, the contents of the transfer pricing documentation in Hungary is stipulated by the TP Decree. Under this, the following elements have to be included in the documentation:

Identification data of the related parties:

- Data of the Hungarian taxpayer: its name and registered seat, its tax registration number;
- Data of the related party: the name and registered seat of the related entity, its tax registration number [in the absence of such, the company registration number (registration number) and the name and seat of the court (authority) in charge of its (corporate) registration];
- Date of preparation and modification.

Summary of the contents of the contract – especially:

- The subjects of the contract, the date of its conclusion and amendment and its validity period;
- The description of the goods and services (for example: their physical characteristics, quality, quantity, nature and their size or scope) the method and terms of performance ("Contract and corporate analysis");

- The activities performed and their characteristics (for example: research and development, design, manufacture, advertisement and marketing, shipment), the resources used (for example: costs, expenses, investments) and the business risk assumed (for example: foreign exchange risk, warranty, financial risk) ("Functional analysis");
- Identification and nature of the market that is relevant for the determination of potential business relationships (for example: size of the market, the extent of liberalization, comparative market position of the suppliers, the availability of substitute goods and services); for the purposes of the documentation, those geographical areas cannot be taken into account where the good or service is either not available or can be purchased (or utilized) or sold only under significantly more disadvantageous conditions ("Industry analysis").

Transfer pricing method:

- The name of the method applied for determining the usual market price;
- In case other methods are applied, the characteristics of these methods;
- The reasons for the selection of the specific method, the definition of the data used for the comparison, the steps of selecting the data and the reasons substantiating this process, and other facts and circumstances associated with comparable goods or services.

The documentation contains:

- depending on the selected method the price, margin, profit, other values or their range (i.e. the arm's length price) as calculated on the basis of comparable goods or services;
- description of deviances in factors affecting the arm's length price and the corresponding adjustment;
- the arm's length price.

Other information:

- any court or other official procedure affecting the subject of the contract;
- name and seat of the court or authority (in case of a foreign country also its name) and registration number of the case;
- the date of the beginning and the end of the procedure;
- the arm's length price presented for approval to the authorities, or the arm's length price that was set (approved) or contested by the authorities.

2.3 Purpose

Fees and severe penalties may apply in case the documentation requirements are not met (or not met within the statutory deadline). The main purpose of the documentation is to avoid punishment. But there is also the purpose to shift the burden of proof. In case of documentation default the tax authority may estimate the adjustment necessary at its own discretion and the burden of proof is shifted from the tax authority to the taxpayer.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

The CIT Act, in compliance with the OECD Transfer Pricing Guidelines also stipulates the methods for determining the fair market price. The applicable methods are as follows:

- *comparable uncontrolled price method ("CUPM")*: the customary market price is the price used by independent parties when selling comparable products or services in an economically comparable market; both internal and external comparables are acceptable.
- *resale price method ("RPM")*: the customary market price is the price used in the course of selling the product or service in an unaltered state to an independent party decreased by the costs of the reseller and the usual profit;
- *cost plus method ("C+M")*: the customary market price constitutes the costs increased by a usual profit;
- *any other method*: if the customary market price cannot be determined by any of the above methods (so-called *traditional methods*), the taxpayer is eligible to apply other methods to determine the customary market price (e.g. *database search* using information provided by a database to determine the fair market value or range of that value).

3.2 Availability of Benchmarking

In Hungary, a mere database screening itself would not be sufficient for a documentation of adequacy. The relevant circumstances have to be substantiated with all the information that is available to the taxpayer or that the taxpayer can make available with reasonable effort (e.g. information from the website of the comparable enterprises). The tax authority has to be able to verify the search process.

A benchmarking analysis alone therefore cannot replace the transfer pricing documentation. Still, benchmarking may be used as a means for supporting the documentation. For example, the AMADEUS database by Bureau van Dijk contains rich information and can be used for benchmarking projects with other European companies.

4. Penalties

4.1 Rates and Conditions

In principle, Hungarian taxpayers are not expected to incur disproportionately high costs when preparing the transfer pricing documentation (however, the TP Decree does not define what is regarded as disproportionately high cost). This, however, does not relieve companies from the obligation of preparing a transfer pricing documentation.

The Hungarian Act on Tax Procedure contains provisions on sanctions for not preparing sufficient documentation. According to this rule, the taxpayer could face a default penalty of up to HUF 2 million (approx. EUR 6,700) if the documentation is missing or is not in compliance with the requirements. The penalty – in theory – is chargeable per contract and per investigation of the Tax Authority. In case a tax audit reveals the lack or non-compliance of the documentation, a proper documentation has to be prepared within a certain period of time as indicated by the tax authority.

Apart from this penalty, the corporate tax base of the taxpayer could be increased twice as a result of improper transfer prices, once to correct the transfer price itself, and secondly, based on the provisions of the CIT Act, because of goods or services provided without consideration, or because the costs were not incurred for the purpose of the company business.

4.2 Extent of Enforcement

As part of the Hungarian tax authority, a special department has recently been founded in order to control the fulfillment of transfer pricing obligations regarding the more considerable companies (basically multinational companies) and transactions. The control is more elaborate, and stricter considering these type of subjects. In addition, companies that do not specifically draw the attention of this special department are controlled according to the general regulations. However, it is possible to assign cases to the special department if required by the facts and circumstances.

4.3 Reduction or Cancellation of Penalties

The Hungarian State Tax Authority might reduce the penalty after taking into account the circumstances of the case at its own discretion.

The statute of limitations on the assessment for transfer pricing adjustments is 5 years from the end of the year in which the return was filed.

5. Special Considerations

5.1 Business Restructurings

The OECD discussion paper on the Transfer pricing aspects of business restructurings ("TP Aspects"), published in September 2008, is recognized by Hungary. However, the implemen-

tation effects of the paper at the level of the tax and finance authorities are not yet developed.

5.2 Tax Return Disclosures

In Hungary, the transfer pricing documentation does not have to be submitted by the taxpayer to the State Tax Authority. As mentioned under Section 2.1, the documentation has to be prepared by the filing deadline of the statutory CIT return, i.e. either May 31 of the year following the tax year, or 150 days after the end of the business year in case of differing business years.

The taxpayer is obliged to retain the documentation(s) among the records of the company, and, after the above deadline has passed, to present it (them) to the State Tax Authority when so requested (i.e. during an official tax audit).

5.3 Competent Authority

The State Tax Authority is generally structured by regions, creating regional directorates that are competent for all taxpayers whose seat is located on their territory. However, the special control department has country-wide competence.

5.4 Other Considerations

The taxpayer shall notify the State Tax Authority on the name, place of seat and tax-number of the related party within 15 days of concluding the first contract with it.

6. Advance Pricing Agreements

6.1 APA Opportunity

As of 1 January, 2007, a new ruling procedure (so-called Advance Pricing Agreement; hereinafter “APA”) entered into force in Hungary regarding the establishment of the fair market value for transactions concluded between related parties. The purpose is to provide a higher level of legal security for internationally acting business groups.

To implement an APA, a separate application has to be submitted to the central office of the Hungarian tax authority (second instance), signed by a tax consultant, tax expert or certified tax expert, or an attorney. However, the taxpayer may ask for a non-binding, prior consultation with the competent tax authority in order to clarify in advance the conditions under which to conduct the proceedings, to make arrangements for the timetable and the possible ways of cooperation.

As a result of the APA, the tax authority – through a tax ruling - will determine (with or without the approval of the competent tax authority of the respective state with which a DTT was concluded during the course of a mutual agreement procedure) which transfer pricing me-

thod shall be used for calculating the fair market value that has to be applied in a specific transaction concluded between related parties. Moreover the facts and circumstances of the transaction and, if possible, the fair market price or price range (fair market value) shall also be clarified in the tax ruling to be issued by the Hungarian Tax authority.

According to Hungarian legislation, an APA may be requested for future contracts as well as for contracts already concluded at the time of the request (however only with regard to future transactions).

The tax ruling determines the duration of the APA of three to five years and its validity may be extended only once by three years, according to the procedural rules.

The validity of an APA depends on the formal approval of all related (domestic as well as international) parties involved in the transaction. Additionally, in the case of bilateral and/or multilateral procedures, a written agreement is necessary between the Hungarian and the competent tax authority of the respective state with which a DTT was concluded.

The administrative time limit for dealing with an APA-request is 120 days, which may be extended twice by 60 days. The administrative time limit does not include the time required to conduct discussions with the competent foreign tax authority.

6.2 APA Filing Fees

The APA is subject to a fee that amounts to 1% of the fair market value, but does not exceed HUF 50 million (approx. EUR 185,000), as long as the fair market price is determined in the tax ruling. However, in case a fair market value is not established (and the ruling only determines the arm's length interest rate of a draft lending contract or the transfer pricing method to be used), the fee amounts to the following range of minimum and maximum:

- HUF 5-12 million (approx. EUR 18,500-44,500) in an unilateral APA process,
- HUF 10-17 million (approx. EUR 37,000-63,000) in a bilateral APA process,
- HUF 15-20 million (approx. EUR 55,500-74,500) in a multilateral APA process.

7. Developments

Hungary was one of the first countries of the Middle-European region to implement a transfer pricing regime in 2003. Moreover, the non-compliance aspects of the Hungarian regulation are among the strictest in the region.

Currently, the Hungarian tax authority is focusing on transfer pricing documentation. The tax authority applies and most likely will apply the OECD-Guidelines and OECD communication papers, such as the Report on the Attribution of Profits to Permanent Establishments and the discussion paper on the Transfer pricing aspects of business restructurings ("TP Aspects"). However, the effects and practical consequences of the implementation of these guidelines have yet to emerge.

7.1. New Documentation Rules as of 2010

As of 1 January, 2010, a new Decree, no. 22/2009 (X.16) of the Ministry of Finance will come into effect. The new decree clarifies a number of issues in particular with regard to keeping records and introduces the possibility for a group of companies to prepare joint documentations if the group members are resident within the territory of the EU (thereby effectively transposing the EU Masterfile concept into domestic law). Moreover the main intention of the decree is also to bring the domestic legislation more in line with the OECD transfer pricing guidelines.

The changes further include specifications and clarifications pertaining to the preparation of simplified documentations and the update of existing ones. Also, the Decree states that documentations can be prepared in any foreign language for transactions taking place in or after 2009 (although the Hungarian Tax Authority may request the translation thereof).

Transfer Pricing in **Latvia**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Latvian Ministry of Finance is the government authority controlling financial issues. Within the Finance Ministry, administration of the Latvian taxation system is under the responsibility of the Latvian State Revenue Service (Valsts ieņēmumu dienestu) which is organized in one centralized authority and six regional authorities.

The relevant law directly controlling transfer pricing is contained in Section 12 of the Corporate Income Tax Act (Par uzņēmumu ienākuma nodokli - "CIT Act").

Paragraphs 83-94 of the Latvian Minister Cabinet Regulation No.556 of 4 July, 2006 contain the rules regarding the choice and application of the transfer pricing methods that can be used in Latvia.

Section 23.² of the Latvian Taxes and Duties Act (Par Nodokļiem un Nodevām) also provides conditions and methods under which the Latvian State Revenue Service can determine the cost of goods, services and work for taxation purposes.

If the Latvian State Revenue Service has adjusted the value of a related party transaction to the taxpayer's detriment, the taxpayer can request an independent valuation by the Transaction Evaluation Commission. After receipt of an opinion both the State Revenue Service and the taxpayer have the right to appeal to a court. Section 39 of the Taxes and Duties Act (Par nodokļiem un nodevām).

The annual disclosure requirements for transactions subject to the transfer pricing rules are contained in the Latvian Minister Cabinet Regulation No.852 of 11 January, 2007.

1.2 Transfer Pricing Regulations

The general application of Latvia's transfer pricing rules is governed by the above stated acts and regulations. It is understood that draft regulations for issuing Advance Pricing Agreements ("APA") exist, however these have not been submitted to the government yet and their date of potential implementation is unknown.

No specific guidelines have been recently issued in Latvia. The existing rules go back several years.

The transfer pricing rules are applicable to transactions between related parties as defined in the CIT Act. At the beginning of 2009, the Latvian High Court confirmed that the Latvian State Revenue Service could only hold parties to be related if the specific circumstances stated in the CIT Act are proved. Two or more entities may not be considered as being "related" under other circumstances. (AT Senāta SKA-7-2009)

The transfer pricing rules are also applicable to transactions occurring between a Latvian registered entity and an entity located in a listed low or nil tax jurisdiction as these transactions are deemed to be related party transactions.

Whilst not specifically defined as related parties, transactions with entities forming a "Group" within which tax losses can be transferred, as well as transactions with entities that are exempted from Latvian Corporate Income Tax or who benefit from reduced tax rates, are also deemed to be related party transactions.

In the event of a tax audit, if the Latvian tax authorities deem that the value of a related party transaction is not in compliance with the transfer pricing rules and, as a consequence, adjust the value of the transaction, the taxpayer has the right to request an independent valuation from the Transaction Evaluation Commission.

1.3 Adherence to OECD-Guidelines

Latvia is not a member of the OECD, but its transfer pricing laws are in general agreement with the OECD-Guidelines.

In Latvian law, the three transactional transfer pricing methods (i.e. comparable uncontrolled price ("CUPM"), cost-plus ("C+M") and resale price method ("RPM")) prevail. Two profit-based methods (i.e. transactional net margin method ("TNMM") and profit split method ("PSM")) are available, if the first three methods would not yield satisfying results.

2. Documentation

2.1 Documentation Requirements

Under Latvian law two or more entities are to be considered related parties if:

- they are parent and subsidiary;
- one entity owns 20 to 50% of the another entity's shares and in addition, such company does not have a majority vote;
- more than 50% of the equity capital, shares or co-operative shares in each of two or more entities is owned by or is ensured by a contract or otherwise a decisive influence over these two or more entities is in the hands of a single person or a relative up to the third degree or a spouse;
- one and the same person(s) have a majority vote in the administrative institutions of two or more companies;
- Contractual agreements ensure control over two or more companies or agreements were concluded regarding the undertaking of activities related to the avoidance of taxes.

Transactions between a Latvian entity and an entity located in a listed low or nil tax jurisdictions are also categorized as related party transactions, and compliance with Latvian transfer pricing rules is required. However, these rules do not apply when the transaction consists in

the purchase of goods from the low or nil tax jurisdictions in which the entity receiving the payment is registered.

Additionally, whilst not specifically being defined as related parties, transactions with entities forming a "Group" within which taxation losses can be transferred, as well as transactions with entities that are exempted from Latvian corporate income tax or benefit from reduced tax rates, are also deemed to be related party transactions.

While preparing its annual tax return, the taxpayer is required to provide in an attachment detailed information on all transactions involving entities that are defined as related parties or with whom related party transactions have occurred.

The attachment must fully identify the other party, the transaction type, whether it was a purchase or a supply transaction, and the transfer pricing valuation method. Both national and international transactions are required to be disclosed.

There is no formal date or delay by which supporting documentation must be prepared. However, if a transaction is reported in the annual tax return, sufficient documentation must have been prepared at the time of disclosure to support the choice of the valuation method(s) and the transaction value.

The original documentation can be in a foreign language but a Latvian translation should be available.

2.2 Components

No formal requirements regarding the form of the supporting documentation are contained in the Latvian law. However, the application of the European Union Code of Conduct on Transfer Pricing Documentation Guidelines ("EU TPD") is recommended.

2.3 Purpose

The purpose of the documentation is to support the basis of the transfer price applied to the transaction and reported in the attachment to the annual tax return.

In the event of an audit, the documentation allows the State Revenue Service to readily establish the taxpayers' pricing basis applied to intercompany transactions.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

Under Latvian law the three transactional transfer pricing methods (i.e. comparable uncontrolled price ("CUPM"), cost-plus ("C+M") and resale price method ("RPM")) prevail. The two profit-based methods (i.e. transactional net margin method ("TNMM") and profit split method ("PSM")) are available, if the first three methods would not yield satisfying results.

The selected transfer pricing method should be the one that best suits the nature of the transaction using the clarifications contained in § 83-94 of the Latvian Minister Cabinet Regulation No.556 of July 4, 2006. These regulations also allow the use of the OECD-Guidelines upon determining the proper pricing methodology.

3.2 Availability of Benchmarking

It is understood that the Latvian State Revenue Service has acquired the AMADEUS database but has not issued any guidelines regarding benchmarking studies and their application to Latvian companies.

Latvian law requires the comparability of transactions to be used and when a unit's production cost has been determined the Latvian State Revenue Service can use the Latvian Central Statistics Board database and, if this database does not have appropriate information, the Latvian State Revenue Service can use its own database.

4. Penalties

4.1 Rates and Conditions

If no documentation is available, or if the documentation is inadequate or not accepted, and a corresponding adjustment is realized by the tax authorities, penalties for understated taxes start at 30% of the understated taxes payable. Depending on the amount of tax underpaid a 50% penalty can also be applied.

There are no specific penalties regarding the failure to prepare supporting pricing documentation or to disclose related party transactions in the annual tax return.

4.2 Extent of Enforcement

Should the Latvian State Revenue Service consider a transaction as not complying with the arm's length principle, an adjustment of the transaction values will be realized and penalties will be imposed.

In situations where OECD standard documentations including Master files and other supporting documents have been prepared, practical experience has yet to show if the Latvian State Revenue Service will seek to dispute the contents and applicability of this documentation.

4.3 Reduction or Cancellation of Penalties

If a penalty is imposed, it is possible to seek a reduction.

The Latvian State Revenue Service has a three year limit to audit a tax return, including all details concerning intercompany transactions, from the date the tax becomes payable. If an audit is performed and no adjustment is made, the audit is final and cannot be reopened un-

less it is later established that criminal acts such as false accounting and fraud have occurred.

Penalties will be imposed if the tax audit reveals that an incorrect transfer price has been applied. However, reductions can be requested. Reductions can be granted and can amount up to a maximum of 70% of the penalty tax payable. There is no current public information available regarding reductions that may have been granted to penalties imposed for adopting incorrect transaction values.

5. Special Considerations

5.1 Business Restructurings

Latvia has adopted rules regulating the fiscal consequences of business restructurings/ reorganizations, but these do not deal with transfer pricing.

5.2 Tax Return Disclosures

When filing the annual Latvian corporate tax return, the taxpayer must indicate whether related party transactions have occurred and complete Appendix 2 of the tax return with details on the transactions.

All related party transactions and transactions that are deemed to be related party transactions must be listed and the parties to the transactions identified, the type of the transaction (such as goods services etc.), specify whether it is a buy or sell transaction as well as the valuation method used for transfer pricing purposes.

5.3 Competent Authority

If the Latvian State Revenue Service has adjusted the value of a related party transaction to the taxpayer's detriment, the taxpayer may request an independent valuation from the Transaction Evaluation Commission. The application must be made within 10 days of the Latvian State Revenue Service's decision to adjust the transaction value.

If such a valuation is requested, tax recovery proceedings are suspended until a decision is reached. Both the taxpayer and the Latvian State Revenue Service may appeal the Commission's decision to a court.

5.4 Other Considerations

Apart from what has been published in the relevant law and regulations, virtually no additional information of any assistance has been issued by the Latvian State Revenue Service. Accordingly, compliance with the Latvian regulations that indicate the approved transfer pricing methods and use of the European Union Code of Conduct on Transfer Pricing documenta-

tion guidelines ("EU TPD") and the OECD-Guidelines are recommended as a basic approach in preparing transfer pricing documentation and determining transaction values.

Management fees are deductible and subject to a 10% withholding tax. The withholding tax is not levied if the recipient is a tax resident of a country with which a Double Tax Treaty ("DTT") has been concluded and provides acceptable proof of their tax status prior to the payment of the management fees by the Latvian entity.

The Latvian State Revenue Service is also in charge of customs in Latvia.

6. Advance Pricing Agreements

6.1 APA Opportunity

Advance Pricing Agreements ("APAs") as such are not available in Latvia. Draft legislation regarding the introduction of APAs has existed for some years but its introduction is not imminent.

Latvian Administrative Law provides the framework for the issue of binding rulings to taxpayers by the Latvian State Revenue Service. As binding rulings are confidential documents between the Latvian State Revenue Service and the taxpayer, the use of a binding ruling as a de facto APA has not been made public.

6.2 APA Filing Fees

Not applicable.

7. Developments

At the time of writing there have been no recent or anticipated developments with respect to transfer pricing in Latvia.

Transfer Pricing in **Lithuania**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance of the Republic of Lithuania (Lietuvos Respublikos finansu ministerija "FM") is the supreme authority for finance issues, which established basic taxation and tax collection principles in Lithuania. The highest tax authority institution in Lithuania is the State Tax Inspectorate which is under the responsibility of the Ministry of Finance of the Republic of Lithuania (Valstybine mokesciu inspekcija prie Lietuvos Respublikos finansu ministerijos, "STI"). The STI is composed of 10 local County State Tax Inspectorates, each of them being responsible for a specific territory.

General transfer pricing provisions are established in Article 40 of the Corporate Income Tax Act ("CIT Act" - for legal persons) and in Article 15 of the Individual Income Tax Act (for natural persons).

1.2 Transfer Pricing Regulations

The above mentioned general transfer pricing provisions are specified by Order No. 1K-123 of the FM.

The transfer pricing regulations have been applied as of 1 January, 2004.

Since 2005, taxpayers (Lithuanian as well as foreign entities engaged in activities through permanent establishments ("PEs")) have to file a Report on Transactions between Associated Persons as an appendix to the annual corporate income tax return. These reports may not be filed if the value of related-party transactions does not exceed LTL 300,000 (approx. EUR 87,000). The taxpayer has a right to declare related-party transactions of lower value on a voluntary basis.

1.3 Adherence to OECD-Guidelines

In general, transfer pricing provisions are harmonized with the OECD-Guidelines.

2. Documentation

2.1 Documentation Requirements

In Lithuania, local and international transactions with associated persons have to be documented.

A definition of "associated person" can be found in the CIT Act and the Individual Income Tax Act. Accordingly, "associated persons" are persons (entities or natural persons) who are meeting at least one of the following criteria:

- they are related persons (see below);

- they may have influence over each other as a result of the terms of their mutual transactions or economic operations other than those where a maximum economic benefit is sought by each of the said persons.

"Related persons" may be treated as such if on any day of the current tax period or the former tax period, they meet at least one of the following criteria, i.e. they are:

- an entity and its members, including the spouses, fiancés and cohabitants of its members;
- directly or indirectly owing more than 25 % of the share capital of another company;
- directly or indirectly holding the right to more than 25% of the decisive votes of another entity;
- members of a group of entities;
- entity and members of its management bodies. Management bodies in this case are (i) director and (ii) management board. For instance, may be treated as a related parties an entity and the board members of that entity, including the spouses, fiancés and cohabitants of those board members;
- an entity and its PE;
- one entity holds decision-making rights in another entity;
- otherwise controlling the entity.

The obligation to prepare written transfer pricing documentation applies to companies which meet at least one of the following criteria:

- Lithuanian entities as well as foreign entities that carry out activities in Lithuania through a PE, when the income of the Lithuanian entity or the income attributable to the foreign entity exceeded LTL 10 million (approx. EUR 2,900,000);
- financial companies and credit institutions, which carry out their activities according to the Act on Financial Institutions;
- insurance companies, which carry out their activities according to the Insurance Act;

Upon request of the tax auditor, transfer pricing documentation should be maintained in the form and language chosen by the taxpayer. Transfer pricing documentation should be submitted in the form it was accomplished, if it enables to identify the reliability of the information presented in it. However, the tax auditor may require a translation of these documents into Lithuanian, setting the deadline for submission of the translation at his own discretion.

There is no preparation deadline for the regular transfer pricing documentation; however, in case of extraordinary business transactions, the documentation has to be provided within 30 days upon request of the tax auditor (usually during a tax audit).

2.2 Components

The transfer pricing documentation should include:

- information about the transaction parties (economic and legal relationship, the structure of the group, cash flows, the ownership and control structure relevant for the involved parties, information concerning other associated persons and other information),
- information about the controlled transaction(s) (characterization of the subject matter of the transaction, functional analysis and conditions, economic circumstances, business strategy),
- information about the transaction method used and comparability (benchmarking) analysis (brief information on how it was applied, what adjustments and calculations were made, what uncontrolled transactions were used, presentation of the functional analysis of the uncontrolled transactions, economic circumstances, business strategy (if possible), and
- other information identifying relevant circumstances likely to have an influence on transfer pricing.

A taxpayer has the right to submit other information and documentation, not specified therein, if he deems them appropriate to answer the tax auditors request, and it allows him to prove that the transfer price complies with the arm's length principle.

2.3 Purpose

The main purpose of the transfer pricing documentation is to show how the transaction price for the goods and services is established between the associated parties and whether they are in compliance with the prices established between unrelated parties.

As a consequence, the documentation purpose is to find out whether the profit, which may be attributable to one of the associated parties, has been shifted to an associated party by inappropriately increasing or reducing the transfer price.

Additional fees and severe penalties may apply in case the documentation requirements are not met (on time).

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In accordance with the transfer pricing rules, taxpayers may use all 5 transfer pricing methods, which are laid down in the OECD-Guidelines. A rule of priority is established and the comparable uncontrolled price method ("CUPM") must be used first. If not enough data are available, the resale price ("RPM") or cost plus ("C+M") methods must be used. The profit split ("PSM") and transactional net margin methods ("TNMM") have the lowest priority and can only be used provided that the data is not sufficient to apply one of the first three methods.

The tax auditor has the right to require an explanation concerning the selection of a specific method by the taxpayer and may apply another method if the selected method is not deemed to be suitable. Finally, he may adjust the taxable values accordingly.

However, tax auditors are encouraged to be flexible in their approach and should not demand from taxpayers unrealistic precisions, taking into consideration all facts and circumstances. Tax auditors are encouraged to take into account the taxpayer's commercial judgment when assessing his transfer pricing policy, so that the transfer pricing analysis is tied to business realities. Therefore, tax auditors should start their transfer pricing analysis by considering the method selected by the taxpayer for transfer pricing determination purposes.

3.2 Availability of Benchmarking

As mentioned above, tax auditors should be flexible and should not demand unrealistic precision. However, taxpayers are required to perform benchmarking analysis in order to verify their results and the tax authority has to be able to verify their search process.

No internal database exists in Lithuania, except for the registry of legal persons, where it is possible to obtain the financial statement of a particular Lithuanian company. Pan-European databases are accepted by tax authorities (usually based on AMADEUS database by Bureau van Dijk).

4. Penalties

4.1 Rates and Conditions

If the taxpayer does not submit a requested transfer pricing documentation within 30 days (or within another established term), a penalty will be imposed according to the Code of administrative law offences of the Republic of Lithuania. The penalty can amount from LTL 50 to LTL 2000 (approx. EUR 14.5 to EUR 580).

If the tax auditor determines that the taxpayer has failed to declare taxes subject to declaration (e.g. corporate tax, when a taxpayer has set an incorrect transfer price and as a result his tax return is inaccurate), the amount of tax underpayment shall be calculated and a pe-

nalty equal to 10-50% of the underpaid amount is imposed (cf. the Act on Tax Administration).

4.2 Extent of Enforcement

As transfer pricing documentation rules were introduced on 1 January, 2004, the penalty regime is applied only from that date.

The statute of limitations on assessment for transfer pricing adjustments is 5 years going back from the current year. This general statute of limitation applies for all taxes (with some exceptions). In case of evasion or fraud, or other criminal activity the period is 10 years.

4.3 Reduction or Cancellation of Penalties

The amount of the actual penalty (from 10% to 50 %) imposed depends on the type of violation, on the taxpayer's cooperation during the tax audit, on his acknowledgment of having committed a violation of tax laws, and on other circumstances which the tax auditor deems to be relevant when determining the amount of the fine.

5. Special Considerations

5.1 Business Restructurings

No specific business restructuring provisions are established in Lithuania.

5.2 Tax Return Disclosures

No specific tax return disclosure is required from the taxpayer, except for the attachment of the Report on Transactions between Associated Persons as an appendix to the annual CIT return.

5.3 Competent Authority

No specific rules exist for the submission of an adjustment to the tax auditor.

5.4 Other Considerations

Management fees are generally deductible and are usually not subject to withholding tax. Withholding tax may be triggered, if management activities involve the transfer of intellectual property.

6. Advance Pricing Agreements

Advance Pricing Agreements ("APAs") are not available in Lithuania.

7. Developments

There are intentions to introduce APAs in the near future.

Transfer Pricing in **Poland**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance ("MF") is the supreme authority for finance issues. The Ministry of Finance is the competent authority for mutual agreement procedures and arbitration procedures relating to double taxation issues, including corresponding adjustments of transfer pricing assessments. The Ministry of Finance is also responsible for the interpretation of the tax law.

With respect to the tax auditing procedures, each tax office is responsible for the conduction of routine controls, including the audit of the transfer pricing issues of the companies seated within its territory. The subsidiaries of foreign companies are grouped into so-called "big tax offices". The other institution empowered to conduct tax audits is the Tax Control Office (Urząd Kontroli Skarbowej, "UKS"). Taxpayers who do not agree with the outcome of an audit or a tax assessment may appeal the decision to the Tax Chamber. If the Tax Chamber supports the decision of the first instance (the tax office or UKS), the taxpayer may appeal to the Administrative Court. The verdicts of the Administrative Courts may be further analyzed by the Supreme Administrative Court.

The principal regulations on transfer pricing are contained in the Corporate Income Tax ("CIT") Law (Articles 9a and 11) and the Personal Income Tax ("PIT") Law (Articles 25 and 25 a) and the Tax Ordinance governing the APA procedures (Section II a, effective since 1 January 2006).

1.2 Transfer Pricing Regulations

The transfer pricing regulations which are in line with the OECD-Guidelines were introduced in the Polish Tax Law on 1 January, 1997, once Poland became member of the OECD. Since then the regulations were amended several times.

The CIT (Article 11) and PIT (Article 25) laws, respectively, provide the definition of the related parties, outline the transfer pricing methods as well as provide for the corresponding adjustments. Article 9a of the CIT Law and Article 25a of the PIT Law also introduce compulsory documentation requirements for taxpayers concluding transactions with related parties or transactions that result in the payments to entities located in tax havens (effective since 1 January, 2001). The same documentation requirements apply to the branches of the foreign entities.

The application of transfer pricing methods is regulated by the Decree on the methods and procedures for determination of the income by estimation of prices applied in transactions between taxpayers dated 10 October, 1997 ("MF Decree on TP"). This Decree sets out the application of the five pricing methods in a manner similar to the one outlined in the OECD-Guidelines.

The MF Decree on TP which lists countries applying harmful tax competition (tax havens) was introduced in January 2001.

The Tax Ordinance is regulating all fiscal procedures, including the APA. The Tax Ordinance also provides certain reporting requirements concerning agreements concluded between related parties. Such reporting requirements are further regulated by the Tax Information Decree of December 2002.

1.3 Adherence to OECD-Guidelines

Polish tax authorities consider the Polish transfer pricing laws to be in line with the OECD-Guidelines. However, in Poland, the so-called standard methods have priority. Transactional profit methods may only be used, if the application of the standard methods would not yield satisfying results.

2. Documentation

2.1 Documentation Requirements

The transfer pricing documentation requirements were introduced on 1 January 2001.

Definition of the related parties

Both cross-border and domestic transactions with related entities as well as transactions concluded with entities located in tax havens are subject to documentation requirements. Following the changes in regulations that occurred since 1 January, 2004, entities are principally considered as being related if one of the following requirements is fulfilled:

- Participation in the control or management of the other entity;
- Direct or indirect participation in capital (at least 5% of share capital);
- The entities have a common shareholder or controlling entity or managing entity.

With respect to the 5% threshold set for the capital relationship, the regulations define the method for establishing the indirect capital share. According to the definition, if one entity has a particular shareholding in the capital of the second entity and the second entity has a particular shareholding in the third entity, the indirect shareholding of the first entity in the capital of the third entity amounts to the lower share hold-out of the two values mentioned.

Besides, with respect to the domestic entities, the regulations recognize the concept of the "personal" relationship. This means that the companies could be related if a family, employment or a capital link exists between the individuals exercising the management or the controlling functions in the entities.

As indicated above, the definition of the related parties changed on 1 January, 2004. Taking into account that the statute of limitations on assessment for transfer pricing adjustments is 5 years from the end of the year in which the return is filed, the fiscal year 2003 is open for a

tax audit up to 31 December, 2009. Therefore, an overview of the regulations applying up to the end of 2003 can be found below.

With respect to cross-border transactions, the definition was principally the same; however, the threshold was set at 5% of the voting rights.

With respect to the domestic transactions, the relation between entities existed if one of the following circumstances took place:

- One of the entities took advantage of income or tax relief,
- Participation in capital,
- An economic relationship existed, i.e. any form of long-lasting co-operation between the parties. This concept was rather unclear and open to the broadest interpretations.

Please note, that the documentation requirements also apply if the Polish company enters into transactions with an entity located in a tax haven country and if, as a result of these transactions, the liability is transferred to such a country.

Since 1 January, 2006, the documentation requirements also apply to the Polish branches of foreign companies.

Language of the documentation

The documentation has to be in Polish. This principally applies to narrative parts. Any source of documentation could be delivered in the original language. However, the tax authorities are empowered to demand the sworn translation into Polish.

Transactions qualifying for the documentation and the statutory deadlines

Related-party transactions are required to be documented if their total annual value exceeds a certain amount. Specifically, the following thresholds apply:

- EUR 20,000 for transactions involving entities located in tax havens,
- EUR 30,000 for transactions relating to the provision of intangibles or services,
- EUR 50,000 or 100,000 for other transactions (the application of the particular threshold depends on the amount of company's share capital). For the transactions exceeding 20% of the amount of share capital, the higher threshold applies).

The company has to submit the required documentation within seven days upon the tax authorities' request. Such requests are usually filed during tax audits concerning the overall tax liabilities of the company for a given tax year or, rarely, ad hoc, during the checking procedures.

2.2 Components

The transfer pricing documentation has to include the following items:

1. Functional analysis;
2. Determination of costs as well as the form and terms of payment;
3. The method and manner of calculating the profit and determination of the price applied;
4. The business strategy adopted;
5. Other factors influencing the transaction;
6. Outline of the derived or expected benefits in the case of transactions involving intangibles and services.

2.3 Purpose

The main purpose is to avoid penalties related to transfer pricing adjustments. If the taxpayer fails to provide documentation within the statutory deadline (7 days) and the tax authorities challenge the pricing arrangements, the difference between the tax declared and the tax assessed is charged with a 50% tax rate.

According to the MF Decree on TP, when examining transfer prices the tax authorities have to determine the arm's length value of the transaction using the method previously applied by the taxpayer, provided that:

- The taxpayer established the transfer price using a recognized traditional transfer pricing method;
- The taxpayer submitted to the tax authorities a documentation supporting the choice of a particular method, based on which the prices were calculated;
- The objectiveness and reliability of the submitted documentation, based on which the transfer prices were calculated, cannot be reasonably questioned;
- Another method would not have been evidently more appropriate.

In the light of the regulations quoted above, well developed and comprehensive transfer pricing documentation should prevent the tax authorities or at least limit their possibility of challenging the pricing methodology and making the adjustment at their own discretion.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general, Polish authorities accept the Comparable Uncontrolled Pricing Method ("CUPM", the Cost Plus Method ("C+M"), the Resale Price Method ("RPM"), the Profit Split Method ("PSM") and the Transactional Net Margin Method ("TNMM"). However, the traditional transactional methods (CUPM, C+M and RPM) have priority over any other method.

Please note, that the transfer pricing methods could also be applied to assess the compliance with the arm's length principle of transactions concluded with entities located in tax havens.

3.2 Availability of Benchmarking

The current regulations do not provide any guidelines regarding benchmarking analysis. Benchmarking analyses are not required for transfer pricing documentation purposes. However, performing such analyses should support the transfer pricing arrangements.

The tax authorities have a sceptical view on foreign comparable data, Pan-European and global benchmarking studies. On the contrary, they have a strong preference for Polish data. Especially companies meeting certain criteria (value of sales, employment, value of assets) are required to publish their financial statements in the governmental journal (Monitor Polski B). The format of financial statements presented in this journal allows for a more detailed financial analysis than the standardized template applied by Amadeus and other database providers.

4. Penalties

4.1 Rates and Conditions

As discussed in Section 2.3 above, failure to submit the transfer pricing documentation within the statutory 7 days deadline triggers the application of a 50% tax rate on the adjustment.

If the documentation is provided but the tax authorities successfully challenge the transfer prices, the tax adjustment is subject to the tax rate applicable for the year under control (currently 19% for corporations).

Please note that in both cases the penalty interest for delayed tax payment (currently at 11%) will be applied (the interest are calculated from the date the tax was due to the date it is actually paid). For example, if the tax authorities perform a transfer pricing adjustment for the fiscal year ending 31 December, 2005 as a result of the 2009 tax audit, the penalties are calculated from 1 April, 2006 up to a date stipulated in the tax decision on which the additional tax should be paid.

Moreover, according to the Tax Ordinance, the transfer pricing documentation is considered as a tax return. Not submitting the tax return to the tax office or submitting false information is

considered as a fiscal offence and is subject to a fine. The amount of the fine is decided by the court on a case-by-case basis. This fine is levied on the individuals in charge of the tax matters within the company (members of the management board or a person appointed by the management board).

Additional penalties for tax evasion may apply. Such penalties are principally imposed for a fiscal offence and apply to individuals in charge of tax matters.

5. Special Considerations

5.1 Tax Return Disclosures

The taxpayers are required to indicate on their annual tax return whether they are required to maintain a transfer pricing documentation ("check the box" procedure).

Moreover, taxpayers concluding agreements (transactions) with foreign related parties exceeding in a given fiscal year the amount of EUR 300,000 are required to fill out a specific form (ORD-U) and submit detailed information. Such information shall be submitted to the tax office together with the annual tax return, (due by the end of the third month after the end of the fiscal year). Failure to submit this form or submitting false information is a fiscal offence.

5.2 Corresponding Adjustments

Please note, that the Polish Tax Authorities are rather reluctant to negotiate the final amount of the transfer pricing adjustment with the taxpayer, as is customary with more mature tax jurisdictions in Western Europe. The taxpayer may appeal the tax decision (cf. Section 1.1).

Double taxation issues are tackled by the Competent Authority (the Ministry of Finance). Following the recent amendments of the CIT Law (effective since 1 January, 2009), the corresponding adjustment procedures (mostly timeframe and formal route) are further regulated by a Ministry of Finance Decree which came into force recently.

5.3 Other Considerations

Management fees are generally deductible. The standard OECD approach should be observed, i.e. shareholder costs should be excluded. The tax authorities recognize cost sharing agreements as complying with the OECD standards, however they require tangible evidence that the services were actually provided. In practice, the tax authorities may challenge the tax deductibility of service fees if the taxpayer is not in the position to prove that such services were actually rendered, i.e. present any proof of their outcome: reports, meeting notes, training materials and other relevant documents.

Management fees are, as a principle, subject to withholding tax (20%) unless the relevant Double Tax Treaty ("DTT") disposes otherwise. To enjoy the DTT treatment, the taxpayer needs to provide a certificate of the service provider's tax residence.

6. Advance Pricing Agreements

6.1 APA Opportunity

Unilateral, bilateral or multilateral APAs are available in Poland since 1 January, 2006. The Ministry of Finance is the competent administration for APAs. According to the regulations the application process should take at least 6 months (for an unilateral APA) and up to 1.5 years (for a multilateral APA). However, our practical experience shows that the procedure takes longer.

The APA decision could be concluded for a maximum period of five years with the possibility of extending the period by another five years. The APA decision could be issued regarding transactions that will take place in the future as well as transactions that started in the past.

6.2 APA Filing Fees

In principle, the fee amounts to 1% of the transaction value. Certain thresholds are set ranging from approx. EUR 1,200 for a unilateral APA to EUR 50,000 for a multilateral APA. The extension of an existing APA costs 50% of the original fees.

7. Developments

At the time of writing this country profile, no further legal developments with respect to transfer pricing in Poland are expected.

Transfer Pricing in **Romania**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Romanian tax authority is the Ministry of Public Finance. The Ministry of Public Finance is involved in the international negotiations regarding the bilateral and multilateral agreements for promoting and protecting investments and concludes Double Tax Treaties ("DTT").

Since 2003, within the Ministry of Public Finance, the National Agency for Tax Administration was established. This administration is in charge of collecting the taxes and contributions to the state budget.

The relevant laws regarding the transfer pricing regulations are contained in the Fiscal Code, the Code of Fiscal Procedures, the Methodological Norms regarding the Fiscal Code and the Order no. 222/2008 regarding the content of the transfer pricing documentation file.

1.2 Transfer Pricing Regulations

Transfer pricing is a relatively new concept in the Romanian legislation. The arm's length principle was introduced for the first time in 1994, but real recognition came ten years later, in 2004 with the Fiscal Code (Law 571/2004). In the Fiscal Code, the definition of affiliated persons, the arm's length principle, as well as the methods for determining transfer prices is presented.

In other words, in a transaction concluded between affiliated persons, the tax authorities may adjust the amount of income or expense of any person, if required, in order to reflect the arm's length price of goods or services provided/rendered within the transaction.

The Code of Fiscal Procedures (OG 92/2003) pointed out the need for documentation concerning the transfer pricing method used by companies performing transactions with affiliated persons. Thus, it establishes the taxpayer's obligation to prepare a transfer pricing documentation file which should indicate the transfer pricing method applied to intra-group transactions.

The content of the documentation file is regulated by the Ministry of Finance Order no. 222/2008.

The Order is complemented by the Transfer Pricing Guidelines issued by the OECD and the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union ("EU TPD").

1.3 Adherence to OECD-Guidelines

The methodological norms regarding the Fiscal Code (HG 44/2004) provide that the tax auditors will take into consideration the OECD-Guidelines for the enforcement of transfer pricing rules.

2. Documentation

2.1 Documentation Requirements:

According to the Fiscal Code, two companies are affiliated if one of them owns, directly or indirectly, including holdings of affiliated persons, a minimum of 25%, in value or in number, of the participation titles or voting rights of the other entity, or effectively controls the other entity.

The taxpayers that carry out transactions with affiliated entities are required to prepare a transfer pricing documentation file, upon request by the fiscal authorities (during the tax audit). The deadline for the submission of the transfer pricing documentation file cannot exceed 3 months.

The transfer pricing values applied by the taxpayers should fall within the range of prices or profits of comparable uncontrolled entities for comparable transactions. For transfer pricing determination purposes, the extreme limits of the range (i.e. the minimum and maximum values) will not be taken into consideration.

If the transfer price determined by the taxpayer does not fall within the range, the tax authority will consider the middle of the range as the appropriate transfer price for adjustment purposes.

The transfer pricing documentation file should be presented in Romanian language. Therefore, documents available in another language should be translated in Romanian by authorized translators.

The obligation to prepare a transfer pricing documentation file does not apply to transactions and periods for which the taxpayer has concluded an advance pricing agreement ("APA") with the National Agency of Fiscal Administration (please refer to Section 6 below).

2.2 Components

The contents of the transfer pricing documentation file are indicated in the Order no. 222/2008 issued by the National Agency for Fiscal Administration ("ANAF") effective since 19 February, 2008.

The contents of the transfer pricing documentation file should include:

- information related to the group (e.g. group structure, activities carried out by the group, transfer pricing methodology applied, general presentation of transactions type within the group, general presentation of the functions and risks assumed within the group for these transactions), and
- information regarding the taxpayer (such as a detailed presentation of transactions with related parties, a benchmark analysis, as well as presentation of related parties involved in these transactions and the selected transfer pricing methodology).

Depending on the circumstances of each case, the taxpayer may have to provide more information and add it to the transfer pricing documentation file upon request of the tax authorities.

2.3 Purpose

The purpose of the transfer pricing documentation file is to illustrate how prices charged by/to the taxpayer in transactions with affiliated entities were set, and to demonstrate that they were at a market price in accordance with the arm's length principle.

The Fiscal Code indicates that in case of transactions between affiliated entities, the tax authorities may adjust the amount of revenues or expenses of either entity, as necessary, in order to reflect the market price for the goods or services provided within the respective transaction.

According to the methodological norms of the Fiscal Code, only the transactions between Romanian entities and affiliated non-resident entities may be adjusted by Romanian tax authorities.

If the taxpayer is resident of a country which concluded a DTT with Romania, the tax authority shall use a mutual agreement procedure when reconsidering the profits. Therefore, if the tax authority increases the taxable profits of the Romanian affiliated entity, the fiscal authority from the other state where the affiliated entity is resident should decrease its taxable profits accordingly.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In determining the market price of transactions between affiliated entities, the most appropriate of the following methods is to be used:

- a) The Comparable Uncontrolled Price method ("CUPM"), by which the market price is determined based on a comparison between prices used by other entities that sell comparable goods or services to uncontrolled entities with the prices used by the entity under control in an affiliated transaction.

According to this method, the market price is determined by the comparable sales price between uncontrolled entities.

- b) The Cost plus method ("C+M"), by which the market price is determined based on the costs of the goods or services provided in the transaction, increased by an appropriate profit margin.

The C+M is determined by adding an appropriate mark-up to the costs incurred by the selling party when manufacturing/purchasing the goods or services provided; the appropriate mark-up is based on the profits of other companies comparable to the tested party.

- c) The Resale price method ("RPM"), by which the market price is determined based on the resale price of the good or service applied to an independent person, decreased by selling expenses and expenses of the entity and increased by an appropriate profit margin.

The Resale Price is obtained by working backwards from transactions taking place at the next stage of the supply chain, and is determined by subtracting an appropriate gross margin from the sale price to an unrelated third party; the appropriate gross margin is being determined by examining the conditions under which the goods or services are sold and comparing the said transaction to other third-party transactions.

This method is usually applicable to distribution companies.

- d) Any other method recognized in the OECD-Guidelines. The Norms of the Fiscal Code recognize the Profit Split method and the Transactional Net Margin method as non-traditional methods.

The Profit Split method ("PSM") is applied when the businesses involved in the transactions under review are too integrated to allow for separate evaluation. The profits should be split in a manner to reflect the roles within the transaction chain, the risks assumed by the parties, the tangible and intangible assets used by the parties, as well as the other resources used.

The Transactional Net Margin method ("TNMM") compares the net margin earned by one of the entities (the tested party) in the transaction with controlled entities to the net margin earned in transactions with uncontrolled entities.

Tax authorities establish the market price of a transaction between affiliated persons by applying the same method used by the taxpayer except in cases where the method selected by the taxpayer is considered as not reflecting the market price of the goods or services. In this case, the tax authorities may apply the most suitable method among those specified above.

3.2 Availability of Benchmarking

According to the Order of the Ministry of Public Finance no. 222 / 2008, the transfer pricing report should include a benchmarking study of comparable entities.

If these entities are not found on the Romanian market, the analysis should be extended to similar companies from other European countries, and in case that also this analysis does not yield satisfying results, to the international market.

There are no limitations regarding the provider of the benchmarking study, but it should only contain up to date information regarding the prices and profits of comparable independent entities.

The database that is most frequently used in Romania is the one provided by the National Institute of Statistics, but it only contains general information regarding the companies so that it may not be possible to find specific information regarding the prices and profits realized within specific transactions.

4. Penalties

4.1 Rates and Conditions

The Romanian Code for Fiscal Procedure states that taxpayers who are engaged in transactions with affiliated entities are required to prepare a documentation file. The documentation file has to be presented to the fiscal authorities upon request.

Taxpayers who do not comply with this requirement are liable to fines ranging from RON 2.500 to RON 5.000 (approx. between EUR 600 and EUR 1.200).

If the taxpayer refuses to prepare and present the transfer pricing documentation file, or if the file is incomplete, the tax authorities are also entitled to estimate the transfer prices corresponding to the average value of three similar transactions (based on the information available to the tax authorities) and to adjust the prices or profits accordingly.

4.2 Extent of Enforcement

As transfer pricing is a relatively new concept in Romania, practical experience about the actual extent of enforcement has yet to emerge.

4.3 Reduction or Cancellation of Penalties

The statute of limitations on the assessment of transfer pricing adjustments is 5 years from the end of the year in which the tax return is filed.

5. Special Considerations

5.1 Business Restructurings

In case of business restructurings, transfer pricing rules are also applicable. The main idea which prevails is that Romanian tax authorities may adjust any transactions between affiliated entities that do not comply with the arm's length principle.

5.2 Tax Return Disclosures

No specific tax return disclosures are required from the taxpayer.

5.3 Competent Authority

Taxpayers are allowed to adjust their tax returns, unless a tax audit was conducted within the referred fiscal year.

5.4 Other Considerations

In case of intra-group administration and management services, the costs of administration, management, audit, advice or similar services shall be deducted at central or regional level via the parent company, on behalf of the group as a whole.

Such expenses may be deducted by the subsidiary only if the parent company includes these costs in the price of goods delivered or value of services supplied.

Moreover, these costs cannot be deducted by a subsidiary that uses such services, taking into account that such services would not have been acquired if it had been an independent party.

6. Advance Pricing Agreements

6.1 APA Opportunity

According to the Code of Fiscal Procedure, taxpayers that have transactions with affiliated parties can request an Advance Pricing Agreement ("APA").

An APA is a binding agreement between the taxpayer and the fiscal authorities with respect to the conditions and pricing methodology for future transactions with affiliated parties that is valid for a certain period of time.

A unilateral, bilateral or multilateral APA can be issued. Unilateral agreements are issued by the National Agency for Fiscal Administration in Romania, while bilateral and multilateral agreements are issued by the National Agency for Fiscal Administration in Romania together with the relevant tax authorities from the states where the affiliated entities are resident.

The deadlines for the issuance of APA are as follows: 12 months for unilateral agreements and 18 months for bilateral or multilateral agreements.

APAs are binding on the tax authorities as long as no material changes occur to the critical parameters. The beneficiaries are obliged to submit an annual report on the compliance with the terms and conditions of the agreement.

If taxpayers do not agree with the contents of the APA, they can notify the National Agency for Tax Administration within 15 days. In this case, the agreement is not implemented.

6.2 APA Filing Fees

According to Government Decision no. 529/2007, the fees imposed by the tax authority for issuing an APA are as follows:

- a) For issuing an agreement at the request of big taxpayers, the fee is EUR 20,000 and EUR 15,000 for modifying it.

- b) For issuing an agreement at the request of small and medium sized taxpayers, the fee is EUR 10,000 and EUR 6,000 for modifying it.

7. Developments

Transfer pricing audits have significantly increased during the past year and requests for presentation of the transfer pricing documentation files have started to become common practice. There were recent cases where the Romanian tax authorities have adjusted the taxable result of a local taxpayer in accordance with the applicable regulations.

Transfer Pricing in **Russia**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance of the Russian Federation is the supreme governmental authority for finance issues. The Ministry is responsible for working out a state policy of taxation and is authorized to give written explanations to taxpayers and tax agents on the application of the provisions of Russian tax legislation.

Tax authorities are represented by the Federal Tax Service and its bodies – regional tax departments and local tax inspectorates. Tax authorities control the adherence to the tax law, the correctness of tax calculation as well as the completeness and timeliness of tax payments by taxpayers and tax agents.

The main act of tax legislation is the Tax Code of the Russian Federation which provides transfer pricing rules.

1.2 Transfer Pricing Regulations

1.2.1 Legally Binding Regulations

Transfer pricing rules are set forth in Article 40 of the Tax Code. This article is not applicable to shares and other securities, which are regulated by special rules set forth in Article 280 of the Tax Code. Besides, transfer pricing rules do not regulate the rates of agreed percentages charged on loans and credits.

1.2.2 Circulars by the Ministry of Finance

The Ministry of Finance issues circulars which, among other issues, give an interpretation of the transfer pricing rules. The circulars are neither binding on the taxpayers nor on the courts, but only on tax authorities. They are important documents, since they indicate the official position of the tax authorities on the respective subjects.

1.2.3 Court Case

In general, the Russian system of law does not recognize the court case as a source of law. However, according to the Arbitration Code of the Russian Federation if a resolution taken by an arbitration court contravenes the uniformity of the interpretation of law provisions realized by other arbitration courts, such contravention can constitute a formal reason for the revision or cancellation of the court resolution by the Supreme Arbitration Court. So in fact court cases on transfer pricing issues are part of the transfer pricing rules.

1.3 Adherence to OECD-Guidelines

Russia is not an OECD country and is not guided by OECD-Guidelines.

2. Documentation

The documentation of taxpayers' business operations is a fundamental principle of the Russian tax legislation which applies to all business activities, not only to transfer pricing. However, the tax law only establishes basic principles concerning the documentation of business transactions but does not provide any detailed requirements with respect to the documentation of transactions which are subject to transfer pricing rules. No documents shall be prepared by taxpayers and submitted to the tax authorities beforehand.

In the course of performing a tax audit, the tax authorities can request from taxpayers the provision of relevant documents and of all necessary information and data.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

Article 40 of the Tax Code provides a restricted number of cases where transfer pricing rules can be applicable. The tax authorities are allowed to challenge prices agreed on by the parties to a transaction only in the following situations:

- the price is agreed by related parties;
- the price is agreed in a barter transaction;
- the price is agreed in a foreign trade transaction;
- the price applied by the same taxpayer on identical or similar goods/services deviates for more than 20% within a relatively short period.

The burden of proof that the price can not be considered to be the fair market price rests with the tax authorities.

Parties are considered as related if they are connected in such a way that their relationship can influence their decisions or the economic results of their activities, namely:

- when one legal entity holds directly or indirectly more than 20% of the share capital of another legal entity;
- one individual is subordinate to another individual;
- individuals are relatives in accordance with Russian family law.

However, courts can recognize parties to be related based on other grounds.

Should the application of the transfer pricing rules be triggered by one of the above circumstances, Article 40 of the Tax Code prescribes to apply the Comparable Uncontrolled Pricing Method ("CUPM"), the Resale Price Method ("RPM") or the Cost Plus Method ("C+M"). The

methods shall be applied in the succession given above. Each subsequent method is applicable only if the application of the preceding method(s) is impossible. No other methods are stipulated by transfer pricing rules. However, courts can take into consideration any other circumstances and are not limited to the above mentioned methods.

3.2 Availability of Benchmarking

Transfer pricing rules prescribe to take into consideration information from official sources about the market prices of goods and services, as well as exchange quotations. But in practice the courts require an additional benchmarking analysis to support the argumentation of adequacy.

4. Penalties

Should the tax authorities ascertain that the price agreed by the parties deviates from the fair market price defined by one of the Pricing Methods for more than 20% up or down, they can calculate and charge taxes (plus penalty interest) based on the fair market price.

Besides, tax authorities consider the miscalculation of taxes in relation to transfer pricing as a case of tax evasion, so as a rule they additionally impose a fine of 20% of the sum of tax arrears or 40% if the deliberate character of the tax offence is proved.

In accordance with the general rule, the tax authorities can only inspect the last three years.

5. Special Considerations

5.1 Business Restructurings

There is no special legislation on business restructuring and/or on the relocation of business functions.

5.2 Tax Return Disclosures

No specific tax return disclosure is required from the taxpayer.

5.3 Competent Authority

Russian tax authorities do not issue any rulings to taxpayers before the filing of tax returns or before paying taxes.

Tax returns can be adjusted. The taxpayer is exempt from responsibility for understating its tax liability in the following cases:

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- the adjustment was submitted to the tax authorities after the deadline of submission but before the taxpayer learnt that the tax authorities had discovered the understatement of the taxpayer's tax liability;
 - the adjustment was submitted to the tax authorities after the deadline of tax payment but before the taxpayer learnt that the tax authorities had discovered the understatement of the taxpayer's tax liability, or before the beginning of the tax audit, on the condition that the sum of tax arrears was paid by the taxpayer before submitting the adjustment;
 - the adjustment was submitted after the completion of a tax audit which did not reveal the understatement of the taxpayer's tax liability and tax arrears.

5.4 Other Considerations

Tax authorities collect information from open information sources and other governmental agencies (customs, statistics etc.). The databases of the tax authorities are not accessible to taxpayers. The level of interaction between tax and customs authorities is rather high.

6. Advance Pricing Agreements

APAs are not available in Russia.

7. Developments

7.1. New Concept of Transfer Pricing

In April 2009 the Ministry of Finance and the Ministry for Economic Development of the Russian Federation have agreed on the Concept of amendments to the Tax Code on transfer pricing ("the Concept"). In October 2009, a bill drafted on the basis of the Concept was submitted for approval to the Government which should introduce it to State Duma (the Parliament). It is expected that a law on new transfer pricing rules will take effect not earlier than 2011.

7.2. Related Parties

It is suggested that the definition of related parties will be extended and the following criteria are added:

- companies in which the same person and its/his/her related parties hold directly or indirectly more than 20% of the share capital;
- the company and the board member;
- companies managed by the same person.

7.3. Controlled Transactions

The Concept introduces an exhaustive list of so-called controlled transactions (transactions that could be checked by the tax authorities during a transfer pricing audit), namely:

- transactions between related parties. If such a transaction is not a foreign trade transaction it is considered as being a controlled transaction only if the sum of incomes and expenses from all transactions between the two parties within one calendar year exceeds one billion roubles (approx. EUR 22.5 million). Besides, the parties to the transaction are considered related regardless of the volume of trade in some specific cases, such as:
 - transactions concerning extracted minerals that are subject to mining operation tax levied at ad valorem rate;
 - if one of the parties applies some simplified tax regimes;
 - if one of the parties is a resident of a special economic zone that provides preferential tax treatment;
- foreign trade transactions concerning services, proprietary rights, information, intellectual property;
- foreign trade transactions concerning exchange commodities: petroleum and oil products, ferrous and non-ferrous materials, precious metals and precious stones;
- transactions between parties residing in the Russian Federation and parties residing in countries or territories belonging to a special list approved by the Ministry of Finance (offshore zones).

Transactions within the so-called consolidated group of taxpayers will not be recognized as controlled with respect to transfer pricing rules. It has been suggested that the bill on the consolidated groups of taxpayers would be considered together with the transfer pricing bill.

7.4. Fair Market Value

The fair market value will be defined as a price that lies within the range of market prices. To define the latter the prices of transactions of identical or similar goods conducted in comparable commercial conditions between non-related parties will be taken into consideration. The range between two extreme prices shall be divided into four quarters. Additional tax can be charged only if the actual price falls outside the two central quarters.

7.5. Pricing Methods and Priority

The following methods and their priority will be set forth:

- CUPM;

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- RPM;
 - Processed Product Sale Price Method: this method is applicable when a party conducts the processing of goods purchased from a related party and then sells the processed products to non-related parties;
 - C+M;
 - CPM;
 - PSM.

7.6. Information Sources

The following information sources will be considered for transfer pricing purposes:

- foreign exchange quotations;
- customs statistics published by the Federal Customs Service of the Russian Federation;
- official information on prices (range of price fluctuation) and exchange quotations published by authorized governmental agencies;
- generally accessible information on prices (range of price fluctuation) and exchange quotations;
- information on assessed value.

7.7. Documentation

Special transfer pricing documentation requirements, which are still missing now, shall be introduced. The documents will be attached to notifications on controlled transactions submitted to the tax authorities.

7.8. Notifications

Taxpayers will be required to notify the tax authorities about their controlled transactions if the sum of income and expenses from controlled transactions with the same counterparty within the tax period exceeds a certain threshold. Initially, the threshold is supposed to be fixed at the level of RUR 100 million (approx. EUR 22,500) and will be gradually lowered.

7.9. Symmetrical Correction

If additional tax is assessed for one party to a controlled transaction based on the fair market value calculated by the tax authority, then the other party to the transaction will have the right to a symmetrical correction of its tax liability.

7.10. APA Opportunity

New transfer pricing rules will make the conclusion of Advance Pricing Agreements ("APAs") with the tax authorities possible.

7.11. Responsibility

Special responsibility regarding the non-provision of transfer pricing information requested by the tax authorities or deliberate provision of wrong information, as well as the breach of an APA will be established.

Transfer Pricing in **Serbia**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Serbian tax authority is the Serbian Tax Administration¹, which is under the responsibility of the Serbian Ministry of Finance².

1.2 Transfer Pricing Regulations

The relevant legislation regarding transfer pricing issues is enclosed in the Corporate Income Tax Law ("CIT" Law) (Official Gazette of the Republic of Serbia, nos. 25/2001, 80/2002, 43/2003, 84/2004). No guidelines have been issued by either the Ministry of Finance or the Tax Administration with regard to transfer pricing issues. Moreover, the Serbian Tax Administration has almost no practice with respect to transfer prices.

2. Documentation

The CIT Law or other regulations do not indicate any specific documentation requirements with respect to transfer prices applied between related parties.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

Pursuant to the Article 61 of the Corporate Income Tax Law, the following transfer pricing methods (in the given order) may be applied:

- Comparable Uncontrolled Prices Method,
- Cost Plus Method,
- Resale Price Method.

3.2 Availability of Benchmarking

Serbian tax laws and regulations do not specifically address benchmarking in detail. However, it is our belief that only local benchmarking studies would be accepted. The Serbian market is not acquainted with transfer pricing databases, thus we cannot assume whether and to what extent one would be accepted by the Serbian Tax Administration.

¹ <http://www.poreskauprava.sr.gov.yu/sr/eindex.jsp>

² <http://www.mfin.sr.gov.yu/eng/>

4. Penalties

4.1 Rates and Conditions

Serbian tax laws do not provide for penalties for failure to provide a transfer pricing documentation. The only penalty indicated in the Corporate Income Tax ("CIT") Law is the penalty for non-disclosure of transfer prices and uncontrolled prices in the taxpayer's tax return (for which the taxpayer can be penalized in the range from approx. EUR 1,000 to approx. EUR 6,300).

4.2 Extent of Enforcement

Due to lack of overall practice in regard to transfer pricing in Serbia, we are not aware of any current enforcement.

4.3 Reduction or Cancellation of Penalties

In general, penalties in Serbia may not be imposed if the misdemeanour is light or if the misdemeanour constitutes the taxpayer's first breach of the law.

Generally, the Tax Administration may adjust the transfer prices for a maximum of 5 years from the end of the tax year which was audited (the tax year equals the calendar year).

5. Special Considerations

5.1 Business Restructurings

There are no special regulations with respect to business restructuring and/or relocation of business functions in Serbia.

5.2 Tax Return Disclosures

The taxpayer only needs to disclose the transfer prices and uncontrolled prices in the tax return.

5.3 Competent Authority

There is no obligation to submit the adjustment to any authority in Serbia. In principle, the Tax Administration may be contacted before paying tax.

5.4 Other Considerations

No other special considerations need to be taken into account.

Management fees are deductible from a taxpayer's income and no withholding tax applies.

The level of interaction between the Tax Administration and the Customs Authorities is assessed as fair.

6. Advance Pricing Agreements

Advance Pricing Agreements (APAs) are not available in Serbia.

7. Developments

There have not been any changes to the transfer pricing legislation in Serbia recently. Amendments to the transfer pricing laws and regulations are expected. However, no formal procedure regarding the adoption of any legislation has been initiated.

Transfer Pricing in **Slovakia**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance of the Slovak Republic (Ministerstvo financií Slovenskej republiky "MFSR") seated in Bratislava is the supreme tax authority in Slovakia. The MFSR is regularly involved in the legislation process and drafts most of the guidelines providing interpretation of tax laws. Local tax authorities supervised through the Tax Directorate (Daňové riaditeľstvo) seated in Banská Bystrica are the responsible tax authorities carrying out tax audits in Slovakia.

Relevant regulations on transfer pricing are contained in Section 18 of the Slovak Income Tax Act (Zákon o dani z príjmov - "ITA"), where also the arm's length standard is adopted.

1.2 Transfer Pricing Regulations

Section 18 (1) of the Slovak ITA was amended in 2008 and the obligation for the taxpayer to keep a documentation regarding the method used was introduced. Based on this amendment of the Slovak ITA, all taxpayers are required to keep transfer pricing documentation in line with the guidelines issued by the MFSR. This guideline was published by the MFSR in its journal Finančný spravodajca No 1/2009. The guideline contains detailed regulations about the required contents of a transfer pricing documentation. The aim of such a guideline is to ensure an equal interpretation and application of the relevant law. It is binding on tax authorities, but not on the courts.

1.3 Adherence to OECD-Guidelines

The MFSR also published the OECD-Guidelines in its journal (Finančný spravodajca Nr. 14/1997; 20/1999; 3/2002). Slovak tax authorities consider the Slovak transfer pricing rules to be in compliance with the OECD-Guidelines. In Slovakia, traditional transaction methods have priority. If it is not possible to use traditional transaction methods, transactional profit methods or their combination or other methods could be used. However, only a method that complies with the arm's length principle may be used.

2. Documentation

2.1 Documentation Requirements

In Slovakia, international transactions with related parties have to be documented. The taxpayer is considered to be related to an entity, if this entity owns (directly or indirectly) a participation of at least 25% in the taxpayer's capital or voting rights or if it is able to exercise a controlling influence. Vice versa, companies are considered to be related, if the taxpayer himself holds a 25% participation in a company's capital or voting rights or if he is able to exercise directly or indirectly a controlling influence. When a third person holds substantial participation (25% or more) in both companies, the owned companies are also related.

As already mentioned above, the documentation requirements are contained in Section 18 (1) of the Slovak Income Tax Act. More detailed instructions are given in the guideline No 1/2009 issued by MFSR.

The taxpayer shall submit the documentation in Slovak language. However, upon request of the taxpayer, the tax authority may accept documentation in other languages.

Taxpayers are obliged to keep so-called "basic documentation" or "simplified documentation". The "basic documentation" has to be established by all companies using the IFRS accounting standards. Among those companies, the entities are listed in the Slovak Accounting Act (especially financial institutions as banks, insurance companies etc), and beside those, the companies that meet special criteria (to meet special criteria, at least 2 of the following criteria have to be met: i) the total amount of assets exceeds EUR 165 million, ii) the net turnover exceeds EUR 165 million, and iii) the company employs more than 2,000 employees in the current tax period).

Other companies have to establish a "simplified documentation".

As far as submission of transfer pricing documentation is concerned, it has to be provided within 60 days upon request of the tax authority (during a tax audit).

2.2 Components

2.2.1 Contents of the "Basic Documentation"

According to Section 3 of the above mentioned MFSR's guideline, the basic documentation for the corresponding tax period should include information on:

- the whole group of associated enterprises ("general documentation") and
- the particular taxpayer ("specific documentation").

The general documentation, similar to a Master file, contains a set of information providing an overall overview of the group of related parties:

- legal forms of particular group members, a description of the worldwide organization, ownership structure including the changes compared to the previous tax period;
- a description of business activities, business strategy, identification of industry, business relations and activities of the group within the industry including the changes compared to the previous tax period;
- the planned business strategy, expected future activities, projects and aims of the group including the changes compared to the previous tax period;
- a functional and risk analysis;
- further information which may serve as evidence that the prices were set at arm's length.

The specific documentation is similar to a country-specific documentation and based directly on the general documentation. It contains specific information on the taxpayer:

- the legal form, description of its organization and ownership structure;
- a description of business activities, business strategy, identification of the industry, business relations and activities of the taxpayer within the industry including the changes compared to the previous tax period;
- the planned business strategy;
- a list of controlled transactions, description of particular controlled transactions of the taxpayer;
- an overview of intangible assets owned or used;
- a list of agreements on transfer pricing method(s) used and approved by tax authorities
- a list of cost allocation contracts concluded by the taxpayer and any other decisions having an impact on transfer pricing;
- a functional and risk analysis;
- Internal and/or external comparable data on non-related enterprises, comparability analysis;
- a description of the selected transfer pricing method and its application.

2.2.2 Contents of the "Simplified Documentation"

As already mentioned above, some companies performing controlled transactions are subject to simplified documentation requirements only. Such documentation should contain the list of transactions carried out by the taxpayer with related parties and its substantial characteristics (e.g. the volume of each specific transaction, the percentage of that transaction on the total turnover of the company etc.) in accordance with the requirements of the special accounting legislation. Based on this information, the taxpayer should be able to prove that the prices set in intra-group transactions of a significant amount are at arm's length.

2.3 Purpose

The main purpose of the documentation is to fulfill the legal obligation as the burden of proof lies with the taxpayer. In case of documentation default, in addition to regular penalties, the tax authority may estimate the tax base adjustment required at its own discretion.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general, the Slovak tax authorities accept traditional methods (the Comparable Uncontrolled Price Method "CUPM", the Cost Plus Method "C+M", the Resale Price Method "RPM") and also profit oriented methods (the Profit Split Method "PSM" and the Transactional Net Margin Method "TNMM"). The traditional methods are considered the most reliable when determining accurate transfer prices. Therefore, the profit oriented methods or other methods are to be used only if the traditional methods do not provide reliable results (no comparable data available).

However, only a method complying with the arm's length principle should be used.

3.2 Availability of Benchmarking

Regarding the use of databases for transfer pricing purposes, currently no specific provisions were introduced in Slovakia. However, database analyses are usually used by taxpayers as a means of supporting the documentation and proving that the transfer prices applied fall within an arm's length range. Besides the benchmark study, a functions and risk analysis has to be performed.

If a database analysis is implemented, the search process should be documented in order to enable the tax authority to retrace the search strategy. The Slovak Tax Authority also has access to the AMADEUS database by Bureau van Dijk. Therefore, it is most likely that they will use this database data when auditing the company.

4. Penalties

4.1 Rates and Conditions

In Slovakia, no special provisions were introduced concerning the penalties for improper or missing transfer pricing documentation. However, if the documentation requirement is not fulfilled, the tax authority can impose a general fine amounting up to EUR 33,000.

In addition, if no documentation is provided, the tax authority may consider a transaction as not complying with the arm's length standard and apply a tax base adjustment based on its own estimation.

If the adjustment leads to an increase of the corporate income tax liability, additional penalty will be imposed (3 times the interest rate of the European Central Bank).

4.2 Extent of Enforcement

Due to the very recent introduction of transfer pricing documentation requirements, practical experience about the actual extent of enforcement has yet to emerge.

4.3 Reduction or Cancellation of Penalties

The tax authority may not levy the general fine if it considers that no material breaking of the law requirements occurred. However, such a situation is not probable if no transfer pricing documentation is prepared at all.

No specific provisions concerning the statute of limitations regarding transfer pricing issues and the corresponding tax audits are in place in Slovakia. Therefore, the general provisions would be applied. According to the general provisions of the Slovak tax law, the statute of limitations on tax assessment in Slovakia is 5 years from the end of the year in which the tax return is filed. Under certain circumstances, this limitation period may be extended. The absolute period of limitation amounts to 10 years (if an international treaty is to be applied).

5. Special Considerations

5.1 Business Restructurings

In Slovakia, there is no special legislation on business restructurings and on the relocation of business functions. However, a new amendment of the Slovak ITA was recently approved and the largest part of this amendment relates to business restructurings and its tax treatment. The new rules will be valid as of January 2010.

5.2 Tax Return Disclosures

Since FY 2007, taxpayers are obliged to include the information on total revenues from activities conducted with foreign related persons into their tax return.

Since FY 2009, the extent of information required when filing a tax return was expanded. Taxpayers have to fill in information about costs and revenues incurred from transactions concluded with foreign related parties in the following classification - loans and advances, services, license fees, intangible assets, tangible assets, financial assets and inventory.

Moreover, some taxpayers, especially those who are required to keep basic documentation (see Section 2.1), were already asked by their local tax authority to provide very detailed information about transactions concluded with foreign related parties along with their filed tax return.

5.3 Competent Authority

Taxpayers have the possibility to initiate a mutual agreement procedure based on the corresponding article of a double tax treaty ("DTT") in order to avoid double taxation of profits of related parties or based on the Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (Section 18 (8) of the Slovak Income Tax Act). The competent authorities ("CA") in this matter are MFSR or tax authorities.

5.4 Other Considerations

Management fees are generally deductible for tax purposes. There is no special provision regarding "shareholder costs" in Slovakia.

Slovakia, historically a capital importing country, focuses on taxation at the source. Therefore payments such as license fees, financing costs and management fees are subject of increased attention of the Slovak tax authority.

6. Advance Pricing Agreements

6.1 APA Opportunity

According to the Slovak income tax law there is a possibility for the taxpayer to request the decision of the tax authorities regarding the approval of a selected transfer pricing method. Such an "approval of the method" is similar to a unilateral APA. However, it will explicitly not involve approval of any margins. The tax authority shall issue such an approval of the pricing method for max. five tax periods. Upon request of the taxpayer, this period may be extended for max. five further tax periods, if the taxpayer is able to prove that the conditions, based on which the original approval of the pricing method had been issued, did not change.

6.2 APA Filing Fees

The approval of the selected method by the tax authority is not currently charged to the taxpayer.

7. Developments

Changes in the Guideline No. 1/2009 issued by MFSR (see part 2.1.) are expected in Slovakia.

Transfer Pricing in **Slovenia**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance (Ministrstvo za finance "MF") is the supreme authority for finance issues. One of the higher authorities that are attached to the MF is the Tax Office (Davčna uprava "DU"). DU is the responsible taxing authority in Slovenia.

Relevant regulations on transfer pricing are contained in:

- Art 16., 17. and 18. of the Corporate Income Tax Act (Zakon o davku od dohodkov pravnih oseb; ZDDPO-2 - "CIT Act"), which provides general rules regarding transfer pricing in Slovenia. In the CIT Act, also the arm's length standard is adopted. The actual version is effective as of 1 January, 2007.
- Art 382. of the Tax Procedure Act (Zakon o davčnem postopku; ZDavP-2), which contains the transfer pricing documentation requirements. The actual version is effective as of 1 January, 2007.
- Transfer Pricing Regulation (Pravilnik o transfernih cenah), which defines transfer pricing issues in detail (methods, comparability analyse etc.). The actual version is effective of 1 January, 2007.

Provisions concerning the hidden profit distribution are given in Art 74 of the CIT Act.

1.2 Transfer Pricing Regulations

Taxpayers have two rights:

- Right to be informed (Art 13 of Tax Procedure Act) and
- Right to obtain the binding information (Art 14 of Tax Procedure Act).

1.2.1. Right to be Informed

In accordance with Art 13 of the Tax Procedure Act, taxpayers shall have always the right:

1. to be informed in a timely and appropriate manner on changes in tax law and in other regulations concerning taxation;
2. to explanations regarding the manner of accounting and payment of taxes; and
3. to data on the current balance of their tax liabilities.

The communication system must be set up in a way that allows all taxpayers to have the easiest, most uniform and up-to-date access to information and that ensures uniform implementation of tax laws.

Instructions regarding the unique interpretation of the tax laws that are published by the MF , the director of the Tax office or the Customs office are binding on tax authorities.

1.2.2. Right to Obtain the Binding Information

In accordance with Art 14 of the Tax Procedure Act, taxpayers shall have the right to obtain the legally binding information about tax aspects/consequences of their transaction(s) in accordance with the tax law.

Irrespective of the paragraphs above, the tax authorities do not issue legally binding opinions regarding transfer pricing issues in accordance with Section 4 of Art 14 of the Tax Procedure Act.

1.3 Adherence to OECD-Guidelines

The Slovenian tax authorities consider the Slovenian transfer pricing laws to be in line with the OECD-Guidelines. However, in Slovenia, the so-called standard methods have priority. Profit oriented methods may only be used if the application of the standard methods would not yield satisfying results.

2. Documentation

2.1 Documentation Requirements

In Slovenia, international transactions with related entities have to be documented. In general, two companies are considered as "related parties", if one of the companies holds directly or indirectly at least 25% of the capital or voting rights of the other company; or the same company holds directly or indirectly at least 25% of the capital or voting rights of both companies; or an individual or his spouse or relatives (parents, children, brothers or sisters) hold directly or indirectly at least 25% of the capital or voting rights of both companies or they participate in the supervision or management of both companies.

The documentation requirements are contained in Art 382. of the Tax Procedure Act (ZDavP-2).

The general documentation (Master File) can be prepared in a foreign language, while the country specific file shall be prepared in Slovenian language. If the general documentation (Master File) is not prepared in Slovenian, the taxpayer must, at the request of the tax authority, translate it within a period of time determined by the tax authority (but at least 60 days).

Taxpayers may keep their documentation in an electronic form.

The documentation should be established contemporarily by the taxpayer and not later than by the submission of the tax return. In case the transactions do not differ significantly, the taxpayer may aggregate the transactions for documentation purposes under the condition that adjustments are made in case there is any kind of difference between these transactions.

During tax audits, taxpayers must make the documentation available at the request of the tax authority. As a rule, taxpayers shall make such documentation available without delay. If a taxpayer cannot immediately provide the documentation, the tax authority shall determine a deadline within which the taxpayer must do so. The deadline has to be at least 30 days, but not longer than 90 days, depending on the extent and complexity of the information required.

2.2 Components

The taxpayer shall provide the following documents (Art 382. of the Tax Procedure Act (ZDavP-2):

- a.) General documentation (Master File) that may be unified for the whole group of related parties as a whole, and shall contain at least a description of:
 - the taxpayer,
 - the organizational chart on the world-wide level and the type of the participating interests (as capital, contractual, personal),
 - the taxpayer's system applied to set the transfer prices,
 - operations and business strategies,
 - general economic and other factors,
 - market competitiveness.
- b.) specific documentation (country-specific documentation) which shall contain at least:
 - data regarding the transactions of related parties (description, class, type, value, time limits and conditions),
 - data with reference to benchmarking analysis:
 - characteristics of assets and services,
 - performed functional analysis (performed assignments regarding assets used or services and risks assumed),
 - contractual terms,
 - economics and other circumstances that have an influence on the transactions,
 - business strategies,
 - other significant influences on the carrying out of the transactions,
 - data of the selected method(s) for determination of transfer pricing and its determination in accordance with comparable market prices,

- other documentation that demonstrates the conformity of the transfer prices to comparable market prices.

2.3 Purpose

Fees and severe penalties may apply in case the documentation requirements are not met (on time). The main purpose of the documentation is:

- to ensure that the prices being charged for the transactions between these associated enterprises are those that would be charged between independent parties, i.e. arm's length prices. Detailed documentation on intra-group transactions is therefore requested in order to obtain sufficient information to assess a multinational's transfer prices; and
- to avoid penalties; and
- to shift the burden of proof. In case of documentation default the tax authority may estimate the adjustment required at its own discretion and the burden of proof shifts from the tax authority to the taxpayer.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

Comparable market prices shall be fixed by using either one of the following methods or by any combinations of these methods:

- the Comparable Uncontrolled Pricing Method ("CUPM"),
- the Cost Plus Method ("C+M"),
- the Resale Price Method ("RPM"),
- the Profit Split Method ("PSM") and
- the Transactional Net Margin Method ("TNMM").

However, the Transfer Pricing Regulation defines a priority rule: The standard methods (CUPM, C+M and RPM) have to be applied, whenever possible. Adjustments may be performed to increase the comparability of the arm's length data available and enable the use of one of the standard methods. A hypothetical arm's length comparison using the PSM or the TNMM method may be performed only, if no standard method can be used.

There is no Best Method Rule in Slovenia.

3.2 Availability of Benchmarking

The Amadeus database of the Bureau van Dijk is used by the Slovenian tax authorities and they refer to benchmarking analysis in the concrete procedures. But mere database screening itself is not sufficient for a documentation of adequacy. The relevant circumstances have to be substantiated with all the information that is available to the taxpayer or that the taxpayer can make available with reasonable effort (e.g. information from the website of the comparable enterprises). The tax authorities have to be able to verify the search process.

A benchmarking analysis alone therefore cannot replace an argumentation of adequacy.

4. Penalties

4.1 Rates and Conditions

A fine amounting up to EUR 25,000 may be levied if a taxpayer does not submit or does not submit in the prescribed manner or within the prescribed deadlines data and documentation on the determination of transfer prices. Moreover, the individuals in charge of the tax matters within the company may incur a fine amounting up to EUR 4.000(Art 397 of the Tax Procedure Act).

4.2 Extent of Enforcement

As the penalty regime to transfer pricing has been introduced recently, practical experience about the actual extent of enforcement has yet to emerge.

4.3 Reduction or Cancellation of Penalties

There is no possibility to reduce penalties or avoid them once the transfer pricing tax audit has started.

5. Special Considerations

5.1 Business Restructurings

There is no special legislation on business restructurings and/or the relocation of business functions in connection to transfer pricing issues.

5.2 Tax Return Disclosures

The following disclosures regarding transfer pricing and involved related entities shall be made when filing a tax return:

- name of the related entities,
- name of the country in which the related entity has its statutory seat,
- tax number of the related entity,
- description of how the entities are related,
- turnover among related persons.

5.3 Competent Authority

There are no special rules for submitting an adjustment to a competent authority ("CA"). There is a possibility to contact a CA before paying tax.

5.4 Other Considerations

There are no other special considerations that have to be taken into account upon providing transfer pricing documentation.

Secret comparables are not used by tax authorities.

With respect to the provision of general intra-group services, the Transfer Pricing Regulation introduced a special rule regarding shareholders' activities. Shareholder activities are in general considered as intra-group services and therefore may rightly be charged to the associated entities and may be deducted on the level of the associated entity for taxation purposes (Section 3. of Article 22. of the Slovenian Transfer Pricing Regulation).

On the contrary, activity costs are not allowed to be charged as services if these costs are charged by the associated entity to another entity as a result of its own share in the capital, management, control or voting rights and if third-parties would not be willing to pay for such an activity in the same or comparable circumstances.

Activity costs are:

- costs incurred by the relationship with the "parent entity" (costs in relation to the shareholder meetings of the "parent entity", share capital issuing in the "parent entity" and supervisory board),
- costs regarding requirements of the "parent entity" in terms of reports, including consolidated reports,
- costs of asset collection for the takeover of shares.

6. Advance Pricing Agreements

APAs are not available in Slovenia.

7. Developments

Recent practice of Slovenian tax authorities is to send the taxpayer the following information request at the beginning of the tax audit:

1. Shortly describe the activity of the company (for example: details regarding products and services) and the branch in which your company operates in. Describe the type of companies which have similar activities to yours and state their names.
2. Present the organizational structure of the companies on a world-wide level. Detail the relations among the related entities and state the names of responsible persons in every related entity.
3. State the main functions performed by related entities.
4. What kind of power of attorney does your board of directors or directors have? Does this power of attorney have any limitations?
5. Describe how the transfer prices are set and who is responsible for transfer pricing policy within the company. Which guidelines are used for setting the transfer prices in the company?
6. Which method is used for setting the transfer prices of transactions involving related entities?
7. Which are the key factors for determining the transfer prices among related entities?
8. Describe your business and investment strategies and state the person who is setting these strategies.
9. List and shortly describe all the contracts or agreements on business cooperation that your company has concluded with related entities. Define the period for which these agreements are concluded.
10. Does any of the concluded agreements involve the use or transfer of intangible fixed assets (know-how, trademarks etc)? If so, please define with whom related entity this agreement is concluded, shortly describe its contents, state the amount of compensation and the time period for which it is concluded.
11. Is there any cost sharing agreement concluded? If so, please define with which related entity it is concluded, shortly describe its content and the time period for which it is concluded.
12. Where are financial reports prepared?

13. Was in previous years the same activity carried on by some other company? If so, please state when and by which company.
14. Has the company business model been changed over the years? Did the company perform the same functions since its creation? Describe the reasons for a change in functions.
15. What are the expectations of the parent company as far as the company turnover and profit are concerned and what measures would it take if the results were not to meet its expectations?
16. With which tax consulting company do you or does the group of companies to which you belong to concluded a contract for tax advising or with which tax consulting company are you cooperating?

Transfer Pricing in **Turkey**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Turkish Ministry of Finance (T.C Maliye Bakanlığı; "MB") is the sole authority for finance issues in Turkey and the Presidency of Revenue Administration ("PRA") which is under the responsibility of the MB is the responsible tax authority in Turkey. PRA is represented by a presidency of city tax offices in cities of the Republic of Turkey and every city has regional tax offices operating under the responsibility of the presidency of city tax offices.

Turkey has enacted new transfer pricing regulations within its new Corporate Tax Code ("CTC") effective as of 01.01.2007. Disguised profit distribution and the arm's length principle are tax issues that have been introduced in the transfer pricing regulations as a unified definition. Relevant regulations on transfer pricing are contained in article 13 of the Turkish CTC.

1.2 Transfer Pricing Regulations

1.2.1 Legally Binding Regulations

Turkey has enacted new transfer pricing regulations through article 13 of its new CTC. According to the new CTC arrangements, profits are treated as entirely or partially distributed in a disguised manner via transfer prices if the companies enter into transactions with related parties that do not comply with the arm's length principle.

In addition to the regulations contained in the CTC, the MB issued several statements: One MB circular and two resolutions of council of Ministers (decrees) that concern TP applications.

While decrees are binding on all parties,; circulars are only binding on tax authorities and exempt taxpayers from tax penalties if they are in line with the directions given via circulars. Circulars and resolutions give particular explanations with respect to the interpretation of the law but are neither binding on the taxpayer nor on the courts, only on the tax authorities themselves.

1.2.2 Communiqués Issued by the MB

- *CTC Communiqué Number 1, 03April, 2007*; First Communiqué on the new CTC. Basic explanations are given in the communiqué.
- *Communiqué Number 1 Concerning the Disguised Profit Distribution Via Transfer Pricing, 18 November, 2007*; Significant explanations concerning the application of the new transfer pricing rules of the Republic of Turkey are provided in this communiqué. These explanations concern the scope, the definition of related parties, the arm's length principle, applicable TP methods, the conclusion of Advance Pricing Agreements ("APAs") with the MB, documentation, penalties, adjustments, rights & royalties, intercompany services.

- *Communiqué Number 2 Concerning the Disguised Profit Distribution via Transfer Pricing, 22 April, 2008; 2nd communiqué amending the 1st one mentioned above. Amendments are made to the related party definition, the APA application procedures and annual documentation.*
- *CTC Communiqué Number 3, 20 November, 2008; the first CTC Communiqué is further amended and a "Treasury Loss" approach is implemented for TP applications. Disguised profit is bound to a "treasury loss" condition for resident taxpayers.*

1.2.3 Decrees Issued by the Council of Ministers

- *Decree Number 2007/12888, 06 December, 2007; First decree regarding the new TP Regulation. Comprehensive explanations are given with respect to methods, alternative methods, comparability criteria, comparable prices and also comparable price ranges, advance pricing agreement procedures and documentation.*
- *Decree Number 2008/13490, 13 April, 2008; Last decree regarding the new TP Regulation. It amends the scope of the APA application.*

1.2.4 Circulars Issued by the MB

The MB published its first circular with respect to TP regulations on 24 July, 2008 and provided explanations regarding the transfer pricing annual form that taxpayers are required to fill out as appendix to the annual corporate tax return.

1.3 Adherence to OECD-Guidelines

Turkish tax authorities consider the Turkish transfer pricing laws to be in line with the OECD-Guidelines. However, in Turkey, the so-called standard methods have priority. Profit oriented methods as well as the taxpayers' own methods may only be used, if the application of the standard methods would not yield satisfying results.

2. Documentation

2.1 Brief Information

All records, lists and documents relating to the calculations of the prices and costs determined in line with the arm's length principle should be kept as authenticating documents. Furthermore, a comprehensive transfer pricing documentation report that complies with the Turkish Ministry of Finance's technical explanations has to be prepared before the date of submission of the annual corporate tax return with respect to the related party transactions realized in the corresponding fiscal year.

2.2. Annual Transfer Pricing Documentation Report

Corporate taxpayers that realized purchase or sale transactions with related foreign parties are obliged to prepare a report on such transactions that occurred during the calendar year. This report has to be ready for submission to the tax authority upon request during a tax audit. This report should contain all calculation tables as well as the following information:

- Information regarding corporate operations, organizational charts, definition of related parties and their contact information (Tax ID Numbers, telephone numbers and addresses etc). Information regarding property relations between related parties should also be given.
- All the information regarding corporate functions performed and corporate risks borne.
- Price Lists for the company's products.
- Information about manufacturing costs.
- Information regarding the value, quantity and invoices of the transactions realized with foreign related parties and 3rd parties during the year under review.
- Copies of all kinds of agreements concluded with related parties.
- Brief financial statements of related parties.
- Information about internal pricing policy of the company applicable to related party transactions.
- Associated information on whether related parties use different accounting standards and methods.
- Information on the intangible assets of the company and information about chargeable or payable royalties.
- Information about the transfer pricing methods in use; reasons for the selection of the method, information on the applications of the selected methods (internal/external comparables, comparability analyses).
- Information about the calculation tables and assumption tables used for the calculation of an arm's length price and profit.
- If the arm's length price has been calculated as a range and not a specific price, information should be given about the calculation methodology applied.

As clearly indicated in the legislation on documentation requirements, the Turkish Ministry of Finance and its tax auditors have comprehensive access to transfer pricing data both through the audited taxpayers and their related parties. Furthermore, the tax authority can request extra information and documents from the taxpayers if it is deemed necessary.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general, the Turkish tax authorities accept the Comparable Uncontrolled Pricing Method ("CUPM"), the Cost Plus Method ("C+M"), the Resale Price Method ("RPM"), the Profit Split Method ("PSM") and the Transactional Net Margin Method ("TNMM"). However, article 13 of the CTC defines the priority of application of the standard methods (CUPM, C+M and RPM) over any other method.

The purpose of the arm's length principle is to ensure that prices applied to the purchase or sale of goods or services between related parties correspond to the prices that would have been applied if such transactions would have been carried out between third-parties under comparable conditions.

A comparability analysis results from the comparison of the terms of controlled transactions with uncontrolled transactions. For this reason, to be comparable there should be no differences between transactions or if there are any differences, adjustments should be performed to ensure comparability. The main factors used in the determination of comparability are the following:

- a) the characteristics of goods or services,
- b) analysis of functions and risks,
- c) economic conditions of the market,
- d) business strategies of parties.

According to the arm's length principle, the most trusted result consists in obtaining a single price or value after performing the comparability analysis. However, rather than one single price or value, an interval or range of values can be determined through benchmarking studies. An arm's length range is a price index obtained either by application of the same method to different comparable uncontrolled transactions or by the application of different transfer pricing methods to the same transactions.

3.2 Availability of Benchmarking

It is uncertain whether the Turkish Ministry of Finance would accept foreign comparables and/or data from the AMADEUS database. Therefore, any benchmarking analysis as well as its results should be very well explained and necessary adjustments have to be well defined in order to eliminate criticism risks. Meanwhile, a national database where local comparable companies could be found does not exist either for the time being.

4. Penalties

4.1 Rates and Conditions

No specific penalty exists for transfer pricing issues other than the applicable tax evasion penalties. However, the disguised profits that are distributed, in whole or in part via transfer pricing shall, for the purposes of the implementation of the income and corporation tax laws, be deemed as the profit share that has been distributed as of the last day of the fiscal period and previous taxing transactions shall be corrected accordingly, by the taxpayers that are parties thereto.

Taxpayers who fail to submit the documents required by the tax authority are punished by the procedural monetary penalties contained in the Turkish Tax Procedures Code which is approximately € 750.00 for the time being.

On the other hand, if transfer pricing documentation is not provided, or the documentation is unusable, or the documentation is not delivered on time, the transfer prices are estimated by the tax auditors.

4.2 Extent of Enforcement

As the transfer pricing regime has been introduced recently in Turkey (effective since 2007), practical experience about the actual extent of enforcement has yet to emerge.

5. Special Considerations

5.1 Business Restructurings

There is no special legislation on business restructurings and/or the relocation of business functions in connection to transfer pricing issues in Turkey.

5.2 Tax Return Disclosures

All corporate taxpayers are required to fill out the standard informative form on "Transfer Pricing, Controlled Foreign Company And Disguised Capital" of the Ministry of Finance in relation to the transactions concluded with related parties during the calendar year, and to deliver it to their tax office as attachment to their annual corporate tax return.

5.3 Competent Authority

There are no special rules for submitting an adjustment to a competent authority ("CA").

5.4 Other Considerations

There are no other special considerations that have to be taken into account with respect to transfer pricing issues.

6. Advance Pricing Agreements

6.1 APA Opportunity

APAs are available in Turkey. A decree and a statement on APAs have been released by the Government. The Ministry of Finance is the competent administration for APAs. The application process takes several months, even take years.

6.2 APA Filing Fees

The application fee for an APA amounts to TRY 25,000 (approx. EUR 11,500).

7. Developments

No change of the legislation with regard to transfer pricing issues occurred recently or is expected in the near future.

Transfer Pricing in **Ukraine**

1. Basic Information

1.1 Taxing Authority and Tax Law

The supreme state body in charge, *inter alia*, for conducting the state's fiscal and tax policy is the Ministry of Finance of Ukraine. The specialized state body in charge of tax issues is the State Tax Service of Ukraine. The State Tax Service of Ukraine is headed by the State Tax Administration of Ukraine; tax agencies (regional state tax administrations, local tax inspectorates etc.) of lower levels are subordinated to the State Tax Administration. Tax authorities are the responsible taxing authorities in Ukraine entitled to maintain control over payment of taxes, duties and other mandatory payments.

As of today, the main provisions on transfer pricing are stipulated in Section 1.20 of the Ukrainian Corporate Profits Tax ("CPT") Act. This Act provides general provisions on the application of arm's length prices and methods for their determination of arm's length prices. In addition, issues regarding the application of the arm's length standard for specific VAT purposes are also considered in the Ukrainian VAT Act. It is worth noting that the legal framework for transfer pricing issues has yet to be completed. As a consequence, it may be argued that the tax authorities currently have no actual power to enforce the application of the arm's length standard (as will be discussed below in more details). Some procedural aspects with respect to transfer pricing issues are also governed by the Ukrainian Law "On Settlements of Taxpayers' Obligations towards the State".

1.2. Transfer Pricing Regulations

The main transfer pricing statutory provisions are contained in the Ukrainian CPT Act. This Act was adopted on 28 December, 1994. The provisions of the CPT Act have been subject to a number of amendments; the currently effective version was adopted on 01 July, 2004 and remained unchanged until today.

The Ukrainian VAT Act requires the mandatory application of arm's length prices for VAT taxation purposes. This rule was introduced into Section 4.1 of the VAT Act on March 25, 2005. Since then, this rule has been subject to some amendments; the current version of this clause has been in effect as of 30 November, 2006. These amendments justified the adjustment to arm's length prices, whenever the contractual price deviates from the arm's length price for more than 20%.

Some procedural aspects with respect to transfer pricing issues are also governed by the Law of Ukraine "On Settlements of Taxpayers' Obligations towards the State", effective as of 21 December, 2000. The current version of the relevant provisions which are in some way related to transfer pricing has been in effect as of 22 November, 2004.

In addition, details on the application of some transfer pricing methods are contained in the Ukrainian Accounting Standards, in particular in Standard 23 "Disclosure of Information on Related Parties".

No other legislation specifically related to transfer pricing exists. However, some transfer pricing issues are regulated by the Methodological Guidelines for Auditing of Unprofitable Enterprises, adopted by the Ukrainian State Tax Administration on 18 June, 2001; this regulation is not binding on taxpayers but rather provides guidelines to tax inspectorates. In addition, there is a large number of so-called clarifications issued by the tax authorities on trans-

fer pricing issues. These documents are not binding on taxpayers but rather indicate the current position of the tax authorities on the application of the legislation. However, such clarifications are binding on tax authorities during any tax audit and are to be taken into account by the tax authorities when adopting decisions during the administrative appeal process (i.e. pre-court contest of tax assessments and penalties).

1.3. Adherence to OECD-Guidelines

Although some provisions of Ukrainian legislation have common features with OECD- Guidelines (e.g. some of the transfer pricing methods), as a whole it may be argued that Ukraine does not currently adhere to the OECD-Guidelines.

2. Documentation

2.1. Documentation Requirements

There are no specific documentation requirements in Ukraine for transactions with related parties or other transactions having to comply with arm's length prices. Therefore, only the general rules apply to such transactions.

According to the Ukrainian Civil Code, most transactions shall be based on written agreements. In particular, a written agreement is required for transactions occurring between legal entities, between legal entities and a natural person (unless it is fully fulfilled from the moment of its conclusion) etc.. International transactions shall also be based on written agreements.

However, for taxation purposes, the transactions shall be supported by the so-called "primary documents", i.e. documents indicating that the business transaction has really been carried out. Examples of such documents are Services Acceptance Acts, expenditure invoices etc. Please note, that according to the Ukrainian legislation, these documents shall be kept by the taxpayer and disclosed during the tax audit, if so requested by the auditors.

The agreements as such do not belong to the "primary documents". However, in practice, the Ukrainian tax authorities usually examine them during tax audits; the state tax authorities may also examine other evidence indicating that the transactions did take place. In practice, the taxpayer should have some internal documentation justifying that the price complies with the arm's length principle (e.g. when a company provides discounts from the standard price of its goods).

2.2. Components

General requirements with respect to primary documents are contained in the Ukrainian Law "On Bookkeeping and Financial Reporting". According to these requirements, the primary documents shall contain the following elements:

- name, date and place of execution of the document;

- name of legal entity issuing the document;
- substance and scope of the business transaction;
- names and positions of persons responsible for carrying out and establishing proper documentation of the transaction;
- signature and other personal data of the person in charge of the transactions.

2.3. Purpose of Documentation

The purpose of the documentation is to provide documentary evidence that the transaction has actually taken place and to provide the main details of it.

3. Transfer Pricing Methods

3.1. Pricing Methods and Priority

Subparagraph 1.20.1 of the CPT Act provides the general rule according to which, unless proven otherwise, the transaction value is deemed to be at arm's length. Thus, for tax purposes, the taxpayer's income realized from selling goods (services) to related parties, non-residents and natural persons, is determined on the basis of contract prices but shall not be less than arm's length prices effective on the date of the transaction. Accordingly, the expenses of the buyer incurred in transactions with respective parties are also determined on the basis of contract prices but shall not exceed the arm's length expenses.

According to the CPT Act, the arm's length price is considered as corresponding with the fair market price. Subparagraph 1.20.2 of the CPT Act stipulates, that as a primary method, information on fair market prices of transactions with identical goods (this term is specifically defined in the Act) is necessary in order to determine the appropriate arm's length price. If no identical goods may be identified, the prices for similar goods (this term is also defined in the Act) are to be considered. The fair market price is generally defined as the one existing on the market in comparable economic conditions. In particular, the following conditions are considered: the quantity (scope) of goods (services), the terms of the agreement, the terms and conditions of payment and other objective conditions that may influence the price. The extra charges or discounts are also to be taken into account.

At the same time, subparagraph 1.20.5¹ of the CPT Act indicates that in case arm's length prices cannot be determined on the basis of fair market prices, the taxpayer may refer to the rules contained in national accounting standards or national standards of assessment of property and proprietary rights. This may be the case if no identical or similar goods can be identified.

The National Accounting Standard 23 "Disclosure of Information on Related Parties", approved by the Ministry of Finance of Ukraine on 18 June, 2001, contains the following methods of assessment of assets and obligations:

- Comparable Uncontrolled Pricing Method ("CUPM");
- Resale Price Method ("RPM");
- Cost Plus Method ("C+M");
- Book Value Method. According to this method assets and obligations are assessed based on the book value, determined under respective accounting standards.

3.2. Availability of Benchmarking

There is no such instrument as benchmarking explicitly mentioned in the Ukrainian legislation. However, according to Section 13 of the Decree of the President of Ukraine of 23 July, 1998 # 817/98 "On some actions aimed at deregulation of commercial activity", arm's length prices shall be determined on the basis of statistic data. Moreover, respective state authorities may determine arm's length prices at their own discretion only, if no statistic data are available. This paragraph may be viewed as legal justification for the use of data from different statistic databases. Hence in practice benchmarking studies may be used as additional proof that transfer prices comply with the arm's length principle if this has been questioned during a tax audit.

In addition, an additional proof generally accepted by Ukrainian authority as supporting evidence for transfer pricing issues is the pricing conclusion of the Ukrainian Agency for Monitoring of Foreign Commodities and Services Markets (so-called "DZI"). This agency works as state expert organization and its conclusions are mandatory in respect to some transactions for currency control purposes; however, in practice, its conclusions may also be used for tax purposes.

4. Penalties

4.1. Rates and Conditions

No specific penalties in Ukraine apply for breaching the transfer pricing legislation. Therefore, when breaching the transfer pricing legislation taxpayers are subject to the general penalties for underpayment of taxes. These penalties may be applied in the form of a fine whose rates may vary from case to case from 10% to 50% of the underpaid tax, i.e. tax computed based on the adjustment. Tax authorities may also apply penalty interest amounting to 120% of the official rate set by the National Bank of Ukraine per day of delay in payment.

Penalties for tax evasion may also be applied to officials of the legal entity subjected to pricing adjustment.

4.2. Extent of Enforcement

As noted above, it may be argued that adjustments to arm's length prices are currently practically unenforceable.

Thus, the CPT Act indicates that a price adjustment for tax purposes may only be performed by the tax authorities following the procedure established for so-called "indirect methods" (para. 1.20.10 of the CPT Act). Additionally, subparagraph 4.3.3. of the Law "On Settlement of Taxpayers' Obligations towards Budget" stipulates that a tax assessment based on "indirect methods" shall only be performed in accordance with the procedure provided by the special law. However, such a special law has yet to be adopted by the Ukrainian parliament. This legislative gap may be used by taxpayers to contest price adjustments performed based on "indirect methods".

However, court practice in this respect varies and these formal arguments were recently not accepted by courts any more.

Moreover, the law stipulates that tax assessment under the indirect methods may be done only via court proceeding. However, tax authorities ignored this rule and made adjustment without applying to the court. However, it seems now that tax authorities have changed their approach. Thus, according to clarification, issued by the Ukrainian State Tax Administration on 30 September, 2009, if as a result of price adjustment additional tax liabilities are assessed, such assessment shall be done via court proceeding. At the same time in other cases (e.g. if tax authorities decrease tax loss) court proceeding is not required.

4.3. Reduction or Cancellation of Penalties

The penalties and adjustments may be contested by initiating an administrative appeal procedure (i.e. respective complaints to tax authorities of higher level) or in court.

The general statute of limitations is 3 years.

5. Special Considerations

5.1. Business Restructuring

There is no specific legislation on business restructurings or relocation of business functions in Ukraine.

5.2. Tax Return Disclosures

Under the Ukrainian legislation a taxpayer is not required to disclose any information regarding transfer pricing or related parties when filing a tax return.

5.3. Competent Authority

There are no specific rules on competent authority in the Ukrainian legislation.

5.4. Other Considerations

5.4.1. Management Fees

Subparagraph 5.3.6 of Article 5 of the CPT Act explicitly prohibits the deduction of costs relating to the financing of managing bodies of the groups of taxpayers, including holding companies that are legal entities independent from the said taxpayers for taxable profit determination purposes. The term "holding companies" includes legal entities which are the owners or exercise control over the taxpayers as affiliates as defined by Section 1.26 of Article 1 of the CPT Act. Therefore, in case of management fees, the fees are deductible if they correspond to actual services, related to the business activity. If tax authorities consider that these fees correspond to the mere financing of the holding company, the fee deductibility may be contested.

5.4.2. Interaction between Tax and Customs Authorities

Recently, the level of interaction between tax and customs authorities has significantly increased. A recent example could be found in the high level of cooperation concerning the payment of royalties for customs valuation purposes. Hence, increased interaction between the two administrations may be expected with respect to other issues.

6. Advance Pricing Agreements

Advance Pricing Agreements ("APAs") are not available in Ukraine.

7. Developments

On 25 September, 2009, the Ukrainian State Tax Administration placed on its web-site the bill "On amending the Ukrainian CPT Act". This bill was drafted by the State Tax Administration in order to amend, inter alia, effective transfer pricing rules. According to this bill, it is planned to set forth transfer pricing methods, used in Ukraine, more in line with OECD-Guidelines. Also, the bill is to provide the procedure of adjustment of prices according to transfer pricing methods. The bill has not yet been submitted for consideration to Ukrainian parliament; the bill is now the subject of public discussion.

As the final note, until recently the tax authorities have not widely performed transfer pricing adjustments. Thus, such pricing adjustments were practically done only in single cases and practical experience on transfer pricing issues has yet to emerge.



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