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SURVEY OF TRANSFER PRICING DOCUMENTATION REQUIREMENTS IN EU MEMBER STATES AND THE CANDIDATE COUNTRIES

Final Report

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Index

1 Background

We were asked to carry out a survey concerning the transfer pricing documentation requirements in the EU Member States: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, UK, and the candidate countries: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovak Republic, Slovenia and Turkey.

The aim of this report is to provide an overview of our findings with respect to the formal transfer pricing documentation requirements in the countries concerned in the following areas:

- the date of introduction/latest modification of these requirements;
- the legal nature of the documentation requirements, e.g. statutory requirements such as law, regulations, or rulings, recommendations etc., (i.e. should official rules issued in writing not exists in the relevant country, we should indicate that such rules are not available, but we should not comment on the common practice);
- the nature and type of different documents required;
- the moment at which these documents need to be prepared, e.g. contemporaneous obligation, filing date of tax return, etc.;
- the time limit for submission to the tax authorities;
- specific documentation requirements for SMEs;
- specific documentation requirements for cost contribution agreements;
- specific documentation requirements for intra group services;
- specific documentation requirements for APAs;
- the language in which the documentation needs to be presented; and
- penalties for late submission/omission of documentation.

In course of our work we identified differences in the scope of transfer pricing legislation and the local approach to transfer pricing documentation requirements. The results of our survey are presented in detail for each country separately and include complete legal references. A comparative table on all elements listed is enclosed to this report as Annex I.

With the growing globalisation and competition, the need for more efficient utilisation of resources and direct market presence have lead to a division of operations within companies. The number of transactions between related parties made it necessary to introduce specific rules for the tax treatment of such transactions in most European jurisdictions. In some countries, in addition to general rules on documenting revenues and expenditures incurred by the taxpayer, or reporting obligation on group transactions under the local accounting legislation, specific formal requirements with respect to information on transfer pricing issues were introduced.

In general, it could be anticipated that the OECD Member States (EU Member States, the Czech Republic, Hungary, Poland, the Slovak Republic, Turkey) follow the OECD Guidelines for Multinational Enterprises and Tax Administration ("the OECD Guidelines", issued in 1976 and re-issued in 1995) and the OECD Model Convention.

According to the OECD Guidelines, enterprises should, in addition to information to be disclosed under the national law of the individual countries, issue information on the structure, activities and policies of the enterprise as a whole. In addition, financial statements and other information relating to the enterprise should be published at least annually, such information containing the ownership structure, geographical areas of their operations, operating results, use of funds, number of employees, research and development expenditure, policies in respect of intra-group pricing and the accounting policies (including consolidation). In addition, the OECD Model Convention provides provisions on the treatment of transactions which were not made on arm's length or the position of the taxpayer in one tax jurisdiction with respect to the tax base adjustments for transfer prices in the other country. It should also be noted that there are certain deviations in the application of the EU Arbitration Convention (expired in 1999, the ratification of the protocol on its extension has not been finalised yet).

2 Description of work and the legal analyses carried out

The survey was carried out by a team of country specialists from the European Unit of the IBFD's Research and Information Department, reporting to Mr. Dali Bouzoraa, the Director of the Research and Information Department, supported by the Transfer Pricing Unit and external tax experts from the countries concerned. The country responsibilities were assigned to the team members with regard to their relevant country experience and local language skills.

The members of the Research and Information Department are responsible for all client information and other (comparative) tax research commissioned with IBFD. In addition, they are responsible for monitoring and reporting on tax and foreign investment legislation developments throughout the world, and the development, production and updates of IBFD publications dealing with both general and more in-depth studies of the tax and investment legislation of individual countries. The Research and Information Department is organized in geographical teams and specialized units.

The team members have used their expertise and information obtained from IBFD publications and monitoring the developments in the tax law of the countries concerned as a secondary source of information.

In course of the work, information obtained from analyses of the tax legislation in effect, including the relevant acts, instructions, rulings, case law or any other official documents related to transfer pricing matters, including those which are according to our information in preparation and available to the IBFD team, was compared to the information obtained from external tax experts cooperating with IBFD and the information contained in our publications.

In countries where no official transfer pricing documentation requirements could be identified from the legal analyses carried out by our team and consultation with external tax experts, the team members sought to obtain an additional confirmation to their conclusion that no formal transfer pricing documentation requirements existed in the relevant country from other information sources publicly available (e.g. publications concerning transfer pricing, including those of audit and consulting companies, available in our library, publicly available information from the Ministry of Finance in the relevant countries, etc.).

We did not comment on obligations to issue financial statements or any other documents and their content under the accounting legislation. We also did not consider the general rules for documenting taxable or exempt income and tax deductibility of costs. In our survey we did not include information on the common practice in case of tax audits or advance pricing agreements (APAs), but only commented on the relevant formal documentation requirements. The issues connected with the general application of the OECD Guidelines, the OECD Model Convention and the EC Arbitration Convention were not covered by this survey and thus are not addressed in this report in detail. This reports is restricted to formal transfer pricing documentation requirements in the countries concerned.

This report summarizes all individual country reports drafted by the IBFD team, including information available as at 31 March 2003. With respect to Germany, however, and pursuant to a specific request from the Commission, the report describes the changes introduced by the new Tax Privileges Reduction Law ("Gesetz zum Abbau von Steuervergünstigungen und Ausnahmeregelungen"), adopted by the German parliament on 11 April 2003.

3 Country Reports

3.1 Austria

In general, Austria has based its transfer pricing legislation on the OECD Guidelines, the OECD Model Convention and the EC Arbitration Convention.

Austrian tax legislation does not provide for any specific transfer pricing documentation requirements. Neither have the tax authorities explicitly stated that such a documentation is required and how detailed such a documentation should be. In the opinion of the Austrian Ministry of Finance, the necessity to maintain any kind of documentation is derived from or based on the general provisions of the Federal Fiscal Code (Bundesabgabenordnung, BGBl 1961/194 as last amended by BGBl I 2002/155). In addition, the OECD Transfer Pricing Guidelines are applicable. The German version thereof was published in the official journal of the Austrian tax administration (AÖFV) as follows: AÖFV 1996/114 (Chapter I - V), 1997/122 (Chapter VI and VII), 1998/155 (Chapter VIII) and 2000/171 (Annex) The Transfer Pricing Guidelines are binding on the tax authorities, but not on the courts.

Under Sec 115 BAO, the examination of the facts and circumstances of a particular case has to be made by the tax office on its own initiative. Under Sec 119 BAO, the taxpayer has, however, to comply with the disclosure obligations and to provide the tax authorities with any information that is necessary for the income tax assessment in the course of the tax audit. According to Sec. 138 BAO, the information provided must be complete and reliable and the taxpayer shall prove its authenticity and accuracy. For cross-border transactions, the situation is different insofar as the taxpayer is under an “increased” obligation to co-operate with the tax authorities, according to Austrian jurisprudence. The tax authorities, however, require the taxpayer to provide such details that cannot be obtained by the authority on its own initiative (e.g. documentation related to foreign bank accounts, the shareholding structure of the partner to the transaction). International instruments on mutual assistance (exchange of information) are normally used only as means of “last resort” if – despite of the taxpayer’s exhaustive co-operation - the relevant facts cannot be substantiated in a proper way without co-operation of a foreign tax administration.

Transfer pricing documentation requirements

Besides the OECD Guidelines, no formal transfer pricing requirements have been introduced in Austria.

3.2 Belgium

It is generally understood that Belgium applies the OECD Guidelines and the EC Arbitration Convention. Also, most Belgian tax treaties contain a clause similar to Article 9 of the OECD Model Convention, albeit sometimes with a divergence from paragraph 2 on corresponding adjustments.

In practice, the application of the guidelines with respect to inter-company serves rendered by Belgian coordination centres (see below) results in problems. In particular the determination of the arm’s length pricing method for central purchasing and factoring continues to raise a lot of discussions.

The national tax legislation does not contain specific provisions on all transfer pricing matters (e.g. the arm's length principle). The basic rules are defined in articles 26, 54, 55, 79, 207 and 344(2) of the Code of Income Taxes (CIT 1992) and the Royal Decree of 10 April 1992 as amended, both effective retroactively from 1 January 1992. These special provisions mainly deal with the deductibility of interest and the granting of abnormal or gratuitous advantages. Art. 54 CIT 92 indicates that interest paid to non-resident companies or establishments not liable to income tax or for which the interest is subject to a particularly more favourable tax treatment than that of Belgium is not deductible, unless the taxpayer shows that the payment corresponds to a normal business transaction and that the amount is not abnormally high. Art. 55 CIT 92 regulates that interest is only deductible to the extend that it does not exceed the market interest rate, taking into account the risk, credit worthiness of the debtor and the term of the debt.

One can notice that a "particularly more favourable tax treatment" means that the nominal tax rate levied on the profits of the foreign company is less than 15% or that the tax effectively levied on the profits of the company is equivalent to less than 15%. This is decided by the King after deliberation at the council of Ministers (par arrêté délibéré en Conseil des Ministres). The 15%-criterium does, however, not apply, for EU based companies.

On 13 February 2003, the Belgian Minister of Finance finalized the list of countries deemed to have advantageous tax regimes in a royal decree.

The final list includes: Afghanistan, Alderney, American Samoa, Belize, Bosnia and Herzegovina, the British Virgin Islands, Burundi, Cape Verde, the Central African Republic, the Comoro Islands, the Cook Islands, Cuba, Dominica, Equatorial Guinea, Estonia, Gibraltar, Grenada, Guernsey, Guinea-Bissau, Haiti, Herm, Iran, Iraq, the Isle of Man, Jersey, Kiribati, Laos, Liberia, Liechtenstein, Macao, the Maldives, the Marshall Islands, Mayotte, Micronesia, Monaco, Montserrat, Namibia, Niue, North Korea, Oman, Panama, St. Christopher and Nevis, St. Lucia, St. Pierre and Miquelon, St. Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, the Seychelles, Somalia, Tuvalu, the U.S. Virgin Islands and Uzbekistan.

Based on Art. 26 CIT 92 any abnormal or gratuitous advantage granted by a Belgian resident company must be added to its total income, unless the advantage is taken into consideration in determining the taxable income of the beneficiary. Furthermore, in the case of advantages granted to non-resident related persons or to non-residents located in tax haven jurisdictions, the taxable income of the paying company must be increased accordingly, without regard to the possibility that the advantage will be taxable abroad in the hands of the beneficiary.

Art. 207 CIT 92 provides that deductions for gifts, additional personnel costs and additional research personnel, exempt intercorporate dividends and former losses cannot be deducted from the profits derived from abnormal or gratuitous advantages.

Art. 344(2) CIT 92 regulates that the sale, transfer or contribution of stock, bonds, claims, patents, trademarks, processes or sums of money to any foreign taxpayer not subject to income tax or enjoying a relatively favourable treatment will not be taken into account. However, the taxpayer may show either that the transaction corresponds to legitimate business needs or that he received a real counterpart producing an amount of income subject in Belgium to a normal tax burden, comparable to the tax which would have applied in the absence of a transfer. This provision does not constitute a real transfer pricing provision as such.

Finally, Art. 198(11) ITC could be mentioned which deals with limitations on deductibility of interest paid to low tax entities, including BCC's. It provides that interest on loans in excess of 7

times the net equity of the company paying the interest will be disallowed as expenses. However, this provision constitutes a thin capitalization provision and is not a real transfer pricing provision as such.

The Royal Decree 187 of 30 December 1982 concerning the setting up of coordination centres was amended by law of 24 December 2002 which modified the company's tax regime and created a system of advance rulings in tax matters. Coordination centers are only allowed to perform certain listed activities. The taxable base of a coordination centre would be determined on the basis of its expenses and operating costs, but contrary to the current regime not as a certain percentage of those costs. Moreover, the taxable base could not be lower than the total sum of (1) disallowed expenses and (2) abnormal or gratuitous advantages granted to the coordination centre.

The new ruling practice which applies from 1 January 2003 aims to attract foreign investors by providing legal certainty in advance with respect to tax due. Under the new practice, unilateral rulings on the tax consequences of intended transactions are issued. No ruling for a tax exemption or reduction is granted, however.

Furthermore, the Belgian government is now promoting the obtaining of APA's.

Under the previous system, a ruling could only be requested for a limited number of tax issues, such as anti-abuse provisions, the tax consequences attached to certain investments, the applicability of tax incentives and certain transfer pricing issues. Under the new ruling practice a taxpayer may request a ruling on all tax queries, unless the relevant tax law specifically indicates that a ruling cannot be requested. A ruling will however, not be granted, if the activity has not sufficient economic substance in Belgium or a tax haven is involved that does not cooperate with the OECD.

A ruling is generally be valid for 5 years, but can be granted for a longer period in certain cases. Moreover, it is possible to request a renewal of a ruling.

Circular Letter of 9 August 1989, amended on 5 May 1994 and replaced by Circular Letter of 30 November 1994 concerned the setting up of distribution centres, which may only carry out certain listed activities. The aim of the distribution centre regulation is to encourage the creation of companies or branches of a foreign company that will operate as the local or regional distributor of the products of the foreign investor. Distribution centres are subject to the normal rules of the corporate income tax. A distribution centre will not be considered to have granted abnormal or gratuitous advantages to related companies if its turnover is not lower than the sum of the following elements:

- the purchase price of the goods that have been sold during the taxable period;
- the cost of services supplied by third persons to the centre, on the condition that the supply of the service is connected to the authorized activities of the centre and the cost of the service includes a normal profit margin;
- 105% of the other working costs of the centre, excluding:
- costs mentioned above;
- non-deductible Belgian taxes;
- non-deductible expenses; and
- provisions or reserves which are to be considered as being taxable reserves.

Circular Ci. RH 421/483.766 of 26 July 1996 provides for a safe-harbour regulation for service centres according to which prices charged by a service centre to other group companies are

deemed to be at arm's length if they comply with certain transfer pricing standards. Service centres may only perform certain listed services that are for the sole benefit of the group. Under the cost-plus method, prices are deemed to be at arm's length if the turnover is not lower than the operational expenses increased by 5% to 15%, depending on the type of activity. Personnel costs and expenses of a disbursement character may, however, be reinvoiced without a profit mark-up. Under the resale-minus method prices charged by a service centre are deemed to be at arm's length if they are:
(1) equal to at least a certain percentage of the turnover realized by group members through the participation of the service centre. The percentage is determined by the tax authorities taking into account the activity of the service centre and the risk borne by the centre, but the percentage may not exceed 5%; and
(2) not lower than the operational expenses.

The taxable profits of a service centre are equal to the higher of (i) actual profits computed under the normal corporate income tax rules and (ii) minimum profits computed under the cost-plus method or resale-minus method. Where the minimum profits are higher than actual profits the service centre is, however, only taxed on the minimum profits to the extent the difference is due to transactions with non-resident group companies.

A number of issues were dealt with by case law, while none of the cases related to transfer pricing documentation requirements.

On 28 June 1999 the Ministry of Finance (now called the Federal Public Service Finance) published a circular letter on transfer pricing issues (AFZ/98-0003). Chapter III.1 of this circular letter gives also a practical approach when an in-depth analysis on transfer pricing issues should take place. It indicates that tax inspectors should carry out in-depth transfer pricing audits where the taxpayer only shows “vague, inappropriate or insufficient substantial information regarding the way in which the company applies transfer prices”. Such audit will be performed when the Belgian tax administration has reasons to believe that transfers where in fact ”abnormal” or “gratuitous benefits” were granted to companies or individuals in Belgium or abroad (Article 26 of the CIT 92) have taken place.

On 7 July 2000 the Ministry of Finance (Federal Public Service Finance) published a circular letter on the arbitration convention (AFZ/Inter 98/0170) amended by circular letter of 25 March 2003.

The Belgian Commission for Accounting Standards in 2002 has rendered an advice on assets obtained by Belgian companies for zero or very reduced value from related entities in Belgium or abroad. The bottom line of the recommendation is that the price differential should be expressed in the books and accordingly is likely to be taxed immediately.

Transfer pricing documentation requirements

Formal transfer pricing documentation regulations were not introduced in Belgium to date, but the general documentation requirements mentioned in Art. 315 CIT 92 should be followed. Art. 315 CIT 92 stipulates that everybody who is liable to pay taxes is obliged to present, without them being relocated, to the tax administration for the purpose of their examination his books and accounts which are necessary to establish the amount of his taxable income. All documents, unless ceased by judicial decision, have to be kept for 5 years in the same location (branch, office) than where they were completed and used.

Art 315*bis* CIT 92 contains a similar requirement but with electronic versions: the administration has the right to have fully access to folders of data analysis and programs; moreover electronic or paper copies of any information needed by the administration have to be done, if asked, in presence of administration agents. The same period of 5 years applies for these electronic programs used to analyze and compute the data.

When the taxpayer is asked to document his transfer prices according to the OECD-guidelines and he refuses to do so, there can be a reversal of proof, such as that taxpayer must furnish proof of the correct amount of taxable income (Art. 352 CIT 92). In this respect it may be noted that the practice notice of 1999 (see above) states that if a taxpayer fails to supply information or is prevented from doing so, the tax authorities are obliged to draw on other sources. However, in the case of associated parties, the Belgian tax authorities, due to the close relationship, take the position that it is reasonable to expect the Belgian taxpayer ultimately to obtain the necessary information.

As regards Art. 26 of the CIT 92, the burden of proof lies with the tax administration, but in practice it will be a joint burden of proof. However, as regards Arts. 54 and 344(2) of the CIT 92, the burden of proof lies with the taxpayer as these articles constitute legal presumption that may be rebutted by the taxpayer.

Case law on transfer pricing documentation is very scarce. In one old case a royalty rate was reduced from 10% to 5%. The Court stated that the reduction of the royalty implied that previously it had been excessive and no useful explanation had been given *(Brussels Court of appeal 21 June 1958, La Revue fiscale (1959) at 118).* If a payment is not granted in the course of fulfilling a contractual obligation, laid down in a written contract the tax authorities may characterize a payment to a related entity as a gratuitous benefit, taxable under Art. 26 of the ITC *(Court of Cassation 31 October 31 October 1979, N.V. Regents Park land C. Bulletin der belastingen/Bulletin des contributions 580, at 2353 and Brussels Court of Appeal 21 January 1953, N.V. Benzina).* In 1995, a court disallowed service charges invoiced by a German related company to a Belgian company because there was no specific description of the service provided or any underlying agreement or parameter for the amounts invoiced *(Brussels Court of Appeal, 24 November 1995, Fiscale Jurisprudentie/Jurisprudence Fiscale at 96/39).* In 2000, the Court of Appeal Brussels decided that parties are bound by the concluded contract (Brussels Court of Appeal, 9 February 2000, Fiscale actualiteit (11 March 200) at 11/11). In the case concerned, a Belgian permanent establishment of a UK company concluded an agreement with a related Dutch company. The permanent establishment invoiced the Dutch company for an amount less than the consideration that was agreed in the contract. The court of appeal Brussels held that the Belgian taxpayer had granted an abnormal or gratuitous benefit).

3.3 **Bulgaria**

Under the local Corporate Income Tax Act of 5 December 1997 (effective from 1 January 1998), the tax authorities may request information on foreign shareholding and transactions between related parties deviating from market conditions. This information should be included in the annual corporate income tax return (due by 31 March of the following year). In addition, in course of a tax audit, the tax authorities may request information as to whether transactions between related parties are performed at arm's length and adjust the taxable base of the taxpayer for any deviation from the market prices.

In the year 1999, the tax authorities issued an ordinance referring to the application of transfer pricing rules. However, the application of the ordinance is rather limited and there are no further guidelines issued to support the implementation of these provisions.

Transfer pricing documentation requirements

Specific formal transfer pricing documentation requirements were not introduced in Bulgaria to date.

3.4 Cyprus

The definition of the arm's length principle under Cypriot law in general follows the wording of the OECD Model Convention and the OECD Guidelines are also recognized in the country. The local tax legislation contains specific provisions on transfer pricing in the Section 33 of the Income Tax Law No. 118 issued on 15 July 2002, as amended by Law 230 issued on 31 December 2002, effective from 1 January 2003. Provisions on the rights of the tax authorities to request information in course of an audit are codified in Section 27 of the Assessment and Collection of Taxes Law No. 23 issued on 27 April 1978 effective retroactively from 1 January 1978, as amended by Law 122 issued on 15 July 2002 effective from 1 January 2003**.**

It should be noted that the arm's length principle applies with regard to transactions between related persons in general and is not limited only to transfers between associated enterprises.

Transfer pricing documentation requirements

Formal transfer pricing documentation requirements were not introduced in Cyprus to date.

3.5 Czech Republic

The Ministry of Finance officially declared that the OECD Guidelines (published in Financial Bulletin 10/1997 and Financial Bulletin 6/1999) and the Commentary to the OECD Model Treaty should be followed, since the Czech Republic became a member of the OECD (Financial Bulletin 4/1996, 251/15 082/1996). In addition, most double taxation treaties entered into by the Czech Republic (or the former Czechoslovakia) contain a clause similar to Article 9 of the OECD Model Convention.

The Czech Income Tax Act No. 586/1992 of 20 November 1992 effective from 1 January 1993 as amended (ITA) contains specific transfer pricing provisions which allow the tax authorities to adjust the taxable base of related parties by differences between the market price and the agreed transfer prices in comparable transactions if such difference is not properly documented (Article 23 (7) of ITA). When determining the interest rate on loans between domestic related parties, interest corresponding to 140% of the National Bank interest rate is considered as the market value.

Transfer pricing documentation requirements

The Czech tax legislation only contains framework provisions on transfer pricing issues, no specific transfer pricing documentation requirements were introduced to date.

3.6 Denmark

Denmark has introduced formal transfer pricing documentation requirements generally based on the OECD Guidelines (with effect from 1 January 1999) and in general follows the Commentary to the OECD Model Convention and the EC Arbitration Convention.

The legal framework for controlled transactions between related parties can be found in the following acts:

- Tax Assessment Act, 791 of 17 September 2002, section 2, latest amended by Law 232 of 2 April 2003, *(Ligningsloven § 2);*
- Tax Control Act, 726 of 13 August 2001, section 3 B, latest amended by Law 313 of 21 May 2002, *(Skattekontrolloven § 3 B)*
- Tax Administration Act, 617 of 22 July 2002, sections 34(4) and 35(1), *(Skattestyrelseloven §§ 34(4) and 35(1)).*

Documentation requirements were introduced by Law 131 of 25 February 1998 and guidelines issued by the Tax Administration in Denmark makes recommendations regarding the documentation requirements as described below.

Transfer pricing documentation requirements

The following taxpayers are required to submit a special information form and transfer pricing documentation:

- Taxpayers controlled by non-resident companies or individuals;
- Taxpayers controlling non-resident companies;
- Taxpayers within the same group as a non-resident company;
- Taxpayers with a foreign permanent establishment; and
- Non-resident taxpayers with a permanent establishment in Denmark;

3.6.1 *Date of introduction/latest modification of TP documentation requirements*

Denmark introduced specific documentation requirements concerning transfer prices between associated enterprises by Law 131 of 25 February 1998 amending the Tax Control Act and the Tax Administration Act. The relevant Acts are generally effective for tax years beginning on or after 1 January 1998, but taxpayers are required to prepare and keep documentation concerning transfer pricing only for tax years beginning on or after 1 January 1999. The transfer pricing documentation requirements are in general covered by section 3B of the Tax Control Act *(Skattekontrolloven § 3 B)*, the requirement to supply transfer pricing documentation is stated in section 3B (4) of this Act and the requirement to file an information form regarding controlled transactions is stated in section 3B(1).

Guidance regarding the transfer pricing documentation requirements are to be found in the Guidelines No 87-7552-401-5 issued by the Danish tax administration on 19 December 2002 (*Juridiske Vejledninger: Transfer pricing; kontrollerede transaktioner; documentationspligt*).

3.6.2 *Legal nature of TP documentation requirements*

The documentation requirements and the obligation to deliver an information form on controlled transactions are in general covered by the Tax Control Act, 726 of 13 August 2001, section 3B,

latest amended by Law 313 of 21 May 2002, *(Skattekontrolloven § 3 B).* The requirement to supply transfer pricing documentation is stated in section 3B (4) of the Tax Control Act and the requirement to file an information form is stated in section 3B(1).

Guidance regarding the transfer pricing documentation requirements such as the scope of information are given in the Guideline No. 87-7552-401-5 issued 19 December 2002 by the Danish tax administration (*Juridiske Vejledninger: Transfer pricing; kontrollerede transaktioner; dokumentationspligt*).

3.6.3 *Nature and type of different TP documents required*

Taxpayers associated with an individual, a non-resident company or permanent establishment are required to supply an information form concerning controlled foreign transactions (05.021 in Danish or 05.022 English version attached as Annex II) as an appendix to the regular income tax return. The form is considered a part of the income tax return and must be submitted irrespective of whether or not transactions with associated non-resident entities or PE's were made in the relevant tax period. The Tax Control Act, 726 of 13 August 2001, section 3B(1), states this obligation. The form is not due in case of domestic related parties.

In addition, written documentation must be submitted upon request to the tax administration (Tax Control Act, 726 of 13 August 2001, section 3B(4)). The documentation must be of a nature that enables the tax administration to assess whether the prices and conditions are set in accordance with the arms length principle.

There are no specific criteria regarding the content of the documentation but in the Documentation Guidelines are described some examples of information that will generally be useful:

- Description of the enterprise;
- Description of the controlled transactions;
- Functional analysis;
- Comparability analysis;
- Selection of pricing methods; and
- Written agreements.

3.6.4 *The moment at which TP documents need to be prepared*

No specific rules apply. The relevant documents must in general be prepared before the submission of the income tax return for the relevant year or be available upon the request of the tax authorities.

3.6.5 *Time limit for submission of TP documents to the tax authorities*

The information form must be supplied with the corporate income tax return, which is due at the latest 6 months after the end of the tax year. If the tax year expires between 1 January and

31 March, the tax return must be filed by 1 July of that year (Tax Control Act, 726 of 13 August 2001, section 4(2), *(Skattekontrolloven § 4(2)))* Individuals must submit the income tax return by 1 May in the year after the tax year. Individuals deriving business income must file a tax return by 1 July in the year following the tax year (Tax Control Act, 726 of 13 August 2001, section 4(1), *(Skattekontrolloven § 4(1)).*

Other documentation on transfer pricing matters must be submitted to the tax authorities upon their request. There is currently no additional information on time limit for submission to the tax authorities.

3.6.6 *Specific TP documentation requirements*

- ***Small and medium sized enterprises (SMEs)***

No specific transfer pricing documentation requirements apply.

- ***Cost contribution agreements***

No specific transfer pricing documentation requirements apply.

- ***Intra group services***

No specific transfer pricing documentation requirements apply.

- ***Advance pricing agreements (APAs)***

There are no specific transfer pricing documentation requirements for the instances mentioned.

3.6.7 *Language for the TP documentation*

There are no official regulations concerning the language in which transfer pricing documentation must be submitted to the authorities. It is understood that Danish, Swedish, Norwegian and English are acceptable. The information form on controlled transactions is available in Danish and English.

3.6.8 *Penalties for late submission/omission of TP documentation*

Penalties for delay or omission of filing the information form on controlled transactions are the same as applied for not meeting the deadline for submitting the income tax return to the tax authorities (Tax Control Act, 726 of 13 August 2001,section 5(1-2), *(Skattekontrolloven § 5 stk 1-2))*. A penalty of DKK 200 per day is imposed for every day of delay, up to DKK 5,000. Daily fines may be imposed in addition to the penalties. There are no penalties for failing to submit the transfer pricing documentation.

3.7 **Estonia**

The transfer pricing rules are contained in sections 4, 5 and 6 of Article 50 of the Law on Income Tax (State Gazette I 1999, 101, 903) of 15 December 1999, effective from 1 January 2000. The transfer pricing methods are stipulated by the Minister of Finance in his Regulation No. 120 of 29

December 1999 (State Gazette Annex 2000, 1, 2). The law and the regulation do not include any specific rules on transfer pricing documentation requirements.

Transfer pricing documentation requirements

According to the legal analyses carried out, no formal transfer pricing documentation requirements exist in Estonia.

3.8 Finland

With respect to transfer pricing matters, Finland in general follows the definitions laid down by the OECD Guidelines, the Commentary to the OECD Model Convention and the EC Arbitration Convention.

The current Finnish transfer pricing regulations are based on a general arm's length requirement which is laid down in the section 31 of the Tax Procedure Act (Laki verotusmenettelysta No. 18.12.1995/1558 effective from 1 January 1996, "VML"). Requirements for making any transfer pricing adjustments in cross-border transactions between affiliated taxpayers under this rule are that:

A taxpayer conducting business or other economic activities in Finland:

- has executed non-arm's length transaction(s),
- with an associated person, and
- due to this transaction the taxpayer's Finnish taxable income is less than it would have otherwise been, whereas
- the taxpayer to whom the income has been shifted is not a Finnish resident for tax purposes.

At the moment there are no explicit Finnish transfer pricing provisions, official guidance from the tax authorities etc. in place for the above-mentioned general arm's length rule provided in section 31 of the VML.

This holds true also with respect to documentation requirements since the current Finnish tax law does not contain any specific transfer pricing documentation requirements that should be fulfilled upon filing a tax return or at any other occasion.

However, it should be noted that according to our information, the Finnish Ministry of Finance together with transfer pricing specialist from the tax authorities are currently drafting transfer pricing documentation rules. However, there is at this stage no official information in this respect, and, as a result, no indication can be given as to the content of the rules or the timing of their introduction.

Further, it should also be noted that the general burden of proof rules may also be applied in cases involving disputes on used intra-group transfer prices. Section 26.4 of the VML contains general rules on the burden of proof under Finnish tax law. According to these provisions, after the taxpayer has fulfilled his obligation to file a tax return, it is up to both parties in accordance with their ability/possibility to take part in solving any open issues.

The government's proposal to the parliament in relation to the introduction of section 26.4 of the VML was introduced mentioned that it is usually the taxpayer who is in a better position to provide information on his own economical situation. The information that may be requested by the Finnish authorities under this rule may thus be materially similar to that which is usually included in a full-scale transfer pricing study. However, as the current law does not require the taxpayers to provide the information in certain format, it is widely recognized that the Finnish tax authorities are not allowed to ask the taxpayer to present/prepare a transfer pricing documentation/study (including possible comparables) as such.

Under section 14 of the VML taxpayers may also be required to disclose all relevant material upon a possible tax audit. As this requirement may only be extended to such material which is stored in Finland, it has been mentioned that the Finnish tax authorities may not, under this or any other Finnish rule, request a taxpayer to disclose such transfer pricing documentation which is prepared for other group companies which are situated outside the Finnish territory.

Specific TP documentation requirements

- ***Small and medium sized enterprises (SMEs)***

Not applicable.

- ***Cost contribution agreements***

Not applicable.

- ***Intra group services***

Not applicable.

- ***Advance pricing agreements (APAs)***

There are no Finnish rules for advance ruling procedure which would explicitly be directed to transfer pricing issues. In other terms, there are no APA or similar procedures in Finland.

Under sections 84 and 85 of the VML taxpayers may, however, apply for a binding advance ruling on any given question that they may have as regards their income taxation. The instance which may issue rulings upon taxpayers' written applications is either the Central Tax Board (under section 84 of the VML) in cases where the decision may constitute important precedents for similar cases in the future, or the local tax office where the taxpayer is situated/taxed (under section 85 of the VML) in all areas of income tax issues. As the scope of these ruling is not limited, they may also be applied for with respect to taxpayers' transfer pricing issues.

As the law explicitly provides that the applying taxpayers must provide the authorities with all the necessary information needed by the authorities so that they are able to give such rulings, applicants are obligated to provide all such information also in cases where the question relates to transfer pricing issues. However, as at today, the tax authorities have not issued any official guidance on what the nature of the information would be required in these cases.

Transfer pricing documentation requirements

The current Finnish tax law does not contain any specific transfer pricing documentation requirements.

3.9 **France**

It should be noted that the French law refers to transfer pricing rules under the OECD Guidelines. The OECD Model Convention and the EC Arbitration Convention should also be mentioned as a basis for the French legislation on transfer pricing.

The introduction of a new law on 12 April 1996 (Law No. 96-314) codified under Article13 B of the *Livre des procédures fiscales* (Tax Procedures Code, *LPF*), reinforced the powers of tax authorities giving them the right to require transfer pricing documentation during tax audits. The law facilitates the application of Article 57 of the French Tax Code (CGI), which provides for general rules on transfer pricing. Article L 13 B implies an obligation of cooperation between the enterprise and the tax authorities with regard to transfer pricing documentation. It should be noted that the tax authorities are entitled to request transfer pricing information under Article L 13 B of the LPF only in the course of a tax audit, where the taxpayer refused to communicate spontaneously some documents that the procedure of Article L 13 B has introduced during the course of the tax audit.

The Article L 13 B does not regulate transfer pricing documentation matters in detail. Therefore, the Guideline No 13 L-7-98 from the tax authorities of 29 July 1998 was issued to interpret the Article L 13 B. Further, the established practice of companies to document their transfer pricing policy follows the OECD Guidelines.

Transfer pricing documentation requirements

The legal reference is found in Article L 13 B of the *Livre des procédures fiscales*, which imposes special documentation requirements within the course of a tax audit and provides the following:

If, during a tax audit, the tax authorities have sufficient information for them to presume that an enterprise has performed an indirect transfer of profits, as defined by Article 57 of the French general tax code, they may request this company to produce information and documentation giving details on:

1. The nature of the relationship, falling within the scope of Article 57 of the general tax code, between this enterprise and one or more enterprises operated outside France, or enterprises, companies or groups of enterprises located outside France.

2. The method used for determining prices for the industrial, commercial or financial transactions it performs with the enterprises, companies or groups of enterprises referred to in 1 and the elements justifying such method as well as any set-off transactions.

3. The activities carried out by the enterprises, companies or groups of enterprises referred to in 1 in connection with the transactions referred to in 2.

4. The tax treatment of the transactions referred to in 2 and performed by the enterprises it operates outside France or by the enterprises, companies or groups of enterprises referred to in 1 of which it holds, either directly or indirectly, the majority of the share capital or voting rights.

The requests alluded to in the first paragraph should be detailed and should clearly indicate, by type of activity or by product, the country or territory in question, the enterprise or group of enterprises concerned as well as any amounts of transactions at issue. The audited enterprise should be informed of the time period allowed for its reply. This period, which cannot be less than two months, may be extended upon a justified request, provided it does not exceed a total period of three months.

In the event the reply is insufficient, the tax authorities send the enterprise a formal notice indicating that it must send a complete reply within thirty days, detailing the additional information required. This formal notice must explicit the sanctions applicable in the event of failure to reply.

The tax administration issued guidelines on transfer pricing documentation (BOI 13 L-7-98), and advance pricing agreements (BOI 4 A-8-99).

3.9.1 *Date of introduction/latest modification of TP documentation requirements*

Formal transfer pricing documentation requirements were introduced by the Article L 13 B of Law No. 96-314 issued on 12 April 1996 effective from 13 April 1996.

The tax administration has also published a Guideline on 29 July 1998 (BOI 13 L-7-98) commenting on the provisions of Article L 13 B of the LPF. The Guideline provides some guidance and specifies the requirements on the following issues:

- the conditions of an information request under Article L 13 B;
- the type of required information;
- the deadline to answer; and
- the applicable sanctions.

Furthermore, advance pricing agreements (APAs) have been recently commented upon by a tax administration guideline of 17 September 1999 (BOI 4 A-8-99).

3.9.2 *Legal nature of TP documentation requirements*

An enterprise may be requested to provide transfer pricing documentation under Article L 13 B provided that:

- it is subject to a tax audit, and
- the tax administration has sufficient information to presume an indirect transfer of profits abroad within the meaning of Article 57 of the CGI.

Resorting to Art L 13 B is neither obligatory nor systematic. This article is implemented only in situations where the company does not cooperate spontaneously with the tax administration during the tax audit. In practice, TP documentation is required to avoid any reassessment of the taxable income as allowed under Article 57 of the CGI.

3.9.3 *Nature and type of different TP documents required*

Documents required by law (i.e. Article L 13 B of the LPF) are divided into four categories:

(a) *Nature of the relationship with the foreign enterprise*

The tax administration may request information relating to the nature of the relationships with the foreign enterprise. The request will be formulated in order to prove either a legal or "de facto" affiliation/dependency with the foreign enterprise exists.

In the case of legal dependency, documents on the following may be requested (as specified by the Guideline of 29 July 1998):

- structure of the group, chains and percentages of participation;
- structure of the foreign enterprise's share capital;
- shareholder agreements;
- nature of the shares held;
- voting rights, etc.

In the case of a "de facto" dependency, any information relating to contractual terms or relationships between the enterprises in question which give rise to such type of dependency may be requested.

(b) *Transfer pricing method*

Information regarding the methodology used to establish transfer prices may also be requested. The request may further include information on elements justifying the transfer pricing method and the existence of counterparts, if any. Any method invoked by the enterprise can be considered acceptable, provided that it is justified by:

- contracts or internal memos describing the method;
- extracts of the general or analytical accounts;
- economic analyses, notably on the markets, the functions fulfilled, the risks assumed, and the comparables retained.

The tax administration interprets in a particularly broad manner the notion of elements justifying the transfer pricing method. A documentation supporting the transfer prices should therefore be as complete as possible.

(c) *Activities operated by the foreign enterprise*

The request for information may cover information related to the activities exercised by the foreign enterprise. Nevertheless, the information requested must relate to the operations realized with the company under audit. The tax administration may request amongst other documents the operating accounts per product, the margins realized, the composition of assets, charge accounts, etc.

(d) *Tax regime applicable to the operations realized by the foreign enterprise*

Where the dependency between the two entities is demonstrated (i.e. French company holds more than 50% of a foreign subsidiary's share capital or voting rights or has a foreign branch), the request may cover information relating to the tax regime applicable to the intra-group operations of the foreign entity, accounting or taxation documents relating to the concerned operations, and if any, particular agreements concluded with foreign authorities or explanations relating to any derogatory regime.

3.9.4 *The moment at which TP documents need to be prepared*

There is no specific deadline for completing the transfer pricing documentation. Transfer pricing documentation must, however, be made available to the tax authorities upon their request within a set deadline (2 months which may be extended by up to one additional month). The transfer pricing documentation file should generally be completed in advance and updated on a regular basis.

3.9.5 *Time limit for submission of TP documents to the tax authorities*

After reception of the tax administration request, the enterprise must reply within 2 months (BOI 13 L-7-98 of 29 July 1998). The taxpayer may apply for an extension to this deadline by a period not exceeding 30 days (Article L 16 A of the LPF). The tax administration will reject any requests for extension of the deadline filed with the intention to delay the audit proceedings. Should the taxpayer fail to deliver the relevant information, the tax administration will reassess his tax base with respect to information in their possession (Article 57 of the CGI).

3.9.6 *Specific TP documentation requirements*

- ***Small and medium sized enterprises (SMEs)***

No specific transfer pricing documentation requirements apply.

- ***Cost contribution agreements***

No specific transfer pricing documentation requirements apply.

- ***Intra group services***

No specific transfer pricing documentation requirements apply.

- ***Advance pricing agreements (APAs)***

APAs under the French tax law cover transactions in goods (tangible or intangible) or services or all of transactions undertaken for a period of 3 to 5 years between related companies or a domestic company and its foreign permanent establishments or branch. Nevertheless, APAs only concern a transfer pricing method and not a definite transfer price. A formal application from the taxpayer must be made to the competent tax authorities at least 6 months before the accounting period in which the agreement is to apply. The application includes a proposed transfer pricing method supported by relevant data. At the same time, the foreign entity must apply for an APA before the foreign tax authorities. The two authorities then negotiate, and the taxpayer is kept informed. Once agreed between the authorities, the APA is submitted to the taxpayer for approval.

The tax administration may request several information documents, the content of which is specified in Guideline BOI 4 A-8-99 issued on 17 September 1999. The guideline provides a list which practically involves the submission of the following:

- An organisational chart for the entire group of enterprises and list of all entities falling under the APA request, including the corporate names, addresses and tax identification numbers (TIN) of all entities involved;

- A description of the group's activities and operations worldwide, their locations, the structure of share capital (e.g. chain of ownership, ownership percentages, composition of the share capital of foreign entities, shareholder agreements, nature of shares held and voting rights), its capitalization, financial arrangements (e.g. payment terms and loans), and the main transactions between the parties;

- Representative financial and tax information relating to the parties, covering the last 3 tax years, as well as other information or documents which describe the proposed transfer pricing methodology;

- The currency used in the transactions between the parties;

- APAs concluded by other group enterprises or which relate to transactions other than those referred to in the request for an APA filed with the tax authorities;

- The beginning and closing dates of each party's tax year;

- A description of the main financial accounting methods used by the entities established abroad which have a direct effect on the proposed transfer pricing methodology;

- The tax regimes which apply to the transactions concerned;

- Articles of incorporation of the relevant enterprises, information on the tax treaties applicable, court decisions or court proceedings concerning income which is supposed to fall under the APA; and

- A description of any issues relating to the transfer pricing methodology which have been or are still being examined, specifying the taxpayer's position and that of the relevant tax authorities to which an APA request is addressed, and the outcome retained. This includes pending or completed court proceedings, as well as proceedings pending before the competent authorities, whether in France or in other countries.

Any information requested by the tax authorities in writing should be communicated to them, while the taxpayer may not refuse to provide such information on grounds of confidentiality. Nevertheless, the APA procedure and agreement are confidential in France and binding for the tax authorities, unless the taxpayer provided incorrect information or did not follow the agreed terms of the APA.

3.9.7 *Language for the TP documentation*

Documents drafted in foreign language shall be accompanied by a French translation or in a manner which makes it possible to fully understand them in French, as stipulated the Article 54 of the CGI.

3.9.8 *Penalties for late submission/omission of TP documentation*

Any delay in submitting the transfer pricing documentation requested by the tax authorities is considered a failure of the taxpayer to reply. In this case, the tax authorities may reassess the tax base of the taxpayer using information available to them without notifying the taxpayer and without following the standard contradictory procedure provided for in Articles L 57 and L 61 of the LPF.

Where a reply is deemed insufficient, the taxpayer will be granted an additional 30-day period from the receipt of the tax administration notice on non-compliance for submitting the missing documentation (Article L 13B of the LPF).

The burden of proof remains on the side of the tax authorities, in accordance with the general rules and the specific provisions relating to auditing transfers of profits abroad. The latter organizes a two steps procedure as follows:

- the tax authorities must prove dependency between two taxpayers, except when the foreign enterprise is located in a low tax jurisdiction as defined by Article 238 of the CGI; and

- the tax authorities must prove that an advantage was conferred to a foreign entity and determine the relevant amounts.

When the tax administration establishes a presumption that profits were transferred abroad, the burden of proof is shifted to the taxpayer, who must then prove that the advantage provided to the foreign entity does not constitute a transfer of profits.

If the taxpayer fails to reply within the set deadline, a fine of EUR 7,500 (Article 1740 nonies of the CGI) will be imposed for each fiscal year for which TP documentation was requested by the tax authorities. The fine is due even if the tax authorities do not reassess the tax base of the taxpayer.

Reassessments are increased by a 10% penalty for late payment and in certain cases by a 40% penalty for bad faith (Article 1729 of the CGI). Moreover, the reassessed profits may, depending on the applicable tax treaty, be re-qualified as constructive dividends and be subject as such to dividend withholding tax.

3.10 **Germany**

In general, with respect to transfer pricing issues Germany has adopted the OECD Guidelines and in negotiating double taxation avoidance treaties follows the relevant articles of the OECD Model Convention, with a divergence from Article 9(2) in most treaties entered into (according to Woehrle/Schelle/Gross, AStG, vor Sec. 1 marginal note 9). The EC Convention is applicable in Germany (Becker/Kroppen, Erl. OECD Verrechnungspreisgrundsaetze, Vorbem. 1 Rn. 16).

3.10.1 *Date of introduction/latest modification of TP documentation requirements*

On 11 April 2003, the Upper and the Lower House of parliament in Germany adopted a new law (Tax Privileges Reduction Law ("Gesetz zum Abbau von Steuervergünstigungen und Ausnahmeregelungen", or short SteVAG)), which introduced, inter alia, a new Sec. 90(3) providing for TP documentation requirements in the General Tax Code (Abgabenordnung, or

short AO). According to the new law, these documentation requirements will apply retroactively to business years starting after 31 December 2002.

Previously, documentation requirements in domestic cases were only based on Sec. 90(1) of the General Tax Code, which requires the taxpayer to cooperate with the tax authorities. The provision was introduced into the AO in 1977 with the adoption of the AO of 1977 (Law of 16 March 1976, published in the Federal Law Gazette (Bundesgesetzblatt) 1976, part I, at 613 effective from 1 January 1977), which replaced the General Tax Code of the Reich (Reichsabgabenordnung, or short RAO). If the taxpayer is engaged in international transactions, only Sec. 90(2) AO applied. The provision was introduced as Sec. 171(3) into the RAO in the course of the implementation of the Foreign Relations Tax Law (Aussensteuergesetz, or short AStG – Law of 8 September 1972 effective from 9 September 1972, published in Bundesgesetzblatt 1972, part I, at 1713) before the adoption of the AO of 1977.

If the taxpayer wishes to deduct debts or other expenses in the case of a relationship with related enterprises that are not subject to a significant level of taxation, the taxpayer has to comply with the special duty to cooperate established by Sec. 16 AStG jo. Sec. 160 AO.

At the level of the tax authorities, several letters issued by the Federal Ministry of Finance provide for transfer pricing documentation requirements:

- The "Administrative Principles for the examination of income allocation in the case of internationally associated enterprises" (*Grundsätze für die Prüfung der Einkunftsabgrenzung bei international verbundenen Unternehmen*, published in the Federal Tax Gazette (*Bundessteuerblatt*) 1983, part I, at 218, marginal note 9);

- The "Administrative Principles for the examination of income allocation by cost contribution arrangements between internationally associated enterprises (*Grundsätze für die Prüfung der Einkunftsabgrenzung durch Umlageverträge zwischen international verbundenen Unternehmen*, published in the Federal Tax Gazette 1999, part I, at 1122, marginal note 5);

- The "Administrative Principles on the allocation of profits in the case of permanent establishments of internationally operating enterprises (*Grundsätze für die Prüfung der Aufteilung der Einkünfte bei Betriebsstätten international tätiger Unternehmen*, published in the Federal Tax Gazette 1999, part I, at 1076, marginal note 5);

- The "Administrative Principles on the allocation of profits between internationally associated enterprises in cases of employee secondments" (*Grundsätze für die Prüfung der Einkunftsabgrenzung zwischen international verbundenen Unternehmen in Fällen der Arbeitnehmerentsendung*, published in the Federal Tax Gazette 2001, part I, at 796, marginal note 5)

- The Administrative Guidelines on Corporate Income Tax of 1995 (*Körperschaftsteuer-Richtlinien*, or short KStR), published in the Federal Tax Gazette 1996, part I, special issue 1, Para. 31 (regarding hidden profit distributions).

In two decisions of 2001, the Federal Tax Court addressed the scope of transfer pricing documentation requirements under German law in effect at that time, in which it stated that no more far reaching transfer pricing documentation requirements exist than provided for by the provisions governing the taxpayer's obligation to cooperate with the tax authorities under Sec. 90(1) and (2) AO (Federal Tax Court dated 10 May 2001, case no. I S 3/01, published in Der

Betrieb, 2001, at 1180; Federal Tax Court dated 17 October 2001, case no. I R 103/00, published in Der Betrieb, 2001, at 2474). There are no official statements by the legislative bodies as to whether the newly established Sec. 90(3) AO constitutes a sufficient basis for applying the transfer pricing documentation requirements provided for by the several "Administrative Principles".

The nature and type of the documentation to be provided by the taxpayer will be specified by an ordinance (Rechtsverordnung) to be prepared by the Federal Ministry of Finance with the consent of the Upper House of Parliament (Bundesrat)(Sec. 90(3) 5th sentence AO).

3.10.2 *Legal nature of TP documentation requirements*

The TP documentation requirements provided for by the new Sec. 90(3) AO as well as the general provisions obliging the taxpayer to cooperate with the tax authorities (Sec. 90 (1) and (2) A0, Sec. 16 AStG) are a parliamentary law.

The letters issued by the Federal Ministry of Finance ("Administrative Principles") are legally binding only for the practice of the tax authorities, but not for the tax courts.

3.10.3 *Nature and type of different TP documents required*

According to the new Sec. 90(3) AO, the taxpayer is obliged to keep documentation, which documents his cross-border transactions with related parties. This requirement includes the obligation to provide information, in writing, on the economic and legal background that is relevant for determining transfer prices and other business terms and conditions concerning transactions with related parties. The documentation requirements analogously apply to resident taxpayers who, for domestic tax purposes, have to allocate profits between their German-resident business enterprise and its foreign permanent establishment, or have to determine the profits of a German-resident permanent establishment of their foreign business enterprise.

Sec. 90(3) AO does not state explicitly what documents the taxpayer must prepare and provide. According to Sec. 90(3) 5th sentence AO, the documentation to be provided by the taxpayer will be specified by an ordinance (Rechtsverordnung) to be prepared by the Federal Ministry of Finance with the consent of the Upper House of Parliament (Bundesrat).

Possibly, an indication of the documentation that could be requested by the tax authorities could be derived from the "Draft Administrative principles on auditing the income allocation between internationally related enterprises with respect to income adjustments, documentation and APAs" (Entwurf von Verwaltungsgrundsätzen für die Prüfung der Einkunftsabgrenzung zwischen international verbundenen Unternehmen in Bezug auf Berichtigungen, Verfahren und verbindliche Auskünfte, or short "withdrawn draft administrative guidelines") the Federal Ministry of Finance had submitted to interested parties in April 2000 and had withdrawn as a result of the two decisions of the Federal Tax Court. These draft administrative guidelines, together with their attachments, contained a long list of specific documents, which could have been requested by the tax authorities when conducting a transfer-pricing audit. The documents that a tax auditor could have requested include:

- General background information on the company (e.g. organizational charts of the group and of the company, the company's statute, recent changes in the company's legal situation);

- Description of the taxpayer's business (e.g. products and services, market share information);
- Identification of the transactions with foreign affiliated enterprises (e.g. for products, services, leases, use and transfer of intangibles, loans);
- Explanation of the functions of those companies that are engaged in transactions with the taxpayer;
- Annual reports of the taxpayer and of those affiliated companies that are engaged in transactions with the taxpayer;
- Budgets and cost accounting information of the taxpayer and of the affiliated supplier;
- Explanation of the value chain (i.e."Wertschöpfungskette", the production chain or the different steps by which the enterprise adds value to the final product or service);
- A description of the transfer pricing method or methods employed to derive an arm's length remuneration; however, it is important to note that the taxpayer is not obliged to evaluate more than one transfer pricing method;
- Analysis of the intercompany transactions and the third-party comparables with regard the functions, risks, contractual terms, intangibles used and market conditions;
- If the transfer prices are based on third-party data of independent companies the taxpayer shall provide all relevant information on such companies; and
- Special circumstances that may affect the prices (e.g. business strategies).

The draft guidelines also contained specific rules for taxpayers who either use a combination or a mixture of standard transfer pricing methods or use non-standard methods. The draft guidelines stated that when non-standard methods are used, the taxpayer has to take even greater care that the necessary documents and evidence are collected and can be easily verified by the tax authorities. In addition, the tax authorities may request the taxpayer to cooperate in their verification as to whether the prices determined under the non-standard method would also be plausible using a standard method.

Moreover, the German draft rules asked for information on how prices are negotiated and on the competencies to take decisions. The administrative principles also required documents that were prepared for other tax authorities.

It is as yet unknown whether the expected future ordinance would restate the above withdrawn draft requirements.

Moreover, specific documentation requirements exist regarding the adjustment of income in cases of hidden profit distributions (verdeckte Gewinnausschüttung) under Sec. 8(3) 2nd sentence Corporate Income Tax Law. Pursuant to this provision, hidden profit distributions shall not reduce the income of a corporation. In order to prove that no hidden profit distribution has taken place, the taxpayer has to furnish proof to the tax authorities that a payment made to him by the corporation is based on legally effective contractual agreements that were entered into in advance, in clear and unambiguous terms. Furthermore, the taxpayer has to prove that the terms of the contractual agreement have to be complied with in practice (see Para. 31(5) KStR).

3.10.4 *The moment at which TP documents need to be prepared*

Under the new Sec. 90(3) 3rd sentence AO, prompt preparation of TP documents is mandatory if extraordinary transactions occur (such as reorganizations (e.g. mergers); the new law does not state examples of "extraordinary transactions"; probably, the question will be addressed by the ordinance).

According to the "Administrative Principles for the examination of income allocation by cost contribution arrangements between internationally associated enterprises" a qualified cost-sharing agreement must be in writing (see Para. 5.1.1.).

Regarding intra group administrative services, according to the "Administrative Principles for the examination of income allocation in the case of internationally associated enterprises" the transfer price must be agreed in advance by the paying corporation and proof must be provided. (Para. 6.2.1.)

3.10.5 *Time limit for submission of TP documents to the tax authorities*

According to the new Sec. 90(3) 8th sentence AO, upon request by the tax authorities the documents will have to be submitted within 60 days. Upon application by the taxpayer, an extension of the time limit may be granted in individual cases (new Sec. 90(3) 9th sentence AO).

3.10.6 *Specific TP documentation requirements*

- ***Small and medium-sized enterprises (SMEs)***

No specific transfer pricing documentation requirements apply.

- ***Cost contribution agreements***

Transfer pricing documentation requirements regarding cost contribution arrangements are covered by the "Administrative Principles for the examination of income allocation by cost contribution arrangements between internationally associated enterprises" (*Grundsätze für die Prüfung der Einkunftsabgrenzung durch Umlageverträge zwischen international verbundenen Unternehmen*, published in the Federal Tax Gazette 1999, part I, at 1122, marginal note 5):

Form and Content

A qualifying cost-sharing agreement must be in writing. A cost-sharing agreement must comply with the following minimum requirements and if necessary, appendices, enclosures or additional agreements have to be provided to the tax authorities as well:

- Names of pool members and other related beneficiaries;
- Detailed description of the contractually agreed services;
- Determination of the costs to be allocated, the method of cost calculation and possible deviations;
- Determination of the benefits expected by the respective participants;

- Determination of the costs allocation key;
- Description of how the value of the initial and the later service contributions of the pool members will be determined and allocated coherently to all pool members;
- Type and extent of inspection of accounts (e.g. in case of cash in advance; date of inspection);
- Provisions regarding adjustments if circumstances change;
- Contractual period;
- Provisions regarding the termination of the agreement as well as, if necessary, the prerequisites and consequences of the entrance of new pool members and the early withdrawal of existing pool members;
- Agreements on the access to the documents and records regarding the expenses and the services of the service provider;
- Allocation of the usage rights stemming from central pool activities in the case of research and development.

Documentation of expenses and services

The services received by the pool members and the expenses attributed to them must be verifiably documented. This applies in particular if different services are combined in a uniform cost-sharing arrangement. If indirect costs are allocated, the basis for the allocation is to be documented. Income earned in association with the cost-sharing arrangement must be recorded separately.

Documentation of the expected benefit

The determination of the expected benefit is of particular importance. The expected benefit can be illustrated by problem analysis, project reports, target descriptions and similar documents. The documents must also indicate to which extent other group members might gain a benefit from the cost-sharing agreement.

Documentation of service recipient

The documentation of the service recipient must contain:

- The cost-sharing agreement including appendices, enclosures and supplements;
- If not already part of the contract or contained in the contractual appendices: documentation to justify the allocated costs in particular with regard to the expected services, the expected benefit, the allocation key and the allocation criteria (extent of the benefit in comparison to other service recipients, causative and use-oriented cost allocation);
- Agreements on advance payments;
- Annual settlement of the expenses actually incurred:

- Itemization of the total expenses in respect of cost centres and their allocation to the pool members;

- Classification of the direct and indirect expenses according to cost types, e.g. labour costs, travel costs, office rent, depreciation for wear and tear, third-party licences, EDP costs, storage expenses;

- Proof of payment;

- Documentation of services actually received and benefit gained, e.g. monthly, quarterly or annual reports on individual services and projects of the service provider, correspondence, visitors' reports, minutes of meetings regarding individual projects; research reports, list of patent applications, press releases, start of production of new products, improvements or innovations in the production of old products.

Evidence

Principally, the cost-sharing agreement can only be taken as a basis for the allocation of the taxable income if the documentation requirements are met. According to the provision of Sec. 90(2) AO, the tax authority is allowed to request information, documents and evidence as necessary in the individual case. Therefore, the service recipient must immediately submit the documents of the service provider on request of the tax authority.

- ***Intra group services***

Transfer pricing documentation requirements regarding intra group administrative services are included in the "Administrative Principles for the examination of income allocation in the case of internationally associated enterprises" (*Grundsätze für die Prüfung der Einkunftsabgrenzung bei international verbundenen Unternehmen*, published in the Federal Tax Gazette (*Bundessteuerblatt*) 1983, part I, at 218, marginal notes 6, 9):

The parties involved are to cooperate in determining the correct allocation of income in accordance with the generally applicable rules (in particular § 90(2) AO). This also requires that the parties involved determine factual circumstances existing abroad themselves and supply documentary evidence located abroad. In doing so they must exhaust all the legal and actual possibilities of obtaining evidence which are open to them; these include, in particular, all means derived through participations subject to corporate and other laws governing the forms of business organization, or derived from the common interests of the related parties.

Domestic enterprises liable to tax are required to cooperate; foreign related enterprises are required to cooperate to the extent that their own tax liability comes into question (e.g. as the recipients of a hidden profit distribution). The duties of a domestic enterprise concerning income determination and evidence further extend to such factual circumstances and means of evidence material to its tax liability in Germany as are held or documented in the books or records of foreign related enterprises.

In accordance with Sec. 90(2) 3rd sentence AO, an involved party cannot claim that it is not able to clarify factual circumstances or to provide evidence if, according to the circumstances of the case, in arranging its affairs, it could have created or obtained the means of doing so. Related persons can meet these requirements by agreeing to assist each other in determining facts and providing evidence. In the case of business dealings with related persons this also applies in

particular to the determination of facts and the evidence required for income allocation. A domestic enterprise cannot therefore claim that a related enterprise abroad (e.g. the parent corporation) has not made available the required evidence or records.

If an examination of income allocation involves an enterprise from a group of companies and thus it is necessary to consider circumstances related to other group companies, the wider duty to cooperate (Sec. 90(2) of AO) is extended also to these circumstances. The domestic enterprise is required to make arrangements for future supply of evidence in advance, as necessary for these cases.

The duty to cooperate extends to all circumstances that are relevant to the determination and appraisal of transfer prices. These include all data necessary for the examination of the transfer price which are available or to which a sound business manager of an independent enterprise would have access, as well as all business data, records and information obtainable from group companies which are necessary for the examination of the transfer price.

If a taxpayer enterprise derives transfer prices in a particular way or if it uses particular tabulated values or centrally collected data, it must ensure that the necessary documents are collected and can easily be inspected. When required, the enterprise must cooperate in examining whether the transfer prices determined appear reasonable also when utilizing other methods.

In case of relationship with related enterprises not subject to a significant level of taxation in Germany, the special documentation requirements established under Sec. 16 AStG jo. and Sec. 160 AO must be met. Under these provisions, if the taxpayer deducts debts or business expenses from his income, he is required to provide the tax authority with precise information concerning the foreign creditors or recipients and disclose all direct and indirect relationships which exist or existed between him and the foreign enterprise.

- ***Advance pricing agreements (APAs)***

Germany has not implemented special regulations dealing with advance pricing agreements to date. However, in 1994 and 1995, two Federal states (Ministry of Finance of Baden-Württemberg, letter dated 28 November 1994, published in *Internationales Steuerrecht (IStR)*, 1995, at 34; Ministry of Finance of Bavaria, letter dated 9 January 1995, published in *IStR*, 1995, at 241), in coordination with the other Federal states, released letters in which the German tax authorities announced that they were willing to participate in bilateral APAs.

According to the withdrawn draft administrative guidelines of April 2000, the possibility to obtain an APA would be restricted to basic cases. However, this restriction would not apply to cases where an application for binding recognition of a transfer pricing arrangement was filed for a period following the period of a tax audit.

3.10.7 *Language for the TP documentation*

Special provisions concerning the required language for transfer pricing documentation were not introduced to date.

If the taxpayer provides the tax authorities with documentation relevant for tax purposes in a foreign language, according to the general rule laid down in Sec. 87(2) AO, the tax authorities are entitled to request prompt translation into German at the expense of the taxpayer.

3.10.8 *Penalties for late submission/omission of TP documentation*

With the adoption of the SteVAG on 11 April 2003, new penalty provisions for late submission/omission of TP documentation were introduced in the AO. It should be noted that, in contrast to the new documentation requirements, the new penalty provisions will only apply to business years starting after 31 December 2003, but not earlier than 6 months after the anticipated ordinance which should specify the documentation requirements (see 3.10.1 above) entered into force.

Previously, penalties for late submission/omission of TP documentation were not imposed in Germany. According to the new Sec. 162(3) AO, if the taxpayer does not fulfil the obligation to cooperate with the tax authorities (under Sec. 90(3) AO), it will be assumed that transfer prices have not been determined on an arm's length basis. In that case the tax authorities may estimate the tax base (Sec. 162(1) AO), while the taxpayer retains the opportunity to verify the appropriateness of the transfer prices.

If the tax authorities have to estimate the tax base, according to the new Sec. 162(4) AO a penalty will be imposed. The penalties range from 5% to 10% of the additional income resulting from the adjustment (a minimum of EUR 5,000). If the taxpayer provides the tax authorities with useful documentation after expiry of the time limit for their submission (see above), the tax authorities can impose a penalty up to the amount of EUR 1,000,000 (minimum amount of EUR 100 for each complete day following the expiry of the time limit). When making use of their discretionary power regarding the amount of a penalty, the tax authorities will have to take into consideration:

- The purpose of the penalties to induce the taxpayer to provide timely transfer pricing documentation;
- The advantages from which the taxpayer benefited as a result of his non-compliance;
- If the taxpayer does not provide documentation timely, the length of the delay.

Penalties are not imposed if the failure of the taxpayer to provide appropriate and timely documentation appears justifiable or if the default of the taxpayer is negligible. In general, penalties will be imposed following the finalization of a tax audit.

3.11 **Greece**

In general, according to the arm's length principle defined in Article 39(1) of the Income Tax Law (L 2238/21994, issued on 16 September 1994 and effective from 17 September 1994, as amended, ITL)**,** when transactions between associated enterprises have been made for prices that are unjustifiably lower or higher than the market price, the difference in price is deemed to be income for the company that received a higher amount than the arm's length one.

Some exceptions apply to this principle:

- when the price is a consideration deriving by a contract between the Greek Government and the foreign company that has been embodied in a Law, and
- when the deviation from the arm's length principle was not made with the purpose to avoid payment of direct or indirect taxes.

Article 39(2) ITL provides also for a definition of associated enterprises and Article 105(10) extends the arm's length principle also to transactions between the head office and its permanent establishments.

Accordingly, the tax administration as a general rule has the power to ask the taxpayer for any kind of documents that could serve the purpose of challenging the transfer pricing between associated enterprises.

Transfer pricing documentation requirements

There are no formal transfer pricing documentation requirements laid down by the Greek tax legislation.

3.12 Hungary

The Hungarian Corporate Income Tax and Dividend Tax Law (LXXXI/1996, effective from 1 January 1997 as amended) contains general rules on transfer pricing, which are mainly based on the OECD Guidelines. It does not directly specify any transfer pricing documentation requirements. It, however, includes a general requirement with reference to an ordinance of the Minister of Finance.

Transfer pricing documentation requirements

3.12.1 *Date of introduction/latest modification of TP documentation requirements*

Corporate taxpayers, other than small and medium sized enterprises, are required to specify the method used by them for establishing arm's length prices and the facts and circumstances supporting these prices, according to the ordinance of the Minister of Finance before submitting their tax return (Article 18(5)). This provision was adopted by Law no. XLII/2002 (passed on 12.10.2002) amending several laws on taxes, contributions and other fiscal liabilities, and is effective from 1 January 2003.

At the same time, the law authorizes the Minister of Finance to regulate by ordinance the detailed documentation requirements necessary for the establishment of arm's length prices. The above requirements will apply only with respect to contracts concluded after the ordinance of the Minister of Finance became effective. At time of finalizing of this research, the ordinance was not yet issued and details were not made officially available yet.

Additionally, the Corporate Income Tax and Dividend Tax Law includes a specific requirement in connection with the adjustment of the taxable base for transfer pricing reasons. Accordingly, the taxpayer may only decrease its taxable income with the difference between the transfer price and the arm's length price, if it is in possession of a document signed by the other party indicating the amount of difference (Article 18(1)). This provision was implemented by the Law No. 2000/CXIII issued on 14.11.2000 which amended several laws on taxes, contributions and other fiscal liabilities, and is effective from 1 January 2001.

The transfer pricing provisions apply to transactions between related parties as defined by the Corporate Income Tax and Dividend Tax Law (Article 4. point 23.). Under the Tax Procedure Act (Law No. XCI/1990 issued on 16.12.1990 and effective from 1 January 1991), the taxpayer

must disclose the identity of a related party (name, seat, tax number) to the tax authority within 15 days from the date of concluding the first contract with that party (Article 15(4)b)).

3.12.2 *Legal nature of TP documentation requirements*

The transfer pricing documentation requirements are set out in the law. Implementation details will be covered by the ordinance of the Ministry of Finance, once issued.

3.12.3 *Nature and type of different TP documents required*

Since the above mentioned ordinance of the Hungarian Minister of Finance has not yet been issued, no details are available with respect to the documents required.

With respect to the above mentioned specific requirement in connection with the adjustment of the taxable base, a document signed by the other party to the transaction concerned by the transfer pricing provisions is required.

3.12.4 *The moment at which TP documents need to be prepared*

According to the provisions of the Corporate Income Tax and Dividend Tax Law, the necessary documents must be prepared before the submission of the taxpayer's tax return.

3.12.5 *Time limit for submission of TP documents to the tax authorities*

Currently not applicable.

3.12.6 *Specific TP documentation requirements*

- ***Small and medium sized enterprises (SMEs)***

No specific transfer pricing documentation requirements apply.

- ***Cost contribution agreements***

No specific transfer pricing documentation requirements apply.

- ***Intra group services***

No specific transfer pricing documentation requirements apply.

- ***Advance pricing agreements (APAs)***

Not applicable. Taxpayers may, however, request an advance ruling on any type of tax provided the ruling relates to the tax consequences of a future transaction and a detailed description of the transaction is provided (Article80/A. of the Tax Procedure Law, Law No. XCI/1990 issued on 16.12.1990 and effective from 1 January 1991).

3.12.7 *Language for the TP documentation*

Currently not regulated.

3.12.8 *Penalties for late submission/omission of TP documentation*

Penalties are currently not specifically applicable to transfer pricing documentation matters. The provisions of the Tax Procedure Law (Law No. XCI/1990 issued on 16.12.1990 and effective from 1 January 1991) on penalties are generally applicable, e.g. penalties for failing to comply with procedural requirements.

3.13 **Ireland**

Ireland operates a self-assessment system for its direct taxes. A company which is within the charge to corporation tax must file a corporation tax return within 9 months of the end of its accounting period. The return is in a prescribed format (Form CT1) and contains the information necessary to enable the company's tax liability to be computed. Where a company is in doubt as to the tax treatment of any matter to be contained in a return, it may complete the return to the best of its belief but in doing so must draw the inspector's attention to the point concerned by specifying the doubt. This procedure enables a company to avoid becoming liable to the 10% surcharge that applies on failure to file a complete return of income within 9 months of the end of its accounting period and to a charge to interest if an underpayment of preliminary tax arises as a result of the company's failure to treat the matter correctly.

Where a company has made a timely return, an assessment will be raised by its local inspector by reference to the information contained in that return. On the other hand, if a company fails to make a return or if the inspector is not satisfied as to its contents, he will make an estimated assessment.

Any tax return is liable to be audited by the Revenue. An audit may comprise either (1) a field audit, or (2) a desk audit. Both types of audit are concerned with establishing the completeness and accuracy of the taxpayer's return. Where an Inspector believes that a return is incomplete or inaccurate, he may raise an assessment in the normal way. Any tax which falls due as a result will carry interest and penalties. An Inspector may raise an assessment within 6 years of the end of the accounting period in which the return is filed. This time limit does not apply where there has been fraud or negligence on the part of the company in making its return.

The transfer pricing legislation comprises several provisions, each of which operates independently of the others. These provisions are found in:

- section 1036 Taxes Consolidation Act 1997 enacted on 30 November 1997 as amended, TCA (Irish resident controlled by non-residents);
- section 811 TCA (a general anti-avoidance provision);
- section 81 (2) TCA (disallowable expenditure);
- section 453 TCA (artificial pricing in low-taxed manufacturing trades).

None of these measures imposes documentation requirements.

Transfer pricing documentation requirements

Formal transfer pricing documentation requirements were not introduced by Ireland to date.

3.14 Italy

The Italian domestic legislation contains specific provisions on transfer pricing under Article 76(5) of the Presidential Decree 917 of 22 December 1986 (ITA effective from 1 January 1987 as amended), according to which income from operations with non-resident companies directly or indirectly controlling or being controlled by the enterprise or sister companies (non-resident companies under the control of the same company which controls the enterprise) is determined on the basis of the market value of goods transferred and services rendered (market value definition in Article 9(3) of ITA), if substituting the market value for the transfer price will result in an increase in the taxable income of the taxpayer. This provision also applies if the determination of the market value will decrease the taxable income, but only in the extent which is necessary for observance of special mutual agreement procedures provided for by international double tax treaties.

The concept of market value is defined in Article 9(3) of ITA as the average price or consideration paid for goods and services of the same or a similar nature, in free market conditions and at the same level of commerce, at the time and place at which the goods and services were purchased or performed, or, if no such criteria are available, at the time and place nearest thereto. In determining the market value, reference must be made (to the extent possible) to price lists or tariffs of the party which has supplied the goods and services or, if necessary, to the indices and price lists of the Chamber of Commerce and to professional tariffs, taking normal discounts into account. For goods and services subject to controlled prices, reference must be made to the regulation in force.

In practice, the Circular Letter No. 22/2267 issued by the tax authorities to transfer pricing issues on 22 September 1980 is widely followed by taxpayers and the tax authorities in Italy. In general terms, the Circular Letter was drafted based on the OECD Guidelines, the Circular Letter not containing specific provisions on transfer pricing documentation requirements. The Commentary to the OECD Model Convention is in general followed by Italy. As regards the EC Arbitration Convention, it should be mentioned that after its expiry on 31 December 1999, Italy rejects taxpayer's applications for initiating a mutual agreement procedure under the EC Arbitration Convention.

As a general rule, taxpayers are obliged to provide information and documentation related to the correct assessment of income taxes upon the request of the tax authorities. Accordingly, the tax authorities may obtain such information and documents also in respect of transfer pricing matters.

Transfer pricing documentation requirements

Italian tax legislation does not include formal requirements with respect to documentation which must be kept or produced by the taxpayer to justify or explain its transfer pricing policy.

3.15 Latvia

The only provisions relating to transfer pricing can be found in the Latvian Business Income Tax Act of 9 February 1995, effective from 1 January 1995 as amended (BITA Sec. 12(2)). This provides that taxable profits are to be increased by the difference between the transfer price and

the market value of goods and services sold at less than market value to affiliated foreign enterprises, enterprises exempt from business income tax or those enjoying reliefs under the Foreign Investment Act etc. It also provides that taxable profits are to be increased by the difference between the transfer price and the market value of goods and services purchased at more than market value from such enterprises.

These provisions are illustrated and commented on in Articles 62 to 64 of the Business Income Tax Act (Application) Regulations (Regulations No. 319 of 19 September 2000, effective from the same date). These Regulations provide that market prices or transaction values can be ascertained by application of any comparable uncontrolled price, resale price or cost-plus methods or by comparison with external prices. Reference may also be made to the Transaction Valuation Commission. Illustrations of typical international group structures that may give rise to transfer pricing adjustments are provided in Article 33 of the Methodical Guidelines for the Computation of Business Income Tax, issued by the State Revenue Service (SRS) on 8 March 2001, effective for accounting periods from 1 January 2000.

Transfer pricing documentation requirements

No formal requirements for documentation relating to transfer-pricing issues were introduced in Latvia to date.

3.16 Lithuania

The Law on Tax on Profit of the Republic of Lithuania (Law of 20 December 2001, No.IX-675, published in the official gazette Valstybes Zinios No. 110 (in English - "State News"), LPT) is effective from 1 January 2002. Article 40 of LPT has introduced provisions on transfer pricing with effect from 1 January 2003 defining the general requirement that transfers between related parties are to be made on arm's length.

According to our information, a regulation is currently being drafted to deal with the advisable transfer pricing methods. Detailed information is not yet available.

Transfer pricing documentation requirements

Specific transfer pricing documentation requirements do not apply in Lithuania to date.

3.17 Luxembourg

The provisions on transfer pricing were drafted with respect to the OECD Guidelines, while the Commentary to the OECD Model Convention and the EC Arbitration Convention are followed by Luxembourg.

The Luxembourg income tax law (Loi du 4 décembre 1967 concernant l'impôt sur le revenue issued on 4 December 1967 and effective from 1 January 1969 as amended, LIR) only contains general transfer pricing provisions. According to Article 56 LIR, the relevant tax authorities may adjust the taxable base of the taxpayer when profits are transferred to a foreign tax resident, legal or natural person, in a special economic relationship (direct or indirect) with the taxpayer. In addition, Article 164 (3) LIR defines hidden profit distributions, which are generally anticipated in situations where a shareholder, a member of an association or any other party involved,

directly or indirectly receives benefits from the relevant company or association which would not be granted to him if the special relationship did not exist.

Transfer pricing documentation requirements

Transfer pricing documentation requirements were not formalized in Luxembourg to date.

3.18 Malta

The Maltese tax law does not have any express provisions governing transfer pricing matters. In general terms, taxpayers are requested to maintain financial records for 9 years and to provide information and documentation related to the assessment of income taxes (Article 19 of the Income Tax Management Act, Chapter 372 of the Laws of Malta, enacted by Act XVIII on 23 September 1994 as amended). Consequently, such information and documents must be made available to the authorities and may also be utilized by them with regard to transfer pricing matters. There are, however, no specific obligations with respect to documentation which must be kept or produced by the taxpayer to justify or explain its transfer pricing policy.

Transfer pricing documentation requirements

Transfer pricing documentation requirements were not formalized in Malta to date.

3.19 The Netherlands

In general, with respect to transfer pricing issues, the Netherlands adopted the OECD Guidelines. Article 9, paragraphs 1 and 2 of the OECD Model Convention form part of the Netherlands standard tax treaty policy. The 1999 extension Protocol to the EC Arbitration Convention was ratified by the Netherlands in 2000. The Dutch State Secretary of Finance stated to Parliament, that the Netherlands are prepared to continue to apply the Convention, pending its ratification by all Member States, on a reciprocal basis with like minded Member States.

Until the year 2001 it was generally assumed that the arm's length principle was inherent in the general definition of profits from an enterprise, which are defined as "The aggregate amount of benefits derived, under whatever name and in whatever form, from carrying on an enterprise" in Article 3.8 Income Tax Act 2001 (Law of 11 May 2000 effective from 1 January 2001 as amended, Official Gazette 215, lastly amended by Law of 12 December 2002, Official Gazette 617, hereinafter: ITA 2001). This concept applies also to the Companies Tax Act 1969 (of 8 October 1969 effective from 1 January 1970 as amended, Official Gazette 445, latest amended by Act of 11 December 2001, hereinafter: CTA 1969).

Over a number of years, however, the Ministry of Finance considered that the development of case law decided by the Dutch Courts dealing with transactions between domestic related enterprises and between companies and their shareholders tended to limit the significance and the effectiveness of the arm's length principle in cross border situations. On 20 June 2000 the Court of Appeal at 's-Hertogenbosch decided against the tax administration in a cross border arm's length profit adjustment case in wordings that raised doubts as to the applicability of the arm's length principle in the Netherlands. The State Secretary announced soon afterwards that he was going to amend the CTA to incorporate explicitly the arm's length principle. This was done by inserting an Article 8b in the CTA 1969, with effect from 1 January 2002. In addition, the State Secretary appealed against the Court's decision to the Dutch supreme court (Hoge Raad, hereinafter HR).

The HR decided on the appeal on 28 June 2002, no. 36446, published as BNB 2002/343c against the State Secretary. The taxpayer was a Dutch company, forming part of a multinational enterprise headquartered in Japan, which was the distributor in the Netherlands of cars and spare parts and of several other lines of products of the group. The distribution of cars gave rise to losses over a number of years, whereas the other lines produced profits. The HR stated that a Dutch BV selling automobiles purchased from its Japanese parent company without any profit was not offending the arm's length principle, since the profit made on other sales was sufficient to substitute the part of income which would have been generated on the sales of cars on the arm's length prices. The BV was not obliged to support the applied transfer price with relevant documentation. According to the HR, if internal prices were not determined at arm's length, the tax inspector had to prove that this negatively affected the taxpayer's tax base compared to a situation where market prices would have been used in the relevant transactions.

Apart from the doubts raised by the Court of 's-Hertogenbosch's decision, the EU Code of Conduct discussion had also questioned the Dutch application of the arm's length principle in their ruling practice, including rulings on transfer pricing. The insertion of Article 8b was meant to remedy both problems.

The newly enacted Article 8b(3) of CTA not only expressly incorporated the arm's length principle, but it also introduced specific documentation requirements. Under this provision:

- associated companies have to include information in their accounts which indicate how the reported transfer prices have been established; and

- which allows (the tax authorities) to determine whether the conditions applying between the related parties are those that would have been agreed between independent parties.

The newly implemented rules only apply to corporate taxpayers. For individual entrepreneurs only the Article 3.8 of ITA applies (i.e. the arm's length principle).

To give taxpayers and tax inspectors some guidance, the State Secretary published the Netherlands interpretation of the OECD Guidelines on 30 March 2001 (no. IFZ 2001/295). The following should be mentioned in this respect:

- for the treatment of fiscal and non fiscal subsidies and deemed non-deductible costs, the State Secretary confirmed the same treatment as for the activities concerned. If, for instance, the cost-plus method applies, the taxpayer is allowed to deduct the subsidy from the cost-plus base. As far as deemed non-deductible costs are concerned, they remain in the cost-plus base;

- for advance agreements (rulings) concerning international transactions which were negotiated before 1 April 2001, a transitional provision applies until 31 December 2005.

The State Secretary shares the objective of reducing the administrative burden for enterprises. According to the State Secretary, the documentation requirements of Article 8b do not represent a substantial increase in the administrative burden of enterprises, as no specific form of documentation is prescribed and it is incumbent on the taxpayer anyway to have documentation to uphold his position as laid down in the tax return. Documentation kept in accordance with other countries' domestic law will in principle be accepted in the Netherlands if it meets the documentation requirements as described in the OECD guidelines. There is, however, no general obligation to perform a benchmark study and the absence of a benchmark study does not lead to the shifting of the burden of proof to the taxpayer. In addition, in order to agree an APA,

increasing the burden on the taxpayer (including undertaking a benchmark study) is necessary, as the Netherlands wishes to comply with the OECD Guidelines.

3.19.1 *Date of introduction/latest modification of TP documentation requirements*

The formal transfer pricing documentation requirements were in general inserted into the CTA in 2001, effective from 1 January 2002. Since then no amendments have made. Specific transfer pricing documentation requirements for APA procedures were introduced on 1 April 2001 by the Decree No. IFZ2001/292 on advance pricing agreements, issued on 30 March 2001 which amended the Decree of 19 October 1994 on APAs (IFZ94/855).

A commentary on the OECD Guidelines was published by the State Secretary under no. IFZ 2001/295M on 30 March 2001.

3.19.2 *Legal nature of TP documentation requirements*

The transfer pricing documentation requirements are regulated by the law and decrees issued by the State Secretary.

3.19.3 *Nature and type of different TP documents required*

The annual tax return form requires taxpayers to list transactions with associated companies. This information may give rise to questions from the tax inspector in the course of a tax audit. In addition, according to Article 8b of CTA, the taxpayer must provide the tax auditor with the following information:

- information concerning the basis of the reported transfer prices;
- information enabling (the tax authorities) to determine whether the conditions applying between the related parties are those that would have been agreed between independent parties.

There are no specific requirements with respect to the form of their presentation. Taxpayers are free to decide in which way they provide the tax inspector with the relevant information. However, if they fail to provide the required information, the tax inspector may reverse the burden of proof and use any information available to him to adjust the tax base.

The list of transactions with related parties must be attached to the annual return.

3.19.4 *The moment at which TP documents need to be prepared*

Article 8b of CTA 1969 (implementing transfer pricing regulation) does not set specific time limits for the preparation of documentation. During the Parliamentary debate, however, it was indicated that normally it could be expected that documentation would be gathered at the time of the relevant transaction(s), but this was not explicitly laid down in the law. When asked for information not readily available, the taxpayer would always be granted a reasonable extension of the period for providing the information of one up to three months.

The list of transactions with related parties must be annexed to the annual return. In general the tax return has to be submitted within five months after the close of the tax year. The tax inspector may extend the period for submission upon the taxpayer's request.

3.19.5 *Time limit for submission of TP documents to the tax authorities*

There is no general obligation to submit documentation at specific moments, for instance when filing the tax return.

If a taxpayer has to submit information on request, the tax inspector will grant him a reasonable time to answer the questions raised. If, however, the questions were not answered or the reply was not sufficient after a reminder, the tax inspector may adjust the tax return and reverse the burden of proof. According to the Act containing general provisions of administrative law (*Algemene wet bestuursrecht*, AWB), the taxpayer may object to such adjustment within six weeks. If the requested information is not provided in the letter of objection, the tax inspector will give the taxpayer a reasonable time for rectification. If the information is still not provided for then, the tax inspector will declare the letter of objection inadmissible and reverse the burden of proof.

As far as APA's are concerned, the tax inspector usually will give the taxpayer a reasonable time to provide him with the requested information. However if the questions are not answered, the tax inspector will reject the APA-request and the taxpayer has to start all over again. If the tax inspector does not allow the request, he makes clear that he does not agree with the arguments of the taxpayer. Then, it is of no use to ask for an APA again.

3.19.6 *Specific TP documentation requirements*

- ***Small and medium sized enterprises (SMEs)***

There are no special documentation requirements for SMEs.

- ***Cost contribution agreements***

There are no specific documentation requirements for cost contribution agreements (CCAs'). The Dutch tax authorities take the position, however, that normally intra group transactions must be charged with a profit mark-up. If no mark-up is included, all information mentioned in Chapter F, paragraph 8.42, of the OECD Guidelines must be provided:

- a list of participants;
- a list of other involved parties;
- the scale of the CCA activities and projects;
- the duration of the project;
- the way of determination of the relative involvement of the participants;
- determination of each members attribution to the CCA (in the past and the future);

- the expected allocation of responsibilities to the members;
- which accession or withdrawal procedures have been implemented;
- all CCA conditions on settlement and adjustments of the conditions if economical changes occur.

- ***Intra group services***

No specific requirements apply for intra group services.

- ***Advance pricing agreements (APAs)***

As far as documentation requirements for APAs are concerned, according to the APA decree, a request for an APA must contain the following information:

(a) information on the transactions, products, business or arrangements that will be covered by the request (including, if applicable, a brief explanation of why not all of the transactions, products, business or arrangements of the taxpayer(s) involved in the request have been included);

(b) information about the enterprises and permanent establishments involved in these transactions or arrangements;

(c) the names of the other state or states to which the request relates;

(d) information regarding the worldwide organizational structure (including information on the beneficial owners of the applicant's capital), history, financial data, products and functions, including the assets (tangible and intangible) and risks of any of the associated enterprises involved;

(e) a description of the proposed transfer pricing methodology, including a comparability analysis which includes comparable data from unrelated market parties and possible adjustments;

(f) the assumptions underpinning the request and a discussion of the effect of changes in those assumptions or other events, such as unexpected results, which might affect the continuing validity of the request;

(g) the financial years to be covered; and

(h) a general description of market conditions, for example, industry trends and the competitive environment.

APAs will be published unless they conform to previously published APAs. The relevant APAs will be published either on an anonymous basis or, if it is not possible to conceal the applicant's identity even if the name is not revealed and where the revelation of the applicant's identity may constitute a breach of the duty of confidentiality laid down in Article 67 of the GTA , in the form of a summary. In the latter case, the summary will contain all of the elements that are material to the APA as concluded.

3.19.7 *Language for the TP documentation*

In general the documentation has to be presented in Dutch. However, according to the Article 6.5 of AWB, a notice of objection may be submitted in a foreign language, but has to be translated by or on account of the taxpayer if necessary for a proper treatment of the case. In practice, documents in English are generally accepted.

3.19.8 *Penalties for late submission/omission of TP documentation*

According to the GTA and the Administrative Penalty Code (APC), there are two different penalties: the omission penalty or the offence penalty.

The omission penalty applies if the tax return is not submitted in time. In addition, an offence penalty may apply, but only if the taxpayer deliberately or grossly negligently violated the law. The penalties do not apply simultaneously.

The following different omission penalties apply:

Number of omissions	**≤ zero tax assessment penalty (in EUR)**	**> zero tax assessment penalty (in EUR)**
first	22	113
second	68	340
third	113	567
fourth	158	794
fifth or more	226	1.134

The following different offence penalties apply:

Number of offences	**Deliberately**	**Gross negligence**
first	50% of the undisclosed tax	25% of the undisclosed tax
second or more	not more than 100% of the undisclosed tax	not more than 50% of the undisclosed tax

If the penalty is disproportionate to the offence or the facts on which the penalty is based, are beyond the direct influence of the taxpayer, the tax inspector may reduce the penalty. However, the authorities are not allowed to burden the taxpayer more than once for the same offence.

According to paragraph 9 APC, Art. 6 of the European Convention on Human Rights applies to both omission penalties and offence penalties (ref.: European Court-case of 23 July 2002, no. 36985/97, Västerberga Tax AB-Sweden). Therefore, the tax inspector and the Court are allowed to reduce the penalty in general. For policy reasons, the tax inspector has to inform the local internal penalty coordinator before reducing the penalty. The coordinator will consult other coordinators and the Ministry of Finance. Eventually, the State Secretary will publish the figures of the actual lowered penalties.

There are no specific penalties for omissions with respect to the transfer pricing documentation.

3.20 **Poland**

Polish transfer pricing legislation generally follows the OECD Guidelines. The legislation specifically defines transfer pricing documentation requirements for corporate and individual taxpayers.

Transfer pricing documentation requirements

3.20.1 *Date of introduction/latest modification of TP documentation requirements*

The transfer pricing documentation requirements were introduced by Law of 9 June 2000 (amending the Corporate Income Tax Law of 15 February 1992) and Law of 9 November 2000 (amending the Individual Income Tax Law of 26 July 1991), both effective from 1 January 2001. The rules were not amended since then.

3.20.2 *Legal nature of TP documentation requirements*

TP documentation requirements are provided for by Article 9a of the Corporate Income Tax Law and Article 25a of the Individual Income Tax Law. Under these provisions, taxpayers are required to prepare documentation on transactions with associated enterprises and transactions with enterprises resident in countries with harmful tax practices.

The reporting requirement applies to transactions the total value of which exceeds in a tax year:

- EUR 100,000, provided that the value does not exceed 20% of the taxpayer share capital;
- EUR 30,000 for transactions involving intangible property and services; and
- EUR 50,000 in other cases.

3.20.3 *Nature and type of different TP documents required*

The Law does not prescribe the form of transfer pricing documents. The Law provides merely that the documentation must contain information on the following aspects:

- the functions performed by the enterprises that are parties to the transaction, including assets used and risk assumed;
- expected costs related to the transaction as well as terms and form of payment;

- method of profit calculation and transaction price determination;
- business strategy as well as other factors that influence the setting of prices; and
- expected benefits, with respect to transactions involving intangible property and services.

3.20.4 *The moment at which TP documents need to be prepared*

The law does not set the moment when the documentation must be prepared, but it should be available upon request of the tax authorities within 7 days.

3.20.5 *Time limit for submission of TP documents to the tax authorities*

TP documentation must be submitted upon the request of the tax administration, within 7 days from the date of receiving the request.

3.20.6 *Specific TP documentation requirements*

- ***Small and medium sized enterprises (SMEs)***

No specific transfer pricing documentation requirements apply.

- ***Cost contribution agreements***

No specific transfer pricing documentation requirements apply.

- ***Intra group services***

No specific transfer pricing documentation requirements apply.

- ***Advance pricing agreements (APAs)***

There are no specific transfer pricing documentation requirements. Advance pricing agreements are not possible under Polish law.

3.20.7 *Language for the TP documentation*

The documentation must be prepared in Polish.

3.20.8 *Penalties for late submission/omission of TP documentation*

The Law provides for penalties with respect to taxpayers that do not comply with the documentation requirement. If, upon application of transfer pricing rules, the income of a taxpayer determined by the tax authorities is higher than the income reported and the taxpayer has not submitted the required documentation, income tax is levied at the rate of 50% (instead of the corporate income tax rate of 27%) on the difference between the reported income and the income determined by the tax authorities.

3.21 **Portugal**

In general, the transfer pricing legislation adopted by Portugal was drafted based on the OECD Guidelines and the relevant articles of the OECD Model Convention are followed in concluding double taxation avoidance treaties.

3.21.1 ***Date of introduction/latest modification of TP documentation requirements***

In accordance with Article 7(1) of Law 30-G/2000 of 29 December 2000 (through which the income tax reform was implemented), the new transfer pricing rules and documentation requirements, as set forth in Article 58 of Portugal's Corporate Income Tax Code (CIRC) apply to tax periods beginning on or after 1 January 2002.

These rules were supplemented in 2001, with the issuance of the Ministerial Order (*Portaria*) 1446-C/2001, published in the Official Gazette *(Diário da República, Series I-B, Nº 294)* of 21 December 2001.

Since then, no amendments or additional administrative instructions have been issued.

3.21.2 ***Legal nature of TP documentation requirements***

The new TP rules and basic documentation requirements are set out in Article 58 CIRC. Article 58(13) of CIRC establishes that "*... the type, nature and contents of the documentation referred to in Article 58(6) CIRC are (to be) regulated by a ministerial order (Portaria) of the Minister of Finance*".

Hence, the mandate of Article 58(13) was implemented by the Minister of Finance through the Ministerial Order 1446-C/2001 mentioned above which remains to date the sole TP Regulation in Portugal (hereinafter the "TP Regulations"). The TP Regulations focus on the TP documentation requirements in Articles 13 through 16 of its Chapter IV (dealing with taxpayers' ancillary obligations).

3.21.3 ***Nature and type of different TP documents required***

All Portuguese-based companies are under statutory obligation to keep available and in good order a general tax documentation file (*"Dossier Fiscal"*) for the relevant tax year during a 10-year period. This file must be centralized in a Portuguese-situs establishment or installation and, in the case of non-resident taxpayers without a permanent establishment in Portugal, at the local tax representative's address. The "*Dossier Fiscal*", in the case of companies with a net turnover in the previous year, as shown on the balance sheet, of EUR 3 million or more, must also include the TP-related documentation and information described in (a) and (b) below.

Moreover, special-purpose companies listed in Article 15(a) of Decree-Law 408/93 of 14 December 1993 as amended, and companies covered by the Portuguese group taxation regime of Article 63 CIRC, are obliged to submit the *Dossier Fiscal* – and not merely to keep it available and in good order – to the Portuguese tax authorities. (The list of special-purpose companies includes more than 570 Portuguese and foreign business operations in the fields of, inter alia, banking, financing, stock broking, insurance and reinsurance, leasing, financial leasing, factoring, investment, venture capital, telecommunications, building and car manufacturing).

A qualifying group, for group taxation purposes, consists of a parent company and one or several 90% or more directly or indirectly held subsidiaries, provided that such holding (1) confers on the parent more than 50% of the voting rights, and (2) is maintained by the parent (except in the case of a newly formed subsidiary) for more than 1 year prior to the application of the group taxation regime. Both the parent and its controlled subsidiaries must be resident SAs, Ldas or partnerships limited by shares and be subject to the standard IRC rate of 30%. They may not have been inactive for more than 1 year and may not have had losses in the 3 years prior to the application of the group taxation regime, except if the holding has existed for more than 2 years.

The *Dossier Fiscal* must contain all the relevant information (see (a) below) and supporting documentation (see (b) below) relating to the taxpayer's transfer pricing policy, and retain data to substantiate:

- the market parity of the terms and conditions agreed, accepted and observed in transactions carried out with related entities; and

- the selection and application of the method or methods most appropriate for the determination of transfer prices that provide the closest match with the terms and conditions observed by independent entities, ensuring the highest possible degree of comparability of transactions or series of transactions carried out with others substantially identical but carried out by independent entities under normal market conditions. SMEs (i.e. any corporate taxpayer whose net turnover in the previous year, as shown on the balance sheet) was below EUR 3 million) are not required to comply with this requirement**.**

(a) Relevant information

Under Article 14 TP Regulations, the term *relevant information* means that companies subject to the TP legislation, as described above, must obtain or produce and retain data regarding especially the following aspects:

- a description of any special relations that exist with the entities with which it is involved in any commercial, financial or other transactions; a history of the corporate link from which the special relationship originated including, where appropriate, the subordination agreement, parity group agreement, or any other with the same purpose, as well as data demonstrating the status of dependency as defined in Article 58(4)CIRC (i.e., broadly, that one party can condition the adoption of managerial decisions of the other on the basis of events or circumstances which do not belong to the business or professional relation itself);

- a description of the activities exercised by the taxpayer and by those related parties with which it carries out transactions and, relative to each of these, a detailed list, broken down by type of transaction and amounts recorded by the taxpayer over the past three years or less and where appropriate, the financial statements of those related parties;

- a detailed description of the goods, rights or services involved in controlled transactions and of the terms and conditions agreed when such information is not revealed in the respective contracts;

- a description of the functions performed, the assets employed and the risks assumed by the taxpayer and by the related parties involved in the controlled transactions;

- expert studies of essential areas of the business, specifically in investment, financing, research and development, marketing, restructuring and reorganization of activities, as well as forecasts and budgets relative to global business, and business by division or product;

- the guidelines regarding to the firm's transfer pricing policy, regardless of the form or heading assigned to them, with instructions specifically on methodologies to be applied, procedures for gathering information (particularly on internal and external comparables), analysis of the comparability of transactions, cost accounting policies and profit margins applied;

- the contracts and other legal arrangements entered into with both related and independent entities, with amendments and with records of compliance. The following data must also be supplied when not shown expressly in existing legal instruments or whenever there is any deviation in performance from the conditions agreed in those arrangements:

  - definition of the scope of involvement of the parties;

  - terms of delivery of the products and ancillary

  - activities involved, specifically after-sale services, technical assistance and sureties;

  - the price and, if necessary, the relevant method of calculation; if subject to assumptions, an indication of these assumptions and the circumstances in which they are subject to revision; an exposition of the respective rules and a detailed explanation of multi-year price adjustments, pointing out, specially, the quantitative effects arising from factors associated with the business cycle;

  - duration agreed upon or foreseen, and accepted termination provisions; and

  - penalties and their respective methods of

  - calculation in the event of delay in performance or non-compliance in whatever way, including penalty interest in particular;

- a description of the method or methods applied to determine arm's length prices relative to each transaction and an indication of the justifications for selecting the method considered to be the most appropriate;

- information on the comparables used, showing, when an external market research company was consulted: the grounds for selection where applicable, the research records, together with a sensitivity analysis and statistical confirmation, and, if an internal data base was used, the respective records;

- details of estimates of the extent of comparability between controlled transactions and uncontrolled transactions and between the companies involved in them, including functional and financial analyses; and eventual adjustments made to eliminate existing differences;

- the business strategies and policies, particularly as regarding risk, which may have a bearing on the determination of transfer pricing or the allocation of profits or losses of the transactions; and

- any other relevant information, data or documentation for determining an arm's length price, the comparability of transactions or the adjustments made.

[Note: As pointed out in the Explanatory Memorandum to the TP Regulations, "the list of relevant information and documentation set out in the Ministerial Order is by no means exhaustive; specifically, the tax administration expects the taxpayer to have and keep available for review any data which he would reasonably be expected to have in order to determine and substantiate his transfer pricing practice, without being, however, forced to incur excessive compliance costs". Thus, the nature and form of such data will depend on the specific facts and circumstances of the taxpayer's business and associated financial practices**]**.

In addition, Article 58(7) CIRC requires all Portuguese corporate taxpayers to disclose, on a yearly basis, whether they have entered into transactions with related parties and file with the tax authorities the following information in their annual accounting and tax information statement:

- identity of the related parties;

- amount transacted with each related party; and

- confirmation that proper documentation in support of transfer prices adopted was timely prepared and is kept available.

(b) Supporting documentation

Under Article 15 of the TP Regulations, the term *supporting documentation* means that corporate taxpayers are required to substantiate the relevant information requirements mentioned above by means of documental evidence, such as:

- official publications, reports, research and databases prepared by public or private entities;

- reports on market research carried out by well known recognized domestic or foreign institutions;

- price lists or quotations published by stock and commodity markets;

- contracts or other legal instruments entered into with both related and independent entities, documentation preparatory to those contracts or other legal instruments and any amendments or supplements to the same;

- market studies, letters or other correspondence referring to the terms and conditions agreed between the taxpayer and associated enterprises; and

- other documents pertaining to transactions carried out by the taxpayer, as required by the applicable tax and commercial regulations.

With respect to continuous transactions that started in prior tax years, taxpayers must update the information referred to in the preceding paragraph if the facts and circumstances associated with those transactions have been substantially changed.

3.21.4 *The moment at which TP documents need to be prepared*

Subject to the provisions of Article 13 of the TP Regulations, large companies (i.e. those with a net turnover in the previous year, as shown on the balance sheet, of EUR 3 million or more) must have prepared the relevant transfer pricing documentation (in order to be submitted with the *Dossier Fiscal*) by the last working day of the six-month period following the end of the tax year (i.e., generally, by the last working day of June in the following year).

SMEs do not need to prepare and maintain the transfer pricing documentation file.

3.21.5 *Submission of TP documents to the tax authorities*

Listed special-purpose companies and companies covered by the Portuguese group taxation regime are required to submit the *Dossier Fiscal* – and not merely to keep it available and in good order – to the Portuguese tax authorities. This submission should occur, contemporaneously with the deadline for filing the annual accounting and tax information statement which is, according to Article 113(2) and (3) CIRC, the last working day of the six-month period following the tax year end (i.e., generally, the last working day of June in the following year). Note that, in addition to the annual accounting and tax information statement, Article 112(1) CIRC requires that all corporate taxpayers also file their annual tax return, generally by the last working day of May in the following year.

3.21.6 *Specific TP documentation requirements*

- ***Small and medium sized enterprises (SMEs)***

Under Article 13(3) of the TP Regulations, SMEs are not required to comply with the obligation to prepare and maintain the TP Documentation File.

- ***Cost contribution agreements***

The rules regarding the documentation requirements applicable to cost contribution agreements are set out in Article 16(1) TP Regulations and they closely follow the OECD guidelines. Article16(1) requires that corporate taxpayers have, inter alia, the following documentation in relation to cost-sharing agreements:

- a description of the participants and other related parties that will be involved in the activity covered by the agreement or that are expected to benefit from or use the results of that activity.
- the nature and type of activities carried out within the scope of the agreement;
- identification and basis on which each participant's proportionate share in the expected advantage or benefits are determined;
- the accounting procedures and methods applied to allocate costs, including the calculations to be made to determine each participant's contribution;
- assumptions that are relevant in forecasting the expected benefits, the frequency of review of the expected benefits and the forecast of the adjustments arising from changes in the operation of the arrangement or in other facts;

- a description of the method applied to make adjustments to the participants' contributions following changes in the basis of the arrangement or any other substantial changes subsequently introduced thereto;

- the expected duration of the arrangement;

- an anticipated allocation of responsibilities and tasks associated with the activity between participants and other enterprises;

- the procedures for and the consequences of a participant entering or withdrawing from the agreement and the termination of the agreement; and

- the rules governing compensation payments.

- ***Intra group services***

The transfer pricing rules on intra-group service agreements are set out in Article 11 TP Regulations and they closely follow the OECD guidelines in that a profit margin should be applied on the charge for the services rendered to the group. There are no other domestic transfer pricing rules for service companies.

The rules regarding the documentation requirements applicable to intra-group service agreements are set forth in Article 16(2) TP Regulations. Under Article 16(2), the documentation of intra-group service must include the following data:

- a copy of the agreement;

- a description of the services covered by the agreement;

- identification of the recipients of the services;

- a description of the costs of the services and the criteria used in their allocation.

- ***Advance pricing agreements (APAs)***

At present, there are no APAs under Portuguese tax law. However, in the medium term, the Portuguese tax system is expected to be in the position to adopt the OECD's recommendations regarding APAs.

3.21.7 *Language for the TP documentation*

As a rule, the supporting documentation relating to TP relevant information must be in the Portuguese language. To this end, Article 15(3) TP Regulations establishes that the DGCI (General Directorate of Taxes) may require that documents in foreign languages be translated into Portuguese beforehand; the translation requirement may be, however, dispensed of on request, if the contents of those documents are fully understandable in their original version.

3.21.8 *Penalties for late submission/omission of TP documentation*

No specific penalties are provided for TP Regulations' infringements. The Explanatory Memorandum to the TP Regulations foresees that the transfer pricing rules will be extended by the publication of specific legislation on penalties for non-compliance with the documentation obligations set forth in this Decree, namely the ancillary requirement to maintain a tax documentation file.

Such specific legislation has not, however, been published or even prepared as yet. Therefore, the penalties for administrative infractions established by General Regime for Tax Infringements (RGIT, as implemented by Law 15/2001 of 5 June 2001) will also apply to late submission/omission of the documentation required under the TP rules.

To this end, the RGIT classifies tax infringements as either administrative infractions (*contra-ordenaçôes*) or criminal offences (*crimes*).

Administrative infractions are divided into:

- unimportant infractions, i.e. those that attract a maximum fine of up to EUR 3,750; and
- serious infractions, i.e. those that either attract a fine exceeding EUR 3,750 or are otherwise classified in the law as serious.

In general, administrative infractions by companies attract a fine of up to EUR 30,000 in the case of negligence and EUR 110,000 in the case of deceit. Serious administrative infractions attract additional sanctions. These include the suspension, where appropriate for a maximum of 2 years, of tax and customs benefits, disqualification from receiving public subsidies, the confiscation of property, the closure of the business, the suspension of administrative licences and the publication of the administrative decision imposing the penalty in two daily newspapers at the expense of the infractor. The list below contains illustrative examples of administrative infractions by companies and applicable fines under Arts. 113 to 127 RGIT (which also apply to late submission/omission of the documentation required under the TP rules):

- the refusal (not constituting a criminal offence) to surrender, show or present accounting records and relevant tax documentation: up to EUR 50,000;
- no or the late filing of periodic returns and other tax assessment-related statements and no or the late filing or provision of supporting documents or any required information or clarification: up to EUR 2,500;
- omissions or inaccuracies (not constituting a criminal offence or serious infraction) in tax returns or supporting documents, bookkeeping, accounting records or other relevant tax documentation required to be maintained, filed or shown: (i) involving a tax assessment, up to EUR 15,000; and (ii) otherwise, up to EUR 7,500;
- not maintaining prescribed accounting records or related books, registers and documents: up to EUR 15,000; and
- keeping irregular accounting records or the late recording of transactions in prescribed accounting records (if not penalized as a criminal offence or serious administrative infraction): up to EUR 1,750.

3.22 **Romania**

The Romanian Ministry of Finance considers the OECD Guidelines to be in general authoritative on the application of the arm's length principle and the interpretation of Article 9 of the OECD Model Convention, however acknowledging that the OECD Guidelines are not formally binding.

The basic rules governing taxation of business profits in Romania are laid down in the Act on Profit Tax of 6 June 2002 (Law 414/2002, APT), replacing the former Corporate Tax Act (issued in September 1994 and in effect from 1 January 1995) with effect from 1 July 2002. According to Article 27 (1) of the APT, the tax authorities are allowed to increase the taxable profit of the taxpayer if the arm's length principle was not correctly applied. In addition, under Article 19 of the Tax Evasion Act, should the taxpayer fail to submit complete and accurate evidence of its revenues and expenses, a deemed profit may be imposed and taxed accordingly.

The arm's length principle was introduced by the Article 27 (2) of the APT, under which the usual market value shall be used for tax purposes in the case of transactions between associated persons. Further guidelines or regulations have not been issued on the point of how such estimation shall be made. However, the tax administration and assessment boards are expected to refer to the OECD Guidelines.

Companies are in general not required to automatically disclose in any way related party transactions, nor is an information-reporting requirement imposed on taxpayers through the financial statements or tax returns. The tax authorities are, however, not required to prove that there was the intention to avoid Romanian tax or that the income was actually reduced due to a special relationship, in order to make a transfer pricing adjustment affecting the domestic company whose income is supposedly understated. Adjustments can be made whenever it is suspected that a taxpayer's income has been decreased as a result of non-arm's-length prices between the taxpayer and an associated enterprise. The law places the burden of proof on the taxpayer and unless it can prove otherwise, the presumption that a reduction of the income took place, eventually as a result of a deemed community of interest, will be considered. In order to revert this presumption, the taxpayer must prove that the deemed community of interest does not exist or that the supposed reduction in income was not caused by the special relationship. The same rules apply irrespective of whether the related parties are also residents of Romania or not.

According to Article 27 (6) of APT, the Government was supposed to issue a Government Decision specifying the methods and procedures set out in the new profit tax law. No details were available to us to date.

Transfer pricing documentation requirements

No formal transfer pricing documentation requirements were introduced in Romania to date.

3.23 **Slovak Republic**

The Slovak tax legislation contains transfer pricing provisions in general based on the OECD Guidelines and follows the OECD Model Convention in negotiating double taxation avoidance agreements (the Slovak translation of the OECD Guidelines was published by the Ministry of Finance, Chapters I – V in the Financial Bulletin 14/1997 of 23 November 1997, Chapters VI – VIII and the enclosures I and II in the Financial Bulletin 20/1999 of 8 December 1999 and the Enclosure III in the Financial Bulletin 3/2002 of 13 February 2002, not binding).

The general concept of the arm's length principle for transactions between related parties was adopted for all taxpayers, including domestic related parties and individuals. The tax authorities are allowed to adjust the taxable base of foreign related parties (Slovak entity related to a foreign entity) for any difference between the market price and the agreed prices (including prices for granted services, loans and borrowings) in comparable transactions, which lead to an decrease of the taxable base of the Slovak taxpayer (Articles 23 (6) and 23 (7) of the Income Tax Act No. 366/1999 which has replaced the previous Act No. 286/1992 with effect from 1 January 2000, ITA). For loans, the market interest rate was set at 140% of the discount rate of the National Bank valid as at concluding the loan contract. In case of domestic related parties (Slovak-Slovak), the agreed prices must include the costs incurred and an appropriate profit that would be included in prices charged to other entities or individuals (Article 23 (7) of ITA). The difference between the market price and the transfer prices should be noted in the tax return filed for the relevant tax period. In addition, the general rules on cooperation with the tax authorities in case of a tax audit were established under the Tax Administration Act (No. 511/1992 effective from 1 January 1993 as amended).

It should also be noted that the Slovak Republic effectively introduced provisions enabling APAs as of 1 January 2001. Under Slovak law, APAs can be negotiated for determination of the pricing method in the case of cross-border transactions involving a multinational group of companies. Based on the new provisions of the Income Tax Act (Article 23a of ITA), a taxpayer may ask the relevant local tax authority for their approval of a transfer price agreement between a group of companies for a fixed period. In other words, the local tax authority can issue its approval on the transfer price agreement in advance, thus increasing the legal certainty of the taxpayers concerned.

There are no specific procedures for applying for an APA. Therefore, taxpayers should follow the general procedures stipulated by the Tax Administration Act. There is no specified form for the APA request and no specific requirements on the documents to be submitted to the Tax Authorities in this respect. However, the APA submission should include all the information necessary to evaluate the appropriateness of the taxpayer's proposed transfer pricing method. The tax authorities consider all information received in the APA process to be provided as information obtained for tax administration purposes. Therefore, the tax authorities could make use of such information also in the context of a reassessment of the taxpayer with respect to matters that are outside the scope of the APA. The APA and related information (including commercially sensitive and proprietary information) are subject to the normal confidentiality provisions.

The tax authorities verify the correctness of the transfer pricing method usage and price difference calculation under the agreed APA in the course of a tax audit. During the tax audit, the tax authorities may use their own calculations or data they obtain even without the taxpayer's collaboration.

Transfer pricing documentation requirements

Formal transfer pricing requirements do not apply in Slovakia.

3.24 **Slovenia**

Slovenia has implemented general transfer pricing provisions with the Corporate Income Tax Law published in the Official Gazette No. 72/1993 and effective from 1 January 1994.

Transfer pricing documentation requirements

Slovenia does not impose any transfer pricing documentation requirements.

3.25 **Spain**

Spain in general based its transfer pricing legislation on the OECD Guidelines and the OECD Model Convention. It is also understood that although there is some uncertainty with respect to the application of the EC Arbitration Convention, Spain continues its application as long as the other Member State agrees.

With the exception of APAs and certain agreements between related parties mentioned below, the Spanish Law does not contain specific transfer pricing documentation requirements. In this field, however, it is generally considered that the general rules on conservation of supporting documentation (invoices, receipts, contracts, etc.) are applicable.

3.25.1 ***Date of introduction/latest modification of TP documentation requirements***

There are no specific transfer pricing documentation requirements, with the exception of documentation requirements introduced with APAs (Articles 18 and 19 of the Regulations to the Corporate Income Tax Law, Royal Decree 537/1997, of 14 April 1997, applicable as of 1 January 1996).

It should also be noted that in cases of intra-group services or cost-sharing for R&D agreements, the Corporate Income Tax Law makes the deductibility of payments dependable upon the existence of a written contract signed beforehand and which establishes the rules for attribution of expenses or use of the intangibles, based on rational criteria (Articles 16.4 and 16.5 of the Corporate Income Tax Law No. 43/1995 issued 27 December 1995 effective 1 January 1996). Thus, contracts and receipts proving the transactions between related parties should be kept, at least until the end of the statute of limitations period (4 years), though Commercial Law establishes a longer period (6 years).

3.25.2 ***Legal nature of TP documentation requirements***

TP documentation requirements are governed by Articles 16.4 and 16.5 of the Corporate Income Tax Law (No. 43/1995 issued 27 December 1995 effective 1 January 1996) and Articles 18 and 19 of Regulations to the Corporate Income Tax Law (Royal Decree 537/1997, of 14 April 1997, applicable as of 1 January 1996).

3.25.3 ***Nature and type of TP documentation requirements***

General TP documentation requirements are not applicable in Spain. However, specific rules apply with respect to APAs, intra-group services and cost sharing agreements.

3.25.4 ***The moment at which TP documents need to be prepared***

No specific rules apply in this respect. In general, relevant information must be made available to the tax authorities upon their request.

3.25.5 *Time limit for submission for TP documents to the tax authorities*

No specific rules were established for the submission of transfer pricing documentation.

If the tax authorities request any document, related or not to transfer pricing, the usual term to submit it is 10 days, although an extension can be requested.

3.25.6 *Specific documentation requirements*

- ***Small and medium sized enterprises (SMEs)***

No specific rules were introduced for SMEs.

- ***Cost contribution agreements and intra group services***

In cases of intra-group services or cost-sharing for R&D agreements, the Corporate Income Tax Law makes deductibility of payments dependable upon the existence of a written contract signed beforehand which establishes the rules for attribution of expenses or use of the intangibles, based on rational criteria.

- ***Advance pricing agreements (APAs)***

The information requirements depend on the APA phase:

A) Preliminary filing of information:

- Identification of the entities, which will perform the transactions referred to in the proposal;
- Brief description of the transactions referred to in the proposal;
- Brief description of the contents of the proposal that the taxpayer intends to present.

B) Filing of the proposal:

- Description from a technical, legal, economic and financial point of view of the operations referred in the APA;
- Description of the valuation method proposed, pointing out the basic economic circumstances needed for its application (economic premises supporting its application);
- Justification of the valuation method proposed;
- Description of the range of transfer values derived from the application of the proposed method;
- Identification of companies operating in the same markets, as well as the prices applied by competitors and independent parties in comparable situations, to the extent that such prices should be reasonably known by the taxpayer;
- Distribution among the related parties involved of the income resulting from the transaction, where the proposed valuation methodology is applied.

- Existence of agreed APAs (or pending resolution) filed by the taxpayer in other countries.
- Description of other intra-group transactions to which the APA will not take effect.

3.25.7 *Language in which the documentation needs to be presented*

The Law is not conclusive on this point. In practice, however, the tax authorities are reluctant to accept documentation in a foreign language and may request a Spanish translation.

3.25.8 *Penalties for late submission/omission of documentation*

If the documentation has been required by the tax authorities during a tax audit, non-submission could qualify as non-cooperation with the tax inspectors, which is considered to be an offence subject to an administrative penalty. The penalty would be a fine ranging from EUR 300.51 to EUR 6,010.12.

In the case of additional tax assessments, the penalty imposed for unpaid taxes would already include also a penalty for non submission/late submission of transfer pricing documents (the administrative penalty would not be imposed).

3.26 **Sweden**

Under the Swedish Income Tax Act, chapter 14 section 19-20 (*Inkomstskattelagen 1999:1229*, which entered into force 1 January 2000 and has effect from assessment year 2002, i.e. the income year 2001), transactions between a domestic Swedish company and a foreign related company shall be made on the arm's length basis. These are the only provisions in domestic law covering transfer-pricing issues.

Sweden in general follows the OECD-guidelines and transaction based methods are preferred over profit-based methods. A tax surcharge may be imposed of 10% - 40% of the outstanding tax in case of penalty for breach of the arm's length principle under the Tax Assessment Law (*Taxeringslagen*), 1990:324, chapter 5 section 1(1-2) which entered into force 30 June 1990 with effect from the assessment year 1991 (income year 1990). Penalties are the same as would apply in case of breaching other tax provisions.

Transfer pricing documentation requirements

Transfer pricing documentation requirements do not apply in Sweden at the moment. However, it is anticipated that formal transfer pricing documentation requirements will be introduced in the future. The National Tax Board, (*Riksskatteverket, abbr. RSV*) has recently issued a study (*10 January 2003, DNR 5824-02/51*) with respect to documentation requirements on pricing of internal transactions by international groups of companies. Please note that the study is not a formal proposal so the suggested changes may differ substantially from any formal proposal and, in addition, it may take a considerable time before these suggestions are included in a formal proposal put before Parliament. No effective date of the proposed measures is included in the study. The study also states that complete documentation would be necessary with respect to advance pricing agreements. Please note that it is not formally possible to enter into such agreements in Sweden at present but that informal agreements have been concluded in the past.

The report outlines a proposal for guidelines that would be introduced in Sweden with respect to documentation requirements. The guidelines would not be established as a law, but would be issued in the form of guidelines. Non-compliance would be subject to civil penalties. The guidelines would generally follow the OECD Guidelines, although it is still not clear how extensive the documentation requirements would be. The proportionality principle should however apply so that the cost for preparation of the documentation would not be a too heavy burden for the taxpayers.

3.27 **Turkey**

There are no specific transfer pricing provisions under the Turkish Tax Law (Corporate Income Tax Act No. 5422 issued on 3 June 1949, effective from 10 June 1949 as amended, Individual Income Tax Act No. 193 issued on 31 December 1960 and effective from 6 January 1961 as amended, Tax Procedural Code No. 213 issued on 4 January 1961 and effective from 10 January 1961 as amended). Two articles of the Corporate Income Tax Act address transfer pricing issues only in general. Article 16 of the Corporate Income Tax Law provides that an excessive payment (exceeding the market prices) by a resident company to its non-resident shareholder (or its affiliate) may be considered as hidden profit distribution, which does not qualify as a deductible expense for the paying company. With respect to thin capitalization, Article 17 of the Corporate Income Tax Law provides that if the ratio of the amount borrowed from a related party is obviously higher in comparison with similar enterprises and if this debt is, in fact, part of the business capital, the loan is regarded as hidden share capital and interest paid on this loan may not be regarded as a deductible item in calculating taxable corporate profits.

Transfer pricing documentation requirements

There are no specific provisions on transfer pricing documentation requirements.

3.28 **United Kingdom**

It is generally understood that provisions on transfer pricing in the national tax legislation were drafted with respect to the OECD Guidelines, the OECD Model Convention and the EC Arbitration Convention. The transfer prices charged in transactions between associated enterprises have long been adjustable to arm's length prices by the tax authorities for the purpose of arriving at the taxable profit or allowable losses of enterprises subject to UK tax. For accounting periods ending on or after 1 July 1999 (i.e. in most cases, accounting periods beginning after 1 July 1998), the onus is placed on taxpayers to use arm's length prices in their own computations of profit for tax purposes. Arm's length prices are generally understood to be those which might have been expected if the parties to the transaction had been independent parties dealing at arm's length. This manner of dealing is not defined in detail in any UK statute, except, for special purposes, in connection with transactions with or between petroleum companies. It may perhaps, however, be broadly described as the normal commercial manner of dealing, unaffected by any special relationship which might exist between the parties.

Formerly, any adjustment of a transfer price under the rules in force up to 1 July 1999 (Secs. 770 et seq. ICTA 1988 of 9 February 1988) has required a direction by the Board of Inland Revenue itself. In practice, however, the inspector and the taxpayer have usually been able to reach agreement, and the necessity for such a direction has rarely arisen. If a direction was issued and the taxpayer objected, he has had the right to appeal against it to the Special Commissioners and from them to the courts of law.

A direction is not required as respects accounting periods or years of assessment ending on or after 1 July 1999, the starting date for self-assessment by companies. Under Sec. 770 et seq., taxpayers were not required to apply the arm's length principle in making their returns because, at the time a return under these rules was made, the Board would have been very unlikely to have considered a taxpayer's transfer pricing arrangements or to have made a direction for the period covered by the return. Under the self-assessment rules, taxpayers are in general required to make a complete and correct return of their income or profits, and it is compatible with this requirement to require them to use the arm's length principle in making their returns. This, as the Inland Revenue explained in their 1997 consultative document, removes the inequity and potential competitive disadvantage faced under the Sec. 770 rules by taxpayers who apply the arm's length standard and those who do not.

During the informal consultation which preceded the publication of the 1997 consultative document, taxpayers and their representatives argued vigorously in support of continuing central monitoring of transfer pricing enquiries by the International Division of the Inland Revenue's head office on grounds that this protects taxpayers from inappropriate enquiries and ensures consistency in the application of the legislation. The government agreed, and Sec. 110 of the Finance Act 1998 of 30 July 1998 provides, inter alia, that the sanction of the Board of Inland Revenue itself is necessary for the issue of any closure notice or a notice under Sec. 30B(1) of the Taxes Management Act (TMA) 1970 of 12 March 1970, amending a partnership statement, or a discovery assessment, if any of these relate to a determination of an amount falling to be brought into account for tax purposes in respect of any assumption made by para. 1(2) of Schedule 28AA of the ICTA 1988 (provision not at arm's length).

Notice of the Board's approval of any such notice or assessment must be given specifically in relation to the case in question and must apply to the amount determined. The Board's approval is not required, however, if an agreement in writing concerning the amount determined was made between the taxpayer and an officer of the Board and was not repudiated within 30 days from the making of the agreement.

3.28.1 *Date of introduction/latest modification of TP documentation requirements*

The transfer pricing rules introduced by Sec. 108 and Schedule 16 of the Finance Act 1998 of 30 July 1998 deleted Secs. 770-773 from the ICTA 1988 and inserted Schedule 28AA, which contains the rules applicable from 1 July 1999.

A selection of the legislation most relevant in the context of transfer pricing is:

- Sec. 74 of the ICTA 1988 of 9 February 1988 (disallowable expenditure);
- Secs. [770 to 773 superseded from 1 July 1999], 839 and 840 and Schedule 28AA of the ICTA 1988;
- Secs. 85, 86 and 87 of the Finance Act 1999 of 27 July 1999 (Advance Pricing Agreements); and
- Para. 28, Schedule 30 of the Finance Act 2000 of 28 July 2000 (Mutual Agreement Procedure).

3.28.2 *Legal nature of TP documentation requirements*

The Inland Revenue have statutory powers to require the production of information for tax purposes. Certain general powers are contained in Secs. 19A, 20, 20A, 20C and 20D of the TMA 1970. Under these provisions and subject to certain safeguards, the taxpayer may be called upon to produce accounts, books and other information relevant to his own liability and, in relation to this tax, so may any other person. These provisions also empower the Inland Revenue (a) to call for client files of an accountant convicted or penalized for knowingly assisting in the preparation or delivery of incorrect tax-related information, accounts or documents and (b) in certain circumstances, to obtain a warrant to enter and search premises.

Special powers contained in Sec. 115 of the Finance Act 1984 empower the Inland Revenue to require a company that is or has been a participator in an oil field to produce information which appears to the Inland Revenue to be relevant in determining whether a disposal of oil is a sale at arm's length or in ascertaining the market value of any oil.

3.28.3 *Nature and type of different TP documents required*

Under the self-assessment procedure, a company taxpayer is still (as before) required to notify the tax authorities of its existence and liability to tax if the tax authorities have not already called for a return of its income. Whether or not the Inland Revenue call for a return, a company is required to file a return by a certain date, calculating its own tax and paying it by certain fixed dates. The company must, when required, supply the information on which the self-assessment is based.

In support of this, the self-assessment rules (para. 21 of Schedule 18 of the Finance Act 1998) require a company to keep such records as may be needed to enable it to deliver a correct and complete return and to preserve them until any enquiry by the Inland Revenue into the relevant return is complete or the time within which an enquiry may be started has elapsed. The records to be kept and preserved include (a) records of all receipts and expenses in the course of the company's activities, (b) records of the matters in respect of which the receipts and expenses arise, and (c) in the case of a trade involving dealing in goods, records of all sales and purchases made in the course of the trade. The duty to preserve records also includes a duty to preserve all supporting documents.

The law imposes penalties for failure to produce information, documents, etc. and for failure to keep and preserve records.

In any case in which the tax authorities decide that it is necessary to examine the transfer prices of a taxpayer it is likely that they will need to elicit additional information. How much and what kinds of additional information they will call upon the taxpayer to provide will vary with each particular case. The UK authorities employ no standard list of questions. But they have indicated that they will generally be interested in the first place in such matters as who owns or controls the company, what the nature of the trade is, how any group of which the company is a member is organized, what are the functions of particular companies in the group, how far the profitability of particular companies has come up to expectations, etc. It is possible too, depending on the facts and circumstances of the case, that at some stage the relevant Inspector will need to enquire for example into the open market prices of goods or services comparable to those provided by the taxpayer or its associates, into the costs of production of goods acquired by the UK taxpayer or the costs of research and other services which are paid for or utilized by the UK taxpayer, or into the prices at which goods processed by the UK company are subsequently sold by their

purchasers, and so on. But the need, if any, for answers to such detailed questions would usually emerge as discussions proceeded.

3.28.4 *The moment at which TP documents need to be prepared*

Documentations to support transfer pricing policies are expected to be available by the time when the taxpayer submits its corporation tax return. Assessments are made under a self-assessment regime whereby companies must compute and pay the corporation tax due within 9 months of the end of their basis (accounting) period. Corporation tax returns must be filed within 12 months of the end of the basis period covered, or within 3 months of receiving a notice to file a tax return.

3.28.5 *Time limit for submission of TP documents to the tax authorities*

The tax authorities and the taxpayer may both, in certain circumstances, "repair" a return to correct erroneous calculations or replace an estimate with an accurate figure. The Inland Revenue have the right to enquire into the completeness and accuracy of any self-assessment tax return. It is not necessary for them to justify an enquiry by identifying the particular aspects of the return which give rise to concern. Random selection will play a part therefore in the selection of cases for enquiry, but the Revenue have said that the majority of enquiry cases will continue to be specially selected by reference to the information in the return and other information in the Revenue's possession. Normally, an enquiry cannot be begun after 12 months from the date the return is filed (if it is filed on the filing due date) or, if the return is filed late, 12 months from the quarter date (i.e. 31 January, 30 April, 31 July or 31 October) following the anniversary of the actual filing date. It is, however, possible for an enquiry to be started after that time has expired if it is for purposes of a "discovery assessment" under Sec. 29 of the TMA 1970 (for individuals) or a discovery assessment or determination (paras. 41 et seq., Schedule 18, Finance Act 1998) for companies.

In general, an assessment by the Inland Revenue cannot be made more than 6 years from the end of the accounting period to which it relates. In the case of fraudulent or negligent conduct by a company, by a person acting on behalf of a company or by a person who was a partner of the company at the relevant time, an assessment may be made up to 21 years after the end of the accounting period to which it relates.

3.28.6 *Specific TP documentation requirements*

- ***Small and medium sized enterprises (SMEs)***

No specific requirements apply for SMEs.

- ***Cost contribution agreements***

No specific requirements apply.

- ***Intra group services***

No specific requirements apply for intra group services.

- ***Advance pricing agreements (APAs)***

The Inland Revenue has participated in the APA process with other tax administrations under the mutual agreement procedure provided by UK tax treaties. Agreements reached between tax administrations by way of this procedure have apparently been helpful in transfer pricing cases but the UK tax authorities have nevertheless concluded that this method of operating is inadequate since it does not enable them to make binding or enforceable agreements with UK taxpayers. The UK government, in consequence, proposed to remedy these deficiencies and included legislation in the 1999 Finance Act.

Legislation was included in the 1999 Finance Act and a Statement of Practice has been published. This followed draft legislation and a draft Statement of Practice, which were issued in December 1998 for consultation. The legislation in the 1999 Finance Act follows, with very minor exceptions, the wording of the consultation draft. The legislation essentially provides for legally binding written agreements, possibly lasting for several years, between taxpayers and the UK tax authorities.

Two kinds of APA are envisaged by the legislation: the "unilateral" type, in which only the taxpayer and the Inland Revenue are involved, and the "bilateral" type, where a double taxation treaty is in point, and in which the tax authorities of the relevant treaty partner country are also involved. The unilateral type could apply in cases concerning cross-border transactions as well as in cases of UK/UK transactions. The Inland Revenue, however, encourage applications for bilateral APAs wherever this is possible, and, on receiving an acceptable application for an APA relating to cross-border transactions, where a double taxation treaty was in point, they would seek to involve the treaty partner country tax authorities by way of the mutual agreement article in the tax treaty. If those authorities were unable or unwilling to take part in the making of a bilateral agreement, or there were other reasons why a unilateral agreement would be more appropriate, then the Inland Revenue would be prepared to consider making one.

The range of situations in which the Inland Revenue would consider making an APA is wide but not unlimited. APAs are described by the Inland Revenue as offering a process for resolving complex transfer pricing issues on a prospective basis and for providing solutions in accordance with the Taxes Acts to situations where there is considerable difficulty or doubt in determining the method by which the arm's length principle is to be applied. The Inland Revenue, therefore, reserve the right to decline to consider an APA if, for example, the situation does not seem to them complex enough to justify the use of the resources which would have to be employed in the exercise.

An APA can only be made under the legislation in relation to a chargeable period (usually this would be the company's accounting year) ending on or after the date on which the 1999 Finance Act was enacted, i.e. 27 July 1999. These agreements are designed to be made in advance of the period involved but, if the necessary discussions are so prolonged that the period has begun before an agreement can be reached, the agreement can still be effective for that period. Moreover, an APA could in certain circumstances be "rolled back", if the taxpayer wished, to apply to open transfer pricing questions in a chargeable period which ended before the application was made. Indeed, it is envisaged that the Inland Revenue might suggest such a procedure in appropriate cases.

APAs are essentially designed to be made for determining the arm's length provision in relation to transactions between associated enterprises, or determining the profits attributable to a branch or agency or other permanent establishment, whether this is one through which a trade is carried on in the United Kingdom, or one through which a UK resident is trading overseas. They can be

made with non-residents as well as with residents. The matters with which they may deal are set out more precisely in Sec. 85(2) of the 1999 Finance Act .

It is for the taxpayer to take the initiative in applying for an APA. The tax authorities are not obliged to accept the application, and, even if they do, they may break off discussions before reaching agreement, or, having made an agreement, they may, in certain circumstances, cancel or revoke it. The taxpayer is required, in applying for an APA, to set out in detail:

- what are the questions with which the agreement is to deal;
- what the taxpayer understands is the effect on the questions of the relevant legislation, including any double taxation treaty which is in point;
- how it is proposed to deal with these questions in the agreement; and
- how these proposals are justified in the light of the UK law and the OECD Transfer Pricing Guidelines.

The taxpayer is also required to provide all the information necessary for the Inland Revenue to consider the proposals. Providing, fraudulently or negligently, incorrect or misleading information would be penalized and would render any agreement reached in consequence null and void.

However, the Inland Revenue recognize that the preparation of proposals for an APA may call for a considerable amount of effort on the part of the taxpayer and they would accept, and indeed welcome, a preliminary expression of interest which would enable both the taxpayer and the tax authorities to explore informally whether it would be worth while to deploy the resources necessary for producing and considering a fully supported and formal application. They would even be prepared to discuss an anonymized expression of interest, which does not reveal the identity of the taxpayer concerned.

The Inland Revenue would need to know the identity of the taxpayer, together with a wide range of other information, in order to consider a formal application for an APA. Information received in the course of considering an application for an APA is confidential in the same way as other taxpayer information. Its use could not, however, be confined to the evaluation of the application. It would in any case be disclosable, under the exchange of information article of any relevant tax treaty, to the competent authority of the partner country. If it indicated that a taxpayer's affairs for earlier periods ought to be re-examined, the fact that it had been provided for the purposes of an APA would not in itself prevent that re-examination. Ordinarily, except in the rollback type of situation (see above), an application for an APA for a particular future period would not, of itself, affect any transfer pricing enquiry into earlier periods.

A condition of operating an APA for any period is that the critical assumptions on which the APA is based remain valid throughout the period. The Inland Revenue will, therefore, require the taxpayer to demonstrate at intervals throughout the period that this is so - probably at the same time as the taxpayer's annual tax return is submitted. Failure to provide such a compliance report, or the negligent or fraudulent provision of incorrect information in connection with the report, would be subject to penalties. If the critical assumptions cease to be valid, the APA may have to be modified or possibly cancelled. If it is cancelled, a new application may be acceptable.

An APA could, in certain circumstances, be renewed for a further term. Similarly, as indicated above, it might in some circumstances be applied to an earlier period. The agreement could be cancelled by the Inland Revenue in certain circumstances under its own terms if such terms are included, but it may also be cancelled by the Inland Revenue if it becomes evident that inadequate or false information has been supplied in the course of considering it, or that in any respects the taxpayer has not complied with its terms.

Once an APA has been signed, a return of profits calculated on any other basis is an incorrect return and may be the subject of penalties.

It is possible for an APA to include provision for modification during its term, in certain eventualities. In addition, if, subsequent to the making of a unilateral APA related to cross-border transactions, an agreement is reached with the tax authorities of the other country under the mutual agreement article of the relevant tax treaty, the legislation provides for the APA to be modified accordingly.

3.28.7 *Language for the TP documentation*

No specific requirements. English translations may be required.

3.28.8 *Penalties for late submission/omission of TP documentation*

Penalties are imposable for a variety of failures to comply with the legal requirements relating to income tax and capital gains tax under the TMA 1970 - particularly by Part X of the Act, which also applied until 1 July 1999 for corporation tax. From 1 July 1999, penalties for failure to comply with corporation tax requirements are essentially imposed by Schedule 18 of the FA 1998. These include:

(1) failure to notify liability; para. 2 of Schedule 18 of the FA 1998 imposes on a company a penalty of up to the amount of tax remaining unpaid 12 months after the end of the relevant accounting period;

(2) failure to deliver a return; paras. 17 and 18 of Schedule 18 of the FA 1998 impose a flat penalty of £ 100 if a late company return is made within 3 months of the proper filing date (£ 200 in any other case), plus a tax-related penalty of 10% of the tax unpaid if the return is made within 2 years of the due date (20% in any other case);

(3) the fraudulent or negligent delivery of an incorrect return; para. 20 of Schedule 18 of the FA 1998 imposes a tax-related penalty on a culpable company of up to the amount of the tax understated;

(4) failure to correct, without reasonable delay, an error discovered in a return; same penalty as for fraudulent or negligent delivery of an incorrect return;

(5) failure to keep and preserve records; para. 23 of Schedule 18 of the FA 1998 imposes a penalty on a company of up to £ 3,000;

(6) failure to produce documents and other information; para. 29 of Schedule 18 of the FA 1998 imposes a penalty of £ 50 plus £ 30 for each day during which the failure continues (£ 150 a day if the penalty is determined by appeal Commissioners); and

(7) the making of fraudulent or negligent returns or statements in connection with a claim for a tax allowance, deduction or relief or the submission of fraudulent or negligent accounts; para. 89 of Schedule 18 of the FA 1998 imposes a penalty on a company of up to the amount of the tax understated.

From a transfer pricing point of view, the most problematic of these categories is the failure to deliver a correct return through negligence. Bearing in mind that, under the self-assessment regime, the onus is on the taxpayer to deliver a correct return using arm's length pricing, that the ascertainment of an arm's length price may often not be an easy matter, and that much in the process rests on judgement and interpretation of evidence, there is obviously a question whether, or to what extent, agreement with the Inland Revenue that a transfer pricing adjustment is necessary implies that the return was made negligently.

Guidance on the policy of the Board of Inland Revenue in relation to penalties imposable in connection with transfer pricing was provided in the Inland Revenue's Tax Bulletin of December 1998. The Bulletin article, like the 1997 consultative document, makes it clear that taxpayers will not be penalized in transfer cases, even if an adjustment is necessary to conform with the arm's length standard, if they can show that they have made an honest and reasonable attempt to comply with the legislation. The Bulletin article emphasizes that the Inland Revenue's approach in this matter will be consistent with the approach of the OECD Transfer Pricing Guidelines. It indicates that an honest and reasonable attempt by taxpayers to make a return in accordance with the arm's length principle would involve, but would not be limited to:

- using their commercial knowledge and judgement to make arrangements and set prices which conform to the arm's length standard (or to make computational adjustments in their returns where they do not);

- being able to show (for example, by means of good quality documentation) that they made an honest and reasonable attempt to comply with the arm's length standard and with the legislation; and

- seeking professional help where they know they need it.

The Bulletin article also provides some illustrative examples of what would and what would not be regarded as negligence.

4 List of Appendices

4.1 **Annex I – Comparative Tables**

4.2 **Annex II - Controlled Transactions - Appendix to income tax return (Denmark)**