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# **EU JOINT TRANSFER PRICING FORUM**

## **Member States' responses to Questionnaire on secondary adjustments**

**Meeting of 26 October 2011**

**Charlemagne building (CHAR)**

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## Introduction

During the JTPF meeting of 9 June 2011, members agreed the new JTPF work programme which, in relation to secondary adjustments acknowledges the following:

*JTPF members have considered that it is useful to take stock of the situation prevailing in each MS and prepare an overview. This will be achieved by launching a questionnaire on the legal and administrative/practical aspects in the different MS, including on whether these adjustments fall within the scope of the AC.*

*Based on an analysis of the answers additional work might take place.*

The Secretariat prepared a questionnaire for EU Member States' tax administrations and circulated it for input on 30 June 2011. The questionnaire is in line with document JTPF/015/2010/EN and annex, where additional background information can be found.

The Questionnaire on secondary adjustments is based on paragraphs 4.66 to 4.76 of the OECD Guidelines.

This document contains the full individual responses sent in by the Member States. It also summarizes the key information by highlighting the main areas of consent as well as those where differences feature.

**Responses provided by Member States reflect the situation prevailing on 1 July 2011.**

## SUMMARY OF MEMBER STATES' RESPONSES

Questions	
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>From the 27 MS that did respond to the questionnaire, 9 have legislation allowing secondary adjustments.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced</b></p>	<p>Within the 18 MS not having legislation allowing secondary adjustments, no MS is planning to introduce this legislation.</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply</b></p>	<p>In nearly all of the 9 MS where domestic legislation allows for secondary adjustments, these are compulsory. In 5 of those MS the taxpayer has the possibility to prove the real nature/cause of the transaction. In at least 5 MS partly different from the MS mentioned, repatriation would be accepted in order not to apply the secondary adjustment.</p>

<b>the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	Only 2 MS impose specific penalties when a secondary adjustment is made.
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	The responses show that the type of adjustment that is performed in most MS where secondary adjustments are allowed is the assumption of a hidden profit distribution/hidden contribution combined with a system of source taxation.
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	In case another MS adjusts transactions on an arm's length basis, all MS where secondary adjustments are allowed indicated that they are – under certain circumstances - willing to take into account a correlative secondary adjustment. In this context some MS mentioned the Parent Subsidiary Directive and domestic participation exemption rules allowing MS not to impose tax on hidden profit distributions. Due to these provisions, the issue of secondary adjustments seemed more often having been encountered in relation to Non-EU countries.
<b>7. Do you consider secondary adjustments under the scope of the AC? In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	While only a few MS consider secondary adjustments as covered by the AC and for some others this is an open question, most of the MS that impose secondary adjustments do not consider them as being under the scope of the AC. . Those MS would, however, in most cases be willing to address them in a MAP under the respective bilateral treaty.

## AUSTRIA

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>Secondary adjustments are required, since a transfer pricing adjustment has an impact on the taxpayer's business property. Secondary adjustments might be undertaken in the form of a receivable, a payable, a hidden profit distribution or a hidden capital contribution (see in detail paragraph 326 of the Austrian Transfer Pricing Guidelines 2010).</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>N/A</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	<p>Secondary adjustments are compulsory, since a transfer pricing adjustment has an impact on the taxpayer's business property and section 4 paragraph 1 of the Austrian Income Tax Act requires that taxable profits have to be determined under the net wealth comparison method which is based on the principles of double entry bookkeeping. They are mandatory irrespective of the real nature of a transaction in order to reflect transfer pricing adjustments in the business property of the taxpayer.</p> <p>The form of a secondary adjustment is dependent on the facts and circumstances of a case. However, a receivable can only be made if a corresponding liability is accepted by the foreign related party (see in detail the answer to question 5 below).</p> <p>The repatriation of the profits does not necessarily require the entry of a receivable in the commercial accounts if the repatriation takes place in the year of the tax audit (say year 5). However, the repatriated cash amounts must in any way enter the accounts. If the company has not yet booked a receivable, the cash transfer might be accounted for as a business income in the commercial accounts. For tax purposes, however, this will be treated as a tax neutral repatriation transaction (in year 5), because the taxable profits had been increased by the tax authorities (only in the "tax accounts") in year 1 where the incorrect pricing of the controlled transaction had occurred.</p>

<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>In Austria no specific transfer pricing penalties exist. Consequently, there are no specific penalties in connection with secondary adjustments.  In General, tax avoidance caused by non-compliance with the transfer pricing rules may constitute a fiscal offense to be prosecuted under the general rules of the Fiscal Penal Code (tax fraud or tax avoidance by negligence depending on whether or not the underpayment of tax was done by intent), unless a “tolerable error” (“entschuldbarer Irrtum”) has occurred. Transfer pricing adjustments in most cases can be regarded as a “tolerable error”.</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>Depending on a specific case, the following secondary adjustments have to be applied:</p> <p><b>1. Receivable:</b>  A transfer pricing receivable is accepted if also the foreign related party accepts a corresponding transfer pricing liability and if a plan exists on how the liability will be settled and if it can reasonably be expected that the liability will be settled. However, it suffices that the foreign related party only accepts a liability under the condition that this will be accepted by its tax administration as well. In case the foreign tax administration does not accept the transfer pricing liability, the receivable can be deleted (in a tax neutral way).</p> <p><b>2. Liability</b>  This is the corresponding book entry in the foreign associated company which has to repatriate the transferred profits)</p> <p><b>3. Hidden profit distribution</b>  In case the hidden profit distribution has to be qualified as “apparently hidden”, or in case no residence certificate of the foreign related party is available, withholding taxes fall due.</p> <p><b>4. Hidden profit contribution</b>  This is the secondary adjustment if profits had been shifted into a subsidiary and no repatriation takes place)</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>In general, Austria takes into account a correlative secondary adjustment, under the condition that the adjustment corresponds to the arm’s length principle.</p>

<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b></p> <p><b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>Yes, secondary adjustments are under the scope of the AC and they should also be addressed in MAP cases. How a secondary adjustment finally is effectuated, depends on the facts and circumstances of a case and is under discretion of the tax office.</p>
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## BELGIUM

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	No
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	No
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	N/A



<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b>   <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>

## BULGARIA

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>Corporate Income Tax Act allows for secondary adjustments in case of reporting a transfer price for goods, services or rights transferred in a controlled transaction higher than the price which would have been established had the transaction taken place at arm's length. According to our legislation secondary transactions could only take the form of constructive profit distribution. The legal base for such adjustments is §1, item 5 and 4 of the Supplementary Provisions of the Corporate Income Tax Act. §1, item 5 deals with hidden distribution of profits. According to the legal definition given by law hidden distribution of profits shall mean any amount exceeding the arm's length prices, accounted, paid or distributed in any form in favour of the shareholders, or parties related thereto.</p> <p>§1, item 4 of the Supplementary Provisions of the Corporate Income Tax Act stipulates that any hidden distribution of profits shall be treated as dividend.</p> <p>The specific provisions addressing the issue of hidden distribution of profits could be found at the official web site of the National Revenue Agency – <a href="http://www.nra.bg/en/page?id=522">http://www.nra.bg/en/page?id=522</a></p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>No other specific legislation related to secondary adjustments is envisaged for the time being.</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove</b></p>	<p>In the case described in Q.1 secondary adjustments are based in law so they should be regarded as compulsory.</p> <p>The taxpayer will be subject to a secondary adjustment any time the prices he reports exceed the arm's length prices which would be attained in comparable circumstances. Notwithstanding the real nature or purpose of the transaction the taxpayer will suffer a secondary adjustment. The now effective tax legislation does not allow for a reconsideration of a secondary adjustment in case the taxpayer suggests repatriation.</p>

<p>that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</p> <p>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</p>	
<p>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</p>	<p>Under Art. 267 of the Corporate Income Tax Act a taxpayer which makes a hidden distribution of profits shall be punished with a pecuniary sanction at the amount of 20 percent of the excess profit constituting hidden distribution of profits.</p>
<p>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</p>	<p>See answer to question 1 above.</p>
<p>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</p>	<p>Yes, if the secondary adjustment is made by another MS in the form of a constructive dividend.</p> <p>Bulgaria has no experience with secondary adjustments made by another MS which are not in line with the Bulgarian qualification of the secondary transaction.</p>
<p>7. Do you consider secondary adjustments under the scope of the AC?</p> <p>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</p>	<p>In principle secondary adjustments are not considered under the scope of AC. However it is not excluded that on a case by case basis secondary adjustments are addressed in a MAP. In addition Bulgaria has no experience with the application of the AC either in respect of TP adjustments or secondary adjustments.</p>

## CYPRUS

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	No
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	No
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	N/A

<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b>   <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>

## THE CZECH REPUBLIC

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>No specific legislation.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>No</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation,</b></p>	<p>N/A</p>

<b>would you accept it in order not to apply the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	N/A
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	N/A
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	N/A
<b>7. Do you consider secondary adjustments under the scope of the AC?  In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	N/A

## DENMARK

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>Danish legislation allows for secondary adjustments; however, in practice these are seldom relevant since contributions and dividends between group companies usually are tax exempt. In the very few cases where secondary adjustments are made the taxpayer has the possibility to undertake an obligation to pay, i.e. to offset the secondary adjustment by paying the other group company, and in so doing revoking the secondary adjustment.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>N/A</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation,</b></p>	<p>N/A</p>



<b>would you accept it in order not to apply the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	N/A
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	N/A
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	N/A
<b>7. Do you consider secondary adjustments under the scope of the AC?  In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	N/A

## ESTONIA

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>No legislation concerning secondary adjustments.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>No</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	<p>N/A</p>

<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b>   <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>

## FINLAND

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	No legislation
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	No
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	N/A

<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b>   <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>

## FRANCE

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>Oui. Les sommes considérées comme constitutives d'un transfert de bénéfice peuvent constituer des revenus réputés distribués au bénéficiaire de ce transfert, et donc être assimilés à des dividendes versés, aux termes de l'article 109 et suivants du Code général des impôts. Une retenue à la source est dès lors susceptible d'être prélevée sur ce dividende réputé versé à un non-résident, l'application de laquelle constitue l'ajustement secondaire.</p> <p>L'instruction administrative 14 F-1-06 du 23 février 2006, afférente aux procédures amiables, comporte des dispositions relatives à cet ajustement secondaire.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>N/A</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation,</b></p>	<p>La retenue à la source sera en principe systématiquement prélevée, dès lors que la convention fiscale applicable, le cas échéant, l'autorise. La possibilité n'est pas offerte au contribuable de prouver que le transfert de bénéfice n'était pas un moyen de verser un dividende.</p> <p>Toutefois, dès lors que la société accepte de procéder au rapatriement des sommes considérées comme constitutives d'un transfert de bénéfices, la retenue à la source notifiée n'est pas prélevée. Le désinvestissement sera annulé par le biais du reversement effectué, soit sous forme d'une inscription en compte courant, soit sous la forme d'un paiement.</p>

<b>would you accept it in order not to apply the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	Secondary adjustments are submitted to interest but in general to no penalty.
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	Les ajustements secondaires prennent la forme de retenues à la source prélevées sur les bénéfices transférés à l'étranger et réputés distribués (cf. réponse à la question 1).
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	Tout ajustement corrélatif dépend de l'appréciation par le service fiscal français du caractère de pleine concurrence de l'ajustement pratiqué par l'administration de l'autre Etat, et de l'existence d'une double imposition dont l'élimination incombe à la France.
<b>7. Do you consider secondary adjustments under the scope of the AC? In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	Non <i>stricto sensu</i> . Nous tirons toutefois toutes les conséquences en matière d'ajustement secondaire des modifications d'un ajustement primaire qui résulteraient d'une procédure amiable.

## GERMANY

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>In Germany, transfer pricing adjustments can be based on several legal provisions. An overview can be found in the Administrative Principles - Proceedings, Federal Ministry of Finance circular of 12 April 2005 (Federal Tax Gazette Part I 2005 p. 570, points 5.1 to 5.3). <a href="http://www.bundesfinanzministerium.de/nr_73738/DE/BMF_Startseite/Aktuelles/BMF_Schreiben/Internationales_Steuerrecht/014.html">http://www.bundesfinanzministerium.de/nr_73738/DE/BMF_Startseite/Aktuelles/BMF_Schreiben/Internationales_Steuerrecht/014.html</a>). Most importantly, a transfer pricing adjustment may, under domestic law, qualify as a hidden profit distribution (constructive dividend), as a hidden contribution (constructive distribution), or as an adjustment under section 1 of the Foreign Relations Tax Act (<i>Außensteuergesetz</i>).</p> <p>In cases where the primary adjustment has to be qualified as a constructive dividend (or hidden profit distribution - section 8 par. 3 Corporate Tax Act see: <a href="http://www.gesetze-im-internet.de/kstg_1977/index.html">http://www.gesetze-im-internet.de/kstg_1977/index.html</a>), there is generally a secondary adjustment in the form of withholding tax on the constructive dividend. Legal basis for withholding tax are the general rules on withholding tax on dividends (<i>Kapitalertragsteuer</i> - sections 43 et seq. Income Tax Act, see <a href="http://www.gesetze-im-internet.de/estg/index.html">http://www.gesetze-im-internet.de/estg/index.html</a>). If the primary adjustment is between brother-sister companies, the constructive dividend is deemed paid to the parent of the German company (not to the sister).</p> <p>Where the constructive dividend is deemed paid to a parent within the European Union in a situation to which the Parent Subsidiary Directive applies, upon request, withholding tax will not be imposed (section 43b Income Tax Act).</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>N/A</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria</b></p>	<p>Secondary adjustments are compulsory where they apply (i.e., withholding tax on constructive dividends). However, as mentioned above, where the constructive dividend is deemed to be paid to a parent company within the European Union in a situation to which the Parent Subsidiary Directive applies, upon request, withholding tax will not be imposed.</p>



<p><b>considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	<p>In cases where a transfer pricing adjustment is qualified as constructive dividend, the taxpayer is not allowed to prove that the purpose of the non-arm's length transfer price was not to pay a hidden dividend but some different reason in order to avoid the secondary adjustment. From the German point of view, such evidence seems to be virtually impossible.</p> <p>Under German domestic law, repatriation can not avoid the qualification as constructive dividend; hence the repatriation would be qualified as hidden contribution (see Administrative Principles - Proceedings, point 5.5.1; as referenced in answer to question 1). However, in MAP, agreements avoiding withholding tax on a constructive dividend by repatriation are in principle possible.</p>
<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>No</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>See answer to question 1 above:</p> <p>In cases where the primary adjustment is qualified as constructive dividend, a secondary adjustment in the form of a withholding tax is compulsory. In the case of a primary adjustment between brother-sister companies, the constructive dividend is deemed to be paid in favour of the parent company of both. Where the constructive dividend is deemed to be paid to a parent company within the European Union in a situation to which the Parent Subsidiary Directive applies, upon request, withholding tax will not be imposed.</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when</b></p>	<p>If the German tax administration agrees to a corresponding adjustment (i.e. in a situation where the foreign related party paid more than an arm's length price to the German party), the excess cash in hand of the German party, under German domestic law, will generally be qualified as a received hidden distribution, or as a received hidden contribution. In cases where the German party is a corporation, a received hidden distribution will be tax-exempt under the participation</p>

<p><b>the other MS makes a secondary adjustment?</b></p>	<p>exemption rules of the Corporation Tax Act. In cases where a secondary adjustment by the other state should not be in line with the German qualification and as a result lead to double taxation, the issue can be addressed in MAP.</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b> <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>The German tax administration considers that secondary adjustments are in principle not within the scope of the Arbitration Convention. However, the German Competent Authority is generally prepared to discuss secondary adjustments in mutual agreement procedures. But, in order to avoid doubts, it seems to be advisable for the taxpayer to request a mutual agreement procedure under the relevant bilateral tax convention (in addition to the AC MAP for the primary adjustment) in respect of that secondary adjustment. From the practical experience of the German Competent Authority, AC MAP cases dealing with secondary adjustment issues have been rare, so far. Such issues more often occur in relation to Non-EU countries.</p>

## GREECE

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	NO
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	NA
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation,</b></p>	NA

<b>would you accept it in order not to apply the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	NA
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	NA
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	NA
<b>7. Do you consider secondary adjustments under the scope of the AC?</b> <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	NA

## HUNGARY

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>No legislation or guidelines.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>N/A</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation,</b></p>	<p>N/A</p>

<b>would you accept it in order not to apply the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	N/A
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	N/A
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	N/A
<b>7. Do you consider secondary adjustments under the scope of the AC?</b> <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	N/A

## IRELAND

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>No, our domestic legislation does not provide for secondary adjustments.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>Neither is being considered.</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	<p>N/A</p>

<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b>   <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>



## ITALY

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	No
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	No
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	N/A

<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b>   <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>

## LATVIA

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>No legislative or administrative guidelines allowing secondary adjustments available.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>No. Problems considering tax issues have not been identified. Adjustments of taxable income have to be made in Corporate Income Tax declaration.</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation,</b></p>	<p>N/A</p>

<b>would you accept it in order not to apply the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	N/A
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	N/A
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	N/A
<b>7. Do you consider secondary adjustments under the scope of the AC?  In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	N/A

## LITHUANIA

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>No, there is no domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines in Lithuanian legal system. A feasible way for implementation of secondary adjustments could be seen through the practical approach using mutual agreement procedures, as for international treaties and decisions based on them prevail over national legislation.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>There are no concrete plans for respective amendments of legal acts.</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	<p>N/A</p>

<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b></p> <p><b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>

## LUXEMBOURG

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>Article 164 § 3 and Article 146 of the income tax code (loi modifiée du 4.12.1967 – LIR). Under these provisions a transaction that does not meet the arm's length principle and has led to a reduction of the tax base of a corporate taxpayer is requalified as a hidden profit distribution. A hidden profit distribution corresponds to the difference between the arm's length remuneration and the actual fixed price. Hidden profit distributions are treated in the same way as dividend payments and as such are submitted to withholding tax. <a href="http://www.impotsdirects.public.lu/legislation/LIR/index.html">http://www.impotsdirects.public.lu/legislation/LIR/index.html</a></p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply</b></p>	<p>The requalification of a non arm's length remuneration as a hidden profit distribution implies that withholding tax is due on this payment. However, the withholding tax rate can be reduced (up to 0%) if the provisions of article 147 of the income tax code are fulfilled or if the provisions of a tax treaty provide for a reduced tax rate. Generally, in an EEE context (debtor and beneficiary being corporate taxpayers resident in an EEE-State) no withholding tax will be due.</p> <p>The burden of proof triggering tax liabilities lies with the tax administration. If a taxpayer can give evidence that a transaction that does not seem to be arm's length is based on sound business reasons no adjustment will be made.</p> <p>A transaction that has been made can not be cancelled with retroactive effect for tax purposes. However if the taxpayer is capable of producing an engagement (legal title) of the beneficiary for the repatriation, the tax administration will refrain from making a secondary adjustment.</p>

<b>the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	Our general provisions apply. No specific penalties for secondary adjustments.
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	The main secondary adjustments concern dividend distributions and more rarely the requalification of a proportion of a debt as capital which would then also result in a requalification of a portion of interest as dividend distribution.
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	We would take secondary adjustments only into consideration if these secondary adjustments are made by the other MS.
<b>7. Do you consider secondary adjustments under the scope of the AC?</b>  <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	Yes, as secondary adjustments are a part of transfer pricing adjustments.



## MALTA

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>No domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines there on exist.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>No consideration as such</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation,</b></p>	<p>N/A</p>

<b>would you accept it in order not to apply the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	N/A
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	N/A
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	N/A
<b>7. Do you consider secondary adjustments under the scope of the AC?  In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	N/A

## THE NETHERLANDS

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>Yes, see paragraph 4, Decree IFZ2001/295.</p> <p>Unofficial translation on <a href="http://www.oecd.org/dataoecd/19/57/38415243.pdf">http://www.oecd.org/dataoecd/19/57/38415243.pdf</a></p> <p>“4. Secondary adjustments (<i>Paragraphs 4.67 - 4.77</i>)            Paragraphs 4.67 to 4.77 of the OECD Guidelines deal with the consequences of secondary transactions. Most countries do not limit transfer pricing adjustments to adjustments of taxable income, but also require that a secondary transaction is made so that the taxpayer's accounts reflect the way in which the adjustment made to the taxpayer's profit and loss account and balance sheet has been processed. A secondary transaction may take the form of an adjustment to a current account, a distribution of income or an informal capital payment. The Netherlands' authorities always require a transfer pricing adjustment to be processed by means of a secondary transaction. A secondary transaction may lead to a secondary adjustment, such as the attribution of interest to the current account, the levying of dividend withholding tax on a distribution of income, or the levying of capital duty on an informal capital payment [<i>capital duty was abolished as from 2006</i>]. Systems differ from one country to another, and this means that the foreign tax authority in question may not be prepared, for example, to credit the dividend withholding tax against its own tax because it does not recognize the payment of a deemed dividend. The secondary adjustment is not performed if the taxpayer is able to demonstrate that, in the light of the difference between the tax systems used by the two states, the dividend withholding tax paid cannot be credited and there is no situation of abuse aimed at the avoidance of dividend withholding tax.”</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>Not applicable</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not</b></p>	<p>a) The Netherlands' authorities always require a transfer pricing adjustment to be processed by means of a secondary transaction. A secondary transaction may lead to a secondary adjustment, such as the attribution of interest to the current account or the levying of dividend withholding</p>

<p><b>compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	<p>tax on a distribution of income. See answer to question 1 above.</p> <p>b) Yes</p> <p>c) Yes</p>
<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>Due to the inexact nature of transfer pricing, the NL tax administration policy is to exercise restraint with respect to imposing penalties in this area. An exception to this general rule can be applied if a taxpayer has intentionally set up a scheme to circumvent taxation. The same policy applies for secondary adjustments.</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>See answer to question 1 above.</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary</b></p>	<p>Yes, only when the other MS makes a secondary adjustment.</p>

<b>adjustment?</b>	
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b></p> <p><b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>1. Unclear, we have not encountered problems in practice.</p> <p>2. Yes, however, we have not encountered problems in practice.</p>

## POLAND

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>The Polish tax system has no particular legislation covering secondary adjustments issues and no internal administrative guidelines on their implementation.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>There are no legislation and guidelines under consideration in this scope.</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	<p>N/A</p>

<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b>   <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>

## PORTUGAL

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	No
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	No
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	N/A



<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b>   <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>

## ROMANIA

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	No
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	Not yet
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation,</b></p>	N/A

<b>would you accept it in order not to apply the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	N/A
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	N/A
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	N/A
<b>7. Do you consider secondary adjustments under the scope of the AC?  In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	N/A

## SLOVENIA

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>The Corporate Income Tax Act (CITA) governs the taxation of corporate entities. When the adjustment under Article 9 of the double tax convention has been made, the general principle is that excess income paid to associated enterprises that does not correspond the arm's length principle can be treated as income similar to dividends under article 74 of CITA (such income includes a hidden distribution of profit) and article 70 (defining income originating in Slovenia as well as the application of the withholding tax).</p> <p>Article 74 serves as a tax avoidance rule. It should also be noted that in case of withholding tax payment as a result of a secondary adjustments the provisions of the double tax convention are taken, when relevant, into account.</p> <p>(Corporate Income Tax Act:  <a href="http://www.mf.gov.si/fileadmin/mf.gov.si/pageuploads/Davki_in_carine/Sprejeti_predpisi/Zakon_o_davku_od_dohodkov_pravnih_oseb/ZDDPO-2ABCDEangNPB6.pdf">http://www.mf.gov.si/fileadmin/mf.gov.si/pageuploads/Davki_in_carine/Sprejeti_predpisi/Zakon_o_davku_od_dohodkov_pravnih_oseb/ZDDPO-2ABCDEangNPB6.pdf</a>)</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>N/A</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary</b></p>	<p>As stated under 1 above, the general principle is to treat excess income as income similar to dividends under article 70 and 74 of CITA, but every case is considered individually, depending on facts and circumstances. The taxpayer is allowed to prove the real nature of the transaction.</p>

<p><b>adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	
<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>Depending on the facts and circumstances of every case the provisions of penalties which can be imposed are determined in the Tax Procedure Act. Articles referring to the penalties are found in the chapter six of the Tax Procedure Act (articles ranging from 394 to 402a). For example the penalty for severe tax offence for a medium sized or large corporate entity amounts up to 30% of under-paid tax, but not less than EUR 1,500 and not more than EUR 150,000.</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>In general secondary adjustment can be applied on income paid to associated enterprises that does not correspond the arm's length principle (recharacterization of income for tax purposes). Such income may be treated according to article 74 of CITA as a hidden distribution of profit.</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>We do not have much experience but in general we would make an adjustment only when it is considered justified taking into consideration all facts and circumstances of the case.</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b></p> <p><b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>We do not have much experience but in general we would make an adjustment only when it is considered justified taking into consideration all facts and circumstances of the case.</p>

## SLOVAKIA

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>Currently, the Slovak domestic tax legislation does not contain any special rules concerning secondary adjustments.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>Not yet. We would consider the possible legislative change based on the information on the applicable legislation in this field from other Member States. It has not been concluded specific date of introduction.</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	<p>N/A</p>

<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>N/A</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>N/A</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>N/A</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b></p> <p><b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>N/A</p>

## SPAIN

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>The secondary adjustment is established in the Spanish Law by Article 16.8 of the Corporate Income Tax Law (CITL), approved by Legislative Royal Decree 4/2004 and is developed by Article 21 Bis of the Corporate Income Tax Regulation, approved by Royal Decree 1777/2004.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>N/A</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply the secondary adjustment?</b></p>	<p>Secondary adjustments are established by Law.</p> <p>The taxation of the secondary adjustment is determined depending on the nature of the income arising from the difference between the arm's length value and that agreed by the parties. The taxpayer may prove that the characterisation given under the rule does not correspond to the real nature of the secondary adjustment.</p> <p>Spanish tax legislation does not contain any reference to the possibility of repatriation in order not to apply the secondary adjustment.</p>



<p><b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b></p>	<p>There are no specific penalties for secondary adjustments.</p>
<p><b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b></p>	<p>The Spanish law does not provide for a general rule on the secondary adjustment to be applied due to the wide range of cases to be found. This adjustment depends on the true nature of the income, as provided for in Article 16.8 of the Amended Text of the Corporation Income Tax Law.</p>
<p><b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b></p>	<p>It will depend on facts and circumstances.</p>
<p><b>7. Do you consider secondary adjustments under the scope of the AC?</b>  <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b></p>	<p>In principle no transfer pricing issue is normally at stake in a secondary adjustment. However, if a double taxation issue arises, it might be discussed under a MAP according to the relevant DTA.</p>

## SWEDEN

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>There is no special legislation, but we have the possibility according to case law to make secondary adjustments by reclassifying transactions to dividend and impose withholding tax. Within the European Union this will normally not be the case as an effect of the provisions in our tax treaties/the parent-subsidiary directive. We do not normally make any secondary adjustments, but they could be considered by us and imposed if there are for example transactions with low tax jurisdictions involved and withholding tax has been avoided. We normally do not establish an account receivable or loan in order to adjust cash flow.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>No</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation, would you accept it in order not to apply</b></p>	<p>See answer to question 1 above.</p> <p>If the taxpayer makes a repatriation in the form of an account receivable we usually accept it, of course under the condition that it is in accordance with the arm's length principle.</p>

the secondary adjustment?	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	Penalties may not be imposed in the case of withholding tax on dividend.
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	If they are applied, which normally is not the case, it would be source taxation on dividend.
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	Under normal circumstances no, but this will be decided on a case by case basis.
<b>7. Do you consider secondary adjustments under the scope of the AC?</b> <b>In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	No, we would normally not consider secondary adjustments under the scope of the AC.

## UNITED KINGDOM

Questions	Answers
<p><b>1. Does your MS have domestic legislation allowing secondary adjustments and/or (internal) administrative guidelines on their implementation? Please briefly indicate key points addressed and include the official reference (and electronic link).</b></p>	<p>The UK does not have domestic legislation or administrative guidelines that allow secondary adjustments.</p>
<p><b>2. If not, are legislation and/or guidelines under consideration and when may they be introduced?</b></p>	<p>There are no changes under consideration to either the legislation or the guidelines.</p>
<p><b>3. a) If yes, are secondary adjustments compulsory? In case they are not compulsory, do you systematically apply such adjustments? What are the criteria considered? Does it depend in particular on the link between the 2 associated companies (parent-subsidiary; subsidiary-parent; sister companies, etc)?</b></p> <p><b>b) Is the taxpayer allowed to prove the real nature/cause of the transaction in order to be cleared of the secondary adjustment (e.g. the taxpayer may prove that the purpose of the payment over the arm's length range was not to pay a hidden dividend but some other different reason)?</b></p> <p><b>c) When a taxpayer suggests repatriation,</b></p>	<p>Not applicable</p>

<b>would you accept it in order not to apply the secondary adjustment?</b>	
<b>4. When you make a secondary adjustment, are penalties imposed? If yes, in which cases and for what amounts?</b>	Not applicable
<b>5. Describe the different types of secondary adjustments that you apply and to which cases each type is applied</b>	Not applicable
<b>6. When another MS adjusts transactions on an arm's length basis, do you take into account the correlative secondary adjustment resulting from that adjustment? If yes, always or only when the other MS makes a secondary adjustment?</b>	Not applicable
<b>7. Do you consider secondary adjustments under the scope of the AC?  In MAP (under the AC) are secondary adjustments addressed in parallel to the TP adjustment?</b>	Not applicable